SYMPOSIUM
THE SUPREME COURT AND ARBITRATION

AN INTRODUCTION TO THE SYMPOSIUM

by
Edward Brunet[*]

The *Lewis & Clark Law Review* has invited several leading arbitration scholars to write articles regarding the numerous Supreme Court cases decided during the past two terms.[1] Our journal received works from Sarah Cole, Chris Drahozal, Margaret Moses, and Maureen Weston and is pleased to be able to publish their insights into an interesting cohort of cases. In addition, this symposium contains a student note written by Aubrey L. Thomas, the 2009–2010 Editor in Chief of this journal,[2] analyzing a vexing arbitration problem, whether nonsignatories to contracts calling for binding arbitration may participate in arbitration.

One methodological point merits disclosure. Invitees were permitted to select any case involving arbitration decided during the 2007 and 2008 terms. The dual choice of *14 Penn Plaza LLC v. Pyett*[3] by both Professors Moses and Cole reveals their individual selection in a free market scheme and was in no way encouraged (nor discouraged) by the law review, its editors, or its advisors. Similarly, this journal did not prod or influence

[*] Henry J. Casey Professor of Law, Lewis & Clark Law School.

[1] *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (mandating arbitration of statutory claims in collective bargaining context); Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009) (allowing interlocutory review by non-parties to request a stay of arbitration where permitted by state law); Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (limiting the ability of the parties to expand judicial review under the FAA and undercutting so-called "manifest disregard of the law" scope of judicial review); Preston v. Ferrer, 128 S. Ct. 978 (2008) (interpreting the FAA to supersede state administrative or judge made law).

[2] Student submissions to this journal are selected anonymously for publication. Ms. Thomas's note was selected by the 2008–2009 editorial board.

[3] 129 S. Ct. 1456 (2009).

Professors Weston or Drahozal who each independently chose to write on the meaning and implications of *Hall Street Associates L.L.C. v. Mattel, Inc.*[4] Just as there ought to be a free market in designing dispute resolutions alternatives,[5] we left topic choices to the individual authors in an effort to play the symposium ball as it lies. Accordingly, the symposium includes two pairs of articles focusing on the *Penn Plaza* and *Hall Street* decisions. These articles take strikingly different perspectives and arrive at contrasting conclusions.

Professor Margaret Moses critiques *14 Penn Plaza LLC v. Pyett*,[6] a 5-4 decision mandating that union workers arbitrate statutory discrimination claims.[7] She concludes that the decision lacks textual support in the 1925 Federal Arbitration Act (FAA), fails to be consistent with prior arbitration precedent, cuts off substantive civil rights statutory protections and merits repeal by Congress. Professor Moses' prior arbitration writing accuses the Supreme Court of rewriting the FAA by publishing a set of opinions having little in common with the intent or language of the Act.[8] Here she continues these valuable inquiries and redoubles her credentials as a critic of modern arbitration decisions of the Supreme Court.

Professor Sarah Rudolph Cole advances a more positive depiction of the *Penn Plaza* decision by assembling data and analysis that defends the labor arbitrator's ability to decide statutory claims of discrimination and to provide access to justice.[9] She focuses on comparisons of arbitration and litigation results, concluding that claims that arbitration yields a form of second-class justice are unfounded. Relying on empirical data, Professor Cole asserts that academic criticisms of an arbitrator's abilities and inclinations to apply a legally premised rule of decision are misplaced. Instead, expert labor arbitrators routinely apply the law of the land rather than the law of the shop and appear well qualified to do so.[10]

Professor Cole also assesses the role of the contemporary union in the context of an arbitration system that decides statutory claims and allows bargaining to assign arbitration of claims of discrimination. She

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[4] 128 S. Ct. 1396 (2008).

[5] *See, e.g.*, Edward Brunet, *The Core Values of Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3 (2006) (arguing that party autonomy is a critical value meriting emphasis and fidelity in interpreting the FAA).

[6] 129 S. Ct. 1456 (2009).

[7] Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 LEWIS & CLARK L. REV. 825 (2010).

[8] *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (concluding that set of Supreme Court preemption decisions intrudes on the powers of the states).

[9] *See* Sara Randolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861 (2010).

[10] *Id.* at 862.

concludes that unions do not compromise their members, including women members who constitute a growing segment of union membership.

Professor Christopher Drahozal authors an important article that explores a pressing issue left open in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[11] whether the parties are allowed to expand judicial review of arbitration by relying on authority other than the FAA. Drahozal, who admits that his inquiry is strictly legal,[12] concludes that the parties' choice of forum matters greatly with a federal court unlikely to enforce a contract to enhance review, but that a state court is more likely to enforce a contract to expand review if state law provides for enhanced review.[13]

Drahozal focuses on the mechanics of drafting a contract that might enable the parties to "contract around" the *Hall Street* norm and concludes that the viability of this tactic works best in state courts. He advances limiting the powers of the arbitrator, banning arbitrator authority to make legal error rather than ordering a federal court to expand review. He notes that this approach was used by the California Supreme Court in *Cable Connection, Inc. v. DirecTV, Inc.* to enhance review.[14] In a particularly interesting segment, Drahozal ponders the parties' selection of state law, weighs the related preemption possibility, considers whether *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*[15] would support such party autonomy, and probes a possible *Erie Railroad Co. v. Tompkins*[16] question.

Professor of Law and Associate Dean Maureen Weston's article also ponders the ultimate meaning of the *Hall Street* decision, a case of local interest here in Portland because the dispute involved a property that once was the manufacturing site of the popular children's toy View-Master.[17] The article explores whether the parties may contract around *Hall Street* by "creative drafting" and finds the decision to raise "more

[11] 128 S. Ct. 1396, 1400 (2008) (holding that the parties cannot expand review pursuant to contract by adding to the grounds for vacatur set forth in the FAA).

[12] Professor Drahozal has also published on the policy aspects of the *Hall Street* litigation. *See* Christopher R. Drahozal, *Default Rule Theory and International Arbitration Law (with Comments on Expanded Review and* Ex Parte *Limited Relief)*, INT'L ARB. NEWS, Winter 2004–2005, at 2, 3.

[13] Christopher R. Drahozal, *Contracting Around* Hall Street, 14 LEWIS & CLARK L. REV. 905 (2010).

[14] 190 P.3d 586, 589 (Cal. 2008) (suggesting that the parties clearly contract that legal errors are outside the powers of the arbitrators).

[15] 489 U.S. 468 (1989) (upholding parties' choice of state law and rejecting argument that this choice was preempted by the FAA).

[16] 304 U.S. 64 (1938).

[17] *See*, OR. DEP'T OF HUMAN SERVS., FEASIBILITY INVESTIGATION OF WORKER EXPOSURE TO TRICHLOROETHYLENE AT THE VIEW-MASTER FACTORY IN BEAVERTON, OREGON 1 (2004).

questions than it answered."[18] The article also addresses the important role of party autonomy in arbitration policy in the wake of a *Hall Street* holding that seemingly cut back the ability of contracting parties to forge their own style of arbitration.[19] Professor Weston's article covers the possibility of post-*Hall Street* party selection of state arbitration law in an effort to expand the nature of judicial review of arbitration awards.

This arbitration symposium also contains the student note of Aubrey L. Thomas, the 2009–2010 Editor in Chief of this journal.[20] The note explores several principles of agency and contract such as third-party beneficiary or equitable estoppel used to mandate arbitration participation by non-signers, then analyzes how courts grapple with reading a duty of good faith standard into the existing contract. The note, which examines the problem of non-signers in both a domestic and international arbitration context finds imposing a good faith requirement consistent with the expectation of the parties.

[18] Maureen Weston, *Supreme Court Arbitration Jurisprudence 2008–2009 Term: The Other Avenues of* Hall Street *and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010).

[19] *See, e.g.*, Brunet, *supra* note 5, at 3 (describing party autonomy as providing a "firm foundation" for arbitration practice and theory).

[20] Aubrey L. Thomas, Note, *Non-Signatories in Arbitration: A Good Faith Analysis,* 14 LEWIS & CLARK L. REV. 953 (2010).