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Supreme Court Limits Scope of Judicial Review of Arbitration Awards

The ink was barely dry on one Supreme Court decision reaffirming the enforceability of arbitration agreements under the Federal Arbitration Act (FAA) when — just last week — the Supreme Court decided another case under the FAA. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 2008 U.S. LEXIS 291 (March 25, 2008), the Supreme Court limited the scope of judicial review of arbitration awards. Specifically, the Supreme Court held that the FAA does ***not*** permit enforcement of an arbitration agreement allowing federal courts to vacate, modify, or correct an arbitration award if it was based upon "erroneous" conclusions of law.

The arbitration agreement at issue in *Hall Street Associates* also stated that an arbitration award could not be confirmed in federal court if "the arbitrator's findings of fact are not supported by substantial evidence." The enforceability of that particular contractual provision was not specifically addressed by the Supreme Court's decision. The decision is clear, however, that an arbitration award "must" be confirmed unless the FAA expressly permits the court to vacate, modify, or correct it. The grounds for judicial review of arbitration awards set forth in the FAA, the Supreme Court held in *Hall Street Associates,* cannot be expanded or otherwise modified by private agreement.

Otherwise, the Supreme Court continues to reaffirm the enforceability of private agreements to arbitrate. In another recent decision, *Preston v. Ferrer,* 128 S. Ct. 978 (U.S. 2008), the Supreme Court reversed the decision of a state intermediate court of appeals in California. In the process, the Supreme Court reminded state courts that the FAA requires state and federal courts alike to apply the "federal substantive law of arbitration" contained in the FAA. The FAA, the Supreme Court held in *Preston,* "trumps" any provision of state law that would require an otherwise arbitrable claim to first be submitted to a state court or administrative agency. "A prime objective of an agreement to arbitrate," the Supreme Court observed, "is to achieve 'streamlined proceedings and expeditious results.'"[1]

Achieving "streamlined proceedings and expeditious results" also appeared to be part of the rationale for the Supreme Court's decision last week in *Hall Street Associates.* As enacted by Congress, Section 9 of the FAA states that a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in Sections 10 and 11. 9 U.S.C. § 9. The grounds for vacating an award "prescribed" in Section 10,[2] and the grounds for modifying or correcting an

[1] Id. at 10, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

[2] Section 10 permits a U.S. district court to vacate an arbitration award under the following circumstances:
(1) Where the award was procured by corruption, fraud, or undue means
(2) Where there was evident partiality or corruption in the arbitrators, or either of them
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made
9 U.S.C. § 10(a).

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award "prescribed" in Section 11,[3] do ***not*** include erroneous conclusions of law (or findings of fact not supported by substantial evidence). The provisions of FAA Sections 9, 10, and 11, the Supreme Court observed in *Hall Street Associates,* are properly viewed "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[4] A contrary reading, the Supreme Court concluded, "opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process."[5]

In limiting the scope of judicial review of arbitration awards — even where the parties to an arbitration agreement bargained for more expansive judicial review — the Supreme Court acknowledged that it was by no means clear what effect its decision might have on the attractiveness of arbitration as a method of dispute resolution: "Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them," but "[o]ne of Mattel's *amici* foresees flight from the courts if it is."[6] Basing its decision in *Hall Street Associates* on the language of the FAA, the Supreme Court declined to predict which outcome was more likely.

And we may ***never*** know — if supporters of the so-called "Arbitration Fairness Act of 2007" have their way. This legislation, as reported in a prior edition of Foley's Legal News Alert: Distribution & Franchise, would invalidate arbitration clauses in "franchise" agreements (defined to include most distributorship and dealership contracts), consumer contracts, and employment agreements. Since its introduction last summer, the legislation has been the subject of hearings before both the House and Senate Judiciary Committees and has attracted increasing support. The Senate version, S. 1782. originally introduced by Senator Russell Feingold (D-WI), now has six co-sponsors — all on the Democratic side of the aisle.[7] Its House counterpart, H.R. 3010, originally introduced by Congressman Henry Johnson (D-GA), now has 68 co-sponsors — 64 Democrats and four Republicans, so that its backers can claim "bipartisan support."[8] The implications of this legislation for companies that market goods and services through independent distributors, dealers, and franchisees are analyzed in a recent article entitled, "Arbitration Fairness Act of 2007: A Trial Lawyer's Dream, A Client's Nightmare." The article, authored by Foley's Distribution & Franchise Practice, appeared in *Franchising World,* a monthly publication of the International Franchise Association.

[3] Section 11 permits a U.S. district court to modify or correct an arbitration award under the following circumstances:
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy
9 U.S.C. § 11.
[4] *Id.* at *22.
[5] *Id.* at * 22-23, quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (2003) (citation omitted).
[6] *Id.* at * 23-24 (citations omitted).
[7] The Senate co-sponsors are Sen. Robert Byrd (D-WV), Sen. Richard Durbin (D-IL), Sen. Edward Kennedy (D-MA), Sen. John Kerry (D-MA), Sen. Patrick Leahy (D-VT), and Sen. Sheldon Whitehouse (D-RI).
[8] The co-sponsors in the House of Representatives are Rep. Thomas Allen (D-ME), Rep. Michael Arcuri (D-NY), Rep. Brian Baird (D-WA), Rep. Tammy Baldwin (D-WI), Rep. John Barrow (D-GA), Rep. Howard Berman (D-CA), Rep. Leonard Boswell (D-IA), Rep. Robert Brady (D-PA), Rep. Bruce Braley (D-IA), Rep. Michael Capuano (D-MA), Rep. Russ Carnahan (D-MO), Rep. Julia Carson (D-IN), Rep. Yvette Clarke (D-NY), Rep. Emanuel Cleaver (D-MO), Rep. Steve Cohen (D-TN), Rep. John Conyers (D-MI), Rep. Elijah Cummings (D-MD), Rep. Danny Davis (D-IL), Rep. Peter DeFazio (D-OR), Rep. Diana DeGette (D-CO), Rep. William Delahunt (D-MA), Rep. Rosa DeLauro (D-CT), Rep. Lloyd Doggett (D-TX), Rep. John Doolittle (R-CA), Rep. Michael Doyle (D-PA), Rep. John Duncan (R-TN), Rep. Keith Ellison (D-MN), Rep. Chaka Fattah (D-PA), Rep. Bob Filner (D-CA), Rep. Barney Frank (D-MA), Rep. Charles Gonzalez (D-TX), Rep. Al Green (D-TX), Rep. Raymond Green (D-TX), Rep. Raul Grijalva (D-AZ), Rep. Brian Higgins (D-NY), Rep. Michael Honda (D-CA), Rep. Sheila Jackson-Lee (D-TX), Rep. Eddie Johnson (D-TX), Rep. Paul Kanjorski (D-PA), Rep. Dennis Kucinich (D-OH), Rep. Steven LaTourette (R-OH), Rep. John Lewis (D-GA), Rep. Stephen Lynch (D-MA), Rep. Carolyn Maloney (D-NY), Rep. Betty McCollum (D-MN), Rep. James McGovern (D-MA), Rep. Jerry McNerney (D-CA), Rep. John Murtha (D-PA), Rep. Jerrold Nadler (D-NY), Rep. Frank Pallone (D-NJ), Rep. Donald Payne (D-NJ), Rep. Ted Poe (R-TX), Rep. John Salazar (D-CO), Rep. John Sarbanes (D-MD), Rep. Janice Schakowsky (D-IL), Rep. Allyson Schwartz (D-PA), Rep. Robert Scott (D-VA), Rep. Hilda Solis (D-CA), Rep. Zackary Space (D-OH), Rep. Fortney Stark (D-CA), Rep. Betty Sutton (D-OH), Rep. John Tierney (D-MA), Rep. Timothy Walz (D-MN), Rep. Debbie Wasserman Schultz (D-FL), Rep. Melvin Watt (D-NC), Rep. Peter Welch (D-VT), Rep. Robert Wexler (D-FL), and Rep. Lynn Woolsey (D-CA).

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