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The U.S. Supreme Court issued, on March 25, its decision in *Hall Street Assoc. v. Mattel Inc.*,[1] a case that had been closely followed by arbitration institutions and practitioners in this country and abroad. As the U.S. Council for International Business (USCIB), the U.S. branch of the International Chamber of Commerce (ICC), wrote in its amicus curiae brief to the Supreme Court, the *Hall Street* case "constitutes a critical moment in the development of the jurisprudence of arbitration law in the United States."[2]

The case pitted against each other two fundamental principles of commercial arbitration—finality of awards and party autonomy—requiring the Court to determine whether parties to an arbitration agreement may provide for more expansive judicial review of arbitral awards than that explicitly contemplated under §§10 and 11 of the Federal Arbitration Act (FAA). The issue had created a circuit split, with the U.S. Court of Appeals for the First, Third, Fourth, Fifth and Sixth circuits allowing for contractually expanded judicial review, and the Eighth, Ninth, and Tenth circuits holding that the FAA's bases for vacatur and modification are exclusive. Significantly, the FAA does not specifically permit parties to expand the grounds for vacatur and modification in §§10 and 11, but also does not explicitly state that they are exclusive.

The Supreme Court held that FAA §§10 and 11 do provide the exclusive bases for vacatur and modification of arbitral awards in proceedings brought under the FAA's framework for expedited judicial review and that parties may not contract for greater judicial review within that framework. At the same time, the Court expressly left open the possibility that an award could be subjected to expanded judicial review outside the context of the FAA.

The 'Hall Street' Case

When they entered into their arbitration agreement, Hall Street Associates and Mattel Inc. were already litigating a dispute arising from an alleged lease violation before the U.S. District Court for the District of Oregon. The parties agreed to arbitrate certain issues, and this agreement was entered as an order by the District Court. The arbitration agreement provided that the District Court "may enter judgment upon any award, either by confirming the award or by vacating, modifying, or correcting the award," but that "the Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

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In so agreeing, the parties were attempting to contract around the strict rules of the FAA, which generally require that a court confirm a final award unless it finds one of seven specified narrow grounds. Namely, an award may be vacated under the FAA only:

- *where it was procured by fraud or corruption,*
- *where the arbitrators exhibited "evident partiality,"*
- *where the arbitrators were guilty of misconduct, or*
- *where the arbitrators exceeded their powers.*

And an award may be modified only

- *where there was an evident miscalculation or errant description in the award,*
- *where the arbitrators have awarded upon a matter not submitted to them, or*
- *• where the award is imperfect in form in a way that does not affect the merits of the decision.*[3]

These grounds for vacatur or modification do not include mistakes of fact or law. This limited review is designed to avoid having courts substitute their appreciation of the merits for that of the arbitrators, so as to encourage the finality of awards and promote the efficiency of arbitration. Yet some parties, like those in *Hall Street,* would prefer a broader scope of judicial review, to guard against the possibility of errors of fact or law by the arbitrators.

After concluding their arbitration agreement, Mattel and Hall Street arbitrated their dispute, and the sole arbitrator rendered an award in favor of Mattel. Hall Street invoked the clause calling for expanded judicial review, and the District Court vacated the award based on a perceived mistake of law by the arbitrator, and remanded the case to the arbitrator.

The arbitrator issued a new award, this time finding for Hall Street. The District Court confirmed this second award, modifying it only slightly with regard to the calculation of interest. The confirmation of the award was appealed, and the Ninth Circuit reversed the confirmation, holding that "the terms of an arbitration agreement controlling the mode of judicial review are unenforceable and severable," and thus the original award should not have been subjected to expanded judicial review.[4] On remand, the District Court again held that the original arbitration award was fatally flawed, and, when that decision was appealed, the Ninth Circuit reversed the District Court a second time.

The courts' confusion over the permissible scope of judicial review was understandable, given not only the circuit split on the enforceability of agreements that call for expanded judicial review, but also the Ninth Circuit's reversal of itself on this issue during the pendency of the proceedings. When the parties originally signed their arbitration agreement, there was precedent in the Ninth Circuit allowing for parties to provide for expanded judicial review by agreement.[5] By the time *Hall Street* reached the Ninth Circuit, however, that court had announced a contrary rule.[6]

After the second reversal by the Ninth Circuit, Hall Street appealed to the Supreme Court, which granted certiorari.

The Supreme Court Decision

The Supreme Court affirmed the Ninth Circuit's holding. Writing for the 6-3 majority, Justice David Souter argued that "the text [of the FAA] compels a reading of the §§10 and 11 categories as exclusive,"[7] finding that "expanding the detailed categories would rub too much against the grain of the §9 language, where provision for judicial confirmation carries no hint of flexibility."[8] Justice Souter noted that FAA §9 provides that a district court "must grant" a motion to confirm an arbitration award, and that the only exceptions to this requirement are listed in FAA §§10 and 11, adding that "[t]here is nothing malleable" about that standard.[9]

In reaching this conclusion, the Supreme Court rejected Hall Street's contention that the §§10 and 11 grounds could not be construed as exclusive because some courts had added to them by creating a ground for vacatur known as "manifest disregard of the law," which is not mentioned in the FAA. Hall Street pointed in particular to the Court's 1953 decision in *Wilko v. Swan*,[10] which some courts have interpreted as alluding to the existence of "manifest disregard" as a separate ground for vacatur.[11] In response, Justice Souter pointed out that the *Wilko* case did not necessarily suggest that this was a distinct vacatur ground; rather, the Court may have merely used the phrase "manifest disregard" as shorthand for the grounds enumerated in the statute.[12] In so characterizing *Wilko,* the Court cast serious doubt on the existence of manifest disregard as a distinct ground, which could prompt the courts that have treated it as such to reconsider the matter.

In his dissent, Justice John Paul Stevens offered a contrary interpretation of the FAA, arguing that the grounds for vacatur and modification listed in the statute should not be construed as exclusive because "[a] listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for review."[13] Justice Stevens added that the primary purpose of the FAA was to ensure that private arbitration agreements are enforced according to their terms, and that "[a]n unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute."[14]

Neither the majority nor the dissent addressed the policy considerations that had been invoked by the parties and their amici curiae, as they debated whether clauses calling for expanded judicial review would further or frustrate the FAA's pro-arbitration policy.

Both the American Arbitration Association (AAA) and the USCIB argued that if parties were allowed to expand judicial review by contract, the efficiency of arbitration would be undermined. On the other hand, the amici supporting Hall Street noted that parties in disputes that would otherwise be heard by a court might agree to arbitration if their awards could be reviewed by a court, thus providing a net gain for arbitration.

There is a dearth of empirical support for either position; in particular, there is no information regarding whether the rule allowing expanded judicial review in some circuits has been beneficial or detrimental to arbitration in those circuits. An international comparative analysis adds little to resolve the question. While numerous jurisdictions, including France and Switzerland, have explicitly rejected the possibility

of contractually expanded judicial review of arbitral awards, the arbitration statutes of both England and New Zealand explicitly allow for such expanded review under some circumstances,[15] and arbitration continues to flourish in all of these jurisdictions.

The Future of Contractually Expanded Judicial Review

Even as the Supreme Court closed the door on the possibility of expanding judicial review by contract in cases where review is sought under the FAA, it explicitly left open the possibility that parties could contract for expanded judicial review outside the FAA. Namely, the Court observed that parties may be able to secure such review "under state statutory or common law, for example, where judicial review of different scope is arguable,"[16] although it did not explain the circumstances under which state law might apply. In addition, the Court sent the case back to the Ninth Circuit to determine whether, due to the fact that the arbitration agreement in this case had been concluded in the midst of litigation, and had been endorsed by the District Court, expanded judicial review would be permissible as an exercise of the District Court's case management discretion under Federal Rule of Civil Procedure 16.

It is questionable whether any of these alternative avenues for expanded judicial review will be available to parties as a practical matter with any regularity.

State arbitration statutes seem to provide little harbor for parties seeking to provide for expanded judicial review of awards. Most states have adopted some form of the Uniform Arbitration Act, which largely mirrors the FAA in its provisions regarding confirmation, vacatur and modification of awards. Certain other state arbitration statutes are likewise similar to the FAA in this regard, even though not based on the Uniform Arbitration Act. This is the case, for example, with New York's arbitration law, CPLR Article 75, which predates the FAA and heavily influenced the federal statute. In light of the similarity of these state provisions to their counterparts in the FAA, an argument could be made that the Supreme Court's interpretation of the FAA would apply equally well to these provisions, thereby precluding contractually expanded judicial review.

And while state courts could arrive at a different interpretation of their state statutes or these could be amended to provide explicitly for contractually expanded judicial review, such statutes are not generally applicable to the review of awards in federal court and some courts have held that they are not even applicable in state court where the underlying contract affects interstate commerce, and is therefore governed by the FAA.[17] Parties may therefore have to provide explicitly in their arbitration agreements for the application of state statutory law to the review of their arbitral awards in order to take advantage of this hypothetical possibility.

Any effort to obtain expanded judicial review under common law would also present problems. Under this scenario, parties could agree to be bound by any arbitral award arising under their contract, save on certain specified grounds (such as, for example, where the award is not supported by substantial evidence, or where the arbitrator's conclusions of law are erroneous). If an award were ultimately rendered, and the losing party failed to abide by it, the other party could bring a contract action in court for the enforcement of the parties' agreement, and the court would have to determine whether or not the specified grounds were satisfied. This option is unlikely to be attractive, however, as it would require an original action for breach of contract, rather than the expedited proceeding for confirmation or vacatur available under the

FAA and state arbitration statutes. In essence, the parties would have to fully litigate two separate disputes, once in arbitration, and once in the common law action to enforce the arbitration agreement.

It also seems unlikely that parties could make recourse to Rule 16 with any frequency as a way to secure expanded judicial review, because, in order to do so, they presumably would have to be involved in court litigation on the merits of their dispute before agreeing to arbitrate.

Conclusion

Nevertheless, there may be other ways to obtain expanded review of arbitral awards beyond those identified in *Hall Street.* Certain arbitration institutions have internal review procedures that allow for the correction of mistakes of fact or law before the arbitral award becomes final. In addition, parties could create an ad hoc review procedure calling for a second arbitrator or tribunal to review their award before it would be deemed final. Any such ad hoc mechanism should be approached with caution, however, because a poorly drafted provision could lead to unforeseen complications, and any such review process would necessarily result in delay and added expense.

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Endnotes:

1. No. 06-989.
2. Brief of USCIB at 2, *Hall Street Assoc. v. Mattel Inc.,* No. 06-989 (2007).
3. 9 U.S.C. §§9-11.
4. 113 Fed.Appx. 272, 272-273 (9th Cir. 2004).
5. *LaPine Tech. Corp. v. Kyocera Corp.,* 130 F.3d 884 (9th Cir. 1997).
6. *Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.,* 341 F.3d 987 (9th Cir. 2003).
7. *Hall Street Assoc. v. Mattel Inc.,* No. 06-989, Slip Op. at 9 (March 25, 2008).
8. Id., at 10.
9. Id., at 10.
10. 346 U.S. 427 (1953).
11. *Hall Street,* Slip Op. at 7-8.
12. Id., at 8.
13. *Hall Street,* Dissent Slip Op. at 3.
14. Id.
15. England: Arbitration Act 1996 (c. 23), §69; New Zealand: Arbitration Act 1996 (099), Second Schedule, art. 5.
16. *Hall Street,* Dissent Slip Op. at 13.
17. See George K. Foster, "Courts running into the arbitration act's limitations," NAT'L. L.J., Nov. 26, 2007, S-1. Among recent cases that have applied the FAA, rather than state law, in proceedings to confirm or vacate awards in state court are *Gissel v. Hart,* 373 S.C. 281, 285 n.2, 287 (S.C. Ct. App. 2007); *Banc of Am. Inv. Serv. Inc. v. Lancaster,* No. 2-06-314-CV, 2007 Texas App. Lexis 7100, at *13-*14 (Texas App.-Fort Worth Aug. 31, 2007); *MBNA Am. Bank N.A. v. Straub,* 815 NYS2d 450, 455 (New York Co., N.Y., Civ. Ct. 2006).