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Client Memorandum
October 2011

In Arbitration, Less is Definitely More: Seventh Circuit Reinstates Arbitration Award Observing that Silence is Just Silence

Finding that an arbitration panel's "failure" to address in its written decision one or more of the central issues in dispute is *not* a reason to vacate an award — or, as Chief Judge Easterbrook put it, "silence is just silence" — the Seventh Circuit in *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, No. 11-2070 (7th Cir. Oct. 3, 2011), overturned a district court decision vacating in part an arbitration award based on what the District Court concluded was a manifest disregard of the law. The Seventh Circuit concluded that the district court erred in rejecting the arbitration award based on a finding that the arbitrator manifestly disregarded the law in concluding that the parties jointly owned one patent family and that one party solely owned another patent family without analyzing inventorship separately from ownership.

In holding that "manifest disregard of the law" is not a basis for vacating an arbitration award, the Seventh Circuit deepened an existing split among circuits that have attempted to apply the Supreme Court's ruling in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Courts have disagreed on whether *Hall* recognized or rejected "manifest disregard of the law" as a ground for vacating an arbitral award. It appears that final resolution of this question will only occur when the Supreme Court agrees to revisit the issue.

The dispute in *Affymax* involved a joint venture agreement between Affymax and Ortho-McNeil-Janssen ("Ortho")— relating to peptide compound inventions created by the parties' joint efforts. Affymax sued Ortho seeking a declaration that it owned two families of patents, one a group of US patents and the other a group of foreign patents. As required by the contract, the dispute was submitted for arbitration.[1] The arbitration panel found that the parties jointly invented, and thus jointly owned, one group of patents, the U.S group, but that Ortho alone invented—and thus solely owned—the other group of patents. Affymax appealed to the district court. The district judge confirmed the arbitration panel's award, with one exception. The district court vacated the award to the extent that the arbitration panel ruled in Ortho's favor on the foreign patents.[2] The district court directed the arbitration panel to reconsider the award with regard to the foreign patents.

The district court found that the panel had "manifestly disregarded the law" by awarding Ortho ownership of the foreign patents without sufficient analysis, indeed, without any analysis.[3] The district court assumed from the lack of discussion that the panel had not properly assessed inventorship and thus determined ownership on some basis other than inventorship. In so doing, the district court found that the arbitrators had manifestly disregarded the law.

In reversing the district court's decision and reinstating the original award, the Seventh Circuit joined two other circuits that have held that "manifest disregard of

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[1] *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876 (N.D. Ill. 2006).

[2] *Affymax, Inc. v. Johnson & Johnson*, No. 04 C 6216, 2011 WL 1050006 28679 (N.D. Ill. Mar. 21, 2011).

[3] *Id.* at *18.

the law" is not a ground under the Federal Arbitration Act on which a district court may vacate an award.[4] Even if it were, the Seventh Circuit concluded, neither the law nor the parties' joint-venture contract required the arbitrators to discuss every issue that a party contested. "No rule of law requires arbitrators to render opinions—or, having chosen to write an opinion, to discuss every issue that the parties contested."

The Seventh Circuit went on to note that even if the district court "chose his words inexactly," and instead meant to conclude that the arbitrators had exceeded their powers under the Federal Arbitration Act or the joint-venture contract, the district court pointed to no language in the arbitration award indicating that the panel had resolved the dispute on any extra-contractual grounds. As noted by the Seventh Circuit:

> [T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.[5]

Concluding that the district court's inference that the arbitrators' silence signified that they relied on extra-contractual grounds was "logical error," the Seventh Circuit reversed and ordered the case remanded with instructions to confirm the original award in full.

The Seventh Circuit's decision, however, puts it at odds with several other courts, including the Second, Third, Sixth and Ninth Circuits, which have found that courts may vacate arbitration awards for "manifest disregard of the law." *See, e.g., Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) ("[W]e view the "manifest disregard" doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision."); *Remote Solution Co., Ltd. v. FGH Liquidating Corp.*, 349 Fed.Appx. 696, 699, 2009 WL 3152846, at *2 (3d Cir. 2009) (The court "may disturb the award only when the arbitrator is 'partial or corrupt' or 'manifestly disregards, rather than merely erroneously interprets the law.'"); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415, 418, 2008 WL 4899478, at *3 (6th Cir. 2008) (This Court "may also vacate an award found to be in manifest disregard of the law."); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th Cir. 2011) ("Although the words "manifest disregard for law" do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4).").[6]

These circuits cite as precedent two Supreme Court decisions which hint that the "manifest disregard of the law" standard refers to "the § 10 grounds collectively," *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 577 (2008), or appear to create a new "manifest disregard" ground for review. *See also Wilko v. Swan*, 346 U.S. 427, 436, 74 S.Ct. 182, 187 (1953) (overruled on other grounds). At the same time, the Seventh Circuit in *Affymax* relied on *Hall Street* for the proposition that the list of grounds for vacating an award under the Federal Arbitration Act "is exclusive," No. 11-2070 (7th Cir. Oct. 3, 2011), at pg. 2, and noted that the list does not include manifest disregard for the law. The confusion and subsequent split in the circuits is understandable given the Supreme Court's less than precise opinion in *Hall Street* that suggests in one breath that "manifest disregard" may well be a new ground for review under the FAA, and several paragraphs later holds that the language of § 10 of the FAA includes the exclusive means for review under the statute. *Id.*

Unless and until the United States Supreme Court weighs in, whether or not an arbitration award can be vacated based on "manifest disregard of the law" will depend on which circuit court is being asked to vacate. But, if you find yourself in the Seventh Circuit, silence alone is not enough to have an award vacated – nor is manifest disregard of the law.

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[4] No. 11-2070 (7th Cir. Oct. 3, 2011); citing *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ("[T]o the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA."); *Medicine Shoppe Intern., Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) ("We have previously recognized the holding in Hall Street and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA.").

[5] *Citing Hill v. Norfolk & Western Ry*., 814 F.2d 1192, 1194–95 (7th Cir. 1987).

[6] The First Circuit also appears to continue to recognize a modified version of "manifest disregard of the law." *See, e.g.*, *Eastern Seaboard Const. Co., Inc. v. Gray Const., Inc.*, 553 F.3d 1, 4 (1st Cir. 2008) ("A court may reverse an arbitrator's award on contractual grounds … in 'instances where it is clear from the record that the arbitrator recognized the applicable law-and then ignored it.'") (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir.1990) (citations omitted)).