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# 'Fiorilla' Decisions Undermine Enforceability of Arbitral Awards in NY State Courts - *New York Law Journal*

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New York courts regularly hear cases involving the enforcement of commercial arbitral awards. They vacate or refuse enforcement of awards only on limited grounds, as required under the Federal Arbitration Act (the FAA) and New York CPLR Article 75. New York courts also regularly consider issues arising under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, which governs the enforcement of foreign and "nondomestic" arbitration awards and agreements. And in that context as well, the New York courts have generally taken a pro-arbitration approach.

A series of decisions in a long-running investor-broker dispute, however, is counter to those trends. In *Fiorilla v. Citigroup Global Markets*, the New York County Commercial Division, and the Appellate Division, First Department, vacated a FINRA arbitration award on the ground that the arbitrators manifestly disregarded the law because, the courts concluded, the arbitrators had wrongly rejected a motion to enforce a putative settlement agreement between the parties. Later in the case, those courts also enjoined the investor from seeking to enforce the FINRA award outside the United States. These decisions establish unfortunate precedent for domestic and international arbitration in New York state courts.

**Background**

In 2010, John Leopoldo Fiorilla filed an arbitration with FINRA in New York against his broker, Citigroup Global Markets, Inc. (CGMI), and one of its individual investment advisors. He alleged that they mismanaged his assets causing him to lose all but $20,000 of the $19.5 million

entrusted to them. In 2012, just before the scheduled arbitration hearing, Fiorilla's counsel informed FINRA that the parties settled. Fiorilla, however, disagreed with his counsel and told FINRA that no settlement had been reached. He fired his attorneys, filed a bar disciplinary complaint against them, and retained new counsel. The arbitral tribunal denied CGMI's motion to enforce the settlement and a renewed motion after CGMI presented additional evidence obtained from the disciplinary proceeding, both without explanation. After a lengthy hearing, the tribunal awarded Fiorilla $10.75 million against CGMI and $250,000 against the individual broker. See *Fiorilla v. Citigroup Global Mkts.*, No. 17-cv-5123, 2018 WL 3130604, at *1-3 (S.D.N.Y. June 6, 2018); Pet. to Vacate Arb. Award, *Citigroup Global Mkts. v. Fiorilla*, No. 653017/2013 (N.Y. Sup. Ct. Aug. 28, 2013), NYSCEF No. 1.

In 2013, CGMI filed a petition to vacate the FINRA award in New York County Supreme Court. The Commercial Division vacated the award on the ground that settlement agreements must be respected, but did not cite or discuss any arbitration statutes or decisions or explain why it disagreed with the arbitrators' apparent finding that the settlement was unenforceable. See Mem. Decision, *Citigroup Global Mkts. v. Fiorilla*, No. 653017/2013 (N.Y. Sup. Ct. Jan. 3, 2014), NYSCEF No. 76. The First Department affirmed, reasoning that the arbitrators manifestly disregarded the law by denying the motion to enforce the settlement without explanation after CGMI had cited the relevant law to the arbitrators. *Citigroup Global Mkts. v. Fiorilla*, 127 A.D.3d 491, 491-92 (1st Dept. 2015). The Court of Appeals denied review. 26 N.Y.3d 908 (2015).

In 2016, Fiorilla sought to enforce the FINRA award in France under the New York Convention. Apparently as permitted under French law, the application was made ex parte. Fiorilla did not disclose to the French court that the New York courts had vacated the award. CGMI sought injunctive relief from the Commercial Division, which enjoined Fiorilla from seeking to enforce the award anywhere in the world. See *Fiorilla*, 2018 WL 3130604, at *2. The First Department again affirmed. In a brief explanation, the court said that the injunction was necessary to protect the judgment vacating the award, Fiorilla filed the French proceeding in bad faith, and no comity was owed to the French decision recognizing the FINRA award. *Citigroup Global Mkts. v. Fiorilla*, 151 A.D.3d 665, 666 (1st Dept. 2017). Although Fiorilla raised the issue in his briefs, the First Department did not discuss the New York Convention. See Br. for Res't-Appellant at 48-52, *Citigroup Global Mkts. v. Fiorilla* (N.Y. App. Div. March 20, 2017). The Court of Appeals dismissed Fiorilla's motion for leave to appeal because the appeal was not from a final order. 30 N.Y.3d 986 (2017). The case is still proceeding on issues relating to the injunction and sanctions. Fiorilla also filed a federal suit that was dismissed for lack of jurisdiction.

**Analysis**

The First Department's two decisions are binding precedent in New York County, where many commercial arbitrations are conducted and the resulting awards enforced. The first decision appears to expand the limited concept of manifest disregard of the law to resemble full appellate review. The second decision conflicts with the New York Convention, which allows—but does not require—one jurisdiction to refuse recognition of an award that has been vacated by the courts of the legal seat.

Manifest disregard of the law. Manifest disregard of the law is not an express basis to vacate an award under state or federal law. Instead, it sprang from dicta in a 1953 U.S. Supreme Court opinion, which said that arbitrators' legal interpretations are not subject to judicial review, "in contrast to manifest disregard." *Wilko v. Swan*, 346 U.S. 427, 436 (1953). The U.S. Supreme Court has not itself affirmed that manifest disregard is a proper ground to vacate an award. The Second Circuit has said that manifest disregard is a "judicial gloss" on the express bases to vacate awards under the FAA, but "[a] litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." *T.Co Metals v. Dempsey Pipe & Supply*, 592 F.3d 329, 339-40 (2d Cir. 2010).

The *Fiorilla* decisions do not discuss this or other precedent cabining the manifest-disregard doctrine. The Commercial Division did not mention manifest disregard at all, or any other specific ground to vacate arbitral awards. The First Department primarily relied on the fact that the arbitrators did not explain the reason for denying the motion to enforce the settlement. While acknowledging that arbitrators are not required to explain their decisions, the court noted that the lack of explanation can be a factor when the court is otherwise inclined to find manifest disregard of the law. 127 A.D.3d at 528. But it is not clear why the First Department was otherwise inclined to find that the arbitrators manifestly disregarded the law.

First, the parties before the tribunal disputed whether Fiorilla had in fact agreed to the settlement. That factual issue would appear solely within the province of the tribunal to decide, even if the courts disagreed with the tribunal's decision.

Second, neither court explained why there was an enforceable settlement agreement. There are a number of reasons that the arbitrators might have rejected the settlement. Similar to the CPLR for litigation settlements, the FINRA rules require a settlement agreement to be signed and in writing in order to terminate an arbitration. See CPLR 2104; FINRA Rule 12504(a)(6)(A). Fiorilla's counsel never signed the settlement agreement that CGMI sent him and the agreement contained terms other than the payment due from CGMI. See Ex. 12 to Pet't to Vacate Arb. Award at 2, NYCEF No. 13. CGMI learned from the disciplinary proceeding that Fiorilla sent an email to his counsel authorizing a settlement at $775,000, but there is no discussion in that email of any other settlement term. Whether the unsigned agreement, Fiorilla's email to his counsel, and his counsel's notification that the matter had been settled were sufficient to bind Fiorilla is open to debate. The tribunal also might have decided that a meeting of the minds had not been reached on all terms material terms, found that Fiorilla revoked his consent to the settlement before CGMI accepted it, or concluded that it could not consider the evidence from the disciplinary case because Fiorilla had not waived the attorney-client privilege for purposes of the arbitration. That is not to say that the tribunal would have been correct to reach any of those conclusions, only that disregard of governing law is not the only explanation for its decision.

Recognition of foreign awards that have been vacated. The First Department's decision to uphold the injunction against Fiorilla is also problematic. Under the New York Convention, the jurisdiction in which an award is made has exclusive jurisdiction to vacate the award and may do so based on domestic law. *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us*, 126 F.3d 15, 23 (2d Cir. 1997). But any other jurisdiction can recognize an award vacated by the judicial seat because the New York Convention provides that such other jurisdiction "may," but not "shall," refuse recognition of a foreign arbitral award that has been annulled. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción* (*Commisa*), 832 F.3d 92, 106 (2d Cir. 2016) (applying the substantively similar Panama Convention). The Second Circuit in *Commisa* permitted recognition of an award annulled in Mexico because it concluded that the Mexican courts' annulment of the award violated U.S. public policy. *See id.* at 107-11.

The fact that Fiorilla did not disclose to the French court that the award had been vacated appears to have heavily influenced the New York courts' decisions. That failure to disclose was perhaps inadvisable, but it does not change the fact that the New York Convention allows foreign jurisdictions to enforce vacated awards in they so choose. Moreover, CGMI no doubt had the resources and ability to fully defend itself in France, including by raising the annulment of the award as a defense.

Implications. The precedential effect of the *Fiorilla* decisions remains to be seen. It is possible that the New York Court of Appeals will grant review of the second decision after all lower-court proceedings have concluded. In any event, courts in future cases should limit *Fiorilla*'s application. The decision annulling the award may be distinguishable in future cases based on the unique facts—the lack of any explanation from the tribunal combined with the evidence obtained from the disciplinary proceeding as to Fiorilla's approval of the settlement amount. The lesson for arbitrators is that failing to explain an important decision like why a settlement agreement does not preclude a merits determination threatens enforcement of the resulting award. The decision on the global anti-suit injunction may be limited based on the courts' finding of bad faith, primarily, it appears, because Fiorilla did not disclose the annulment of the award to the French court. In future cases, New York courts should respect the New York Convention's design and allow courts in other jurisdictions to decide whether to enforce an arbitral award or a judgment vacating the award, just as U.S. courts are free to decide between those options.