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JUDICIAL REVIEW OF INTERNATIONAL ARBITRAL AWARDS: PRESERVING INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATIONS

I. INTRODUCTION

The resolution of potential disputes is of great concern to parties involved in international business transactions. Due to the high cost of overseas litigation and the uncertainty of relying upon a foreign legal system, such disputes are often difficult to resolve.¹ It is essential to the maintenance of international trade relationships that businesses feel confident in the methods by which they resolve commercial disputes.²

Arbitration agreements allay many of the concerns relating to international business by ensuring a degree of organization and predictability in the process through which disputes are resolved.³ Accordingly, international businesses frequently enter into arbitration agreements that pre-arrange the procedures to be followed in the event that a dispute arises. Establishing a process of dispute resolution in advance helps to create a "neutral playing field," increasing the parties' comfort level and promoting future involvement in international commercial transactions.⁴

In long-term commercial relationships, the details of an agreement to arbitrate, including the applicable law, standards, and procedures to be followed, are generally established in the initial contract between the parties. Ironically, the contractual nature of international arbitration brings about many drawbacks. Although the possibility of an arbitrator abusing an unchecked process may jeopardize its integrity, interference in a private agreement is contrary to the fundamental goals of international arbitration. As noted by one commentator, "the effectiveness of international commercial arbitration depends on the predictable enforcement of arbitral agreements and awards."⁵

1. Ginger Lew & Jean Heilman Grier, *Essay: The Role of International Law in the Twenty-First Century: A Role For Governments in the Resolution of International Private Commercial Disputes*, 18 FORDHAM INT'L L.J. 1720, 1722-23 (1995).

2. *Id.*

3. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

4. See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 656 (1989).

5. Michael F. Hoellering, *International Arbitration Under U.S. Law and AAA Rules*, DISP. RESOL. J., Jan. 1995, at 25.

International arbitration policies are founded upon two basic interests: preserving the finality of arbitral awards and maintaining a just system.⁶ Arbitration is a consensual process.⁷ The contractual nature of an arbitration permits international companies to pre-arrange a predictable system of dispute resolution which preserves the privacy of their business relationship.⁸ Judicial review undermines the fundamental benefits of submitting to commercial arbitration.⁹ The very reasons parties enter into international arbitration agreements—to increase speed, neutrality, efficiency, privacy, and finality, and to reduce costs of dispute resolution¹⁰—are rendered void if a national court is permitted to reexamine the decision of an arbitral panel.

In effect, review systems designed to protect the accuracy of an arbitration award and ensure legal precision may impede the attainment of “justice” through delay by eroding “confidence in the efficiency and fairness of the system.”¹¹ Under a judicial system of control, increased costs in time and money are passed onto parties who selected arbitration as a way to protect their rights.¹² Ultimately, such parties are denied the protections they sought through arbitration and possibly priced out of the system altogether.¹³

Nevertheless, there are dangers inherent in the complete independence of arbitral forums. A forum with no system of review is more susceptible to abuse.¹⁴ For example, arbitrators in an unchecked system may be more tempted to exceed the terms of an arbitration agreement or to ignore customary policy considerations,¹⁵ resulting in an arbitrary decision.¹⁶ Arguably, such a system empowers arbitrators with the

6. See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 5 (1992) [hereinafter REISMAN, SYSTEMS OF CONTROL]. Reisman argues that these competing interests are reflected in a Roman maxim which argues that “the public interest requires that there be an end to disputes,” and a quote from Abraham Lincoln, stating that “nothing is final until it’s right.” *Id.*

7. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1989) [hereinafter Reisman, *ICSID Arbitration*].

8. *Id.* at 746.

9. REISMAN, SYSTEMS OF CONTROL, *supra* note 6, at 6.

10. See Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1687 (1983). See also Reisman, *ICSID Arbitration*, *supra* note 7, at 747.

11. Reisman, *ICSID Arbitration*, *supra* note 7, at 744.

12. *Id.*

13. *Id.*

14. *Id.* at 746.

15. Park, *supra* note 4, at 653.

16. Reisman, *ICSID Arbitration*, *supra* note 7, at 743.

ability to violate the terms of an arbitration agreement. Parties may lose confidence in a system in which they suffer unremedied breaches of their agreements. If the system of international arbitration is to continue to meet the needs of international business, it is necessary to reach a balance between the conflicting goals of justice and finality in commercial arbitration.¹⁷

This Comment will set forth the current standards for review of international arbitral awards and discuss the status of their application. Next, it will assess the implications of a national system of judicial review on the role the United States plays in international trade. Finally, this Comment will discuss the criticisms and potential misapplication of the current standards of review.

II. CURRENT STATUS OF JUDICIAL REVIEW OF ARBITRAL AWARDS

The primary issue facing the system of international arbitration concerns the review of arbitral awards. Since there is no institutional system of review, aggrieved parties are forced to appeal arbitrators' decisions in national courts. Although judicial review has been limited somewhat by statute and international accord,¹⁸ standards do exist by which United States courts may refuse to enforce an award.¹⁹

United States courts have repeatedly emphasized a strong public policy favoring international arbitration.²⁰ Accordingly, the role of domestic judicial systems is limited. There is no review of an arbitrator's substantive conclusions in rendering an award.²¹ To subject an award to review on the merits of the dispute would "destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid."²² However, the Court of Appeals for the Second Circuit has held that, notwithstanding the parties' intent to provide for

17. *Id.* at 744.

18. *Office of Supply, Government of the Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972) ("Judicial review has been thus restricted in order to further the objective of arbitration which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation.").

19. *See* 9 U.S.C. §§ 1-16, 201 and 301 (1995) (codifying the Federal Arbitration Act, the New York Convention, and the Inter-American Convention on International Commercial Arbitration).

20. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

21. *Northrop Corp. v. Triad Int'l Marketing, S.A.*, 811 F.2d 1265, 1269 (9th Cir. 1987).

22. *Id.*

a final decision, an arbitral award is subject to statutory defenses regarding enforcement.²³ Unfortunately, questions submitted for review are frequently intertwined with the substantive issues of a dispute.²⁴ Currently, United States courts review arbitral decisions under both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act.²⁵ Although these exceptions have been the subject of passing reference in a few Supreme Court decisions, the scope and validity of their application have yet to be decided.²⁶

A. *The New York Convention*

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been incorporated into the United States Code,²⁷ provides for the enforcement of foreign arbitral awards in United States courts.²⁸ However, the rules of the Convention permit refusal of an award under limited circumstances. A number of the grounds for setting aside an arbitral award are based on deficiencies in the arbitral process. Specifically, Article V of the New York Convention provides that:

1. An award may be refused, at the request of the party against

23. *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992); *Fotochrome*, 517 F.2d at 519. Many courts also apply a common law standard of review based on an arbitrator's "manifest disregard" of the law. See, e.g., *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991); *Siegel v. Titan Industrial Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (per curiam); *Blue Bell Inc. v. Western Glove Works Ltd.*, 816 F. Supp. 236, 242 (S.D.N.Y. 1993). This standard will be discussed in detail in Part III of this Comment.

24. *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 748-49 (8th Cir. 1986).

25. Craig M. Gertz, Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depechage*, 12 NW. J. INT'L L. & BUS. 163, 181 (1991) (citing 9 U.S.C. §§ 1-16, 201 (1995)). The Federal Arbitration Act governs all arbitration proceedings occurring within the United States or otherwise submitted under the Act. Consequently, many of the cases applying the standards of the Act concern disputes among domestic parties. Because interpretations made by courts in domestic cases concern the same statute, the interpretations may also be persuasive in the international context.

26. The Court has failed to adopt even a description of the permissible application of the exceptions to enforcement. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) (upholding the binding nature of arbitration agreement and confirming award); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (enforcing order to compel arbitration).

27. 9 U.S.C. § 201 (1995) [hereinafter the "New York Convention"].

28. *Id.*; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, art. V, 21 U.S.T. 2517, 2520 (1970) [hereinafter Convention on the Recognition]. The rules of the Inter-American Convention on International Commercial Arbitration provide for the refusal to recognize an arbitral award under identical circumstances. 9 U.S.C. § 301 art. 5.

which it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties . . . [were] under some incapacity, or the said agreement is not valid under the law . . .

(b) The party against whom the award is invoked was not given proper notice . . . or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the scope of the submission to arbitration . . .

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . .

(e) The award has not yet become binding on the parties.²⁹

In addition, arbitral awards may also be vacated under less concrete standards involving the suitability of an issue for arbitration or policy reasons. Article V of the New York Convention provides that:

2. Recognition of an arbitral award may also be refused if the authority of the state where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that [country]; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.³⁰

These exceptions are considered by a federal district court when a party to an arbitration seeks to have the award enforced in the United States.³¹ Most of the exceptions under Article V(1) protect both the integrity of the contract and the fairness of the procedure.³² These provisions are relatively clear and cause little dispute. In contrast, the grounds for refusing to enforce an award under subsections 1(c) and 2(b)

29. New York Convention, *supra* note 27, at art. V(1); Convention on the Recognition, *supra* note 28, art. V(1), at 2520.

30. New York Convention, *supra* note 27, at art. V(2); Convention on the Recognition, *supra* note 28, art. V(2)(a)-(b), at 2520.

31. New York Convention, *supra* note 27, at art. V(1); Convention on the Recognition, *supra* note 28, art. V(1), at 2520.

32. Convention on the Recognition, *supra* note 28, Art. V(1), at 2520. For example, article V(1)(b), concerning notice, ensures the protection of due process rights under the standards of the forum state. *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992) (citing *Parsons & Whittlemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 975-76 (2d Cir. 1974)).

offer little direction to the courts interpreting them.³³ Thus, parties to an arbitration agreement, who may ultimately be subject to this provision, are faced with considerable uncertainty. Ironically, uncertainty is one of the problems parties seek to avoid through the execution of an arbitration agreement.

1. Excess of Authority

Due to the contractual nature of arbitration, an award must be based on the provisions of the agreement, rather than an arbitrator's personal interpretation of legislative requirements.³⁴ If an arbitrator fails to confine his or her decision to the provisions of the agreement, the arbitrator has exceeded the scope of authority, rendering the award unenforceable.³⁵ However, it is often difficult to distinguish between a mere error of law and an action which wholly exceeds arbitral authority.³⁶ Thus, a court risks imposing its own substantive evaluation of a dispute in reviewing the scope of an arbitrator's authority.³⁷ The burden of showing an arbitral tribunal has exceeded its contractual authority falls on the party challenging confirmation of the award.³⁸ The strength of the public policy favoring international arbitration renders this burden difficult to overcome.³⁹

2. Public Policy

A reviewing court may also vacate an award that it finds contrary to domestic public policy.⁴⁰ Article V(2)(b), which permits review under this standard,⁴¹ is to be construed narrowly due to the strong policy in favor of international arbitration.⁴² However, review under this "catch-all" standard is somewhat troublesome.⁴³ The court in *Fotochrome Inc.*

33. Convention on the Recognition, *supra* note 28, art.V (1)-(2), at 2520.

34. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (reviewing arbitration under a collective bargaining agreement).

35. *Id.* See *infra* Part II(B)(2) of this Comment for a discussion of the standard of excess of authority under the Federal Arbitration Act.

36. *Park*, *supra* note 4, at 675.

37. *Id.*

38. *Ministry of Defense of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992).

39. *Id.*

40. Convention on the Recognition, *supra* note 28, art. V(2)(b), at 2520. See *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum, & Plastic Workers of America*, 461 U.S. 757, 766 (1983) (enforcing an arbitral award pursuant to a collective bargaining agreement); *Fotochrome, Inc. v. Copol Co.*, 517 F.2d 512, 516 (2d Cir. 1975).

41. Convention on the Recognition, *supra* note 28, art. V(2)(b), at 2520.

42. *Fotochrome*, 517 F.2d at 516.

43. See *Park*, *supra* note 4, at 677-79, 682.

*v. Copal Co.*⁴⁴ found the public policy exception under Article V(2)(b) of the New York Convention difficult to apply, observing that “[t]he legislative history of the provision offers no certain guidelines to its construction.”⁴⁵ As a result, the court limited its application of this provision to circumstances in which recognizing the award would violate fundamental conceptions of “morality and justice.”⁴⁶

More recently, the Supreme Court offered insight into the direction it may take in applying the public policy exception. In *W.R. Grace v. Local 759*,⁴⁷ the dispute involved an arbitration award issued pursuant to a collective bargaining agreement. Although the New York Convention was not applicable, the Court applied a general policy standard to the award, holding that in the context of labor arbitration, an award must be contrary to an explicit, overriding policy in order to justify a refusal to enforce an award.⁴⁸ Moreover, the Court explained that under this test, the policy must be “well defined and dominant” and derive from “reference to the laws and legal precedents and not from general consideration of supposed public interests.”⁴⁹ While the Court’s explanation offers some clarity regarding the requisite strength of the policy, it is troublesome in the arena of international commercial arbitration, where the dominant public policy is arbitration itself.

In *Waterside Ocean Navigation Co. v. International Navigation*,⁵⁰ the Second Circuit Court of Appeals held that to require a judicial determination of the existence and the significance of inconsistencies in policy “would render the allegedly simple and speedy remedy of arbitration a

44. 517 F.2d 512 (2d Cir. 1975).

45. *Id.* at 516 (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d at 973 (2d Cir. 1974)).

46. *Id.* (citing *Parsons*, 508 F.2d at 974).

47. 461 U.S. 757 (1983).

48. *Id.* at 766. The Court’s statements in this case are not binding in all instances of arbitration, however, because the circumstances surrounding arbitration under a collective bargaining agreement are unique, varying a great deal from those arising in the international context. For example, the primary goals of arbitration under a collective bargaining agreement are to reduce the potential for a strike and to protect employees against discrimination and unfair labor practices. These issues have widespread consequences and are governed by independent federal law. Conversely, international commercial arbitration involves the resolution of individual, private disputes arising out of business transactions, where policy dictates the promotion of international trade. *See Lew & Grier, supra* note 1, at 1722-23.

49. *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

50. 737 F.2d 150 (2d Cir. 1984).

mockery.”⁵¹ Moreover, one commentator characterized the public policy exception to enforcement as an “escape hatch,” under which a court may interject “national bias and political undertones” into its assessment of the award.⁵² Consideration of policy issues could threaten the viability of international arbitration as a mechanism for commercial dispute resolution.⁵³ At a minimum, it would compromise the neutrality of the proceeding, frustrating the fundamental goals and intentions of the parties.⁵⁴

B. *Federal Arbitration Act*

When determining whether to vacate an arbitral award, a reviewing court may also consider the Federal Arbitration Act.⁵⁵ Under this Act, enforcement of an award may be refused if: (1) the award was procured through fraud or corruption, (2) the arbitrators were biased, (3) the arbitrators engaged in misconduct resulting in prejudice against the rights of any party, or (4) the arbitrators exceeded their authority.⁵⁶ There is a heavy burden upon a party invoking one or more of these defenses to exhibit that the standards required for denying recognition have been met.⁵⁷

1. Uncommon Grounds for Vacating an Arbitral Award

The first three grounds for vacating an arbitration award under the Federal Arbitration Act are rarely invoked by parties to an arbitration agreement. Accordingly, there is little guidance available in the form of judicial interpretation concerning the application of these statutory provisions. The nature of these standards, however, enables them to be assessed independently from an arbitral award.

51. *Id.* at 153. The policies at issue in this case involved fraud and the standards of proof underlying the arbitral award. *Id.* at 151. The court emphasized that to refuse confirmation of the award under the circumstances of the case would open the door to progressive emasculation of the Convention, which “was intended to remove obstacles to confirmation, not to create them.” *Id.* at 153.

52. Paul D. Tutun, Note, *Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes*, 12 B.U. INT’L L.J. 179, 204 (1994).

53. *Id.*

54. *Id.* at 203-04.

55. 9 U.S.C. §§ 1-16 (1994).

56. *Id.* § 10.

57. *Blue Bell Inc. v. Western Glove Works Ltd.*, 816 F. Supp. 236, 240 (S.D.N.Y. 1993).

2. Excess of Authority

Review of an award based on an alleged abuse of authority is quite limited.⁵⁸ The excess-of-powers provision of the Federal Arbitration Act § 10(d) is afforded an extremely narrow interpretation.⁵⁹ Courts apply a particularly narrow reading of this provision where a dispute arises from an arbitrator's decision on an issue that was properly submitted to the tribunal.⁶⁰

An arbitrator's authority derives solely from the contract between the parties to the arbitration.⁶¹ Accordingly, an arbitrator must act within the boundaries of his or her power under an arbitration agreement.⁶² If an arbitral decision includes rulings on issues not presented to the tribunal or otherwise authorized, the arbitrator has exceeded her authority and the award may be vacated.⁶³ This standard has been characterized as a "Pandora's box" due to the fine line between an arbitrator who has simply rendered a "bad decision," and one who has failed to respect the terms of an arbitration agreement.⁶⁴

Courts have consistently held that awards supported by any "colorable justification" must be enforced.⁶⁵ Thus, where arbitrators explain the basis of their conclusions, even where the award is barely justifiable, enforcement cannot be refused.⁶⁶ An arbitrator, however, must act within the confines of the contract authorizing arbitration.⁶⁷ While the arbitrator may interpret any ambiguity in the contract language, he or she may not disregard or alter unambiguous provisions.⁶⁸ Conversely, *Blue Bell v. Western Glove Works*⁶⁹ emphasized

58. See *infra* Part II(A)(1) of this Comment for a discussion of the excess of powers standard under the New York Convention.

59. See *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991); *Blue Bell*, 816 F. Supp. at 240 (citations omitted); *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*, 487 F. Supp. 63, 65 (S.D.N.Y. 1980).

60. *Fahnestock*, 935 F.2d at 515.

61. *Blue Bell*, 816 F.2d at 240. The consensual nature of arbitral jurisdiction is central to the system of international arbitration and it is critical that a reviewing court preserve the parties' autonomy. *Id.*

62. *Id.*

63. *Fahnestock*, 935 F.2d at 515 (citations omitted).

64. Park, *supra* note 4, at 698.

65. See *Fahnestock*, 935 F.2d at 516; *Blue Bell*, 816 F. Supp. at 240; *Mobil Oil Indonesia, Inc. v. Asamera Oil (Indonesia) Ltd.*, 487 F. Supp. 63, 65 (S.D. N.Y. 1980).

66. *Mobil Oil*, 487 F. Supp. at 65 (quoting *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 703 (2d Cir. 1978)).

67. See Convention on the Recognition, *supra* note 28, art. V(1)(a)-(c), at 2520.

68. *Inter-City Gas v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988).

the importance of maintaining the consensual nature of arbitral jurisdiction, holding that "a purported award which is accomplished in ways inconsistent with the shared contractual expectations of the parties is something to which they had not agreed."⁷⁰ The court went on to explain the necessity of maintaining control over an arbitrator's exercise of power, stating:

Without [exces de pouvoir],⁷¹ arbitration would lose its character of restrictive delegation and the arbitrator would become a decision maker with virtually absolute discretion; whatever limits may have been prescribed by the parties would become meaningless because the arbitrator would be answerable effectively to no one. Exces de pouvoir thus is the conceptual foundation of control for arbitration.⁷²

Nonetheless, the court stressed that the limitation on an arbitrator's exercise of authority is not intended to permit a dissatisfied party to destroy the result of a consensual arbitration proceeding, but rather to confine an arbitrator's decision to issues submitted to the tribunal.⁷³

III. THE COMMON LAW STANDARD OF MANIFEST DISREGARD

In addition to the statutory grounds for vacating an arbitral award, many courts have adopted the common law standard of "manifest disregard."⁷⁴ The standard derives from dicta contained in the 1953 Supreme Court case of *Wilko v. Swann*.⁷⁵ In *Wilko*, the Court invalidated an arbitration agreement on the grounds that the dispute arose under the Securities Act and that congressional intent was better served by prohibiting arbitration of a securities issue.⁷⁶ In reaching this conclusion, the Court reasoned that "[i]n unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the

69. 816 F. Supp. 236 (S.D.N.Y. 1993).

70. *Id.* at 240 (quoting Reisman, *ICSID Arbitration*, *supra* note 7, at 745).

71. *Exces de pouvoir* is a Latin phrase describing the Roman Law doctrine of excess of powers. Reisman, *ICSID Arbitration*, *supra* note 7, at 745.

72. *Blue Bell*, 816 F. Supp. at 240 (quoting Reisman, *ICSID Arbitration*, *supra* note 7, at 745).

73. *Id.*

74. *See, e.g.*, *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991); *Siegel v. Titan Industrial Corp.*, 779 F.2d 891, 893 (2d Cir. 1985); *Blue Bell Inc. v. Western Glove Works Ltd.*, 816 F. Supp. 236, 242 (S.D.N.Y. 1993).

75. 346 U.S. 427 (1953).

76. *Id.* at 438.

federal courts, to judicial review for error in interpretation.”⁷⁷

A. *Validity of the Standard*

In the years following the *Wilko* decision, a number of courts referred to the *Wilko* Court’s comments, applying the manifest disregard language as an additional standard by which to assess arbitral awards.⁷⁸ However, discussions of this standard have been inconsistent. For example, in his dissenting opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,⁷⁹ Justice Stevens asserted that manifest disregard is the only standard of review for arbitration awards.⁸⁰ In reaching this conclusion, Justice Stevens apparently *ignored* the statutory provisions of the New York Convention and the Federal Arbitration Act.

Conversely, the Court in *Bernhardt v. Polygraphic Company of America*,⁸¹ which was decided shortly after *Wilko*, implied a different approach to the review of arbitral awards. In its discussion of the enforceability of an arbitration agreement, the Court made a number of statements that highlight the difficulty in applying the standard of manifest disregard,⁸² suggesting the Court’s reluctance to accept the standard. For example, the Court stated that an arbitrator’s erroneous construction of an arbitration contract is not subject to judicial review.⁸³ In addition, the Court asserted that arbitrators are not required to disclose the reasoning behind their decisions, and that they may “draw on their personal knowledge” in deciding the issues presented to them.⁸⁴

B. *Application of the Doctrine*

Unfortunately, the boundaries of the common law standard have

77. *Id.* at 436.

78. See *Fahnestock*, 935 F.2d at 516; *Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Int’l Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989); *Siegel*, 779 F.2d at 893; *Blue Bell*, 816 F. Supp. at 242.

79. 473 U.S. 614 (1985).

80. *Id.* at 656 (Stevens, J., dissenting). See *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995).

81. 350 U.S. 198 (1956).

82. *Id.* at 203 n.4. In *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974), the court interpreted the comments of the Court in *Bernhardt* as negating the application of a non-statutory standard of review to cases based upon the construction of a contract, such as that of an arbitration clause. *Id.* at 431.

83. *Bernhardt*, 350 U.S. at 203 n.4 (citations omitted).

84. *Id.*

never been clearly defined.⁸⁵ Rather, courts adopting the standard of manifest disregard have described its proper application with language equally as vague as the term itself. For example, the court in *Siegel v. Titan Industrial Corp.*⁸⁶ characterized the standard as "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law."⁸⁷

Courts have also attempted to describe the circumstances in which the standard has been met, permitting the refusal to enforce an award where an arbitrator "understood and correctly stated the law but proceeded to ignore it."⁸⁸ In *Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Int'l Ltd.*,⁸⁹ the court characterized the restrictions placed upon a court applying this test stating, "The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable."⁹⁰ Refusal to enforce an award on the grounds of manifest disregard, however, is not permitted where an arbitrator has erroneously applied rules of law or erroneously decided the facts of a case.⁹¹

C. Criticisms of the Manifest Disregard Standard

Several courts have either declined to apply the doctrine of manifest disregard or criticized its appropriateness.⁹² In the 1992 case, *Ainsworth v. Skurnick*,⁹³ the Eleventh Circuit Court of Appeals declared that it had never adopted the standard of manifest disregard as a basis for refusing an arbitral award, and that to do so would be incorrect under

85. See *Siegel*, 779 F.2d at 892; *Blue Bell*, 816 F. Supp. at 242.

86. 779 F.2d 891 (2d Cir. 1985).

87. *Id.* at 892 (quoting *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978)).

88. *Id.* at 893 (quoting *Bell Aerospace Company Division of Textron, Inc. v. Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973)).

89. 888 F.2d 260 (2d Cir. 1989).

90. *Id.* at 265 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986)). The court went on to state that it was not "at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Id.*

91. *Siegel*, 779 F.2d at 892-93 (citing *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974)); *South East Atlantic Shipping Ltd. v. Garnac Grain Co., Inc.*, 356 F.2d 189, 192 (2d Cir. 1966).

92. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (declining to adopt the standard); *Ainsworth v. Skurnick*, 960 F.2d 939, 940-41 (11th Cir. 1992) (declining to adopt the standard); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986) (declining to adopt the standard). See also *Raiford v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 903 F.2d 1410, 1412-13 (11th Cir. 1990) (criticizing the standard); *Stavborg*, 500 F.2d at 430-31 (criticizing the standard).

93. 960 F.2d 939 (11th Cir. 1992).

the law of that circuit.⁹⁴ Similarly, the court in *Raiford v. Merrill Lynch, Pierce, Fenner, & Smith*⁹⁵ declined to adopt manifest disregard as a standard of review. In discussing its reluctance to apply the standard, the court noted that, "indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case)."⁹⁶

Bernhardt v. Polygraphic Company of America, Inc.,⁹⁷ the only Supreme Court case to consider this topic since *Wilko*, suggests that application of a nonstatutory standard of manifest disregard to an arbitral award would be inappropriate.⁹⁸ The Court stated that "[w]hether the arbitrators misconstrued a contract is not open to judicial review,"⁹⁹ and that "[arbitrators] may draw on their personal knowledge in making an award."¹⁰⁰ In *I/S Stavborg v. National Metal Converters, Inc.*,¹⁰¹ the court recognized that inconsistencies between *Wilko* and *Bernhardt* and questioned the validity of the manifest disregard standard.¹⁰²

Recently, the Seventh Circuit expressed strong criticisms of the manifest disregard standard in *Baravati v. Josephthal, Lyon & Ross, Inc.*¹⁰³ In *Baravati*, the court asserted that *Wilko dicta* is "history" and that permitting application of the standard would enable a disappointed party to renew his or her dispute by bringing it into court through the "back door."¹⁰⁴ The court stated:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire

94. *Id.* at 940-41.

95. 903 F.2d 1410 (11th Cir. 1990).

96. *Id.* at 1413. Similarly, the court in *Stroh Container Co.* determined that it was unnecessary to adopt the standard as an exception to enforcement because the award would be affirmed regardless. *Stroh Container Co.*, 783 F.2d at 750.

97. 350 U.S. 198 (1956).

98. *Id.* at 203 n.4.

99. *Id.* (citations omitted).

100. *Id.*

101. 500 F.2d 424 (2d Cir. 1979).

102. *Id.* at 431. The dispute in this case arose out of a disagreement regarding the payment of a shipment made to Spain. *Id.* The court criticized the manifest disregard standard and affirmed the district court's holding confirming an arbitral award determined pursuant to the parties' arbitration agreement. *Id.*

103. 28 F.3d 704, 706 (7th Cir. 1994).

104. *Id.*

modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators “exceeded their powers”—it is superfluous and confusing. There is enough confusion in the law.¹⁰⁵

In addition, the fact that the manifest disregard doctrine has existed since 1953, but was never incorporated into the New York Convention or the Federal Arbitration Act, suggests that Congress intended to exclude it as a standard of review for arbitral awards.

IV. PRESERVING INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

The United States has a great interest in preserving the viability of arbitration as a method of commercial dispute resolution. The Supreme Court has reinforced the national interest in preserving international trade through frequent reference to the public policy favoring international arbitration.¹⁰⁶ As a practical matter, this interest cannot be protected through interference in international arbitration by national courts, but only through respect of the parties' autonomy in resolving disputes by arbitration.

A. *Acceptance of Arbitration in National Courts*

The Supreme Court has endorsed the system of international arbitration with powerful language, describing the role of arbitration in ensuring the continued success of United States business in the international market. For example, the Court stated in *Bremen v. Zapata Off-Shore Co.*¹⁰⁷ that “[t]he expansion of American business and industry will hardly be encouraged, if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”¹⁰⁸

In *Vimar Seguros & Reaseguros, S.A. v. M/V Sky Reefer*,¹⁰⁹ the

105. *Id.* In a recent holding on who determines the arbitrability of a dispute, the Supreme Court noted the problems involved in expanding standards of review. The Court asserted that “it is undesirable to make the law more complicated by proliferating review standards without good reasons.” *First Options of Chicago, Inc.*, 115 S. Ct. at 1926.

106. *See, e.g.*, *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2328-29 (1995) (enforcing arbitration clause); *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 638 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (enforcing forum selection clause).

107. 407 U.S. 1 (1972).

108. *Id.* at 9.

109. 115 S.Ct. at 2322.

Supreme Court expressed the need to recognize parties' consent to submit to arbitration, stating, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement' would frustrate 'the orderliness and predictability essential to any international business transaction.'"¹¹⁰ This assessment applies equally to the enforcement of an arbitral award. Parties conducting business in an international market consent to arbitration for the purpose of ensuring predictability in the resolution of potential disputes and to avoid the unfamiliar procedures and laws of a foreign legal system.¹¹¹ Review of arbitration in national courts destroys these goals as "[r]eliance on the varying standard of review in national legal systems offers only inconsistency and the prospect of unfairness"¹¹² A district court in New York affirmed this position asserting that "the policy underlying the Convention, the avoidance of 'the vagaries of foreign law for international traders' would be defeated by the allowance of multiple suits . . . where the parties have agreed, by contract, to place their dispute in the hands of an international arbitral panel in a neutral legal forum."¹¹³

In *M/V Sky Reefer*, the Supreme Court asserted that "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."¹¹⁴ The Court reasoned that to construe international accords in a fashion which would "disparage the authority or competence of international forums for dispute resolution," would be contrary to the purpose of our international agreements.¹¹⁵ In emphasizing its position, the Court warned that skepticism regarding the competence of foreign arbitrators "must give way to contemporary principles of international comity and commercial practice."¹¹⁶ Conversely, in his dissenting opinion in *Sky Reefer*, Justice Stevens argues that permitting disputes to be resolved independently in separate forums

110. *Id.* at 2328 (quoting *Scherk*, 417 U.S. at 516).

111. Stein & Wotman, *supra* note 10, at 1687.

112. Tutun, *supra* note 52, at 208.

113. *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*, 745 F. Supp. 172, 176 (S.D.N.Y. 1990) (citing *Cooper v. Ateliers De La Montobecane, S.A.*, 442 N.E.2d 1239, 1240 (1982)).

114. 115 S. Ct. at 2329. The Court also advised against interpreting international agreements to "nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law." *Id.*

115. *Id.* at 2328.

116. *Id.*

results in a lack of uniformity.¹¹⁷ Arguably, a lack of uniformity in dispute resolution could interfere with international trade by increasing parties' uncertainty.¹¹⁸

Unfortunately, the process of international arbitration is becoming increasingly "litigation-minded and less conciliation-minded."¹¹⁹ Ultimately, reliance on national judicial systems frustrates parties' expectations of reaching a "neutral and depoliticized resolution of disputes."¹²⁰ As one commentator noted, "Judicial enforcement of arbitration agreements and awards against recalcitrant parties unavoidably insinuates into the arbitral process elements of a national legal system, thus providing the bargained-for non-national arbitration at the expense of interjecting the peculiarities of the enforcement forum."¹²¹

Undoubtedly, an attitude favoring arbitration is imperative in developing international markets. Encouraging viable alternatives for the resolution of international commercial disputes is essential in developing free trade and economic development.¹²² Accordingly, national courts must "shake off the old judicial hostility to arbitration."¹²³

B. *Balancing the Interests of Review and Independence*

Although it is somewhat unsettling that an arbitrator may taint a binding decision through fraud, bias, or the exercise of excess authority,¹²⁴ a subsequent resort to the judicial system imposes an entirely new

117. *Id.* at 2331-37 (Stevens, J., dissenting). Justice Stevens emphasizes the "commercial interest in uniformity," stating that in particular, "[d]isuniformity in the interpretation of bills of lading will impair their negotiability." *Id.* at 2333, 2335.

118. *See id.* at 2331-37 (Stevens, J., dissenting). A foreign arbitration clause opens a shipper to "application of unfamiliar and potentially disadvantageous legal standards, until he can obtain review . . . in a domestic forum under the high standard applicable to vacation of arbitration awards." *Id.* at 2333.

119. Filip De Ly, *Current Issues in International Commercial Arbitration: The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L & BUS. 48, 50 (1991).

120. Tutun, *supra* note 52, at 192-93 (citation omitted). This results from the dangerous possibility that a dispute will be submitted to a hostile forum, thereby compromising the interests of one party. *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 516 (1974).

121. Park, *supra* note 4, at 678.

122. Lew & Grier, *supra* note 1, at 1721

123. *Mitsubishi v. Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (quoting *Klukundish Shipping Co. v. Amtorg Trading Co.*, 126 F.2d 978, 985 (2d Cir. 1942)). The Court emphasized that this includes the "customary and understandable unwillingness to cede jurisdiction" over domestic claims to non-domestic forms. *Id.*

124. Tutun, *supra* note 52, at 192. Any system without a hierarchical structure is susceptible to abuse. REISMAN, SYSTEMS OF CONTROL, *supra* note 6, at 6.

set of concerns onto the process of dispute resolution. The uncertainties of litigation are precisely what parties to an arbitration agreement seek to avoid by establishing a procedure for non-judicial dispute resolution.¹²⁵ The resolution of international commercial disputes is complicated and expensive.¹²⁶ Parties to an arbitration agreement attempt to minimize the disadvantages inherent to potential disputes involving international business transactions through arbitration, which carries with it the benefits of speed and cost efficiency.¹²⁷ The pressure that national judicial review places upon the system of arbitration eliminates these advantages, and the consequence may be a reduction in international trade as businesses become discouraged with the system.¹²⁸

In the commercial context, time is often a key concern when a dispute arises. Thus, the finality of a decision is one of the most attractive features of the arbitration procedure.¹²⁹ Conversely, hierarchical layers of protection increase the likelihood of accuracy in an award.¹³⁰ Arguably, parties to an arbitration agreement balance competing interests of justice and finality and make a conscious decision to invoke the benefits of arbitration. England's House of Lords supports parties' right to make this choice, holding that "the policy favoring autonomy of the contracting parties to adopt arbitration as the means of finally resolving their international disputes prevails over the policy favoring judicial review of arbitration awards on questions of law."¹³¹

Although judicial review may increase the accuracy of arbitration decisions, the costs of such review is passed on to the parties submitting to arbitration, thereby negating the benefits of arbitration and undermining the system altogether. For example, the efficiency and finality of resolution is eliminated,¹³² the parties are subject to great expense, potentially excluding them from the opportunity to protect their interests;¹³³ and the nature of the problem becomes public, destroying

125. See Lew & Grier, *supra* note 1, at 1722-23.

126. De Ly, *supra* note 119, at 50.

127. See *supra* notes 6-13 and accompanying text for a discussion of the benefits of arbitration.

128. Lew & Grier, *supra* note 1, at 1723.

129. See Reisman, *ICSID Arbitration*, *supra* note 7, at 747.

130. REISMAN, *SYSTEMS OF CONTROL*, *supra* note 6, at 4.

131. Stein & Wotman, *supra* note 10, at 1687 (citation omitted).

132. For example, the eighth circuit noted that review may result in "an opportunity for serious delay and duplication of effort." *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d at 748-49 (8th Cir. 1986).

133. REISMAN, *SYSTEMS OF CONTROL*, *supra* note 6, at 4.

the aspect of confidentiality.¹³⁴ Inflation and rising interest rates occurring during the review process may also erode the original value of the award.¹³⁵ Moreover, parties dissatisfied with the arbitral award could potentially use the judicial system to harass the other party, causing additional legal fees and subjecting them to the uncertainty of a national court decision.

Due to the negative impact that a system of review has on international commercial arbitration, review acts as a "roadblock" to its effectiveness, even as United States courts emphasize the need for encouraging its development.¹³⁶ The United States depends upon international markets to expand its economy. Accordingly, the possible unfairness inherent in a lack of judicial review is outweighed by the national interest in preserving the independence of international arbitration.

C. *Criticisms of the Current Standard for Review of Arbitral Awards*

Notwithstanding the negative effect judicial review has on the viability of international commercial arbitration, it is unrealistic to presume that United States courts will permit the standards of review to disappear altogether. Consequently, it is crucial that the standards be clarified and narrowed such that parties to arbitration are afforded a reasonable level of certainty in their expectations. In assessing the problems surrounding the grounds for vacating arbitral awards, courts have considered the following issues: the absence of a complete record upon which to apply the standards, the interconnection of arbitral procedure with the merits of the dispute, and the possible misapplication of the standards due to the lack of clarity in their scope.¹³⁷

1. Absence of a Complete Record of Arbitral Proceedings

Arbitrators are not required to disclose the factual basis or reasoning behind their awards and, unless otherwise specified by the parties, a

134. Stein & Wotman, *supra* note 10, at 1726.

135. *Id.* at 1725.

136. *Fotochrome, Inc. v. Copol Co.*, 517 F.2d 512, 519 (2d Cir. 1975). This view was reinforced in the recent decision *Pan Atlantic Group, Inc. v. Republic Insurance Co.*, 878 F. Supp. 630, 641 (S.D.N.Y. 1995).

137. See, e.g., *Stroh*, 783 F.2d at 743; *Blue Bell, Inc. v. Western Works, Ltd.*, 816 F. Supp. 236 (S.D.N.Y. 1993).

written transcript is unnecessary.¹³⁸ Consequently, courts are unable to carry out consistent or meaningful review.¹³⁹ Where findings and conclusions of a panel of arbitrators are absent, the court is left to theorize about to the basis of an award.¹⁴⁰ Under these circumstances it is impossible to review, for example, whether the arbitrator refused to apply a law of which she was aware, governing the dispute. Thus, arbitrators who act in violation of an arbitration agreement may be able to evade review by issuing awards without a record for a court to consider.

2. Distinguishing Review of Merits and Procedure

United States courts have consistently maintained that they will not review the merits of an arbitral award.¹⁴¹ However, the vague language of the standards reduces the ability of a court to focus its review on a specific aspect of the proceeding, even where the court attempts to apply a narrow scope of review. The court in *Stroh Container Co. v. Delphi Industries, Inc.*¹⁴² noted the difficulty of this task, explaining that issues of procedure are often intertwined with the merits of the dispute.¹⁴³ For example, “the line between mere error of law and excess of authority is unclear, even for a judge, and the judge who attempts to correct the latter problem rather than the former may in fact be imposing his own conclusions on the merits of the dispute.”¹⁴⁴

3. Potential Misapplication or Expansion of Standards

The lack of definition and clarity available to guide courts in applying the grounds for vacating an arbitration award, leaves them with considerable discretion in deciding individual cases. Such broad discretion leaves open the potential for courts to apply the standards

138. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956) (citations omitted); *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

139. This problem could be remedied by imposing a requirement that arbitrators issue a complete record of the proceeding and their reasoning. However, such a requirement would further interfere with the independence of international arbitration.

140. *Blue Bell*, 816 F. Supp. at 241

141. *See, e.g., Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988).

142. 783 F.2d 743 (8th Cir. 1986).

143. *Id.* at 748.

144. Karyn S. Weinberg, Note, *Equity in International Arbitration: How Fair is “Fair”?* *A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT’L L.J. 227, 251 n.167 (1994). This problem is particularly prominent with respect to the excess of authority exception. *See Park, supra* note 4, at 698 (characterizing this distinction as a “Pandora’s Box”).

inconsistently and to expand them where doing so would achieve a particular purpose.¹⁴⁵ Although courts thus far have been reasonably conservative in their discussions of the standards, the Supreme Court has yet to address the standards directly.

V. CONCLUSION

The strong policy supporting international arbitration dictates that courts preserve the independence of arbitral tribunals and effectuate the intent of parties to finalize their disputes through arbitration. Although there are dangers inherent in an unchecked system of dispute resolution, parties to an arbitration agreement are free to balance the costs and benefits of arbitration and overseas litigation.

The advantages of arbitration in an international commercial context are strong, eliminating a great deal of cost and uncertainty. Parties involved in international trade realize the benefit of arranging a neutral, efficient, and final method of resolving commercial disputes. Accordingly, they voluntarily submit to the arbitral process. It is imperative that both domestic and foreign parties remain confident in the predictability and autonomy of international arbitration if the United States is to continue to develop its international markets. Imposing national review onto international arbitral awards will only produce skepticism and reluctance to submit to international commercial arbitration.

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145. The public policy exception under the New York Convention is particularly susceptible to this sort of manipulation, enabling a court to controvert the parties' intentions to effectuate its own objectives. See *supra* notes 40-54 and accompanying text for a discussion of the application of the public policy exception.