**Appealing Arbitration Awards and the Circuit Split**

**Over “Manifest Disregard of the Law”**

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Appealing an adverse arbitration award has always been hard. And about 10 years ago, the Supreme Court made it even harder. Section 10 of the Federal Arbitration Act says a court may vacate an arbitration award in the following circumstances:

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

(2) where there was evident partiality or corruption in the arbitrators;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, 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 was not made.

9 U.S.C. § 10(a)(1)–(4). For decades, courts also occasionally vacated an arbitration award based on the arbitrator’s “manifest disregard of the law”—and most circuits characterized this as an additional common-law ground for vacating the award. But in 2008, the Supreme Court held that Section 10 of the FAA provides the “exclusive” grounds for vacatur. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 584–585 (2008). And since then, a circuit split has developed over whether “manifest disregard” remains available as a basis for vacating an arbitration award.

The Seventh, Eighth, and Eleventh Circuits quickly decided that “manifest disregard” is no longer available because it doesn’t appear in Section 10 of the FAA. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284–285 (7th Cir. 2011); *Medicine Shoppe Intern., Inc. v. Turner Invest., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323–1324 (11th Cir. 2010). And the Fifth Circuit likewise rejected “manifest disregard” after *Hall Street*—but only “to the extent that [it] constitutes a nonstatutory ground for vacatur.” *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009). Unlike the Seventh, Eighth, and Eleventh Circuits, the Fifth Circuit left open the possibility that “manifest disregard” might be reconceptualized as a statutoryground for vacatur under Section 10. *Id.* at 356–357.

The Fifth Circuit’s hedge was based on *Hall Street* itself, where the Supreme Court had noted that, as a basis for vacating arbitration awards, “manifest disregard” had originated in language from one of the Court’s own decisions. See *Hall Street*,552 U.S. at 584–585 (discussing *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). Instead of simply rejecting “manifest disregard” as an invalid nonstatutory ground for vacatur, the Supreme Court recognized that “manifest disregard of the law” might be understood as judicial shorthand for the statutory grounds that are listed in Section 10. *Ibid.* (citing cases to show “manifest disregard of the law” might refer either to “the § 10 grounds collectively” or to the specific provisions that authorize vacatur where arbitrators are “guilty of misconduct” or “exceeded their powers”).

Given this leeway, the Second, Fourth, Sixth, and Ninth Circuits have held—or at least indicated—that arbitrators who manifestly disregard the law have “exceeded their powers” under Section 10(a)(4). *Schafer v. Multiband Corp.*, 551 F. App’x 814, 819 n.1 (6th Cir. 2014); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *overruled on other grounds*, 559 U.S. 662 (2010). And the Second Circuit explicitly “reconceptualized [‘manifest disregard of the law’] as a judicial gloss on the specific grounds for vacatur enumerated in section 10.” *Stolt-Nielsen*, 548 F.3d at 94–95.

Notably, when *Stolt-Nielsen* presented the Supreme Court with an opportunity to reject the Second Circuit’s reconceptualization of “manifest disregard” as a “judicial gloss” on Section 10, the Supreme Court instead reversed on other grounds—and indicated that “manifest disregard” might indeed remain available as a statutory ground for vacatur. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. 662, 669–670, 672 n.3 (2010) (assuming, without deciding, that “manifest disregard” still “applies”).

Given the above, it is clear that cases from the Second, Fourth, Sixth, and Ninth Circuits, combined with the Supreme Court’s receptiveness in *Hall Street* and *Stolt-Nielsen*, can provide ample support for arguing that “manifest disregard” remains available as a ground for vacating an adverse arbitration award—especially in the First, Third, and Tenth Circuits, where the issue remains unresolved. See *Sabre GLBL, Inc. v. Shan*, --- F. App’x ---, 2019 WL 2880999, at \*3 (3d Cir. July 3, 2019) (“We again find it unnecessary to resolve this issue.”); *THI of New Mexico at Vida Encantada, LLC v. Lovato*, 864 F.3d 1080, 1088 (10th Cir. 2017) (“We assume (without deciding) the viability of [‘manifest disregard’].”); *Ortiz-Espinoza v. BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 46 (1st Cir. 2017) (“We need not and do not decide now whether manifest disregard remains as an available basis for vacatur.”). And it appears the Fifth Circuit still remains open to reconceptualizing “manifest disregard” as a statutory ground for vacatur, too. See *McKool Smith, P.C. v. Curtis Internat’l, Ltd.*, 650 F. App’x 208, 213 (5th Cir. 2016).

In fact, an enterprising party (with an enterprising appellate lawyer) might even argue that “manifest disregard” should be reconceptualized as a statutory ground for vacatur and resurrected in the Seventh, Eighth, and Eleventh Circuits, given that those circuits abandoned “manifest disregard” without much analysis after *Hall Street*—and without considering *Hall Street*’s own suggestion that “manifest disregard” might remain viable. See *Affymax*, 660 F.3d at 284–285; *Medicine Shoppe*, 614 F.3d at 489; *Frazier*, 604 F.3d at 1323–1324.

One final note, which is not intended as legal advice but only as something to consider: When drafting contracts with arbitration agreements, parties might want to not only identify the law that governs the agreement, but also require the designated arbitrator to apply that body of law in resolving a dispute between the parties. It isn’t clear how this would play out in the courts. But on appeal from an adverse award, it might be easier to persuade the court that the arbitrator “exceeded his powers” under Section 10(a)(4), when he manifestly disregarded the law, if a contractual provision required the arbitrator to apply a certain body of law to the parties’ agreement.