# Judicial Assistance in Support of International Arbitration

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Lawyers and scholars alike view arbitration as a type of procedural contract. Parties mutually agree to forego their right of access to court in return for a mutual agreement to submit their dispute to a private, neutral arbitrator whose award presumptively binds the parties.

Although this procedural contract largely seeks to exclude judicial recourse, courts always have played a residual role in the arbitral process. The most familiar forms have been judicial scrutiny over the enforceability of the arbitration agreement and judicial review of the enforceability of the arbitral award.

Recent developments in arbitration law have begun to expand the judicial role. The papers that follow explore these opportunities including in areas such as antisuit injunctions, asset freezes and discovery orders. Tellingly, courts sometimes perform these roles even though the arbitral situs is elsewhere and the locus of judicial assistance bears virtually no relationship to the arbitration.

Are these developments salutary? Do they re-enforce limitations on arbitration as an efficacious method of dispute resolution? Or are they dangerous developments threatening to reintroduce courts to a system that

sought to exclude them? Moreover, regardless of their advisability, how can counsel exploit them in a dispute? How must counsel be mindful of them when drafting an arbitration agreement?

In the papers that follow, an esteemed panel of attorneys offers their insights on these increasingly important questions.

# ASSET FREEZES

[Paper prepared by John Watkins, Barnes & Thornburg)

Last year, in *Sojitz v. Prithvi Information Solutions Ltd*, 82 A.D.3d 89, 921 N.Y.S.2d (2011), the Appellate Division of the New York Supreme Court took an expansive view of the remedy of pre-award attachment in aid of arbitration provided by a New York statute, CPLR § 7502(c). The statute deals with pre-award relief, including pre-award attachment. The statute provides:

> **Provisional remedies.** The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.

*Sojitz* involved an action by a Japanese company, Sojitz, against an Indian company, Prithvi. The parties entered into a contract under which Sojitz was to provide telecommunications equipment manufactured in China to Prithvi in India. Prithvi was to make payments into an escrow account in India from which Prithvi was to draw funds for payment. The contract provided for the application of English law and for disputes to be resolved by arbitration in Singapore.

Neither party regularly transacted business in New York and neither transacted business in New York with respect to the current transaction. As such, it was conceded there was no personal jurisdiction over Prithvi in New York.

Sojitz received payment only for a fraction of the goods because Prithvi wanted to use the money "for other things" and "had cash flow problems." Prithvi owed Sojitz over $48 million. Sojitz moved for a writ of attachment ex parte in the amount of $40 million in the Supreme Court of New York County (the trial court). The court initially granted the order of attachment in the amount of $40 million and ordered Prithvi to post a $2 million bond.

Prithvi moved to vacate the award, establishing that it had no offices in New York, was not licensed to do business in New York, had no employees in New York, and had no business activities in New York in connection with the contract in issue. It occasionally solicited customers in New York, but had only three or four customers from the state. One customer owed Prithvi $18,848.

The Supreme Court then vacated the $40 million order of attachment, confirmed the attachment for $18,480, and reduced the bond to $900 (five percent of the amount attached). The Order dissolved because of the failure certain events to occur (unstated in the opinion), and the Court granted Sojitz's request to discharge the bond. Prithvi, apparently seeking to recover damages for the attachment, arguing that the attachment should not have issued and the bond should not have been reduced.

Although Prithvi did not question the application of CPLR § 7502(c) pursuant to its provisions, it argued that the attachment was improper because the trial court lacked personal jurisdiction over it. The Appellate Division disagreed.

First, the court noted that *Shaffer v. Heitner*, 433 U.S. 186 (1977) had over thirty years earlier established that cases involving in rem and quasi in rem jurisdiction are subject to the same standard of constitutional scrutiny applicable to other cases; namely, minimum contacts with the state such that the maintenance of the suit does not offend traditions of fair play and substantial justice. *International Show Co. v. Washington*, 326 U.S. 310, 316 (1945).

Because the court conceded that the trial court lacked personal jurisdiction over Prithvi, it would have seemed that would be the end of the story. However, the court turned to dicta in *Shaffer* suggesting that a plaintiff might be able to maintain an action to attach property "as security" for a judgment being sought in another forum without demonstrating minimum contacts in the suit seeking the attachment. *See Shaffer*, 433 U.S. at 210. Citing two district court opinions finding such attachments "for security" permissible, *Barclays Bank, S.A. v. Tsakos*, 543 A.2d 802 (D.D.C. 1988) and *Carolina Power & Light v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977), the court agreed and found the pre-award attachment permissible.

The court observed that the statute has a number of safeguards, including the statutory requirement that the petitioner must show that any award would be rendered ineffectual if the provisional relief were not granted. The statute also requires that, if the arbitration is not commenced within 30 days after the attachment, the order shall expire and be null and void. The court also saw no difference between cases allowing attachments to execute foreign judgments against foreign debtors with no contacts other than the ownership of property in the forum.

*Sojitz* provides claimants in international arbitration with a substantial weapon *if* they can identify assets of the respondent in New York. On the other hand, it should be cautioned that the relief is not likely to be available in many cases. Assuming the assets can be found, the statute

does require a showing, as noted above, that relief would be rendered ineffectual if the provisional relief were not granted. This appears to be a relatively high bar. Further, if the relief is granted, the court might also impose a substantial bond requirement, which could be a practical bar to many litigants.

It is also unclear whether *Sojitz* will survive additional scrutiny. Although it is correct that *Shaffer* mentioned the possibility of attaching property as security, 433 U.S. at 210, the holding of *Shaffer* was: "*[A]ll* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id*. at 212.

Further, it is certainly arguable, contrary to the analysis in *Sojitz*, that there is a fundamental difference between asserting jurisdiction to *enforce a judgment* (presumably issued by a court of competent jurisdiction) and a *pre-award attachment* for an arbitration that may *not have even been filed*. For these reasons, it is unclear whether *Sojitz* represents a substantial change, or whether it is more properly viewed as an anomaly.

# DISCOVERY ORDERS

SUTHERLAND

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## Current Issues Regarding 28 U.S.C. §1782

### I. The Courts are Split on Whether a Foreign Arbitral Tribunal is a "Foreign or International Tribunal" Under Section 1782.

A) International arbitrations historically were outside the scope of § 1782

i) U.S. Courts have had the power to order discovery in connection with foreign proceedings for over 150 years

ii) The first federal statute giving courts such authority was the "Act of March 2, 1855." Congress enacted a more restrictive version of the 1855 Act in 1863.

iii) The 1863 Act, amended in 1948 and 1964, has evolved to become the § 1782 we have today.

iv) The current version of § 1782 provides:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or

> international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

B) Prior to 2004, and the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, the consensus view was that § 1782 did not apply to private arbitral tribunals:

i) *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999): the Second Circuit was the first federal appellate court to consider whether § 1782 applied to foreign arbitral tribunals. The

court held that § 1782 only applied to "governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state." 165 F.3d at 189.

a) The case involved a dispute between NBC and a Mexican television station. Under the parties' contract, they were required to arbitrate the dispute and the arbitration was conducted in Mexico before the International Chamber of Commerce. 165 F.3d at 185-86.

b) The Second Circuit expressed concerns that expanding the scope of § 1782 would undermine the strong U.S. policy in favor of arbitration by opening the door to the type of expansive discovery that is permitted under the Federal Rules of Civil Procedure. 165 F.3d at 191.

ii) *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999): less than two months after the *National Broadcasting* decision, the Fifth Circuit held that § 1782 did not apply to private arbitral tribunals.

a) In *Biedermann*, the Republic of Kazakhstan instituted an action in the Southern District of Texas seeking deposition testimony and documents from a nonparty in relation to an arbitration with Biedermann International before the Arbitration Institute of the Stockholm Chamber of Commerce. 168 F.3d at 881.

C) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004): in 2004, the Supreme Court, in an opinion by Justice Ginsburg, considered the scope of § 1782 and determined that its scope was broad, calling into question the opinions set forth in *National Broadcasting* and *Biedermann*.

i) *Intel* involved a European antitrust dispute being arbitrated before the Directorate-General for Competition of the Commission of the European Communities. 542 U.S. at 246.

ii) AMD applied to the United States District Court for the Northern District of California, seeking an order requiring Intel to produce documents. *Id.*

iii) The Court examined the legislative history of § 1782 and concluded that "Congress understood that change [to the law] to 'provid[e] the possibility of U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].' *Id.* at 258.

iv) The Court concluded that it had "no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit," and remanded the case to the district court to determine whether it should exercise its discretion under § 1782. *Id.* at 258, 266.

D) Territorial Breakdown of Decisions Since *Intel*

i) In 2006, the first district court to consider the issue of what qualifies as a "Foreign or International Tribunal" under § 1782 extended the section to cover a discovery request made in connection with a foreign arbitral proceeding. *See In re Oxus Gold PLC*, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006).

ii) Since the *Intel* decision, only one appellate court – the Fifth Circuit – has addressed the issue, albeit in an unpublished, per curium decision. *See In re El Paso II*, 341 Fed. Appx. 31, 33-34 (5th Cir. 2009) (holding that the Supreme Court's decision in *Intel* shed no light on the issue of whether a foreign arbitral tribunal is a "foreign or international tribunal" within the meaning of § 1782 and that, because the *Intel* decision did not "unequivocally" overrule *Biedermann*, the district courts in the Fifth Circuit were still bound by the standard set forth in *Biedermann*).

iii) The district courts have reached varying conclusions about the scope of § 1782 after Intel:

a) Examples of opinions in which foreign arbitral tribunals were found to be "foreign or international tribunals" within the meaning of § 1782 are:
   (1) *See In re Oxus Gold PLC,* 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006)
   (2) *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006)
   (3) *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007)
   (4) *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008)
   (5) *Comision Ejecutiva, Hidroelectrica Del Rio Lempa v. Nejapa Power Co.*, LLC, 2008 U.S. Dist. LEXIS 90291(D. Del. Oct. 14, 2008)

b) Examples of opinions in which foreign arbitral tribunals were found not to be "foreign or international tribunals" within the meaning of § 1782 are:
   (1) *El Paso I*, 617 F. Supp. 2d 481 (S.D. Tex. 2008)
   (2) *In re Norfolk Southern Corp.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009)
   (3) *In re Operandora I*, 2009 WL 2435750 (M.D. Fla. May 28, 2009)
   (4) *In re Application by Rhodianyl S.A.S*, 2011 U.S. Dist. LEXIS 72918 (D. Kan. Mar. 25, 2011)
   (5) *In re Finserve Group Ltd.*, 2011 U.S. Dist. LEXIS 121521 (D.S.C. Oct. 20, 2011) (expressing doubt that private arbitration organizations are "foreign tribunals" under § 1782 but not definitively ruling on the issue)

c) As seen from the cases above, district courts in the **1st, 3rd, 8th, and 11th** Circuits have held that foreign arbitral tribunals are "foreign or international tribunals" within the meaning of § 1782 and district courts within the **5th, 7th, 10th and 11th** Circuits have held that foreign arbitral tribunals are not "foreign or international tribunals" within the meaning of § 1782. At least one district court within the **4th** Circuit has intimated that it would not find foreign arbitral tribunals to be "foreign or international

tribunals" within the meaning of § 1782. Note the split within the 11th Circuit.

d) *Chevron*: the litigation between Chevron and Ecuador has resulted in a multitude of cases related to § 1782. Chevron has repeatedly been granted discovery orders under § 1782, although only some of the courts have addressed the issues of whether an arbitral tribunal established by an international treaty (as is the case in the Chevron conflict) should be considered an international tribunal under § 1782. *See In re Application of Chevron*, 709 F. Supp. 2d 282 (S.D.N.Y. 2010); *Ex parte Petition and Application for Order under 28 U.S.C. § 1782, Chevron v. Stratus Consulting, Inc.*, No. 10-cv-00047 (D. Colo. Dec. 18, 2009); *Ex parte Petition and Application for Order under 28 U.S.C. § 1782, In re Chevron*, No. 1:10-MI-0076 (N.D. Ga. Feb. 19, 2010); *Chevron v. E-Tech, Int'l*, No. 10-cv-1146 (S.D. Cal. Sep. 10, 2010); *Application for Order Pursuant to 28 U.S.C. § 1782, In re Chevron*, No. 10-cv-2675 (D.N.J. May 26, 2010); *Application for Order Pursuant to 28 U.S.C. § 1782, Chevron v. Mark Quarles*, No. 10-cv-00686 (M.D. Tenn. July 16, 2010).

## II. The Intel Decision Set Out Factors for Courts to Consider When Deciding Whether to Exercise Their Discretion under Section 1782.

A) Factors that Courts Consider When Deciding Whether to Compel Discovery

i) The court in Intel set forth a non-exhaustive list of factors for courts to consider when deciding whether to grant requests under § 1782. *See* 543 U.S. at 264-65.

ii) Those factors are:

a) Is the person from whom discovery is sought a participant in the foreign proceeding?

(1) When the person from whom discovery is sought is a participant in the foreign proceeding, the need for aid under § 1782 is less apparent because a foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.

b) What is the nature of the foreign tribunal?

(1) A court presented with a § 1782 request may consider the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.

Does the request conceal an attempt to circumvent foreign evidentiary restrictions?

(2) A court may consider whether the § 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.

(3) *Intel* made it clear, contrary to some earlier authority, that there is no discoverability requirement, meaning that the evidence requested need not be discoverable under the rules of foreign jurisdiction. *See Intel*, 542 U.S. at 260. Some courts have extended that reasoning to hold that there is no admissibility requirement under § 1782 either. *Brandi-Dohrn v. IKB Deutsche Industriebank AG,* 2012 U.S. App. LEXIS 4719, at **15-16 (2d Cir. Mar. 6, 2012)

c) Is the request unduly intrusive or harassing?

(1) A court may consider whether the requests is unduly intrusive or burdensome and may reject or trim the request accordingly.

## III. The Territorial Limitations of Section 1782 are Unresolved.

A) Under § 1782, can a U.S. court order a person "residing" or "found" in the United States to produce documents within that person's possession, custody or control that are located outside the United States?

B) This issue might arise in several contexts:

i) An interested person or party to a foreign tribunal could request a U.S. Court to compel the production of documents that are in the possession, custody or control of a person "residing" or "found" in the United States but that are located outside the United States;

ii) An interested person or party to a foreign tribunal could request a U.S. Court to compel an individual witness who is served with a subpoena under § 1782 while traveling in the United States but who then returns home to return to the United States to give testimony in accordance with the subpoena for purposes of a foreign or international proceeding;

iii) An interested person or party to a foreign tribunal could request a U.S. Court to compel a corporate person "residing" or "found" in the United States be bring to the United States a corporate officer, director, or managing agent from outside the United States to give testimony on behalf of the entity for use in a foreign or international proceeding.

C) The majority view is that § 1782 does not authorize the discovery of documents located abroad:

i) The **2nd, 7th, and 9th Circuits**, and district courts in the 2nd Circuit, have held, or implied via dicta that they would hold, that § 1782 does not authorize the discovery of documents located abroad. *See Kestrel Coal Pty Ltd. v. Joy Global Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (containing dicta suggesting that § 1782 does not authorize the discovery of documents located abroad); *Four Pillars Enterprises Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079 (9th Cir. 2002) (same); *Edelman v. Taittinger*, 295 F.3d 171, 176-77 (2d Cir. 2002) (containing dicta suggesting that § 1782 does not authorize the discovery of testimonial evidence located abroad); *Chase Manhattan Corp. v. Sarrio S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) (containing dicta suggesting that § 1782 does not authorize the discovery of evidence located abroad); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (stating that "§ 1782 does not authorize discovery of documents held abroad"); *In re Godfrey*, 526 F. Supp. 2d 417, 423-24 (S.D.N.Y. 2007) (holding that that § 1782 does not authorize the discovery of evidence located abroad); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 50-55 (D.D.C. 2005) (containing dicta suggesting that § 1782 does not authorize the discovery of evidence located abroad).

ii) At least one district court in the **2nd Circuit** has held that that § 1782 does authorize the discovery of documents located abroad. See *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 28, 2006) (holding that § 1782 does authorize the discovery of documents located abroad).

iii) Tyler Robinson argues that § 1782 should authorize the discovery of documents located abroad. Tyler Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 In Aid of Foreign and International Litigation and Arbitration*, 22 AM. REV. INT'L ARB. 135 (2011).

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# AWARD ENFORCEMENT

# Manifest Disregard As A Ground to Vacate Arbitration Awards . . . Post Hall Street

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The Federal Arbitration Act (FAA), 9 U.S.C. §§ 9-11, provides for expedited judicial review to confirm, vacate, or modify arbitration awards. Under § 9, a Court must confirm an award, unless it is vacated, or modified or corrected pursuant to §§ 10 and 11. The grounds to vacate an arbitration award under §10 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 and 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.

Under section 11, the grounds for modifying or correcting an award are:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The U.S. courts have supplemented the narrow procedural grounds for vacatur, found in § 10 of the FAA, with a handful of non-statutory grounds. These common law grounds supporting vacatur include awards that are "arbitrary and capricious," *Ainsworth v. Kurnick, 960 F.2d 939 (11th Cir. 1992)* "completely irrational," *Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 578 (8th Cir. 1999); 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)* fail to draw its essence from the underlying contract, *Advest Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990)* and those in "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 has been the most widely used ground upon which courts set aside, or vacate, an arbitral award. 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 Mungioli, 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 Millenium: Developments in the Law, 37 HOUSTON LAWYER 27, 31 (2000).*

The standard for finding manifest disregard 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 manifest disregard was available as a means of vacating an award in domestic arbitration cases only. See, *e.g.*, M & C, 87 F.3d at 851 (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 arbitral 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)* where the court unequivocally stated that manifest disregard was available as a means of vacatur in non-domestic cases coming under the New York Convention. *Id*. at 19-20.

Since 2008, however, the continued existence of manifest disregard as a grounds for vacatur has been in question based upon *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 128 S. Ct. 1396 (2008). The case arose out of a commercial landlord-tenant dispute between Mattel, the tenant, and its landlord, Hall Street Associates. Following the discovery of environmental contamination on the leased property, Mattel notified Hall Street that it intended to terminate the lease. After the initial litigation over the termination provisions in the lease was won by Mattel, 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, provided for the federal court's *de novo* review of 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". The court found 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 pursuant to *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003),* the parties agreement allowing for judicial review for legal error was unenforceable. The Ninth Circuit held in Mattel's favor, reversing the district court's decision on the ground that the provision of the arbitration agreement allowing the district court to vacate the initial award for "legal error" was not an authorized ground under the FAA. The Supreme court granted *certiorari* on the question of whether the FAA's statutory grounds for vacatur and modification under §§10 and 11 are exclusive. *Hall at 1400 - 01.*

The Supreme Court agreed with the Ninth Circuit, although, whether the Court struck down manifest disregard is less than clear. The Court addressed the split among the Circuits on the parties' ability to contract for expanded judicial review. It did not address the split over the judicial expansion of the grounds for review. The Court then left the door open for the continued use of manifest disregard.

"In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. 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. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards." *Hall* at 590.

Since *Hall,* the Supreme Court sidestepped an opportunity to address whether or not manifest disregard was still viable. In *Stolt-Nielsen S.A., v. Animalfeeds International Corp.,* 130 S. Ct. 1758 (2010), the Court found that the arbitrators' decision could be vacated because they "exceeded their powers" under §10(a)(4) of the FAA by imposing its view of public policy. The Court specifically refused to decide the issue based upon manifest disregard. "We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc., 552* U.S. 576, 585, 128 S. Ct. 136, 17 L.Ed. 2d 254 (2008), 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." Id at n. 3.

Federal Circuit Courts have had differing views on whether manifest disregard survives:

**First Circuit**

The most recent federal district court case stated that manifest disregard is no longer grounds to vacate and chose to disregard all of

Defendant's arguments based on the doctrine. *Thomas Diaz, Inc. v. Colombina, S.A.*, 2011 U.S. Dist. LEXIS 140412, 6 (D. P.R. 2011). The Court held that only those grounds expressly listed in the FAA can be used to vacate arbitration awards.

In *Kashner Davidson Securities Corp. v. Mscisz,* 531 f.3d 68 (1st Cir. 2008), the First Circuit avoided the issue when it stated that the appellant had failed to properly raise the argument that *Hall Street* prohibited the use of manifest disregard as a ground to vacate the arbitration award.

**Second Circuit**

Since *Hall Street* the Second Circuit has continued to recognize manifest disregard as a valid ground for vacating arbitration awards. See *Schwartz v. Merrill Lynch & Co.,* 665 F.3d 444, 452 (2nd Cir. 2011); *Jock v. Sterling Jewelers Inc.,* 646 F.3d 113 (2nd Cir. 2011); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.,* 592 F.3d 329 (2nd Cir. 2010). In *Schwartz,* the Court stated that its "standard for what constitutes a manifest disregard largely tracks the standard assumed arguendo by the Supreme Court in *Stolt-Nielsen*." The Court considers whether the governing law alleged to have been ignored by the arbitrators was well defined, and whether the arbitrator knew of the clearly governing legal principle and chose to ignore

it. Id. Based on this standard, the Court affirmed the district court's decision to deny the petition to vacate. Id.

**Third Circuit**

In 2009, the Court in *Andorra Servs. v. Venfleet, Ltd.*, 355 Fed. Appx. 622 (3rd Cir. 2009) indicated that the fate of manifest disregard in the Third Circuit was unclear. In 2010 and 2011, the Third Circuit issued two unpublished opinions, in which it side-stepped the issue. *See Bapu Corp. v. Choice Hotels Int'l, Inc.*, 371 Fed. Appx. 306 (3rd Cir. 2010) and *Int'l Bhd. of Teamsters, Local 701 v. CBF Trucking, Inc.*, 440 Fed. Appx. 76 (3rd Cir. 2011). In *Bapu* and other cases, the Court decided that there was no need to address the validity of manifest disregard since that ground for vacating is used only in "exceedingly narrow" circumstances, which were not present. Id. at 8.

**Fourth Circuit**

The Fourth Circuit has considered very few cases involving manifest disregard of the law, however, *Choice Hotels Int'l, Inc. v. Savannah Shakti Corp.*, 2011 U.S. Dist. LEXIS 123162, 8-9 (4th Cir. 2011) suggests that the Fourth Circuit would continue to recognize it as a grounds for vacating an arbitral award.

**Fifth Circuit**

The Fifth Circuit no longer recognizes manifest disregard of the law since the Supreme Court's decision in *Hall Street*. See *Saipem America v. Wellington Underwriting Agencies Ltd.*, 335 Fed. Appx. 377 (5th Cir. 2009); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009). *Citigroup*, overruled all previous precedent holding that nonstatutory grounds can support vacatur.

**Sixth Circuit**

The Sixth Circuit has explicitly held that it will continue to use the manifest disregard standard during the post- *Hall Street Associates* era. *Coffee Beanery Ltd. v. WW L.L.C.*, 300 Fed. Appx. 415 (6th Cir. 2008). The Court uses it solely to vacate awards, and prohibits its use as a basis for modifying them. *Grain v. Trinity Health*, 551 F.3d 374 (6th Cir. 2008). Even recognizing that the Supreme Court left open the ability of the lower federal courts to vacate an arbitration award, and that the Sixth Circuit has chosen to allow it, many courts actually do not use that doctrine as grounds for vacatur because of its extremely narrow standard. See *Dealer Computer Servs. v. Dale Spradley Motors, Inc.*, 2012 U.S. Dist. LEXIS 2614 (E.D.Mich. 2012).

**Seventh Circuit**

The Seventh Circuit has recognized that *Hall Street* limits the grounds for vacating an award to the statutory grounds only. However, courts have determined that the manifest disregard of the law standard fits within the statutory provision for arbitrators who exceeded their powers under section 10(a)(4). *Doerflein v. Pruco Sec., LLC,* 2009 U.S. Dist. LEXIS 6953 (S.D. Ind. 2009). As in other circuits, manifest disregard of the law is interpreted very narrowly. So much so, that the Seventh Circuit has confined it to cases in which arbitrators actually "direct the parties to violate the law." *Jimmy John's Franchise, LLC v. Kelsey*, 549 F. Supp. 2d 1034, 6 (C.D. Ill. 2008).

**Eighth Circuit**

Since *Hall Street*, the Eighth Circuit has disallowed the use of manifest disregard for the law as grounds for vacating arbitration awards. See *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971 (8th Cir, 2008). An award can be vacated only for one of the reasons enumerated in the FAA. Id.

**Ninth Circuit**

Similar to the Seventh Circuit, *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277 reiterated that the manifest disregard grounds for

vacatur is shorthand for section 10(a)(4), the provision providing that awards may be vacated where arbitrators exceed their powers. See also *Kaliroy Produce Co. v. Pac. Tomato Growers, Inc.*, 730 F. Supp. 2d 1036 (D. Ariz. 2010). Despite this holding some courts have avoided addressing the issue. In *ESCO Corp. v. Bradken Res. Pty Ltd.*, 2011 U.S. Dist. LEXIS 46460 (D. Oreg. 2011) the Court went through the manifest disregard analysis and determined that the award was not in manifest disregard of the law so the issue of the validity of the doctrine was moot. Id.

**Tenth Circuit**

The Tenth Circuit has avoided addressing the manifest disregard issue. The Court in *DMA Int'l, Inc. v. Qwest Communs. Int'l, Inc.*, 585 F.3d 1341 (10th Cir. 2009) found that the arbitrator did not act with manifest disregard of the law or in any other way that would justify vacatur. Therefore, whether the manifest disregard for the law argument was foreclosed by *Hall Street* was not central to the case and the court did not determine its validity. Id. at 1345. However, in 2011 a district court held that it continues to be a valid basis for vacating awards. See *Fisher v. Gen. Steel Domestic Sales, LLC,* 2011 U.S. Dist. LEXIS 125826 (D. Colo. 2011).

**Eleventh Circuit**

The Eleventh Circuit no longer recognizes manifest disregard for the law as a grounds for vacating awards. See *Frazier v. CitiFinancial Corp, LLC*, 604 F.3d 1313, 1323-24 (11th Cir. 2010) (holding that judicially-created bases for vacatur, such as the traditional "manifest disregard of the law" basis, are no longer valid); *Waddell v. Holiday Isle, LLC*, 2009 U.S. Dist. LEXIS 67669 (S.D. Ala. 2009) (stating, "as noted, manifest disregard of the law is not a statutory ground for vacating an award; therefore, it can no longer be relied on for that purpose.")

## Other Cases on Enforcement of International Arbitration Awards

*Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru*, 665 F.3d 384

(2nd Cir. 2011)

The Plaintiff-Appellee in this case was a contractor who signed a consulting agreement with the Defendants-Appellants to prepare engineering studies on water and sewage services in Peru. A fee dispute between the parties was referred to a Peruvian arbitral panel, which rendered a $21 million dollar award in favor of the contractor.

The contractor then filed a petition in the Southern District of New York to confirm the award. The petition was brought pursuant to the Federal Arbitration Act, the Panama Convention, or alternatively, the New York Convention. Peru filed a motion to dismiss the petition on various grounds, including lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, forum non-conveniens, and international comity. The District Court denied the motion to dismiss, and Peru filed an interlocutory appeal for the Circuit Court to review the determinations concerning forum non-conveniens, and comity. After oral argument, the Second Circuit invited the views of the United States on aspects of the appeal, that might have implications for the conduct of the foreign relations of the United States.

The Second Circuit then reversed the District Court. It found that although the Panama Convention establishes jurisdiction in the United States, there is authority to reject that jurisdiction for reasons of convenience, judicial economy, and justice. The Second Circuit dismissed the petition to confirm the award on the basis of forum non-conveniens.

In a dissenting opinion, Judge Gerard Lynch pointed out that by entering into the Panama Convention, the United States has, "committed our courts to the enforcement of international arbitral awards, as if they were foreign

judicial judgments." Since forum non-conveniens is not listed as defense to enforcement in either the New York or Panama Convention, it should not have been applied, as a reason to refuse to enforce the foreign arbitral award.

*Republic of Arg. v. BG Group PLC,* 665 F.3d 1363 (D.C. Cir. 2012)

Appellant Republic of Argentina moved to vacate an arbitral award pursuant to the Federal Arbitration Act, 9 U.S.C.S. §§ 10(a) & 11. Appellee, the United Kingdom, filed an opposition and a cross-motion for recognition and enforcement of the final award. The United States District Court for the District of Columbia denied vacatur and granted enforcement. Argentina appealed.

The Bilateral Investment Treaty between the United Kingdom and Argentina provided that disputes between an investor and the host State would be resolved in the host State's courts. If, however, no final court ruling was forthcoming within eighteen months or the dispute was unresolved after a court ruling, the parties could resort to arbitration. A British corporation and investor in Argentinian gas companies invoked the arbitration clause without first filing a claim in the Argentine courts. The arbitration panel nonetheless ruled it had jurisdiction, found Argentina had

violated the Treaty, and awarded damages. The appellate court held that although the scope of judicial review of the substance of arbitral awards was exceedingly narrow, an arbitrator could not ignore the contracting parties' intent." Where, as here, the result of the arbitral award was to ignore the Treaty's terms and shift the risk that the Argentine courts might not resolve the claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel's decision was wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration." The appellate court reversed the orders denying the motion to vacate and granting the cross-motion to confirm, and vacated the Final Award.

# ANTISUIT

# INJUNCTIONS

(paper to be supplied separately)