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I. INTRODUCTION

Likely the most salient, significant, and uniquely American contribution to private procedural international law is embodied in 28 U.S.C. § 1782(a).1 This statute boldly authorizes the use of the Federal Rules of Civil Procedure—specifically, the rules governing the discovery of documents and information in U.S. federal courts2—to assist a “foreign tribunal” or “investigation” (preaction) with securing documents or deposition testimony from persons or entities present (not limited to residents) in the United States.3

Adherence to § 1782(a) in the context of international commercial

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2. Pursuant to the methodology set forth in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the judicial authority of a signatory state may petition the competent authority of another signatory state by issuing letters rogatory to request the gathering of evidence. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 1, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. Even though this system represents a remarkable development in the arena of international judicial assistance, it is less than satisfactory in terms of effectiveness and efficiency. The Convention forces the petitioning party to surrender control of the discovery process pursuant to its domestic procedural rules and shifts the burden to the authorities of the nation receiving the letter rogatory to comply with the request in conformance with its status as a signatory state. See id. art. 9. Section 1782, however, allows a non-U.S. party to a non-U.S. proceeding or investigation to circumvent the cumbersome letters rogatory methodology and directly apply to a U.S. federal district court for discovery, consonant with the Federal Rules of Civil Procedure, from an entity located within the jurisdiction of the federal district court. See § 1782(a). Today, it is patent that the United States has undertaken a protagonist role in providing global access to its federal court system for the limited purpose of providing foreign tribunals with assistance in the context of discovery and gathering of evidence. For a list of obstacles raised by nations with judicial systems based upon the Roman-Germanic Civil Code, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 847–49 (2009).
3. The fundamental proposition governing § 1782 can be summarized as follows:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement
arbitration reconfigures the procedural law applicable to an arbitral proceeding as to the gathering of documents and information by parties, and even the very commencement of the proceeding. Post-Intel Corp. v. Advanced Micro Devices, Inc. and its progeny, an "interested person" is vested with authority to prosecute a § 1782(a) petition in a federal district court in the United States prior to actually filing and serving a request for arbitration, so long as the filing of such arbitral proceeding is "in reasonable contemplation." Thus, the arbitration, which now as a matter of law constitutes a "foreign or international tribunal," need not even be pending before a prospective respondent finds itself with a binding normative legal obligation to respond to "discovery," as opposed to the mere gathering or taking of evidence, pursuant to the Federal Rules of Civil Procedure. Intel and its progeny divest prospective institutional arbitral centers from even engaging in the most rudimentary arbitration case-management exercise of administering the gathering of evidence. Similarly, this extraordinary doctrinal development in private procedural international law divests arbitral tribunals of all authority concerning the applicable standard, the conduct, the admissibility, the nature, and the character of the disclosure and exchange of documents and information between parties and nonparties to an arbitral proceeding.

Irrespective of whether § 1782 is deemed a positive doctrinal

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§ 1782(a) (emphasis added).

The current iteration of § 1782 was adopted with modifications in 1964. Courts have observed that § 1782 was amended "to facilitate the conduct of litigation in foreign tribunals, improve international cooperation in litigation, and put the United States into the leadership position among world nations in this respect." In re Bayer AG, 146 F.3d 188, 191–92 (3d Cir. 1998). After reviewing the Senate Report that accompanied the final iteration of the draft that eventually became the current version of § 1782, the United States Court of Appeals for the First Circuit concluded that "Congress hoped to encourage foreign countries to revise their judicial procedures similarly." In re Application of Asta Medica, S.A., 981 F.2d 1, 5 (1st Cir. 1992) (citing S. Rep. No. 1580 (1964)).


5. Id. at 247. It is less than clear, however, whether as a matter of law, a federal district court may exercise its discretion in favor of granting a § 1782(a) petition prior to the filing of a request for arbitration where, despite the imminence of the proceeding, there is a finding of record that the petition was filed and prosecuted for purposes of perfecting or rendering possible the actual claim as opposed to gathering documents and information for use, presumably with respect to the adjudication of the merits. This issue is one of first impression.

6. Id. at 258.

7. Id. at 247.

8. See id. Indeed, this wresting of authority certainly is in pace with most major arbitration institutions. The International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR), by way of example, accord the arbitral tribunal virtually unbridled discretion in the (1) conduct, (2) fashioning of the applicable standard, and (3) admissibility of document and information disclosure.
development in both U.S. (domestic) and international arbitral proceedings, there are numerous paradigms in which risk-assessment models suggest that a party to a transaction would be decisively and materially disadvantaged should a dispute arise precipitating the invocation of an arbitration clause and, consequently, the possible filing of a § 1782 petition by the adverse party.

The most common scenario where a party to an arbitral proceeding would be disadvantaged if § 1782 applications were filed with U.S. federal district courts is the common case where the seat of the arbitration is located outside the United States and its territories, and the respondent to a § 1782 petition has headquarters, affiliates, asset managers, agents, representatives, bank accounts, or past transactions in the United States that fall within the ambit of Rule 26 of the Federal Rules of Civil Procedure. Conversely, the petitioner is typically a non-U.S. entity with no ties whatsoever to the United States, other than the event giving rise to the arbitration that is now characterized as a proceeding in a foreign or international tribunal for purposes of § 1782(a). Consonant with this scenario, the respondent is meaningfully exposed in contrast to the petitioner, who has assets and contacts beyond the jurisdiction of federal district courts. A permutation of this equally treacherous and unilateral paragon occurs in the context of discovery in aid of execution of an arbitral award even before the award itself has been formally, if not substantively, reduced to an official, court-issued judgment. Moreover, it remains far from clear whether incorporating language in the arbitral clause would proscribe recourse to § 1782(a). It is equally opaque whether agreement on the United States as the arbitral seat, so as to attempt to render the tribunal "nonforeign" for purposes of § 1782, also would obviate the statute’s application.

Intel and its scant progeny, to date, have yet to address these novel issues. Two methodologies, both strategically and tactically executed at the negotiating stage of the arbitration clause, do suggest themselves as possible defenses to the application of § 1782. This article seeks to explore the doctrinal consequences that may affect enforcement of an arbitration award arising from an arbitral tribunal’s refusal to consider evidence obtained pursuant to § 1782 and in accordance with Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or consonant with the doctrine of manifest disregard of the law. In so endeavoring, this article shall necessarily trace the contours of the doctrine of manifest disregard of the law.

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law and submit to sustained and reasoned examination of the jurisprudence attendant to the proscription of § 1782.

II. THE DISADVANTAGED PARTY: CAN ANYTHING BE DONE?

A. The First Approach and Rediscovering Basics

First, a return to first principles is necessary. Because arbitration itself, and hence the arbitral tribunal, are but creatures of contract in both theory and praxis, the parties’ intent must be paramount in the construction of the terms of the arbitration clause. Where the parties in advance agree to foreclose recourse to § 1782, the arbitral tribunal presumably would honor the agreement and shy away from applying § 1782. In fact, the tribunal theoretically is empowered to issue an order denying any such application. The possible practical and conceptual difficulties arise with the ubiquitous issue of enforcement.

Assuming that the movant unilaterally files a § 1782 petition under the theory that, among other considerations, such petitioner meets the statute’s strictures, which are independent of and parallel to the arbitral tribunal’s ambit, it is certainly conceivable that a federal district court may find the argument persuasive, despite the plain meaning of the language contained in the arbitration clause. Consequently, although advisable and potentially dispositive, it is far from certain that inclusion of language proscribing recourse to a § 1782 petition would indeed limit the parties or otherwise foreclose them from availing themselves of the Federal Rules of Civil Procedure pursuant to this framework. Also, one would be hard pressed to conclude that a federal district court necessarily would defer to an arbitral tribunal’s interlocutory ruling. Close scrutiny of the Intel opinion, to some extent, suggests that even if the arbitral tribunal conclusively and indisputably ruled that it did not wish for § 1782 discovery to proceed, the vast discretion vested in federal district courts certainly may be exercised, notwithstanding the arbitral tribunal’s volition. Specifically in Intel, the discovery sought was granted as a matter of law even though, quite significantly, the foreign tribunal had refused to seek it. The narrow issue is whether a court addressing a

10. See AT & T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 648–49 (1986) (noting that “arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration” (citing Gateway Coal Co. v. Mine Workers of Am., 414 U.S. 368, 374 (1974))).

11. See Intel, 542 U.S. at 261–62 (“A foreign tribunal’s reluctance to order production of materials present in the United States . . . may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a) [in United States federal courts].”).

12. See id. at 265 (granting discovery although “[t]he European Commission has stated in amicus curiae briefs to this Court that it does not need or want the District Court’s assistance”).
§ 1782 application would enforce the parties’ prior agreement not to file any such request.

A related issue arises when the movant unilaterally prosecutes a § 1782 petition, successfully secures documents and information, and, upon attempting to introduce these materials into evidence during the arbitration, is precluded from so proceeding by the arbitral tribunal. Would the arbitral tribunal’s categorical refusal to consider evidence secured pursuant to § 1782, consistent with the explicit language of the governing arbitral agreement proscribing such discovery, jeopardize the integrity of the final award to be rendered in such proceedings? Greater analysis is necessary.

B. The Consequences of Refusal and the New York Convention

Refusal to consider materials lawfully secured pursuant to a federal statute is susceptible to being characterized, at least under one of many analyses, as precluding a party from presenting its case. In such a situation, a ruling by the arbitral tribunal may directly and explicitly trigger application of Article V of the New York Convention. Article V(1)(b) proscribes the recognition and enforcement of an arbitral award where a

13. Article V of the New York Convention governs the recognition and enforcement of arbitral awards and is so central to the universal success of international commercial arbitrations that it compels citation in its entirety:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
party was “unable to present his case.”

Certainly, the petitioner to the § 1782 application may have a built-in appellate recourse with substantial and measurable basis for setting aside the award, should it determine the award to be contrary to its interests. Therefore, an arbitral tribunal’s blanket foreclosure of materials secured in accordance with § 1782 runs the very immediate and material risk of rendering any prospective award unenforceable.

Further analytic and legal support for this interpretation may be found in 9 U.S.C. § 10(a)(3) of the Federal Arbitration Act (FAA). In praxis, this provision constitutes a codification and interpretation of Article V(1)(b) of the New York Convention. Section 10(a)(3) seeks to underscore the need for fundamental due process as a predicate to recognition and enforcement of a foreign arbitral award by identifying as a ground for vacating an award any instance where the arbitrators “refus[ed] to hear evidence pertinent and material to the controversy[,]” or in cases where “any other misbehavior by which the rights of any party have been prejudiced . . . .” A blanket preclusion by the arbitral tribunal of any consideration of documents or other information elicited pursuant to § 1782 could quite conceivably fall within both of the referenced categories: (1) denial of an opportunity to present a case and (2) misbehavior by an arbitrator adversely compromising the rights of a

(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.

New York Convention, supra note 9, art. V.


15. See 9 U.S.C. § 10(a)(3) (2006), which provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

... 

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced[]

Id.

16. Compare id. (authorizing a United States court to vacate an order issued pursuant to an arbitration proceeding “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”), with New York Convention, supra note 9, art. V(1)(b) (providing that “[r]ecognition and enforcement of the [arbitration] award may be refused . . . [i]f [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”).

Indeed, multiple countries had varying and often conflicting views on what elements actually render an arbitral award "international" or "foreign" for purposes of the New York Convention. Not surprisingly, the conceptual differences were fundamentally between common law and civil law doctrinal views on the subject, each rooted in their respective legal and social cultural traditions. These divergent views were carefully canvassed by the United States Court of Appeals for the Second Circuit in Bergesen v. Joseph Muller Corp.

In that case, the plaintiff, a Norwegian owner of cargo vessels, filed an action against the charterer of the ships for the recognition and enforcement of a judgment arising from an arbitral award rendered in New York in favor of the owner and against the charterer. The underlying arbitration arose from clauses contained in the charter parties. The district court entered judgment recognizing and enforcing the arbitration award, and an appeal ensued to the Second Circuit, which affirmed the district court’s ruling. The Second Circuit identified the issue to be considered as "whether the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable to an award arising from an arbitration held in New York between two foreign entities." After explaining that the Convention, in part, resulted from "the rapid expansion of international trade following World War II" and from the penchant of international merchants for "arbitration over litigation because it is faster, less expensive and more flexible[,]" the Second Circuit premised its affirmanse on a painstaking analysis of the different propositions asserted for defining a “foreign” or “international” award within the draft Convention’s then-aspirational objective.

18. See id.
20. 710 F.2d 928, 931 (2d Cir. 1983).
21. Id. at 929–30.
22. Id. at 929.
24. Bergesen. 710 F.2d at 929 (citation omitted).
25. Id. The court also noted that in 1958, the Convention was held to address the inefficacy of international agreements in securing enforcement of arbitral awards even when such arbitration proceedings were conducted under the auspices of the ICC or the LCIA. Id. In this same vein, the Second Circuit observed that "[t]he United States attended and participated in the conference but did not sign the Convention. Ten years later, in 1968, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation." Id. (citing John P. McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 2 J. MAR. L & COM. 735, 737 (1971)). “There was no opposition to the proposed enactment.” Id. (citing H.R. REP. No. 91-1181 (1970)).
The nations of western Europe, it was advanced, and their counterparts from common-law jurisdictions, were at a doctrinal and conceptual stalemate.\textsuperscript{26} By way of example, France, Italy, and then-West Germany, found the proposed definition of foreign tribunal unacceptable because, in their view, a territorial criterion was ill suited as a litmus test to determine the character of an award as foreign or domestic.\textsuperscript{27} Instead, these nations preferred a three-prong test that considered (1) the nationality of a party, (2) the subject of the dispute, and (3) the rules of arbitral procedure as the most material factors to be analyzed in determining the character and nature of an award as foreign or domestic.\textsuperscript{28} West Germany and France were of a single voice in asserting that the nationality of an award must be determined by the law governing the proceeding.\textsuperscript{29}

So as to articulate a viable alternative to the territorial doctrine, "eight European nations proposed that the Convention ‘apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon.’"\textsuperscript{30} The court further noted that "[e]ight other countries, including the United States, objected to this proposal, arguing that common law nations would not understand the distinction between foreign and domestic awards. These latter countries urged the delegates to adopt only the territorial criterion."\textsuperscript{31} Having delineated the two doctrinal camps and the resolution synthesizing a compromise formula, the Second Circuit surgically addressed the six propositions upon which the appellant charterer bottomed its appeal.

First, appellant asserted that "the award may not be considered a foreign award within the purview of the second sentence of Article I(1) because it fails to qualify as an award ‘not considered as domestic.’"\textsuperscript{32}

\textsuperscript{26} Id. at 931.
\textsuperscript{27} Id.
\textsuperscript{28} Id.; see also G.W. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 2 (1958).
\textsuperscript{29} Bergesen, 710 F.2d at 931.
\textsuperscript{30} Id. (quoting HAIGHT, supra note 28, at 2).
\textsuperscript{31} Id. The Second Circuit further underscored that:

A working party composed of representatives from ten states to which the matter was referred recommended that both criteria be included. Thus, the Convention was to apply to awards made in a country other than the state where enforcement was sought as well as to awards not considered domestic in that state. The members of the Working Party representing the western European group agreed to this recommendation, provided that each nation would be allowed to exclude certain categories of awards rendered abroad. At the conclusion of the conference this exclusion was omitted, so that the text originally proposed by the Working Party was adopted as Article I of the Convention.

\textsuperscript{32} Id. at 932.
In connection with this argument, the appellant further averred that "the purpose of the 'not considered as domestic' test was to provide for the enforcement of what it terms 'stateless awards,' i.e., those rendered in the territory where enforcement is sought but considered unenforceable because of some foreign component." 33 This argument was flatly rejected on the ground that "some countries favoring the provision desired it so as to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically." 34

Second, appellant urged a narrow construction of the Convention concerning the omission of any definition of nondomestic awards so as to conclude that eligible awards were very few in both theory and practice. Here, the Second Circuit stressed that "[t]he Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'nondomestic' in conformity with its own national law." 35 In fact, this omission, as the court aptly grasped, rendered it more palatable for states promoting the territorial doctrine to ratify the Convention, while simultaneously rendering the Convention more appetizing to "those states which espoused the view that the nationality of the award was to be determined by the law governing the arbitral procedure." 36 Consequently, the court adopted the view that awards "not considered as domestic" refer to awards falling within the Convention's purview "not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." 37 To be sure, the construction that the court adopted best comports with the Convention's principal objective of rendering international arbitration awards enforceable transnationally irrespective of divergent, and often conceptually irreconcilable, doctrinal differences embedded in the very heart of different legal cultures and traditions.

Third, the court rejected the proposition that the Convention must be narrowly construed because of the two reservations to Article I(3) that the United States adopted upon accession. 38 The contention was rejected

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33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id. at 932–33. This contention was predicated on a Presidential Proclamation dated September 1, 1970. Id. (construing New York Convention, supra note 9, 21 U.S.T. 2517, 330 U.N.T.S. 3).
on the ground that "[t]he fact that the United States acceded to the Convention with a declaration of reservations provides little reason for [the court] to construe the accession in narrow terms." 39 The court further added that "[h]ad the United States acceded to the Convention without these two reservations, the scope of the Convention doubtless would have had wider impact." 40 "Nonetheless, the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes." 41 Succinctly stated, the norms governing the construction of treaties are not subordinated to instances that may be drawn from the two Article I(3) reservations that the United States secured as a predicate to accession.

Fourth, it was argued that "the implementing statute was not intended to cover awards rendered within the United States." 42 In support of this premise, reference was made to 9 U.S.C. § 202, 43 entitled "Agreement or award falling under the Convention," which, in pertinent part, reads:

An [arbitration] agreement or award arising out of... a [legal] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. 44

This statutory rubric's legislative history, however, demonstrates that "it was intended to ensure that 'an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state.' " 45 The court reasoned that "[h]ad Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so." 46

Moreover, additional analytical support for the premise that arbitral awards issued in the United States constitute the appropriate subject matter for enforcement pursuant to the Convention was found in the

39. Id.
41. Id. (identifying the Convention's objective as an effort "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts" (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974))).
42. Id.
45. Id. (alteration in original) (citing H.R. Rep. No. 91-1181(1970)).
46. Id.
remaining sections of the implementing statute. In fact, the court observed, “Section 204 supplies venue for such an action and section 206 states that “[a] court having jurisdiction under this chapter may direct that arbitration be held . . . at any place therein provided for, whether that place is within or without the United States.” This construction was further supported by what in effect would be an analysis premised on a reductio ad absurdum. Specifically, the court underscored that “[i]t would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose.”

Appellant’s fifth and penultimate assertion was that Congress could not have intended to apply the Convention to a transaction akin to the one at bar “because it would remove too broad a class of awards from enforcement under the Federal Arbitration Act . . . .” This proposition was discarded on the simple ground that there was no basis from which to conclude “that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act.”

Sixth, the final proposition upon which the appeal was predicated asserted that the petition itself was technically insufficient and, therefore, “did not meet the requirements of the Convention.” In particular, appellant placed a rather novel construction on Article IV(1) of the New York Convention by suggesting that either a duly authenticated original or a certified copy of a duly authenticated original is required pursuant to Article IV(1). Here, the court observed that “[c]opies of the award and the agreement which have been certified by a member of the arbitration panel provide a sufficient basis upon which to enforce the award and such were supplied in this case.”

As exemplified in Bergesen v. Joseph Muller Corporation, the very fundamental issue of what constitutes an “international” or “foreign” tri-

47. Id. (alterations in original).
48. Id.
49. Id. at 934 (citation omitted).
50. Id.
51. Id.
52. Article IV(1) of the New York Convention provides:

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof.

New York Convention, supra note 9, art. IV(1).
53. Bergesen, 710 F.2d at 934.
54. Id.
bunal has been the subject of considerable debate and controversy among practitioners, judges, and scholars from civil code and common law traditions. The hybrid and flexible resolution of this fascinating clash of juridical, cultural doctrines provides sufficient conceptual grounds from which to argue forcefully and persuasively, based upon the particular facts configuring a case, that under such circumstances, an international arbitration having the arbitral seat in the United States certainly may constitute a "foreign or international tribunal" for purposes of a § 1782(a) application. Thus, an arbitration clause that selects the United States or any of its territories as the arbitral seat far from ensures preclusion of a § 1782 application.

III. POSSIBLE CONSEQUENCES OF REFUSAL AND MANIFEST DISREGARD OF THE LAW

In addition to triggering issues concerning Article V of the Convention—issues that may adversely compromise the integrity of a prospective final award because of the arbitral panel’s failure to accord a party an opportunity to present its case—an arbitral tribunal’s blanket rejection of § 1782 discovery may be construed as "manifest disregard of the law."

Pursuant to 9 U.S.C. § 10(a), an arbitration award may be vacated where the arbitrators (1) engaged in misconduct or (2) "exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."55 Significantly, unlike the strictures set forth in Article V of the Convention for setting aside an award, U.S. jurisprudence recognizes vacatur of an award sought to be enforced in a U.S. district court where there is a determina-

55. 9 U.S.C. § 10(a)(3)-(4) (2006). Indeed the grounds for vacating an award for rehearing are quite narrow and are set forth in § 10(a)-(b), which reads:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(1) where the award was produced by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
tion that the award arose from the arbitral tribunal’s “manifest disregard of the law.” To command reversal under this precept, the award “must fly in the face of clearly established legal precedent.” Manifest disregard shall be found where “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.”

By way of example, in Jacada (Europe), Ltd. v. International Marketing Strategies, Inc., the plaintiff British software developer filed a state court action to vacate an arbitral award that had been rendered in favor of the defendant distributor. The distributor, however, filed an action in federal court to enforce the arbitral award issued in its favor. Upon removal of the state-court proceeding, transfer, and consolidation of the actions, the federal district court entered a judgment in favor of the distributor who sought enforcement. The United States Court of Appeals for the Sixth Circuit affirmed the district court’s ruling and rejected the appellant developer’s contention that the arbitrators’ decision displayed manifest disregard of the law.

There, vacatur of the award was premised on the proposition that the arbitral tribunal purposely and intentionally failed to accord any weight to a limitation of damages provision. This fact was not contested and, indeed, the arbitrators observed that “the potential effect of the limitation of damages provisions is to . . . exclude damages for a large breach of the Agreement while permitting damages for a small breach of the contract.” Therefore, the Sixth Circuit reasoned that because the limited liability provision rendered the distributor’s right “meaningless” as to the distribution agreement, the arbitrators “disregarded the provision to effectuate a core purpose of the contract, [the distributor’s] right to distribute the [developer’s] software package throughout Europe, the Middle East, and Africa.”

The command in Jacada is clear: Where an arbitral tribunal construes a contract so as to further the underlying goals and purpose of that

57. Id. at 704.
58. Id. at 715.
59. Id. at 712-13.
agreement, manifest disregard of the law shall not ensue, even where such contractual construction intentionally and deliberately obviates a contractual provision negotiated at arm’s length between the parties. The Sixth Circuit’s analysis in *Jacada* and its recitation of the elements defining manifest disregard of the law may shed some light on the issue of whether an arbitral tribunal’s foreclosure of § 1782 discovery or its decision to strictly construe an arbitration clause that proscribes recourse to § 1782 may constitute manifest disregard of the law for purposes of vacating an award. Arguably, the first prong of the manifest disregard of the law standard is met where the tribunal disregards § 1782 as the applicable procedural legal principle, which is both clearly defined and not subject to reasonable debate. The blanket refusal to consider any of the § 1782 discovery likely satisfies the second prong—refusal to follow the applicable legal standard.

This proposition would be analytically enhanced where it is undisputed that consideration of such discovery would further the subject contract’s objectives. As in *Jacada*, in this hypothetical, the arbitral tribunal would be reading out a provision of the contract, presumably so as to further the equitable administration of justice and the goal of the arbitration agreement (if such a goal is, in part, defined as a consideration of all potentially relevant and material documents and information leading to a comprehensively transparent airing of the issue in controversy). Here, the arbitration clause itself is deemed to be the agreement. The converse analysis is equally engaging.

Again, following the *Jacada* analysis, would manifest disregard of the law attach where an arbitral tribunal exercises its discretion to foreclose consideration of all documents and information arising from § 1782 application, particularly where an arbitration clause does not mention § 1782 at all? Under this hypothetical, the arbitrators are not asked to read out or otherwise deliberately ignore a bargained-for contractual provision, unlike in *Jacada* and the first hypothetical. Here, however, the arbitral tribunal is being asked to disregard arguably applicable procedural law governing the gathering of evidence. Can the disregard of a procedural law that does not arise from the seat of the arbitration rise to the level of manifest disregard of law?

Under this scenario, the analogy to *Jacada* rapidly collapses. In contrast to *Jacada*, the scenario does not address the intentional omission of a legal provision in a contract (be it the actual contract or the arbitration clause, construed under the severability doctrine as a free-standing contract). Additionally, the federal law of the United States—a jurisdiction foreign to the arbitral seat—is being applied. The problem becomes exquisitely more complex because in this hypothetical, there is
no "precedent," unlike the test enunciated in *Jacada*, which requires that the arbitrator's award "must fly in the face of clearly established legal precedent."67 Also unlike *Jacada*, the issue in this hypothetical is the alleged disregard for procedural and not substantive law.

To some extent, the construction of the hypothetical illustrates the many dormant issues that remain for adjudication and scholarship so as to create, if not binding precedent, a body of commentary that may serve to facilitate efforts by arbitrators, courts, practitioners, and captains of industry to address this issue. It also provides a clear understanding of the rather mercurial and elusive nature of the "manifest disregard of the law" standard that is unique to U.S. enforcement proceedings and finds no, at least ostensible, doctrinal basis in Article V of the Convention. Indeed, the jurisprudence in this area commands greater scrutiny of this doctrinal development.

Certainly, general fundamental elements of the manifest disregard of the law doctrine are clear and beyond cavil. By way of example, it is undisputed that an arbitral award may be vacated if manifest disregard of the law is plainly evident from the arbitration record.68 It is less than clear, however, the nature and character of the record that arbitral proceedings keep. Thus, the complete absence of any meaningful guidance as to the configuration of a record, as verbatim transcripts are not requirements in arbitration proceedings, may indeed conceivably hamper the review of the systematic misapplication of law during the actual proceeding. It is also settled that a reviewing court must accord an arbitral panel's decision "great deference."69 Indeed, "[a] party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law."70 Beyond these very rudimentary precepts, it appears to be hardly discernible, from a conceptual standpoint, an objective test that would categorically suggest when the doctrine actually attaches.

The doctrine's origins can be traced to dicta contained in *Wilko v. Swan*.71 There, the Supreme Court observed that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not sub-

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67. *Id.* (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)).
68. See, e.g., *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002).
70. *Id.*
ject, in the federal courts, to judicial review for error in interpretation. Notably, the doctrine finds its genesis in five words that scarcely constitute a subordinate clause within a single sentence. The Supreme Court did not offer any guidance or otherwise elaborate on what would be an example of manifest disregard of the law warranting vacatur of an arbitration award, let alone a standard for the practicing bench and bar. It is from this modest statement, without more, that jurisprudence has developed in effect amending the very narrow grounds for vacating an award embodied in the FAA.

A. The Duferco Analysis: An Attempt to Discern a Doctrine’s Defining and Salient Elements

The Second Circuit in Duferco International Steel Trading v. T. Klaveness Shipping A/S undertook a meaningful analysis of some cases within the sparse universe of authority where manifest disregard for the law was found by federal appellate courts. After observing that it (the Second Circuit) had first enunciated the severely limited and highly deferential arbitral award standard in 1960, the court observed that as of June 24, 2003 it had vacated “some part or all of an arbitral award for manifest disregard in . . . four out of at least [forty-eight] cases where [it] applied the standard.” But for the decision in Halligan v. Piper Jaffray, for authority, in dicta, observing that a punitive-damage award by an arbitral panel would support vacatur, see Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347, 365 (5th Cir. 2003), which states, “Thus, if punitive damages were indeed awarded in this case, it would be

72. Id. at 436-37 (emphasis added).
73. See Duferco, 333 F.3d at 388.
74. 333 F.3d 383 (2d Cir. 2003).
75. That standard was articulated by the Second Circuit in Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).
76. Duferco, 333 F.3d at 389. The court identified these cases as the following four:
1. Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (holding that “in view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both”)
2. N.Y. Tel. Co. v. Commc’ns Workers of Am. Local 1100; 256 F.3d 89, 93 (2d Cir. 2001) (per curiam) (holding that the “opinions [relied on by the arbitrator were] not the law of this circuit” and “it was therefore ‘manifest disregard of the law’ for the arbitrator to reject [Second Circuit law] and apply another rule”)
3. Fahnestock & Co. v. Waltman, 935 F.2d 512, 519 (2d Cir. 1991) (holding that “this is an appropriate case under the provisions of section 10(d) of the FAA for vacatur of the punitive damages award”)

Id.
Inc., the remaining three cases concerned review of arbitral awards that exceeded the arbitrator's authority. Accordingly, the Second Circuit contended, "In those cases, it is arguable that manifest disregard need not have been the basis for vacating the award, since vacatur would have been warranted under the FAA." Also, the Second Circuit aptly defined the standard for application of the doctrine in the negative. Despite the apparent want of doctrinal development, the court's guidepost is of meaningful assistance. It explained,

Our reluctance over the years to find manifest disregard is a reflection of the fact that it is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply.

Thus, three elements are discernible in this standard. First, the doctrine is one of "last resort." It may only be used upon exhausting all other grounds upon which vacatur would be appropriate. In addition, the "last resort," prong would only apply to the most extreme and egregious circumstances. Third and lastly, the doctrine may attach only where the provisions of the FAA simply do not apply.

This three-prong test is applied in the context of the long-standing arbitration precept that the objective of arbitral proceedings is to resolve a very discrete dispute between parties independent of: judicial intervention, the influence of doctrines embodied in legislative enactments, case law that reflect the public policy of the state far beyond the particular dispute at issue, or industry considerations. In this connection, the Second Circuit stressed the need to refrain from interfering with a process so as to avert frustrating "the intent of the parties, and thwart[ing] the usefulness of arbitration, making it 'the commencement, not the end, of litigation.'"

 Quite remarkably, despite having articulated the historical test (its own exegesis of a practical standard for application of the doctrine) and briefly tracing the doctrine's historical genesis, the Second Circuit admitted that the infrequent application of the doctrine has generated but a paucity of jurisprudence. Consequently, said the Second Circuit, the

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77. 148 F.3d 197, 204 (2d Cir. 1998).
78. Duferco, 333 F.3d at 389.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
doctrines’s “precise boundaries are ill defined, although its rough contours are well known.” 85 Therefore, in addition to construing manifest disregard as a doctrine (1) of last resort, (2) to be applied only in the most extreme and egregious circumstances, (3) where no provision of the FAA is applicable, and (4) in the very limited context of industry standards and the issues framed by the very specific contours of the dispute between the parties, the Second Circuit fashioned a three-inquiry standard in an attempt to define with greater clarity and precision the doctrine’s triggering standard.

First, a court must determine whether the ignored authority in itself was unambiguous, that is clear, and applicable to the issues before the tribunal. 86 Therefore, the law must be settled and clearly applicable.

Second, assuming that the first inquiry is answered in the affirmative, a court must find “that the law was in fact improperly applied, leading to an erroneous outcome.” 87 Here, emphasis is placed on the final outcome having a direct causal nexus with the improper application so as to obviate a scenario where, irrespective of the propriety of the application of law to facts, the result would still have been the same. 88 Put simply, the doctrine is irrelevant if the allegedly erroneous result would have followed from a correct application of the law. Also, should the arbitral award be susceptible to multiple, reasonable readings, the doctrine shall be deemed inapplicable if even one such reading renders a legally sustainable justification for the outcome. 89

Third, upon satisfaction of the first two inquiries, the “intent” component is analyzed. 90 This subjective analysis purports to determine, to some extent, the arbitrator’s knowledge of the law, because it is plain that only that which is known can be intentionally disregarded. 91 For purposes of fulfilling this inquiry, the Second Circuit identified two fac-

85. Id. The court also noted that a predicate for the doctrine’s application must be “more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law.” Id. Indeed, the court appears to have carved a special space beyond both mere misunderstanding in the application of law and the element of intent. Accordingly, the movant seeking vacatur must establish “that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.” Id. (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) and Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 28 (2d Cir. 2000)).
86. Id. at 389–90 (citing Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 209 (2d Cir. 2002) and Bobker, 808 F.2d at 934).
87. Id. at 390.
88. See id.
90. Dufeco, 333 F.3d at 390.
91. Id.
tors to be considered. At the outset, only the law that the parties communicated to the arbitrators will be analyzed for purposes of arriving at a conclusion concerning the arbitrators’ knowledge of the law that presumably was intentionally disregarded.92 Second, the presumption of knowledge and intent to disregard shall be imputed to the arbitrators where it has been determined that the parties did not educate the arbitrators as to the legal tenets at issue, but the error was so blatant and uncontroverted that it would be an affront to reason not to acknowledge it as capable of being recognized by the average, qualified arbitrator.93

B. Post-Duferco

Since the Second Circuit’s ruling in Duferco through June 2008, that court has reviewed a total of twelve cases (excluding Duferco) concerning petitions to vacate arbitral awards based upon the manifest disregard of the law doctrine.94 Where Duferco is included, then of the total of thirteen cases, exactly eleven awards have been affirmed despite the manifest disregard of the law challenge.95 One case was remanded96 and another award was vacated on the grounds of manifest disregard of the law.97 Two cases appear to be of particular interest: Wallace v. Buttar98 and Hardy v. Walsh Manning Securities, LLC.99

In Wallace, the court framed the issue as a case that “raises questions regarding the scope of federal court review of a decision issued by an arbitral panel.”100 Quite remarkably, the Second Circuit observed that the case was to be resolved pursuant to “the application of the familiar principle that the scope of such review is highly constrained.”101

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92. Id.
93. Id.; see also Willemijn Houdstermaatschappij, BV, 103 F.3d at 13.
95. See Nicholls, 204 F. App’x at 43; IMC Mar. Group, 167 F. App’x at 849; Nutrition 21, Inc., 150 F. App’x at 110; Bear, Stearns & Co., 409 F.3d at 93; Tobjy, 111 F. App’x at 641; Wallace, 378 F.3d at 196; IBAR Ltd., 92 F. App’x at 821; Carpenter, 91 F. App’x at 707; Banco de Seguros, 344 F.3d at 264; Hoeft, 343 F.3d at 71; Duferco, 333 F.3d at 393.
96. See Hardy, 341 F.3d at 134.
97. Porzig, 497 F.3d at 140.
98. 378 F.3d 182 (2d Cir. 2004).
99. 341 F.3d 126 (2d Cir. 2003).
100. Wallace, 378 F.3d at 183.
101. Id.
court further added that "[t]his is especially true with regard to an arbitral panel's assessment of whether the documentary and testimonial evidence presented to it is sufficient to satisfy a particular legal claim."\textsuperscript{102} The court then advanced the extraordinary observation that "[f]ederal district judges are, of course, highly skilled in matters of weighing evidence. As illustrated by the result we reach here, however, \textit{district judges must put these skills aside when faced with the question of whether a decision issued by an arbitral panel should be confirmed}."\textsuperscript{103}

The procedural history and the district court's findings cry for reasoned examination. Petitioners, the Buttars, instituted an arbitration proceeding with the National Association of Securities Dealers, Inc. (NASD) naming Montrose Capital Management ("Montrose") and Robert Winston, a broker at the firm, as respondents.\textsuperscript{104} The statement of claim was premised on averments of false representation concerning a particular investment opportunity that included an allegedly fraudulent representation as to guaranteed returns within a two-month period as a result of investing in the company at issue.\textsuperscript{105} An amended statement of claim was filed with the NASD containing factual averments identical to those asserted in the initial statement of claim, but naming Michael Wallace, David Jacaruso, and Joseph Scotti as respondents, in addition to the original respondents, Montrose and Winston.\textsuperscript{106} The theory of liability was that Wallace, Jacaruso, and Scotti "possessed the power to control and supervise the operations of Montrose [and] Winston."\textsuperscript{107}

The arbitral panel conducted a three-day hearing on the Buttars' claim, and, even though all parties to the arbitration were represented by counsel, Winston, Jacaruso, and Scotti did not personally appear at the final arbitral hearing.\textsuperscript{108} The Buttars supplied the panel with a posthearing memorandum that purported to set forth the rudimentary precepts of "control person liability" under North Carolina and federal law.\textsuperscript{109} Wallace, Jacaruso, and Scotti, through counsel, also submitted a posthearing memorandum, but the submission was virtually bereft of legal analysis of whatever type, even though the Second Circuit observed that it was "notable for its use of invective."\textsuperscript{110}

The panel considered evidence characterized as "neither non-exis-
tent nor overwhelming” concerning the status of Wallace, Jacaruso, and Scotti as “control persons,” together with testimony from a stockbroker who testified that upon being employed at Montrose, Winston urged him to invest in securities pertaining to the company at issue. The broker further testified regarding his increasing concern that brokers at Montrose “were being forced [by Winston] to buy . . . securit[ies] that they didn’t want to buy for their customers.”

The NASD served all parties with the arbitral award, which, in part, asserted that the panel “made no determination with respect to the claims asserted against Montrose, but that the [Montrose bankruptcy] stay does not apply to Respondents Winston, Wallace, Scotti, and Jacaruso.” The arbitral panel found these remaining four respondents liable for fraud.

The Buttars sought to enforce the award, but Wallace, Jacaruso, and Scotti filed actions to vacate the award. The district court granted the motions to vacate the award. The district court understood it to be “undisputed that Winston, a broker employed by Montrose, committed a primary violation of the securities laws, that Jacaruso and Scotti were directors and shareholders of Montrose, and Wallace was its president.” Consequently, the only remaining issue was whether the panel properly could have found Wallace, Jacaruso, or Scotti liable for Winston’s acts and omissions.

With respect to this single concern, the district court found that the panel could not have held Wallace, Jacaruso, or Scotti liable for the Buttars’ losses without engaging in both manifest disregard of the law and manifest disregard of the facts. Indeed, the district court held that there was no evidence ever presented before the panel from which it could be inferred that Wallace, Jacaruso, or Scotti had the requisite intent to commit fraud as co-participants in Winston’s scheme. A

111. Id. at 186.
112. Id.
113. Id. (alterations in original).
114. Id. at 187 (internal quotation marks omitted) (“On December 7, 2001, the U.S. District Court for the Southern District of New York had issued a stay of all legal proceedings against Montrose pursuant to § 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a).”).
115. Id.
116. Id. at 187–88. Winston neither filed an action to vacate the award nor any papers in opposition to the Buttar cross-motion to confirm the award.
118. Id. at 395.
119. Id.
120. Id.
121. Id. at 394–95.
The totality of the evidence . . . overwhelmingly indicates that Wallace never dealt with the Buttars, lacked awareness of all wrongdoing in respondents’ account, [and] had no duty nor reason to educate himself of the activity in the Buttars’ accounts . . . . There was no evidence of any action taken by Jacaruso and Scotti in connection with the transactions in which Winston defrauded the Buttars. . . .

Clearly the arbitrators could not have found that Wallace, Jacaruso, and Scotti possessed the requisite intention to defraud the Buttars without manifestly disregarding this evidence, or lack of evidence. 122

Lastly, the district court also found that the panel had manifestly disregarded the law in concluding that Wallace, Jacaruso, and Scotti were liable as “control persons.” 123 After engaging in a very sustained and reasoned analysis of authority addressing manifest disregard of the law and manifest disregard of the evidence, the Second Circuit reversed and remanded based on the conceptual talisman that appears as a recurring theme in the Second Circuit’s analysis, which can be reduced to two words: “colorable justification.” 124 Significantly, the court stressed that the district court had placed considerable weight on Ninth Circuit authority, 125 applying a “manifest disregard of the facts” doctrinal analysis; yet in Coutee v. Barington Capital Group, a decision issued post-Wallace v. Buttars (the district court action), the Ninth Circuit uncontroversially asserted that “[m]anifest disregard of the facts is not an independent ground for vacatur in this circuit.” 126 Additionally, in Coutee the Ninth Circuit underscored that “it does not appear that any other circuit has adopted a manifest disregard of the facts standard,” 127 and that the Second Circuit had recently clarified that Halligan v. Piper Jaffray, Inc. 128 is, in fact, based on the orthodox standard of manifest disregard of the law. 129

122. Id.
123. Id. at 396.
125. See id. at 191 n.4 (citing Wallace, 239 F. Supp. 2d at 393–94 (construing Am. Postal Workers Union v. U.S. Postal Serv., 682 F.2d 1280 (9th Cir. 1982) and Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019 (9th Cir. 1991))
127. Id. at 1133 n.5.
128. 148 F.3d 197 (2d Cir. 1998). Halligan had appeared to stand for the proposition that an arbitral award may be vacated on the ground of manifest disregard of the facts when the award “runs contrary to ‘strong’ evidence favoring the party bringing the motion to vacate.” See Wallace, 239 F. Supp. 2d at 392 (citing Halligan, 148 F.3d at 202, 204).
129. Coutee, 336 F.3d at 1133 n.5 (citing GMS Group, LLC v. Benderson, 326 F.3d 75, 79 (2d Cir. 2003)). Indeed, the Second Circuit in Wallace announced that authority adopting the
In this regard, the Second Circuit in *Wallace* further amplified and explained the dicta and holding in *Halligan* by stating that in that case, the arbitral tribunal simply offered no explanation for the rejection of the claim, which had been established with overwhelming evidence and material admissions from a party opponent. Thus, the Second Circuit in *Halligan* “held that the district court had erred in confirming the award because the evidence in the claimant’s favor was so strong as to engender ‘the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.’” Therefore, the Wallace district court’s reliance on the Ninth Circuit’s adoption of the manifest disregard of the evidence language considerably undermined the ruling’s normative basis.

In addition, the Second Circuit reasoned that there was a colorable basis under North Carolina law pursuant to which control person liability may attach. Similarly, the court concluded that the award in its entirety was “at least colorably based upon the facts and the law as presented to the Panel.” *Wallace v. Buttar* stands as an emblematic post-*Duerferco* case that clarifies the manifest disregard of the law doctrine—at least to the extent of emphasizing the need to find almost universally, intuitively-cognizable wrongdoing in the tribunal’s application of law to fact—and, in effect, explains that there is no such doctrine as manifest disregard of the facts.

A second post-*Duerferco* case worthy of note is *Hardy v. Walsh Manning Securities, LLC*. Without engaging in any analysis of the facts, the case merits emphasizing because of the procedural oddity that attached to the Second Circuit’s decision to affirm in part and remand in part. Curiously, the court in that case determined that the arbitration award sought to be confirmed was not enforceable as written. The query became, from a judicial perspective, what should be done? The award at issue, according to the court, (1) did not contain any legal reasoning, (2) did advance an explicit legal conclusion susceptible only to
one plausible reading, and (3) did not rest on a colorable interpretation of the law. Consequently, the court found itself reluctant to announce that the award was outright void as written (that is, the arbitral panel manifestly disregarded the law).

The court answered its query by seeking clarification of the award, not from the district court, but from the arbitral panel. To be sure, the actual language used commands a revisit:

Although certainly not the normal course of things, we do have the authority to remand to the Panel for purposes broader than a clarification of the terms of a specific remedy. That is, we have the authority to seek a clarification of whether an arbitration panel’s intent in making an award ‘evidence[s] a manifest disregard of the law.’

IV. ORDER OUT OF CHAOS: THE NEED FOR A UNIFORM STANDARD FOR “MANIFEST DISREGARD OF THE LAW” BEYOND MERE INTUITION

Since 1980 through August 2007, nearly twenty Court of Appeals cases have vacated arbitration awards based upon the doctrine of manifest disregard of the law. Analysis of this authority reflects twelve fundamental principles that appear to be shared by most, if not all, of the cases.

First, the authorities appear to be of a single voice in holding that an appellate court reviewing an arbitration award where vacatur is

135. Id. (internal quotation marks omitted).
136. See id. at 133–34.
137. Id. at 134 (alteration in original) (quoting Americas Ins. Co. v. Seagull Compañía Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985)).
sought must engage in a de novo proceeding. Second, the grounds upon which vacatur may be predicated are extremely narrow and limited to those set forth in the FAA or common law. Third, arbitrators by operation of law need not articulate reasons justifying their conclusions, nor must they keep a record of the proceedings either simultaneously or sequentially. Fourth, a district court’s finding of legal error on behalf of the arbitral tribunal, without more, does not constitute a legally binding ground for vacatur. Fifth, while it is clear in virtually every circuit that the conduct warranting vacatur must be “egregious” in nature and character, there is some uncertainty inherent in the term, which flows over to the attendant legal analyses. Sixth, an arbitration tribunal’s interpretation of an ambiguous clause in a contract or an agreement shall not give rise to vacatur. In fact, reviewing tribunals are charged with the obligation of construing any ambiguity in the arbitral tribunal’s interpretation of the contract in favor of sustainability of the award.

Also, to the extent that the arbitral tribunal’s interpretation of a contractual provision may comport with even a modicum of “reasonableness,” such award shall be upheld and defy vacatur challenges. Seventh, a common occurrence present among some circuits is the blurring of the distinction between the grounds for vacatur set forth in the § 10(a) of the FAA and the common-law doctrine of manifest disregard of the law. Eighth, in the context of domestic arbitral proceedings, greater impartiality in the resolution of disputes has been identified when arbitrators are appointed from lists pertaining to independent arbitration agencies as opposed to self-regulating organizations (SROs). Ninth, courts in unison hold that parties are free to structure arbitration clauses as they see fit. Tenth, a reviewing court may remand an award back to the arbitral tribunal in cases where an arbitration award is found

139. See, e.g., Porzig, 497 F.3d at 138 (citing Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004)); Patten, 441 F.3d at 234; Nationwide, 330 F.3d at 845.
140. See, e.g., Porzig, 497 F.3d at 138; Patten, 441 F.3d at 234.
141. See Halligan, 148 F.3d at 204.
142. See, e.g., Citgo Asphalt, 385 F.3d at 815–16; Nationwide, 330 F.3d at 846.
143. See, e.g., Halligan, 148 F.3d at 202; Duferco, 333 F.3d at 389.
144. See, e.g., Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060, 1065 (8th Cir. 2003).
145. See, e.g., Nationwide, 330 F.3d at 847.
149. See e.g., Boise Cascade Corp. v. Paper, Applied-Indus., Chem., & Energy Workers (PACE), Local 7-0159, 309 F.3d 1075, 182 (8th Cir. 2002).
to be ambiguous.\footnote{150} Eleventh, the burden of proving that the arbitrators exceeded their authority is a significant one that is not readily met.\footnote{151} Twelfth, and finally, an arbitral tribunal is devoid of any discretion to render an award containing a remedy not provided for in the underlying contract containing the arbitration clause.\footnote{152}

Despite these shared elements, the authority defining the factors to be considered in vacating an award on the common-law ground of manifest disregard of the law is far from uniform. Indeed, even a surface review of some of the most salient cases from the different circuits demonstrates substantially different standards and, in some instances, the test is confused with the four bases for vacatur codified in 9 U.S.C. § 10(a). This latter confusion is particularly prevalent where vacatur rests on a finding that an arbitral tribunal exceeds the scope of its authority.\footnote{153} The disparate and often contradictory standards applied in cases of vacatur based upon manifest disregard of the law contribute to the creation of an ill-conceived conceptual category practically based upon intuition, bringing to mind Justice Stewart’s criteria for a finding of pornography in violation of the First Amendment: “But I know it when I see it.”\footnote{154} Keen as this observation undoubtedly may be, subjective intuition should play no role in analytical jurisprudence and, therefore, in the doctrinal development of the fundamental elements of arbitration.

A. Halligan v. Piper Jaffray, Inc.

Six cases are emblematic of the problem, and, to some extent, suggestive of a practical and theoretically consistent resolution.\footnote{155} Halligan
v. Piper Jaffray, Inc.,\textsuperscript{156} is quite helpful. There, Irene Halligan ("Mrs. Halligan"), serving as executrix for the estate of Theodore Halligan ("Halligan") appealed three orders entered by the United States District Court for the Southern District of New York.\textsuperscript{157} The first two orders, respectively, refused vacatur and confirmed an arbitration award entered in favor of the defendants (collectively "Piper").\textsuperscript{158} Halligan had alleged that the defendants had terminated his employment in violation of the Age Discrimination in Employment Act (ADEA).\textsuperscript{159} The third order dismissed Mrs. Halligan's federal-court action on the ground of res judicata because it arose from the same facts as those underlying the ADEA claim in arbitration.\textsuperscript{160} Mrs. Halligan based her appeal on the doctrine of manifest disregard of the law.\textsuperscript{161}

Specifically, Halligan submitted an ADEA claim, together with other averments, to arbitration before an NASD panel of arbitrators.\textsuperscript{162} The record suggests that "[b]efore he could complete his own re-direct testimony, however, his health deteriorated and in early 1995 the arbitrators were advised that Halligan was unable to testify further."\textsuperscript{163} Pursuant to stipulation, his redirect testimony was stricken from the record, but the direct testimony had been subject to cross-examination.\textsuperscript{164} Upon his passing, the arbitration continued.\textsuperscript{165}

Even though the record was rife with compelling evidence suggestive of age discrimination, ten evidentiary facts were particularly central to the Second Circuit's analysis:

1. Defendant conceded in the form of a party admission throughout the proceeding that Halligan was "basically qualified."
2. Halligan ranked fifth out of twenty-five institutional salesmen.
3. He held a number one ranking from 1987 through 1991.
4. The record established that he "had consistently been among the defendant’s top salesmen."
5. He testified to recurring discriminatory statements published by defendants.

\footnotesize{questions find no definitive answer in the post-1980 through August 2007 cases vacating arbitration awards based upon manifest disregard of the law.}

\textsuperscript{156} 148 F.3d 197 (2d Cir. 1998).
\textsuperscript{157} Id. at198.
\textsuperscript{158} Id.
\textsuperscript{160} Halligan, 148 F.3d at 198.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
6. Halligan had contemporaneous writings concerning relevant conversations.
7. During the arbitration, several witnesses testified to having heard Halligan say that he was "being fired."
8. Numerous witnesses testified on Halligan's behalf that the defendant's personnel had expressed their intention to terminate Halligan because of his age.
9. Even though defendant's personnel denied having made discriminatory statements, "their testimony was occasionally inconsistent or ambiguous."
10. Halligan presented testimony from current and former clients who consistently testified that he was among the best in his field.\textsuperscript{166}

The arbitral tribunal rendered an award that identified the parties' respective claims and defenses, denying Halligan any relief. "The award did not contain any explanation or rationale for the result."\textsuperscript{167} Mrs. Halligan petitioned the district court for vacatur pursuant to § 10(a) of the FAA, asserting, inter alia, that both the compelling evidence and clear standard commanded a finding of manifest disregard of the law on the arbitrators' part.\textsuperscript{168} The district court predicated its denial of the petition for vacatur, and its corollary order confirming the award, upon a finding that "the determination of what constitutes 'direct evidence' [of discrimination] . . . is a difficult one to make."\textsuperscript{169}

Upon observing that federal courts have experienced an increase in the scrutiny and controversy attendant to the use of predispute arbitration agreements for purposes of adjudicating statutory claims of employment discrimination,\textsuperscript{170} such as here, the Second Circuit enunciated what it opined to be the standard for application of the doctrine of manifest disregard of the law. In this connection, it articulated that it "clearly

\textsuperscript{166} Id. at 198–99.  
\textsuperscript{167} Id. at 200.  
\textsuperscript{168} Id.  
\textsuperscript{169} Id. at 200 (alterations in original) (quoting Halligan v. Piper Jaffray, Inc., No. 96 Civ. 4472(KMW), 1997 WL 181028, at *3 (S.D.N.Y. Apr. 15, 1997)). The Second Circuit's opinion emphasized the recitation of the district court's principal rationale:

In addition, the record . . . does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof. . . . [T]he Panel was faced with the task of evaluating conflicting witness testimony, and where it did not issue a written opinion, I [Judge Kimba Wood] cannot conclude that the panel did in fact disregard the parties' burden of proof. . . . [C]redit[ing] one witness over another does not constitute manifest disregard of the law. . . .

\textsuperscript{170} Id. (alterations in original) (emphasis added) (quoting Halligan, 1997 WL 181028, at *3).  
\textsuperscript{171} Id. at 201.
means more than error or misunderstanding with respect to the law."\textsuperscript{171} The court additionally enunciated a two-prong predicate standard for application of the doctrine: "a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."\textsuperscript{172}

The difficulties arising from the application of this standard are compounded and multiplied in the context of mandatory binding arbitration of employment-discrimination disputes as a condition of employment. Perhaps not surprisingly, "[t]he major independent arbitration agencies have formulated due process standards for the adjudication of these disputes."\textsuperscript{173} Yet,

Industry self-regulatory organizations (SRO's) like the NASD have been singled out for criticism because, among other reasons, the role they play in determining the pool of available arbitrators and selecting the arbitrators who will hear a particular discrimination claim against a member firm of the SRO calls into question the impartiality of the arbitrators selected.\textsuperscript{174}

The clear implication of likely impartiality may, in part, account for scant recordkeeping and little more than conclusions memorialized in awards. Accordingly, a reviewing court would face a daunting task in trying to marshal the applicable evidence in an effort to evaluate the doctrine's applicability.\textsuperscript{175}

In applying the standard and reversing the district court, the Second Circuit, in addition to the ten salient evidentiary issues here identified, underscored two observations. First, the record was conclusive in establishing "that counsel for both parties generally agreed on the applicable law (and still do on appeal)."\textsuperscript{176} Second, the dispositive law was

\textsuperscript{171} Id. at 202 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).

\textsuperscript{172} Id. (citing DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997)).

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} To be sure, federal courts have expressed considerable concern over this issue. See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1479 (D.C. Cir. 1997) ("Despite the Supreme Court's recent endorsement of arbitration of statutory claims, however, concerns remain regarding arbitration's ability to live up to the Court's expectations, particularly in cases involving mandatory arbitration of statutory claims which is imposed as a condition of employment. In fact, the Equal Employment Opportunity Commission has taken the position that such agreements are unenforceable in a number of cases being litigated around the country."); Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that "appellants were not bound by any valid agreement to arbitrate these employment disputes, because they did not knowingly contract to forego their statutory remedies in favor of arbitration").

\textsuperscript{176} Halligan, 143 F.3d at 204.
explained to the arbitrators. The Second Circuit’s specific and carefully crafted holding merits close scrutiny. The court specifically held that “[i]n view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.”178

Although at first innocuous, the language of the court (in what is unclear to be dicta or the actual holding) is particularly disconcerting, despite the Second Circuit’s subsequent effort to clarify this issue. Three actual possibilities are contained in the single-sentence pronouncement. The court finds that it is inclined to vacate the award on the basis of the doctrine of manifest disregard of the law because the arbitrators “ignored the law.”179 The analysis does not stop here. The court additionally states that the arbitrators also could have just ignored the evidence.180 Yet a third scenario is suggested. The arbitrators conceivably could have ignored both law and evidence. It was this tripartite pronouncement, it shall be recalled, that led numerous courts to adopt—quite wrongly—a “manifest disregard of the facts” standard in addition to the “manifest disregard of the law” doctrine. As earlier referenced,181 it was not until six years later in Wallace v. Buttar that the Second Circuit classified this language as “dicta” and disavowed “manifest disregard of the facts” as a common-law doctrine compelling vacatur.

The opinion’s debilities are subtle but with palpable contours. The two-prong test is too abbreviated to find universal application to standard fact-intensive arbitration proceedings. While the first prong speaks to whether arbitrators “knew of a governing legal principle yet refused to apply it,”182 it takes for granted the meaning of the word “know” as an essential element of the test. Is “knowing” the applicable law, for purposes of vacatur under this standard, present where the parties in fact

177. Id. It was emphasized that “even under a strict construction of the meaning of manifest disregard, [it is doubtful that] it is necessary for arbitrators to state that they are deliberately ignoring the law.” Id. (citing DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 463 (S.D.N.Y. 1997)). Indeed, it is a true challenge to the imagination to conceive of a scenario where an arbitral tribunal would admit to deliberately ignoring the applicable legal precepts. In the realm of arbitral disputes, however, little is impossible.

178. Id. Quite curiously, even though arbitral tribunals are not invested with the obligation to keep records or to explain the basis for the findings (factual or legal), the court did state that “[a]t least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account.” Id.

179. Id.

180. Id.

181. See supra note 129 (explaining Wallace v. Buttar, 378 F.3d 182 (2d Cir. 2004)).

182. Halligan, 143 F.3d at 202.
have briefed the dispositive jurisprudence? Can knowledge be inferred from the briefing of the parties alone as a matter of law? Again, is "awareness" the same as "knowledge" in the context of application of this regime?

The second part of the first prong is equally bewildering. This pronouncement references two concepts in the disjunctive: refusal or ignorance.183 "Refusal" suggests an intentional disregard of the law. "Ignorance" or "ignoring" the law is closer to a negligence or unintentional recklessness standard. Thus, at least with respect to this first prong, it stands to reason that the first part of the test shall be satisfied upon a threshold finding that the arbitral tribunal somehow knew the law but failed to apply it by inexplicably not according it any weight. This standard is dramatically more relaxed and less exacting than its disjunctive counterpart—refusal—that compellingly suggests a deliberate intent not to use that which is known.

The first and second prongs must be met in the conjunctive. The second prong just uses the word "ignored." This construction would lend support to an interpretation of the standard as met where the arbitrators merely acted "negligently" or "carelessly" in not applying the governing legal principles. The second prong, however, goes on to require that the dispositive legal principle must be "well defined, explicit, and clearly applicable to the case."184 These exigencies virtually raise the applicability of the governing legal principles to the status of a science. It would not be unreasonable to posit that rarely are the "governing principles" applicable to any proceeding (1) well defined, (2) explicit, and let alone (3) "clearly applicable to the case." Indeed, particularly in the context of the common law tradition, the exercise of distinguishing cases as well as analogizing them to the fact pattern at issue is rarely clear or explicit. The question of "governing authority" also raises more concerns than it redresses. Again, especially in the common law rubric, authority is often found in jurisdictions other than that in which the parties have selected. Here, where only persuasive authority exists, can the two-prong standard be applied at all?

B. New York Telephone Co. v. Communications Workers of America

The Second Circuit itself addressed this issue in New York Telephone Co. v. Communications Workers of America Local 1100.185 There, the court affirmed a judgment of the United States District Court

183. See id.
184. Id.
185. 256 F.3d 89 (2d Cir. 2001) (per curiam).
for the Southern District of New York vacating a labor arbitration award entered against the New York Telephone Company and denying the union’s motion for summary judgment seeking confirmation. After engaging in a virtually boiler-plate recitation of the deference accorded to arbitration awards and the de novo standard of review charged to reviewing tribunals, the court stressed that “[t]he arbitrator expressly disregarded [the Second Circuit’s holding in] International Longshoremen’s Ass’n v. Seatrain Lines, Inc.” Instead, the Second Circuit observed, the arbitrator elected to rely “on two (more recent) opinions from outside this Circuit.” Therefore, the Second Circuit held that vacatur was warranted because “[t]hese opinions are not the law of [the Second] Circuit; it was therefore ‘manifest disregard of the law’ for the arbitrator to reject Seatrain and apply another rule.”

It is noteworthy that nowhere in the opinion is there any reference or citation to the two-prong test enunciated in Halligan. The court limited its manifest disregard of the law affirmance to the narrow ground that the arbitrator relied on—albeit more modern authority than that arguably on point from the Second Circuit—authority from a different circuit, which can only be persuasive in nature. Here the elements of “knowledge,” “intentional” nonapplication of authority, or reckless or negligent “ignoring” of governing authority simply played no role in the analysis. Application of only persuasive authority where binding legal principles exist, significantly and meaningfully relaxes the standard for application of the doctrine. The application of persuasive authority, without more, tends to suggest legal error rather than a deliberate undertaking. Yet, all circuits are in unison in holding that legal error alone shall not trigger application of the doctrine.

C. United States Steel and Carnegie Pension Fund v. McSkimming

Greater clarity, even within the same sophisticated appellate tribunals, is absolutely imperative.

The United States Court of Appeals for the Third Circuit in United
States Steel & Carnegie Pension Fund v. McSkimming\textsuperscript{191} reversed a district court judgment affirming an arbitration award concerning a statutory labor dispute under the enforcement provision of the Employee Retirement Income Security Act (ERISA).\textsuperscript{192} In reversing the judgment and vacating the award at issue based on the doctrine of manifest disregard of the law, the court discussed yet a third standard of review.

In this case, the court identified the applicable standard as one requiring that an arbitrator’s award be upheld:

\begin{quote}
[If the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties’ intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.\textsuperscript{193}
\end{quote}

Remarkably, even though the Third Circuit amply adopted this standard, it inexplicably applied it together with yet another standard—which may have absolutely nothing to do with the doctrine of manifest disregard of the law, but everything to do with 9 U.S.C \textsection 10(4)—that the court certainly did treat as central to its reasoning and holding. In particular, it underscored that “[i]f an arbitral decision is based solely upon the arbitrator’s view of the requirements of enacted legislation, rather than on the [contract], the arbitrator has exceeded the scope of the submission, and the award will not be enforced.”\textsuperscript{194}

Both standards enunciated by the Third Circuit merit closer attention. In the first standard, a “reasonableness” test is adopted, such that only when whatever connection between the award and the labor contract at issue can be construed as irrational can vacatur attach. Otherwise restated, this standard appears to stand for the proposition that an arbitration award shall be affirmed unless it cannot be sustained under any rational legal hypothesis. The standard is so exacting that it certainly stands in sharp relief when compared to the two Second Circuit pronouncements here analyzed, \textit{Halligan} and \textit{New York Telephone Co}.

The second standard that the Third Circuit articulates is poles apart from the first and is somewhat difficult to classify, as it is not altogether clear that it falls within the ambit of either manifest disregard of the law or 9 U.S.C. \textsection 10. Issuance of vacatur on the finding that an arbitrator premised an award on her interpretation of enacted legislation rather

\textsuperscript{191} 759 F.2d 269 (3d Cir. 1985).
\textsuperscript{192} 29 U.S.C. \textsection 1132 (2006).
\textsuperscript{193} \textit{McSkimming}, 759 F.2d at 270–71 (quoting Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)).
\textsuperscript{194} \textit{Id.} at 271 (second alteration in original) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)) (internal quotation marks omitted).
than on the text of the operative agreement is difficult to reconcile as a
test with any of the preceding three standards. The question becomes
whether legal error in the methodology applied constitutes manifest dis-
regard of the law. Would vacatur ensue on the same doctrinal ground
were an arbitrator to reach the right result but based on the wrong
analysis?

The want of analysis in the articulation of standards, use of prece-
dent, and unartfully advanced assumption is conducive to mere subjec-
tive relativism in the doctrine's application.


In Patten v. Signator Insurance Agency, Inc., the United States
Court of Appeals for the Fourth Circuit identified yet a fifth standard for
the application of manifest disregard of the law. There the court stated
that the doctrine attaches and vacatur shall issue where the arbitration
award "fail[s] to draw its essence from the governing arbitration agree-
ment . . . ." Distinguishing between "misapplication of . . . contractual
interpretation [or] erroneous interpretation," where neither ground
suffices for vacating an award, the court carved out a category triggering
application of the doctrine where an arbitrator "amend[ed] or alter[ed]
the agreement" and thereby "act[ed] without authority." By altering
the agreement, so says the argument, the "essence of the agreement" is
frustrated, and thus a "scope" or "authority" issue arises, but with a com-
mon law, and not a 9 U.S.C. § 10, normative foundation.

The "essence of the agreement" foundation for manifest disregard
of the law is a factually intensive and quite subjective standard. First, it
assumes that there is such a thing as a single "essence" of an agreement.
It is not unusual for contracts to create multiple binding obligations and
incident objectives. In addition, it is often unusual, if not altogether
impossible, to distinguish between disavowing the "essence of an agree-
ment" and simply misconstruing it as a matter of contractual interpreta-
tion of the primary or secondary contract objectives. Also of
significance in the Fourth Circuit's articulation of the applicable mani-
 fest disregard of the law standard is the want of any need for arbitrators

195. 441 F.3d 230 (4th Cir. 2006).
196. Id. at 237.
197. Id. at 236 (alteration in original) (quoting Apex Plumbing Supply, Inc. v. U.S. Supply
Co., 142 F.3d 188, 194 (4th Cir. 1998)).
198. Id. (alterations in original) (quoting Mo. River Servs., Inc. v. Omaha Tribe, 267 F.3d 848,
855 (8th Cir. 2001)) (internal quotation marks omitted).
199. See id. at 235 n.8 (citing Apex Plumbing, 142 F.3d at 193 n.5) ("While the 'essence of the
agreement' standard was first articulated by courts reviewing labor arbitration awards, the courts
have generally acknowledged that it applies to other arbitration proceedings as well.").
to engage in irrational or extreme conduct in executing their obligation in construing the operative agreement. The need for the doctrinal development of this test is immediately obvious. Its conceptual growth, however, can be readily nurtured by the various other paradigms examined. An examination of the five tests already canvassed is testimony to something of a loosely constructed, but rich, framework on which to build upon "the essence of the agreement" standard greater rigor, universality, and elements that may enhance the predictive value of its application.

Since its origin and inception in Wilko v. Swan, the doctrine of manifest disregard of the law, purporting to address the enforceability of arbitration agreements and the permissible scope of judicial review of arbitration awards, has received the greatest amount of doctrinal and conceptual scrutiny in the context of disputes arising from collective bargaining agreements. Even though many such cases misapprehend FAA strictures for vacatur within the common-law doctrine of manifest disregard of the law, there has been some effort to tailor the doctrine so as to meet the specific underlying facts comprising the agreement at issue. More specifically, and by way of example, in the case of individual employment disputes, courts have deemed it both desirable and logical to emphasize the strict enforcement of the arbitration agreement while promoting a de minimis review of arbitration awards. The jurisprudence suggests that in the context of noncollective bargaining agreements, where individuals pursue statutory rights that have been congressionally enacted, arbitration appears to be viewed as merely a

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200. Intentionally I have refrained from engaging in analysis of the vacatur of arbitration awards premised on "public policy" grounds. It is, however, critical to observe that courts have disagreed, certainly in the context of employment disputes, on whether an arbitration award reinstating a discharged employee violates public policy. *Compare Nw. Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 84 (D.C. Cir. 1987) ("[S]o long as the Board acts within its jurisdiction and its awards draw their essence from the collective bargaining agreement, and neither contravene established law nor require an unlawful act . . . precedent under the [Railway Labor Act] compel[s] that such awards be enforced."). *and Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) ("The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct."). *with Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427 (8th Cir. 1987) (noting that arbitration awards reinstating employees are susceptible to vacatur when the contract interpretation violates an explicit public policy), and *Bd. of County Comm'rs v. L. Robert Kimball & Assocs.*, 860 F.2d 683, 686 (6th Cir. 1988) (holding that the standard is "whether the arbitrator's interpretation of the contract jeopardizes . . . public policy"). For a comprehensive analysis of this split among the circuits, see *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 362–64 (3d Cir. 1993).


202. See *Patten*, 441 F.3d at 234.
substitute for litigation. Thus, the doctrine of manifest disregard of the law, when applied to such cases, appears to be subject to a standard having greater proclivity for vacatur and enhancing judicial intervention in the arbitral process.

E. Montes v. Shearson Lehman Bros.: A Literal Paradigm

An example of a scenario involving judicial review of an arbitration award concerning a private individual’s efforts to enforce federal statutory rights outside a collective bargaining context (minimizing an arbitration award’s binding effect, while maximizing judicial fiat in applying the manifest disregard of the law doctrine) is eloquently detailed in the Eleventh Circuit’s pronouncement in Montes v. Shearson Lehman Bros. In addition, this opinion underscores the dire need to develop a transparent standard, universally applicable, for the manifest disregard of the law doctrine. As shall be demonstrated in considerable detail, after tracing the borders of a line of jurisprudence applying the doctrine, the Eleventh Circuit in effect circles back to the most fundamental of principles in its effort to distill the meaning, and therefore, the applicability of the doctrine.

In Montes, plaintiff Delfina Montes (“Montes”) was employed by Shearson Lehman Bros. (“Shearson Lehman”) where, in addition to a forty-hour weekly work description requirement, she exceeded the forty-hour threshold with the expectation of receiving overtime pay. Interestingly, Shearson Lehman asserted that “although Montes worked more than the forty hours weekly that she recorded on her time-cards, she was exempt from the [Fair Labor Standards Act’s] overtime payment requirements because she held either an ‘administrative’ or ‘executive’ position.” Upon leaving Shearson Lehman, Montes filed an action seeking overtime pay based upon the FLSA. Shearson Lehman removed the action to the District Court for the Southern District of Florida. The district court referred the case to arbitration, and the arbitration board issued an award denying Montes any relief in favor of Shearson Lehman. After petitioning the district court to vacate the board’s decision without any success, Montes appealed to the Eleventh Circuit.

Even though Montes raised numerous grounds for reversal of the

203. 128 F.3d 1456 (11th Cir. 1997).
204. Id. at 1458.
205. Id.
206. Id.
207. See id.
208. Id.
209. Id.
district court’s ruling and for issuance of an order vacating the board’s decision, the gravamen of the appeal rested on the contention that “Shearson’s attorney improperly urged the arbitration board specifically to disregard the FLSA to find in Shearson’s favor and that the board apparently did so.”

Upon preliminary recitation of the governing de novo standard of review, together with the presumptions accorded to arbitration awards, the court, finding analytical support in Wilko v. Swan, enunciated that arbitrators cannot be reversed for errors or misrepresentations of law. In this connection, the opinion provided that “every other circuit except the Fifth (which has declined to adopt any non-statutory grounds for vacating arbitration awards), has expressly recognized that ‘manifest disregard of the law’ is an appropriate reason to review and vacate an arbitration panel’s decision.” It is upon this explicit acknowledgement of the doctrine that the Eleventh Circuit has struggled to distill from material authority the applicable governing standard(s) for the sake of doctrinal consistency.

Indeed, this opinion is emblematic of the patent want of a polestar that sets forth the doctrine’s elements in a consistent and uniform manner. The court’s recourse to such fundamental authority as Black’s Law Dictionary and the American Heritage Dictionary of the English Language are testimony to this conceptual void. The court’s effort to extrapolate a legal standard governing the doctrine by engaging in a very

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210. Id. Montes also had bottomed her appeal on the averments that the board’s decision was “arbitrary, capricious, and violative of public policy.” Id. Also, she challenged the district court’s referral of the case to arbitration. Id. On this ground the Eleventh Circuit did affirm the district court’s ruling. Id.

211. Id. The court referred to its ruling four years earlier in Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778–79 (11th Cir. 1993), in an effort to delineate “the general circumstances in which arbitration awards can be vacated”:

Our review of commercial arbitration awards is controlled by the Federal Arbitration Act (“FAA”). Judicial review of arbitration awards under the FAA is very limited. The FAA presumes that arbitration awards will be confirmed and enumerates only four narrow bases for vacatur, none of which are applicable in this case. In addition to these four statutory grounds for vacatur, we have recognized two additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. Second, an arbitration award may be vacated if enforcement of the award is contrary to public policy.

Montes, 128 F.3d at 1458 (emphasis added) (citations omitted) (quoting Brown, 994 F.2d at 778–79).

212. Id. at 1460.

213. Because the Eleventh Circuit opinion in Montes v. Shearson Lehman was rendered in 1997, it obviously could not have taken note of Hughes Training Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001) (“An arbitration agreement may therefore expand judicial review of an arbitration award beyond the scope of the Federal Arbitration Act.”).

214. Montes, 128 F.3d at 1460.
surface philological analysis of the doctrine's name is indeed somewhat arresting. Even though the court premises this analysis with the caveat that there is a need to "give meaning to the distinction made by the Supreme Court in Wilko between an erroneous interpretation of the law and a manifest disregard of it," it still proceeds to glean this critical distinction, quite remarkably, by reviewing the plain lexicological meaning of the term. The analysis merits review in its entirety.

The Eleventh Circuit began by noting, "'Manifest' means '[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, undisputable, evident, and self-evident.'" In this same vein, the court analyzed the word "disregard." Here too, it borrowed from Black's Law Dictionary and the American Heritage Dictionary of the English Language for guidance:

"Disregard," in turn, means "[t]o treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe." 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.

Armed with this "standard," the Eleventh Circuit concluded that the doctrine attached because the arbitrators in the award's summary of argument identified the party's plea to disregard the law, together with a complete absence of evidence in the record or elsewhere "to indicate that they did not heed this plea"; thus, the court vacated the award in reversing the district court's ruling.

A careful reading of the opinion in its totality compellingly suggests that the Eleventh Circuit certainly reached the right result, but based upon questionable doctrinal grounds. As helpful as consultations to basic dictionaries may be, it is hardly a suggested methodology for identifying the conceptual difference between a legal mistake and the common-law doctrine of manifest disregard of the law. To be sure, a more careful, jurisprudential, and helpful analysis (which would create stare decisis so as to assist the practicing bar, bench, captains of industr-

215. Id. at 1461.
216. Id. at 1461 (alteration in original) (quoting Black's Law Dictionary 962 (6th ed. 1990) and citing American Heritage Dictionary of the English Language 794 (New College ed. 1981)).
217. Id. (alteration in original) (emphasis added) (citations omitted) (quoting Black's Law Dictionary at 472 and citing American Heritage Dictionary of the English Language at 381).
218. Id. at 1461–62, 1464.
try, prospective claimants, and arbitrators alike) entails a careful reading of precedent, in the purest pursuit of the common-law tradition, so as to distill and extrapolate from that authority the various legal tests that have triggered the doctrine’s application. Despite explicit reference to the adoption of the doctrine by practically all circuits, thus emphasizing its very juridic universality, the court abandons—rather starkly—this methodology and proceeds to consult dictionaries. Moreover, the weight accorded to the absence of any evidence of record or elsewhere directed to the twin issues of knowledge and intent is even more puzzling. Positive affirmations from negative premises hardly have played a role in either the common law or civil law traditions in the formation and transformation of legal precepts. To the contrary, such inferences historically have been criticized, if not altogether disavowed.

The analysis nowhere purports to reconcile any of the six standards here reviewed from the Second, Third, and Fourth Circuits with yet its new, seventh paradigm based upon a plain meaning analysis of the doctrine’s nomenclature together with references to a single sentence citation of cases where the issue of manifest disregard of the law was addressed.

The fundamental policies governing international commercial arbitration and domestic arbitration make clear that arbitral proceedings:

1. primarily, if not exclusively, concern the resolution of particular disputes among private parties,
2. do not entail the application of law to fact so as to effectuate the equitable administration of justice in the context of underlying public policies enacted by a sovereign in the exercise of its sovereignty through the different branches of government, especially the judicial and the legislative branches,
3. do not constitute binding or even persuasive precedent,
4. contemplate “appellate review” only on the narrowest of grounds,
5. are not bound by rules of judicial administration, evidence, and only to a limited extent, civil procedure,
6. do not adjudicate issues of great political importance, such as constitutional concerns, per se, but, if at all, only incidentally and without social transcendence,

219. See id. at 1461–62.
220. See, e.g., David Fontana, Comment, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539, 551 n.59 (2001). For completeness’s sake, academic integrity compels emphasizing that the Eleventh Circuit did comb the record comprising witness examination for purposes of determining that Montes was correct in asserting that “because she lacked supervisory authority, she . . . does not fit within the ‘executive’ exemption from the FLSA.” See Montes, 128 F.3d at 1462 n.10, 1463–64.
7. contemplate the role of an arbitrator as materially distinct from that of a judge,
8. secure jurisdiction on contractual and not on legislative grounds,
9. enjoy equal hierarchy with judicial proceedings,
10. establish a unique relationship with the judiciary pursuant to which courts presumably assume a subordinate role designed to facilitate the arbitral tribunal’s resolution of specific disputes rather than intervene in the arbitral proceedings so as to influence substantively and materially the resolution of the dispute at issue.\footnote{221}

The very nature of the judicial process, however, compels courts to seek consistent normative grounding in established precedent, clearly elucidating accepted legal norms. With respect to the common-law doctrine of manifest disregard of the law, this imperative is yet to be fulfilled. There is no doubt that the brilliance and majesty inherent in the common-law process is identifiable once an effort is undertaken to trace the conceptual development of the doctrine from the rather abbreviated subordinate clause giving rise to it in \textit{Wilko v. Swan}, through the nearly twenty cases since 1980 through August 2007 that have vacated arbitration awards based on application of the doctrine.\footnote{222} However, greater

\footnote{221. \textit{PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS} 115 (2009).}

\footnote{222. The seven tests impel recitation:
First, the Second Circuit announced a two-prong test to be applied in the conjunctive. Pursuant to that paradigm, the manifest disregard of the law doctrine attaches where a court finds that “(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.” \textit{Halligan v. Piper Jaffray, Inc.}, 148 F.3d 197, 202 (2d Cir. 1998).

Second, the Second Circuit also fashioned a standard in accordance with which application of the doctrine would be warranted if the arbitral tribunal applied persuasive authority from other jurisdictions, instead of the substantive law of the governing jurisdiction (irrespective of the recent nature of that jurisprudence). \textit{N.Y. Tel. Co. v. Commc’ns Workers of Am. Local 1100}, 256 F.3d 89, 93 (2d Cir. 2001). Put simply, only positive law or jurisprudence consonant with the substantive law contained in the arbitration clause may preclude the doctrine’s attachment. Significantly, there is no reported authority as of August 2007 speaking to the issue of whether “persuasive authority” from a jurisdiction other than that identified in the arbitration clause would give rise to attachment of the doctrine in a scenario where the substantive law of the jurisdiction selected by the parties and memorialized beyond quibble in the arbitration clause is not on point or otherwise cannot fully dispose of a genuine material issue constituting a predicate to the equitable administration of justice in the arbitral proceeding.

Third, the Third Circuit articulated a paradigm bottomed on “reasonableness” or “a reasonable relationship” standard. Specifically, the court attempted to enunciate the test as follows:
If the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties’ intention; only where there is manifest disregard of the agreement, totally}
doctrinal development is necessary.

V. CONCLUSION

Neither the due process argument, which is embedded in Article V of the New York Convention and in § 10(a)(3) of the FAA and arises from the averment that the arbitral tribunal forecloses a party from presenting its case by not considering that party’s evidence, nor the possible contention that an arbitral tribunal cannot refuse to acknowledge an arbitral clause that proscribes the use of § 1782, has been addressed by courts or commentators as of the date of the writing and publication of this text.

Likewise, even in the absence of any reference to § 1782 in the arbitration clause at issue, exercise of the arbitral tribunal’s discretion in favor of foreclosing any and all consideration of discovery secured by a party pursuant to § 1782, where the seat of the arbitration is outside the jurisdiction of the United States and its territories, also constitutes a case of first impression. While the construction of hypothetical paradigms may somewhat facilitate analysis of viable doctrinal developments that in turn may foster party autonomy, predictive value, transparency of

unsupported by the principles of contract construction, may a reviewing court disturb the award.


This test can be succinctly summarized as holding that an arbitral award may not be vacated pursuant to the doctrine if the language of the operative agreement can be sustained as rational and coherent under any reasonable hypothesis of law, logic, or interpretative construction precepts.

Fourth, the doctrine shall attach upon a showing that an award issued based only on the arbitrators’ view of the requirements of legislation rather than on the plain meaning of the operative contract. Id.

Fifth, the “essence of the contract” test is recurring throughout the case law. The Fourth Circuit, however, explained that the doctrine attaches and vacatur shall issue where the arbitration award fails to draw its essence from the governing arbitration agreement. Patten v. Signator Ins. Agency, 441 F.3d 230, 234 (4th Cir. 2006). Here, courts have carved a juridic space between “misapplication of contractual interpretation “and “erroneous interpretation,” neither of which sufficed for nullification purposes where vacatur is warranted in the presence of an interpretation that completely undermines the factual and juridic tenets underlying the contract issue.

Sixth, in the context of adjudicating confirmation petitions concerning collective bargaining contracts versus individual labor contracts where individual parties seek enforcement of statutory rights, the Fourth Circuit too has announced that there shall be a greater emphasis placed on the role of a judicial tribunal reviewing the award’s propriety and lesser weight accorded to the presumption of correctness attaching to an arbitration award and to party-autonomy in fashioning the underlying contract. The converse would hold true in the context of collective bargaining agreements. The different proclivities for vacatur rise to the level of a new standard in reviewing a petition seeking confirmation of an arbitration award.

Seventh, the Eleventh Circuit introduced a rudimentary but novel lexicographic analysis based upon the doctrine’s very nomenclature. Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1461–62 (11th Cir. 1997).
standard, and certainty, the necessity for sustained analysis in the development of jurisprudence is simply indispensable.

The second methodology for attempting to circumvent the use of § 1782 in an international commercial arbitration also is best addressed at the formation stage of the arbitration clause. By agreeing to have the seat of the arbitral proceeding in the United States or its territories, the "for use in a foreign or international tribunal" element of § 1782, by definition, cannot be met, because a "foreign or international tribunal" within the meaning of the statute refers to a non-U.S. jurisdiction. This technique, as has been explained, also is susceptible to significant challenges. Most notably, the party seeking to prosecute a § 1782 petition may credibly and meaningfully assert that despite the arbitration's seat in the United States or its territories, the proceeding is still "international" in nature and character and, therefore, within the statute's clearly contemplated purview. The proposition would further assert that to hold otherwise is but the exaltation of form over substance.

Juridical support for this proposition may be found in the extraordinarily broad definition of "international" contained in Chapter 2 of the Federal Arbitration Act (FAA). That provision provides that an arbitration agreement falls within the Convention where the agreement at issue (1) concerns property located outside the United States, (2) contemplates either performance or enforcement abroad, or (3) has a "reasonable relation" with a foreign state. Consequently, having an arbitration agreement with language that proscribes recourse to § 1782...

223. 9 U.S.C. § 202 (2006). When Congress ratified the Convention in 1970, it also enacted implementing legislation: 9 U.S.C. § 201–208. Within this framework, only § 202 offers a definition of whether an award is non-domestic. Section 203 provides for federal jurisdiction over all cases within the Convention's purview. Section 204 determines the venue in which those cases can be filed. Section 205 provides for removal of all cases falling within the Convention. Section 206 provides a federal district court adjudicating a proceeding arising from the Convention may order or compel arbitration. Section 207 in effect serves as a three year statute of limitations within which time frame a party may seek an enforcement order. Section 208 simply states that the FAA apply to proceedings brought under Convention with the proviso that the statute not conflict with the Convention or the implementing legislation codified at § 202-207.


An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principle place of business in the United States.

§ 202 (emphasis added).
and a provision as to the arbitration seat far from ensures that a § 1782 application shall not ensue as an important component of the procedural law governing the conduct of the arbitration.

With respect to this methodology, the complete absence of any jurisprudence or even commentaries addressing the issue only highlights our need to consider patience as a necessary virtue as we await the development of juridical and academic authority.

It is here suggested, and even urged, that if international commercial arbitration is indeed to serve as a conceptual bridge filling the void one day to be occupied by transnational courts of civil procedure, the integration of cross-cultural, doctrinal precepts shall constitute a very much desired, if not altogether necessary, predicate. Despite a majority academic view that appears to shun discovery as configured by the Federal Rules of Civil Procedure in the context of international arbitral proceedings, sustained analysis and serious erudition demonstrate that U.S.-style discovery most aptly comports with, and actually furthers, the very tenets underlying international commercial arbitration as not just an alternative, but actually as a preferred dispute-resolution methodology, to judicial recourse within the framework of cross-border disputes. This issue, however, is best discussed in a separate writing worthy of its overwhelming stature and importance. We shall aim for the proverbial “next time.”