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## Revived \$100M Award Boosts NY's Pro-Arbitration Reputation

By **Caroline Simson**

Law360 (October 5, 2018, 8:31 PM EDT) -- When a New York appeals court recently revived a \$100 million arbitral award that had been set aside because of a tribunal's "manifest disregard" of the law, many in the New York arbitration community breathed a sigh of relief, saying the decision underscored that courts in the Empire State won't second-guess arbitral tribunals.

Late last month, a panel for New York's Appellate Division, First Department, **overturned** a 2017 decision in which New York Supreme Court Judge Charles Ramos **set aside** parts of a \$100 million arbitral award issued by a New York-seated tribunal to a South Korean food conglomerate following a dispute with NutraSweet Co. over an aspartame deal.

The decision has been welcomed by many in New York arbitration circles, who say the appellate court's decision more closely aligns with the approach taken by the U.S. Court of Appeals for the Second Circuit, which is to set aside arbitral awards only on the rarest of occasions. Left in place, experts say the lower court decision could have adversely affected New York's reputation as a seat of arbitration since the finality of arbitral awards is a key consideration for parties who choose to arbitrate, rather than litigate, their disputes.

"This decision makes clear that arbitration is not a prelude to the judicial review process," said Latham & Watkins LLP partner Claudia T. Salomon, global co-chair of the firm's international arbitration practice. "In arbitration, finality is a two-edged sword, but this decision makes clear that the court process is not an avenue for appeal."

Within the U.S., arbitral awards can be set aside only in certain specific circumstances, such as if the award was procured by corruption, but not for an error of law. To that point, the New York City Bar Association had argued in an amicus brief before the appeals court in the NutraSweet case that arbitral awards can be vacated only if leaving the award in place would "undermine the fundamental integrity of the arbitration itself."

An assurance that courts respect that standard is an important consideration for parties when they're deciding where to conduct arbitration, according to Clyde Lea, former deputy general counsel at ConocoPhillips and now a practicing independent arbitrator.

"The point the court made here was that people choose arbitration in their contract for a reason," he said. "They recognize they're making certain compromises when they choose arbitration. They're giving up the formal right of appeal that you have in the courts. In those jurisdictions where you effectively fear you're going to have to litigate the arbitration, that deprives you of the bargain that you first had with your arbitration."

At issue in the NutraSweet decision was the interpretation of the so-called manifest disregard doctrine, under which arbitral awards may be set aside if a tribunal manifestly disregarded the law. Some U.S. courts, including the Second Circuit, have decided that the manifest disregard doctrine can be used in relation to arbitral awards issued by U.S.-seated tribunals in disputes involving at least one international party, as was the case in the NutraSweet matter.

Judge Ramos had concluded that the underlying tribunal — composed of chairman Louis B.

Kimmelman and co-arbitrators Arnold S. Schickler and Jonathan D. Schiller — had erred when it based its dismissal of NutraSweet Co.'s claims that it had been fraudulently induced into its deal with the Korean company on a technicality of New York law, and that the arbitrators had wrongly dismissed NutraSweet's breach of contract claim. In his ruling, the judge found that the tribunal had disregarded applicable law that would have allowed the fraud claims to proceed and had demonstrated an "egregious dereliction of duty" when it denied NutraSweet's breach of contract claim.

But in reversing his decision, the New York appeals court concluded that his order couldn't be justified under the Federal Arbitration Act. The panel noted that manifest disregard means more than a "simple error of law," and that courts are not empowered to review the arbitrators' determinations of law or fact.

"The Appellate Division's decision confirms that New York courts can be counted on to reliably enforce agreements to arbitrate and arbitrators' awards — and not substitute their own view of the law or the facts for those of the arbitrators," said Baker McKenzie partner Grant Hanessian, who chairs his firm's international arbitration group in North America and who helped write the amicus brief submitted by the New York City Bar Association.

Parties who opt for arbitration over litigation have a number of important considerations when drafting the arbitration clause, including the applicable law and rules. But one of the most critical decisions is choosing where to have the actual proceeding take place, known as the seat of arbitration.

The seat of arbitration can affect the proceeding in a number of ways, since assistance from local courts is sometimes needed during an arbitration, and once an award is issued, it typically can only be set aside by a court at the seat. So the importance of knowing that the judiciary at the seat of arbitration is unlikely to set aside an award can't be overstated.

While New York is widely considered to be one of the world's most desirable arbitral seats, the manifest disregard doctrine had prompted some practitioners and commentators outside the U.S. to question that reputation, according to a 2012 report issued by the New York City Bar's Committee on International Commercial Disputes. Had Judge Ramos' decision been upheld, it could have contributed to those concerns, according to James Carter, senior counsel at WilmerHale and chair of the board of directors of the New York International Arbitration Center.

But he noted that the doctrine, particularly the way it was approached in the appellate NutraSweet decision, isn't all that uncommon from the approach taken by courts outside the U.S. as well.

"This is one of the things that people who say bad things about arbitration in the U.S., people from elsewhere, use as a stick to beat us," he said, referring to the manifest disregard doctrine. "It's always good to be able to say, 'Don't worry about it. It's no more ominous than the judicial review that's available in most countries.'"

For the New York arbitration community, being able to promote the city as a seat of arbitration — and to ensure that the economic boon of conducting an arbitration comes to the city and their firms — is becoming all the more important as the number of cities competing for a piece of the arbitration pie continues to increase.

In recent years, countries like France and Singapore have passed arbitration laws in order to appear arbitration-friendly and attract more of the considerable amount of international disputes work, according to Michael McIlwrath, global chief litigation counsel for GE Oil & Gas in Florence, Italy.

Even within the U.S., the competition is becoming ever greater as cities like Miami and Atlanta continue to promote themselves as favorable arbitral seats. California, too, recently passed a law allowing out-of-state and foreign attorneys to appear in international commercial arbitrations in the state, legislation that proponents said sends a "clear message" that California is open for business for international arbitration.

"One key point that some people may not appreciate is the amount of competition among arbitration seats to attract resolution of international disputes," McIlwrath told Law360. "International parties,

when choosing a seat, will not wish to invest considerable resources in obtaining a Pyrrhic victory in arbitration."

--Editing by Jill Coffey and Emily Kokoll.

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