

In the U.S.

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Navigating a mixture of international and domestic law, with a conflict among federal courts sometimes thrown in, is required.

Enforcement of International Arbitration Awards

In the United States, arbitration was not well received by courts prior to 1925. At that time, judges subscribed to a theory known as the “ouster doctrine,” and they refused to enforce agreements to arbitrate, reasoning that the agree-

ments improperly deprived or “ousted” courts from hearing claims arising from the law of the land. Once an arbitration award had been properly made, however, a court would enforce the award. The result of this practice was that parties could walk away from agreements to arbitrate any time before issuance of an award.

This changed when the Federal Arbitration Act (FAA) was enacted in 1925. 9 U.S.C. §§1–16. The FAA legitimized arbitration as a legal, binding alternative to litigation, and most courts interpreted Congress’ move as establishing a national policy favoring arbitration.

In 1958, the United Nations held a conference to adopt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Known as the “New York Convention,” this convention is a recognized, foundational instrument of international arbitration that requires courts of contracting states to assign effect to agreements to arbitrate, and also to recognize

and enforce awards made in other states, subject to specific, limited exceptions. Congress adopted the convention by amendment as Chapter 2 of the FAA in 1970. 9 U.S.C. §§201–208.

The convention’s purpose was to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Ter-morio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 933–34 (D.C. Cir. 2007) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.5.

In 1975, the Inter-American Convention on International Commercial Arbitration, also known as the “Panama Convention,” was adopted by a conference attended by countries belonging to the Organization of American States. Congress adopted it in 1990, and it became Chapter 3 of the FAA. 9 U.S.C. §301–307. The New York Convention and the Panama Convention are the two



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main vehicles used to enforce foreign arbitration awards in the United States.

The New York Convention

The New York Convention provides that countries that ratify it may do so with either one or both of two reservations offered in Article I (3). The first reservation is a “reciprocity reservation.” This limits the enforcement of awards only to those awards made in countries that have ratified the convention. The second reservation is a commercial reservation that limits recognition and enforcement of awards only to those involving commercial disputes. The United States has ratified the New York Convention with both reservations. Presently, all told, 144 countries have ratified the New York Convention.

Arbitration awards fall into one of three categories: domestic, foreign, or non-domestic. Domestic awards do not fall under the New York Convention, and instead are governed by Chapter 1 of the FAA. Section 202 of the FAA describes both “foreign” and “non-domestic” agreements and awards, which do fall under the New York Convention:

An agreement or award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in §2 of this title and which is entirely between citizens of the United States shall be deemed not to fall under the Convention *unless that relationship involves property located abroad, envisages performance enforcement abroad, or has some other reasonable relation with one or more foreign states.* For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. (Italics added).

Foreign awards are those that are “made in a State other than the State where the recognition and enforcement of such awards are sought.”

A non-domestic award subject to the New York Convention has been defined as one made within the legal framework of another country, or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. *Bergesen v. Mülle Corp.*, 710 F.2d 928, 932 (2d Cir. 1983);

see also Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995), *cert. denied*, 516 U.S. 914 (1995).

A general rule of thumb for distinguishing a “foreign” award from a “non-domestic” award is to discover where the award was made. A “foreign” award will always be made abroad, while a “non-domestic” award will usually be made in the United States. However, an award made abroad but under U.S. law will also be considered “non-domestic.” The important point about non-domestic awards is that they are subject to both Chapters 1 and 2 of the FAA, while foreign awards are subject only to Chapter 2. This leads to an important distinction between foreign awards and non-domestic awards.

The New York Convention, Chapter 2 of the FAA, enumerates specific grounds on which a court can refuse to enforce an arbitration award. It does not include a provision permitting a court to vacate an arbitration award. Since foreign awards are only subject to Chapter 2, a court has no ground to vacate an arbitration award confirmed by a foreign court. A U.S. court only has grounds through Chapter 2 to refuse to enforce that award. The reason is that a losing party argues for vacatur in the state where the award was made, while a winning party seeks enforcement of an award in a country *other* than the one where the award was made. Because the court in the second country has no jurisdiction to vacate an award from the first country, the country where the award was made, the second court can only refuse to confirm or “enforce” the award.

Chapter 1, the domestic chapter of the FAA, does, however, allow courts to vacate arbitration awards. Since non-domestic awards are subject both to Chapters 1 and 2, a losing party can affirmatively seek to vacate a non-domestic award under Chapter 1’s authority. The grounds for vacating an award as contained in the FAA will only apply if the arbitration was held in the United States and a party filed a timely motion to vacate the award in the district court of the place of the arbitration.

Panama Convention

The Panama Convention applies when arbitration arises from a commercial relationship between citizens of signatory nations. *Sanluis Developments, L.L.C. v. CCP Sanluis, LLC*, 498 F. Supp. 2d 699 (S.D.N.Y. 2007).

Article V of the Panama Convention nearly mirrors Article V of the New York Convention regarding the bases for refusing to enforce arbitration awards. *Internacional Ins. Co. v. Caja Nacional de Ahorro y Seguro*, No. 00C6703, 2001 WL322005 (N.D. Ill. Apr. 2, 2001) (the Panama Convention defenses are “essentially the same” as the New York Convention defenses). The legislative history of the Panama Convention’s implementing statute shows that Congress intended for the same results to be reached whether the New York Convention or the Panama Convention is applied. *Republic of Ecuador v. Chevron Texaco Corporation*, 376 F. Supp. 2d 334, 348 (S.D.N.Y. 2005). However, this is not to say that the conventions are nearly identical in all respects.

When both the New York and Panama Conventions could apply, courts determine which convention to use as follows:

1. If a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified the Panama Convention, the Inter-American Convention, and are member states of the Organization of American States, the Panama Convention will apply.
2. In all other cases, the New York Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, will apply.

Republic of Ecuador v. Chevron Texaco Corporation, 376 F. Supp. 2d 334, 348 (S.D.N.Y. 2005).

Enforcement Under the New York Convention

As mentioned, the New York Convention provides that countries that ratify it may do so with either one or both of two reservations, offered in Article I (3). The first reservation is a “reciprocity reservation.” This limits the enforcement of awards only to those awards made in another country that has ratified the convention. The second reservation is a commercial reservation. This limits recognition and enforcement of awards to those only involving commercial disputes. The United States ratified the New York Convention with both reservations.

Since the New York Convention is older than the Panama Convention, most of the applicable case law involves the former. A party can seek enforcement in any country in which the losing party has assets. And

the U.S. district courts have jurisdiction when a party seeks to enforce a foreign or non-domestic award in the United States. 9 U.S.C. §207.

An action to enforce or confirm an award must commence within three years of an award's origin. 9 U.S.C. §§207, 302. A party seeking to enforce an arbitration award can establish a prima facie case for

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enforcement by providing the original or a certified copy of the arbitration agreement and award. 9 U.S.C. §§207, 302. Once a party has made a prima facie case for enforcement, a district court "shall confirm" the arbitration award unless one of the grounds for refusal specified in the New York Convention exists. 9 U.S.C. §207.

Article V of the New York Convention provides the exclusive grounds for refusing to enforce an award. *Seung Woo Lee v. Imaging 3, Inc.*, 283 Fed. Appx. 490, 492 (9th Cir. 2008) (the grounds for refusal to recognize or enforce an arbitration award are limited to the seven grounds listed in Article V).

As long as a party requests enforcement within the three years prescribed under section 207 of the FAA, unless it finds one of the seven Article V grounds, a U.S. court *must* confirm an award. A court must find one of the following grounds to refuse to enforce an award:

- The contracting parties suffered under some incapacity or the arbitration agreement was invalid.
- A losing party that failed to pay the award did not receive proper notice of the arbitration proceedings or was unable to present its case.

- The arbitration exceeded the scope of the arbitration agreement.
- The arbitration panel or procedure did not conform to the parties' agreement or applicable law.
- The arbitration award has not yet become binding or has been set aside or suspended by a competent authority of the country in which the award was made or under the governing law of that country.
- The subject matter was not subject to arbitration.
- Enforcing the award would conflict with public policy.

The party seeking to prevent enforcement bears the burden of producing competent authority that one of the enumerated grounds exists.

Defending Against Arbitration Award Enforcement

As mentioned, a court can refuse to enforce an arbitration award if one of the seven grounds listed above exist, so defenses against enforcement generally rely on one or more of those seven grounds.

Incapacity or Invalidity

As noted, under the New York Convention's Article V (1)(a), a court can refuse to enforce an arbitration award

Where the parties were, under the law applicable to them, under some incapacity, where the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award is made.

No U.S. court has denied to enforce a foreign arbitration award either because one or both of the contracting parties suffered an incapacity or because an agreement to arbitrate was invalid under the applicable law. Incapacity at the time of an arbitration hearing is not a defense. To use incapacity as a defense to an enforcement action, a party must show that it suffered from an incapacity when it signed *the contract* containing the arbitration agreement. *Seung Woo Lee v. Imaging 3, Inc.*, 283 Fed. Appx. 490, 492 (9th Cir. 2008). The validity necessary under Article V (1)(a) requires that the arbitration agreement be "in writing," as specified under Article II (1). Courts generally interpret the "in writing" requirement broadly, meaning that it can be met

by incorporation into or reference to other agreements. *Ibeto Petrochemical Industries Limited v. M/T Boffen*, 475 F.3d 56, 63 (2d Cir. 2007) ("a broadly worded arbitration clause which is not restricted to the immediate parties may effectively be incorporated by reference into another agreements") (quoting *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 48 (2d Cir. 1993)).

Due Process Violations

Article V (1)(b) of the New York Convention states that a court can refuse to enforce a foreign arbitration award if the "party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

This defense has not often been successful. Instead, U.S. courts have narrowly construed Article V (1)(b), considering the overall arbitration result and determining whether a defendant received a fair hearing. Courts defer greatly to arbitrators' rulings regarding the relevancy of evidence, and absent a showing of abusive discretion, a court probably will not refuse to enforce an arbitration award based on an allegation of improper evidence or an allegation that proper evidence was missing. *Laminoris-Trefileries-Cableries de Lens, S. A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

A party cannot fail to appear at a hearing, or fail to offer a satisfactory explanation for its absence, and then prevent enforcement of an award on the grounds that it was unable to present its case. *Fitzroy Eng'g Ltd. v. Flame Eng'g Ltd.*, 1994 U.S. District LEXIS 17781, at *16 (N.D. Ill. Dec. 2, 1994). In *Iran Aircraft Industries v. Auco Corporation*, 980 F.2d 141 (2d Cir. 1992), however, the court used this ground to refuse to enforce an arbitration award. The facts of that case were that an American company was unaware that a replacement tribunal judge had changed the evidentiary requirements, which prevented it from fully presenting its case. *Id.*

Exceeds the Submission Terms or Arbitration Scope

Article V (1)(c) of the New York Convention provides that a court can refuse to enforce an arbitration award when

The award deals with a difference not

contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

This defense is not often successful because usually courts broadly interpret the scope of the differences in arbitration agreements that parties have agreed to arbitrate. This defense has a narrow application, and a court will not second guess an arbitrator's construction of the parties' arbitration agreement. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 977 (2d Cir. 1974). As to doubts, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability." *Progressive Casualty Insurance Co. v. C. A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 48 (2d Cir. 1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

Improper Arbitration Procedure or Arbitration Panel Composition

Article V (1)(d) of the New York Convention states that a court will not enforce a foreign arbitration award when

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

U.S. decisions have upheld awards that have addressed improper composition of arbitration panels convened under the New York Convention. For instance, in *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976), it was discovered after the award was made that the third arbitrator had previously drafted the civil code for the Ethiopian government, the prevailing party in the arbitration. Baruch-Foster argued that this violated the arbitration agreement, which provided that the third arbitrator should

have no direct or indirect connection with either party. The court of appeals affirmed the enforcement of the award by the district court on the grounds that the defendant's allegations were unsubstantiated.

In *Al Haddad Bros. Enterprises, Inc. v. M/S Agapi*, 635 F. Supp. 205 (Dist. of Del. 1986), *aff'd without op.*, 813 F.2d 396 (3rd Cir. 1987), the arbitration agreement called for three arbitrators, but the award was made by a sole arbitrator. The award was enforced because the New York Convention allows a court to recognize an award that complied with laws of the country where the arbitration occurred. The arbitration had occurred in the United Kingdom, where a sole arbitrator may decide a dispute.

A Not Yet Binding, Set Aside, or Suspended Award

Article V (1)(e) of the New York Convention allows a court to refuse to enforce an award when "the 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."

"Binding" generally means that no further appeals are available. Enforcing an award, however, does not require a party to exhaust all of the court appeals in the country in which the arbitration award was made.

In *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), the defendant took the position that the arbitration award against it was not binding because it was under review by an Indian court for errors of law. The federal court in Ohio found that the award was binding for purposes of the New York Convention and quoted Gerald Aksen, former general counsel of the American Arbitration Association, who had commented, "The award will be considered 'binding' and for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being 'binding.'"

One case in which a court used this ground to refuse to enforce an arbitration award is *Termorio S.A.E.S.P. v. Electranta*, 487 F.3d 928 (D.D.C. 2007). The court refused to enforce a Colombian arbi-

tration award, which had been lawfully set aside by a Colombian court.

Non-arbitrable Subject Matter

Article V (2)(a) of the New York Convention specifies that if a prospective enforcing court's national laws prevent parties from arbitrating a controversy due to its subject, the court may refuse to enforce an arbitration award.

To take advantage of this defense, a party must prove that the enforcing nation attaches a special national interest to the dispute that makes settling it by arbitration impossible. The national interest must be more than "incidentally" involved in the dispute for a court to find that the dispute is not arbitrable. *Parson & Whittemore Overseas Co. v. RAKTA*, 508 F.2d 969, 975 (2d Cir. 1974).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the defendant argued that anti-trust claims, which were the subject of the dispute, were not subject to arbitration. The court found the claims arbitrable and stated that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Id.* at 629.

One case in which an arbitration award was not enforced because the court found that the subject matter was not arbitrable was *Libyan American Oil Co. v. Socialist Peoples Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated without op.*, 684 F.2d 1032 (D.C. Cir. 1981).

Public Policy

Article V (2)(b) states that if recognizing or enforcing an award would conflict with the public policy of the country where a party seeks enforcement, a court can refuse to enforce the award. As with other grounds against enforcing arbitration awards, courts narrowly construe this ground, applying it only when effectuating an award would violate the most basic notions of morality and justice of the foreign state. *Parson & Whittemore Overseas Co. v. RAKTA*, 508 F.2d 969, 973 (2d Cir. 1974).

In *Fitzroy v. Flame*, 1994 U.S. District LEXIS 17781 (N.D. Ill. Dec. 2, 1994), the party opposing enforcement asserted the public policy exception, claiming that its own counsel had failed to disclose a conflict of interest. The court stated that to prevail on that defense, “the respondent must convincingly show that a clear, direct conflict existed that could have affected the outcome of the proceeding.” *Id.* The court held that the respondent failed to meet this burden. *Id.*

One case in which the public policy defense was used successfully is *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980). The court refused to enforce the interest payments ordered by the arbitrators as the interest rate was so excessive that it was penal, holding that the penal nature of the interest violated public policy.

Vacating Non-domestic Arbitration Awards

While foreign arbitration awards are governed strictly by the New York Convention, which contains no authority to vacate or set aside a foreign award, court may vacate non-domestic awards under the applicable law of the country in which a party initiates a vacatur action, that is, either the country in which the award was made, or the country of the law of choice specified in the arbitration agreement. *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera Industrial Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990).

In the United States, the governing law in section 10 of Chapter 1 of the FAA specifies that the grounds to vacate an arbitration award are

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed

them that a mutual, final, and definite award upon the subject matter submitted as not made.

9 U.S.C. §10.

An action to vacate a non-domestic award can overlap with an action to enforce the same award. In *Yusef Ahmed Alghanim & Sons, W.L.C. v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), a dispute arose out of licensing and supply agreements between Toys “R” Us and Yusuf Ahmed Alghanim & Sons (Alghanim). Toys “R” Us then sold its franchise rights to Alghanim’s territory to two other companies and invoked the arbitration clause in the agreement, which called for arbitration to take place in the United States. The arbitrator found that Toys “R” Us had breached the contract, and awarded Alghanim \$46.44 million in lost profits, plus interest. The district court found that since the New York Convention and the Chapter 1 of the FAA both governed the award, a petition to confirm under the convention did not foreclose a cross-motion to vacate under Chapter 1 of the FAA. The Second Circuit affirmed, holding that this was a non-domestic award within the scope of the New York Convention, and the district court had authority under the convention to apply the FAA’s implied ground of manifest disregard of the law to vacate the award. It then found that in this case, the criteria for finding manifest disregard of the law had not been met. *Id.* at 17–24.

Is Manifest Disregard a Valid Vacatur Ground?

The U.S. courts have supplemented the narrow procedural grounds for vacatur, found in U.S.C. § 9 §10, with a handful of non-statutory grounds. These common law grounds supporting vacatur include awards that are “arbitrary and capricious,” “completely irrational,” fail to draw their essence from the underlying contracts, or those in “manifest disregard of the law.” *Ainsworth v. Kurnick*, 960 F.2d 939 (11th Cir. 1992) (“completely irrational”); see also *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 578 (8th Cir. 1999); and see also *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 192 (4th Cir. 1998); *Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861 (N.D. Iowa 1999) (fails to draw its essence from the underlying contract); *Advest Inc. v. McCarthy*, 914 F.2d 6,

8 (1st Cir. 1990) (“manifest disregard of the law”); see *Wilco v. Swan*, 363 U.S. 427, 436–37 (1953), *overruled on other grounds*; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Among these, manifest disregard of the law has been the most widely used by courts to set aside, or vacate, arbitration awards. Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOKLYN L. REV. 471 (1998); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996); Marcus Mungiolli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY’S L.J. 1079 (2000); Lionel M. Schooler, *Arbitration at the Millennium: Developments in the Law*, 37 HOUSTON LAWYER 27, 31 (2000).

The standard for finding manifest disregard of the law is extremely high. Courts usually require the party arguing for vacatur to show that (1) the law was unambiguous and clearly applicable, (2) the arbitrator knew the law, and (3) the arbitrator chose to ignore the law despite his or her knowledge of it. See *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000); *Health Svcs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

It was traditionally thought that the manifest disregard doctrine was available as a means of vacating an award in domestic arbitration cases only. See, e.g., *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996) (concluding that the convention’s exclusive grounds for relief “do not include miscalculations of fact or manifest disregard of the law”); *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial*, 745 F. Supp. 172, 181–82 (S.D.N.Y. 1990) (refusing to apply a “manifest disregard of law” standard on a motion to vacate a foreign arbitration award); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987) (“In my view, the ‘manifest disregard’ defense is not available under Article V of the Convention or otherwise to a party... seeking to vacate an award of foreign arbitrators based upon foreign law.”); see also Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 265

(1981) (“the grounds mentioned in Article V are exhaustive”).

This notion was tossed aside in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), when the court unequivocally stated that manifest disregard of the law was a means of vacatur in non-domestic cases governed by the New York Convention. *Id.* at 19–20.

Does *Hall Street* Preclude Manifest Disregard Doctrine?

The *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), case arose from a commercial, landlord-tenant dispute between Mattel, the tenant, and its landlord, Hall Street. Following the discovery of environmental contamination on the leased property, Mattel notified Hall Street that it intended to terminate the lease. After Mattel won the initial litigation over the termination provisions in the lease, Hall Street and Mattel agreed to submit the indemnification issue to arbitration. The arbitration agreement, which was approved and entered as an order by the federal district court, specified that the federal court would review, de novo, the arbitrator’s conclusions of law. The arbitrator decided the dispute in Mattel’s favor.

The district court, however, exercised the provision in the parties’ arbitration agreement that allowed review for “legal error,” determined that the arbitrator had made an erroneous conclusion of law, and vacated the award. The district court remanded the case to the arbitrator for further consideration, after which the arbitrator then decided the dispute in Hall Street’s favor. The district court upheld the arbitrator’s second award. Mattel then switched horses, contending that, according to *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003), the parties agreement allowing judicial review for legal error was unenforceable. The Ninth Circuit decided the case in Mattel’s favor, reversing the district court’s decision on the ground that allowing the district court to vacate the initial award for “legal error” was not an authorized vacatur ground under the FAA, regardless of that provision in the arbitration agreement. The Supreme Court granted certiorari on whether the FAA’s statutory grounds for vacatur and modification under sections

10 and 11 were exclusive. *Hall Street*, 128 S. Ct. at 1400–01.

The Supreme Court agreed with the Ninth Circuit, which had reaffirmed its own decision from *Kyocera Corp.*, although, whether the Court struck down manifest disregard is less than clear. The Ninth Circuit’s decision in *Kyocera* overruled its previous decision in *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 9 1997), which held that parties were free to contract for an alternative standard of review. *Id.* at 888. Furthermore, the court in *LaPine* clearly distinguished the contractually enhanced judicial review from judicially defined grounds for vacating an arbitration award, such as manifest disregard of the law.

It is beyond peradventure that in the absence of any contractual terms regarding judicial review, a federal court may vacate or modify an arbitration award only if that award is ‘completely irrational,’ exhibits a ‘manifest disregard of law,’ or otherwise falls within one of the grounds set forth in 9 U.S.C. §§10 or 11. *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991) (citation omitted). The instant case does not, however, fall neatly within the contours of the usual rule. That is because the parties indisputably contracted for heightened judicial scrutiny of the arbitrators’ award when they agreed that review would be for errors of fact or law. *Id.*

The Ninth Circuit’s holding in *LaPine* clearly aimed to support *contractual* expansion of judicial review of determinations of fact and law at the foundation of arbitration awards, not manifest disregard or other judicial doctrines. *Kyocera* overturned this narrow holding in *LaPine* regarding contractual judicial review, and the Supreme Court agreed when it affirmed the Ninth Circuit’s decision that the FAA provides the “exclusive” grounds for vacatur. This conclusion is further supported by the Court’s language throughout the *Hall Street* opinion. When describing the split among the circuits that the opinion was intended to fix, the Court only discussed the split regarding parties’ ability to contract for expanded judicial review. *Hall Street*, 128 S. Ct. at 1403. The Court listed the circuits that had held that parties may not contract

for expanded judicial review of arbitrations, and those that had held that it was allowed. *Id.* at n.5. There was no mention of a circuit split over *judicially expanded* review of arbitration awards beyond the four statutory grounds in the FAA.

The Court addressed manifest disregard of the law only because Hall Street argued that the use of the judicial doctrine was

An action to vacate a non-domestic award can overlap with an action to enforce the same award.

proof that the FAA’s vacatur grounds were not exclusive. *Id.* at 1404. The court distinguished manifest disregard of the law from contractual terms for judicial review in two ways. First, it swatted away Hall Street’s “camel’s nose” argument, stating that it is quite a “leap from a supposed judicial expansion by interpretation to a private expansion by contract.” Second, the Court remarked that the manifest disregard doctrine originated with a statement in *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, the Supreme Court said that “power to vacate an arbitration award is limited... the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject... to judicial review for error in interpretation.” *Id.* at 436–37. The *Wilko* decision expressly rejected Hall Street’s request “for general review for an arbitrator’s legal errors.” *Hall Street*, 128 S. Ct. at 1404. The Court provided another interpretation of the use of the term “manifest disregard” in the *Wilko* court, stating that it could have been “shorthand” for certain FAA provisions. *Id.* It then evaded the underlying question—whether manifest disregard of the law was still a ground for vacatur—by reaffirming its view of the doctrine from *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which said that manifest disregard of the law was a ground for vacatur, further stating that it would not “accord” the doctrine the significance that Hall Street urged. *Hall Street*,

128 S. Ct. at 1404. This indicates that the Court did not accept Hall Street's argument that "if judges can add grounds to vacate, so can contracting parties." See *id.* at 1403.

Unfortunately, courts still disagree about whether *Hall Street* excludes manifest disregard of the law as a ground for setting aside an arbitration award. Some courts have side-stepped the issue. In *Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008), the court found, without mentioning *Hall Street*, that the arbitrators acted in manifest disregard of the law when they dismissed the investors' "counterclaims and third-party claims as sanctions in contravention of explicit provisions" in the securities arbitration code. *Id.* at 71. On remand, the district court vacated the award, and remanded the case to the arbitral body. The court denied the appellant's motion for relief from its remand order. The appellant again appealed to the circuit court.

This time, the appellant, Kashner Davidson, argued that manifest disregard of the law was not explicitly listed as a ground for vacatur in section 10 of the FAA, so it was not a ground for vacatur, as clarified in *Hall Street*. *Kashner Davidson Securities Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010). The First Circuit side-stepped those arguments, stating that Kashner Davidson had failed, on many occasions, "to raise the *Hall Street* argument through ordinary procedures." *Id.* at 23. And the First Circuit would not permit Kashner Davidson to raise that argument "by invoking a procedural remedy reserved for extraordinary situations." *Id.* 23. See also *AmeriCredit Financial Serv-*

ices, Inc. v. Oxford Management Services, 2008 WL 4371752 (E.D.N.Y. Sept. 18, 2008) (finding that arbitrators had not manifestly disregarded the law in their ruling, but that it may be moot anyway, after *Hall Street*).

Further, the First Circuit is not the only circuit court to side-step whether manifest disregard of the law is a ground for vacatur:

The Supreme Court has recently held that the provisions of the FAA are the exclusive grounds for expedited vacatur and modification of an arbitration award, which calls into doubt the non-statutory grounds which have been recognized by this Circuit. However, because we affirm the district court and hold that the arbitration award is confirmed, there is no need in the instant case to determine whether those non-statutory grounds for vacatur of an arbitration award remain good law after *Mattel*. (citation omitted).

Rogers v. KBR Technical Servs. Inc., No. 08-20036, 2008 WL 2337184, at *2 (5th Cir. June 9, 2008).

Some courts have found that after *Hall Street*, the manifest disregard doctrine is no longer grounds to vacate an arbitration award. See *Sherry Hereford v. D.R. Horton*, No. 1070396, 2009 WL 104666 (Ala. Jan. 9, 2009) ("Under the Supreme Court's decision in *Hall Street Associates*, manifest disregard of the law is no longer an independent and proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator's award."); *Robert Lewis Rosen Associates v. Webb*, 566 F. Supp. 2d 228 (S.D.N.Y. 2008) ("As the Second Circuit's traditional understanding of Wilko and

§10—that Wilko endorsed manifest disregard and that §10's grounds are not exclusive—is inconsistent with the basis for the holding in *Hall Street*, the Court finds that the manifest disregard of the law standard is no longer good law."); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) ("We acknowledge the Supreme Court's recent holding in *Hall Street*... that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act.") (citation omitted); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (manifest disregard of the law is no longer an "independent, nonstatutory ground" for setting aside an arbitration award).

Yet other courts have held that the manifest disregard doctrine is alive and well after *Hall Street*. See *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("manifest disregard of the law "remains a valid ground for vacatur for an arbitration award under §10(a)(4) of the Federal Arbitration Act"); *Stolt-Nielson SA v. AnimalFeeds Int'l Corp.*, 2010 LEXIS 3672 (S.C. 2010) (although the Supreme Court analyzed the arbitration panel's decision under §10(a)(4), the court acknowledged the Second Circuit's holding that manifest disregard survived the Supreme Court's decision in *Hall Street*).

In the end, defending against an action to enforce an international arbitration award requires navigating a mixture of international and domestic law, with a conflict among the federal courts sometimes thrown in.

