New York Supreme Court

Appellate Division—First Department

Application of

DAESANG CORPORATION,

Petitioner-Appellant,

For an Order Pursuant to Article 75 of the CPLR Confirming an Arbitration Award,

– against –

THE NUTRASWEET COMPANY, NUTRASWEET IP HOLDINGS, INC. and SWEETENERS HOLDINGS KOREA LTD.,

Respondents-Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF APPELLANT AND REVERSAL

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INTEREST OF THE *AMICUS*

The New York City Bar Association (the "Association") is a private, non-profit organization of more than 24,000 members professionally involved in a broad range of law-related activities. Founded in 1870, the Association is one of the oldest bar associations in the United States.

Through its standing committees, including the International Commercial Disputes Committee (the "ICDC"), the Association seeks to educate the bar and the public about many legal issues, including application of the Federal Arbitration Act (9 U.S.C. § 1 et. seq., the "FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") in the state and federal courts of New York. The ICDC membership reflects a wide range of corporate, private practice, and academic experience in the resolution of international commercial disputes.

The decision of Justice Charles E. Ramos of the Commercial Division, New York County, dated May 15, 2017 (the "Decision"), applying the judicially created federal doctrine of manifest disregard of law to vacate in part an international arbitration award, has been widely reported in the legal press, which has recognized the unusual nature of the Decision and the questions it raises for arbitration

jurisprudence in New York.[1] The Association and ICDC have previously considered the effect of the manifest disregard of law doctrine on New York's position as one of the world's preeminent international arbitration centers. In 2012, the ICDC issued a report on the manifest disregard of law doctrine in New York. *See* New York City Bar International Commercial Disputes Committee, *The "Manifest Disregard of Law" Doctrine and International Arbitration in New York* (2012) (the "Report").[2] This *amicus* brief discusses the history and context of the manifest disregard of law standard and the important public policy considerations requiring its very limited application. [3]

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[1] *See, e.g.*, Claudia Salomon, *New York Vacates Arbitral Award With Manifest Disregard Doctrine*, N.Y.L.J., Aug. 4, 2017, *available at* http://www.newyorklawjournal.com/id=1202794794016/New-York-Vacates-Arbitral-Award-With-Manifest-Disregard-Doctrine; Hon. Richard M. Berman, *NY Remains Hospitable Venue for International Arbitration*, Letter to the Editor, N.Y.L.J., Aug. 14, 2017, *available at* http://www.newyorklawjournal.com/letters-to-the-editor/id=1202795402366/NY-Remains-Hospitable-Venue-for-International-Arbitration; Caroline Simson, *NY Court Nix Of ICC Award Spotlights 'Manifest Disregard'*, Law360.com, June 12, 2017, *available at* https://www.law360.com/commercialcontracts/articles/933220/ny-court-nix-of-icc-award-spotlights-manifest-disregard-; Lacey Yong, *Sweetener dispute ends on sour not with "manifest disregard' ruling*, Global Arbitration Review, May 26, 2017, *available at* http://globalarbitrationreview.com/article/1142077/sweetener-dispute-ends-on-sour-note-with-manifest-disregard-ruling.

[2] *Available at* http://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf.

[3] This brief was not authored, in whole or in part, by counsel to a party and no contribution to its preparation or submission was made by any person other than the Association. The Honorable John G. Koeltl, a member of the International Commercial Disputes Committee, took no part in the consideration or submission of this *amicus* brief. Louis B. Kimmelman, a member of the International Commercial Disputes Committee, took no part in the consideration or submission of this *amicus* brief.

ARGUMENT

The United States' strong national policy favoring arbitration requires that arbitration awards be treated as final, and hence that they may be vacated only in narrow, statutorily defined circumstances that undermine the fundamental integrity of the arbitration itself. Courts across the country have accordingly determined that the judicially created "manifest disregard of law" doctrine is at most a mere "gloss" on the statutory grounds for vacating an award, which must be treated with the utmost rigor and be reserved only for truly extraordinary circumstances when arbitrators deliberately fail in their mandate to try to apply the law governing any given dispute. Expansion of the manifest disregard doctrine to permit courts to vacate an award when they simply disagree with the arbitrators' assessment and application of the law would transform the limited review authorized by statute into an appeal on the merits and destroy many of the benefits that make arbitration attractive and effective for parties that have agreed to arbitrate.

These principles apply with even greater force to international arbitration. The New York Convention requires that the 157 countries that are parties to the Convention – including the United States – recognize and enforce arbitration awards subject only to narrow exceptions. The manifest disregard doctrine has long led parties in the rest of the world to question whether the U.S. is a safe jurisdiction in which to seat an arbitration, a doubt that has been tempered only by the courts'

steadfast insistence on keeping the manifest disregard doctrine tightly confined and not letting it become an appeal by another name. Courts in New York – the preeminent U.S. commercial center – should therefore be especially wary about loose or mistaken application of the manifest disregard doctrine and should insist on its rigorous and narrow application.

I. THE MANIFEST DISREGARD OF LAW DOCTRINE DOES NOT ALLOW JUDICIAL REVIEW OF ARBITRATORS' LEGAL OR FACTUAL ERRORS

As a matter of federal law, a proceeding to vacate an international commercial arbitration award rendered in the United States is governed by Title 9 of the United States Code, commonly known as the "Federal Arbitration Act" or "FAA." *See, e.g.*, *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 20-23 (2d Cir. 1997). Under the FAA, an arbitral award rendered in the United States must be confirmed unless:

(1) "the award was procured by corruption, fraud, or undue means";

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

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

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

9 U.S.C. § 10(a); *see also* 9 U.S.C. § 9.

None of these grounds empowers courts to review an award for errors of fact or law. However, in the 1953 U.S. Supreme Court decision *Wilko v. Swan*, 346 U.S. 427 (1953), the Court in dictum arguably opened the door to a very limited scope of review of awards – not where the arbitrators have erred in interpreting and applying the law, but only where they have manifestly disregarded the law they were bound to apply:

> Power to vacate an award is limited. . . . In unrestricted submission, such as the present margin agreements envisage, 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.

Id. at 436-37 (emphasis added).

Lower courts interpreted this statement to allow vacatur of an award in limited circumstances. But, bearing in mind the need to respect the parties' agreement that the arbitrators' decision should be final and binding as to both law and fact, courts have recognized that manifest disregard is "more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). Rather, the Second Circuit has stated that in order to vacate an award for manifest disregard of law,

> [t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an

> arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

Thus, the judicially created manifest disregard of law doctrine may only be applied where an arbitration panel intentionally ignored or disregarded a governing, well-defined and explicit legal principle. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 481 (2006). An award may not be vacated on grounds of manifest disregard of the law if there is even a "barely colorable justification" for the outcome. *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). Anything less would risk transforming a vacatur proceeding under FAA Section 10 into an appeal on the law or the facts – which Congress did not authorize in the FAA, and which parties forgo by contracting for binding arbitration.

In applying these federal-law principles, the New York Court of Appeals has emphasized that the doctrine of manifest disregard "gives extreme deference to arbitrators." *Wien & Malkin LLP*, 6 N.Y.3d at 480. The Court of Appeals held, accordingly, that "an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." *Id.* at 479-80 (citing *Wallace*, 378 F.3d at 189, quoting *Banco de Seguros del Estado v. Mutual*

Mar. Off., Inc., 344 F.3d 255, 263 (2d Cir. 2003)). As the Court of Appeals has stated, manifest disregard of law "is a doctrine of last resort," reserved for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent." *Id.* at 480 (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

The United States Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) further circumscribed the manifest disregard doctrine. In *Hall Street*, the Supreme Court specifically stated that Section 10 of the FAA provides the "exclusive grounds" for vacating an arbitration award. *Id*. at 584. The Court noted that those grounds address only "egregious departures from the parties' agreed-upon arbitration," and specifically held that a court may not review an arbitration an award "for just any legal error." *Id*. at 586. The Court also remarked that its "manifest disregard of the law" dictum in *Wilko v. Swan* did not have to be read as recognizing an extra-statutory ground for vacatur but could merely be a reference to "the § 10 grounds collectively" or for the grounds set forth in Section 10(a)(3) and (4) specifically. *Hall Street*, 552 U.S. at 585.

After *Hall Street*, the Second Circuit recognized that the doctrine of manifest disregard of law is not a separate basis for vacating an award, but merely a "judicial gloss" on Section 10(a)(4) of the FAA, allowing vacatur when the arbitrators have "exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made." *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp*., 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010). The Second Circuit held:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc. — conduct to which the parties did not consent when they included an arbitration clause in their contract.

Id. at 95 (quoting *Wise v. Wachovia Sec., LLC,* 450 F.3d 265, 269 (7th Cir.), *cert. denied*, 549 U.S. 1047 (2006)) (citations omitted). Other federal courts have gone even further, stating that the "manifest disregard" defense does not survive *Hall Street. Frazier v. CitiFinancial Corp., LLC,* 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Markets Inc. v. Bacon,* 562 F.3d 349, 350 (5th Cir. 2009); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008).

Accordingly, where the arbitrators decided the issues that the parties agreed to submit to them, and sought to apply the law that the parties selected, a party may not obtain judicial relief merely on the ground that the arbitrators misinterpreted the law. Further, the New York Court of Appeals, like numerous federal courts, has made clear that the manifest disregard of law doctrine does not permit vacatur based on allegedly erroneous *factual* findings of an arbitration tribunal. *Wien & Malkin LLP*,

6 N.Y.3d at 483 ("manifest disregard of the facts is not a permissible ground for vacatur of an award") (*citing Wallace*, 378 F.3d at 193; *Westerbeke Corp. v. Daihatsu Motor Co., Ltd*., 304 F.3d 200, 213 (2d Cir. 2002)).

II. "MANIFEST DISREGARD OF LAW" APPLIES ONLY IF THE ARBITRATORS INTENTIONALLY REFUSED TO APPLY KNOWN, WELL-DEFINED, EXPLICIT AND CLEARLY APPLICABLE LAW

In *Wien & Malkin*, the New York Court of Appeals' most recent application of the manifest disregard doctrine, the Court held that an award may be vacated on grounds of manifest disregard of the law only if:

> (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.

Wien & Malkin LLP, 6 N.Y.3d at 481 (*quoting Wallace*, 378 F.3d at 189) (emphasis added).[4]

The United States Supreme Court's subsequent statement in *Hall Street* that vacatur is limited to "extreme arbitral conduct" amounting to "egregious departures from the parties' agreed-upon arbitration," *Hall Street*, 552 U.S. at 586, emphasizes the high bar required for a finding that arbitrators manifestly disregarded the law.

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[4] In addition, courts have held that an award will not be vacated unless the manifest disregard of the law actually affected the outcome. *E.g., Stolt-Nielsen*, 548 F.3d at 93.

Given the stringent standard required to satisfy the manifest disregard doctrine, it is not surprising that very few awards have been vacated pursuant to the doctrine. In *Stolt-Nielsen,* the Second Circuit noted in 2008 that it had vacated awards for manifest disregard in only five of the 64 cases seeking such relief. 548 F.3d at 92, n.7. None of those cases involved international awards. Indeed, the Association did not find any decisions—other than the decision below and two others overturned on appeal[5]—in which a New York state or federal court vacated an international arbitration award on grounds of manifest disregard of the law.

Following *Hall Street*'s admonition that vacatur is limited to "extreme arbitral conduct" amounting to "egregious departures from the parties' agreed-upon arbitration," *Hall Street*, 552 U.S. at 586, courts have imposed very demanding standards for manifest disregard claims.

A review of the last two decisions we have found in which a New York Appellate Division panel vacated a *domestic* arbitral award for manifest disregard of law—other than *Wien & Malkin*, which was reversed by the Court of Appeals—demonstrates the infrequency of such decisions and the principle that the manifest disregard doctrine should apply only when the arbitrators have deliberately departed from the parties' agreement.

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[5] *See Stolt-Nielsen*, 548 F.3d at 95 (reversing U.S. District Court decision that vacated arbitration award); *Westerbeke Corp.*, 304 F.3d at 213 (same).

First, in *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103 (1st Dep't 2003), the arbitrators failed to apply limits on punitive damages that both parties had agreed were applicable. In that case, claimant argued for an award of punitive damages of twice the amount of compensatory damages allegedly incurred by breach of a Connecticut statute. Counsel for both parties agreed that neither the statute nor Connecticut case law supported a greater ratio of punitive damages to compensatory damages. *Id.* at 113-114. Yet the arbitrators awarded punitive damages of $25 million, 23 times the awarded compensatory damages. There was no indication that the arbitrators considered whether the amount of punitive damages complied with applicable law. This Court accordingly found that "[s]ince both sides agreed on this well-settled rule of proportionality and the panel was specifically advised of its existence, its $25 million punitive damages award, grossly disproportionate to the compensatory damages awarded, was made in manifest disregard of law." *Id.* at 114.

Second, in *Citigroup Global Markets, Inc. v. Fiorilla,* 127 A.D.3d 491 (1st Dep't 2015), the arbitrators disregarded the parties' written settlement agreement. After the claimant reneged on the settlement, respondent asked the arbitrators to give effect to the settlement agreement. The arbitrators instead issued an award in favor of the claimant on the merits of the underlying dispute. This Court found that it was appropriate to set aside the award on grounds of manifest disregard of law because

the respondent "provided the relevant law regarding the enforcement of settlement agreements…but the arbitrators ignored the law and denied the motions [to enforce the settlement agreement] without explanation." *Id.* at 492.

In both of those cases, the circumstances found to constitute manifest disregard involved actions by the arbitrators directly contrary to both party agreement and to what was in each case indisputably clear and well-settled law. The standard is that high. It is a far cry from mere disagreement with the arbitrators about how to interpret the a legal rule, especially one that is unsettled, and does not even contemplate disagreement with the arbitrators' factual findings. As the Court of Appeals has made clear, vacating an award for manifest disregard of the law requires nothing less than a demonstration that the arbitrators acted with "intent to flout the law." *Wien & Malkin LLP*, 6 N.Y.3d at 484.

III. THE EMPHATIC NATIONAL AND STATE POLICY IN FAVOR OF ARBITRATION REQUIRES THAT REVIEW OF AWARDS MUST BE STRICTLY LIMITED

The very high bar for application of the manifest disregard of law doctrine directly results from the "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985). Vigorous enforcement of this pro-arbitration policy in the context of international business transactions is essential because "arbitral agreements

[promote] the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation." *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991).

Thus, the U.S. Supreme Court has said that our public policy requires "just the limited [judicial] review needed to maintain arbitration's essential virtue of resolving disputes straightaway," without "the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process ... and bring arbitration theory to grief in post arbitration process." *Hall St. Assocs.*, 552 U.S. at 588. Judicial review of arbitral awards must be extremely limited "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 588 (2d Cir. 2016)

New York state courts have fully embraced this national policy. *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 850 (2010). The late Honorable Chief Judge Judith Kaye, the guiding force behind creation of the New York International Arbitration Center, frequently emphasized that New York courts may be relied upon to support "the important role arbitration plays in the resolution of commercial disputes."

Judith S. Kaye, *New York and International Arbitration: A View from the State Bench*, 9 NYSBA N.Y. Dispute Resolution Lawyer 1, 24 (Spring 2016).

New York has long been one of the world's premier international arbitration centers, particularly for commercial, financial, maritime, and insurance disputes. [6] This confidence that New York courts will reliably enforce agreements to arbitrate and arbitrators' awards—and not substitute their own view of the law or the facts for the arbitrators' conclusions—is essential to maintaining New York's preeminence as a world-class arbitration center. Parties and their counsel have many choices as to where to seat their arbitrations and are known to avoid jurisdictions in which local courts cannot be relied upon to enforce awards. *See, e.g.*, Queen Mary Univ. of London, *2010 International Arbitration Survey: Choices in International Arbitration* 17 (2010) (identifying the "legal infrastructure" as the most important factor in choosing the seat of arbitration for 62% of survey respondents); Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*

[6] New York is home to many experienced international arbitrators and leading law firms in the field and hosts many respected international arbitration institutions including the International Center for Dispute Resolution of the American Arbitration Association, the CPR International Institute for Conflict Prevention and Resolution, JAMS International, and an office of Secretariat of the International Court of Arbitration of the International Chamber of Commerce. It is one of the most popular choices for seat of arbitration among parties to international contracts, though it faces substantial competition from other world cities. *See, e.g.*, New York International Arbitration Center "New York Tops Popularity Ranking as Seat for International Arbitration," May 5, 2016, *available at* https://nyiac.org/nyiac-news/new-york-tops-popularity-ranking-as-seat-for-international-arbitration/ ("New York City is the fifth most popular venue for international arbitration under the Rules of Arbitration of the International Chamber of Commerce ('ICC') after Paris, London, Geneva and Singapore").

66 (5th ed. 2016) ("Nations with interventionist or unreliable local courts should always be avoided as arbitral seats").

An expansive interpretation of the manifest disregard of law doctrine would discourage parties from selecting New York for their international arbitration by undermining the interest in finality of awards. When parties agree to arbitrate, they contract out of any right to have their factual and legal disputes determined by national or state courts, instead opting for determination of those issues by a panel of arbitrators selected in accordance with their agreement. Respecting the parties' agreement is particularly important in international contracts, where parties often see the choice of a neutral arbitral forum as a way of avoiding any perceived risk of favoritism by domestic courts. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Any suggestion that New York courts will review the arbitrators' factual and legal determinations, as if on appeal, will only send the signal that New York does not respect the parties' choice of forum, and will discourage parties from choosing New York as the place of arbitration. Indeed, some commentators have suggested that the mere possibility of vacatur on manifest disregard grounds already operates as a disadvantage to New York as an arbitral seat. *See* Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 Am. Rev. Int'l Arb. 45, 47-48 (2011).

Additionally, expanding the manifest disregard doctrine to turn narrow vacatur review into a merits appeal would permit and encourage greater resort to the courts by parties unhappy with the results of arbitration. This would increase the number of cases in which parties seek judicial review of arbitral awards, not only prolonging and increasing the cost and uncertainty of the arbitration process but adding significantly to the burdens on New York's courts. As the U.S. Supreme Court has observed, arbitration is not "merely a prelude to a more cumbersome and time-consuming judicial review process." *Hall Street*, 552 U.S. at 588. In all but the most exceptional cases, the arbitration award should be the end of the process, not the beginning of lengthy, uncertain and time-consuming litigation.

CONCLUSION

Loose and broad application of the manifest disregard doctrine is contrary to the FAA and to prior decisions of the US Supreme Court and the New York Court of Appeals; would seriously undermine the advantages of arbitration in New York and the attractiveness of New York as an arbitral seat for international business; and risks inundating the courts with requests for appellate review of what the law and the parties' expect to be final arbitration awards. Accordingly, the Association urges this court in making its decision in this case to enforce a rigorous and narrow interpretation of the manifest disregard doctrine.

Dated: October 4, 2017

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APPELLATE DIVISION – FIRST DEPARTMENT
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October 4, 2017

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