

Recent Developments in Arbitration Law

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Discovery in Arbitration

- ▶ No detailed or formal rules govern discovery in arbitration
- ▶ Review arbitration clauses, arbitration rules and guidelines, applicable statutes
 - Examples:
- ▶ **AAA Employment Arbitration Rules and Mediation Procedures, Rule 9. Discovery**

“The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”

Discovery in Arbitration

- ▶ **Commercial Arbitration Rules and Mediation Procedures, R-21. Exchange of Information**


“(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

 - i. the production of documents and other information...

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.”
- ▶ CPLR 7505: “An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.”

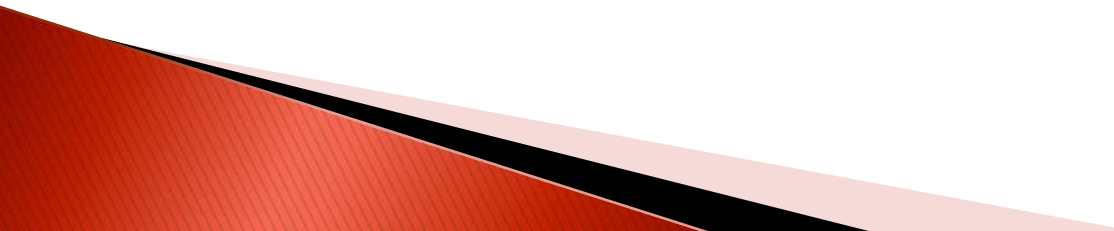
Role of Arbitrators and Parties to Streamline Process

▶ Arbitrators:

- Setting discovery deadlines
 - Preliminary Conference with Parties and Counsel to discuss discovery early (comprehensive scheduling order)
 - Availability of arbitrator to address discovery issues as they arise
 - Additional management or discovery conferences as necessary
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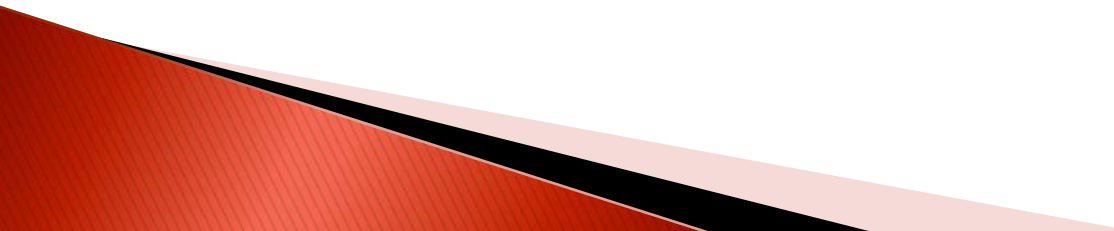
Role of Parties

Parties:

- ▶ Limiting number of depositions by agreement; document requests
 - ▶ Agreement on stipulated facts
 - ▶ Well-framed document requests
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Role of Arbitral Institutions

Examples of Institutional Efforts to Streamline:

- ▶ AAA Commercial Arbitration Rules, Expedited Procedures
 - ▶ ICDR Guidelines for Information Exchanges in International Arbitration
 - ▶ CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration
 - ▶ CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration
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Court Support of Arbitrator Management of Discovery/Evidence

- ▶ Robert Lewis Rosen Assocs. v. William Webb, 2003 WL 22801698 (SDNY 2003), aff'd 473 F.3d 498 (2d Cir. 2007)
 - “Obviously, it is the role of the Arbitrator, as it is the role of any judiciary or quasi-judiciary figure, to limit discovery to those subjects that will lead to relevant information.” at *5
- ▶ Credit Suisse First Boston Corp. v. Crisanti, 289 A.D.2d 83 (NY App Div, 1st Dept 2001) – confirmed award because refusal to hear testimony of witness not fundamentally unfair.

Standard of Review for Arbitral Awards

▶ Section 9 of the FAA:

- Within one year after the award is made, any party may apply to the court for an order confirming the award;
- Made to the court specified in the parties' agreement; if no court specified, then to the United States court in and for the district within which the arbitral award was made;
- Court shall grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11.

Standard of Review for Arbitral Awards

- ▶ Treated as Summary Proceedings: Petitions to confirm, as well as petitions to vacate, modify, or correct, are made and heard the same as motions after an initial complaint is filed.
- ▶ New York CPLR 7510: “The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.”

Vacatur under the FAA

Four grounds under the FAA to vacate an arbitration award:

- FAA §10(a)(1) – Award procured by corruption, fraud or undue means.
- FAA §10(a)(2) – Evident partiality or corruption on the part of the arbitrator(s).
- FAA §10(a)(3) – Arbitrator misconduct in refusing to postpone the hearing, upon sufficient cause shown; refusing to hear evidence pertinent and materials to the controversy; or any other misbehavior causing prejudice to the parties' rights.
- FAA §10(a)(4) – Arbitrator exceeds powers, or so imperfectly executes them that a mutual, final and definite award upon the subject matter has not been made.

- ▶ New York CPLR 7511 similar grounds, but includes specific provision regarding party who neither participated in the arbitration nor was served with notice of intention to arbitrate.

Manifest Disregard of the Law Standard of Review: Is it still viable?

- ▶ First articulated by the U.S. Supreme Court in its 1953 decision *Wilco v. Swan*, 346 U.S. 427 (1953), overruled by, *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989), in which the court stated that “interpretations of the law by the arbitrators in contrast to manifest disregard are not subject in the federal courts to judicial review for error in interpretation.”
- ▶ Hall Street Assocs. v. Mattel, Inc., 128 S.Ct. 1396 (2008)
“§§10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification,” reasoning that the provision for judicial confirmation of an arbitrator's award contained in § 9 carries no hint of flexibility.

Manifest Disregard of the Law Standard of Review: Is it still viable?

Post-Hall Street – Varying Interpretations

- ▶ Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009) (“[i]n the light of Hall Street’s repeated statements that ‘We hold that the statutory grounds are exclusive,’ ” it could not be interpreted as applying only to contractual expansions of §§ 10 and 11. Id. at 356.)
- ▶ Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) – (“We hold that our judicially-created bases for vacatur are no longer valid in light of Hall Street.”)
- ▶ Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S.Ct 1758 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in [Hall Street], as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. §10. Id. At 1768 fn. 3)

Manifest Disregard of the Law Standard of Review: Is it still viable?

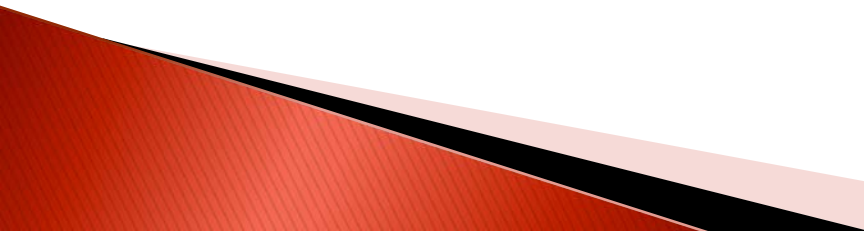
New York Decisions

- ▶ Cantor Fitzgerald Sec. v. Refco Sec., 83 A.D.3d 592 (N.Y. App., 1st Dep't 2011)

“Contrary to Cantor's contention, the judicially-created ‘manifest disregard of the law’ ground for vacating an arbitration award under the FAA is still viable, notwithstanding the Supreme Court's decision in Hall Street.”

- ▶ Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008), rev'd and remanded Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010) (manifest disregard survived Hall Street as a “judicial gloss” on the specific grounds for vacatur enumerated in section 10 of the FAA)

Class Claims in Arbitration

- ▶ Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)
 - Homeowners brought class action lawsuit against commercial lenders
 - Court did not decide whether class arbitration was permitted under the FAA, but rather determined that the arbitrator, not the court, should make that determination
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Class Claims in Arbitration

The AAA Class Arbitration Policy

- The AAA will accept for administration any demand for class arbitration that is filed except where there is a class waiver unless the parties obtain a court order compelling class arbitration.
- AAA Supplementary Rules for Class Arbitration went into effect October 2003.

Class Claims in Arbitration

Stolt–Nielsen S.A. v. Animal Feeds Int’l Corp., 130 S.Ct 1758 (2010)

- Held that arbitration panel exceeded its powers under the Federal Arbitration Act by imposing its own policy choice on the issue of whether the parties’ agreement permitted class arbitration.

▶ Example of Narrowing of Stolt–Nielsen:

- Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2nd Cir. 2011)

Holding: Arbitrator within the scope of her authority in finding that class arbitration was authorized by parties’ agreement where parties’ disagreed about whether clause authorized class arbitration and arbitrator based decision on parties’ agreement and state law.

Class Arbitration Waivers

AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011)

- ▶ Issue Considered: Whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.
- ▶ Holding: Federal Arbitration Act preempted the application of California's unconscionability doctrine to a class arbitration waiver in a consumer contract.

Class Arbitration Waivers

In re American Express Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012)

- ▶ Issue: Whether a class action waiver clause is enforceable even if the practical effect of enforcement would be to preclude a party's vindication of statutory rights.
- ▶ Holding: The Second Circuit held that the arbitration clause was unenforceable because the class-action waiver would entirely preclude merchants' federal antitrust claims against issuer.