19-4022-cv

United States Court of Appeals

for the

Second Circuit

SENECA NATION OF INDIANS,

Plaintiff-Appellant,

– v. –

STATE OF NEW YORK,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

GREGORY M. STARNER
MATTHEW L. NICHOLSON
LAURI KAI

WHITE & CASE LLP
Attorneys for Defendant-Appellee
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTER-STATEMENT OF THE ISSUES PRESENTED 5

STANDARD OF REVIEW 5

STATEMENT OF THE CASE 6

I. THE COMPACT AND THE UNDERLYING DISPUTE 6

II. THE ARBITRATION PROCEEDINGS 8

III. THE AWARDS 10

IV. THE DISTRICT COURT'S CONFIRMATION OF THE AWARDS AND DENIAL OF THE NATION'S MOTION TO VACATE 15

SUMMARY OF THE ARGUMENT 19

ARGUMENT 21

I. THE NATION HAS FAILED TO ESTABLISH THAT THE PANEL MANIFESTLY DISREGARDED APPLICABLE LAW 21

A. The Panel Had The Exclusive Authority And Jurisdiction To Interpret The Compact 23

B. The Panel Majority Did Not Disregard IGRA When Interpreting The Compact 25

II. THE DISTRICT COURT PROPERLY DENIED THE NATION'S PETITION TO VACATE BASED ON MANIFEST DISREGARD OF THE LAW 33

A. The District Court Did Not "Misunderstand" The Nation's Argument 33

B. The District Court Did Not "Write The Manifest Disregard Standard Out Of The Law" 36

III. THE DISTRICT COURT CORRECTLY DECLINED TO REFER REVIEW OF THE AWARDS TO THE DEPARTMENT OF INTERIOR PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE 38

A. Agency Referral Is Unwarranted Under The FAA 38

B. In Any Event, There Is No Basis To Apply The Primary Jurisdiction Doctrine To The Parties' Contract Interpretation Dispute 41

C. The Nation's New Policy-Based Arguments Are No Basis for Referral 47

CONCLUSION 49

CERTIFICATE OF COMPLIANCE 51

TABLE OF AUTHORITIES

Page(s)

CASES

Allianz Ins. Co. v. Lerner,
416 F.3d 109 (2d Cir. 2005) 32, 47

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....33

Anderson Grp., LLC v. City of Saratoga Springs,
805 F.3d 34 (2d Cir. 2015) 47

Cardinale v. 267 Sixth Street, LLC,
No. 13 Civ. 4845 (JFK), 2014 U.S. Dist. LEXIS 136340 (S.D.N.Y Sept. 26, 2014) 32

Chartis Seguros Mex., S.A. v. HLI Rail & Rigging, LLC,
967 F. Supp. 2d 756 (S.D.N.Y. 2013) 23

Citizen Potawatomi Nation v. Oklahoma,
881 F.3d 1226 (10th Cir. 2018) 33

D.H. Blair & Co. v. Gottdiener,
462 F.3d 95 (2d Cir. 2006) 21

Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,
333 F.3d 383 (2d Cir. 2003) 26, 27, 31

Ellis v. Tribune TV Co.,
443 F.3d 71 (2d Cir. 2006) .....*passim*

Folkways Music Publrs., Inc. v. Weiss,
989 F.2d 108 (2d Cir. 1993) 41

Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.,
84 F.3d 91 (2d Cir. 1996) 4, 43, 44

Golden Hill Paugussett Tribe of Indians v. Weicker,
39 F.3d 51 (2d Cir. 1994) 44

Hardy v. Walsh Manning Sec., LLC,
341 F. 3d 126 (2d Cir. 2003) 30

In re Nortel Networks, Inc.,
737 F.3d 265 (3d Cir. 2013) 28

Jock v. Sterling Jewelers Inc.,
646 F.3d 113 (2d Cir. 2011) 40

Landau v. Eisenberg,
922 F.3d 495 (2d Cir. 2019) (per curiam) 21, 41

Law Debenture Tr. Co. v. Maverick Tube Corp.,
595 F.3d 458 (2d Cir. 2010) 35

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,
808 F.2d 930 (2d Cir. 1986) 22, 29

Mo. River Servs. v. Omaha Tribe,
267 F.3d 848 (8th Cir. 2001) 29

N.Y. Tel. Co. v. Commc'ns Workers Local 1100,
256 F.3d 89 (2d Cir. 2001) 29

Navajo Nation v. Dalley,
896 F. 3d 1196 (10th Cir. 2018) 37

New York v. Oneida Indian Nation,
78 F. Supp. 2d 49 (N.D.N.Y. 1999).....42

Pike v. Freeman,
266 F.3d 78 (2d Cir. 2001) 5

Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC,
497 F.3d 133 (2d Cir. 2007) 32

Rich v. Spartis,
516 F.3d 75 (2d Cir. 2008) 21

Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.,
375 F.2d 577 (2d Cir. 1967) 30

Schwartz v. Merrill Lynch & Co.,
665 F.3d 444 (2d Cir. 2011) 22, 29

Seneca Nation of Indians v. New York,
420 F. Supp. 3d 89 (W.D.N.Y. 2019).....6

Shearson/Am. Express v. McMahon,
482 U.S. 220 (1987).....40

Stemcor USA, Inc. v. Miracero, S.A. de C.V.,
No. 14-CV-0921 (LAK) (RLE), 2014 U.S. Dist. LEXIS 118504
(S.D.N.Y. Aug. 22, 2014).....22

T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.,
592 F.3d 329 (2d Cir. 2010) .....*passim*

Telenor Mobile Commun's AS v. Storm LLC,
584 F. 3d 396 (2d Cir. 2009) 30

Unite Here Local 100 v. Westchester Hills Golf Club, Inc.,
161 F. Supp. 3d 262 (S.D.N.Y. 2016) 22, 27

Wallace v. Buttar,
378 F.3d 182 (2d Cir. 2004) 27, 31

Westerbeke Corp. v. Daihatsu Motor Co.,
304 F.3d 200 (2d Cir. 2002) 3

STATUTES AND RULES

9 U.S.C. § 2.....23

9 U.S.C. § 10.....15

25 U.S.C. § 2710.....25, 26, 38

Indian Gaming Regulatory Act.....*passim*

MISCELLANEOUS

25 C.F.R. § 293.4.....26

INTRODUCTION

Dissatisfied with the outcome of an arbitration in which it freely participated, the Nation seeks to overturn the arbitrators' determination that it remains bound under the terms of its agreement with the State (the "Compact") to continue to share with the State a portion of its gaming revenues upon renewal of the Compact.

The Nation knows that a disagreement over contractual interpretation is no ground to vacate an award in this Circuit. It therefore dresses up its challenge as one of "manifest disregard of the law," contending that the Parties' agreed-to arbitral panel (the "Panel"), chaired by a retired federal district judge, "willfully flouted" applicable law when it read the Compact as requiring the Nation to continue to make its revenue sharing payments during the renewal period. This is so, the Nation says, because the Panel "added" a "new obligation" to the terms of the Compact in contravention of the provisions of the Indian Gaming Regulatory Act ("IGRA") that require the Secretary of the Interior (the "Secretary") to approve state-tribe compacts and their amendments. The Nation also says that, for this same reason, the decision to confirm and enforce the Panel's determination should be referred to the Secretary under the doctrine of primary jurisdiction.

The Nation's position rests on the fallacy that the Panel amended the Compact when it resolved an ambiguity in its terms. The Panel did no such thing.

Rather, the Panel elucidated the meaning of the Compact through well-established means of contractual interpretation and after receiving extensive briefing, conducting an evidentiary hearing, and analyzing the extrinsic evidence presented by both Parties. The Panel concluded (by a majority) in two awards (the "Awards") that the Nation's contention that it could continue to receive the full benefit of the Compact without providing the agreed revenue share to the State had no support in the terms of the Compact, would subvert the animating purpose of the Parties' agreement, and was contrary to commercial reasonableness, common sense and the evidence of the Parties' pre- and post-execution communications.

Unhappy with that ruling, the Nation petitioned the United States District Court for the Western District of New York (Skretny, W. J.) (the "District Court") to vacate the Awards. The District Court saw the Nation's argument for what it is—a mere disagreement with the Panel's conclusions of contractual interpretation—and correctly concluded that this case does not fall within "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent" and may justify vacatur for manifest disregard of law. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010). The Nation's effort to raise the same challenge on appeal is similarly without merit.

First, the Nation's theory that the Panel disregarded IGRA by "adding a new

payment obligation" presupposes that the Panel committed an error of contractual interpretation (*i.e.*, that the Panel read into the Compact an obligation that was not there). But, as the Nation itself concedes, the Nation cannot prevail on its manifest disregard challenge to the extent that it is premised on an assertion that the Panel went wrong as a matter of contract law and contractual interpretation.

Second, as the District Court observed, the statutory provisions that the Nation alleges the Panel disregarded—the provisions of IGRA granting the Secretary authority to approve amendments to gaming compacts—were not applicable, let alone "well defined, explicit, and clearly applicable" as is required in this Circuit. *See Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 209 (2d Cir. 2002). The Nation provided to the Panel (and the District Court) no authority to the effect that an arbitral panel's interpretation of an already-approved compact constitutes an "amendment" requiring further secretarial approval. And it has likewise offered none to this Court.

Third, as the District Court held, even if the provisions of IGRA on which the Nation relies were "clearly applicable," the Panel did not "intentionally misapply" or "willfully flout" their terms. To the contrary, the Panel considered and rejected the same arguments that the Nation now seeks to re-litigate. The Panel properly concluded that its mandate was to interpret the meaning of the Compact that the Secretary had already approved, and that discharging that

mandate would not "usurp" the Secretary's authority nor create an amendment subject to the Secretary's approval. Even if the Panel had gotten the law wrong (it did not), such an error would fall outside the scope of a manifest disregard challenge.

The Nation's alternative argument—that the District Court should have referred the confirmation of the Awards to the Secretary under the primary jurisdiction doctrine— fares no better. The Parties agreed to arbitrate, and agreed that any arbitration award would be binding and enforced against the Nation in the District Court. The District Court properly declined to abdicate its jurisdiction in favor of the Secretary. Furthermore, as the District Court held, the Nation identifies no legal authority suggesting that Congress delegated to the Secretary the authority to weigh in on a contract interpretation dispute, much less exercise quasi-appellate jurisdiction regarding the enforceability of arbitration awards issued per the terms of an approved gaming compact. In fact, the Office of the Secretary has already made clear that it defers to the "certainty" of the Parties' agreed arbitration process on matters of contractual interpretation. *See* Br. at 20 (quoting A-212). Regardless, this Court has made clear that the Secretary's authority over the formation of contracts gives it no jurisdiction to adjudicate subsequent breach of contract disputes. *See Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996).

Because no legal authority supports vacatur of the Awards or referral of the Parties' dispute to the Secretary under the primary jurisdiction doctrine, the District Court's order should be affirmed and the Awards confirmed.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

Whether the District Court correctly held that the Panel majority did not manifestly disregard applicable law when it interpreted the terms of the Compact to require the Nation to continue making revenue sharing payments during the renewal term of the Compact.

Whether the District Court appropriately declined to invoke the primary jurisdiction doctrine to relinquish its jurisdiction to review the Awards issued pursuant to the Parties' arbitration agreement in order for the Department of the Interior to adjudicate the Panel majority's interpretation of the terms of the Compact.

STANDARD OF REVIEW

In reviewing a district court's confirmation of an arbitral award, this Court reviews legal issues *de novo* and findings of fact for clear error. *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001). A district court's decision not to apply the doctrine of primary jurisdiction is generally subject to *de novo* review. *Ellis v. Tribune TV Co.*, 443 F.3d 71, 83 n.14 (2d Cir. 2006).

STATEMENT OF THE CASE

In this appeal, the Nation seeks to overturn the judgment by the District Court that denied the Nation's petition to vacate the Awards and granted the State's cross-petition to confirm the Awards. *Seneca Nation of Indians v. New York*, 420 F. Supp. 3d 89 (W.D.N.Y. 2019).

I. THE COMPACT AND THE UNDERLYING DISPUTE

On August 18, 2002, following four years of negotiations, the Nation and the State entered into the Compact. The Compact was deemed approved by the Secretary pursuant to IGRA on November 12, 2002 and became effective on December 9, 2002 (the "Effective Date") upon publication in the Federal Register as required by IGRA and the Compact. Br. at 14; A-225-27.[1]

The Compact set forth the terms and conditions under which the Nation is permitted to conduct certain casino-style gaming (*i.e.*, Class III gaming) in New York. As part of the agreement, the State agreed to provide the Nation exclusive rights to operate slot machines and other gaming devices in an expansive area of Western New York (the "Exclusivity Area") in exchange for a portion of the Nation's proceeds from these gaming devices (the "State Contribution"). A-140 (Compact ¶ 12(b)(1)). The State Contribution is the only consideration that the State receives under the Compact.

[1] "Brief" or "Br." refers to the Nation's appellate brief [D.I. 36].

The Compact was signed for an initial 14-year term, commencing on the Effective Date. A-115 (Compact ¶ 4(a)-(b)). Therefore, the original term of the Compact ran through December 9, 2016. During this initial 14-year period, the Nation developed three Class III gaming facilities in the Exclusivity Area, which have collectively generated billions of dollars in gaming revenues for the Nation. *See* A-313 (Witness Statement of Robert Williams, dated Sept. 12, 2018, at ¶ 15 ("My understanding is that the Nation's gaming revenues . . . have been in the range of $6.5 billion.")). During this period, the Nation paid the State Contribution in consideration for the exclusivity provided by the State, which payments the State used, *inter alia*, to finance public services in communities in which the Nation's casinos are located.

The Compact provides that, unless one of the Parties objects in writing at least 120 days before its term, the Compact renews automatically for an additional seven years. A-115 (Compact ¶ 4(c)(1)). Neither Party gave notice of any objection within the required period, resulting in the automatic renewal of the Compact on December 9, 2016 for an additional seven years (the "Renewal Period"). *See* A-115 (Compact ¶ 4(c)(1)). Accordingly, the Compact remains in effect until December 9, 2023.

On March 31, 2017, after the Compact renewed, the Nation advised the State for the first time that it would no longer pay the State Contribution after the final

quarter of 2016. A-339 (Letter from President Todd Gates to Governor Andrew Cuomo, dated Mar. 31, 2017). The Nation took the position that it was not bound to pay the State Contribution during the Renewal Period, but that the State nonetheless continued to be bound to provide exclusivity under the Compact within the Exclusivity Area. *Id.*[2]

II. THE ARBITRATION PROCEEDINGS

The Compact includes a broad dispute resolution provision that requires the Parties to submit any disputes to binding arbitration. The Compact thus provides that "[i]n the event of any dispute, claim, question, or disagreement arising from or relating to this Compact or the breach [t]hereof," the Parties will first engage in good faith negotiations. A-143 (Compact ¶ 14(b)). Should negotiations fail, then after 30 days, "either Party may submit the dispute, claim, question, or disagreement to binding arbitration" (A-143 (Compact ¶ 14(c)) to be conducted in accordance with the rules of the American Arbitration Association (the "AAA") (A-144 (Compact ¶ 14(f)). The Compact provides that any arbitral awards are "final, binding, and non-appealable." A-145 (Compact ¶ 14(i)). The Compact further provides that "[f]ailure to comply with the arbitration award within the time

[2] The Nation's Brief sets forth allegations that the State allowed competitive gaming within the exclusivity zone, but did not raise that allegation with the District Court. *See* Br. at 16-17. The Nation included similar allegations in its statement of defense in the arbitration (*see* A-269-71), but the Panel did not address these allegations in the Awards.

specified therein for compliance, or should a time not be specified, then forty-five (45) days from the date on which the arbitration award is rendered, shall be deemed a breach of the Compact." A-145 (Compact ¶ 14(i)). The Compact also gives the United States District Court for the Western District of New York the exclusive jurisdiction to enforce any arbitration awards. A-145 (Compact ¶ 14(i)); *see also* A-369 ("Parties to an arbitration under [the AAA] rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction there.").

After the Nation refused to pay the State Contribution during the Renewal Period and negotiations failed, the State submitted a Demand for Arbitration to the AAA seeking specific performance of the Nation's obligation to make the State Contribution payments under the Compact. *See* A-280. The Compact expressly contemplates specific performance in these circumstances.[3] The AAA rules likewise provide that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." A-368 (AAA Commercial Arbitration Rules and Mediation Procedures, Rule 47(a)).

[3] The Compact permits an arbitral panel to issue "[a]n arbitration award against the Nation for specific performance that entails the payment of money to the State [to] be satisfied solely and exclusively from the revenues of the Nation's Class III Gaming Facilities operated pursuant to this compact." A-144-45 (Compact ¶ 14(h)).

The Nation did not object to arbitration. The State appointed Henry Gutman, Of Counsel at the law firm Simpson Thacher & Bartlett LLP in New York, as arbitrator, while the Nation appointed Kevin Washburn, Dean of the University of Iowa College of Law. The Parties then jointly selected the Honorable William G. Bassler, a retired United States District Judge for the District of New Jersey and experienced arbitrator, as the Chair of the Panel.

After extensive briefing, a hearing proceeded before the Panel on December 12 and 13, 2018. The State presented written and live testimony from Robert Williams, Deputy Secretary in the Office of the New York State Governor Andrew Cuomo and one of the negotiators of the Compact. The Nation offered written testimony from Todd Gates, President of the Seneca Nation of Indians, and David Sheridan, Chief Financial Officer at the Seneca Gaming Corporation. The Nation did not present written or live testimony from anyone involved in the negotiation of the Compact. A-61 (Partial Final Award at 38); A-390-91 (Dec. 12, 2018 Hr'g Tr. at 12:19-24; 96:14-97:8).

III. THE AWARDS

On January 7, 2019, a majority of the Panel issued a Partial Final Award in the State's favor, determining that the Nation's obligation to make State Contribution payments continued during the Renewal Period and ordering specific performance of the Nation's payment obligations. A-78 (Partial Final Award at

55). After considering all of the Parties' relevant arguments and evidence, the Panel majority concluded that the Compact, read as a whole, called for the Parties' fundamental bargain—the exchange of State Contribution payments for exclusivity—to continue during the Renewal Period. *See* A-67, A-77-78 (Partial Final Award at 44, 54-55).

First, the Panel attempted to determine the Parties' intent from the four corners of the Compact, taking into consideration the purpose of the Compact (exclusivity in exchange for State Contribution), the term provision (14-year term), the renewal provision (automatic 7-year renewal absent objection), and other Compact provisions. A-47-59 (Partial Final Award at 24-36). Ultimately, the Panel found that the Compact was ambiguous as to whether the State Contribution payments continued or ceased after the initial 14-year term of the Compact. *See* A-57, A-59 (Partial Final Award at 34, 36).

Second, the Panel resolved that ambiguity by considering extrinsic evidence put forth by the Parties, consistent with both New York state and federal common law on contract interpretation. *See* A-59-71 (Partial Final Award at 36-48). That evidence included the Parties' pre-execution negotiations as well as post-execution communications (including detailed submissions by the Parties to the Department of the Interior ("DOI") seeking the Secretary's approval of the Compact). *See* A-60-68 (Partial Final Award at 37-45). As to pre-execution negotiations, the Panel

noted that this case is "not a situation in which silence in the negotiating history about the Nation's current interpretation of its obligations during the renewal period is a neutral fact, much less cuts against the State." A-63 (Partial Final Award at 40). Given that the "central premise of the Compact" was that the Nation would receive exclusivity in exchange for payment of the State Contribution, the Panel noted that "[t]he notion that the parties somehow agreed that during the renewal period — for as much as seven years — the State would be obligated to provide exclusivity, but the Nation would pay nothing, without a single scrap of paper or witness recollection that this deviation from the basic bargain was even discussed, simply defies credulity." A-63 (Partial Final Award at 40). Similarly, as to the Parties' post-execution communications, the Panel observed that "[n]either the Nation's post-execution letter to the Department of the Interior nor the Nation's information sharing documents to its members about the meaning of the Compact suggest that the Nation's revenue sharing payment obligations cease in the renewal period." A-64 (Partial Final Award at 41).

Third, the Panel employed additional contract-interpretation tools, including consideration of the commercial context in place as of the Compact's execution, common sense and commercial reasonableness. *See* A-59-76 (Partial Final Award at 36-53).

Each of the legal conclusions regarding the Compact in the Partial Final

Award was well supported by legal authority. *See* A-59-76 (Partial Final Award at 36-53). Accordingly, the majority of the Panel found in the State's favor, concluding that "the Compact read as a whole and in light of the extrinsic evidence supports the conclusion that 'renewal' means that the Compact was continued on the same terms and conditions that were in place immediately prior to expiration of the Compact's initial term which entailed revenue sharing for exclusivity." A-77 (Partial Final Award at 54). The Panel added:

> To conclude otherwise and interpret "renew" to mean that the Nation gets exclusivity without sharing revenue would render several provisions of the Compact meaningless, ignore the purpose of the Parties' agreement, challenge common sense and produce a commercially unreasonable result. As the party claiming breach of contract, the State has met its burden of proof.

Id. The Panel thus held that, under the Compact, "the Nation is obligated to make State Contribution payments of 25% of net drop payable on a quarterly basis during the seven-year renewal period." A-77 (Partial Final Award at 54).

In the Partial Final Award, the Panel also addressed the Nation's contention that the Secretary had not "approved" (as allegedly required by IGRA) revenue sharing during the Renewal Period. The Panel rejected this argument on three separate bases.

First, the Panel found that "while it is beyond dispute that the Panel has no legal authority to usurp the Secretary's role and enforce a Compact term that the

Secretary did not approve, the Panel does have the duty and authority to determine whether the terms of the Compact *already* provide for revenue sharing payments upon renewal." A-65 (Partial Final Award at 42) (emphasis added) (citations omitted). The Panel disagreed with the Nation's contention that interpreting the terms of the Compact in the State's favor would amount to "approving" an additional seven years of payments. Instead, the Panel held that "it would simply be finding that the terms of renewal in the Compact deemed approved by the Secretary included revenue sharing payment obligations." A-66 (Partial Final Award at 43).

Second, the Panel found that "[t]here [was] no evidence in the record to suggest that the DOI shared the view now asserted by the Nation," namely, "that 'renewal' did not include revenue sharing." A-65 (Partial Final Award at 42).

Third, the Panel found that "renewal was part of the Compact that was reviewed and deemed approved" by the Secretary such that "[i]f . . . the Secretary did not approve the terms of renewal, then that arguably would mean that renewal of the Compact was not properly authorized and the Nation's gaming activities are unlawful." A-65 (Partial Final Award at 42).

On April 12, 2019, the Panel issued the Corrected Final Award on the remedy (the "Final Award" and, together with the Partial Final Award, the "Awards"). A-22. The Final Award directed the Nation to pay the State

Contribution in accordance with the Compact and liquidated the past due payments from January 1, 2017 to December 31, 2018. A-23 (Final Award at 2). The Panel also held that "the Nation is obliged under ¶¶ 4(c)(1) and 12(b) of the Compact to continue to pay the State Contribution during the Compact renewal period at a rate of 25% of Net Drop of each category of Gaming Device for which exclusivity exists payable on a quarterly basis," and that "the Nation is to specifically perform its obligation under ¶¶ 4(c)(1) and 12(b) by paying the State Contribution currently owed to the State, including all past due payments, and by making all future payments in accordance with the Compact." A-22-23 (Final Award at 1-2).

IV. THE DISTRICT COURT'S CONFIRMATION OF THE AWARDS AND DENIAL OF THE NATION'S MOTION TO VACATE

On June 6, 2019, the Nation filed in the District Court a petition seeking to vacate the Final Award (the "Petition"). *See* Nation's Br., Dist. Ct. Docket #2-1; 9 U.S.C. § 10. The Nation did not challenge the Panel's interpretation of the Compact, but asserted that the Final Award was issued in "manifest disregard" of certain IGRA provisions because the Secretary never approved payment of the State Contribution during the Renewal Period. Alternatively, the Nation argued that the District Court should refer the question of whether the Secretary approved such payments to the DOI under the primary jurisdiction doctrine.

On July 12, 2019, the State cross-petitioned to confirm the Partial Final

Award and Final Award under Section 9 of the FAA. *See* State's Br., Dist. Ct. Docket #9-2 (the "Cross-Petition"); 9 U.S.C. § 9. The State argued there was no basis for vacatur, statutory or otherwise, and that the Nation's request for referral of the Parties' contract dispute under the primary jurisdiction doctrine was improper and unwarranted. *See* State's Br., Dist. Ct. Docket #9-2 at 23-24.

In a 30-page Decision and Order dated November 8, 2019, the District Court denied the Nation's Petition and confirmed the Awards. Special Appendix ("SPA") at 29-30. The District Court determined that there existed no grounds to vacate the Awards. SPA-19. The District Court determined that the Awards were not issued in "manifest disregard of the law." In reaching its conclusion, the District Court considered (1) "whether the 'governing law alleged to have been ignored by the arbitrators [was] well-defined, explicit, and clearly applicable;'" and (2) "whether the arbitrators knew of 'the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.'" SPA-21 (citations omitted). The District Court found that the Nation "made no showing that the IGRA Secretary-approval requirement clearly govern[ed] or that the panel simply ignored it." SPA-21.

First, the District Court rejected the Nation's central contention that the "[Panel] majority . . . impose[d] a new revenue-sharing obligation" when interpreting the Compact, and found instead that "the [P]arties' existing, already-

approved Compact required revenue sharing during the renewal period." SPA-24.[4] The District Court rejected the Nation's assertion that the Secretary did not approve the payments, holding that the Panel was charged with interpreting the Compact's renewal provision and "simply construed the [P]arties existing, approved [C]ompact." SPA-25. The District Court further determined that the Nation's disagreement with the Panel's allegedly "inverted reasoning" was not a basis to find manifest disregard. SPA-25 n.10.

Second, the District Court rejected the Nation's argument that the Secretary-approval provisions in IGRA applied to the Parties' dispute. SPA-23. The District Court held that "[t]he Nation's position is premised on a proposition that it has provided no authority for—that the arbitration award is an amendment to the Compact that requires the Secretary's approval under the IGRA." SPA-23. The District Court cited the Nation's failure to provide any legal authority holding that an arbitral panel's contract interpretation resulting in an arbitration award, made pursuant to a binding arbitration provision contained in a gaming compact approved by the Secretary, is subject to further Secretary approval. SPA-23-24, 27.

Third, the District Court found that "even assuming that the Secretary-

[4] The Nation conceded that it was not challenging the Panel's interpretation of the Compact, just as it now concedes it cannot challenge contract-law determinations under the manifest disregard standard. Br. at 3, 25; SPA-23-24.

approval provision of the IGRA is a 'clearly governing legal principle,'" the Panel "did not consciously disregard it." SPA-24. Rather, the District Court held that the Panel had considered and rejected the argument and that the Nation's contention that the Panel's rejection was incorrect does not give rise to a manifest disregard challenge:

> [I]n rejecting the very same arguments that the Nation lodges here, the majority found that its decision did not constitute an amendment to the Compact that would require Secretary approval. The majority considered the Nation's arguments and rejected them. It follows then that the [P]anel did not ignore or pay no attention to the Nation's proffered "clearly governing legal principle." That the Nation may disagree or find error in the majority's determination is not a basis to find manifest disregard.

SPA-24 (citations omitted).

Accordingly, the District Court held that the Nation failed to meet its burden of demonstrating that the Awards constituted one of "those exceedingly rare instances where some egregious impropriety on the part of an arbitrator" warranted the extreme remedy of vacatur. SPA-20-22.

The District Court also declined to refer to the DOI under the primary jurisdiction doctrine the question of whether the Secretary had approved the State Contribution payments during the Renewal Period. SPA-27. The District Court correctly held that "[t]he arbitration question was not whether the Secretary explicitly approved State-Contribution payments during the renewal period, but

rather, whether the terms of the Compact that the Secretary *did approve* provide for payment of the State Contribution during that term." SPA-27 (emphasis in original). The District Court concluded that referral under the primary jurisdiction doctrine "is not necessary to assess the propriety of the [P]anel's resolution of that question." SPA-26-27. The District Court also noted the Nation's primary-jurisdiction arguments were based on the unsupported premise that Secretary approval of the Awards was required. SPA-27. Thus, the District Court held that "even if the primary-jurisdiction doctrine could apply . . . it would not materially assist in the resolution of the relevant issues," which the District Court rightly held were questions of contract interpretation subject to the Parties' arbitration agreement. SPA-27. The District Court also held that the Nation had not established that Congress had delegated to the Secretary any special authority over arbitral awards pertaining to approved compacts. SPA-27 n.12.

The Nation's appeal of the District Court's confirmation of the Awards followed.

SUMMARY OF THE ARGUMENT

As recognized by the District Court, the Panel properly exercised its exclusive authority to interpret the terms of the approved Compact as requiring the Nation to continue making the State Contribution payments during the Renewal Period. The Nation has not established that the Secretary-approval provisions of

IGRA applied to the contract dispute before the Panel or precluded the Panel from resolving the Parties' dispute as to the proper interpretation of the Compact. These approval provisions, which set forth the procedural authority of the Secretary to approve new tribal-state compacts and amendments to existing compacts, were not applicable to the Parties' dispute because the Panel was not asked to, and did not, amend an existing IGRA compact when it interpreted the already-approved Compact in accordance with standard canons of contractual interpretation.

Additionally, the Panel did not intentionally misapply or willfully flout any applicable law. The Panel (and the District Court) correctly determined that resolving the Parties' contract-law dispute would not usurp the Secretary's authority as set forth in the IGRA provisions relied on by the Nation. That the Nation disagrees with the Panel's interpretation of the Compact or IGRA does not support vacatur on the basis of manifest disregard, and the District Court did not err in denying the Petition.

The District Court also properly rejected the Nation's effort to invoke the primary jurisdiction doctrine to refer to the Secretary the question of whether the Secretary had approved the State Contribution payments during the Renewal Period. As the District Court properly held, the primary jurisdiction doctrine cannot be used to overrule the Parties' arbitration agreement. Referral is not warranted or necessary with respect to the Parties' contract dispute, and the courts

are the proper forum for reviewing the Awards per the Parties' agreement and well-established law.

ARGUMENT

I. THE NATION HAS FAILED TO ESTABLISH THAT THE PANEL MANIFESTLY DISREGARDED APPLICABLE LAW

It is well established that "[t]he FAA creates a 'strong presumption in favor of enforcing arbitration awards' and courts have an 'extremely limited' role in reviewing such awards." *Landau v. Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019) (per curiam) (internal quotation omitted); *see also Rich v. Spartis*, 516 F.3d 75, 81 (2d Cir. 2008) ("[A]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.") (internal quotation omitted). Accordingly, "[t]he arbitrator's rationale for an award need not be explained," and "[o]nly a barely colorable justification for the outcome reached" is necessary to confirm the award. *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation omitted). The moving party bears a heavy burden of proof to vacate an arbitration award, "and the showing required to avoid confirmation is very high." *Id.*

In this Circuit, "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*, 592 F.3d at 339 (emphasis added).

Errors of law or fact by the arbitrator are not sufficient. *Id*. The Nation bears the heavy burden of making "a showing that the arbitrators knew of the relevant legal principle, *appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it*." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) (emphasis added); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986) (same). Furthermore, an arbitrator's interpretation of a contract is not subject to review under this standard. *T.Co Metals*, 592 F.3d at 339; *Unite Here Local 100 v. Westchester Hills Golf Club, Inc.*, 161 F. Supp. 3d 262, 265 (S.D.N.Y. 2016) ("An arbitrator's 'factual findings and contractual interpretation are not subject to judicial challenge.'"); *see also Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, No. 14-CV-0921 (LAK) (RLE), 2014 U.S. Dist. LEXIS 118504, at *24 (S.D.N.Y. Aug. 22, 2014) ("[B]ecause the panel's contractual interpretations are not subject to judicial challenge, the Court finds no manifest disregard of law.").

Here, the Nation has failed to meet the exacting standards for vacatur, and the District Court's denial of the Nation's Petition and grant of the State's Cross-Petition must be affirmed.

A. The Panel Had The Exclusive Authority And Jurisdiction To Interpret The Compact

The Panel undeniably had the jurisdiction and authority to decide the contractual interpretation dispute that the Parties submitted to arbitration, and nothing in IGRA divested the Panel of such jurisdiction or authority. The Parties agreed in the Compact to submit "any dispute . . . or disagreement arising from or relating to this Compact" to binding arbitration. A-143 (Compact ¶ 14(c)). The Parties further agreed that any resulting arbitral award would be final and binding, and enforceable by the District Court. A-145 (Compact ¶ 14(i)). Accordingly, the Panel possessed the exclusive jurisdiction to adjudicate any dispute regarding the meaning of the Compact. *See, e.g.*, 9 U.S.C. § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."); *Chartis Seguros Mex., S.A. v. HLI Rail & Rigging, LLC*, 967 F. Supp. 2d 756, 764 (S.D.N.Y. 2013) ("When the arbitration clause is broad enough that it includes disputes 'of any nature or character' or 'any and all disputes,' all questions or disputes arising thereunder are within the exclusive jurisdiction of an arbitrator."). The Nation does not dispute any of this, nor does the Nation dispute that the Secretary approved the Compact's dispute resolution provisions. Indeed, the Nation did not object to arbitration or the Panel's jurisdiction when the State

demanded arbitration over the Nation's refusal to continue to pay the State Contribution during the Renewal Period.

The Nation thus concedes (as it must) that "the Panel had the authority to determine whether the Compact terms reviewed by the Secretary 'already provide[d] for' the disputed payments." Br. at 39. The Nation nonetheless insists that the majority determined that the terms of the Compact did not provide for the disputed payments and the Panel "imposed" a new, additional term that was not approved by the Secretary. *Id.* But the Panel did no such thing. The Panel instead determined that the Compact was *ambiguous* in this respect and the Panel was thus required to determine "whether the term 'renew' means that the State Contribution payments continue at the 25% rate in effect when the initial 14-year term ended, or whether 'renew' means to continue with the original terms that did not expressly provide for any State Contribution payments in Years 15-21." A-59 (Partial Final Award at 36). The Panel resolved that ambiguity using orthodox methods of contractual interpretation and concluded that the Compact *already* imposed that payment obligation during the Renewal Period. A-77 (Partial Final Award at 54) ("[T]he Compact read as a whole and in light of the extrinsic evidence supports the conclusion that the Compact was continued on the same terms and conditions that were in place immediately prior to expiration of the Compact's initial term which entailed revenue sharing for exclusivity."). Far from "adding" a new term to the

Compact, the Panel simply confirmed what was already there.

B. The Panel Majority Did Not Disregard IGRA When Interpreting The Compact

The Nation asserts that the Awards were issued in "manifest disregard" of certain provisions of IGRA and its implementing regulations. Br. at 41. The Nation relies specifically on certain sections of IGRA that provide the Secretary authority to approve tribe-state compacts and amendments to such compacts. *See* Br. at 24, 26-27 (citing 25 U.S.C. §§ 2710(d)(8)(A) (providing "[t]he Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State"); 2710(d)(3)(B) ("[A] compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register."). The Nation also invokes several IGRA regulations from the Federal Register, which generally reiterate the Secretary's authority to approve compacts and amendments. *See* Br. at 24, 27 (citing 25 C.F.R. § 293.4(a) (IGRA "[c]ompacts are subject to review and approval by the Secretary"); *id.* § 293.4(b) (same for amendments)).

The Nation has failed to demonstrate that those provisions of IGRA apply to—much less conflict with—the Panel's interpretation of the Compact or the District Court's confirmation of the Awards. The Secretary-approval provisions of IGRA cited by the Nation are not implicated by the Panel's interpretation of the

Compact or issuance of the Awards. Those provisions by their plain terms apply only to the approval of new compacts or amendments to existing compacts. *See* 25 U.S.C. § 2710(d)(8)(A) ("The Secretary is authorized to *approve* any Tribal-State *compact entered into* between an Indian tribe and a State . . . ." (emphasis added)); 25 U.S.C. § 2710 (d)(3)(B) (providing that a Tribal-State gaming compact "shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register"); 25 C.F.R. § 293.4 (providing that compacts and amendments to compacts are subject to review and approval by the Secretary). The Panel's interpretation of the Compact did not create a new compact or constitute an amendment to the existing Compact, as even the Nation concedes. *See* Br. at 42-45. Accordingly, neither the Panel's determination nor the Awards are so clearly governed by the Secretary-approval provisions of IGRA as to satisfy the Nation's heavy burden to succeed on its manifest disregard challenge. *See, e.g.*, *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389-90 (2d Cir. 2003) ("First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable.") (internal citations omitted).

As the District Court highlighted, the Nation has not provided any legal

authority holding that an arbitral panel's contract interpretation made pursuant to a binding arbitration provision in a compact approved by the Secretary is subject to further approval by the Secretary. SPA-23-24. Instead, the Nation cites—for the first time on appeal—a single case to suggest that there is a specialized application of contract law in the context of "agreements subject to prior court approval or authorization" that forecloses resort to extrinsic evidence. Br. at 34 (citing *In re Nortel Networks, Inc.*, 737 F.3d 265, 272 (3d Cir. 2013)). The Nation did not cite this case or make this argument to the Panel (or the District Court), which is fatal to its manifest disregard challenge. *See* A-234-35 and A-253-58; *see also Duferco*, 333 F.3d at 390 ("In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him."); *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) ("[A]n arbitrator 'under the test of manifest disregard is ordinarily assumed to be a blank slate unless educated in the law by the parties.'") (quotation omitted). Even if the Nation had preserved the argument (and even if *Nortel* were analogous), it would still not be open to the Nation to challenge at the award confirmation stage the Panel's application of standard canons of contract construction (including the review of extrinsic evidence), erroneous as that application may have been. *See T.Co Metals*, 592 F.3d at 339 ("With respect to contract interpretation, this [manifest disregard] standard essentially bars review of whether an arbitrator misconstrues a contract.");

see also Unite Here Local 100, 161 F. Supp. 3d at 265 ("An arbitrator's 'factual findings and contractual interpretation are not subject to judicial challenge.'").

In any event, *Nortel* is not "analogous." In that case the issue was whether various Nortel debtor entities had agreed to arbitrate certain disputes in a funding agreement. *Nortel*, 737 F.3d at 267. The court held that the funding agreement contained no agreement to arbitrate. *Id.* at 272. The court also acknowledged that New York law permits resort to extrinsic evidence when an agreement contains an ambiguity, but declined to consider extrinsic evidence because the agreement at issue contained no ambiguity. *Id.* Here, the Compact approved by the Secretary contains a clear arbitration clause, the Nation did not dispute the referral to arbitration of its contractual interpretation dispute with the State, and the Panel found that the agreement was ambiguous before considering extrinsic evidence, none of which the Nation challenges on appeal. *See* A-29 (Partial Final Award at 6).

Second, the Panel did not ignore, much less "willfully flout," any clearly applicable law. To the contrary, the Panel considered and rejected the same IGRA-based arguments that the Nation raised in the Petition and now presses before this Court. Just as it did before the District Court and does again here, the Nation argued to the Panel that the arbitrators would be usurping the Secretary's right to review compacts by approving a Compact term the Secretary had not considered

and approved. Br. at 29. And, just as with the District Court and here, the Nation did not provide the Panel with any legal authority for the proposition that its resolution of the Parties' contractual interpretation dispute would be tantamount to amending, adding to or changing the Compact under IGRA (or any other law).

Furthermore, as the District Court rightly held, the Panel did not ignore the arguments presented by the Nation, much less consciously disregard them. The Panel recognized that, while it had "no legal authority to usurp the Secretary's role and enforce a Compact term that the Secretary did not approve," it had "the duty and authority to determine whether the terms of the Compact already provide for revenue sharing payments upon renewal." A-65 (Partial Final Award at 42). Thus, the Panel concluded (properly) that it was interpreting and enforcing the terms of the Parties' *existing agreement*, as previously approved by the Secretary, pursuant to its mandate under the Parties' arbitration agreement.[5] The Nation has not

[5] This case is unlike the cases cited by the Nation in which an arbitral award clearly violated applicable law. For example, in *Missouri River Services v. Omaha Tribe*, "'the arbitrator did not interpret the contract, she rewrote it' by eliminating the geographical limitation to 'Thurston County, Nebraska,' and the gaming limitation to bingo and bingo-related activities.'" 267 F.3d 848, 855 (8th Cir. 2001). It was the arbitrator's decision to "disregard this unambiguous language and craft her own remedy" that "effectively overrode the policies behind [25 U.S.C.] § 81 ["Contracts with Indian tribes or Indians"] and the IGRA." *Id.* Here, the Nation does not dispute that the Panel interpreted the Compact under well-established canons of contract construction, and does not argue that the Panel's interpretation contradicts an express provision of the Compact. This is also not a case where the arbitrator explicitly rejected binding and clearly applicable authority in favor of

demonstrated that the Panel "knew about 'the existence of a clearly governing legal principle *but decided to ignore it or pay no attention to it*.'" *Schwartz*, 665 F.3d at 452 (emphasis added). That the Nation disagrees with the Panel's determination is no basis to vacate the Awards. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 808 F.2d at 934 ("We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it."); *see also T.Co Metals*, 592 F.3d at 339 (more than an "arguable difference regarding the meaning or applicability of laws urged upon an arbitrator" is required to vacate an award) (internal quotation omitted). Indeed, as even the Nation acknowledges, mere error in the law or failure on the part of the arbitrators to understand or apply the law is not a basis to vacate. *See* Br. at 26 (citing *Duferco*, 333 F.3d at 389); *see also Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("[A]n award, based on 'manifest disregard' of the law, will not be enforced; but this presupposes '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.'") (internal quotation omitted).[6]

---

out-of-circuit authority, as was the issue in *N.Y. Telephone Co. v. Communications Workers Local 1100*, 256 F.3d 89, 93 (2d Cir. 2001).

[6] The Nation certainly has not set forth a basis for this Court to conclude, as a matter of law, that there exists "no reading of the Award that resolves its apparent contradiction with the law." Br. at 41. Indeed, it was eminently reasonably for the Panel to conclude that its interpretation of the terms of the Compact did not create

The Nation essentially argues that, once the Panel concluded there was an ambiguity in the Compact, it should have referred the matter to the Secretary for resolution. The Nation did not articulate that argument before the Panel, and that is fatal to its post hoc challenge. *See, e.g.*, *Duferco*, 333 F.3d at 390; *see also Wallace*, 378 F.3d at 190. In any event, the Nation provides no support for this supposition, which is directly contrary to the agreed-to (and exclusive) arbitration provisions in the Compact that the Secretary reviewed and approved. Certainly, the plain language of Section 2710 of IGRA does not support this supposition, let alone do so "clearly," which is the high threshold requirement for the Nation's manifest disregard challenge.

Third, the Partial Final Award is a well-reasoned decision supported by clearly applicable principles of contract law. The Panel considered all of the Parties' relevant arguments and, applying common tools of contract interpretation

---

any new terms or amendments to the Compact (which even the Nation agrees with) and thus did not implicate the Secretary-approval provisions of IGRA that apply to new compacts or amendments to compacts. This case is a far cry from the circumstances in *Hardy v. Walsh Manning Sec., LLC*, where the arbitral panel ignored well established New York law that employees cannot be held liable for the torts of other employees under respondeat superior. 341 F.3d 126, 130-32 (2d Cir. 2003). Here, of course, the Nation has not even identified a specific law that clearly conflicts with the Panel's determination, much less demonstrated how the Panel totally disregarded it. The Nation's reliance on *Telenor Mobile Communications AS v. Storm LLC* is similarly misplaced, as the Court in that case upheld the district court's confirmation of the awards at issues. 584 F.3d 396, 409-12 (2d Cir. 2009).

supported by New York law and federal common law, issued a 56-page decision with a well-reasoned conclusion that the Nation's obligation to pay the State Contribution in exchange for the bargained-for exclusivity continued during the Renewal Period. *See* A-47-57 (Partial Final Award at 24-34). For its part, the Final Award is a purely remedial order that adopted the calculation of past due State Contribution payments, which the Parties jointly agreed to and provided to the Panel. Accordingly, the Awards are supported by far more than a "barely colorable" basis. On that basis alone, the Nation's "manifest disregard" challenge fails.

Fourth, the Nation cannot salvage its deficient manifest disregard argument on the basis of the purported public policy underlying IGRA. *See* Br. at 27-28. As a threshold matter, the Nation did not present these public policy arguments to the District Court (nor the Panel) and thus they cannot support a reversal of the District Court. *See, e.g.*, *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (internal quotation omitted).

In any case, an alleged conflict with a purported public policy is not a ground for vacatur in this Circuit. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007) (the Second Circuit does not vacate arbitral awards on basis they are "contrary to an explicit public policy"); *see also*

Cardinale v. 267 Sixth St., LLC, No. 13 Civ. 4845 (JFK), 2014 U.S. Dist. LEXIS 136340, at *23 (S.D.N.Y. Sept. 26, 2014) ("The Second Circuit does not recognize violation of a strong public policy as a ground for vacatur under the FAA."). The Nation also has not identified a bona fide conflict between IGRA and the Awards. While IGRA gives the Secretary a role in approving compacts and amendments thereto, nothing in IGRA or the underlying public policy requires or permits the Secretary to approve an arbitral decision interpreting the scope of an existing compact. Further, any such policy would be directly contrary to and trumped by the FAA, which was enacted to overcome resistance to arbitration and instill a national policy favoring it. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate."); *see also Citizen Potawatomi Nation v. Okla.*, 881 F.3d 1226, 1237 (10th Cir. 2018) ("[Appellant] d[id] not provide a single citation to authority in support of its contention that the policies underlying IGRA are more important than the policies underlying the FAA. Nor has this court found any such authorities.").

II. THE DISTRICT COURT PROPERLY DENIED THE NATION'S PETITION TO VACATE BASED ON MANIFEST DISREGARD OF THE LAW

A. The District Court Did Not "Misunderstand" The Nation's Argument

The Nation asserts that the District Court misunderstood the Nation's

argument to be that the Awards were an amendment to the Compact. Even if the District Court's misapprehension of the Nation's argument could independently warrant reversal (it does not),[7] the Nation would be solely to blame for that misunderstanding, and it would provide no basis for reversal. The Nation argued to the District Court that "the majority's decision 'acts to amend the Compact'" and "the effect of the majority's decision is to amend the Compact." Br. at 43 n.19; 44. The Nation also admits that it "submitted the Final Award and accompanying materials for Secretarial review because the Award *acts to amend the* [Compact]." Nation's Br., Dist. Ct. Docket #2-1, at 9 (emphasis added). Indeed, the Nation sought the Secretary's "review and approval" of the Awards as an "amendment to the [Compact]," pursuant to the very same provisions of IGRA that it now contends the Panel ignored. A-213.

In any event, the Nation's semantics are self-defeating because, if there was no amendment to the Compact, the Nation's manifest disregard challenge can only fail. As discussed above, the sole legal authority that the Nation asserts the Panel

[7] The cases cited by the Nation are unavailing as the lower courts in those cases had applied the wrong legal standard. *See Charles v. Orange Cty.*, 925 F.3d 73, 81 (2d Cir. 2019) (reversing where the district court applied the wrong standard in determining plaintiff's claim); *see also Dobson v. Hartford Fin. Servs. Grp.*, 389 F.3d 386, 393 (2d Cir. 2004) (the district court misinterpreted plaintiff's claim as a per se allegation). Here, the Nation does not dispute that the District Court applied the correct legal standard to its manifest disregard argument. The cases cited by the Nation also did not involve the limited review of an arbitral award under the manifest disregard standard as is the case here.

ignored are the Secretary-approval provisions of IGRA and its implementing regulations, which generally provide that compacts and their amendments are subject to review and approval by the Secretary. *See* Br. at 26-27 (citing 25 U.S.C. § 2710(d)(8), 25 C.F.R. § 293.4). The Nation does not contend that the Awards created a new compact that required initial approval. That leaves only the Secretary's role in approving compact "amendments," but the Nation admits that the Awards are not amendments either. Br. at 42 ("[T]he Nation never argued that an arbitral interpretation of a compact 'constitutes an amendment' under IGRA."). And the Nation provides no legal authority for the proposition that the Secretary-approval provisions of IGRA apply to an arbitral panel's interpretation of a compact that "acts to amend" but does not "actually amend" the agreement. *See* Br. at 43 & n.19.

The Nation's belated attempt to square the circle by reference to contract law also fails. The Nation contends that "[a]ny time an arbitrator or court adds, by construction, a term to a contract not included in the contract at its formation . . . the court or arbitrator overstepped." Br. at 43 n.19 (citing *Law Debenture Tr. Co. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010)). As a threshold matter, the Nation did not make this argument to the District Court and it therefore was not preserved for appeal. In any event, the Nation's reliance on *Maverick Tube* is misplaced. The quoted passage in *Maverick Tube* refers to the law applicable to

unambiguous contracts, as the surrounding citations make clear. *See Maverick Tube*, 595 F.3d at 467 ("[A] written agreement that is complete, clear and unambiguous on its face must be [interpreted] according to the plain meaning of its terms.") (internal quotation omitted). Here, the Panel found that the Compact was ambiguous. And, in any event, such a contract-law argument would not support vacatur on the basis of manifest disregard of law. *T.Co Metals*, 592 F.3d at 339.

B. The District Court Did Not "Write The Manifest Disregard Standard Out Of The Law"

The Nation contends that the District Court adopted a holding that "[o]nce the Secretary approves the terms of a Compact containing an arbitration provision, it has implicitly and prospectively approved the enforcement of *any* subsequent arbitral interpretation of those terms. And such an interpretation must be enforced by a court because it is 'not reviewable under the manifest disregard standard.'" Br. at 46 (emphasis in original) (citing SPA-25). The Nation further contends that, because the Panel's interpretation of the Compact contravenes IGRA, the District Court's deference to the Panel was tantamount to enforcing an illegal promise. Br. at 47. However, the District Court held only that "*Compact interpretation* is not reviewable under the manifest disregard standard." SPA-25 (emphasis added). This is fully consistent with binding precedent (*see T.Co Metals*, 592 F.3d at 339), as even the Nation acknowledges. Br. at 46-47.

Nor did the District Court defer to an interpretation of the Compact that would enforce an illegal promise. To the contrary, the District Court first determined that the Panel's interpretation of the Compact did not conflict with the law cited by the Nation, and then held that any disagreement the Nation had with the Awards as a matter of contract law would not support a manifest disregard challenge. *See* SPA-25 ("[The Panel] did not impose a new revenue-sharing obligation, and its Compact interpretation is not reviewable under the manifest disregard standard."). The Nation mischaracterizes the Panel's and District Court's analysis as "inferring" Secretarial approval of a "new" payment obligation. Br. at 47. Neither the Panel nor the District Court needed to "infer" the Secretary's approval; it is undisputed that the Secretary approved the Compact, including the ambiguity identified by the Panel as well as the dispute resolution provision delegating to the Panel the authority to resolve that ambiguity.

Finally, while the Nation contends in its Brief that the District Court sanctioned and enforced an unlawful outcome under the guise of deferring to the Panel (*see* Br. at 45-47), the Nation has never actually alleged (let alone proven) that IGRA prohibited the Parties from agreeing in the Compact to continue the payment obligation upon renewal of the term of the Compact (as indeed the Panel found they had agreed). The Nation merely asserts that *procedurally* such an agreement required the Secretary's approval under IGRA, and the District Court

clearly addressed that argument when it held that the Awards did not constitute an amendment to the Compact. SPA-24. Therefore, unlike *Navajo Nation v. Dalley*, this is not a case in which the parties made an agreement that is clearly illegal under IGRA. 896 F.3d 1196 (10th Cir. 2018). There, the Tenth Circuit reversed a district court that held that a tribe and state could agree to allocate jurisdiction over tort claims arising on tribal lands, which is specifically prohibited by 25 U.S.C. §§ 2710(d)(3)(C)(ii) and (vii). *Id.* at 1218. Here, the Nation has provided no authority demonstrating that the Parties were not permitted to make the agreement that the Panel concluded they made in the Compact.

III. THE DISTRICT COURT CORRECTLY DECLINED TO REFER REVIEW OF THE AWARDS TO THE DEPARTMENT OF INTERIOR PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE

The District Court properly determined that there is no basis to invoke the primary jurisdiction doctrine to refer the Parties' dispute to the DOI. It is well established that the scope of the primary jurisdiction doctrine is narrow, and applies only when the issue involves technical questions of fact uniquely within the expertise of an agency. *Ellis*, 443 F.3d at 91. Here, the District Court's review of the Awards did not warrant invocation of the doctrine, and the Nation's arguments to the contrary are without merit.

A. Agency Referral Is Unwarranted Under The FAA

The District Court correctly declined to abdicate its jurisdiction to review

and confirm the Awards. Federal courts are required to exercise their jurisdiction. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"). Here, where the District Court clearly had jurisdiction to confirm the Awards pursuant to the FAA and the Compact (which the Nation does not dispute), it properly exercised such jurisdiction. S*ee also* 9 U.S.C. § 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . [upon application] the court *must* grant [a confirmation] order unless the award is vacated.") (emphasis added). This was particularly the case, as the Parties had agreed in the Compact that the District Court would have exclusive jurisdiction to enforce the Awards. A-145 (Compact ¶ 14(i)).

The Parties agreed in the Compact to arbitrate their dispute and the Nation confirmed that agreement when it did not object to the State's demand for arbitration and instead participated in full in the proceedings. The Nation cannot now invoke the primary jurisdiction doctrine to circumvent that agreement. The Parties also agreed that any resulting award would be "final, binding, and non-appealable", and that the State could enforce any such award against the Nation in this Court. A-145 (Compact ¶ 14(i)). These binding arbitration and enforcement provisions were clearly laid out in the Compact when the Secretary approved it.

The Nation does not dispute any of this.

There was thus no scope under the FAA for the District Court to decline its jurisdiction here. Nevertheless, in seeking to refer the Awards to the DOI, the Nation asked the District Court, and now asks this Court, to overrule the Parties' agreement to final and binding arbitration and allow the Nation to pursue a separate appeal with the DOI now that it has lost in the arbitration. Such an outcome would be contrary to the strong public policy, enshrined in the FAA, in favor of honoring agreements to arbitrate and enforcing arbitral awards. *See* 9 U.S.C. § 9 ("[A]ny party to the arbitration may apply . . . for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated.") (emphasis added); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 121 (2d Cir. 2011) ("[T]he FAA supports a strong presumption in favor of enforcing arbitration awards.") (internal quotation omitted). Indeed, the FAA forecloses such a collateral attack on the Awards. *See, e.g.*, *Arrowood Indem. Co. v. Equitas Ins. Ltd.*, No. 13-cv-7680 (DLC), 2015 U.S. Dist. LEXIS 99787, at *14 (S.D.N.Y. July 30, 2015) ("[A]rbitral mulligans are forbidden by the FAA . . . . The [FAA] provides the exclusive remedy for challenging conduct that taints an arbitration . . . [and when] a suit is in substance no more than a collateral attack on the award itself, it is governed by the provisions of the Act.") (quotations omitted).

Significantly, the Nation has not cited a single case in which a court invoked

the primary jurisdiction doctrine to refer an issue to an agency in the context of a petition to vacate or confirm an arbitral award.[8] This is not surprising, as awards are subject to very limited review and referring disputes regarding the confirmation of awards to agencies would undermine the very purpose of the FAA and the underlying goals of arbitration. *See, e.g.*, *Landau*, 922 F.3d at 498 ("The FAA creates a strong presumption in favor of enforcing arbitration awards and courts have an extremely limited role in reviewing such awards.") (internal quotation omitted); *Folkways Music Publrs., Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) ("Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.").

B. In Any Event, There Is No Basis To Apply The Primary Jurisdiction Doctrine To The Parties' Contract Interpretation Dispute

The primary jurisdiction doctrine does not apply here in any event. The doctrine is concerned with "promoting proper relationships between courts and administrative agencies charged with particular regulatory duties," and is not

[8] This case does not concern—and the Nation does not suggest that IGRA is—a federal statute as to which there exists "congressional intent to exclude [claims arising thereunder] from the dictates of the Arbitration Act" as was the case in *Shearson/American Express v. McMahon*, 482 U.S. 220, 238 (1987). The Nation does not dispute that the Parties agreed to arbitrate their contract dispute, that such arbitration regime was approved by the Secretary and that the Panel had jurisdiction to resolve the dispute.

implicated unless a question is "within the special competence of an administrative body." *Ellis*, 443 F.3d at 81-82 (internal quotations omitted). In assessing whether the doctrine may apply, courts generally consider four factors: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Id*. at 82-83. All of these factors weigh against referral here.

As to the first of the *Ellis* factors, it is well established that contract disputes are legal questions within the competence of the courts. As the District Court recognized, the relevant legal issue in the arbitration was a contract-law issue not referable to an agency under clear Second Circuit precedent. SPA-26-27 (citing *N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010) ("Contract disputes are legal questions within the conventional competence of the courts and thus the doctrine of primary jurisdiction does not normally apply.")). The Parties' dispute involved the interpretation of the approved Compact (and, in particular, its renewal provisions), not whether the Compact was in fact approved in the first place. The appointed arbitral Panel—chaired by a retired federal judge—was fully capable of resolving the contractual

interpretation dispute in accordance with the Parties' arbitration agreement.[9]

In such circumstances involving contractual interpretation issues, any "special competence" of the DOI is not implicated and there is no basis to invoke the primary jurisdiction doctrine. *See, e.g.*, *New York v. Oneida Indian Nation*, 78 F. Supp. 2d 49, 58 (N.D.N.Y. 1999) ("[D]eferral to the [National Indian Gaming Commission] is not warranted. . . . [T]he question here is simply whether the Nation has violated the [IGRA] Compact. . . . The Compact, moreover, does not include novel words or unusual language that may need specialized understanding."); *Fulton Cogeneration*, 84 F.3d at 97 ("Even if [the agency] could exercise proper jurisdiction over this case, however, we would nevertheless find the primary jurisdiction doctrine inappropriate because the issues of contract interpretation here are neither beyond the conventional expertise of judges nor within the special competence of the [agency].").

The Nation asserts that a referral is appropriate because the Secretary is best positioned to review and approve compacts, but the Nation's argument is based on the same faulty premise that the Panel "added to" or "changed" the Compact when it interpreted it. Br. at 49. As discussed above, and as the District Court recognized, no new terms were "added" to the Compact, and the Panel neither

[9] Nor has Nation provided any authority for the proposition that the DOI possesses "special competence" to advise the Court as to the Parties' dispute over the meaning of an ambiguous contract term.

created a new compact nor amended the existing Compact. SPA-27. It just read and construed what the Parties had agreed and what the Secretary had already approved.

For the second *Ellis* factor, the Nation failed to cite to any legal authority that provides the DOI with discretion regarding enforcement of the Awards. The Nation has established at most that the Secretary exercises discretion in the *authorization* of IGRA compacts, which is not at issue. Moreover, even if the DOI were willing to "extend [the Secretary's] express jurisdiction over the formation of contracts to adjudication of breach of contract disputes," this Court has made clear it could not do so. *Fulton Cogeneration*, 84 F.3d at 97. Agencies take jurisdiction by delegation from Congress and, as the District Court rightly found, "the Nation has not established that Congress has delegated to the Secretary any authority over arbitral awards pertaining to approved compacts." SPA-27 n.12.

Nor has the Nation provided any legal support or identified anything in the Parties' agreement that gives the DOI authority or discretion to resolve the Parties' underlying contractual interpretation dispute, much less exercise quasi-appellate jurisdiction over the Awards. *See, e.g.*, *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) ("The threshold issue in determining whether [the primary jurisdiction] doctrine applies is whether both the court and an agency have jurisdiction over the same issue."). To the contrary, the Secretary

approved the Parties' agreement in the Compact to submit their dispute to arbitration and have the District Court enforce the resulting awards.

With respect to the third and fourth of the *Ellis* factors, the DOI has already declined to inject itself into the Parties' dispute and the Nation thus cannot demonstrate a substantial danger of inconsistent rulings. The Nation takes pains to obscure from this Court that the DOI has already expressly deferred to the arbitration process and made clear that it does not consider itself the proper authority to decide the Parties' contract-law dispute. *See* A-212; *see also* Br. at 20.[10] The Nation also implies that the DOI deferred to the arbitration in December 2017 with the unstated expectation that it would be consulted during confirmation proceedings (*see* Br. at 51), but this finds no support in the record. In fact, the DOI more recently rejected the Nation's effort to submit the Awards for review and

[10] The Nation cites to the DOI's Technical Assistance Letter of January 19, 2017 (the "TA Letter"), in which the Secretary (responding to a letter from the Nation that was not included as an exhibit to the Petition, is not part of the record before this Court and which the State has never seen), stated that, in the DOI's view, "the Nation's 14-year revenue sharing obligation granted the Nation 21 years of exclusivity." Br. at 19 (citing A-165-66). The Nation's reliance on the TA Letter (which itself was not submitted to the Panel) is misplaced. On its face, the TA Letter was not "to be construed as [] a preliminary decision or advisory opinion regarding compacts that are not formally submitted to this Office for review and approval." A-165. Furthermore, the DOI withdrew the letter in December 2017 after the Parties agreed to submit their dispute to arbitration under the terms of the Compact. The DOI properly deferred to the arbitration process "to resolve [the Parties'] differences regarding interpretation of certain provisions in the [Compact]," and acknowledged that the TA Letter "did not provide the certainty available to the parties in arbitration proceedings." A-212.

approval by the DOI as an "amendment" to the Compact. A-291.[11] Particularly where the DOI has already deferred to the Parties' agreed-to arbitration, the primary jurisdiction doctrine does not apply. *See, e.g.*, *Ellis*, 443 F.3d at 88 (endorsing deferral "to agencies that are simultaneously contemplating the same issues"). Moreover, by virtue of the DOI's deferral to the agreed arbitration process, there is no "substantial danger" of this Court and the DOI issuing inconsistent rulings—indeed, the Nation has not alleged that inconsistent rulings are even possible, let alone a "substantial danger."

Finally, the Nation's assertion the District Court "mischaracterized" its primary jurisdiction argument is puzzling. Br. at 48. The District Court properly stated that the question before it was "not whether the Secretary explicitly approved State-Contribution payments during the renewal period, but rather, whether the terms of the Compact that the Secretary *did approve* provide for" those

[11] The Nation mischaracterizes its correspondence with the DOI when it asserts "the Department indicated its willingness, upon a proper submission by the parties, to provide its views *as to whether the panel majority's imposition of a 'Years 15-21' payment term complies with IGRA's Secretarial review requirement*." Br. at 51 (citing A-291) (emphasis added). The Nation's submission did not request the DOI's views on that issue; the Nation simply requested the Secretary's "review and approval" of the Awards as an "amendment" to the Compact. A-213-14. In rejecting the Nation's submission as not complying with applicable regulations, the DOI "t[ook] no position on th[e] question" of whether "the Arbitration Award effectively amended [the Compact] that was approved by operation of law in 2002." A-291 n.1. Of course, the Nation now adamantly disavows any suggestion the Awards amended the Compact, further confirming that this correspondence with the DOI has no relevance here.

payments. SPA-27 (emphasis in original). The Nation asserts that it does not seek referral to the Secretary of the question of what "the terms of the Compact . . . provide for," but rather "whether the requisite Secretarial approval was obtained for the 'Years 15-21' payment term imposed by the Panel majority." Br. at 49. However, the Secretary already approved the Compact (including its Renewal Period), and the Compact by its plain terms tasked the Panel with resolving the Parties' contract dispute (as the Panel did in the Awards). Thus, the Nation's attempt to frame the question as "whether the requisite Secretarial approval was obtained" for the continued payments misses the point: the requisite approval was already obtained, and the District Court rightly concluded that referring that question to the Secretary would not materially assist in the resolution of the relevant contract law issues or confirmation of the Awards. *Id.*[12]

C. The Nation's New Policy-Based Arguments Are No Basis for Referral

The Nation included a number of new arguments and factual allegations regarding the primary jurisdiction doctrine that were not raised before the District

[12] The Nation alternately seeks to frame the question as "whether, as a matter of law and policy, the Secretary's decision to deem the Compact approved 'to the extent the compact is consistent with the provisions of [IGRA],' . . . can be said to have implicitly endorsed all subsequent interpretations of its terms as the majority's opinion suggests and the district court held." Br. at 49-50. However, the Panel did not so hold, and the District Court did not endorse any such holding. *See supra* Section I.D. In any event, the Nation did not seek referral from the District Court on these grounds, and cannot do so now for the first time on appeal.

Court and thus are not subject to review on appeal for the first time. *See* Br. at 52-57; *Allianz Ins. Co.*, 416 F.3d at 114 ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal."); *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015) ("[A]rguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal.").[13] In any case, these new arguments do not support referral.

First, the Nation's arguments rely on the same unsupported contention that the Awards imposed additional payments beyond those called for in the Compact. Br. at 52. As discussed above, that contention is simply wrong.[14]

Second, it is clear that the Nation is simply seeking to re-litigate the merits of the Parties' dispute by reframing a clear contract law issue as an inquiry into whether secretarial approval for the continued State Contribution payments was

[13] Specifically, the Nation did not raise with the District Court any of its new allegations regarding the purported erosion of certain competitive protections (Br. at 53-55) or the Secretary's alleged views on revenue-sharing payments in other unrelated tribe-state compacts (Br. at 55-56).

[14] The Nation asserts that the DOI should address whether, if the Secretary did not "preapprove" payments during the Renewal Period in 2002, the DOI "would do so now." Br. 56. However, the DOI would have authority to approve the payments "now" only if the Awards constituted an amendment to the Compact (or a new compact). As noted, the Nation has emphatically denied the Awards are amendments, thereby foreclosing any basis to refer this question to the Secretary. Nor would any present day approval of the terms of the Parties' agreement bear any relevance to the scope of the Parties' agreement at its execution in 2002.

obtained in 2002. Not only is this the incorrect inquiry and not subject to review under a manifest disregard standard, but the "evidence" that the Nation puts forth would be irrelevant in any case. Any purported lack of approval in 2002 could not have resulted from alleged changes to the competitive landscape years later. Br. at 54-55 (referring to market changes in the years after the Compact was approved). Nor has the Nation provided any support for the notion that the Secretary can somehow retroactively amend what was approved in 2002 to take into account later alleged changes in the competitive landscape. *Id.* Likewise, the Nation's new allegation that the DOI may have limited the revenue-sharing payments in other state-tribe compacts misses the mark. Br. at 55-56. What the Secretary approved or did not approve as to other compacts in the years before the Compact was approved has no bearing on the Parties' contract dispute arising under the specific terms of their Compact.

CONCLUSION

In light of the foregoing, the Court should affirm the District Court's decision confirming the Awards, and grant such other relief as it deems just and proper.

Dated: June 15, 2020

Respectfully submitted,

By: /s/ Gregory M. Starner, Esq.

Gregory M. Starner
Matthew L. Nicholson
Lauri Kai
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
Tel.: (212) 819-8200

Attorneys for the State of New York

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement of Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. Excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,206 words and thus complies with Local Rule 32.1(a)(4)(A).

Respectfully submitted,

/s/ Gregory M. Starner

Date: June 15, 2020