

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals  
2           for the Second Circuit, held at the Thurgood Marshall United  
3           States Courthouse, 40 Foley Square, in the City of New York,  
4           on the 24<sup>th</sup> day of February, two thousand sixteen.

5  
6           **PRESENT:**

7                     DENNIS JACOBS,  
8                     DENNY CHIN,  
9                     CHRISTOPHER F. DRONEY,  
10                                     Circuit Judges.

11  
12           - - - - -X

13           **ISMT, LIMITED,**  
14                     Petitioner-Appellee,

15  
16                     -v.-                                     15-2086

17  
18           **FREMAK INDUSTRIES, INC.,**  
19                     Respondent-Appellant.

20           - - - - -X

21  
22           **FOR APPELLANT:**                     Michael B. Kramer, Michael B.  
23                                                     Kramer & Associates, New York,  
24                                                     New York.

25  
26           **FOR APPELLEE:**                     Lainie E. Cohen & Robert A.  
27                                                     Giacovas, Lazare Potter &  
28                                                     Giacovas LLP, New York, New  
29                                                     York.

1 Appeal from a judgment of the United States District  
2 Court for the Southern District of New York (Hellerstein,  
3 J.).

4  
5 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
6 **AND DECREED** that the judgment of the district court be  
7 **AFFIRMED.**  
8

9 Fremak Industries, Inc. ("Fremak") appeals from the  
10 judgment of the United States District Court for the  
11 Southern District of New York (Hellerstein, J.), confirming  
12 an arbitral award in favor of ISMT, Limited ("ISMT"). We  
13 assume the parties' familiarity with the underlying facts,  
14 the procedural history, and the issues presented for review.  
15

16 "We review a district court's decision to confirm an  
17 arbitration award *de novo* to the extent it turns on legal  
18 questions, and we review any findings of fact for clear  
19 error." Duferco Int'l Steel Trading v. T. Klaveness  
20 Shipping A/S, 333 F.3d 383, 388 (2d Cir. 2003). "It is well  
21 established that courts must grant an arbitration panel's  
22 decision great deference. A party petitioning a federal  
23 court to vacate an arbitral award bears the heavy burden of  
24 showing that the award falls within a vary narrow set of  
25 circumstances delineated by statute and case law . . . all  
26 of which involve corruption, fraud, or some other  
27 impropriety on the part of the arbitrators." Id.  
28 Additionally, "we permit vacatur of an arbitral award that  
29 exhibits a 'manifest disregard of law.'" Id. (quoting  
30 Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d  
31 Cir. 2002)). "Our review under the doctrine of manifest  
32 disregard is 'severely limited.' It is highly deferential  
33 to the arbitral award and obtaining judicial relief for  
34 arbitrators' manifest disregard of the law is rare." Id. at  
35 389 (quoting Gov't of India v. Cargill Inc., 867 F.2d 130,  
36 133 (2d Cir. 1989)).  
37

38 "First, we must consider whether the law that was  
39 allegedly ignored was clear, and in fact explicitly  
40 applicable to the matter before the arbitrators . . . .  
41 Second, once it is determined that the law is clear and  
42 plainly applicable, we must find that the law was in fact  
43 improperly applied, leading to an erroneous outcome. We  
44 will, of course, not vacate an arbitral award for an  
45 erroneous application of the law if a proper application of  
46 law would have yielded the same result. . . . Third, once

1 the first two inquiries are satisfied, we look to a  
2 subjective element, that is, the knowledge actually  
3 possessed by the arbitrators." Id. at 389-90. The doctrine  
4 is circumscribed to those "exceedingly rare instances where  
5 some egregious impropriety on the part of the arbitrators is  
6 apparent." Id. An "arbitration award should be enforced,  
7 despite a court's disagreement with it on the merits, if  
8 there is a barely colorable justification for the outcome  
9 reached." Banco de Seguros Estado v. Mut. Marine Office,  
10 Inc., 344 F.3d 255, 260 (2d Cir. 2003) (quoting Landy  
11 Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l  
12 Union, AFL-CIO, 954 F.2d 794, 797 (2d Cir. 1992)).

13  
14 Fremak has fallen far short of sustaining its heavy  
15 burden. The Tribunal did not manifestly disregard the law  
16 in concluding, based on an analysis of the parties' course  
17 of dealing, that Fremak waived its right to timely  
18 performance. Fremak contends that the Tribunal improperly  
19 weighed the evidence in finding that title passed from ISMT  
20 to Fremak on September 10, 2012; however, "the Second  
21 Circuit does not recognize manifest disregard of the  
22 evidence as proper ground for vacating an arbitrator's  
23 award." Wallace v. Buttar, 378 F.3d 182, 193 (2d Cir. 2004)  
24 (quoting Success Sys., Inc. v. Maddy Petroleum Equip., Inc.,  
25 316 F. Supp. 2d 93, 94 (D. Conn. 2004)). Nor did the  
26 Tribunal manifestly disregard the law in concluding that  
27 Fremak failed to properly demand adequate assurances because  
28 it failed to put such a demand into writing.<sup>1</sup> No other  
29 circumstance warrants disturbing the arbitral award.

30  
31 For the foregoing reasons, and finding no merit in  
32 Fremak's other arguments, we hereby **AFFIRM** the judgment of  
33 the district court.

34  
35 FOR THE COURT:  
36 CATHERINE O'HAGAN WOLFE, CLERK  
37

---

<sup>1</sup> As a result, it is unnecessary to reach Fremak's argument that the Tribunal erred in finding that ISMT provided such assurances. In any event, Fremak concedes it did not raise this argument below. It "is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994).