The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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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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DISCLOSURE OF BRAIN TUMOR DIAGNOSIS?

Zurich Am. Ins. Co. v. Team Tankers A.S., No. 14-4036-cv, 2016 U.S. App. LEXIS 1390 (2d Cir. Jan. 28, 2016)[2]

In June 2008, Vinmar International, Ltd. ("Vinmar") chartered a ship from Team Tankers to move a quantity of ACN[3] from Houston, Texas to Ulsan, South Korea where Vinmar planned to find a buyer for the cargo.[4] The chartered ship arrived in Ulsan during August 2008 where the cargo was moved into storage tanks on the mainland.[5]

Six weeks later, Vinmar discovered that an ACN sample in the Ulsan storage tanks had yellowed.[6] Thereafter, Vinmar tested samples from tanks in Houston, the Team Tankers' transport ship, and the Ulsan storage tanks.[7] Vinmar found that ACN samples from the transport ship and Ulsan storage tanks had both yellowed, but the sample from the Houston tanks was still colorless.[8]

Vinmar initiated an arbitration proceeding, before the Society of Maritime Arbitrators, Inc. ("SMA"), as provided in the charter agreement.[9] During the arbitration, Vinmar argued the ACN

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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. My thanks to Macdonald A. Norman, a third-year law student at Texas A&M University School of Law, for his research and drafting assistance.

[2] 2014 WL 2945803.

[3] Acrylonitrile (ACN), a versatile raw material, is used in the manufacture of plastics, adhesives, synthetics rubbers, and many other products. ACN is typically either a colorless liquid or a yellowish liquid. ACN may turn yellow due to contact with impurities such as other chemicals. Colorless ACN is significantly more valuable than yellow ACN.

[4] *Zurich Am. Ins. Co. v. Team Tankers A.S.*, No. 14-4036-cv, 2016 U.S. App. LEXIS 1390, at *3–4 (2d Cir. Jan. 28, 2016).

[5] *Id.* at 4.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

was colorless when delivered to Houston but was contaminated by "pygas," a chemical previously carried in the chartered ship's tanks.[10]

In August 2013, the arbitration panel—applying the Carriage of Goods by Sea Act—[11] held Vinmar was not entitled to relief.[12] The panel held that Vinmar failed to make "a *prima facie* case that the ACN had been damaged" while on board the transport ship.[13] Additionally, the panel held that "even if Vinmar had made a *prima facie* case, Team Tankers showed it had exercised due diligence during the transport.[14] In any event, the panel held Vinmar had not proven damages.[15]

On November 25, 2013, Vinmar petitioned the district court to vacate the award under § 10(a)(2)–(3) of the FAA.[16] Specifically, Vinmar argued the arbitration panel manifestly disregarded COGSA,[17] a common law vacatur ground still available in the Second Circuit.[18] In January 2014, Vinmar learned that the panel's chairman had died of a brain tumor.[19] The chairman was diagnosed during the arbitration, but he failed to disclose the diagnosis to the parties.[20] In response to this information, Vinmar amended its original petition to vacate in order to argue the failure to disclose the life-threatening diagnosis constituted "'corruption' or 'misbehavior.'"[21]

The district court held that the arbitration panel did not manifestly disregard the law in determining Vinmar did not make a "*prima facie* case under COGSA; accordingly, the Court declined to address Vinmar's other manifest-disregard arguments."[22] Furthermore, the court held the chairman was not "guilty of 'corruption' or 'misbehavior.'"[23] Specifically, on § 10(a)(2) grounds, the district court, even assuming, arguendo, that brain tumors "necessarily impair brain function, at most Szostak served as an arbitrator when he had reason to doubt he could adequately discharge his responsibilities. That is not corruption."[24]

On § 10(a)(3) grounds, the district court first noted that "[u]nder the FAA, an arbitrator is under no duty to disclose medical conditions."[25] Any number of matters, such as lack of sleep or

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[10] *Id.*
[11] 46 U.S.C. § 30701 [hereinafter COGSA].
[12] *Zurich Am. Ins. Co.*, 2016 U.S. App. LEXIS 1390, at *5.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*; *see also Zurich Am. Ins. Co. v. Team Tankers A.S.*,13cv8404, 2014 U.S. Dist. LEXIS 89260, at *23 (S.D.N.Y. 2014).
[17] *Id.*
[18] *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010). The Sixth Circuit, along with the Second, Fourth, and Ninth Circuits, continue to recognize "manifest disregard" as a common law vacatur ground. *See* the January 2014 *Arbitration Newsletter* for a decision of the *Dewan v. Walia*, 2013 WL 5781207 (4th Cir.2013), and the excellent Amici Curiae Brief filed in support of a Petition for Writ of Certiorari to the U.S. Supreme Court (2014 WL 250946) on the continuing viability of "manifest disregard" as an independent common law ground for vacatur.
[19] *Zurich Am. Ins. Co.*, 2016 U.S. App. LEXIS 1390, at *5.
[20] *Id.*
[21] *Id.* at *6 (citing 9 U.S.C. § 10(a)(2) and (3), but making no argument regarding §10(a)(1) or (4)).
[22] *Id.* at *6–7.
[23] *Id.* at *7.
[24] *See also Zurich Am. Ins. Co. v. Team Tankers A.S.*, 2014 U.S. Dist. LEXIS 89260, at *28 (S.D.N.Y. 2014).
[25] *Id.* at *28–30.

marital problems, might affect an arbitrator's concentration or faculties. Further, the district court stated, "Parties are entitled to unbiased and uncorrupted arbitrators…not perfect arbitrators."[26] Second, the district court stated that the parties "saw nothing that made them question" the arbitrator's competence.[27] Further, even if they had known of the tumor, Zurich "would have had no basis for compelling [resignation]."[28]

The district court awarded attorney's fees and costs to Team Tankers for the vacatur/confirmation proceeding in district court based on the charter agreement that authorized attorneys' fees as damages for *breach* of the charter.[29]

The Second Circuit Court of Appeals disposed of Vinmar's manifest disregard claims with two short paragraphs. The real issue for the court was the district court's award of fees and costs, authorized under the charter, to Team Tankers that were incurred seeking to confirm the award. First, the Second Circuit Court held that the trial court erred in awarding fees and costs because there had been no finding—"nor indeed any suggestion"— that Vinmar breached the charter.[30] Team Tankers attempted to argue that Vinmar breached the charter by resisting confirmation of the arbitral award when the parties agreed to be bound by arbitration.[31]

The court rejected this argument on two grounds. First, the parties agreed to arbitrate, and they also consented to confirmation in any court of competent jurisdiction.[32] So, the parties "effectively incorporated FAA review into their contract . . ."[33] Thus, the court reasoned it was not a breach to resist confirmation, an action permitted under the FAA.[34]

Second, even if the charter did require Vinmar not to resist confirmation, the court stated that the contract would be unenforceable to that extent. Parties seeking confirmation "may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard."[35] Accordingly, if the Vinmar-Team Tanker's contract were read to require the parties not to resist confirmation, the contract would authorize a court to confirm the award but effectively prevent any review by the court.[36]

Thus, the Second Circuit held that the district court did not err in denying Vinmar's motion to vacate and granting Team Tanker's motion to confirm the arbitration award.[37] But, the court held the district court did err in awarding Team Tanker's attorneys' fees and costs incurred while Vinmar resisted Team Tanker's motion to confirm.

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[26] *Id.* at *29 (citation omitted)(citing 9 U.S.C. § 10(a)(2)).
[27] *Id.* at *29–30.
[28] *Id.* at *30.
[29] *Zurich Am. Ins. Co.*, 2016 U.S. App. LEXIS 1390, at *7.
[30] *Id.* at *12–13.
[31] *Id.* at *13.
[32] *Id.*
[33] *Id.* at *14.
[34] *Id.*
[35] *Id.* at *15 (quoting Hoeft v. MVL Grp., Inc., 343 F.3d 57, 66 (2d Cir. 2003), *abrogated on other grounds by* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 584–85 (2008)).
[36] *Id.* at *14–15.
[37] *Id.* at *16–17.

OBSERVATIONS

1. Disclose, disclose, disclose – when in doubt disclose!

2. Manifest disregard is still alive in the Second Circuit[38] but not in the Fifth Circuit.[39]

3. Texas state courts applying the Texas General Arbitration Act still recognize "manifest disregard" as a common law vacatur ground.[40]

4. Both federal courts in those circuits that still recognized "manifest disregard" as a vacatur ground and Texas state courts have extremely high standards for what constitutes "manifest disregard," thereby making it a less successful vacatur ground than "exceeded their powers" of 9 U.S.C. §10(a)(4) and Tex. Civ. Prac. & Rem. Code §171.088(a)(3)(A).

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[38] "Manifest disregard of the law" is a "judicial gloss on the specific grounds for vacatur" found in the FAA. T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (quoting Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94-95 (2d Cir. 2008), rev'd on other grounds, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)). The continued existence of the manifest disregard of the law doctrine was put in question by the Supreme Court's decision in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 584-85, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). The Court later declined to decide whether "manifest disregard" survived Hall Street. See Stolt-Nielsen S.A v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). The Second Circuit has recognized the viability of the "manifest disregard" doctrine after Hall Street, see T.Co Metals, 592 F.3d at 339, as well as after Stolt-Nielsen. See Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451-52 (2d Cir. 2011); Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121-22 (2d Cir. 2011). The doctrine applies to arbitration awards governed by the New York Convention if they were rendered in the United States. Yusuf Ahmed Algahanim & Sons, 126 F.3d at 20-23. *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 2014 U.S. Dist. LEXIS 89260, *10-11, 2014 AMC 2305, 2014 WL 2945803 (S.D.N.Y. 2014), affirmed in part and reversed in part.

[39] *Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("[M]anifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").

[40] *Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 794 (Tex. App. – Dallas 2014, no pet.) ("Under the TAA, the courts have traditionally permitted certain common-law, non-statutory grounds for vacating an arbitration award, including manifest disregard of the law, gross mistake, and an award that violates public policy. The Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), has cast doubt upon the continued viability of these common-law grounds. *See Townes Telecomms., Inc. v. Travis, Wolff & Co., L.L.P.*, 291 S.W.3d 490, 493 n.1 (Tex. App.—Dallas 2009, pet. denied). The Supreme Court of Texas has not yet ruled on whether the common-law grounds of manifest disregard, gross mistake, and public policy survive under the TAA. We will consider appellants' arguments concerning these grounds.").