



## CASES OF INTEREST

# The Shifting Landscape of Arbitration

*The world is changing – the global climate, the national economy, local and national politics, the balance of trade, the international balance of power – everything seems to be shifting all at once. Just as the larger world changes, so does the smaller world of arbitration. In this edition of the **Alert**, we focus in on three important cases that are reshaping the way the world of judges and appellate courts relate to the semi-private world of commercial dispute resolution.*

## 1. *Hall Street v. Mattel: The Right Result the Wrong Way?*

By **Hiro N. Aragaki**

Although the losing party to a lawsuit generally has an automatic right of appeal, the main purpose of which is to correct legal errors made by the trial court, the losing party to a private arbitration has no such right. Under the Federal Arbitration Act (“FAA”), the grounds on which courts of law may review arbitral awards are extremely limited – they have more to do with correcting fundamental injustices than correcting an arbitrator’s erroneous decision on the merits.

Until the U.S. Supreme Court decided *Hall Street Associates v. Mattel*, 128 S.Ct. 644 (Mar. 25, 2008), few knew whether private parties were able to contract to expand the FAA grounds to allow courts to review arbitral awards with the same scrutiny that applies to appeals from lower courts. *Hall Street* provided the answer: The FAA’s narrow grounds for judicial review of arbitral awards are the exclusive grounds.

In this article, I explore the background and implications of the *Hall Street* decision.

### Background of the Case

The dispute in *Hall Street* involved a commercial lease between Mattel and its predecessors, as lessees, and Hall Street and its predecessors, as lessors. In 2000, Hall Street sued Mattel claiming that Mattel had improperly (1) terminated the lease and (2) failed to comply with applicable environmental laws during the lease term.

The case proceeded to a bench trial on the termination issue, and Mattel prevailed. The parties then asked the court to refer the second issue to arbitration. They entered into an agreement to arbitrate that was unique in the following respects:

- It called for the court to review any legal errors in the arbitral award under a “*de novo*” standard—a far more searching level of judicial review than what the FAA provides.
- Unlike the vast majority of arbitration agreements, which are contained in private contracts negotiated well in advance of an eventual dispute, it was entered into *after* Hall Street and Mattel were already waging their battle in court.
- It was approved of by the trial judge and entered as an order of the court.

According to *Hall Street*, the *de novo* review provision “was crucial to the parties’ willingness to arbitrate the remainder of their dispute because of the high stakes at issue.”

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The case ricocheted back and forth among the arbitrator, the federal trial court and the Ninth Circuit U.S. Court of Appeals. It eventually reached the U.S. Supreme Court on the following question:

“[Does] . . . the FAA preclude[] a federal court from enforcing the parties’ clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?”

## The Supreme Court’s Decision

Justice Souter wrote the majority opinion (six votes to three), which concluded that the FAA does in fact preclude the enforcement of private agreements for heightened judicial review of arbitral awards. In the majority’s view, Section 9 of the FAA states that a court “must” confirm an arbitral award “unless [it] is vacated, modified, or corrected as *prescribed* in sections 10 or 11.” Sections 10 and 11, in turn, set forth extremely limited grounds (such as corruption or fraud by the arbitrators or where they make an award upon a matter not submitted to them for decision) but neither of them “prescribes” such a result if the arbitrator reaches the wrong legal conclusion. And if Congress had intended for sections 10 and 11 to be default provisions capable of expansion by private contracts, it could surely have

said so as it had in other sections of the FAA. To Justice Souter, this was a simple exercise in statutory interpretation, one that he undertook with consummate judicial restraint.

Souter’s opinion went out of its way to make clear that the FAA is not the only path into court for parties seeking judicial enforcement of arbitral awards. Those who do not wish to take advantage of the FAA’s expedited enforcement procedure are free to rely on state statutory or common law, in which case the Court conceded that “judicial review of [a] different scope” may be possible. Moreover, because a unique feature of the *Hall Street* arbitration agreement was that it was entered as an order of the court, federal rules (such as Rules 16 and 53 of the Federal Rules of Civil Procedure) and case law regarding the trial court’s authority to manage its docket may provide a still further basis for enforcing that agreement. The upshot of all this is that the holding in *Hall Street* speaks only to whether parties can contract for more searching judicial review of arbitral awards *when they seek enforcement under the FAA*. In the Court’s own words, the opinion “decide[s] nothing about other possible avenues for judicial [review and] enforcement of arbitration awards.”

## What’s Wrong With *Hall Street*?

In my view, *Hall Street* reached the right result on the wrong question.

The Court’s conclusion that private parties cannot alter *by contract* the FAA’s clearly enumerated judicial review standards is unquestionably correct. True, arbitration is a “creature of contract.” But it is one thing for the parties to dictate whether, when and what to arbitrate; it is another thing entirely for parties to tell federal courts what procedures they should use to review arbitral awards—especially when Congress has already spoken on



the matter by enacting the FAA.

Nonetheless, the question that Hall Street and Mattel submitted for decision was not the real question in this case. The Court realized this after the appeal had been briefed and hinted as much during oral argument. In a rare move, the Court even ordered the parties to file post-argument supplemental briefs in an attempt to rectify this problem.

Why was it the wrong question? Because *Hall Street* was never a case about whether parties could insert a provision for heightened judicial review in their arbitration agreement and then expect a court to honor it later. I shall refer to such agreements, typically drafted without judicial oversight and years before a dispute even arises, as *ex ante* judicial review agreements. The vast majority of judicial review agreements (and arbitration agreements generally) are *ex ante* agreements.

By contrast, the agreement in *Hall Street* is what I call an *ex post* judicial review agreement because it was drafted after litigation had already begun and (more importantly) with the approval of the reviewing court. There is nothing extraordinary about a trial judge, with the consent of the parties, ordering certain issues in a case to be privately arbitrated while retaining the power to review the award under the same standards contemplated in *Hall Street*. Indeed, *ex post* judicial review agreements are frequently used in connection with the appointment of a special master to determine discrete issues in a case.

A big problem with the *Hall Street* opinion is that the Court did not sufficiently distinguish between *ex ante* and *ex post* judicial review agreements. If it had, it would have realized that the question presented was whether *ex ante* judicial review agreements are enforceable under the FAA, whereas the real issue in the case relates to *ex post* agreements. Although the Court answered the former in the negative, it did not squarely consider (much less decide) whether *ex post* judicial review agreements are also unenforceable under the FAA. And even if it did, there are other sources of law that arguably provide for the enforcement of such agreements in the arbitral context. All nine Justices were unanimous on this – and only this – point.

What I take away from *Hall Street* is that for now, *ex post* judicial review agreements are probably enforceable under federal rules relating to the court's case manage-

ment powers or perhaps even under the FAA. *Ex ante* judicial review agreements are probably not enforceable because there are certain things for which private parties simply cannot contract, and one of them is standards of judicial review. And unless a state arbitration statute explicitly provides for it, or the FAA is subsequently amended by Congress, no party will succeed in obtaining *de novo* judicial review of an arbitrator's award, by contract or otherwise.

## What *Hall Street* Means for Arbitration

Many in the arbitration community reject the proposition that courts should be empowered to review arbitral awards for substantive errors. They fear that such review will undermine what is deemed to be the "essence" of arbitration and its chief advantage over litigation: Finality.

But as valuable as finality may be, surely it is not the only or even the overriding reason why parties choose arbitration. Confidentiality, control over the process, speed, cost-effectiveness, subject matter specialization of the panel, and a perception that arbitration is less adversarial than courtroom litigation are equally likely candidates. It is also questionable whether finality was ever an organizing principle in arbitration's venerable history. For centuries in Europe, arbitration was a way to settle disputes between itinerant traders and locals using the more or less universal customs of merchants rather than the law of a particular jurisdiction (which was often ill-adapted to handle the realities of commercial life). Arbitration was favored over litigation chiefly because it allowed merchants to handle their affairs within their community and because it was better suited to the preservation of business relationships.

Well-intentioned academics and practitioners who augur the downfall of arbitration if parties are able to design hybrid arbitration-litigation procedures like the one in *Hall Street* underestimate arbitration's resilience over time and overestimate the importance of finality. To my knowledge, there is no proven empirical link between augmented judicial review of arbitral awards and declining arbitration rates. Quite the contrary: The English Arbitration Act of 1996 provides for expansive judicial review of arbitration awards, yet arbitration con-

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tinues to be alive and well in London. Opening the door to an arbitration-plus-judicial-review procedure might in fact attract users who value accuracy and correctness – users who currently opt out of arbitration for fear of being saddled with a final but incorrect result.

But perhaps the biggest concern we should have about the finality view is that it risks going against an even greater value undergirding the ADR movement: Party autonomy. Harvard Law Professor Frank Sander called in 1976 for a “multi-door courthouse” signaling the importance of what has been referred to as “process pluralism” – the idea that disputants should not be limited to one “right” or “best” way to resolve their disputes but should instead be empowered to choose from a smorgasbord of options in order to best meet their particular needs. That is precisely what Hall Street and Mattel sought to do with the assistance of the trial court. We should champion such efforts at individualized dispute system design, not condemn them.

These are just some of the many complex issues that *Hall Street* raises, leading Justice Breyer aptly to dub it the arbitration “case of the century” – not so much for its one-time doctrinal impact but for the ongoing discussion that it promises for several years to come.

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## 2. The Inadvertent Fallout from a Footnote in the *Buckeye Check Cashing Decision*: Do Colorable “Arbitrability” Defenses Have the Potential to Delay Arbitrations?

**By Robert B. Davidson**

There have been a number of U.S. court decisions from the Supreme Court, as well as the lower courts, on a topic known as arbitrability. “Arbitrability” generally

refers to two concepts. The first concerns the identity of the correct decision maker; that is, should a court or an arbitrator decide, for example, whether a particular party must arbitrate at all or whether a particular claim or cause of action is subject to arbitration. A second class of arbitrability cases involves the question of what the decision maker should decide about the proper scope of arbitration, i.e., whether a particular dispute is subject to arbitration in the first place under the language of the parties’ arbitration agreement. For example, can a party arbitrate a RICO claim or a statutory claim under state law, or are unjust enrichment or quasi-contractual claims arbitrable under the wording of a particular arbitration clause.

The most recent Supreme Court pronouncement on the issue came in the case of *Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204 (2006). In *Buckeye*, a number of borrowers commenced a class action in a Florida state court against a lender who engaged in so-called deferred payment transactions. In those transactions, a borrower post-dates a check for, say \$120.00 a month from now and, in return, gets \$100.00 today. When the borrower enters into such a transaction he or she signs an agreement with an arbitration clause. These transactions, as you can imagine, result in huge interest rate charges (if one characterizes the difference between the amount of the post-dated check and the amount of cash received as “interest”). In addition, the customers who seek these deferred payment transactions largely consist of low income borrowers.

*Buckeye Check Cashing*, when faced with a class action brought against it in state court, moved to arbitrate in accordance with the arbitration clauses contained in the agreements with its borrowers. The borrowers resisted the application to send the cases to arbitration on the ground that the contracts were usurious under Florida law and therefore void. As void agreements, the plaintiffs reasoned that their contracts – including the arbitration clauses – were a nullity.

The Supreme Court of Florida agreed with the borrowers and declared the contracts illegal and therefore void under Florida law. As a result, the Florida court held that the arbitration clauses disappeared with the underlying loan agreements.

The U.S. Supreme Court reversed the Florida Supreme Court. In doing so the U.S. Supreme Court explained that whether the contracts were void or not was an issue for an arbitrator to decide, and not a Florida court. Because the FAA applied, the Florida state courts should have applied federal substantive arbitration law (See *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984)). That federal substantive law includes the doctrine of severability first articulated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967). According to that doctrine, an arbitration clause is deemed to be severable from the contract in which it is embedded. Because there was no independent challenge launched against the arbitration clauses in the deferred payment agreements, the clauses were valid and it was up to an arbitrator to decide whether the contracts were enforceable in the face of defenses such as illegality or the like. In other words, the Florida Court erred by applying state law to determine that the contracts were void *ab initio*, rather than applying federal substantive law to determine that the arbitrator was the correct decision maker to make that threshold determination.

### Footnote 1 in *Buckeye*

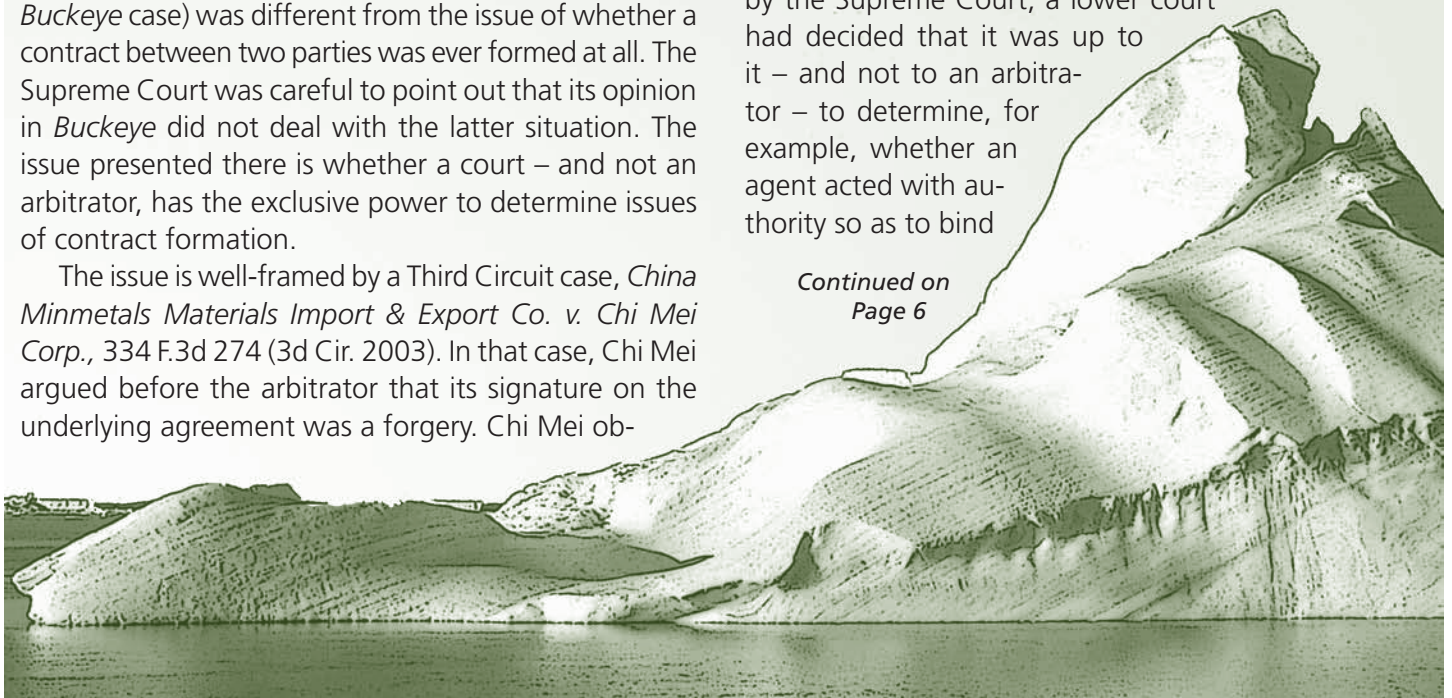
*Buckeye Check Cashing* is particularly interesting, not only because of its holding, but also because of a footnote in the opinion. That footnote said that the issue of a contract's validity (which was at issue in the *Buckeye* case) was different from the issue of whether a contract between two parties was ever formed at all. The Supreme Court was careful to point out that its opinion in *Buckeye* did not deal with the latter situation. The issue presented there is whether a court – and not an arbitrator, has the exclusive power to determine issues of contract formation.

The issue is well-framed by a Third Circuit case, *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003). In that case, Chi Mei argued before the arbitrator that its signature on the underlying agreement was a forgery. Chi Mei ob-

jected to the arbitration going forward, but participated in the arbitration nonetheless. The arbitrator ultimately determined that Chi Mei, contrary to its contention that its signature on the contract was a forgery, did not demonstrate that it had not executed the contract. In the alternative, the arbitrator found that Chi Mei was bound to the agreement based on other legal doctrines. When China Minmetals, the winner in the arbitration, moved in the district court to recognize and enforce the award against Chi Mei [*China Minmetals* was an international arbitration to which the New York Convention applied. Thus, the prevailing party moved to “recognize and enforce” the arbitration award rather than to “confirm” it under a state statute.], Chi Mei opposed the motion arguing that – notwithstanding the arbitrator's determination – it was entitled to a jury trial in the district court on whether or not its signature on the contract was a forgery. The district court agreed and the Third Circuit affirmed. Chi Mei got a second bite of the apple. In deciding as it did, the Third Circuit set the rule that it is up to a court and not an arbitrator to decide whether a contract was formed at all and, therefore, whether an arbitration agreement ever existed.

The *Buckeye* footnote – while not approving of these cases specifically – went to pains to distinguish them from the situation in *Buckeye*. The footnote cited to several contract formation cases and stated that the *Buckeye* holding was not intended to change the result in those cases. In the contract formation cases cited by the Supreme Court, a lower court had decided that it was up to it – and not to an arbitrator – to determine, for example, whether an agent acted with authority so as to bind

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his principal to a contract with an arbitration clause; or whether a contracting party had the mental capacity to form a contract at all.

## The Potential for the Misuse of an Arbitrability Defense

There are serious implications to this line of cases. What if, for example, you as a litigator have a client who wants to delay the day of reckoning and, in addition, has a colorable argument that his agent who signed the agreement with the arbitration clause was not authorized to do so; or whether your client has another argument that he never agreed to arbitrate at all? If you preserve your rights in the arbitration (and that, it seems, takes relatively little effort—nothing more than a protest that the arbitrator should not be deciding the issue), you may well be entitled (at least in the Third Circuit) to a second bite of the apple at the enforcement stage by arguing that a court must determine whether your client agreed to arbitrate in the first place.

This defense could also exist in cases where an arbitrator purports to order a non-signatory to arbitrate, or allows an arbitration to proceed at the behest of a non-signatory.

These are situations that have the potential for delays that arbitration was supposed to avoid. Indeed, the desire to keep arbitration efficient was undoubtedly one of the motivating forces guiding the Supreme Court in 1967 when it decided the *Prima Paint* case. In *Prima Paint* the claimant in the arbitration resisted arbitration alleging that he was fraudulently induced to enter into a contract that happened to contain an arbitration clause. Thus, reasoned the claimant, he should be entitled to a trial in court on the threshold issue of whether the contract was void because it was induced by fraud. After all, if the contract itself was void, then the arbitration clause falls with it. The Supreme Court decided that—absent a specific attack on the arbitration clause itself—the issue of fraudulent inducement was a question for the arbitrators and not a threshold question for the courts. If one thinks about it, this is the only rational decision if you believe that arbitration is worth saving. Absent a so-called “severability” or “separability” doctrine, one

of the hallmarks of the process, to wit, speed, would be severely compromised. There are not many enterprising lawyers who – seeking to delay a final determination – would not raise a “fraud in the inducement” defense in a contract action if the mere raising of that defense would ensure a years-long court process as a prelude to arbitration. This was recognized long before the Supreme Court did the right thing in *Prima Paint*. Virtually all of the rules of the major arbitration provider organizations, both domestic and international, have the severability doctrine embedded in their rules. See, e.g., JAMS Comprehensive Rule 11(c).

Thus far, the case reports have not disclosed a substantial number of cases in which challenges to arbitrability – such as those described in the Supreme Court’s footnote in *Buckeye Check Cashing* – have been used with any degree of frequency to slow down or scuttle arbitration proceedings, but the potential is there. Only time will tell whether the ability to raise such threshold defenses will enable reluctant litigants to buy time either via applications to stay arbitration or applications to vacate at the enforcement stage.

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## 3. Classwide Arbitration Waivers in California – The Effects of *Gentry*

**By Hon. Lawrence C. Waddington (Ret.)**

In four sentences, the California Supreme Court summarized its decision precluding waiver of classwide arbitration agreements included in employment contracts. That Court held, “[i]n some cases prohibition of classwide relief would undermine vindication of employees’ unwaivable statutory rights.” Accordingly,

such "class arbitration waivers should not be enforced... if the trial court finds classwide arbitration ineffective to vindicate statutory rights." *Gentry v. Sup.Ct.*, 42 Cal.4th 443 (2007); Lab. Code 1194.

To which the dissent replied, "...there is more than one way courts can show hostility to arbitration as a simpler, cheaper, and less formal alternative to litigation. They can simply refuse to enforce the parties' agreement. Or, more subtly they can alter the arbitral terms to which the parties agreed ..."

Although the California Supreme Court had endorsed classwide arbitration in *Keating v. Sup.Ct.*, 31 Cal.3d 584 (1982) – a case reversed by the United States Supreme Court on other grounds in the famous case of *Southland Corp. v. Keating*, 465 U.S. 1 (1984) – several federal courts had refused to consolidate multiple arbitrable claims. But in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 1029 (2003) a splintered Supreme Court majority apparently approved classwide arbitration if state courts or legislatures either permitted consolidation or did not prohibit class wide arbitration. Employers, service providers and franchisors seeking to impose a format for individual arbitration claims wrote classwide arbitration waivers into contract clauses of employees, consumers and franchisees as exemplified in *Gentry*.

The majority opinion in *Gentry* does not find the classwide arbitration waiver signed by the employee automatically unenforceable but remands the case to the trial court with instructions to determine whether the specific terms of the arbitration agreement in question enables an employee to vindicate statutory rights as outlined in the Labor Code. The *Gentry* court instructs the

trial court to consider several factors in reaching its conclusion: the modest size of the potential recovery; employer retaliation against class members; inability to inform absent class members of their rights; other real world obstacles to vindication of alleged Labor Code violations through individual arbitration.

According to the *Gentry* court, this analysis coincides with rules applicable to class actions in general, i.e., predominant questions of law and fact; typical claims of class members; numerous class members; adequate representation of absent and non-class members. The *Gentry* majority requires trial courts to compare classwide arbitration with alternative individual arbitration clauses offered by the employer in specific cases instead of merely comparing individual arbitration with classwide litigation in general.

*Gentry* also challenges the arbitrability of the arbitration agreement as procedurally unconscionable despite an "opt-out" agreement for employees. The court notes the agreement accelerates time lines to file employee claims, contradicts the conventional statute of limitations, limits damages (back pay),

eliminates punitive damages, and allocates costs and fees. These conditions are deemed potentially unconscionable, leaving the ultimate decision about unconscionability for trial court resolution.

The list of factors cited in *Gentry* a court should consider in determining whether to prohibit classwide arbitration waivers, or in the alternative, a finding of unconscionability of the arbitration agreement, guarantees an analytic framework that draws no "bright lines" and assures more litigation.

*Gentry* is joined by the ruling in *Discover Bank v. Sup.Ct.*, 36 Cal.4th 148 (2005), an earlier California Supreme Court case invalidating waiver of classwide arbitration in consumer cases. Together, these cases open the door, albeit slightly, to permit class action waivers "in some cases." The majority in *Discover Bank* explained that

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# Emotion or Reason? How Do You Resolve Disputes?

## *The Political Brain*

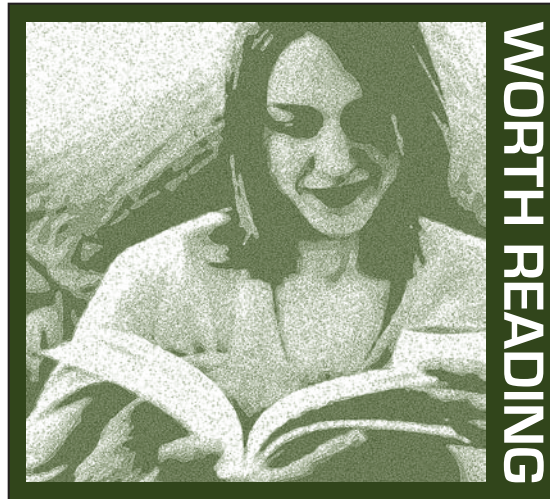
by Drew Westen

Reviewed by Richard Birke

Here at the *Alert* we strive to maintain a non-partisan stance. Individual members of our team may have preferences, and of course, we vote and we hope you do too. But we never discuss *Alert* politics, except to assure each other that the *Alert* is no place for politics. After all, we want to resolve disputes among and between members of all parties and unaffiliated people as well. If you have something to be arbitrated or mediated, we don't care whether you voted for Lincoln or for Douglas.

And now I am about to review a book as partisan as ever there was. Why? Because Drew Westen's new book offers brilliant lessons for anyone interested in the way the brain operates when faced with new information, difficult situations and heartfelt opposition – sound familiar? These are the same issues facing anyone trying to resolve a legal conflict. The book, *The Political Brain*, explores the tension between arguments that appeal to reason and arguments that appeal to emotion, and while Westen explores the themes in the realm of political debate, the ideas are equally applicable to anyone in a mediation or arbitration.

*The Political Brain* will likely make every reader angry, but for different reasons. It will enrage Democrats because the author's thesis is that the Democrats snatched defeat from the jaws of victory when Reagan beat Carter, Bush beat Dukakis, Bush beat Gore, and when Bush beat Kerry (no beating around the bush here!). Drew Westen maintains that Democrats should have won each of those elections but lost as a result of flawed strategies. The book will similarly upset Republicans because Westen suggests that the Republican party has



been hijacked by a right wing faction that shares its values with a small fraction of the voting public. And non-partisans may be offended at the stridency of the argument that D's should be attacking R's with emotional, vitriolic campaigns designed to anger one-third of the nation. So there's something here to tick off just about everybody.

But there are some things in this book that are so important and others so provocative that

despite the fact that *The Political Brain* is partisan and strident, I recommend that you read this book.

Drew Westen is a distinguished professor of psychology at Emory University. He's a very serious scholar and an accomplished academic. His recent work has begun to incorporate empirical neuroscience (and a good sense of humor) into his writing. He is also a Democrat who believes that the Republicans have the wrong values but the right campaign strategies. He confesses in the introduction that he flirted with the idea of writing a book that took a neutral perspective on the topic of political decision making, but he decided instead to speak from his heart as well as his mind, and that gives the book a consistently left-leaning tone. Westen never pretends to be neutral, so once the reader understands Westen's perspective, it's easy to sort fact from viewpoint.

As far as those facts and viewpoints go, I will outline three (among many) – the fMRI studies on political information, the importance of emotional intelligence, and the call to a winner-take-all politic. After the outline, I will attempt to demonstrate the importance of each to the field of dispute resolution.

### The fMRI

The fMRI is essentially a moving picture MRI. It is now possible to take an active brain scan and watch what happens while the owner/occupant of the brain reacts to stimuli.

Westen put subjects in “the magnet” (that’s what “cool” fMRI researchers call it) and subjected them to political information. People presented with information that fit their preconceptions (good tidbits about candidates of their party and bad things about the others) experienced mild brain activity. When presented with information that didn’t fit (good tidbits about the other and bad things about their candidates), they experienced higher levels of brain activity. Moreover, the pleasant info triggered the neo-cortical areas of the brain – those associated with intellectual, higher level thought. The unpleasant info, however, stimulated the mid-brain and brainstem. In other words, the reactions weren’t just stronger – they were more animalistic.

### Emotionally Intelligent Campaigning

Westen demonstrates that every election since TV became the medium of choice for vetting candidates, was won by the candidate who was more emotionally intelligent. An effective TV campaign caused people to like the candidate’s party and to distrust the other party. What mattered next was whether the campaign caused people to like the individual candidate as a person and to see the other candidate as suspect. Finally, a distant third was whether the campaign was built around good ideas for governing the nation.

Westen suggests that in the elections won by Republicans, liking the party trumped agreement with positions on issues. He points to survey data that show that most Americans are pro-choice, and that fewer than one-third would severely restrict that right. The same is true about same-sex marriage. And gun control. And civil rights. In other words, the ideas that form the typical (losing) Democratic platform are the ideas that are shared by most voters, but the voters vote based on powerful emotional reactions, not wan intellectual reasons.

### Winner Take All

It’s axiomatic that in politics, the winner takes all. But once the election is done, the candidate has to be the official who presides over the whole electorate, not just those in his party. Once, prevailing thought was that elections were won by occupying the center. Now, Westen argues, the prevailing thought is to move the center by wrenching the electorate toward your

end of the spectrum. Politics has become divisive, and Westen exhorts the Democrats to fight back as viciously as the Republicans have been fighting. He says “if your campaign doesn’t make at least 30% of the electorate mad, it’s not going to be effective.”

### Implications for Dispute Resolution

Parties, mediators and negotiators will find important ramifications stemming from each of these three principles.

First, the fMRI study vivifies the possibility that we can reach a much deeper understanding of how the mind reacts to common dispute resolution situations. Take the example of reactive devaluation. While we were already aware of behavioral studies of the phenomenon of distrusting an enemy, the fMRI adds something important. By proving that disconfirming information triggers lower brain function, Westen’s study offers tips to help get tough cases settled. If the lower brain is activated and angry after hearing bad news, it makes sense to take a time-out after presenting a party with information that demonstrates weakness in their case, and not to ask for a concession until after a cooling off period.

Moreover, the wealth of psychological principles sometimes yields conflicts and confusion. For example, when facing a straightforward question like “Should I make the first offer or wait,” the “anchoring principle”

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***Westen suggests that in the elections won by Republicans, liking the party trumped agreement with positions on issues.***

## Worth Reading *Continued from Page 9*

says to be proactive, but other behavioral studies suggest that waiting will yield information that will tilt the advantage away from the first offerer. (Most disputes end at the midpoint between opening offers.) Testing “what trumps what and when” in the behavioral laboratory would be complicated. However, in an fMRI, it may be possible to determine the strength, intensity and location of emotional reactions to various kinds of presentation of information.

As for emotionally intelligent campaigning, the implications are equally profound. Do people really prefer faith to reason? Does data matter less than feelings? If Westen is right, that Democrats have been trying to “stay above the fray” and sell the superiority of their platforms as “more intelligent” and in most cases they have lost to well articulated stances on issues related to strong feelings (gay marriage, abortion, 9-11), does this mean that parties in a dispute settle based on their gut and not on their research and preparation?

It’s not all or nothing. An emotionally appealing candidate with no qualifications whatsoever and no platform doesn’t stand a chance. But it looks like a highly qualified candidate with a strong platform will also lose in the absence of a strong emotional appeal. This suggests that lawyers and businesspeople and others involved in negotiation and dispute resolution ought to be careful about spending all their time and money dotting i’s and crossing t’s. They ought to invest in creating a story and an approach that touches the right emotional keys.

Finally, I am troubled by Westen’s endorsement of the notion that politics is all or nothing, and that if you don’t anger one-third of the population with every stance you take you have no coherent position and will lose. If this is the case, then what can a centrist do? What about those of us who really do strive to reach win-win results in which everyone is better off? One may be tempted to look at politics as a special case – it’s all or nothing whereas most human relations have the possibility of value-creating outcomes. I retain the hope that elected officials of all political stripes will represent everyone appropriately in every aspect of their jobs.

If, in this day of talk radio and attack ads, we become more and more conditioned to a winner-take-all mindset in our government, we are more likely to call upon those



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same impulses when we find ourselves embroiled in a more personal dispute. If we are barraged by political ads that tell us to hate the other side, when we are in conflict with another, the neural pathways created by our politics may be activated and we may see little choice but to sue, or if sued, to adopt a “take no prisoners” approach to the defense of our case.

In this regard, Westen’s book is provocative, but in a way that is thoroughly troubling to me.

### Conclusion

While Westen’s book suffers a bit from his stridently partisan perspective, the aspects of the book that are new, empirical and apolitical are very good. The writing style is a balance between hard science and political science, all presented in a reasonably funny tone. The parsing of ad campaigns from past political races is both intriguing and nostalgia-inspiring. The thesis is bold and creative, and no matter whether you are a Republican who can be proud of his party’s ability to win elections by choosing emotionally intelligent candidates or Democrats who are encouraged to feel that they are the party of the true majority, *The Political Brain* is well Worth Reading.

## The Shifting Landscape of Arbitration Continued from Page 7

"...the law in California is that class action waivers in consumer contracts of adhesion are unenforceable under some circumstances." If an adhesive consumer contract is unconscionable, or the complaint alleges a small amount of damages incurred by a scheme to cheat large numbers of consumers and disabling them from vindicating statutory rights, the classwide arbitration waiver becomes potentially vulnerable; Civ. Code 1688; 1670.5.

*Gentry* and *Discover Bank* are superficially synonymous in linking the right of employees and consumers to vindicating their statutory rights. In both cases the contracts are adhesive and usually involve a small amount of damages but the theoretical basis for treating them similarly ignores the legal relationship between the parties. Employee and employer relationships are personal – in the sense each person signs a contract to perform services for another person or entity (although there is clearly disproportionate bargaining power). Service provider – consumer relationships are impersonal. Selling a product or providing service to a consumer is typically a single transaction involving exchange of money with little to no ongoing interaction between parties, and each party has low cost alternatives to agreement. The consumer can continue to shop elsewhere and the service provider can insulate itself in the awareness that the small amount of damages involved in a typical dispute will diminish incentives to pursue a contested case.

Consistent with its *Discover Bank* decision, the court majority in *Gentry* puts California in a minority position among federal and state court decisions upholding classwide arbitration waivers in consumer cases. The Justices in *Gentry* cited only a handful of U.S. District Court decisions in support of its position. The dissent identifies numerous state and federal Circuit Courts of Appeal employment decisions conflicting with the *Gentry* majority.

In state court cases removed to federal court on grounds of diversity jurisdiction, employers and service providers also filed motions to compel arbitration of individual claims citing the classwide waiver in contracts of employees or consumers. A federal court applying

state contract law as required under the Federal Arbitration Act could refuse to enforce classwide arbitration waiver on the grounds that the adhesive nature of the contractual clause fails to vindicate statutory rights or is unconscionable, but in such instances, severance of the unenforceable clause is a viable (and indeed encouraged) option. *Kristian v. Comcast Corp.*, 446 F.3d 251 (1st Cir. 2006).

The Ninth Circuit, historically unsympathetic to arbitration of employment cases until reversed by the Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), had previously held classwide arbitration waivers in adhesive employment contracts unconscionable in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) and in consumer contracts. *Ting v. AT & T*, 319 F.3d 1126 (9th Cir. 2003). Citing *Gentry*, the Ninth Circuit panel in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) also refused to enforce a classwide arbitration waiver in a consumer contract on grounds the adhesive contract was unconscionable but without the *Gentry* caveat of possible exceptions.

Despite that holding, the Ninth Circuit panel endorsed classwide arbitration in principle as an alternative to litigation enabling arbitrators to resolve contractual disputes by introducing resolution techniques unavailable in federal trial courts.

*Shroyer* discusses the effect of the Consumers Legal Remedies Act (CRLA), a California consumer based statute that defines an unconscionable provision in a contract as an unlawful business practice and unenforceable. Civ.Code 1770 (a) (19). Although the pleadings in *Shroyer* had alleged an unlawful business practice, the trial court had certified a national class citing invalidity of the classwide arbitration waiver. For a federal court to certify a national class based on the innumerable laws of multiple jurisdictions on classwide waiver would defeat the purpose of Rule 23 (FRCP) requiring procedural superiority prior to class certification.

The First Circuit has confronted challenges to classwide arbitration waivers in a trilogy of cases illustrating the difficulty of conforming to Supreme Court insistence on eliminating previous judicial hostility to arbitration.

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## Shifting Landscape

*Continued from Page 11*

In *Kristian*, the classwide waiver of arbitration clause included a remedy stripping provision precluding a party from collecting statutorily mandated damages for violation of federal anti trust law. That court held that the classwide arbitration waiver disabled the plaintiff from vindicating their federal statutory rights to obtain treble damages. Yet the court salvaged arbitration by severing the unenforceable damages clause and permitting classwide arbitration pursuant to a "savings clause" in the contract.

In *Anderson v. Comcast Corp.*, 500 F.3d 66 (1st Cir. 2007) the court was unsympathetic to an argument against a classwide arbitration bar based on a state statute permitting class actions. Citing its decision in *Kristian*, the court held that as long as the state permits class actions, or inferentially class arbitration, the parties can agree to waive that right. But this decision is not for the court to resolve, the clause not involving formation of the contract; or in the language of arbitration, not a judicial question of "arbitrability."

In *Skirchak v. Dynamics Corp.*, the First Circuit commented that the classwide arbitration bar is arguably unconscionable but also severable. In an interesting jurisdictional question, the parties solicited the court rather than the arbitrator to decide issues of unconscionability or inability to vindicate statutory rights. The court confirmed its jurisdiction conferred by the parties.

In contrast to the First Circuit, California, the *Gentry* court majority and the Ninth Circuit have cloaked a policy position in legal garments by refusing to enforce waivers of classwide arbitration in employment and consumer contracts, in each case on different grounds, but paradoxically endorsing the process per se.

What lies ahead? It appears that a major issue will involve the expanding role of arbitrators in classwide arbitration. When a case is decided involving that issue, you can look forward to another update.

*Judge Waddington is a full-time arbitrator and mediator with JAMS. Prior to joining JAMS, he served on the Los Angeles Superior Court for 15 years.*



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