THE HELMSLEY CASE: AN ILLUSTRATION OF THE CONFUSED STATE OF THE LAW SURROUNDING THE MANIFEST DISREGARD OF LAW DOCTRINE AS APPLIED TO ARBITRATION

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This Note addresses the Manifest Disregard of Law Doctrine as applied to arbitral awards.

It is well settled that arbitral awards in manifest disregard of law will not be confirmed or enforced by a reviewing court. However, since the Supreme Court promulgated this judicial doctrine in 1953, it has failed to provide the lower courts with guidelines or standards to consistently apply it. This Note generally addresses the evolution of the judicially created doctrine in the lower federal and state courts. Specifically, this Note addresses the confused state of the law surrounding the judicial doctrine, details the manifestation of that confusion in the Helmsley case, and finally, suggests that Supreme Court or legislative intervention is necessary to effect consistent application of the doctrine in the lower federal and state courts.

Federal and state courts alike have invoked the Manifest Disregard of Law Doctrine when presented with a challenge to an arbitral award. More often than not, federal and state courts have applied drastically divergent criteria when applying the doctrine; the result being a mosaic of divergent judicial principles that can euphemistically be termed confounding. This Note describes the drastically divergent standards used by the circuit courts and discusses the viability of the manifest disregard of evidence as an alternative and additional ground to vacate an arbitral award. Additionally, this Note addresses two salient Supreme Court decisions that may indicate the doctrine's future, and illuminate the importance of the judi-

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cial doctrine in the modern business community.

After detailing the confusion surrounding the Manifest Disregard of Law Doctrine, and its offspring, the Manifest Disregard of Evidence Doctrine, this Note describes how that confusion infected the Helmsley case by detailing the New York State Court of Appeals disposition regarding several points of confusion described in previous sections of this Note.

Lastly, this Note argues that Supreme Court or Legislative intervention is necessary. This Note concludes by suggesting uniform guidelines for federal and state courts to application of the Manifest Disregard of Law Doctrine.

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THE HELMSLEY CASE: AN ILLUSTRATION OF THE CONFUSED STATE OF THE LAW SURROUNDING THE MANIFEST DISREGARD OF LAW DOCTRINE AS APPLIED TO ARBITRATION

INTRODUCTION

A recent decision by the New York Court of Appeals ended a decade-long battle over a significant patch of expensive commercial realty located in the heart of New York City.[1] The case was closely monitored by the press and was even chronicled in an epilogue of a popular book written about the Empire State Building.[2] The legal significance of the case, however, is the inconsistent evolution of the legal standard governing the enforcement of arbitration awards. While it has been an article of faith among lawmakers and the courts that arbitration is a favored method of dispute resolution, *Wien & Malkin LLP v. Helmsley-Spear*[3] illustrates this often articulated public policy (premised upon efficiency and judicial economy) has not yielded a certain or straightforward path to the enforcement of awards. As this Note details, after sixty days of trial, the issuance of a 134-page arbitration award (initially affirmed by a New York intermediate appellate court—applying New York law),[4] and, a remand

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[1] Wien & Malkin LLP v. Helmsley-Spear, Inc. (*Helmsley at Court of Appeals*), 846 N.E.2d 1201, 1202 n.1 (N.Y. 2006).

[2] MITCHELL PACELLE, EMPIRE: A TALE OF OBSESSION, BETRAYAL, AND THE BATTLE FOR AN AMERICAN ICON 309-14 (2001).

[3] *Helmsley at Court of Appeals*, 846 N.E.2d 1201.

[4] Wien & Malkin LLP v. Helmsley-Spear, Inc. (*Helmsley at Appellate Division*), 751 N.Y.S.2d 21, 22 (App. Div. 1st Dep't 2002).

for reconsideration by the United States Supreme Court,[5] that same state appellate court applied federal arbitration law to vacate the award.[6] Next, that same appellate court stayed its own vacatur and certified the issue to be heard by the New York Court of Appeals,[7] which applied federal law to enforce the award, thus reversing the appellate division's vacatur.[8]

The confusing and protracted procedural posture of the *Helmsley* case is hardly surprising in light of the diverse legal landscape governing the enforcement of arbitration awards. Federal and state courts around the country are sharply divided on several key components of the standards governing their review of arbitration awards: (1) whether findings of fact made by arbitrators are reviewable at all and, if so, under what criteria; (2) what legal determinations are subject to review and how that review is to be conducted; (3) whether a reviewing court may consider the evidentiary record developed during the arbitral process and, if so, the criteria to be applied and the purpose of such review; and, (4) the significance of arbitral misconduct—such as willfulness and/or defiance associated with a legal or factual error.

This divergent legal landscape, particularly those issues raised by the *Helmsley* case, is rooted in a case decided by the Supreme

[5] Wien & Malkin LLP v. Helmsley-Spear, Inc. (*Helmsley at the Supreme Court*), 540 U.S. 801 (2003).

[6] Wien & Malkin LLP v. Helmsley-Spear, Inc. (*Helmsley at Appellate Division on Remand*), 783 N.Y.S.2d 339, 345-46 (App. Div. 1st Dep't 2004).

[7] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206. The certified question asked whether "the order of [the appellate division], which reversed the judgment of [the] Supreme Court, [was] properly made?" *Id.*

[8] *Id.* at 1210.

Court in 1953, *Wilko v. Swan*,[9] where the Court, in dicta, indicated the enforcement of an arbitration award could be challenged if there was a manifest disregard of law. "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[10] Thus, since *Wilko*, in addition to those circumstances specified in the Federal Arbitration Act ("FAA") (which are generally based on arbitral misconduct such as corruption, fraud, or other similar improprieties),[11] the efficacy of an arbitration award has been tested under the judicially created Manifest Disregard of Law Doctrine.[12]

The uncertainty associated with the enforcement of arbitration awards did not emerge merely from the creation of this judicial doctrine. Rather, uncertainty has evolved because the Supreme Court has not established any standard regarding what constitutes a manifest disregard of law or how the doctrine is to be applied.[13] Thus, the lower courts have navigated the boundaries of the doctrine blindly which has resulted in divergent principles and applications that can euphemistically be described as confounding. For instance, in the Seventh Circuit, manifest disregard of law may only be found "when the arbitrator's award actually orders the parties to violate the law."[14]

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[9] 346 U.S. 427 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989).

[10] *Wilko*, 346 U.S. at 436-37.

[11] 9 U.S.C.A. § 10(a) (West 2007).

[12] *Wilko*, 346 U.S. at 436-37.

[13] For example, the Supreme Court has never articulated the appropriate scope or nature of judicial review to guide the lower courts in applying the doctrine.

[14] Butler Mfg. Co. v. United Steelworkers of Am., 336 F.3d 629, 636 (7th Cir. 2003) ("[A]n arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law.") (citing George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001)).

In the Second Circuit, however, an award will be vacated if an arbitration panel ignores or refuses to apply a clearly defined and applicable legal principle.[15]

The prospect of inconsistent standards and application to the enforcement of arbitration awards should be very troubling to the business community. Obviously, the outcome of litigation—even dispute resolution—should not depend upon the venue or forum. "Chicago you win, New York you lose" sounds more like a coin flip than an effective and serious method of resolving a significant commercial dispute. Accordingly, the strong policy favoring arbitration requires consistency which can only be provided by the Supreme Court or by legislative intervention.

This Note explores the evolution of the Manifest Disregard of Law Doctrine and its application in the *Helmsley*[16] proceeding. Part I discusses the genesis of the doctrine since *Wilko*[17] and the conflicting application that followed within the circuit courts. Part I also discusses the confusion created by differing standards that have been articulated by the Second Circuit.[18] Part II follows the procedural history of the *Helmsley* case starting with a lengthy arbitration process and proceeding through years of complicated appellate practice, including a stop at the United States Supreme Court and ending with a

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[15] Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 90 (2d Cir. 2005) ("To vacate an arbitration award, a reviewing court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it all together, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.' " (quoting DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997)).

[16] *Helmsley at Court of Appeals*, 846 N.E.2d 1201.

[17] *Wilko*, 346 U.S. at 436-37.

[18] *See infra* Part I.

decision from the New York State Court of Appeals.[19] Significantly, Part II focuses on how the conflicting standards that have been enunciated and applied to the Manifest Disregard of Law Doctrine infected *Helmsley*. Part III concludes that a determination by the Supreme Court of the United States or some additional legislative action is required in order to further the public policy considerations favoring arbitration.[20]

I. THE GENESIS OF THE DOCTRINE

Part I focuses on the evolution of the Manifest Disregard of Law Doctrine since *Wilko* and highlights the inconsistent standards used by the circuit courts in applying the doctrine. Part I also notes the debate within the Second Circuit concerning the application of the doctrine, as well as two salient Supreme Court decisions that arguably provide guidance to lower courts when reviewing arbitration awards.

The FAA was enacted in 1947 and provides that an arbitration award may be vacated:

> 1) where the award was procured 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)

[19] *See infra* Part II.
[20] *See infra* Part III.

> 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.[21]

In 1953, the Supreme Court decided *Wilko*[22] and added a ground upon which a court may refuse to enforce an arbitration award. While the legal interpretations of arbitrators were not subject to judicial review, an arbitrator's manifest disregard of law could not be sanctioned.[23] The Supreme Court, however, has never explained the distinction made between a legal error and a manifest disregard of law. Nor has the Court provided criteria for the application of the doctrine. In the absence of requisite guideposts, federal and state courts have applied the doctrine inconsistently (in over 365 recorded cases to date), and have scrambled to formulate workable judicial standards.[24] As explained by one commentator, "To assert that the dictum from the Supreme Court's opinion in Wilko v. Swan has . . . left the federal circuit courts of appeals in a state of confusion regarding the grounds upon which a commercial arbitration award properly may be vacated is an understatement."[25]

This confusion has been reflected in the divergent decisions emerging from the circuits. In the Seventh Circuit, manifest disre-

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[21] 9 U.S.C.A. § 10(a).

[22] *Wilko*, 346 U.S. 427.

[23] *Id.* at 436.

[24] While the majority of those decisions have been rendered by federal courts, in light of recent Supreme Court jurisprudence asserting the FAA is coextensive with the Commerce Clause, the standard's applicability will likely be pervasive under state law in coming years. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003).

[25] Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 774 (1996).

gard of law may only be found "when the arbitrator's award actually orders the parties to violate the law."[26] This standard is so strict that it "all but eliminate[s] its applicability."[27] In the Fifth Circuit, a manifest disregard of law occurs if (on the basis of the information available to the court) the arbitrators appreciated the existence of the law but refused to follow it.[28] Such a refusal will not, however, trigger the non-enforcement doctrine unless it would result in significant injustice, considering all the circumstances of the case, including the power of arbitrators to judge norms appropriate to the relations between the parties.[29] The Fourth Circuit has promulgated yet another standard to be applied to the manifest disregard doctrine. "Courts of Appeals do not review the reasoning of arbitrators in determining whether their work draws its essence from the contract, but look only to the result reached; the single question is whether the award . . . is rationally inferable from the contract."[30]

Currently, the Second Circuit's standard for enforcement of arbitral awards is similar to the standard adopted by several other circuits. As stated in *Wallace v. Buttar*, to vacate an arbitration award, "a reviewing 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,

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[26] *Butler*, 336 F.3d at 636.

[27] Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT'L ARB. 363, 377 (2001).

[28] Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 355 (5th Cir. 2004).

[29] *Id.* (stating that if an award is rationally inferable from the facts before the arbitrator, the award must be affirmed).

[30] Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998).

explicit, and clearly applicable to the case."[31] However, unlike the Seventh Circuit, there is no requirement that a party be ordered to violate the law,[32] and unlike the Fifth Circuit, there is no requirement of "significant injustice."[33] The standard, likewise, differs from the "rationally inferable" test applied by the Fourth Circuit.[34]

Moreover, even among circuits having similarly stated enforcement standards, enforcement of arbitral awards may vary due to differing application principles. For instance, the Eighth and Second Circuits both articulate standards embodying a refusal to apply a legal principle.[35] In the Eighth Circuit, however, such a refusal must be evidenced by the award itself, "If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' "[36] Conversely, in the Second Circuit, a refusal to apply the law may be proven by extrinsic evidence.[37] For instance, in *Hardy v. Walsh Manning Securities LLC*, it was shown an arbitrator refused to apply a legal principle that had been stipulated to by the parties.[38]

The Second Circuit has likewise qualified, characterized, and explained the test (generally adding a subjective component) as

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[31] Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (internal citations omitted).
[32] *See Butler Mfg. Co.*, 336 F.3d at 636.
[33] *See Kergosien*, 390 F.3d at 355.
[34] *See Apex Plumbing Supply, Inc.*, 142 F.3d at 193.
[35] Lincoln Nat'l Life Ins. Co. v. Payne, 374 F.3d 672, 674 (8th Cir. 2004) ("Any disregard must be made clearly to appear and may be found when arbitrators understand and correctly state the law, but proceed to disregard the same.") (internal citation omitted); *Wallace*, 378 F.3d at 189 (setting forth the Second Circuit's two-prong standard).
[36] *Payne*, 374 F.3d at 675.
[37] *Wallace*, 378 F.3d at 191.
[38] *See generally* Hardy v. Walsh Manning Securities, LLC, 341 F.3d 126 (2d Cir. 2003).

something beyond a mere refusal to apply a legal principle. In *Saxis Steamship Co. v. Multifacs International Traders, Inc.*,[39] the court held that vacatur of an arbitration award under the manifest disregard standard requires "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law."[40] In *Westerbeke Corp. v. Daihatsu Motor Co.*,[41] the Second Circuit held that "[a] party seeking vacatur must therefore demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless, willfully flouted the governing law by refusing to apply it."[42] In *Duferco International Steel Trading v. T. Klaveness Shipping A/S*,[43] the Second Circuit—while characterizing the doctrine as one of last resort—decided that within the Second Circuit, the courts only review "for a clear demonstration that the panel intentionally defied the law."[44] To add further confusion in the manner that the standard ought to be applied in *Hoeft v. MVL Group, Inc.*,[45] the Second Circuit held:

> [E]ven a 'barely colorable' justification for the outcome reached will save an arbitral award. As long as there is more than one reasonable interpretation of the governing law, the law is not well-defined, explicit, and clearly applicable, and an arbitrator cannot be said to have manifestly disregarded the law in rejecting ei-

[39] 375 F.2d 577 (2d Cir. 1967).
[40] *Id.* at 582 (quoting San Martine Compania de Navegacion v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 (9th Cir. 1961)).
[41] 304 F.3d 200 (2d Cir. 2002).
[42] *Id.* at 217.
[43] 333 F.3d 383 (2d Cir. 2003).
[44] *Id.* at 393.
[45] 343 F.3d 57 (2d Cir. 2003).

ther party's interpretation.[46]

In addition to the confusion resulting from different standards and application principles, there was an internal debate among the judges in the Second Circuit regarding the deference given to arbitrateors' factual determinations. This debate began in 1998, with the court's decision in *Halligan v. Piper Jaffray, Inc.*,[47] where the court explained the vacatur of an arbitral award. "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*."[48] For several years thereafter, the district courts within the Second Circuit read *Halligan* as permitting vacatur of awards if it was shown that an arbitrator ignored the evidence, thus arbitration awards were routinely challenged as being contrary to the evidentiary record.[49]

Finally, eight years later, that judicial review of fact-findings made by arbitrators ended. In *Wallace*, the court reversed a vacatur of an award because "the district court held that an arbitral award may be . . . vacated on the ground of '[m]anifest disregard of the

[46] *Id.* at 71 (citations omitted).

[47] 148 F.3d 197 (2d Cir. 1998).

[48] *Id.* at 204 (emphasis added).

[49] *See, e.g.*, Hakala v. Deutsche Bank AG, No. 01 Civ. 3366, 2004 WL 1057788, at *2 (S.D.N.Y. May 11, 2004); Gwynn v. Clubine, 302 F. Supp. 2d 151, 167-68 (W.D.N.Y. 2004); Ono Pharmaceutical Co., v. Cortech, Inc., No. 03 Civ. 5840, 2003 WL 22481379, at *2 (S.D.N.Y. Nov. 3, 2003); Tripi v. Prudential Sec., Inc., 303 F. Supp. 2d 349, 353 (S.D.N.Y. 2003); Raiola v. Union Bank of Switz., LLC, 230 F. Supp. 2d 355, 358 (S.D.N.Y. 2002); GFI Securities LLC v. Labandeira, No. 01 Civ. 00793, 2002 WL 460059, at *4 (S.D.N.Y. Mar. 26, 2002); McDaniel v. Bear Stearns & Co., 196 F. Supp. 2d 343, 351 (S.D.N.Y. 2002).

facts' when the award runs contrary to 'strong' evidence favoring the party bringing the motion to vacate."[50] The court explained, "We note that a number of other district courts in our Circuit, directly relying on *Halligan* or on district court authority purporting to rely on that case, have asserted the same principle. Such reliance is mistaken."[51] Reinforcing this point, the court observed, "In *Westerbeke* we explicitly characterized *Halligan*'s suggestion that arbitral awards may be vacated on the ground of manifest disregard of evidence as dicta."[52]

As detailed more fully below, this confusion impacted the *Helmsley* case.[53] Initially, the appellate court in *Helmsley* (the Appellate Division, First Department)[54] relied upon the Second Circuit's articulation of the rule—manifest disregard of evidence—when reviewing arbitral awards under the manifest disregard standard.[55] Thus, just as in many federal cases that mistakenly followed *Halligan*, the lower appellate court in *Helmsley* also reviewed the facts and evidence.[56] As discussed below, such review was the principle reason for reversal by the New York Court of Appeals.[57]

The record that proceeded to the New York Court of Appeals

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[50] *Wallace*, 378 F.3d at 191 (quoting Wallace v. Buttar, 239 F. Supp. 2d 388, 392 (S.D.N.Y. 2003)).

[51] *Id.* at 191-92 (internal citations omitted).

[52] *Id*. at 192.

[53] *Helmsley at Court of Appeals*, 846 N.E.2d 1201.

[54] *See generally Helmsley at Appellate Division on Remand*, 783 N.Y.S.2d at 344-45.

[55] *Wallace*, 378 F.3d at 191-92.

[56] *Helmsley at Appellate Division on Remand*, 783 N.Y.S.2d at 344 ("[The arbitrators] ignored the facts that Helmsley-Spear, Inc. had different officers, directors, shareholders, management personnel, financial structure and fewer properties under management than Helmsley-Spear.").

[57] *Helmsley at Court of Appeals*, 846 N.E.2d 1201.

was certainly complex. The court's task was further complicated because, under its own jurisprudence, if the Supreme Court has not ruled, and the federal appellate courts are divided upon a legal principle, the New York Court of Appeals is not bound to follow the Second Circuit's view of federal law, nor that of any other Circuit.[58] Hence, it fell to the New York Court of Appeals to develop an appropriate standard and application of principles governing the Manifest Disregard of Law Doctrine as to be applied by New York State courts.[59]

Finally, adding to this very complicated legal landscape, there are two important Supreme Court cases that impacted *Helmsley*. While neither of the cases focused directly on the Manifest Disregard of Law Doctrine, both influenced the outcome of *Helmsley*. In *United Paper Workers International Union v. Misco, Inc.*,[60] the Supreme Court held, "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept."[61] Although *Misco* related to a collective bargaining dispute (which mandates arbitration in a majority

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[58] Flanagan v. Prudential-Bache Sec., Inc., 495 N.E.2d 345, 348 (N.Y. 1986).

> When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts, however, a State court required to interpret the Federal statute . . . is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits.

Id.

[59] The FAA is not an independent basis of federal jurisdiction, so it will not be uncommon for state courts to be the interpreters of the FAA and/or the Manifest Disregard of Law Doctrine. Indeed, in the absence of diversity jurisdiction state courts would be the only forum for an aggrieved party to challenge an arbitration award.

[60] 484 U.S. 29 (1987).

[61] *Id.* at 37-38.

of labor relation cases), it was urged by the petitioners that there was no principled distinction between fact finding made by collective bargaining arbitrators and a panel operating under the FAA.[62] Petitioners argued that there is no distinction because arbitral findings of facts are not reviewable, and when parties enter into an agreement to arbitrate it is the fact-findings of the arbitration panel that count, not those of a reviewing court.[63] As discussed below, the Court of Appeals appears to have credited this argument.

Citizen Bank v. Alafabco Inc.[64] is the other salient Supreme Court decision. The Court held that the reach of the FAA is coextensive with that of the Commerce Clause of the United States Constitution, and applies to disputes that merely "affect commerce" rather than only those "in commerce."[65] Thus, the statutory provisions of the FAA along with the Manifest Disregard of Law Doctrine will be applied to the vast majority of commercial arbitration awards. Nearly all business "affects commerce."

II. THE CASE

Part II reviews the background of the case and includes a description of the factual and legal findings made by the arbitration panel (including former United States Attorney General Nicolas Katzenbach) and the protracted appellate challenge to the arbitration award—particularly highlighting the New York Court of Appeals de-

[62] *Helmsley at the Court of Appeals*, 846 N.E.2d 1201.
[63] *Id.*
[64] 539 U.S. 52.
[65] *Id.* at 56 ("We have interpreted the term involving commerce in the FAA as the functional equivalent of the more familiar term affecting commerce . . . .").

cision.

A. Helmsley Publicized: An Introduction

It started in 1997. *The New York Times* headline proclaimed, "Helmsley Turns Over Control of Company."[66] The newspaper continued, "Leona Helmsley has turned over control of Helmsley-Spear Inc., one of the city's largest real estate management companies, to her late husband Harry Helmsley's two closest business associates, ending a bitter three-year feud that had hampered her ability to sell off a $5 billion real estate empire."[67] The story also noted the commencement of litigation involving Mrs. Helmsley and billionaire business associates Irving Schneider and Alvin Schwartz. "Although Mrs. Helmsley has ended her battling on one front, she remains locked in combat with another of Mr. Helmsley's former business associates, Peter Malkin, a wealthy landlord who owns many buildings in partnership with the Helmsley estate and with Mr. Schneider and Mr. Schwartz."[68] The press continued to follow the litigation. Three years later, an article in *The Wall Street Journal*, headlined, "Inside the Bitter Battle for Helmsley Buildings", described the "court battle [as] part of the final chapter of a great Helmsley saga that has riveted New York for decades."[69]

Finally, or so it seemed, the battle was over. Under the banner headline, "Helmsley-Spear Retains Control of Empire State

[66] Charles V. Bagli, *Helmsley Turns Over Control of Company*, N.Y. TIMES, Sept. 26, 1997, at B7.
[67] *Id.*
[68] *Id.*
[69] Peter Grant, *Inside the Bitter Battle For Helmsley Buildings: Role of Managing Agent Becomes Center of Fight That's Dragged for Years*, WALL ST. J., May 3, 2000, at B14.

Building," the *New York Times* reported in April of 2001:

> An arbitration panel ruled on March 30 that Mr. Malkin could not remove Mr. Schneider or Helmsley-Spear as the managing agent of the properties. Mr. Malkin's law firm had accused Helmsley-Spear of mismanagement, but after four years, 1,000 exhibits and 50 witnesses, it failed to persuade the arbitrators of any wrongdoing.
>
> In its decision, which was filed on Friday, the panel said it found "credible proof" that Wien & Malkin "breached numerous ethical obligations" in its supervision of the properties, as Helmsley-Spear had asserted. The arbitrators said Wien & Malkin must disclose its actions to its partners, if it tries to terminate Helmsley-Spear in the future.[70]

The case, however, was nowhere near a conclusion. Instead, the litigation continued for another five years, the sole issue being the efficacy of this ruling by the arbitration panel issued on March 31, 2001. Before the media frenzy over *Helmsley*, the case erupted from relatively ordinary beginnings.

B. The Arbitration Award

The 134-page Award ("Award")[71] begins by describing the partnership forged by two of the most prominent players of the New York City real estate scene in the twentieth century. Lawrence Wien, the founder of a law firm known as Wien & Malkin, was credited as

[70] Charles V. Bagli, *Helmsley-Spear Retains Control of Empire State Building*, N.Y. TIMES, Apr. 10, 2001, at B7.

[71] *In re* Arbitration between Wien & Malkin, LLP v. Helmsley-Spear, Inc., American Arbitration Association Case Nos. 13 180 00976 97 & 13 180 00964 97 (Mar. 30, 2001) (on file with author) [hereinafter *Award*].

the creator of modern real estate syndications—investment vehicles using partnership entities and multiple layers of leaseholds to allocate the risk and reward, including the tax advantages of owning real estate among "participants."[72] In the late 1940s, Mr. Wien joined forces with Harry Helmsley, a well known real estate venture capitalist. Wien and Helmsley divided responsibility for the properties they syndicated; Wien made money "by investing but also by syndicating shares and then managing the legal aspects of the syndication"[73] while Helmsley "made his money both by taking a piece of the property as an investment and equally importantly by acting as managing agent and earning commissions on the rentals."[74]

The press reported much of the Award focused upon the efforts of Peter Malkin (Wien's son-in-law) and Wien & Malkin (the law firm Mr. Wien had founded) to oust Helmsley-Spear as managing agent for eleven of the syndicated properties because of alleged improprieties and mismanagement and to terminate Helmsley-Spear "for cause."[75] The Award details the virtual mountain of proof adduced by Wien & Malkin in support of its multiple claims of mismanagement and impropriety.[76] Wien & Malkin's case failed. The panel was critical of the expert testimony proffered and also suspi-

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[72] *Id.* at 1-2. For instance, the Empire State Building is managed by an "operating partnership" that leases the building (and shares the profit) with another partnership; that partnership in turn leases the building (and shares profit) with another entity pursuant to ground lease. Each of these partnerships provides investment opportunities for multiple investors ("participants") that purchased interests, allowing them to enjoy the benefits of ownership of the world's most prestigious building.

[73] *Id.* at 2.

[74] *Id.* (emphasis omitted).

[75] *Id.* at 3, 109.

[76] *See Award*, *supra* note 71.

cious of other evidence supporting the claims of mismanagement, including documents such as business records. The panel explained its overall impressions.

> Prior to late 1996-early 1997, the relationship between Wien & Malkin and Helmsley-Spear appears to have been at least cordial. At some point in the late 1996 time frame, however, Wien & Malkin apparently decided to embark on a massive effort to terminate Helmsley-Spear as managing agent, culminating in this arbitration. We found that starting in late 1996, virtually everything Wien & Malkin said, wrote and did was primarily intended to strengthen its litigation position in its dispute with Helmsley-Spear.[77]

None of the panel's adverse determinations regarding mismanagement and impropriety were ever challenged by Wien & Malkin, nor were the panel's "for cause" determinations against Wien & Malkin subject to appellate review.[78] Accordingly, this Note does not describe Wien & Malkin's remarkable claims of bid rigging, below-market renting, bribery, or the other claims of operational deficiencies and incompetence.[79] Instead, this Note focuses solely on Wien & Malkin's arguments challenging the Award: (1) the determination that Helmsley-Spear enjoys the status of successor in interest—it was not a legal imposter as contended by Wien & Malkin;[80] (2) that Helmsley-Spear had not been properly removed (in some cases by a vote of virtually all the investors involved in a building) as managing

[77] *Id.* at 14.

[78] *Helmsley at Appellate Division*, 751 N.Y.S.2d 21.

[79] *See Award*, *supra* note 71.

[80] *Id.* at 117-18.

agent of the buildings;[81] and (3) the panel's validity determination regarding Leona Helmsley's voting agreement executed as part of her settlement with Messrs. Schwartz and Schneider.[82] These three issues were sometimes referred to collectively by the arbitration panel and the reviewing courts as Wien & Malkin's "without cause" case.

1. *The Arbitrators Found that Helmsley-Spear was a Valid Successor in Interest—Not a Legal Imposter*

As noted above, in 1997, Mrs. Helmsley settled a well-publicized three-year battle with her husband's former associates, Messrs. Schwartz and Schneider. One subject of that litigation was the enforcement of an option agreement under which Messrs. Schwartz and Schneider were given the right to acquire Mr. Helmsley's interest (the stock of the corporate entity) in Helmsley-Spear, Inc.[83] As part of the settlement of this three-year litigation, the stock option was recast as a sale of all the assets of Helmsley-Spear—including an assignment of one critical asset—the right to serve as managing agent of the properties.[84]

Wien & Malkin argued that the assignment of management rights was unlawful, that such rights (whether under management

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[81] *Id.* at 111-17.

[82] *Id.* at 119-24.

[83] *Award*, *supra* note 71, at 118. The option agreement stated:

> [t]his agreement shall be binding upon the heirs and legal representatives of the individual parties and upon the successors and assigns of HELMSLEY ENTERPRISES, INC. and HELMSLEY-SPEAR, INC. The rights of SCHWARTZ and SCHNEIDER hereunder are personal to each of them and to the survivor of them, and are not transferable by both or either by operation of law or otherwise.

Id.

[84] *See Award*, *supra* note 71, at 118.

agreements or part of formative partnership agreements) were in the nature of a personal service agreement requiring consent of the Partnerships that owned and/or controlled the properties.[85] Since no such consent was sought or given, Wien & Malkin contended the entity in the arbitration (formerly Newco) was a legal imposter.[86] As such, Newco had no claim to manage the eleven commercial properties in dispute.[87]

The arbitrators rejected Wien & Malkin's argument explaining:

> This analysis must start with our conclusion that Newco, renamed Helmsley-Spear, Incorporated, the Respondent in this case is the valid successor in interest of Helmsley-Spear, Incorporated. It achieves that status by virtue of an option agreement of 1970.
> . . . .
>
> The parties to the 1997 transaction cast it as a purchase of the assets of the existing Helmsley-Spear corporation rather than a purchase of its stock. We are persuaded this change was merely one of form, done for tax reasons having to do with certain "parked" properties that are unrelated to the issues in this case. Claimants have not persuaded us that the change of form had any other consequence to the parties, to the partnerships or to Wien & Malkin. We find that the change of form is not a breach of any duty Helmsley-Spear owed to the partnerships and that Claimants' efforts to elevate this technical matter to a nullification of Helmsley-Spear's rights are without merit.[88]

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 117-18.

2. *The Voting Agreement*

As part of the 1997 settlement with Messrs. Schwartz and Schneider, Mrs. Helmsley entered into a voting agreement.[89] This agreement was designed to ensure Helmsley-Spear would continue to manage several of the disputed buildings and required that Mrs. Helmsley take all action within her power (including casting partnership votes) to ensure that Newco—now Helmsley-Spear—continued as managing agent.[90] Wien & Malkin argued the voting agreement was in violation of New York Partnership Law Section 53(1),[91] which permits a partner to transfer only his economic interest, not management rights.[92] Wien & Malkin continued to argue the agreement also violated section 40(7) of New York Partnership Law which provides: "No person can become a member of a partnership without the consent of all the partners."[93] The panel disagreed and stated, "[t]he option agreement is of long standing, and plainly contemplated that Mr. Schneider and Mr. Schwartz would continue the Helmsley management of Helmsley-Spear. Mrs. Helmsley, as successor to Harry Helmsley, is merely carrying out that intention."[94]

3. *The Votes Invalidated*

The arbitration panel did recognize that Helmsley-Spear could be terminated if the requisite interests of the partnership owning the

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[89] *Award*, *supra* note 71, at 119.
[90] *Id.*
[91] N.Y. P'SHIP LAW § 53(1) (McKinney 2006).
[92] *See Award*, *supra* note 71, at 120.
[93] N.Y. P'SHIP LAW § 40(7) (McKinney 2006).
[94] *Award*, *supra* note 71, at 120.

properties (usually specified in the formative partnership agreements) decided to do so (a proxy vote was also found to be permissible).[95] The panel, however, determined that such a decision by the partnership must be informed and the result of a fair process.[96] For instance, according to the panel, the replacement of Helmsley-Spear as managing agent would have been justified if the partnership believed a different managing agent could produce better results.[97]

The panel proceeded to find that the purported votes (and there was a significant issue about whether any vote was taken) terminating Helmsley-Spear were invalid.[98] Finding multiple flaws in the process, including the use of a blind, uninformed proxy as well as serious deficiencies in what was disclosed to partners and what was hidden from them, the panel essentially disqualified Mr. Malkin as a proxy solicitor.[99] The panel likewise invalidated all purported votes that were conducted by Wien & Malkin in its effort to terminate Helmsley-Spear as managing agent.[100]

The panel found Mr. Malkin's request to get the discretion to vote his partner's interest without disclosing the complete details "of how and to what extent he and his entities would benefit from the removal of Helmsley-Spear, as well as any interest he or his entities might have in some future managing agent" to be a breach of Mr.

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[95] *Id.* at 110.
[96] *Id.* at 113.
[97] *Id.* at 115.
[98] *Id.* at 131.
[99] *Award*, *supra* note 71, at 112-15.
[100] *Id.* at 115 ("[W]e are nullifying the Malkin Proxies for these reasons and voiding any vote or purported vote in which they were used or might be used in the future . . . .").

Malkin's disclosure obligations.[101] The panel also found that Helmsley-Spear presented credible proof of numerous ethical violations relating to the solicitation of proxies and the voting process and concluded, "those who seek proxies assume the highest fiduciary obligations to those they solicit, and must provide complete and accurate information on the matters solicited."[102] Given the factual determinations, it was evident that neither Mr. Malkin nor Wien & Malkin satisfied these ethical obligations. The votes did not stand.[103]

4. *Arbitration Summarized*

The panel denied the claims of Wien & Malkin and Peter Malkin to remove Helmsley-Spear, Inc. as managing agent for cause in the subject properties.[104] Likewise, Wien & Malkin's claims to remove Helmsley-Spear without cause were denied.[105] Incidental to that holding, the panel determined proxies solicited by Wien & Malkin (permitting a vote to remove Helmsley-Spear) were "null, void and [the] votes" against Helmsley-Spear as managing agent for any of the properties were, likewise, voided by the panel.[106] The panel also held that Helmsley-Spear was not a legal imposter but instead that it legitimately succeeded to the rights to manage the eleven properties.[107] Further, the panel enjoined Wien & Malkin from "contesting the validity or in any way interfering with the Voting Agreement

[101] *Id.* at 115.
[102] *Id.* at 113.
[103] *Id.* at 117.
[104] *Award*, *supra* note 71, at 131.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 131.

between Leona Helmsley and Helmsley-Spear" (Wien & Malkin must give full force and effect to that agreement in any future vote to remove Helmsley-Spear as managing agent).[108] Finally, the panel found Wien & Malkin had engaged in ethical impropriety serious enough to require all future votes and partnership governance be judicially monitored.[109]

Litigation on these issues persisted until 2006 when the case was finally settled.

C. The Court Challenge

1. *New York Courts and New York Law*

After the panel's determination that the evidence did not support grounds for termination of Helmsley-Spear as managing agent for the partnerships, Wien & Malkin moved to vacate the decision on the theory that it was "legally in error."[110] The New York Supreme Court disagreed and confirmed the award on July 23, 2001.[111] On appeal, the Appellate Division, First Department, ruled that because the buildings were located in New York City, the dispute did not have a substantial effect on interstate commerce, the FAA did not apply.[112] It also affirmed the supreme court's confirmation, stating, "the award must stand unless shown to be utterly arbitrary or viola-

[108] *Id.*
[109] *Award*, *supra* note 71, at 132.
[110] *Helmsley at Court of Appeals*, 846 N.E.2d at 1204.
[111] The decision of the New York Supreme Court granting Helmsley-Spear's motion to confirm the Award is unpublished.
[112] *Helmsley at Appellate Division*, 751 N.Y.S.2d at 22.

tive of public policy."[113] The court stated, "We are not empowered to vacate an award merely for errors of law or fact committed by the arbitrators . . . we conclude that the arbitration panel's findings . . . were not so arbitrary as to warrant vacatur."[114] The New York Court of Appeals denied plaintiff's motion for leave to appeal.[115]

2. *United States Supreme Court Remand*

After exhausting its state court appeals, Wien & Malkin filed a petition for certiorari with the United States Supreme Court on July 21, 2006.[116] While the petition was pending, the Court decided *Citizens Bank v. Alafabco, Inc.*,[117] holding that the FAA is coextensive with the Commerce Clause in that it applies to activities that merely affect commerce (as opposed to activities actively in the stream of commerce).[118] In light of *Alafabco*, the Supreme Court remanded *Helmsley* (in a one sentence decision) with instruction to reconsider the determination that the FAA did not apply to the enforcement of the award.[119]

Alafabco has profound implications for the Manifest Disregard of Law Doctrine. Since nearly all activities affect commerce, the Manifest Disregard of Law Doctrine will be the standard for review in the vast majority of challenges to commercial arbitration

[113] *Id.* (citing N.Y. C.P.L.R. § 7511 (McKinney 2008)).
[114] *Helmsley at Appellate Division*, 751 N.Y.S.2d at 22.
[115] Wien & Malkin, LLP v. Helmsley-Spear, Inc., 790 N.E.2d 277 (N.Y. 2003).
[116] Petition for a Writ of Certiorari, Wien & Malkin LLP v. Helmsley-Spear, Inc., No. 06-98, (U.S. 2006). The Supreme Court denied the petition. Wien & Malkin LLP v. Helmsley-Spear, Inc., 127 S. Ct. 34 (2006).
[117] 539 U.S. 52 (2003).
[118] *Id.* at 56.
[119] *Helmsley at the Supreme Court*, 540 U.S. 801.

awards—both in federal and state courts. Given this commercial reality, it is essential that the standard for arbitral review be consistent in order to encourage businesspeople to arbitrate.

3. *New York Courts and Federal Law*

On remand, the First Department determined that in light of *Alafabco*,[120] the FAA applied to *Helmsley.*[121] Accordingly, the court proceeded to apply the manifest disregard standard to the issues raised by Wien & Malkin.[122] First, the court held that the arbitrators exhibited a manifest disregard of law in determining that Helmsley-Spear had obtained the status as a legal successor.[123] Instead, the court made its own factual determinations: (1) the new Helmsley-Spear was more than a mere "change in form" and (2) the panel "ignored the fact that Helmsley-Spear, Inc. had different officers, directors, shareholders, management personnel, financial structure and fewer properties under management than Helmsley-Spear."[124] The court then characterized the transaction between Mrs. Helmsley and Messrs. Schneider and Schwartz as an assignment and proceeded to address an argument that was not reached by the panel: whether the assignment of the personal service contract to Helmsley-Spear (formerly Newco) was valid.[125] The court, applying what it described as well-settled law, voided the assignment of the management agree-

[120] 539 U.S. at 56.
[121] *Helmsley at Appellate Division on Remand*, 783 N.Y.S.2d at 341.
[122] *Id.*
[123] *Id.* at 344.
[124] *Id.*
[125] *Id.*

ments (personal service contracts) to Helmsley-Spear.[126]

The First Department also found that the arbitrators manifestly disregarded the partnership agreements in its finding that the vote to terminate Helmsley-Spear was not sufficiently informed or misinformed, and thereby void.[127]

> Contrary to the findings of the arbitration panel, the partnership agreements did not provide for a particular method of solicitation of proxies for a vote to terminate the managing agents and did not establish a fiduciary duty to them. Nor was there any showing that Peter Malkin fraudulently induced the partners to give him their proxies.[128]

Finally, the court upheld the arbitration determination that Leona Helmsley's voting agreement with Schwartz and Schneider was valid for the reasons cited by the panel.[129] Next, evidently recognizing the peculiar nature of its decision (vacating an award under federal law that was previously confirmed under state law), the First Department granted Helmsley-Spear leave to appeal to the New York Court of Appeals. The following question was certified: "Was the order of this Court, which reversed the judgment of the Supreme Court, properly made?"[130]

4. *The Court of Appeals: The Last Chapter*

On February 21, 2006, the New York Court of Appeals issued

[126] *Helmsley at Appellate Division on Remand*, 783 N.Y.S.2d at 344-45.
[127] *Id.*
[128] *Id.* at 345.
[129] *Id.*
[130] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206.

the final decision on the *Helmsley* case.[131] That decision reversed the vacatur issued by the appellate division and confirmed the award.[132] In so doing, the court established the standard for applying the Manifest Disregard of Law Doctrine in all New York State courts.

While not required to do so under its own jurisprudence, the New York Court of Appeals generally adopted the Second Circuit's interpretation of the Manifest Disregard of Law Doctrine.[133] The court echoed the Second Circuit's admonition that the doctrine of manifest disregard is a "severely limited doctrine,"[134] that it is a "doctrine of last resort,"[135] and is to be used only upon a rare occurrence of apparent "egregious impropriety"[136] on the part of the arbitrator where none of the statutory provisions of the FAA apply. The New York Court of Appeals also adopted the Second Circuit's two-prong articulation of the Doctrine of Manifest Disregard:

> To modify or vacate an award on the ground of manifest disregard of the law, 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.[137]

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131 *Id.* at 1201.
132 *Id.* at 1206.
133 *See Flanagan*, 495 N.E.2d at 348.

> When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts, however, a State court required to interpret the Federal statute . . . is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits.

Id.
134 *Helmsley at Court of Appeals*, 846 N.E.2d at 1206.
135 *Id.*
136 *Id.*
137 *Id*. at 1207 (citing *Wallace*, 378 F.3d at 189).

While relying principally on the Second Circuit, the court referenced Supreme Court authority as well as its own jurisprudence. The court opened its opinion by citing the Supreme Court's holding in *United Paperworkers International Union v. Misco Inc.*[138] for the proposition that it is the arbitrator's findings of fact and contractual language that control, not the appellate court's interpretation of a factual record or contractual term.[139] The New York Court of Appeals also cited its own jurisprudence for the principle that "an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice."[140] Also, "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."[141]

Applying these standards was a relatively easy task. Not only has the Appellate Division expressly rejected the fact determinations made by the panel, but it had also substituted its own judgment for that of the arbitrators. This was particularly evident with regard to the transaction by which Helmsley-Spear achieved successor status. The Appellate Division rejected the panel's determination that Messrs. Schwartz and Schneider had exercised the option allowing

[138] 484 U.S. 29 (1987).

[139] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206 (citing *Misco*, 484 U.S. at 37-38).

[140] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206 (citing *In re* Sprinzen, 389 N.E.2d 456, 458 (N.Y. 1979)).

[141] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206 (citing New York State Corr. Officers & Police Benev. Ass'n, Inc. v. State, 726 N.E.2d 462, 465 (N.Y. 1999)).

them to acquire Helmsley-Spear; for example, the Appellate Division found the Option Agreement was cancelled. The Court of Appeals resolved this factual debate about the option in favor of the arbitral panel. "Whether the . . . option agreement was exercised was a factual determination by the panel and its findings should remain undisturbed."[142] The Court of Appeals also noted the Appellate Division's broader analysis of the transaction by which Helmsley-Spear acquired successor status (as found by the arbitral panel). The Appellate Division stated that the panel "*erroneously conclud*[*ed*] *that Helmsley-Spear*[] *was a mere change of form*" and "ignored the facts that Helmsley-Spear[] had different officers, directors, shareholders, management personnel, financial structure and fewer properties under management than [the former] Helmsley-Spear."[143] Citing Second Circuit authority,[144] *Misco*,[145] and its own decision in *Dowleyne*,[146] the Court of Appeals held that the Appellate Division's analysis of the transaction—second-guessing the arbitrators—constituted reversible error.[147] "In this regard, the Appellate Division improperly disturbed the panel's finding that the change in form was not consequential."[148]

[142] *Helmsley at Court of Appeals*, 846 N.E.2d at 1208.

[143] *Helmsley at the Appellate Division on Remand*, 783 N.Y.S.2d at 344 (emphasis added).

[144] *See Wallace*, 378 F.3d at 192-93 (holding that manifest disregard of evidence is never an appropriate ground for vacatur in the Second Circuit).

[145] 484 U.S. at 38 ("But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.").

[146] Dowleyne v. N.Y. City Transit Auth., 816 N.E.2d 191 (N.Y. 2004) (reversing the appellate division vacatur of an arbitration award "because it improperly substituted its factual finding for that of a majority of the arbitration panel.").

[147] *Helmsley at Court of Appeals*, 846 N.E.2d at 1209.

[148] *Id.*

The Court of Appeals was also critical of the Appellate Division's review of the legal determination (one not even reached by the panel) concerning the assignment of management rights. "Even if the law of assignment of personal services contracts was clearly applicable, there was no showing that the arbitrators knew they were disregarding the law by naming Helmsley-Spear a valid successor in interest."[149] Here, the Court of Appeals focused upon the subjective component of the Manifest Disregard of Law Doctrine. "Nor is there any deliberateness or willfulness [found either within the award or inferred from a determination that was not barely colorable] exhibited within the award that shows the arbitrators' intent to flout the law."[150] In the absence of proof of such willfulness, the Court of Appeals held the panel's legal determinations could not be disturbed.[151]

Next, the Court of Appeals turned to the panel's voiding of several votes taken to terminate Helmsley-Spear as managing agent. The panel required that such votes be informed (even if conducted by proxy); the Appellate Division disagreed and held to the contrary. Just as the Appellate Division's ruling regarding Helmsley-Spear's status as a successor was overturned, the Appellate Court's ruling regarding the voting agreement was also reversed.[152] The standard (borrowed from the Second Circuit) applied, however, was somewhat different. While fact determinations are not subject to review under the Manifest Disregard of Law Doctrine, a "manifest disregard of a

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Helmsley at Court of Appeals*, 846 N.E.2d at 1210.

contract is appropriate only where the arbitral award contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract."[153] Applying the standard, the court held that there was no such deviation from any express or ambiguous term of the governing contracts, reversing the Appellate Division.[154]

Finally, the Court of Appeals held that the First Department did not err in determining that the voting agreement between Mrs. Helmsley, Schneider, and Schwartz was valid.[155] The panel determined the voting agreement did not transfer Leona Helmsley's partnership interest, which would be prohibited by New York Partnership Law,[156] but merely acted as an agreement that Helmsley would vote for Helmsley-Spear, Inc. as managing agent.[157] Because Mrs. Helmsley was well within her rights to cast a vote in any manner she pleased, with or absent agreement, she thus did not act in contravention of New York State Partnership Law, and the Arbitration Panel did not abuse its discretion in finding that the Voting Agreement did not violate any settled law.[158]

[153] *Id.* at 1210 (citing Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 222 (2d Cir. 2002)).

[154] *Helmsley at Court of Appeals*, 846 N.E.2d at 1210.

[155] *Id.*

[156] N.Y. P'SHIP LAW § 53(1) (stating that while a partner may transfer his economic interest, he may not transfer his management rights).

[157] *Helmsley at Court of Appeals*, 846 N.E.2d at 1210.

[158] *Id.* ("Leona Helmsley's agreement involved a vote she was entitled to cast in whatever manner she chose. Therefore, we agree with the lower court's reasoning that the arbitrators did not manifestly disregard the law by concluding Mrs. Helmsley's actions did not violate state partnership law.").

III. THE FUTURE OF THE DOCTRINE

Part III summarizes the confusion within the circuit courts regarding the application of the Manifest Disregard of Law Doctrine, the appropriate scope of appellate review of a panel's factual determinations, if any, and if and when manifest disregard of contract is an appropriate ground for vacatur of an award. Part III urges the Supreme Court and/or legislature to take an active role in providing consistent standards by which federal and state courts can apply the doctrine. Finally, Part III recommends a resolution to the unanswered questions emerging in wake of *Wilko* and the policy considerations underpinning the recommended standard.

The most glaring fact to emerge from the case law following *Wilko* is the inconsistency in the standards and criterion that have been enunciated by the federal circuit courts in applying the Manifest Disregard of Law Doctrine. After *Alafabco*, this is true for state courts as well. The Seventh Circuit has articulated a test that requires the arbitrator to order the parties to the arbitration to violate the law,[159] a standard so stringent that it is not, in any way, a significant addition to the preexisting FAA statutory framework that encompasses such egregious misconduct.[160] The Fifth Circuit requires that the arbitrators appreciated the applicable legal standard, but failed to apply it, and even when such disregard of the law is present, the award will not be vacated unless it would result in a significant injus-

[159] *Butler*, 336 F.3d at 636.
[160] *See* 9 U.S.C.A. § 10(a) (West 2007).

tice.[161] The Fourth Circuit standard, by contrast, prohibits a review of the arbitrator's reasoning. Thus, vacating if the arbitral disposition is not "rationally inferable from the contract."[162] The Second Circuit's standard differs in that it does not require a violation of law (like the Seventh Circuit); it does not require significant injustice (like the Fifth Circuit); and, finally, it does not use a "rationally inferable" test (like the Fourth Circuit).[163]

There are additional unsettled questions that compound the confusion drawn from these inconsistent standards. Does the Manifest Disregard of Law Doctrine apply to arbitral fact finding as well as legal determinations? May an arbitral award be vacated if a panel disregards a contract? The Second Circuit has changed positions on these issues. In *Halligan*, the court applied the Manifest Disregard of Law Doctrine to both facts and evidence.[164] Predictably, lower courts followed the appellate court's lead and vacated many awards based upon a determination that arbitrators disregarded evidence presented by the parties.[165] Indeed, this is just what the appellate division did in the *Helmsley* case—citing its own jurisprudence that followed *Halligan* into the thicket of fact review. All this changed as a result of *Wallace*, where the Second Circuit disowned *Halligan*, and stated

[161] *Kergosien*, 390 F.3d at 355.

[162] *Apex*, 142 F.3d at 193.

[163] *Wallace*, 378 F.3d at 189 (stating that to vacate an arbitration award, a reviewing 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.") (citing *Banco*, 344 F.3d at 263).

[164] *Halligan*, 148 F.3d at 204 ("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.").

[165] *See supra* notes 50-57 and accompanying text.

that the passage from *Halligan* allowing for fact review was mere dicta.[166] The Second Circuit then proceeded to admonish the lower courts because arbitral fact review was not permissible.[167]

The New York Court of Appeals has made one thing clear: arbitral fact-findings are not reviewable—at least in New York State. Additionally, the Court of Appeals' reliance upon *Misco* suggests that this rule may have broader application.[168] Nevertheless, even in light of this clear prohibition of fact review, the New York Court of Appeals carved out another basis upon which disappointed litigants may challenge arbitration awards. "[V]acatur on the basis of manifest disregard of a contract is appropriate only where the arbitral award contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract."[169] The distinction between contract and fact review is difficult to understand, and not surprisingly, with the exception of the Second Circuit, there is no such distinction made by circuit courts.

[166] *Wallace*, 378 F.3d at 192.

[167] *Id.* at 193 (holding that a manifest disregard of evidence by the panel is never an appropriate ground for vacatur of an arbitration award).

[168] *Helmsley at Court of Appeals*, 846 N.E.2d at 1206 (citing *Misco*, 484 U.S. at 37-38). The New York Court of Appeals' reliance on *Misco* indicates that the court accepted the argument that there was no principle distinction between the contract labor dispute in *Misco* and a commercial dispute arising under the FAA. Thus, *Misco* may be controlling and preclude review of a panel's evidentiary findings in all disputes arising under the FAA. Currently, *Misco* remains persuasive authority on the issue.

[169] *Helmsley at the Court of Appeals*, 846 N.E.2d at 1210 (citing *Westerbeke*, 304 F.3d at 222).

A. The Efficacy of Arbitral Awards: The Future of the Doctrine

Given the confusion that has emerged after *Wilko*, the Supreme Court's voice is necessary to provide clear, uniform guideposts for the lower courts to apply when considering vacatur under the doctrine of manifest disregard. The Supreme Court should grant certiorari to a case presenting these issues at the earliest possible time. "[The] principal purpose for which [the United States Supreme Court] use[s its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."[170] Alternatively, if the Supreme Court does not act, it is certainly feasible for Congress to do so.

Particularly, the FAA could be amended to provide express standards to be applied in adjudicating whether there has been a manifest disregard of law. In either case, the manifest disregard standard should incorporate the following criteria:

- There should be no review of a panel's factual determinations. The *Misco* case ought to be applied inasmuch as there is no principle distinction between a collective bargaining case such as *Misco* and a case arising under the FAA. The policy considerations underpinning a preclusion of fact review in labor dispute arbitrations, such as certainty, efficiency, and finality, are equally applicable to disputes arising under the

[170] Braxton v. United States, 500 U.S. 344, 347 (1991) (citing SUP. CT. R. 10(a)).

FAA.

- The arbitrator's determinations, with regard to contractual determinations, should likewise be binding and non-reviewable. There is no principled distinction between a factual determination and contract interpretation.
- The basic standard should be that which has been articulated by the Second Circuit (and followed by several other circuits) and adopted by the New York Court of Appeals. The Seventh Circuit standard is too rigorous inasmuch as it writes the doctrine out of the law, and the Fourth Circuit is too lenient in permitting fact review. The Second Circuit standard is that an award will be vacated if an arbitration panel ignores or refuses to apply a clearly defined and applicable legal principle.
- In addition to satisfying the Second Circuit standard, borrowing the "significant injustice" requirement from the Fifth Circuit will help ensure finality and certainty of arbitration awards. The significant injustice requirement will permit vacatur pursuant to the recommended standard only if, the Second Circuit standard is met first, and, second, the award would result in significant injustice to one or both of the parties. Even if an arbitrator knowingly disregards a well-settled principle, the award will still be upheld if no great in-

justice is suffered by the parties to the arbitration.

These criteria best satisfy the policies underlying arbitration—finality, efficiency, and certainty—while still maintaining the efficacy of the legal process.

B. Policy Considerations

Two policy consideration underpinning the recommendation that an arbitral determination be subject to such a limited review. First, members of the business community generally agree to arbitrate a dispute because the process offers an efficient, final, and private resolution. Arbitration is usually streamlined. Discovery is significantly curtailed, hearings are scheduled without regard to distractions that often preoccupy judges, and a comprehensive appellate process is eliminated (or reduced). The recommended standard—integrating the Second and Fifth Circuit standards—is designed to provide a certain result to this efficient process. Certainly, the Second Circuit standard is an appropriate basic framework to ensure certainty, efficiency, and finality to arbitral awards. Empirical evidence illustrates that the standard adopted by the Second Circuit disturbs only the most egregiously wrong results.[171] As noted in *Wallace*, the Second Circuit has vacated some part or all of an arbitral award on grounds that the panel manifestly disregarded the law in four of forty-eight applications.[172] Adding the "significant injustice" requirement[173]

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[171] *Wallace*, 378 F.3d at 189.

[172] *Id*. at 191 ("[I]t was calculated that since 1960 [the second circuit has] vacated some part or all of an arbitral award for manifest disregard in . . . four out of at least 48 cases . . . ."

should further bolster perception of the business community that the overwhelming majority of arbitral awards will be confirmed. Hence, the business community, to the extent it is seeking certainty and finality, should find arbitration to be a very attractive method to resolve disputes.

Second, while fostering finality and certainty, the proposed standard does maintain some role for a reviewing court (in addition, to that provided by the FAA).[174] This role should serve the business community's requirement for a dispute resolution process that, while efficient and certain, also maintains some predictability. Predictability is important because it allows businesspeople to understand the risk associated with the litigation, establish appropriate reserves, and engage in an informed settlement discussion. While they may be willing to relinquish the right to a full appellate review process, the business community may not be willing to include arbitration clauses in their contracts if there is no constraint whatsoever on arbitral discretion, such as a lack of any predictability. The recommended standard provides such constraints while at the same time providing arbitrators with a very wide berth to resolve disputes.

Lastly, the recommended standard will encourage arbitral panels to issue written decisions. Most arbitration clauses contained in commercial contracts do not require arbitrators to issue written ar-

(citing *Duferco*, 333 F.3d at 389)).

[173] *Kergosien*, 390 F.3d at 355. The court held that to vacate an award the arbitrators must appreciate the applicable legal standard, but not apply it. Moreover, even when such disregard of the law is present, the award will not be vacated unless it would result in a significant injustice. *Id.*

[174] *See* 9 U.S.C.A § 10(a) (West 2007) (providing four statutory grounds for vacatur of awards upon a finding of the most egregious arbitral misconduct).

bitration decisions. Allowing an intrusive search into the arbitrator's evidentiary findings (as permitted in the Fourth Circuit)[175] and contract determinations (as *Helmsley* seemed to permit)[176] would deter a panel from executing a written award. Therefore, to encourage that arbitrators continue to issue written awards (which enable a reviewing court to more readily preserve the efficacy of that award), it is essential that their findings of fact (evidentiary or contractual) are not subject to review. In *Misco*, the Supreme Court emphasized the importance of written arbitration awards to an effective enforcement/vacatur procedure and the chilling effect invasive fact review would have on those writings. While the subject matter litigated in *Misco* involved a collective bargaining dispute (not arising under the FAA), the policies to avoid fact review are present in all arbitration: to encourage written awards and allow a limited legal review to ensure the efficacy of the arbitral award while still preserving the policies that encourage commercial enterprises to arbitrate.

IV. CONCLUSION

In light of the Supreme Court's holding in *Alafabco*,[177] clarification of the criteria for review of arbitration awards is of imminent importance to the business community. Moreover, because arbitration clauses are commonplace in business agreements, clarification of

[175] *Apex*, 142 F.3d at 193. The Fourth Circuit permits vacatur upon a judicial finding that the arbitration panel could not have rationally inferred its disposition in light of the applicable contract(s) and/or evidentiary record presented by the parties. *Id.*

[176] *Helmsley at Court of Appeals*, 846 N.E.2d at 1210 (citing *Westerbeke*, 304 F.3d at 222).

[177] *Alafabco*, 539 U.S. at 56 (holding that the FAA is coextensive with the Commerce Clause applying to activity merely affecting commerce).

the standard of review for vacatur is of even greater importance. Given the underlying policies that encourage business entities to employ arbitration as an alternative to litigation, reviewing courts should review with a presumption in favor of enforcement. However, such courts ought to utilize the Manifest Disregard of Law Doctrine to ensure that the arbitration panel did in fact adhere to the legal principles that govern the dispute. Thus, while the Supreme Court or legislature must be charged with the final determination of how to strike this balance, a hybrid of the Second Circuit standard bolstered by the Fifth Circuit's "significant injustice" requirement would best serve the policy underpinning arbitration, while allowing a limited role for a reviewing court (a role that would ensure the efficacy of the arbitration panel's legal determinations).

In any case, *Helmsley* represents the culmination of fifty-three years of confusion surrounding the Manifest Disregard of Law Doctrine. That confusion manifested itself in the *Helmsley* litigation, which is instructive to the adverse effect the current state of the doctrine has on the principles underpinning arbitration. Surely, Helmsley-Spear and Wein & Malkin agreed to engage in arbitration based on common expectations of that process—that it would effectuate a quick, certain, and final resolution to a complicated commercial dispute. However, as a result of the half-century of confusion surrounding the doctrine, the parties to *Helmsley* were subject to a protracted appellate process with a stop at the New York State Supreme Court, two trips to the New York State Appellate Division, First Department (separated by a trip to the Supreme Court), and, fi-

nally, litigation at the New York Court of Appeals. Indeed, even the parties to the dispute, who zealously believed in the merits of their respective claims, eventually decided to settle the dispute rather than continue the process. Certainly, if commercial arbitration is to remain viable, particularly in light of the doctrine's current applicability to both state and federal review of arbitral awards, legislative action or the Supreme Court must clarify the standards of review to reinstate the policies underpinning arbitration. Of course, the business community is aware of the *Helmsley* case and one can be sure they will want nothing to do with a process that might result in such a protracted, uncertain, appellate nightmare.