"Manifest Disregard" Alive and Well?

By Timothy Dyer*

In *Dewan v. Walia* the Fourth Circuit Court of Appeals recently addressed the reversal of arbitration awards based on "manifest disregard of the law", a subject over which US Circuit Courts are split.[1] In *Dewan*, the court held that the decision of an arbitrator should be vacated on grounds of the arbitrator's blatant failure to employ proper jurisprudential principles in rendering her determinations, and this failure constituted one such "manifest disregard."[2]

The Case

Appellant Dewan, an accounting firm, signed Appellee Walia, a Canadian national, to a three-year employment agreement culminating in 2006; Dewan secured a U.S. work visa for Walia as part of the hiring process.[3] The parties signed an extension of Walia's employment agreement in 2006 but under circumstances that remain in dispute, the parties parted ways in 2009. Upon his departure, Walia signed an agreement (the Release) to "release and discharge" Dewan from claims related to his employment in exchange for $7,000, with a provision allowing for binding arbitration in the event of a dispute regarding the Release itself.[4]

After execution of the Release, Dewan initiated arbitration proceedings against Walia alleging breach of both the Release and Walia's earlier employment contract.[5] Walia asserted counterclaims on several grounds, and pursuant to the terms of the Release, the claims were subsequently arbitrated. Following an inquiry, the arbitrator not only ruled in Walia's favor, but also awarded him over $450,000 in compensatory and punitive damages.[6] Dewan challenged the award in the district court, and although the court denied his petition to vacate, his subsequent appeal to the Fourth Circuit proved more fruitful.

The appellate court focused on the "expansive breadth and scope" of certain clauses in the Release's language. For example, one clause stated, "Employee promises never to file a lawsuit or assist in or commence any action asserting any claims, losses, liabilities, demands, or obligations released hereunder."[7] The court held that this and other similar provisions in the Release prevented Walia from bringing forth his counterclaims in any forum, ***including arbitration***, and that the arbitrator's decision must thus be vacated in its entirety because of her "manifest disregard of the law" in awarding damages where none – under the express terms of the Release – were permissible.[8]

The Law

"Manifest disregard of the law" as a means for dissolving arbitration decisions remains in wide dispute, with circuits split on its permissibility. The Fourth Circuit, however, has generally allowed its use.[9] Nonetheless, considerable confusion remains even within individual circuits as to how the law should be applied. In *Dewan*, both parties and the district court believed the Maryland Uniform Arbitration Act controlled the resolution of the dispute.[10] The Fourth Circuit, however, disagreed, holding instead that the Federal Arbitration Act ("FAA") was controlling. In the court's view, the FAA did not merely supply a procedural framework applicable in federal courts; it also called for the application, in both federal *and* state courts, of federal substantive law regarding arbitration.[11]

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Under the FAA, the four grounds under which a reviewing court can vacate an arbitration award 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 . . . ; 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."[12] The Fourth Circuit contends there are permissible common-law grounds upon which an award may be vacated as well, including "circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law."[13]

This conclusion, however, has been called into considerable doubt following a series of U.S. Supreme Court decisions suggesting the contrary. These decisions have held that a reviewing court's ***exclusive*** means to vacate an arbitration award are the FAA's four statutory grounds.[14] As the Fourth Circuit noted in *Dewan*:

> In the wake of the Supreme Court's decision in *Hall Street* . . ., this court has recognized that considerable uncertainty exists "as to the continuing viability of extra-statutory grounds for vacating arbitration awards." Nevertheless, we have recognized that "manifest disregard continues to exist" as a basis for vacating

an arbitration award, either as "an independent ground for review or as a judicial gloss" on the enumerated grounds for vacatur set forth in the FAA.[15]

In a strongly worded dissent, Judge Wynn pointed out that a court's review of an arbitration award should be so "severely circumscribed" that it is "among the narrowest known at law," and suggested that the case offers insufficient grounds for overturning the arbitrator's award.[16] The dissent also disputed the majority's interpretation of the Release as prohibiting both legal ***and*** arbitrational recourse; only the former was expressly excluded from the dissenter's perspective.[17]

Conclusion

"Manifest disregard" as a basis for vacating arbitration awards remains shaky at best. While the Fourth Circuit continues to issue rulings on this basis, as do the Second, Sixth, Ninth and Tenth Circuits, the First, Fifth, Seventh, Eighth and Eleventh Circuits have determined that the tenet is no longer a viable form of recourse for challenging arbitration awards.[18] Although the Supreme Court has yet to issue a decisive opinion regarding these extra-statutory grounds for negating arbitration awards, its recent history – encompassing a strong embrace of federalist principles and a rejection of lower courts' attempts to circumvent FAA mandates– suggests that the Fourth Circuit's stance on "manifest disregard" may soon be manifestly disregarded.

** University of Houston Law Center, Class of 2014.*

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1 *Dewan v. Walia*, ___ F.3d ___, 2013 WL 5781207 (4th Cir. 2013).

2 *Id.*, at *7.

3 *Id.*, at *1.

4 *Id.*, at *5-6.

5 *Id.*, at *2.

6 *Id.*, at *3.

7 *Id.*, at *6.

8 *Id.*, at *7.

9 *See id.*, at *5 n.5, wherein the court stated:
In the wake of the Supreme Court's decision in Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008), this court has recognized that considerable uncertainty exists "as to the kkkkcontinuing viability of extra-statutory grounds for vacating arbitration awards." Raymond James, 596 F.3d at 193 n.13.
Nevertheless, we have recognized that "manifest disregard continues to exist" as a basis for vacating an arbitration award, either as "an independent ground for review or as a judicial gloss" on the enumerated grounds for vacatur set forth in the FAA. Wachovia Secs., LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2012).

10 *Id.*, at *3-4.

11 *Id.*, quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

12 9 U.S.C. §10(a) (2002).

13 *Dewan*, 2013 WL 5781207, at *5. The court stated:
The permissible common law grounds for vacating such an award "include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law." MCI Constructors, 610 F.3d at 857 (citation omitted). Under our precedent, a manifest disregard of the law is established only where the "arbitrator understand[s] and correctly state[s] the law, but proceed[s] to disregard the same." Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 235 (4th Cir. 2006) (citation omitted). Merely misinterpreting contract language does not constitute a manifest disregard of the law. Id. An arbitrator may not, however, disregard or modify unambiguous contract provisions. Id. "Moreover, an award fails to draw its essence from the agreement if an arbitrator has `based his award on his own personal notions of right and wrong.' . . . In such circumstances, a federal court has `no choice but to refuse enforcement of the award.'

14 *See, e.g., Hall Street Assoc. v. Mattel, Inc.*, 552 U.S. 576 (2008).

15 *Dewan*, 2013 WL 5781207, at *5 n.5 (citations omitted).

16 *Id.*, quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998)(footnote omitted).

17 *Dewan*, 2013 WL 5781207, at *9. *Dewan* was not selected for publication in the Federal Register, and per the Fourth Circuit's rules, unpublished opinions are not binding within the circuit. Therefore, the case may be repetitious of the court's former holdings or may not be intended to gain precedential traction.

18 *See* Liz Kramer, *"Manifest Disregard Of The Law" Has Circuit Courts in Disarray*, Arbitration Nation (Mar. 4, 2012), http://arbitrationnation.com/manifest-disregard-of-the-law-has-circuit-courts-in-disarray/; *see also Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) (holding FAA statutory provisions are the exclusive means for vacatur).