The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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SUPPORT FOR "MUSCULAR" ARBITRATORS
RUBENSTEIN v. ADVANCED EQUITIES, INC.
2014 WL 1325738 (S.D.N.Y. March 31, 2014)

A federal district court for the Southern District of New York recently confirmed a FINRA arbitration award and denied the losing parties' ("Petitioners" in the district court and "Claimants" in the arbitration) motion to vacate. The arbitration concerned employment compensation claims by former employees in the New York office of a multi-city broker-dealer and its parent company.[2] The former employees' claims were denied and the former employer's claims on promissory notes were granted by the panel.

The motion to vacate was based on the FINRA panel's alleged wrongful exclusion of what the Petitioners called "highly pertinent evidence"[3] that allegedly constituted arbitrator misconduct,[4] evident partiality,[5] and "manifest disregard of the law."[6]

[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] The FINRA arbitration was initiated on February 19, 2010, and resulted in an award on or about December 6, 2012. The proceedings included twelve pre-hearing sessions and sixty hearing sessions over thirty-two days. 2014 WL 1325738, *4.

[3] 2014 WL 1325738, *6 (Excluded evidence constituted "records from AEI offices outside New York and testimony from former AEI employees who worked outside New York" and "evidence relating to custody and control of the warrants referenced in Petitioners' employment agreements."). The panel also refused to subpoena bank records in an attempt to show that disputed warrants had been used by the employer to collateralize a bank loan, which the bank denied. 2014 WL 1325738, *10.

[4] Petitioners claimed that this caused the panel to be "guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy." 2014 WL 1325738, **6. *See* 9 U.S.C. §10(a)(3).

[5] 2014 WL 1325738, *10. *See* 9 U.S.C. §10(a)(2).

[6] 2014 WL 1325738, *5. The Petitioners' also claimed that the panel manifestly disregard the law in its interpretation of "gross commissions," in refusing to order one of the arbitration respondents to produce 200,000 pages of internal e-mails produced in another arbitration, and in not allowing evidence from other arbitrations (that considered claims by other employees in other offices against the same employer).

The district court first explained the "legal standard for vacatur and confirmation" under 9 U.S.C. §§9-11.[7] Confirmation is "a summary proceeding" that recognizes the FAA's principal purpose is to "ensure that private arbitration agreements are enforced according to their terms."[8] As long as an arbitrator's decision "can be inferred from the facts of the case," the arbitrator's rationale for an award "need not be explained, and the award should be confirmed."[9] This means that "a barely colorable justification for the outcome reached" by the arbitrator is all that is necessary for confirmation.[10] The movant to vacate has a "very high" burden of proof.[11]

The district court interpreted "manifest disregard," as a Second Circuit doctrine, that recognizes "a judicially-created [gloss on the specific] ground[s] [for vacatur], citing the Second Circuit's opinion in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir.2008), *rev'd on other grounds and remanded, Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010) ("[M]anifest disregard reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards.").

The district court found no unfair prejudice, no egregious error, and no denial of fundamental fairness necessary to 9 U.S.C. §10(a)(3) misconduct by the panel.[12] The district court found no bias and no evident partiality in the panel's rulings because a reasonable person could not conclude that the panel was partial to one party in the arbitration and also noted that evident partiality may not be shown "by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence."[13]

The district court then discussed the vacatur standard for "manifest disregard of the law."[14] An arbitrator's legal conclusions "will be confirmed in all but those instances where there is no colorable justification for a conclusion."[15] The movant's burden is "heavy" and will only be met in "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator" occurs.[16] Manifest disregard of the law is "a doctrine of last resort" and must be based on something other than "mere error in the law or failure on the part of the arbitrators to understand or apply the law."[17] It is only the law "identified by the parties" to the arbitrator that is subject to manifest disregard and then (1) the law must be "well defined, explicit, and clearly applicable" and (2) the arbitrator knew of the "clearly governing principle but decided to ignore it or pay no attention to it."[18] There is no vacatur for manifest disregard of the **facts**.[19]

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[7] 2014 WL 1325738, *5-6.
[8] 2014 WL 1325738, *5.
[9] *Id.*
[10] *Id.*
[11] 2014 WL 1325738, *6.
[12] 2014 WL 1325738, *9 and 10.
[13] 2014 WL 1325738, *10 (citations omitted).
[14] 2014 WL 1325738, *11.
[15] *Id.*
[16] *Id.*
[17] *Id.* (citations omitted).
[18] *Id.* (citations omitted).
[19] 2014 WL 1325738, *11, fn4.

The petitioners argued that manifest disregard of the law occurred when the panel construed "gross commissions" as used in the parties' contract, found that "commission" and "placement fee" were not synonymous, refused to order the production of 200,000 pages of internal e-mails introduced in another arbitration, and refused to permit impeachment of a witness by prior arbitration awards. The district court painstakingly reviewed each of these contentions and rejected all of them.

OBSERVATIONS

1. This case demonstrates the arbitrator's broad discretion in the management of an arbitration proceeding.[20]

2. It demonstrates the strong FAA support for arbitrator determinations of fact and law.[21]

3. It also provides good illustrations of appropriate responses from an arbitration panel to an aggressive lawyer for one of the parties.[22]

4. The court's discussions of the standards of review for confirmation and vacatur (including §§10(a)(2) and (3) and manifest disregard of the law) are helpful, although the Fifth Circuit does not recognize manifest disregard of the law as a vacatur ground.

5. The Second Circuit's view of "manifest disregard of the law" is explained in detail and applied to the panel's decisions.

6. This panel dismissed most of Petitioners' claims at the conclusion of Petitioners' case-in-chief including the dismissal of all the individual Respondents.[23]

7. The arbitration process in this case is not a model of efficiency and economy. The entire arbitration from initiation to award lasted approximately thirty-three (33) months, with twelve (12) pre-hearing sessions, and sixty (60) final hearing sessions over thirty-two (32) days.[24] However, the court's opinion does not discuss or critique the length or complexity of the arbitration.

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[20] 2014 WL 1325738, *13-15.
[21] 2014 WL 1325738, *6, 10, and 11.
[22] 2014 WL 1325738, *16-17.
[23] 2014 WL 1325738, *4.
[24] 2014 WL 1325738, *4.