

Soapbox: Federal Arbitration Act tested

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In the Daily Deal, Arthur D. Felsenfeld, a litigation partner at Andrews Kurth LLP, examines arbitration award under The Federal Arbitration Act in relation to the Supreme Court's ruling on the Hall Street Associates LLC v. Mattel Inc case.

May parties to an arbitration agreement governed by the Federal Arbitration Act, or FAA, provide by contract for an expanded scope of review of an arbitration award?

Most of the Circuit Courts of Appeal that have been presented with this issue, consistent with the concept that the entire arbitration proceeding itself is a product of the parties' contract, have held that parties may so agree and their agreement will be enforced. On March 25, however, the United States Supreme Court in Hall Street Associates LLC v. Mattel Inc. squarely ruled to the contrary. The Supreme Court held that the grounds stated in the FAA are the exclusive grounds for vacating or modifying an arbitration award.

The statutory grounds for vacating an award under the FAA are limited to situations where (a) "the award was procured by corruption, fraud, or undue means," (b) "there was evident partiality or corruption of the arbitrators," (c) the arbitrators were guilty of "misconduct" or "misbehavior by which the rights of any party have been prejudiced" or (d) the arbitrators exceeded or improperly executed their powers. The grounds for modification of an award, on the other hand, generally go to errors in form not affecting the merits or to evident material miscalculations or misdescriptions.

Bad as they may be, findings of fact unsupported by substantial evidence or erroneous conclusions of law -- the grounds for vacatur agreed to by the parties in Hall Street -- are far cries from the statutory grounds of fraud, misconduct and the like under the FAA and are far more readily assertable by a losing party seeking to prolong the proceedings or to extract a settlement. Following Hall Street, such agreed-upon grounds are no longer available to a party seeking to overturn an arbitration award.

As one who, as counsel, has represented parties in commercial and securities arbitrations and also has sat on arbitration panels, I am relieved that the Supreme Court came out as it did. By limiting the grounds for review of an arbitration award to those enumerated in the FAA, the Supreme Court prevents parties, perhaps unwittingly, from turning an arbitration into merely a prelude or "dress rehearsal" (to borrow a phrase by the Respondent in Hall Street) to a lengthy litigation, including appeals, which would subvert the very purpose of arbitration.

Not only did the court hold unenforceable contractual provisions for expanded review of arbitration awards, but its analysis went a step further. The court appeared to strike down, albeit in dicta, the widely recognized standard of "manifest disregard of the law" as a ground for vacating arbitration awards. By implication, other judicially supplemented grounds such as where the award "violates public policy," is "arbitrary and capricious" or is "completely irrational" are of questionable validity, as well. It is a safe bet that there will be substantial controversy over the Supreme Court's statement on this point, and it remains to be seen how the courts will interpret it.

Another interesting aspect of the Supreme Court's ruling was its observation that parties can tailor by contract some aspects of the arbitration process but distinguished the parties' right to agree upon grounds for post-arbitration judicial review. The two are interrelated, however. I submit that the scope of review of arbitration awards could substantially impact on the conduct of arbitrators during the arbitration proceeding itself. Arguably, this decision gives arbitrators greater latitude in departing from the law in fashioning an award. And there is no question that a contrary ruling by the Supreme Court would have significantly impacted the arbitration process in situations in which the parties contracted for expanded judicial review. For example, where parties agreed that the arbitration award could be overturned for an error of law, such an agreement, if enforceable, would have effectively compelled the appointment of one or more attorneys to the panel. It would likely also have increased the expense of the arbitration by requiring, among other things, more extensive briefing by the parties on points of law, perhaps independent research by the arbitrators, additional time spent on preparing an award and the ordering of transcripts of the proceedings.

What does this all mean for parties drafting arbitration agreements? To the extent such agreements are governed by the FAA -- and any agreement which involves interstate commerce is -- clauses providing for expanded judicial review of arbitration awards (beyond the narrow grounds set out in the FAA) will no longer be enforced. For litigants, it should be clear that once parties commit to arbitration of controversies covered by the FAA, they can generally fashion the arbitration proceeding as they see fit, but the grounds for subsequent judicial review will be limited to the statutory grounds.

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