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Focus

Award Hesitation

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The 9th Circuit has found that the doctrine of "manifest disregard of the law" is still available as a potential ground for vacatur of an arbitrator's award. *Comedy Club Inc. v. Improv West Associates*, 2009 DJDAR 1458. This has been in question since the recent U.S. Supreme Court case *Hall Street Associates LLC v. Mattel Inc.,* 128 S.Ct. 1396 (2008), which cast doubt on the doctrine's future. The 9th Circuit has now joined the 2nd Circuit, which dealt with the issue in *Stolt-Nielsen SA v. AnimalFeeds International Corp.,* 548 F.3d 85 (2d Cir. 2008), in finding that *Hall Street* did not abrogate the doctrine. These cases hold that manifest disregard continues to constitute a valid ground for vacatur of an arbitral award, notwithstanding the Supreme Court's ruling in *Hall Street*.

"Manifest disregard" is a common law doctrine that has been enunciated by numerous federal courts when reviewing arbitrators' awards under the strictly limited vacatur provisions of Federal Arbitration Act, Section 10, which lists only four specific grounds for vacating an arbitration award: if the award was procured by corruption, fraud or undue means, there was evident partiality or corruption in the arbitrators, the arbitrators engaged in misbehavior by refusing to consider material evidence, refusing without cause to postpone a hearing, or other acts which prejudiced one of the litigants, or 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. Section 10. The "manifest disregard" doctrine is in marked contrast to the normal rule that the statute provides the only grounds for review of an arbitrator's award.

The doctrine has been subject to various linguistic formulations in the jurisdictions that apply it, but it generally permits a court to refuse to recognize an arbitral award where the arbitrator knew of a controlling, well-defined legal principle that clearly applies to the dispute, but either refuses to apply it or ignores it.

The doctrine arose out of dictum in the U.S. Supreme Court's decision *Wilko v. Swan,* 346 U.S. 427 (1953), which was later overruled on other grounds, but it has never been expressly approved or disapproved by the Supreme Court as a non-statutory ground for review of arbitral awards.

Hall Street addressed the separate but related issue of whether parties may contractually expand on the statutory bases for judicial review of an arbitrator's award, by so stating that intention in their contract. The *Hall Street* opinion answered that question in the negative. In so holding, the court stated that Section 10 of the Federal Arbitration Act provides the "exclusive grounds for expedited vacatur," and discerned "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."

In the eyes of many knowledgeable analysts, this signaled the death of the "manifest disregard" doctrine. But *Hall Street* also stated that *Wilko's* "manifest disregard" dictum "may have been shorthand for" Sections 10(a)(3) or 10(a)(4), "the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" The 9th Circuit relied on this language, concluding that after *Hall Street*, "manifest disregard of the law remains a valid ground for vacatur because it is a part of" Section 10(a)(4). The 2nd Circuit employed similar reasoning in its decision in *Stolt-Nielsen*, finding manifest disregard remains a valid ground for vacating arbitration awards when "reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in" Section 10 of the Federal Arbitration Act.

But the 1st Circuit has, albeit in dictum, "acknowledged 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 [FAA]." *Ramos-Santiago v. United Parcel Service,* 524 F.3d 120 (1st Cir. 2008) (emphasis added). Some district courts have likewise concluded that manifest disregard is no longer a basis for vacating an arbitration award post-*Hall Street*. Two unpublished 6th Circuit opinions indicate disarray. Compare *Coffee Beanery Ltd. v. WW LLC*, 2008 WL 4899478 (6th Cir. Nov. 14, 2008), finding that the Supreme Court "did not foreclose federal courts' review for an arbitrator's manifest disregard of the law," with *Martin Marietta Materials Inc. v. Bank of Oklahoma*, 2008 WL 5272786 (6th Cir. Dec 17, 2008), which questioned whether manifest disregard survives *Hall Stree*t.

It thus appears likely that this issue may ultimately have to be resolved by the Supreme Court. It is worth noting that the *Comedy Club* case was before the 9th Circuit on remand from the Supreme Court, which had vacated an earlier judgment originally made by the 9th Circuit before *Hall Street* came down. On remand, the Supreme Court directed the circuit to reconsider its decision in light of *Hall Street*. The 9th Circuit reaffirmed its earlier position, finding that *Hall Stree*t had not changed the law of manifest disregard on which it had originally relied.

Counsel who are considering an attack on, or defense of, an arbitral award should know what law governs their motions to confirm or vacate. Whenever they are able to exercise control over the venue of, and law governing their motions to confirm or vacate, they should be careful to assess and

choose correctly. Sections 9 and 10 of the Federal Arbitration Act provide for venue of petitions to confirm or to vacate awards. Petitions to confirm are to be made in the court specified by the parties' agreement or, if no court is specified, then to the district court in the district within which the award was made. Petitions to vacate are to be made to the district court in the district within which the award was made. However, the venue provisions of Sections 10 and 11 have been held to be permissive, not mandatory. *Cortez Byrd Chips Inc. v. Bill Harbert Construction Co.,* 529 U.S. 193 (2000). Thus, a motion to confirm or vacate may be brought either in the district where the award was made, or in any district proper under the general venue statute. Venue may thus be proper, for example, both where the award was made and in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. Sections 1391(a)(2); 1391 (b)(2). Therefore, strategic choices can often be made regarding where to bring such motions and, under the evolving law of reviewability, such choices can be crucial in determining the level of scrutiny given to arbitral awards.

These issues are also important to address when drafting arbitration clauses, as they can have consequences for the finality of the award.

For example, "manifest disregard" has never been a ground for review under California arbitral law. In the landmark case *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992), the California Supreme Court found that arbitral awards are generally not reviewable for errors of fact or law, because "It is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final. ... When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive. ... Even in the absence of an explicit agreement, conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest " (citations omitted).

And, in *Cable Connection Inc. v. DIRECTV Inc.,* 2008 DJDAR 13491, the California Supreme Court declined to follow Hall Street's holding and found that contractually negotiated review provisions are enforceable under the California Arbitration Act, even if not under the Federal Arbitration Act. Thus, in these two important areas (availability of contractually expanded judicial review, availability of manifest disregard as a basis for seeking vacatur), California arbitral law is in marked contrast to federal arbitral law. Parties may now find themselves in very different scenarios depending on whether they move to confirm/vacate their awards in California courts under the California Arbitration Act, in federal courts under the Federal Arbitration Act and depending on which federal court they are in. Thus, whenever counsel have options about where to bring or defend motions to confirm or vacate arbitral awards, forum selection and choice-of-law questions are crucially important.

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