'Manifest Disregard of the Law': The Continuing Evolution of an Historically Ambiguous Vacatur Standard

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Introduction

Manifest disregard for the law – the judicial-born concept that some US courts have treated as an independent ground for vacating arbitral awards – is a topic much discussed, and often disfavoured, in international arbitration circles. The Supreme Court of the United States (the 'Supreme Court') seems only to have fuelled the debate over its validity and suitability by its opaque references to the concept since its origination in the 1953 case of *Wilko v Swan* and its indecision over whether the concept remains a valid, independent ground for annulment. The US Courts of Appeals, left to fend for themselves, have split into camps, each treating the concept with its own brand of judicial contempt or deference. Ultimately, the survival of the manifest disregard standard as an independent ground for vacatur seems of little consequence, as even those courts who have given it some degree of favour caution how difficult it is to satisfy.

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'Manifest disregard for the law'

All arbitration participants and practitioners should be aware that section 10 of the Federal Arbitration Act (FAA) – the US legislation codifying the New York Convention (the 'New York Convention' or the 'Convention') and providing the framework for enforcement of arbitration agreements and awards in the US[1] – provides very limited grounds on which an arbitral award rendered in the US may be vacated.[2] Nowhere within the statutory text does the phrase 'manifest disregard for the law' appear. Yet, many US courts continue to adhere to the Supreme Court's prior opaque use of that phrase to infer the existence of a separate ground for vacatur not expressly included in the statute.

That now notorious phrase has its origins in the Supreme Court case of *Wilko v Swan*.[3] *Wilko* involved the question of whether an agreement to arbitrate controversies between securities brokers and buyers constituted an invalid waiver of the buyer's right to select a judicial forum under the Securities Act of 1933.[4] The Court of Appeals for the Second Circuit,

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1 The FAA governs 'foreign' or 'non-domestic' awards (Chapter 2, 9 U.S.C. §§ 201 *et seq.*) and 'domestic' awards (Chapter 1, 9 U.S.C. §§ 1 *et seq.*). An award will be considered 'foreign' or 'non-domestic' if it involves at least one non-US party or if it arises out of a legal relationship that 'involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states.' (9 U.S.C. § 202.) While the FAA therefore may affect arbitrations seated in the US and those with seats outside the US, parties may only seek vacatur of arbitral awards, including for a manifest disregard of the law, if such awards were rendered in the US (whether those awards are considered domestic or foreign/non-domestic). See n 3 below.

2 9 U.S.C.A. § 10. Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention' or 'Convention'), a Convention award may be 'set aside or suspended' only 'by a competent authority of the country in which, or under the law of which, that award was made' (New York Convention, Arts. V(1)(e), VI). US courts have interpreted this language to mean that they may assume the power to vacate arbitral awards when the seat of the arbitration was in the US. *Yusuf Ahmed Alghanim & Sons, W.L.L. v Toys 'R' Us, Inc.*, 126 F.3d 15, 21–23 (2d Cir. 1997) ('We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.'). See also Victoria Orlowski, 'Chapter 22: FAA Section 10 Applications to Vacate an Award (Including "Manifest Disregard")' in Laurence Shore et al (eds), *International Arbitration in the United States*, (Kluwer L. Int'l, 2017) 503, 506 (insofar as the classic majority view is concerned, '[n]ational arbitration law at the place of arbitration (or under the law of which an award is made) establishe[s] the grounds for vacating awards. In the U.S., the law that contains the grounds for vacating international arbitration awards usually is the FAA, as the federal grounds for vacatur generally preempt state grounds unless the parties clearly provide otherwise in their agreements.').

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

4 *Ibid.*

in determining that the Securities Act did not prohibit the arbitration agreement in question (a position rejected by the Supreme Court),[5] stated in dicta that a failure by arbitrators to decide in accordance with the provisions of the Securities Act 'would ... constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act.'[6] In response, the Supreme Court remarked passively that any such 'failure would need to be made clearly to appear,' since '*interpretations of [] law* by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation' [emphasis author's own].[7] To this day, it remains unclear what the Supreme Court intended by these cryptic remarks.[8]

Did the Court mean to prescribe a judicially created common law ground for vacatur in addition to those identified expressly in the FAA? Did it mean to refer summarily to those grounds listed in section 10 of the FAA or, perhaps, a specific ground, such as where the arbitrators are 'guilty of ... misbehavior by which the rights of any party have been prejudiced' (section 10(4)(3)) or have 'exceeded their powers' or 'so imperfectly

5 *Ibid.*, overruled by *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

6 *Wilko v Swan*, 201 F.2d 439, 444-45 (2d Cir. 1953).

7 *Wilko*, 346 U.S. at 436-37.

8 The Court cited a number of authorities, many preceding the enactment of the FAA, in support of its insinuation that manifestly disregarding the law the arbitrators are bound to apply may present a valid basis for vacatur. One in particular – the 1874 Supreme Court case of *United States v Farragut* – provides a thin window into the Court's conception of this distinctive phrase (89 U.S. 406 (1874)). In addressing whether the award of an arbitral tribunal appointed to tackle claims involving prizes of war was final as to all questions of law and fact involved, the Court determined – without citation – that the 'award was [] liable, like any other award, to be set aside in the court below, for such reasons as are sufficient in other courts,' including 'exceeding the power conferred by the submission, *for manifest mistake of law*, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery' [emphasis author's own] *Ibid.* at 421. '[U]nless it can be shown that in making this award [the arbitrators] have acted upon a manifest mistake of law, the award must be upheld.' *Ibid.*; see also *ibid.* at 422 ('unless [the arbitrators] violated some principle of law in deciding [the matters before them], ... the award must be confirmed'). See also *Burchell v Marsh*, 58 U.S. 344, 349-50 (1854) (providing that, '[i]f the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact,' but if there is 'more than an error of judgment, such as ... gross mistake,' such that 'had [the mistake] not happened, [the arbitrator] should have made a different award,' vacatur may be warranted).

executed them' (section 10(a)(4))?[9] One can reasonably infer that the Court intended some meaning to be ascribed to this notion of 'manifest disregard' – at the very least, that so clearly disregarding the law that the arbitrator, by submission, was bound to apply (as opposed to misapplying or misinterpreting the law) would subject her award to some limited form of judicial review or correction and potentially vacatur.[10] There is little textual support for such view in the statute – 'the court *must* grant [] an order [of confirmation] unless the award is *vacated, modified, or corrected as prescribed in sections 10 and 11* of this title' [emphasis author's own].[11] Indeed, the FAA is clear and unambiguous: unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of the FAA (neither of which provides for recourse based on a manifest disregard of the law), a court is *required* to grant an order of confirmation. Still, the Supreme Court's *obiter dicta* is

9 The *Wilko* Court also cited cases appearing to accept that, if a 'manifest disregard of the law'-type principle were to exist, it would fall under the FAA's 'excess of power' ground. *The Hartbridge N. of Eng. S.S. Co. v Munson S.S. Line*, 62 F.2d 72, 73 (2d Cir. 1932) (considering appellant's 'excess of power' argument tantamount to a 'perverse misconstruction' of the law, which, if 'plainly established,' may constitute grounds for set aside under the FAA). Incidentally, it was suggested at a session of the Working Group on International Contract Practices – the group entrusted by UNCITRAL to prepare the initial draft of what ultimately became the Model Law on International Commercial Arbitration – that 'manifest injustice' be one of the grounds pursuant to which an award could be vacated, in addition to those grounds contained in the New York Convention for denial of recognition or enforcement of an award. That proposal ultimately was rejected, being considered 'too vague and too broad,' and, in most cases, already covered by other grounds. UNCITRAL Seventeenth Session, *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (1983) A/CN.9/245, para 151, p 35; see also Holtzmann and Neuhaus, UNCITRAL Model Law, Chapter VII, Article 34 ['Application for setting aside as exclusive recourse against arbitral award'], *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer L. Int'l 1989) 910, 913.

10 There is no doubt some difficulty in ascertaining the difference between reviewing the arbitrator's award for misinterpretations of law versus a manifest disregard thereof. Note, 'Judicial Review of Arbitration Awards on the Merits' (1950) 63 Harv L. Rev 681, 685 ('Award Based on Erroneous Rule') (positing that one cannot easily define the 'blurred border between nonreversible error and reversible unreason.'). Though, these same authors did recommend that, 'unless the arbitrator has made his decision capriciously, as by the toss of a coin – which would be in itself a failure to exercise judgment as to the rule he should apply – a court should hesitate to place his action on the wrong side of that border.' *Ibid.* at 686. This notion of capriciousness – action dominated by impulsivity or unreason – may well have served as a prelude of sorts to the manifest disregard principle.

11 9 U.S.C. § 9. See also *Hall Street Assocs., L.L.C. v Mattel, Inc.* (2008) 552 U.S. 576, 582, 587 ('Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. … There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.').

hard to ignore.[12]

It was not until more than 30 years after *Wilko* that the elusive phrase reappeared.[13] In *Thomas v Union Carbide Agricultural Products Co.*, a contingent of the Court stated – again in dicta and without elaboration – that the judicial review prescribed under a federal pesticide law 'encompasses the authority to invalidate an arbitrator's decision when that decision exceeds the arbitrator's authority *or exhibits a manifest disregard for the governing law*' [emphasis author's own].[14] At first blush, Justice Brennan's use of the conjunction 'or' suggests that 'manifest disregard for the governing law' may constitute a ground for vacatur *separate from* that of an arbitrator having exceeded her authority.[15] Justice Brennan's concluding remarks, however, refer only to the 'judicial review' requisite 'to ensur[ing] that the arbitrator's exercise of authority in any given case does not depart from the mandate of the delegation [of a lawmaking function to the arbitrator] ….'[16] In considering the Court's statements together, it is reasonable to infer that the Court viewed the notion of manifest disregard as synonymous with, or a different way of viewing, an arbitrator's departure from his mandate or having overstepped his authority. The Court's citation to *Steelworkers v Enterprise Wheel & Car Corp.* supports such position.[17] Still, that this case did not concern the FAA's vacatur standards and the lack of any elaboration or discussion concerning the manifest disregard principle makes any definitive assessment of the Court's views difficult.

The dissenting opinion of Justice Stevens issued the following day, in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, provides no greater revelations. Justice Stevens stated, again in dicta, that '[a]rbitration awards

12 But cf., eg, *Baravati v Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) ('We can understand neither the need for the [manifest disregard] formula nor the role that it plays in judicial review of arbitration (we suspect none – that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles – whether the arbitrators' 'exceeded their powers' – it is superfluous and confusing.').

13 *Thomas v Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 601 (1985).

14 *Ibid.* at 601. The statute in question made the arbitrator's decision subject to judicial review 'only for "fraud, misrepresentation, or other misconduct".' *Ibid.* at 573-74.

15 It should be noted that this case did not involve, and the court was not called upon to decide, any issues regarding the specific standards for vacatur under the FAA.

16 *Ibid.* at 602.

17 363 U.S. 593, 597 (1960) ('[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the [] agreement.* When the arbitrator's words *manifest an infidelity to this obligation*, courts have no choice but to refuse enforcement of the award.' [emphasis added]).

are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207.'[18] The dissent's rather summary recitation of award reviewability and general reference to section 10 certainly suggests an intention that the manifest disregard principle was meant to act as a general reference to all the grounds for vacatur enumerated in the FAA. The Court's additional citation to section 207, however, is perplexing, as that section deals not with vacatur but confirmation of an award subject to the grounds for refusal or deferral of recognition and enforcement, as provided in the New York Convention. The Convention does not, nor does it aim to, establish a set of grounds or uniform standard for vacating international arbitration awards in those states where such awards were rendered;[19] moreover, a US court may not refuse to recognise or enforce a foreign award on the basis of manifest disregard.[20]

Two years later, the Court again referenced manifest disregard – still providing little to decipher its position on the concept's meaning and import. In writing for the majority, Justice O'Connor simply restated the Court's formulation in *Wilko*: '*Wilko* noted that the "[p]ower to vacate an award is limited", and that "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".'[21] Justice Blackmun, in a partially concurring and dissenting opinion, stressed that there are 'only four grounds for vacation of an award: fraud in procuring the award, partiality on the part of arbitrators, gross misconduct by arbitrators, and the failure

18 *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985).

19 See, eg, *KT Corp. v ABS Holdings, Ltd.*, 17 Civ 7859 (LGS), 2018 U.S. Dist. LEXIS 115268, at *7-8 (S.D.N.Y. 10 July 2018) ('The New York Convention does not articulate a basis for vacating arbitration awards, but a court applying the New York Convention may vacate an arbitration award based on the grounds provided in the FAA.'). It also bears noting that the New York Convention delegates 'rejected the formulation "manifest disregard of the law" as a ground for denial of enforcement.' Marike R P Paulsson, 'Chapter 6: Resisting Enforcement of Awards' in *The 1958 New York Convention in Action* (Kluwer L. Int'l 2016) 157, 168.

20 *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V v Pemex-Exploracion Y Produccion*, 832 F.3d 92, 106 (2d Cir. 2016) ('[A] district court must enforce an arbitral award ... unless a litigant satisfies one of the seven enumerated defenses,' which do not include "manifest disregard".'); *Int'l Standard Elec. Corp. v Bridas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 181 (S.D.N.Y. 1990) ('We observe that the Convention says nothing about "manifest disregard of the law".'). See also Nicola Christine Port, Scott Ethan Bowers & Bethany Davis Noll, 'Article V(1)(c)', in Herbert Kronke, Patricia Nacimiento & Dirk Otto, et al (eds) *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer L. Int'l 2010) 257, 263. ('[A]lthough manifest disregard of the law may be an implied ground for vacating an award under the FAA, it is not an express or implied defense to enforcement under the Convention') (citing sources).

21 *Shearson/American Express, Inc. v McMahon*, (1987) 482 U.S. 220, 231.

of arbitrators to render a final decision,' citing FAA section 10.[22] He further stated that '[t]he arbitrators' interpretation of the law would be subject to judicial review only under the "manifest disregard" standard.'[23] Justice Blackmun later clarified in the same opinion that '[j]udicial review is still substantially limited to the four grounds listed in § 10 of the Arbitration Act *and* to the concept of "manifest disregard" of the law' [emphasis author's own].[24] It thus appears that at least a contingent of justices viewed the principle of manifest disregard as supplementary to the FAA section 10 grounds.

In 1995, the Court in *First Options of Chicago, Inc. v Kaplan* cited with approval the manifest disregard standard: 'The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. *See, e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko []* (parties bound by arbitrator's decision not in 'manifest disregard' of the law).'[25] Justice Breyer's separate citations with explanatory parentheticals to section 10 and *Wilko* certainly indicates – like Justice Blackmun's earlier position – that the Court viewed manifest disregard as an independent ground for vacatur.

It was not until 2008, nearly 55 years after *Wilko*, that the Court provided its most expansive (albeit still limited) discussion of manifest disregard to date.[26] In *Hall Street Associates, LLC v Mattel, Inc.*, the Court was tasked with deciding whether parties to an arbitration agreement may contractually supplement the grounds for vacating an arbitral award found in section 10 of the FAA. The Court, in resolving a disagreement between the circuits, held that the FAA's grounds for vacatur (in section 10) and modification or correction (in section 11) 'are exclusive' and cannot be expanded by contract.[27] In doing so, the Court rejected Hall Street's argument that, if judges can add grounds to vacate or modify an award (including, for example, manifest disregard), so can contracting parties.[28] However, in dispensing with that argument, the Court was not required to make any determination on the validity of the manifest disregard standard. Rather, the Court determined that Hall Street's argument required an unjustified 'leap from a *supposed judicial expansion by interpretation* to a *private expansion*

22 *Ibid.* at 257-58.

23 *Ibid.* at 258.

24 *Ibid.* at 259.

25 *First Options of Chi., Inc. v Kaplan* (1995) 514 U.S. 938, 942.

26 *Hall Street*, 552 U.S. 576 at 584.

27 *Ibid.*

28 *Ibid.* at 585 ('Hall Street sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties. But this is too much for *Wilko* to bear.').

by contract,' [emphasis added] and, in any event, its request that parties be entitled 'general review for an arbitrator's legal errors' was 'expressly reject[ed]' by *Wilko*.[29]

The Court did express some scepticism about the significance of *Wilko*'s use of 'manifest disregard', providing two reasons why *Wilko* may not have intended this concept to act as a separate, independent ground for annulment under the FAA. The Court suggested that *Wilko* may have 'merely referred to the § 10 grounds collectively, rather than adding to them.'[30] It also stated that the phrase '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".'[31] Each of those suppositions is possible, although at least some of the Court's statements and references to *Wilko* over the past few decades are not supportive of either.[32] Regardless, the Court chose not to decide whether manifest disregard of the law might constitute a further ground for vacatur outside the statute or perhaps provide a gloss on or summarise those grounds already codified.[33]

The last decision of the Court referencing the concept of manifest disregard came in 2010, in *Stolt-Nielsen SA v AnimalFeeds International Corp.*[34] In a single footnote, the Court nourished the doubt that remained in respect of the continued legitimacy of the manifest disregard standard following *Hall Street*, stating simply, 'We do not decide whether "manifest disregard" survives our decision in *Hall Street []*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.'[35]

At present, therefore, the various US Circuit Courts of Appeals have been left to interpret what the Supreme Court, despite its vacillation, meant by its use of this obscure phrase – specifically, whether the concept still exists, either as an independent ground for vacating an arbitral award or as

29 *Ibid*. See also *Abbott v Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 617 (10th Cir. 2011) ('The *Hall Street* decision rejected the notion that *Wilko* opened the door for parties to contractually expand the scope of court review of arbitration decisions but declined to address whether those grounds could be expanded judicially.').

30 *Ibid*.

31 *Ibid*.

32 See, eg, *McMahon*, 482 U.S. at 257-58 (citing section 10 grounds for vacatur in addition to *Wilko*'s manifest disregard standard); *Kaplan*, 514 U.S. at 942 (same).

33 *Hall Street*, 552 U.S. at 584-86; see also *ibid*. at 590 ('The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.').

34 *Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, n 3.

35 *Ibid*.

a judicial gloss on those grounds already deemed exclusive by the Court.[36]

36 The US federal court system has three primary levels: (1) the lowest level of courts are the district courts (or trial court); (2) the appellate level, or circuit courts of appeals, act as the first level of appeal; and (3) the Supreme Court of the United States, the highest US federal court, acts as the final level of appeal in the federal system. There are 94 District Courts, 13 Circuit Courts of Appeals, and one Supreme Court.

A discussion of procedural matters relating to seeking vacatur of an arbitral award rendered in the US is beyond the scope of this article. Nonetheless, a few points – each of which raises a number of complex legal issues, and none of which should be considered exhaustive – bear mentioning.

First, under the FAA, a motion to vacate an award may be brought in 'the United States court in and for the district wherein the award was made.' 9 U.S.C. § 10; see also 9 U.S.C. § 208 (applying Chapter 1 of the FAA to Convention awards to the extent no conflict exists); Jennifer L. Permesly & Yasmine Lahlou, 'Chapter 21: Recognition and Vacatur of Foreign Arbitral Awards in the United States' in Laurence Shore et al (eds), *International Arbitration in the United States* (Kluwer L. Int'l 2017) 471, 490. The Supreme Court has held that the aforementioned language is 'permissive', such that the FAA's venue provisions (sections 9-11 of Chapter 1) permit motions to confirm, vacate or modify an arbitration award either 'where the award was made or in any district proper under the general venue statute [28 U.S.C. § 1391].' *Cortez Byrd Chips, Inc. v Bill Harbert Constr. Co.*, 529 (2000) U.S. 193, 195; see also Yasmine Lahlou, Andrew Poplinger & Gretta Walters, 'Chapter 13: Procedure for Recognition and Enforcement and Vacatur of Arbitral Awards in New York' in Andreas A Frischknecht &Yasmine Lahlou, et al (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer L. Int'l 2018) 217, 222-23 (providing that a party seeking vacatur of an arbitral award may commence proceedings either (1) 'in such court for the [federal] district and division which embraces the place designated in the [arbitration] agreement as the place of arbitration if such place is within the United States' (see 9 U.S.C. § 204) – an award will be deemed to have been made in a particular place (for example, New York), when it is the product of an arbitration seated there; or (2) in any federal district court in which, but for the arbitration agreement, the underlying action could have been brought under the general federal venue statute, 28 U.S.C. § 1391). Further, section 205 provides that, where an action involving a Convention award rendered in the US is brought in state court, 'the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending' (9 U.S.C. § 205).

Second, the party seeking vacatur of the award must be able to establish that the court in question has subject-matter jurisdiction over the action. Section 203 of the FAA provides that federal courts have subject-matter jurisdiction over actions or proceedings falling under the Convention (9 U.S.C. § 203). For non-New York or Panama Convention awards, 'there must be an independent basis of jurisdiction before a district court may entertain petitions to confirm or vacate an award under the FAA.' *Scandinavian Reinsurance Co. Ltd. v Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) (internal citations and punctuation omitted). Such independent basis may be satisfied by establishing federal question jurisdiction (where the cause of action arises under federal law, 28 U.S.C. § 1331) or diversity jurisdiction (where the amount in controversy exceeds USD 75,000 and no plaintiff shares a state of citizenship with any defendant (28 U.S.C. § 1332(a)).

Third, the party seeking vacatur also must be able to establish that the court can exercise personal jurisdiction over the award debtor (*in personam* jurisdiction) or over the award debtor's property located in that district (*quasi in rem* jurisdiction). Thus, subject to meeting the aforementioned obligations of jurisdiction and venue, parties may have some ability, albeit limited, to 'forum shop' by filing a vacatur action in a federal district court whose circuit may be more sympathetic to the concept of manifest disregard.

The result, as one might expect, is a broad split.[37]

The Fourth, Sixth, and Tenth Circuit Courts of Appeals have held that manifest disregard remains a valid ground for vacatur:

US Court of Appeals for the Fourth Circuit

In the 2012 case of *Wachovia Securities, LLC v Brand*, the court held 'that manifest disregard did survive *Hall Street* as an independent ground for vacatur.'[38] That remains the case today. In 2017, in the case of *Frye v Wild Bird Centers of America, Inc.*, the court stated that, '[b]efore a reviewing court will vacate an arbitration award, "the moving party must sustain the heavy burden of showing one of the grounds specified in the Federal Arbitration Act ... or one of certain limited common law grounds." … The relevant common law grounds for vacating are "where an award fails to draw its essence from the contract" and where "the award evidences a manifest disregard of the law".'[39] An arbitrator will have manifestly disregarded the law only 'where [she] understands and correctly states the law, but proceeds to disregard the same.'[40]

US Court of Appeals for the Sixth Circuit

In 2008, the court in *Coffee Beanery, Ltd. v WW, LLC* determined that its 'ability to vacate an arbitration award is almost exclusively limited to [the section 10] grounds, although it may also vacate an award found to be in manifest

37 For additional discussion on the split within the circuit courts of appeals, see generally Orlowski, at n 2 above, at 529-37; Jennifer L. Permesly & Yasmine Lahlou, 'Chapter 21: Recognition and Vacatur of Foreign Arbitral Awards in the United States' in Laurence Shore et al (eds), *International Arbitration in the United States* (Kluwer L. Int'l 2017) 471, 495-98.

38 *Wachovia Sec., LLC v Brand*, 671 F.3d 472, 480 (4th Cir. 2012). The court iterated later in its opinion that 'manifest disregard continues to exist as *either* an independent ground for review or as a judicial gloss,' but it had no need to 'decide which of the two it [was] because Wachovia's claim fail[ed] under both' [emphasis author's own]. *Ibid.* at 483.

39 *Frye v Wild Bird Ctrs. of Am., Inc.*, 714 F. App'x 211, 213 (4th Cir. 2017), quoting *MCI Constructors, LLC v City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010); *UBS Fin. Servs., Inc. v Padussis*, 842 F.3d 336, 339 (4th Cir. 2016) ('Courts may vacate or modify an arbitration award only under the limited circumstances listed in the Federal Arbitration Act, 9 U.S.C. §§ 10–11, or under the common law if the award "fails to draw its essence from the contract" or "evidences a manifest disregard of the law".'), quoting *Patten v Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006); *Barranco v 3D Sys. Corp.*, No. 17-1744, slip op. at 5 (4th Cir. May 31, 2018.) (in unpublished *per curiam* opinion, the court confirmed that it 'may vacate an arbitration award ... on common law grounds, *i.e.*, "where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law".'), quoting *MCI Constructors*, 610 F.3d at 857.

40 *Frye*, 714 F. App'x at 213; *Barranco*, No. 17-1744, slip op. at 5 ('"[A] manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same," such as "disregard[ing] or modif[ying] unambiguous contract provisions".'), quoting *Patten*, 441 F.3d at 235.

disregard of the law.'[41] In the court's view, while *Hall Street* 'significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, [] it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law.'[42] In the 2014 case of *Schafer v Multiband Corp.*, the court accepted that, '[s]ince *Hall Street*, we have continued to acknowledge "manifest disregard" as a ground for vacatur—albeit not in a published holding.'[43] The court reiterated that position most recently in 2017, stating, 'We have previously held that despite the Supreme Court's language in *Hall Street Associates*, the "manifest disregard" doctrine remains a viable ground for attacking an arbitrator's decision.'[44] While 'not an easy standard to meet,' as long as 'the applicable legal principle is clearly defined and not subject to reasonable debate' and 'the arbitrators refused to heed that legal principle,' the arbitrators' award may be vacated for manifest disregard of the law.[45]

US Court of Appeals for the Tenth Circuit

In 2011, in the case of *Abbott v Law Office of Patrick J Mulligan*, the court held that, 'in the absence of firm guidance from the Supreme Court,' it would 'decline to decide whether the manifest disregard standard should be entirely jettisoned.'[46] Years later, and without any mention of *Hall Street*, the court held that '[a] district court may vacate an arbitration award only "for the reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, *or* for 'a handful of judicially created reasons",' including 'manifest disregard of the law…'[emphasis author's own].[47] In July 2017, the court reiterated the same, although it also 'assum[ed] (without deciding) that

41 *Coffee Beanery, Ltd. v WW, LLC*, 300 F. App'x 415, 418 (6th Cir. 2009).

42 *Ibid.*; *see also ibid.* at 419 ('In light of the Supreme 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.').

43 *Schafer v Multiband Corp.*, 551 F. App'x 814, 818-19, n.1 (6th Cir. 2014), citing *Coffee Beanery*, 300 F. App'x at 418; *Dealer Comput. Servs., Inc. v Dub Herring Ford*, 547 F.3d 558, 561 n. 2 (6th Cir. 2008) (stating that manifest disregard survives *Hall Street*); *Ozormoor v T–Mobile USA, Inc.*, 08–11717, 2010 WL 3272620, at *2 (E.D. Mich. Aug. 19, 2010), *aff'd*, 459 F. App'x 502 (6th Cir. 2012). See also *Physicians Ins. Capital v Praesidium Alliance Grp.*, 562 F. App'x 421, 423 (6th Cir. 2014) ('In addition to the grounds for vacating an award expressly provided by the FAA, we will also vacate in the rare situation in which the arbitrators "dispense [their] own brand of industrial justice," by engaging in manifest disregard of the law.').

44 *Marshall v SSC Nashville Operating Co., LLC*, 686 F. App'x 348, 353 (6th Cir. 2017).

45 *Ibid.* (internal citations omitted).

46 *Abbott*, 440 F. App'x at 620.

47 *Adviser Dealer Servs. v Icon Advisers, Inc.*, 557 F. App'x 714, 717 (10th Cir. 2014) (internal citations omitted).

the "manifest disregard" exception remains available.'[48] A few weeks later, while acknowledging that the 'exception's viability has been uncertain,' the court confirmed that, '[t]o supplement [section 10's] statutory grounds, we have recognized a judicially created exception to the rule that even an erroneous interpretation or application of law by an arbitrator is not reversible. … [T]his court has held that "manifest disregard of the law"—which requires "willful inattentiveness to the governing law"—is subject to reversal.'[49] To apply, 'the record must show that the arbitrators knew the law and explicitly disregarded it.'[50] The commission of an error, 'or even a serious error,' is not enough.[51]

The Second and Ninth Circuit Courts of Appeals have held that manifest disregard does not constitute (and may never have constituted) an independent, non-statutory ground for vacatur. Rather, the courts consider that arbitrators who manifestly disregard the law have 'exceeded their powers' under section 10(a)(4) of the FAA. Under this view, because the arbitrator is aware of a controlling legal principle yet refuses to apply it, she disregards the law in such a manner as to exceed the powers bestowed upon her:

US Court of Appeals for the Second Circuit

Since 2008, as established in *Stolt-Nielsen SA v AnimalFeeds International Corp.*, the court has held firm to the position that it must continue to 'vacate arbitration awards in the rare instances in which "the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it",' which is simply another way of saying that 'the arbitrators have thereby "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject

48 *A. Kershaw, PC v Shannon L Spangler, PC*, 703 F. App'x 635, 639-40 (10th Cir. 2017).

49 *THI of NM at Vida Encantada, LLC v Lovato,* 864 F.3d 1080, 1084 (10th Cir. 2017) (internal citations omitted).

50 *Lovato,* 864 F.3d at 1085.

51 *Ibid.*; *Abbott,* 440 F. App'x at 617 ('Our role is only to decide whether it manifestly disregarded the law, something substantially different from a misunderstanding or misapplication of the law. The panel's possible adoption of a flawed argument is merely error, not manifest disregard of the law, and is not grounds for reversal under the FAA.')

matter submitted was not made".'[52] The court thus 'reconceptualised' the doctrine 'as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.'[53] Still, it remains a 'doctrine of last resort,' reserved for 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.'[54]

US Court of Appeals for the Ninth Circuit

In the 2009 case of *Comedy Club, Inc. v Improv West Associates*, the court joined the Second Circuit and confirmed its pre-*Hall Street* holding that the 'manifest disregard ground for vacatur is shorthand for a statutory ground under the [FAA], specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate "where the arbitrators exceeded their powers".'[55] That remains the standard today, as the court most recently reiterated – in 2018 – its prior holding 'that arbitrators 'exceed their powers' [under section 10(a)(4)] not when they merely interpret or apply the governing law incorrectly, but when the award is 'completely irrational' or 'exhibits a "manifest disregard

52 *Stolt-Nielsen SA v AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), overruled on other grounds, 559 U.S. 662 (2010). See also *Tully Constr. Co., Inc. v Canam Steel Corp.*, 684 F. App'x. 24, 26 (2d Cir. 2017) ('The Second Circuit recognizes two additional bases for vacatur,' including 'if the award was rendered "in manifest disregard of the law".') (internal citations omitted); *Zurich Am. Ins. Co. v Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016) (vacatur allowed based on manifest disregard where 'the court finds both 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.'); *Goldman Sachs Execution & Clearing, LP v Official Unsecured Creditors Comm. of Bayou Grp.*, 491 F. App'x 201, 203 (2d Cir. 2012) ('Although the Supreme Court's decision in *Hall Street*…..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".') (internal citations omitted); *Jock v Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011) (an award 'may be vacated when an arbitrator has exhibited a manifest disregard of law'); *Wallace v Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (manifest disregard requires something more than 'error or misunderstanding with respect to the law').

53 *Stolt-Nielsen*, 548 F.3d at 94-95.

54 *Duferco Int'l Steel Trading v T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003); see also *Stolt-Nielsen*, 548 F.3d at 95 ('our review for manifest disregard is "severely limited", "highly deferential", and confined to "those exceedingly rare instances" of "egregious impropriety on the part of the arbitrators".'), quoting *Duferco*, 333 F.3d at 389.

55 *Comedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009), quoting *Kyocera Corp. v Prudential–Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (*en banc*); *ibid.* ('[W]e conclude that, after *Hall Street Associates,* manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)'; 'We note that we join the Second Circuit in this interpretation of *Hall Street Associates.*').

of law".'[56] 'To vacate an arbitration award on this ground, "[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it".'[57]

In the District of Columbia and Third Circuit Courts of Appeals, the standard's continued viability remains an open question:

US Circuit Court of Appeals for the District of Columbia

In the few post-*Hall Street* cases referencing manifest disregard, the court '[a]ssum[ed] without deciding that the 'manifest disregard of the law' standard still exists,' but also found that the standard was not met in each case.[58]

US Court of Appeals for the Third Circuit

In 2010, in *Paul Green School of Rock Music Franchising, LLC v Smith*, the court held that it had 'not yet addressed whether manifest disregard of the law remains a valid ground for vacating an arbitration award under the FAA' in

56 *Sanchez v Elizondo*, 878 F.3d 1216, 1221-22 (9th Cir. 2018); *Shaw v ROI Land Invs. Ltd.*,No. 2:17-CV-01165, Order at 4 (D. Nev Mar. 1, 2018) (referring to the 'standard for finding an award *completely irrational*' as '"extremely narrow and [] satisfied only where [the arbitration decision] fails to draw its essence from the agreement"' [emphasis author's own]), quoting *Comedy Club*, 553 F.3d at 1288.

57 *Lagstein v Certain Underwriters at Lloyd's, London*, 607 F.3d 634 641 (9th Cir. 2010), quoting *Mich. Mut. Ins. Co. v Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995); see also *Pioneer Roofing Org. v Local Joint Adjustment Smart Bd. Local Union No. 104*, No. 17-15296, mem. op. at 1 (9th Cir. 4 June 2018) (requiring evidence 'in the record where the arbitrator recognized and ignored controlling law'), citing *Mich. Mut. Ins. Co. v Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995), as amended (8 Feb. 1995); *Collins v D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) ('[T]o demonstrate manifest disregard, the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard [it].'), quoting *San Martine Compania De Navegacion, SA v Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (internal quotations omitted).

58 *Affinity Fin. Corp. v AARP Fin., Inc.*, 468 F. App'x 4, 5 (D.C. Cir. 2012); see also *Regnery Pub., Inc. v Miniter*, 368 F. App'x 148, 149 (D.C. Cir. 2010). See also *Crystallex Int'l Corp. v Bolivarian Republic of Venez.*, 244 F. Supp. 3d 100, 121, n. 31 (D.D.C. 25 Mar. 2017) ('The Court [] does not take a position on the current validity of manifest disregard of the law as justification to vacate or modify an award under the New York Convention.').

wake of *Hall Street*.'[59] The court continues to adhere to that position.[60]

The Fifth and Eighth Circuit Courts of Appeals have abandoned the concept altogether:

US Court of Appeals for the Fifth Circuit

In the 2009 case of *Citigroup Global Markets, Inc. v Bacon*, the court held that, 'to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the

59 *Paul Green Sch. of Rock Music Franchising, LLC v Smith*, 389 F. App'x 172, 176 (3d Cir. 2010).

60 *Anoruo v Tenet HealthSystem Hahnemann*, 697 F. App'x. 110, 111, n.1 (3d Cir. 2017) ('We have not ruled on whether a court may also still vacate an award for a "manifest disregard of the law" after *Hall [Street]*.'); *Goldman v Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 256, n.13 (3d Cir. 2016) (reiterating that 'manifest disregard as a basis for vacating arbitration awards [was] thrown into doubt by the Supreme Court's holding in *Hall Street*,' but avoiding decision on 'the continuing validity of manifest disregard as a basis for vacatur.'); *Whitehead v Pullman Grp., LLC*, 811 F.3d 116, 121 (3d Cir. 2016) (stating that 'this Court has not yet weighed-in' on the 'circuit split' and 'declin[ing] the opportunity to do so now'); *Bellantuono v ICAP Sec. USA, LLC*, 557 F. App'x. 168, 174 (3d Cir. 2014) ('This Court has not yet ruled on the issue [of whether manifest disregard of the law remains a viable ground for vacating an arbitration award],' and 'we need not do so here'). But cf. *Egan Jones Ratings Co. v Pruette*, No. 2:16-MC-00105-JLS, mem. op. at 3 (E.D. Pa. 30 Oct. 2017) ('An arbitrator's decision may be vacated where the award evidences a "manifest disregard of the law"'), quoting pre-*Hall Street* case of *United Transportation Union Local 1589 v Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995); *Ross Dress for Less, Inc. v VIWY, LP*, No. 2:12-CV-00131-JS, Mem. at 5 (E.D. Pa. Sept. 19, 2017) (acknowledging that the Third Circuit 'has not yet weighed-in' on the circuit split post-*Hall Street*, and that courts within the Third Circuit 'have taken inconsistent views on this issue'), citing, inter alia, *Whitehead v Pullman Grp., LLC*, 811 F.3d 116, 121 (3d Cir. 2016); *Vitarroz Corp. v G. Willi Food Int'l Ltd.*, 637 F. Supp. 2d 238, 245 (D.N.J. 2009) (holding that, 'in light of *Hall Street*, use of the manifest disregard standard is no longer authorized to the extent it was previously viewed as an additional basis for vacatur' under the FAA, but 'insofar as manifest disregard is merely "shorthand for § 10(a)(3) or § 10(a)(4)", the standard lives on.').

Assuming manifest disregard remains a valid ground for vacatur in the Third Circuit, establishing its existence remains exceptional, and the court will apply an extremely deferential standard to manifest disregard challenges. *Whitehead*, 811 F.3d at 121 (the arbitrator must 'appreciate[] the existence of a clearly governing legal principle but decide[] to ignore or pay no attention to it.') (internal citations omitted); *Smith*, 389 F. App'x at 177 ('[A]s the Second Circuit explained in *Stolt-Nielsen*, the party seeking to vacate an arbitrator's decision on the ground of manifest disregard of the law must demonstrate that the arbitrator (1) knew of the relevant legal principle, (2) appreciated that this principle controlled the outcome of the disputed issue, and (3) nonetheless willfully flouted the governing law by refusing to apply it.'); *Vitarroz*, 637 F. Supp. 2d at 244 ('The standard is necessarily a strict one, and means that a reviewing court will decline to sustain an award "only in the rarest case".') (internal citations omitted); see also *Morgan Stanley Smith Barney LLC v Walker*, **No. 2:17-CV-05635-JCJ**, mem. op. at 11 (E.D. Pa. 1 June 2018) (requiring that 'petitioner establish that the arbitrator "(1) knew of the relevant legal principle, (2) appreciated that this principle controlled the outcome of the disputed issue, and (3) nonetheless willfully flouted the governing law by refusing to apply it".'), quoting *Smith*,389 F. App'x at 177.

FAA.'[61] The court has held firm to that position, as seen more recently in the case of *McKool Smith, PC v Curtis International, Ltd.*[62] Still, the court has not decided whether the concept might fall within section 10(a)(4)'s excess of powers ground and thus constitute a '*statutory* ground[] for vacating arbitration awards' [emphasis author's own],[63] as other courts have held – including the Second and Ninth Circuits, as previously discussed.

US Court of Appeals for the Eighth Circuit

In the 2010 case of *Medicine Shoppe International, Inc. v Turner Investments, Inc.*, the court held that 'an arbitral award may be vacated only for the reasons enumerated in the FAA.'[64] Since the party's 'claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10,' they are 'not cognizable.'[65] A year later, the court confirmed that, following *Hall Street*, it had 'eliminated judicially created vacatur standards under the FAA, including manifest disregard for the law.'[66]

In the First, Seventh, and Eleventh Circuit Courts of Appeals, there arguably remains some confusion over whether the manifest disregard standard remains an independent non-statutory ground for vacatur post-*Hall Street*. Although, for the most part, the courts appear either to have treated the standard sceptically or limited greatly its application:

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61 *Citigroup Glob. Mkts., Inc. v Bacon*, 562 F.3d 349, 355 (5th Cir. 2009); *ibid.* at 358 ('In the 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 rejected.').

62 *McKool Smith, P.C. v Curtis Int'l, Ltd.*, 650 F. App'x 208, 211-12 (5th Cir. 2016).

63 *Ibid.* at 212.

64 *Med. Shoppe Int'l, Inc. v Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010)

65 *Ibid.*

66 *Air Line Pilots Ass'n Int'l v Trans States Airlines, LLC*, 638 F.3d 572, 578 (8th Cir. 2011), citing *Med. Shoppe*, 614 F.3d at 489. But cf., *SBC Advanced Sols., Inc. v Commc'ns Workers of Am., Dist. 6*, 794 F.3d 1020, 1027 (8th Cir. 2015) (stating, in non-FAA case, that the court will 'overturn an award if "it is completely irrational or evidences a manifest disregard for the law".'), quoting *Hoffman v Cargill, Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (quotations and citations omitted); see also *ibid.* at 1027 ('[A]n arbitration decision only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.') (internal citations omitted); *Reyco Granning LLC v Int'l Bhd. of Teamsters, Local Union No. 245*, 735 F.3d 1018, 1020 (8th Cir. 2013) (stating, in non-FAA case, that '[a]n arbitrator's award may be reversed if it "fails to draw its essence from the agreement" or "manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it".') (citations omitted).

US Court of Appeals for the First Circuit

In 2008, the court interpreted *Hall Street* as holding 'that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA].'[67] But two years later, in the case of *Kashner Davidson Securities Corp. v Mscisz*, the court conceded that, while it had previously 'referred to the issue in *dicta*,' it had 'not squarely determined whether [its] manifest disregard case law can be reconciled with *Hall Street*' [emphasis author's own].[68] In 2017, the court in *Ortiz-Espinosa v BBVA Securities of Puerto Rico, Inc.* went one step further, stating that, if the doctrine 'remains as an available basis for vacatur,' *Hall Street* nevertheless 'compels the conclusion that it does so only as a judicial gloss on § 10.'[69] The court thus has come closer to joining ranks with the Second and Ninth Circuit Courts of Appeals. Most recently, in *Mountain Valley Property, Inc. v Applied Risk Services, Inc.*, the court reiterated that it 'has yet to decide whether manifest disregard of the law remains as a ground for vacatur of arbitration awards.'[70]

US Court of Appeals for the Seventh Circuit

In the 2011 case of *Affymax, Inc. v Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, the court held that, following *Hall Street*, '*[e]xcept to the extent recognized in George Watts & Son*, "manifest disregard of the law" is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act' [emphasis author's own].[71] In *George Watts & Son*, the court had held that the '"manifest disregard" principle is limited to two possibilities: an arbitral order requiring the parties to violate the law…., and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4).'[72] Many have taken this to mean

67 *Ramos-Santiago v United Parcel Serv*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

68 *Kashner Davidson Sec. Corp. v Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010), citing *Ramos-Santiago*, 524 F.3d at 124 n 3. See also *Raymond James Fin. Servs., Inc. v Fenyk*, 780 F.3d 59, 64-65 (1st Cir. 2015) ('Although we concluded, in *dicta*, that the doctrine is no longer available, … we have "not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*".' [emphasis author's own]) (internal citations omitted); *Bangor Gas Co., LLC v H.Q. Energy Servs. (US) Inc.*, 695 F.3d 181, 187 (1st Cir. 2012) (same).

69 *Ortiz-Espinosa v BBVA Sec. of PR., Inc.*, 852 F.3d 36, 46 (1st Cir. 2017).

70 *Mountain Valley Prop., Inc. v Applied Risk Servs., Inc.*, 863 F.3d 90, 95 (1st Cir. 2017).

71 *Affymax, Inc. v Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011).

72 *George Watts & Son, Inc. v Tiffany and Co.*, 248 F.3d 577, 581 (7th Cir. 2001). Even though the court provides that manifest disregard is limited to two actions, in reality it appears limited to one (a prohibition on ordering the parties to violate the law). The court also refers to the refusal to adhere to the parties' contract, although it can be argued that such action would more entail an excess of the arbitrator's authority, and thus fall under the statutorily prescribed ground, section 10(a)(4), than a manifest disregard of the law.

that manifest disregard only truly applies where the arbitral tribunal has ordered the parties to violate the law.

More recently, the court in *Renard v Ameriprise Financial Services, Inc.* appears to have broadened the concept, recognising that an award may also be 'set aside ... if "the arbitrator deliberately disregards what he knows to be the law".'[73] The Chief Judge's expansion of the previous understanding – that manifest disregard only arises where the arbitrator has ordered the parties to violate the law – may have been accidental, as Judge Wood was part of the court that decided the *Affymax* case, which seriously limited the understanding of manifest disregard; Judge Wood also quoted a 1994 decision long preceding the Supreme Court's decision in *Hall Street*, while also citing to *George Watts & Son* as standing for the narrower principle applied in *Affymax.*[74]

US Court of Appeals for the Eleventh Circuit

In the 2010 case of *Frazier v CitiFinancial Corp., LLC*, the court held that its 'judicially-created bases for vacatur are no longer valid in light of *Hall Street.*'[75] Still, Judge Pryor stated in 2015 that, '[i]n addition to the four statutory grounds' under the FAA, 'a court may vacate an arbitration award "(1) if it is arbitrary and capricious, (2) if its enforcement is contrary to public policy, or (3) if it evinces a manifest disregard of the law".'[76] As with other circuit courts of appeals, Judge Pryor's reliance on pre-*Hall Street* case law may have been inadvertent error.

Conclusion

While it is not an unreasonable position to argue that the Supreme Court pre-*Hall Street* viewed this judicially created concept as an independent ground for vacatur, such position post-*Hall Street* is tenuous at best. Ultimately, it matters little in practical terms. The Supreme Court has been adamant that, whatever the reason for vacatur, it must entail an '*egregious departure[]* from the parties' agreed-upon arbitration'[emphasis author's own][77]; moreover,

73 *Renard v Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015), quoting *Eljer Mfg., Inc. v Kowin Dev Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994).

74 *Renard*, 778 F.3d at 567.

75 *Frazier v CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010); see also *Campbell's Foliage, Inc. v Fed. Crop Ins. Corp.*, 562 F. App'x 828, 831 (11th Cir. 2014) ('In view of *Hall Street*, we have held the "judicially-created bases for vacatur" we had formerly recognized, such as where an arbitrator behaved in manifest disregard of the law, "are no longer valid".') (quoting *Frazier*, 604 F.3d at 1324).

76 *Grigsby & Assocs., Inc. v M Sec. Inv*, 635 F. App'x 728, 732 (11th Cir. 2015), quoting *Peebles v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005).

77 *Hall Street*, 552 U.S. at 586 (requiring 'extreme arbitral conduct').

while practitioners all too often use this standard as a crutch to support a speculative merit review of arbitral awards, the doctrine in most US Circuit Courts of Appeals has been applied both rigorously and sparingly.[78]

As held by those circuit courts which currently recognise the concept in some form, there effectively must be '*no colorable justification* for a panel's conclusion' in order for arbitrators to have manifestly disregarded the law

78 In 2012, the International Commercial Disputes Committee of the New York City Bar Association drafted a comprehensive report on the manifest disregard standard, determining that challenges based thereon rarely are successful in New York and in most other states. *The 'Manifest Disregard of Law' Doctrine and International Arbitration in New York*, Report by the Comm. on Int'l Commercial Disputes of the Ass'n of the Bar of the City of N.Y. ('ICDC Report') (Aug 2012) Appendix A, 4, 7, 11-12. In fact, to date, courts in the Second Circuit have not vacated any *non-domestic* arbitration awards based on manifest disregard; in New York State court, only one decision has done so. In the heavily criticised opinion by Judge Ramos, in *Daesang Corp. v NutraSweet Co.*, the court held that the tribunal manifestly disregarded New York law in dismissing NutraSweet's counterclaim for fraudulent inducement seeking the remedy of equitable rescission, since the 'Tribunal chose to disregard the well-established principle that a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast to future performance) and cause the actual losses claimed.' *Daesang Corp. v Nutrasweet Co.*, 58 N.Y.S.3d 873 (Table), No. 655019/2016, 2017 WL 2126684, at *5 (Sup. Ct. N.Y. Cty. 15 May 2017). In so holding, it appears that the court did little more than conclude that the Tribunal misinterpreted or misapplied the law, as opposed to determining that the Tribunal knew of a clearly defined and applicable law and ignored the same. The decision may well be reversed on appeal (notice of appeal filed 14 June 2017), and, in any event, should be considered an outlier. See Steven Skulnik, 'New York Commercial Division Justice partially vacates ICC arbitration award in dispute over the sale of an aspartame business' (*Practical Law Arbitration Blog*, 1 June 2017) http://arbitrationblog.practicallaw.com/ accessed 28 June 2018); Brief *Amicus Curiae* of the Association of the Bar of the City of New York in Support of Appellant and Reversal, *Daesang*, 58 N.Y.S.3d 873, Index No. 655019/16 ('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'); Grant Hanessian et al, 'The Arbitration Review of the Americas 2018: United States' (*Global Arbitration Review,* 29 August 2017) https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146880/united-states accessed 28 June 2018; Claudia Salomon, 'New York Vacates Arbitral Award With Manifest Disregard Doctrine' (*N.Y.L.J.,* 4 Aug. 2017) www.law.com/newyorklawjournal/almID/1202794794016/ accessed 28 June 2018). The fourth circuit, however, has vacated an international award on the basis of manifest disregard. *Dewan v Walia*, 544 F. App'x 240, 248 (4th Cir. 2013); see also *PM A 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) (vacating international awards at the district court level).

[emphasis author's own].[79] The burden therefore is (and should be) quite high, almost insurmountable – absent a showing that the arbitrator was both aware of and bound to follow a law that is well defined, explicit, and clearly applicable, but nevertheless consciously disregarded it without any colourable reason, the award almost certainly will not be annulled on the basis of manifest disregard.[80]

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79 *Pfeffer v Wells Fargo Advisors, LLC*, No. 17-1819-cv, 2018 WL 895327, at *2 (2d Cir. 15 Feb. 2018). Conversely, 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.' *Wallace*, 378 F.3d at 190 (internal citations omitted); *Tully*, 684 F. App'x at 26 ('[O]nly "a barely colorable justification for the outcome reached" by the arbitrator is necessary to confirm the award'). Whatever the standard, it is beyond dispute that manifest disregard requires more than mistake of law or disagreement with the arbitrator's interpretation thereof. *Oxford Health Plans LLC v Sutter*, 133 S. Ct. 2064, 2070 (2013) ('[C]onvincing a court of an arbitrator's error—even his grave error—is not enough' to justify vacatur); *Tully*, 684 F. App'x at 27 ('[M]anifest disregard "clearly means more than error or misunderstanding with respect to the law".') (internal citation omitted); *Crystallex*, 244 F. Supp. 3d at 122 ('This is a high standard that requires "more than error or misunderstanding with respect to the law".') (internal citation omitted).

80 See, eg, *Sanchez*, 878 F.3d at 1223 ('To vacate an arbitration award on this ground, "it must be clear from the record that the arbitrators recognized the applicable law and then ignored it".'); *Mountain Valley*, 863 F.3d at 95 (courts have 'very limited power' to review for manifest disregard); *Frye*, 714 F. App'x at 213 ('[A] manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same'), quoting *Patten*, 441 F.3d at 235; *Goldman Sachs*, 491 F. App'x at 203 ('The manifest disregard standard is, by design, exceedingly difficult to satisfy…'); *Brand*, 671 F.3d at 481 ('to vacate an award under the manifest disregard theory, the arbitration record must show that "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle".') (internal citations omitted); *Stolt-Nielsen*, 548 F.3d at 95 (vacatur warranted where 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it'); ICDC Report, pp 6-7 (finding, based on an empirical review of case law in the Second Circuit, that the 'the doctrine of manifest disregard does not hang "like a sword of Damocles", endangering international arbitral awards rendered in New York.') (internal citation omitted).

Some courts also require the movant to establish that, without the alleged disregard, the outcome would have been different. *Duferco*, 333 F.3d at 390 ('We will ... not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result.'); *Barranco*, No. 17-1744, slip op. at 5.