February, 2004

Georgia General Assembly Adopts Manifest Disregard as a Ground for Vacating Arbitration Awards: How Will Courts Treat the New Standard?

Thomas V. Burch, Florida State University

Available at: https://works.bepress.com/thomas_burch/3/
Georgia General Assembly Adopts "Manifest Disregard" as a Ground for Vacating Arbitration Awards:

How Will Georgia Courts Treat the New Standard?
Arbitration offers attractive alternatives to litigation in terms of speed, lower costs, flexibility of process and business-oriented decisions. However, these advantages can come at the price of a legally incorrect decision — a result that is significantly at odds with the judicial process. Over the last decade, state and federal courts have struggled to find an acceptable balance between these competing interests of arbitration and litigation, and their efforts have raised an important question: To what extent should courts respect the decisions of arbitrators?

Generally, courts may only set aside arbitration awards on the grounds listed in the Federal Arbitration Act or the applicable state arbitration code. However, all federal circuit courts and a few state courts have adopted a non-statutory exception that allows a court to overturn an arbitrator’s decision if the arbitrator has exemplified a “manifest disregard” of the law.

The manifest disregard standard for vacating arbitration awards originated from the U.S. Supreme Court’s decision in Wilko v.票K, and one court has since defined it as an arbitrator’s “willful inattention to the governing law.” However, in the fifty years following Wilko, only two federal courts have vacated an arbitration award based on the manifest disregard standard. This may be attributed to problems associated with distinguishing “manifest disregard” from “ordinary legal error.” The Wilko Court was the first to make this distinction, but it did not give explicit guidelines for when or how lower courts should do the same. As a result, most courts have taken different approaches to, and have reached different results after, implementing the manifest disregard standard.

In 2003, after several years of tentative lower court decisions, the Georgia Supreme Court, in Progressive Data Systems v. Jefferson Holding Corporation, held that manifest disregard is not a proper ground for vacatur in Georgia. The court emphasized that Georgia’s Arbitration Code does not implicitly contain the manifest disregard standard, and that Georgia courts should not liberally interpret the Code in a vain attempt to find it. In 2003, however, the Georgia General Assembly amended the Georgia Arbitration Code to specifically include manifest disregard as a ground for vacating arbitration awards. Governor Sonny Perdue signed the act in June of 2003, effectively nullifying the Georgia Supreme Court’s decision in Progressive Data Systems, and thereby making Georgia the first state in the country to statutorily adopt the manifest disregard standard. Nevertheless, because the new act does not instruct courts regarding how to apply manifest disregard, it is uncertain whether Georgia courts will adopt a broad or narrow interpretation of the doctrine.

ARBITRAL DISCRETION AND THE DOCTRINE OF “MANIFEST DISREGARD”

As the time and expenses involved in litigating a case have risen in recent years, public policy has dictated an increasing emphasis on more efficient alternatives, including arbitration. Arbitration agreements commit parties to accept the decisions of a neutral arbitrator on questions of fact, contract, and law that may arise
Further, determining whether an arbitrator manifestly disregarded the law can be a very difficult task because arbitrators do not have to disclose the reasons behind their awards. When an arbitrator fails to explain an award, a reviewing court can only infer from the record whether the arbitrator knew about the governing legal principle but decided to ignore it. In such a case, the court must confirm the arbitration award even if the ground for the decision is based on error of fact or law.

As one can see, courts that allow for the vacatur of an award based on an arbitrator’s manifest disregard of the law have set an extremely high standard for review. Because of the strong public policy that exists in favor of arbitration, courts give great deference to arbitrators’ decisions, and the judicial inquiry under the manifest disregard standard is quite limited.

RATIONAL FOR APPLYING, OR REFUSING TO APPLY, THE MANIFEST DISREGARD STANDARD

Courts evaluating whether to adopt the manifest disregard standard often reach different outcomes because of conflicting philosophies regarding two primary issues. First, courts disagree over the amount of deference they should grant to arbitrators’ decisions. Giving greater deference to the arbitrator will result in a more efficient judicial system. However, subjecting the arbitrators’ decisions to higher scrutiny will encourage arbitrators to comply with the requirements of the law.

Second, courts hold differing opinions on their ability to vacate arbitration awards on grounds that are not specifically listed in the applicable arbitration acts. Some state courts have refused to adopt the manifest disregard standard because it is not mentioned in their respective state laws on arbitration. All of the federal circuits, however, have adopted the standard as a ground for vacating arbitration awards, either accepting that manifest disregard is an official creation of the judiciary, or finding that manifest disregard is implicit in the language of the Federal Arbitration Act.

THE 11TH CIRCUIT’S APPLICATION OF THE MANIFEST DISREGARD STANDARD

The 11th Circuit adopted two other non-statutory grounds for vacating arbitration awards before it accepted manifest disregard, and it only accepted manifest disregard when faced with a case where one party “explicitly urged [the arbitrator] to disregard the law.” In Montes v. Shearson Lehman Brothers, the court vacated an arbitration award because Shearson’s attorney convinced the arbitrator to rule in favor of his client by saying: “I know, as I have served many times as an arbitrator, that you as an arbitrator are not ... strictly bound by case law and precedent. You have the ability to do what is right, what is fair and proper, and that’s what Shearson is asking you to do.”
For nearly 10 years, the Georgia Supreme Court and the Georgia Court of Appeals have reached differing opinions regarding the applicability of the manifest disregard standard.

11th Circuit analyzed the appropriateness of overturning an arbitration award under such circumstances and “conclude[d] that a manifest disregard for the law ... can constitute grounds to vacate an arbitration decision.” Nonetheless, the 11th Circuit emphasized the narrow scope of the manifest disregard standard and noted that it would not reverse arbitrators’ decisions for mere errors or misinterpretations of applicable legal principles. The court only applied the standard in Montes because “the arbitrators recognized that they were told to disregard the law.”

The most interesting aspect of Montes, however, is that in order to find that the arbitrators manifestly disregarded the law, the 11th Circuit had to presume that the arbitrators actually followed the advice of Shearson’s counsel. Thus, the court found “manifest disregard” without any type of admission by the arbitrators that they consciously ignored the law. Once the court determined that the arbitration decision was legally incorrect, the statements of Shearson’s counsel created a presumption that the arbitrators knowingly disregarded applicable legal principles. Because there was no evidence in the record to refute this presumption, the court vacated the arbitration award.

A potential problem with the 11th Circuit’s presumption is that, if construed broadly, it could be abused by the courts. Under such a standard, courts could find that virtually any improper evidence creates a presumption of arbitral wrongdoing. If there is no evidence in the record to refute the presumption once it arises (which will usually be the case because arbitrators normally do not provide written opinions), the court could freely vacate the award. However, the Montes court emphasized that manifest disregard is a narrow ground for vacatur and only adopted the standard where the record showed evidence that one party explicitly urged the arbitrator to ignore the law. Therefore, because such factual circumstances are rare, the likelihood of abuse in the 11th Circuit (i.e., applying Montes without legitimate evidence of arbitral wrongdoing) should be minimal.

GEORGIA’S TREATMENT OF THE MANIFEST DISREGARD STANDARD

For nearly 10 years, the Georgia Supreme Court and the Georgia Court of Appeals have reached differing opinions regarding the applicability of the manifest disregard standard. In 1994, the Georgia Court of Appeals accepted the principle that “an arbitrator’s decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of the law.” Two years later, however, the Georgia Supreme Court stated that courts should strictly construe the Georgia Arbitration Code and that the four statutory grounds listed under Section 9-9-13(b) of the Code were the exclusive grounds for vacating an arbitration award. Accordingly, the Court announced that a court may only vacate an arbitration award if the rights of a party were prejudiced by: (1) corruption, fraud, or misconduct, (2) a partial arbitrator, (3) an arbitrator’s overstepping his authority, or (4) a court’s failure to follow procedure.

In 2002, the Georgia Supreme Court issued another opinion on the validity of manifest disregard as a ground for vacatur. Progressive Data Systems v. Jefferson Randolph Corp. involved an arbitrator’s decision to award future licensing fees as damages for a breach of contract. Even though the arbitrator recognized that future licensing fees were an unenforceable penalty, he awarded them anyway. The Georgia Court of Appeals vacated the award by saying that the arbitrator manifestly disregarded the law, and it held that Section 9-9-13(b)(3) of the Georgia Arbitration Code implicitly contained manifest disregard as a ground for vacatur. However, the Georgia Supreme Court reversed the Court of Appeals’ decision, emphasizing that manifest disregard is not implicit within Section 9-9-13(b)(3), which section only allows courts to overturn arbitration awards when arbitrators overstep their authority. The Georgia Supreme Court noted that “[o]verstepping the arbitrator’s authority ... only comes into play when an arbitrator determines matters beyond the scope of the case,” and does not include the concept of manifest disregard.
Despite the Georgia Supreme Court's efforts to exclude manifest disregard as a ground for vacating arbitration awards, the standard now exists in the state because of recent actions taken by the Georgia General Assembly. In January 2003, a bill was introduced in the Georgia House of Representatives to specifically include manifest disregard as one of the grounds for vacatur contained in Section 9-9-13(b). Although that bill later died in the Senate, a second version successfully passed through both houses in April 2003. The governor then signed the bill into law on June 4, 2003, making Georgia the first state to legislatively adopt the manifest disregard standard. Therefore, effective July 1, 2003, “manifest disregard” is a valid ground for vacating arbitration awards in Georgia.

Because the General Assembly has enacted manifest disregard as part of Georgia’s Arbitration Code, Georgia courts must now decide how to apply the standard to the vacatur of arbitration awards. The language of the amendment to the Georgia Arbitration Code does not give courts any instruction on how to do so. The Code simply states that courts should overturn arbitration awards if the rights of a party were prejudiced by “[the arbitrator’s] manifest disregard of the law.” Therefore, Georgia courts are free to interpret the breadth of the new manifest disregard standard.

**WHAT TO EXPECT**

Considering the issues raised in state and federal courts over how to apply manifest disregard as a ground for vacatur, no clear guidelines exist for how Georgia courts should treat the General Assembly’s recent amendment to the Arbitration Code. One might argue that if the General Assembly had wanted to constrain arbitrators to be strictly bound by applicable law, the amendment could have been much more intentional. For example, the General Assembly could have enacted a specific ground for vacatur that the arbitrators “failed or refused to follow applicable law.” Instead, the legislature incorporated into the General Arbitration Code a checkered judicial doctrine most often interpreted by other state and federal courts to have a limited reach. Indeed, previous 11th Circuit and Georgia Court of Appeals decisions dealing with the issue of manifest disregard have attempted to place severe limitations on a court’s authority to review the merits of an arbitrator’s decision, and these limitations may well be instructive as to how Georgia courts will treat the standard.

If Georgia courts continue with this trend and treat the manifest disregard standard as they have in the past, the scope of the manifest disregard doctrine in Georgia will be very limited.

**Endnotes**


2. See Advest, Inc. v. McCarthy, 914 F.2d 6, 9 n5 (1st Cir. 1990); Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 380 (3d Cir. 1995); Remmey v. Paine Webber, Inc. 32 F.3d 143, 149 (4th Cir. 1994); Williams v. Cigna Financial Advisors, 197 F.3d 752, 758-59 (5th Cir. 1999); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 850-51 (6th Cir. 1996); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992); Lee v. Chica, 983 F.2d 883 (8th Cir. 1993); Michigan Mut. Ins. v. Unigard Sec. Ins., 44 F.3d 826, 832 (9th Cir. 1995); ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995); Montes v. Shearson Lehman Brothers, 128 F.3d 1456, 1461-62 (11th Cir. 1997); Sargent v. Paine Webber Jackson & Curtis, Inc. 882 F.2d 529, 532-33 (D.C. Cir. 1989).

3. See Swentor v. Swentor, 520 S.E.2d 330, 338 (S.C. Ct. App. 1999) (“The court may vacate the award only upon the establishment of one of the grounds set forth in section 15-48-130, or the rarely applied non-statutory ground of ‘manifest disregard or perverse misconstruction of the law.’”); Geissler v. Sanem, 949 P.2d 234, 237-38 (Mont. 1997) (accepting manifest disregard as a well reasoned approach to vacat-
ing arbitration awards); Wichinsky v. Mosa, 847 F.2d 727, 731 (Nev. 1993) ("When an arbitrator manifestly disregards the law, a reviewing court may vacate an arbitration award"); Garrity v. McCaskey, 612 A.2d 742, 746-47 (Conn. 1992) (accepting manifest disregard as a ground for vacatur); Board of Educ. v. Prince George’s County Educator’s Ass’n, 522 A.2d 931, 938-41 (Md. 1987) (passing on the question of whether manifest disregard is a standard for vacatur under statutory law but stating that "[u]nder Maryland common law standards for reviewing arbitration awards, however, we hold that an award is subject to being vacated for a ‘palpable mistake of law or fact ... apparent on the face of the award’ or for a ‘mistake so gross as to work manifest injustice.").

4. 1 DOMKE ON COMMERCIAL ARBITRATION § 33.08 (2003) [hereinafter DOMKE].


6. ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995).

7. DOMKE, supra note 4, at § 33.08; see also 4 Ian R. MACNEIL, ET AL., FEDERAL ARBITRATION LAW §§ 7.7 (2d Ed. 1999) [hereinafter MACNEIL ET AL.] ("It is nearly impossible to find FAA arbitration decisions where application of the doctrine has resulted in upsetting of an award.").


9. Compare Advest Inc. v. McCarthy, 914 F. 2d 6, 8-9 (1st Cir. 1990) (stating that the First Circuit will enforce the manifest disregard standard where it is clear that the arbitrator knew the applicable law and ignored it) with Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (vacating an arbitration award based on the arbitrator’s manifest disregard of the law and facts).

10. 568 S.E.2d 474, 475 (Ga. 2002).

11. Id. at 475.


15. Id. at 741.

16. See Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1215 (2d Cir. 1972) (stating that forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process achieves).

17. See Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1461 (11th Cir. 1997) ("An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.").

18. See id. at 1459-60 ("By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

19. See Williams v. Cigna Financial Advisors, 197 F.3d 752, 761 (5th Cir. 1999); MACNEIL ET AL., supra note 7, at § 40.7.2.1.

20. DOMKE, supra note 4, at § 33.08.

21. Id. at § 33.08; see also MACNEIL ET AL., supra note 7, at § 40.7.2.1 (expounding on the principles of the manifest disregard standard).


23. See DOMKE, supra note 4, at § 33.08.

24. Id.; but see Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (vacating an arbitration award where the arbitrator manifestly disregarded the evidence).

25. See MACNEIL ET AL., supra note 7, at § 40.7.2.1.

26. See id. at § 40.7.2.5 (discussing the degree to which courts should allow arbitrators to supersede applicable law with their own ideas of justice).

27. See, e.g., Warlington Constr., Inc. v. Franklin Landmark LLC, 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001) (refusing to adopt manifest disregard as a basis for vacating arbitration awards).

28. See Williams v. Cigna Financial Advisors, 197 F.3d 752, 759 (5th Cir. 1999) ("Accordingly, each of the other numbered federal circuit courts and the D.C. Circuit have recognized manifest disregard of the law as either an implicit or nonstatutory ground for vacatur under the FAA."). See also cases cited supra note 2.

29. See, e.g., Advest, Inc. v. McCarthy, 914 F.2d 6, 9 n5 (1st Cir. 1990) ("The lane of review that has opened out of this [manifest disregard] language is a judicially created one, not to be found in 9 U.S.C. § 10.").


31. Montes v. Shearson Lehman Brothers, 128 F.3d 1456, 1458 (11th Cir. 1997) (recognizing that the 11th Circuit previously adopted "arbitrary and capricious," and "contrary to public policy" as grounds for vacating an arbitration award before accepting the manifest disregard standard).

32. Id. at 1459.

33. Id. at 1461-62.

34. Id. at 1460-62.

35. Id. at 1462.


45. See Greene, 468 S.E.2d at 352 (citing GA. CODE ANN. § 9-9-13(b)(1)-(4) (2002)).

46. See Progressive Data Systems, 568 S.E.2d at 474.


49. Id.

50. See GA. HB 91 (2003).


52. See GA. HB 792 (2003).

53. Most courts admit that manifest disregard is a limited ground for vacatur. Some, however, have adopted a very broad interpretation.

---

**Lawyer Assistance Program**

This free program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems and mental or emotional impairment. The program also serves the families of Bar members, law firm personnel and law students.

If you have a personal problem that is causing you significant concern, the Lawyer Assistance Program can help. Please feel free to call one of the volunteer lawyers listed below. All calls are confidential. We simply want to help you.

**Area**                  **Committee Contact**                  **Phone**
Albany                     H. Stewart Brown                  (229) 420-4144
Athens                     Ross McConnell                (706) 369-7760
Atlanta                    Melissa McMorries                (404) 688-5000
Atlanta                    Brad Marsh                      (404) 874-8800
Atlanta/Decatur            Ed Furr                         (404) 284-7110
Atlanta/Jonesboro          Charles Driebe                 (770) 478-8894
Cornelia                   Steve Adams                    (770) 778-8600
Fayetteville               Wiley Glen Howell             (770) 460-5250
Hazelhurst                 Luman Earle                    (478) 275-1518
Macon                      Bob Berlin                     (478) 477-3317
Macon                      Bob Daniel                    (912) 741-0072
Norcross                   Phil McCurdy                   (770) 662-0760
Savannah                   Tom Edenfield                  (912) 234-1568
Valdosta                   John Bennett                  (229) 333-0860
Waycross                   Judge Ben Smith               (912) 449-3911
Waynesboro                 Jerry Daniel                  (706) 554-5522

**Hotline: (800) 327-9631. All Calls are Confidential.**
The Effect of Forum-Selection Clauses on a District Court's Power to Compel Arbitration

BY JOHN W. HINCHEY AND THOMAS V. BURCH

Section 4 of the Federal Arbitration Act creates a trap for unwary drafters of arbitration clauses because it contains conflicting directions to district courts on the proper venue to hear motions to compel arbitration. For this reason, having a forum selection clause in an arbitration agreement may not achieve the desired certainty that the forum selected will be the locale for resolving any disputes that may arise. Courts have adopted three approaches for resolving § 4's internal conflict and have managed to turn the selection of arbitral venue into a process that requires the undivided attention of parties and their attorneys.

Typically, forum selection clauses provide a measure of predictability and certainty to contracts. However, forum-selection clauses in arbitration agreements may not provide the certainty that contracting parties expect. Because of conflicting language in § 4 of the Federal Arbitration Act (FAA), much judicial confusion exists on the district courts' authority to compel arbitration in the location mandated by the parties' agreement. Specifically, § 4 provides that district courts should compel arbitration in accordance with the terms of the parties' agreement, but it also provides that the arbitration should take place within the district where the motion to compel arbitration was filed. Section 4 does not explain, however, how a district court should proceed when a party seeking to compel arbitration files a motion to compel in a district outside of the parties' contractually selected forum. In the absence of such guidance, courts have adopted three different approaches to resolving the issue and have turned what should be a straightforward analysis into a surprisingly complex inquiry. This article attempts to explain the three approaches and examines each in light of the Federal Arbitration Act.


Several federal circuit courts have decided that a district court has the power to compel