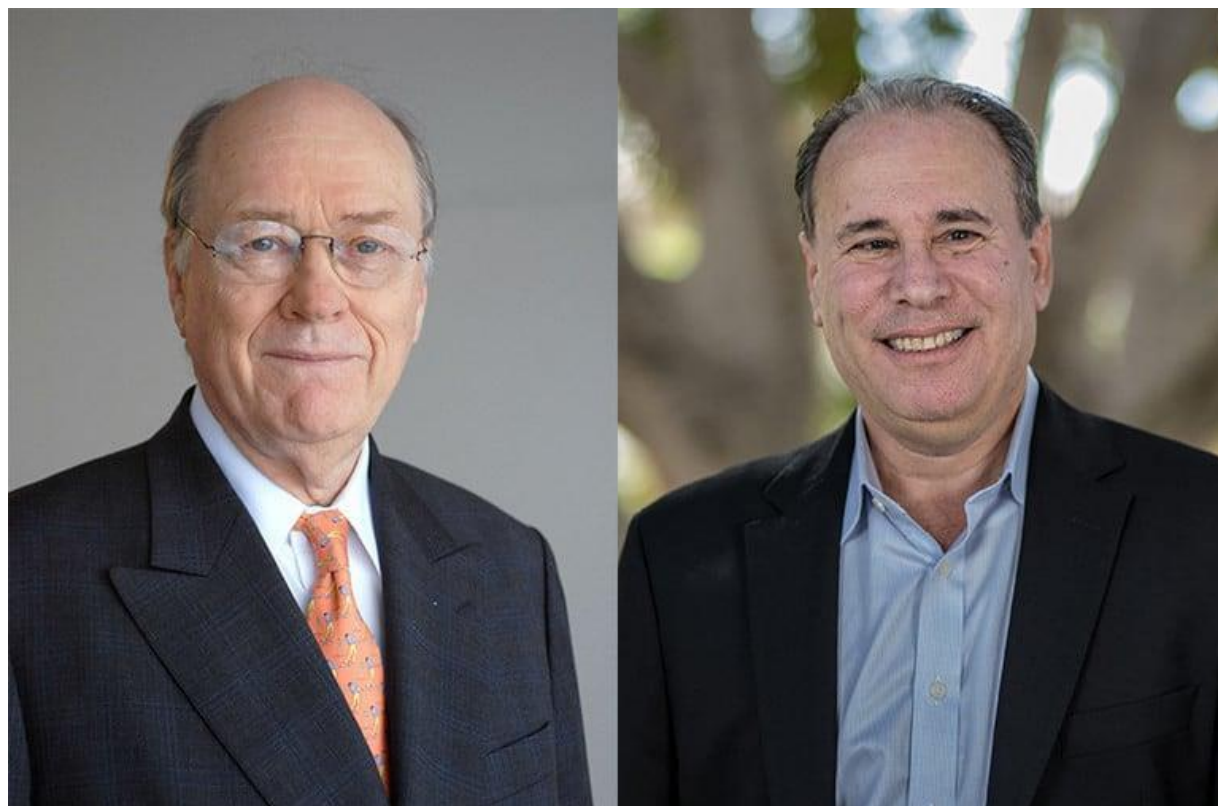


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Visiting Old Friends: Manifest Disregard, The Non-Existent Arbitral Institution and Section 1782

In their International Litigation column, the authors look at recent decisions that address issues discussed in this column over the years: manifest disregard of the facts, the non-existent arbitral institution and Section 1782 discovery.

By **Lawrence W. Newman & David Zaslowsky** | May 21, 2026



In today's column, we examine several recent decisions that address issues this column has covered over the years. We begin with a Ninth Circuit decision addressing manifest disregard of the facts. We then discuss a case involving a contract that called for arbitration under the Arbitration Rules of the Dubai International Financial Centre–London Court of International Arbitration (DIFC-LCIA), which the government of Dubai closed in 2021. Finally, we review a Second Circuit decision concerning discovery from a law firm under 28 U.S.C. §1782.

Manifest Disregard

In *Wilko v. Swan*, 346 U.S. 427 (1953), the U.S. Supreme Court stated, in *dicta*:

In unrestricted submissions, such as the present margin agreements envisage, the interpretation 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.

Succeeding generations of losing parties in arbitration relied on *Wilko*'s reference to "manifest disregard" in efforts to vacate arbitration awards.

In 2008, the Supreme Court held that the Federal Arbitration Act sets forth the "exclusive" grounds for vacating an arbitration award. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). The Supreme Court did not decide whether an award may nevertheless be challenged for "manifest disregard" of the law. Because that doctrine had often been viewed as a judicially created, extra-statutory ground for vacatur, many commentators concluded that *Hall Street* sounded the death knell for manifest-disregard challenges.

In some circuits—the Fifth, Seventh and Eleventh—it did. But in the Second, Fourth, Sixth, Eighth and Ninth circuits, parties may still argue manifest disregard of the law as a basis for challenging an award.

What about manifest disregard of the facts? Courts have generally rejected that theory. The Ninth Circuit, however, stands alone in recognizing a narrow variant. In *VIP Mortgage Inc. v. Gates*, 162 F.4th 1010, 1015 (9th Cir. 2025), the court reaffirmed its "legally dispositive facts" exception, which permits vacatur where: "(1) the factual error was so critical to the disputed legal issue that it determined the outcome of that issue, and (2) the fact was so obvious and undisputed that the arbitrator must have known about it when she decided the legal issue."

The "quintessential example," as referred to in *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F. 4th 1232, 1243 (9th Cir. 2022) comes from *American Postal Workers Union v. U.S. Postal Serv.*, 682 F.2d 1280 (9th Cir. 1982). There, it was undisputed that a postal worker had participated in a strike, but the arbitrator found that he had not. Because strike participation determinatively affected whether the worker could be reinstated, and because the arbitrator had been put on notice of the fact but ignored it, the Ninth Circuit affirmed denial of confirmation.

In *VIP Mortgage*, the arbitrator approved the parties' stipulation dismissing the respondent's counterclaims. The stipulation also provided that each side would bear its own fees and costs associated with those counterclaims. At the conclusion of the arbitration, the arbitrator awarded the claimant damages on her affirmative claims and awarded attorneys' fees, but did not distinguish between time spent on the claims and the counterclaims. On appeal, VIP argued that the arbitrator erred by awarding attorneys' fees related to the counterclaims.

The Ninth Circuit agreed that VIP satisfied the first component of the "legally dispositive fact" test: had the arbitrator recognized the parties' agreement to bear their own fees on the counterclaims, she would have ruled for VIP on that issue. But the court held that VIP failed to satisfy the second component—that the fact was so obvious the arbitrator must have known it when deciding the fee request.

The court explained that the fee issue related to the counterclaims was minor, the stipulation had been executed more than a year before the award, and VIP did not cite the stipulation in its briefing. Under those circumstances, the case did not clear the "high bar" required to establish manifest disregard of a legally dispositive fact.

At its essence, even this exception is a variant of manifest disregard of the law because it involves a factual error that was "so critical, obvious, and intentional that it amounted to manifestly disregarding the law." Since *Hall Street*, the Supreme Court has refused multiple certiorari petitions seeking to resolve the circuit split on whether manifest disregard remains a viable defense to confirmation. The court should accept that invitation.

The Non-Existent Arbitral Institution

What happens when a dispute arises under a contract that calls for arbitration before an arbitral institution that no longer exists? That question was the focus of our July 24, 2024 column, *The Perils of the Non-Existent Arbitral Institution*. As discussed there, the issue arose repeatedly in cases involving the National Arbitration Forum (NAF), a once-popular arbitral institution that stopped accepting new consumer matters in July 2009.

Many courts answered the question by applying the “integral part” rule, under which unavailability of the chosen forum precludes arbitration if “the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern.” That inquiry turns on “how important the term was to one or both of the parties at the time they entered into the agreement,” and courts reached divergent outcomes in applying it to NAF arbitration clauses.

A similar issue arose earlier this year in a case involving a contract calling for arbitration under the Rules of the DIFC-LCIA, a joint venture of the DIFC and the LCIA established in 2008. In Sept. 2021, however, the Government of Dubai issued Decree 34, which effectively dissolved the DIFC-LCIA and established the Dubai International Arbitration Centre (DIAC). The district court denied a motion to compel arbitration, holding that the clause was unenforceable because it designated a now-defunct forum.

The Fifth Circuit reversed. *Baker Hughes Saudi Arabia Company Limited v. Dynamic Industries, Inc.*, 126 F. 4th Cir. 1073 (2025). Applying the integral-part rule, it held that the contract designated only a set of rules—not a particular arbitral forum, adding that, even if the parties had implicitly designated the DIFC-LCIA as the forum, that designation was not integral; the parties’ dominant purpose was “to arbitrate generally.”

On remand, the district court rejected the argument that appointment of arbitrators “by the LCIA Court”—a function DIAC could not perform—rendered the clause unenforceable. *Baker Hughes Saudi Arabia Co. v. Dynamic Indus., Inc.*, No. CV 23-1396, 2026 WL 251711 (E.D. La. Jan. 30, 2026). That provision, the court held, related to administration, not exclusive forum selection. The court further found that DIAC was capable of administering arbitrations under the DIFC-LCIA Rules consistent with the parties’ intent.

The district court also noted that, under Decree 34, DIAC assumed responsibility for administering arbitrations under the DIFC-LCIA Rules for proceedings commenced after March 21, 2022, and that the DIAC Rules were substantially similar. It therefore granted the motion to compel arbitration.

Section 1782

Our final decision concerns 28 U.S.C. §1782, which permits discovery in the United States in aid of foreign proceedings—a subject we have addressed many times in this column.

In *In re SBK ART LLC*, 168 F.4th 68 (2d Cir. 2026), SBK ART LLC (SBK) sought documents and deposition testimony from Akin Gump Strauss Hauer & Feld LLP (Akin) for use in civil proceedings pending in the General Court of the European Union and the Civil Court of Malta. The district court granted the application, and Akin appealed.

The narrow question before the Second Circuit was whether the district court abused its discretion by granting a Section 1782 petition seeking discovery from a client’s law firm where the same materials

would be undiscoverable from the client abroad. Akin argued that the Second Circuit’s decision in *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238 (2d Cir. 2018), required answering that question in the affirmative. The court was not persuaded.

Kiobel relied on two of the four discretionary factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The first Intel factor is whether “the person from whom discovery is sought is a participant in the foreign proceeding.” That weighed against discovery in *Kiobel* because the true target was Shell—a party to the foreign proceeding—not its U.S. law firm.

The third *Intel* factor is whether the request sought to circumvent foreign proof-gathering restrictions. In *Kiobel*, statements by counsel showed an attempt to evade the Netherlands’ more restrictive discovery regime. By contrast, as the Second Circuit noted, Akin did not challenge the district court’s weighing of the *Intel* factors in *SBK*.

Even more significant was the presence in *Kiobel* of a confidentiality order prohibiting use of Shell’s documents absent consent or a court order. Permitting Section 1782 discovery there would have functioned as an improper “workaround.” No comparable confidentiality order existed in *SBK*.

Akin also urged adoption of a “foreign discoverability” requirement when discovery is sought from law firms. The Supreme Court rejected such a requirement in *Intel*, and the Second Circuit declined to resurrect it, even in light of strong policy concerns regarding attorney-client relationships.

The court emphasized that Akin remained free to object to discovery as unduly burdensome or as improperly intruding on attorney-client relationships—but that such objections should be addressed under the Federal Rules of Civil Procedure after a Section 1782 application is granted, not at the threshold stage.

Finally, the Second Circuit rejected Akin’s argument that its recent decision in *Banoka S.à.r.l. v. Elliott Management Corp.*, 148 F.4th 54 (2d Cir. 2025), requires district courts to consider extraterritoriality factors, including the foreign location of documents and custodians. *Banoka*, the court explained, merely held that consideration of such factors was permissible under the fourth Intel factor—not mandatory.

For these reasons, the Second Circuit affirmed the order granting the Section 1782 application.

Lawrence W. Newman is of counsel and **David Zaslowsky** is a partner in the New York office of *Baker McKenzie*.