New York State Bar Association
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Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

September 21, 2021

S. 565 By: Senator Hoylman
A. 2503 By: M. of A. Weinstein
Senate Committee: Judiciary
Assembly Committee: Passed
Effective Date: 180 days after it shall 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: CPLR § 7511

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES OPPOSES THIS LEGISLATION

A. Summary and Comments on Proposed Amendments

This bill would add a new subdivision to CPLR 7511, which would permit an arbitration award to be vacated due to arbitral manifest disregard of law.

According to the Memorandum in Support of Legislation: "While arbitration can be a useful tool for persons to settle disputes in a more timely and cost-effective way, such resolutions should not be totally divorced from applicable standards of law."

B. Reasons for Opposition

"Manifest disregard of the law" is a judicially created gloss on arbitration statutes that permits an award to be set aside where the arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Merrill Lynch, Pierce, Fenner & Smith v. Bobker,* 808 F.2d 930, 933 (2d Cir.1986). Under a few Federal decisions and out of state decisions, an arbitration award may be reviewed to determine whether it was made in "manifest disregard" of law. *See, e.g.,* Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act,* 22 Am. Rev. Int'l Arb. 45, 85 n. 12 (2011). While the New York Court of Appeals has not recognized such ground for vacating an award under the CPLR, Appellate Division precedent implicitly has done so. *See, e.g., Schiferle v. Cap. Fence Co.,* 155 A.D.3d 122, 128 (4th Dep't 2017) ("Given our high Court's unanimous adoption of the manifest disregard standard under the Federal Arbitration Act in *[Wien & Malkin LLP v.*

Helmsley-Spear, Inc., 6 N.Y.3d 471, 476 (2006)], we see no reason to reject the manifest disregard standard under the identically-worded provision of CPLR 7511(1)(b)(iii)-particularly given the utility of harmonizing state and federal practice regarding judicial oversight of arbitration proceedings").

We oppose the proposed legislation primarily because adding the "manifest disregard" standard to the CPLR likely would increase the number of proceedings in which parties seek judicial review of arbitral awards to reverse the result of an arbitration or at least to postpone an award's enforcement. This standard invariably will result in litigation that serves as a proxy for attack on the substantive merits of an award. As a corollary, this increased litigation will impose a substantial burden on the courts, which will be obligated to deal with potentially complex litigation (including appeals) concerning an arbitral tribunal's alleged "manifest disregard" of the law of New York or other jurisdictions (including even foreign jurisdictions).

Adding the "manifest disregard" standard to the CPLR would create other disadvantages for New York as a seat for domestic arbitrations. The increased risk that sophisticated parties will bear of having to relitigate the merits of their dispute before a court (a result they presumably sought to avoid given their preference for arbitration) under the guise of a vacatur proceeding predicated on "manifest disregard" may prompt corporate counsel drafting arbitration clauses to reconsider designating New York as the seat of a potential arbitration. Extensive post-award litigation will also add to the cost of using New York as a seat of the arbitration and may prompt parties to favor other jurisdictions, such as Florida, that will come at a lower cost.

While adding "manifest disregard" is unlikely to significantly impact international arbitrations seated in New York, the prospect of any judicial interference with the post-award enforcement process may alarm foreign enterprises contemplating New York as a seat for their arbitration. As explained by a leading international arbitration scholar:

> For foreign litigants, U.S. arbitration law is not easily accessible when one thinks of the maze of case law implementing the FAA, the ground for vacation of awards for "manifest disregard of the law" introduced by *Wilko v. Swan* [246 U.S. 436-437 (1953)], the somewhat unclear residual scope of state law after *Volt [Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989)] and *Mastrobuono* [v. *Shearson Lehman Hutton, Inc., et al.*, 514 U.S. 52 (1995)] and the 'one size fits all' approach making no distinction between domestic and international arbitration. All these may be obstacles to the choice of an arbitration venue in the United States for a foreign observer.

Gabrielle Kaufmann-Kohler, *Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration,"* 20(2) ICSID Rev. 339, 345 (2005). This poses a unique problem for New York's ability to remain a leading seat for arbitral

disputes because other "legal systems have amended their national laws to attract arbitrations with increasingly liberal arbitration regimes or laisser-faire regimes." *Id.*

Adding the "manifest disregard" to the CPLR also will make New York an outlier among states, as no state has codified this judge-made standard. In that connection, the Uniform Law Commissioners voted not to include the manifest disregard standard in revising the Uniform Arbitration Act in 2000 because 1) "there is a very significant question of possible FAA preemption … should the Supreme Court or Congress eventually confirm that the four narrow grounds for vacatur set out in Section I0(a) of the federal act are the exclusive grounds for vacatur" and 2) "the dilemma in attempting to fashion unambiguous, 'bright line' test" as to what constitutes "manifest disregard of the law." Revised Uniform Arbitration Act (RUAA), available *at:* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c f35cea8-4434-0d6b-408d-756f961489af&forceDialog=0.

Finally, the inclusion of the "manifest disregard" standard in the CPLR will strongly incentivize parties (who may otherwise prefer a reasoned award) to require arbitrators to issue awards that do not explain their reasoning to avoid a potential dispute at the award enforcement stage.

C. Conclusion

The uncertainty created by the "manifest disregard" standard will likely result in more litigation that will burden the courts at all levels with potentially complex commercial disputes, including disputes governed by other jurisdictions' laws, and discourage parties, both domestic and international, from arbitrating their disputes in New York.

For the foregoing reasons, the Committee on Civil Practice Law and Rules OPPOSES this legislation.

Persons who prepared the report: Michael A. Fernandez.

Co-Chairs of the CPLR Committee: Hon. Lucy A. Billings and Thomas Wiegand