Vol. 39 No. 3 Summer 2013

Litigation

American Bar Association

The Journal of the Section of Litigation

The Client

Representing the Anonymous Client

The Most Rehabilitated Prisoner in America

Managing Clients in Life-Threatening Litigation

RULEMAKING

We Need to Do Something about Arbitration

GREGORY P. JOSEPH

The author is with the Gregory P. Joseph Law Offices LLC, New York City

Nobody I know retires anymore. Everyone becomes an arbitrator-slash-mediator. That's because no one tries cases in court anymore. Everyone is arbitrating and mediating everything, so there is a big market for arbitrators-slash-mediators. In my experience, neither arbitration nor mediation is wholly satisfying. Mediation is a settlement process, and most of the time your client either gives up too much or gets too little. I suppose that's the definition of a settlement. But I can't think of anything to do about mediation. Because it's a settlement process, the parties set up a procedure that suits them. Arbitration is another matter, though. It is adjudicatory. It can be like real trial—it can be a real trial—and real trials are satisfying. But there is too often something different about arbitration trials.

You can pick out first-rate arbitrators, you can agree on rules, you can try your case the way you would a regular lawsuit, and yet you harbor a lingering uncertainty about whether the ultimate result will resemble a courtroom determination—an up-or-down, win-or-lose, on-the-merits determination. There are many reasons for that, I suppose, but one that hovers over all the rest is that there is no meaningful judicial review of arbitral decisions. The arbitrators don't have to look over their shoulders at what a reviewing court will have to say about what they do. With rare exception, whatever the arbitrator decides, whether sound or peculiar or noxious, must be judicially confirmed. That is pretty much what the Supreme Court said in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). This largely removes the sobering virtue of self-consciousness from the arbitral decision-making process.

It doesn't have to be that way. Yes, the Supreme Court ruled in *Hall Street* that you can't agree by contract to have a federal judge review an arbitration award on any grounds broader than the extremely limited ones set out in the Federal Arbitration Act (FAA). *Hall Street* went so far as to neuter, if it didn't outright nullify, even the limited review we used to get under the "manifest disregard of the law" standard. I can't imagine there is a constituency in our riven Congress to amend the FAA to allow parties to contract for judicial review of arbitration awards, even though that would be the cleanest fix and would enhance the process immensely.

But *Hall Street* indicates that a rulemaking fix may also be available. The arbitration agreement in *Hall Street* was entered into during the course of the litigation, was submitted to the judge as an alternative dispute resolution technique, and the judge ordered the arbitration to proceed subject to judicial review for legal error. The Supreme Court sua sponte raised the question of whether the agreement could be treated as an exercise of the district court's authority to manage

Illustrations by Sean Kane

its cases under Rule 16. The Court didn't decide that issue because it hadn't been thoroughly explored below. Maybe that's for the best. Looking at Rule 16, I think it's fair to say that the rule isn't quite up to the task today. But it could be.

Rule 16(c)(2) authorizes the court, at a pretrial conference, to "consider and take appropriate action" on a laundry list of items, but the list isn't quite long enough. Rule 16(c)(2)(H) provides for "referring matters to a magistrate judge or master," and (I) refers to "using special procedures to assist in resolving the dispute when authorized by statute or local rule." Neither quite gets there. The 1993 advisory committee's note talks about "alternative procedures such as . . . nonbinding arbitration," but we're talking about binding arbitration.

What if the Advisory Committee on Civil Rules were explicitly to add binding arbitration as a forum to which matters could—or would—be referred on consent of the parties? The committee could provide a vehicle for judicial review of arbitration awards beyond that in the FAA. As the Supreme Court indicated in *Hall Street*, the FAA need not provide the exclusive permissible standard for judicial review of arbitration awards.

There is a lot to consider. There is the FAA. There is the Alternative Dispute Resolution Act. I suspect that the smart and creative members of the advisory committee can navigate these shoals without encountering a conflict with these statutes, but even if not, there is always supersession. As the Seventh Circuit pointed out last August in *Halasa v. ITT Educational Services*, 690 F.3d 844 (7th Cir. 2012), a properly enacted Federal Rule of Civil Procedure, "by force of the Rules Enabling Act, 28 U.S.C. § 2072(b)," supersedes previously enacted legislation that conflicts with it.

This is something the advisory committee should consider. It would allow parties to draft arbitration clauses with meaningful judicial review. It would have the virtue of keeping my friends who are arbitrators-slash-mediators on the straight and narrow when they wear their arbitrator hat. ■