New York State Bar Association
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Memorandum in Opposition

DISPUTE RESOLUTION SECTION

DR #1

May 14, 2019

A. 5610
S. 2396

By: M. of A. Weinstein
By: Senator Hoylman
Assembly Committee: Judiciary
Senate Committee: Judiciary
Effective Date: 180th day after it shall have become a law

AN ACT to amend the civil practice law and rules, in relation to vacating arbitration awards on the basis of arbitrator disregard of the law.

LAW AND SECTIONS REFERRED TO: Section 7511 of the civil practice law and rules.

Manifest disregard of the law is a judicially-created ground for vacating arbitration awards that is derived from the express provisions that permit an award to be set aside under the Federal Arbitration Act where the "arbitrators have exceeded their powers." The manifest disregard of the law ground is exceedingly narrow: the court must find that both [1] the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and [2] the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case. *Wallace v. Buttar,* 378 F.3d 182, 189 (2d Cir. 2004). Less than 5% of the manifest disregard challenges in federal courts have been successful. The Uniform Arbitration Act eliminated this standard and no states use it as part of the statutory framework. New York would become an outlier if it adopted this provision. It is a vague and imprecise criterion that can mean different things to different people.

The New York Court of Appeals recognizes that the limited scope of this federal doctrine applies in New York state courts *Wien & Malkin LLP v. Helmsley-Spear,Inc.*, 6 N.Y.3d. 471, 481 (2006). In a ruling in the Fall of 2018, just a few months ago, the Appellate Division, First Department stated that manifest disregard is "a doctrine of last resort limited to rare occurrences of apparent egregious impropriety on the part of the arbitrators." The First Department adopted the federal two-prong test. *Daesang Corp. v. The NutraSweet Co.*, 167 A.D.3d 1, 16 (1st Dept. 2018). Adding a state ground of "manifest disregard" to overturn an arbitration ruling could only lead to uncertainty that is inimical to parties' interests in arbitration. It would materially discourage the use of New York as an arbitration forum by both domestic and international parties.

The better practice, if the Legislature is intent on amending CPLR § 7511, would be to use the suggested language, taken from the *Daesan Corp*. decision's exact definition of manifest disregard, so there is no confusion and a future court would not misinterpret the intent.

Based on the foregoing, the NYSBA's Dispute Resolution Section **OPPOSES** this legislation.