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## 9th Circuit joins others with arbitration appealability ruling

By David Martinez and Jill Casselman

Arbitration clauses are useful tools to ensure predictability in resolution of disputes between contractual parties. Amongst other provisions, the Federal Arbitration Act (FAA) severely limits the availability of judicial review of arbitration awards. And parties sometimes agree to altogether eliminate judicial review of such awards in order to ensure closure and the speedy resolution of disputes. Until recently, such agreements were binding in the 9th Circuit.

That is no longer the case, as the 9th U.S. Circuit Court of Appeals has ruled that a non-appealability clause in an arbitration agreement that eliminates all federal court review is unenforceable. In *Wal-Mart Wage & Hour Empl. Practices Litig. v. Class Counsel & Party to Arbitration*, 2013 DJDAR 16253 (Dec. 17, 2013). This ruling, which puts the 9th Circuit in harmony with prior decisions of the 1st, 2nd, 3rd and 11th Circuits, has important implications for lawyers and their clients.

### Competing Considerations

The court in *Wal-Mart* balanced the policies underlying the freedom of contract against those of preserving minimal due process for parties to arbitration proceedings. Since the passing of the FAA, federal courts, up to and including the Supreme Court, have consistently recognized a national policy in favor of enforcing of arbitration agreements. The touchstone of this policy has been to enforce the intent of litigants and to promote speedy dispute resolution. However, courts have recognized that these concerns must be balanced against the requirements of due process. For this reason, the FAA provides for expedited and limited judicial review of arbitration awards, on the grounds enumerated by FAA Sections 10-11.

Section 10 of the FAA provides the exclusive grounds upon which a district court may vacate an arbitration award. Those grounds are very limited. An award may only be vacated where: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing or consider evidence; or (4) the arbitrators exceeded their powers. In other words, Section 10 mandates that arbitration awards

tainted by partiality, lack of elementary procedural fairness, corruption, or similar misconduct will not be confirmed by federal courts.

The Supreme Court has already held that the statutory grounds for judicial review in the FAA are exclusive and may not be supplemented by contract. *Hall St. Assocs. LLC v. Mattel Inc.*, 552 U.S. 576, 587 (2008). However, in recent years, several courts have grappled with the competing efficiency and due process implications of allowing parties the freedom to contract to limit federal court review of arbitration awards. This is precisely the issue faced by the 9th Circuit in *Wal-Mart*.

### The 9th circuit's Ruling in *Wal-Mart*

*Wal-Mart* involved an attorney fees dispute amongst class counsel in the *Wal-Mart* wage and hour multi-district litigation, MDL 1735. The underlying case settled in mediation, including a \$28 million fee award, and the settlement was approved by the U.S. District Court for the District of Nevada. The settlement agreement also provided that any disputes over fees were to be submitted to "binding, non-appealable arbitration."

A dispute later arose over the proper distribution of the fee award to plaintiffs' counsel. Pursuant to the settlement agreement, the dispute was submitted to "binding, non-appealable" arbitration. After the arbitrator entered an award distributing the funds, one party moved to confirm the award, and another one moved to vacate it. The district court confirmed the award and entered judgment. On appeal one of the parties argued the 9th Circuit lacked jurisdiction owing to the settlement agreement's provision that the fee arbitration would be "non-appealable."

In addressing the jurisdiction issue, the 9th Circuit explained that the non-appealability clause at issue is ambiguous because it is susceptible to two possible interpretations. The first is that the phrase "binding, non-appealable arbitration" may be understood to preclude only federal court review of the merits of arbitration award, and not to eliminate the parties' right to appeal an award tainted by partiality, corruption or misconduct under Section 10 of the FAA. The second possible interpretation would construe the phrase "binding, non-appealable" as divesting the district court and appellate courts of jurisdiction to review the arbitra-

tion award on any ground, including the limited grounds for vacation enumerated by Section 10. The 9th Circuit declined to reach the question of which interpretation was correct or intended in this circumstance, because it held that the second interpretation was unenforceable as a matter of law.

The 9th Circuit reasoned that even though Congress enacted the FAA to promulgate a "national policy favoring arbitration" and to place "arbitration agreements on equal footing with all other contracts" (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) and *Hall St. Assocs. L.L.C. v. Mattel Inc.*, 552 U.S. 576, 581 (2008)), due process dictates that there be limits on the parties' freedom to modify judicial review of arbitration awards. Relying on *Hall St. Assocs.*, the 9th Circuit reasoned that, just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, "it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract."

Notably, while other FAA provisions expressly do permit modification by contract, a federal court "must" confirm an arbitration award unless, among other things, it is vacated under Section 10. This language "carries no hint of flexibility" and "does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else."

This result makes sense. Any contrary result would disrupt Congress's intended scheme to ensure a minimum level of due process to parties to arbitration. If the statutory grounds for vacatur of an arbitration award could be waived or eliminated by contract, the balance between efficiency and due process struck by Congress would be disturbed, leaving parties to such contracts without any procedural safeguards against arbitral abusen.

### Other District Courts

This ruling puts the 9th Circuit in harmony with the 1st, 2nd, 3rd and 11th Circuits, which have held that a contract provision purporting to render an arbitration non-appealable must be interpreted to mean that the parties only waive review as to of the merits of the arbitration. See, e.g., *Southco Inc. v. Reell Precision Mfg. Corp.*, 331 F. App'x 925 (3d Cir. 2009); *Rollins Inc. v. Black*, 167 F. App'x 798

(11th Cir. 2006); *Goodall-Sanford Inc. v. United Textile Workers*, 233 F.2d 104, 107 (1st Cir. 1956); *Hoefl v. MVL Group Inc.*, 343 F.3d 57, 66 (2d Cir. 2003). The *Hoefl* court aptly explained the grounds for vacatur under Section 10 "represent a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties intentions. While the remaining circuits have yet to decide this issue, district courts from the 7th Circuit have noted that a "non-appealability" provision is generally presumed to foreclose only merits-based review. See, e.g., *Team Scandia v. Greco*, 6 F. Supp. 2d 795 (S.D. Ind. 1998).

### Implications

Arbitration agreements are an increasingly prevalent means of dispute resolution, and are ubiquitous in certain contexts, such as commercial and employment contracts. As such, *Wal-Mart* will have an immediate impact on contracts with arbitration clauses designed to avoid judicial review in this circuit. These provisions will likely be read as permitting judicial review on the grounds set forth by Section 10. Although some circuits have yet to address this issue, the weight of authority suggests that review under the grounds enumerated under Section 10 is mandatory. These decisions provide increasing predictability in commercial disputes while preserving minimal due process for parties to arbitration proceeding, even if they did not bargain for it in the first instance.

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