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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"MANIFEST DISREGARD" ALIVE AND WELL
(At Least in the 4th Circuit U.S. Court of Appeals)
Dewan v. Walia[2]

Dewan v. Walia is a recent unpublished opinion by the United States Court of Appeals for the Fourth Circuit that has created additional discussion about the federal common law ground for vacatur known as "manifest disregard." A petition for writ of certiorari was filed on December 13, 2013, with the U.S. Supreme Court and, on January 16, 2014, a "Brief of Professors and Practitioners of Arbitration Law as Amici Curiae in Support of Petition for a Writ of Certiorari" was filed by Professor George A. Bermann, Columbia University School of Law and others (the "Brief").[3]

Walia, a Canadian citizen, came to work as an accountant for Dewan's CPA firm on a U.S. employment visa. Two successive employment agreements between Walia and the Dewan CPA firm were signed in 2003 and 2006 for three-year terms each. The 2006 agreement also contained nonsolicitation and noncompetition provisions with a broad arbitration agreement. A third employment agreement may have been signed as well after the 2006 agreement terminated by its own terms on March 23, 2009.[4] Walia continued working for Dewan through August 21, 2009 but was informally terminated at or about that time. Walia then on November 3, 2009, signed a "Release" of all claims against Dewan and the Dewan CPA firm related to Walia's employment in exchange for $7,000 paid to and negotiated by Walia.

Dewan initiated arbitration proceedings against Walia with the American Arbitration Association ("AAA") on January 29, 2010, claiming breaches of restrictive covenants in an

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[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] *Dewan, CPA, P.A. et al. v. Walia,* 2013 WL 5781207 (Oct. 28, 2013), not for publication.

[3] Appendix 1 to the Brief includes the names of all subscribers to the Brief.

[4] Dewan did not produce this third agreement but the arbitrator found "a viable Employment Agreement drafted by [Dewan] and signed by [Walia] on March 14, 2009 [during the hospital visit]." 2013 WL 85781207, *2.

employment agreement and the "Release" between Dewan and Walia. The dispute was heard for four days by one arbitrator who issued an "interim"[5] and then later a "final" award.

Ten of the arbitrator's findings are listed in the 4th Circuit's opinion, including that "Walia 'voluntarily' signed the Release and thereafter negotiated checks totaling the $7,000 paid by Dewan for the Release, and Walia was therefore 'legally bound' by the Release to the extent that it barred 'all tort and contractual claims in federal or state courts as well as attorney's fees'."[6] Nevertheless, the arbitrator awarded Walia $387,108.20 in compensatory damages and $70,000 in punitive damages with both Dewan, individually, and his CPA firm jointly and severally liable for $457,108.20.

Dewan and his CPA firm filed a motion to vacate on December 16, 2012, in federal district court.[7] Walia filed a motion to confirm. The federal district court denied the motion to vacate[8] and confirmed the final arbitration award.[9] Dewan and his CPA firm appealed the district court's order denying their motion to vacate to the U. S. Court of Appeals for the Fourth Circuit. The 4th Circuit reversed and remanded to the district court with instructions to vacate the award.

The 4th Circuit reversed the district court on the sole ground of "the Arbitrator's manifest disregard of the law."[10] The court agreed with Dewan that "the Arbitrator could not find the Release valid and enforceable but nevertheless make an award to Walia on claims arising out of his employment with the Company."[11] Calling "manifest disregard" a permissible common law ground for vacating an award,[12] the court defined this ground as "established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same."[13] Although the 4th Circuit admitted that "merely misinterpreting contract language does not constitute a manifest disregard of the law" but also stated that disregarding or modifying "unambiguous contract provisions" does.[14] The court's *per curiam* opinion quotes the actual terms of the "Release" including a definition of "Known or Unknown Claims"[15] to show the "expansive breadth and scope of the Release" as reflected in the Release's "plain language."[16] The court surmised that the arbitrator concluded the Release did not release claims brought in

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[5] Pending "guidance in this case from [U.S. Department of Labor's] investigation of Dewan and Dewan's CPA firm." 2013 WL 85781207, *2.
[6] 2013 WL 85781207, *2.
[7] *Id.*
[8] *Kiran M. Dewan, CPA, P.A. v. Walia*, 2012 WL 3156839 (D.Md. Aug. 3, 2012).
[9] *Kiran M. Dewan, CPA, P.A. v. Walia*, 2012 WL 4356783 (D.Md. Sept. 21, 2012).
[10] 2013 WL 5781207, *5.
[11] 2013 WL 85781207, *5.
[12] The Court does footnote its recognition of "considerable uncertainty" created by *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed. 2d 254 (2008) but then states that it continues to recognize manifest disregard "either as 'an independent ground for review or as a judicial gloss' on the enumerated grounds for vacatur set forth in the FAA." 2013 WL 5781207, *5 fn5. The Court's opinion chooses to treat manifest disregard as an independent ground for review.
[13] *Id.*; *citing Patten v. Signator Ins. Agency, Inc.,* 441 F.3d 230, 236 (4th Cir.2006).
[14] *Id.*
[15] 2013 WL 5781207, *6.
[16] 2013 WL 85781207, *5.

arbitration but only released claims "if they were brought in state or federal court."[17] In response, the court found "untenable the Arbitrator's attempt to parse the language of the Release so finely."[18]

Circuit Judge Wynn dissented because "the arbitrator interpreted a release agreement"[19] and "unquestionably construed the release agreement at issue, we are not at liberty to substitute our preferred interpretation for the arbitrator's," citing 4th Circuit precedent.[20]

SUMMARY OF BRIEF

A group of "professors of law and lawyers engaged in the field of arbitration" filed the Brief within days of the filing of the petition for writ of certiorari.[21] The Brief states that "the primary interest of *amici* is the orderly and consistent review of arbitral awards by courts in the United States when a party seeks vacatur under Section 10 of the FAA" and states *amici's* belief that the 4th Circuit's decision in *Dewan v. Walia* "is contrary to this Court's arbitration precedents and deepens the existing circuit divide on the proper bases for vacatur."[22] The Brief argues that *Dewan* (1) "directly conflicts with this Court's holding in *Hall Street*"; (2) "the division among the circuits regarding manifest disregard creates uncertainty and unpredictability in arbitration"; (3) the use of manifest disregard "to interfere with the arbitrator's contract interpretation [in *Dewan*] violates the Court's precedents and leads to frivolous 'appeals' of arbitration awards"; and (4) "the current state of the law on manifest disregard has negative implications for arbitration in the United States [including both domestic and international arbitration sited in the U.S.]. The Brief concludes: "The Petition [for certiorari] presents this Court with an important opportunity to clarify the status of the manifest disregard doctrine in United States arbitration law and ensure that the Court's long-standing support of a deferential approach to arbitration is maintained."

OBSERVATIONS

1. The 5th Circuit has made it clear that "judicially-created bases for vacatur are no longer valid in light of *Hall Street*." *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir.2009).[23]

2. The 4th Circuit's opinion in *Dewan* only refers to *Hall Street* in footnote 5 of the opinion but the opinion clearly chooses manifest disregard as a ground for review independent of the FAA.[24]

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[17] *Id.*
[18] *Id.,* at *7.
[19] 2013 WL 85781207, *8.
[20] 2013 WL 85781207, *9; *citing Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31,,* 933 F.2d 225, 229 (4th Cir.1991)("As long as the arbitrator is even arguably construing or applying the contract[,] a court may not vacate the arbitrator's judgment.").
[21] See opening paragraph of this newsletter and fn2 *supra*.
[22] *Brief* at *1.
[23] As have the 8th and 11th Circuits. The 7th Circuit has also rejected "manifest disregard of the law" as an independent basis for vacatur, a slight variation on the rationale used by the 8th and 11th Circuits. Brief at *10.

3. Three federal circuits have declined to decide whether manifest disregard survives *Hall Street*.[25]

4. The *Amici* in the Brief describe this "circuit split" as "significant, deep-rooted, and antithetical to the national uniformity and consistency sought by the FAA."[26]

5. The Brief provides a concise summary of where all the federal circuits are on FAA vacatur and argues persuasively for the exclusivity of FAA Section 10(a) vacatur grounds.

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[24] As has the 6th Circuit while the 2nd and 9th Circuits continue to recognize manifest disregard as a "judicial gloss" on FAA Section 10(a)(4)'s "exceeding powers" provision. Brief at *12.
[25] First, Third, and Tenth Circuits. Brief at *12-13.
[26] Brief at *13.