AN INFORMATIONAL HEARING OF THE SENATE COMMITTEE ON JUDICIARY

The Federal Arbitration Act, the U.S. Supreme Court, and the Impact of Mandatory Arbitration on California Consumers and Employees

March 1, 2016
1:30 p.m.
State Capitol, John L. Burton Hearing Room (Room 4203)

Section 2 of the Federal Arbitration Act (9 U.S.C. Sec. 2): ***A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.***

Section 1281 of the California Code of Civil Procedure: ***A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.***

BACKGROUND PAPER

I. Background

Arbitration is a form of alternative dispute resolution that allows for the resolution of disputes outside of the court system. The Federal Arbitration Act (FAA; 9 U.S.C. Sec. 1 et seq.), enacted in 1925, and the California Arbitration Act (CAA; Code Civ. Proc. Sec. 1280 et seq.), enacted in 1927, both provide that arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. In other words, under federal and California law, arbitration agreements must be enforced, and such enforcement is limited only by certain general contract principles that would apply to any other contract (such as fraud, duress, or unconscionability).

On Tuesday, March 1, 2016, the Senate Judiciary Committee will hold an informational hearing to review the impact of mandatory arbitration clauses arising out of adhesion

contracts[1] on California's consumers, employees, employers, and businesses. The Committee will review the extent to which state action can be taken to address any issues arising out of such clauses, in light of the FAA and foreseeable federal preemption issues based upon the development of case law interpreting that act. Lastly, the Committee will review the efficacy of the ethical rules that were promulgated over the last 15 years to ensure the neutrality of arbitrators. The Committee will explore, among other things, the following questions:

- What is the status of current statutory and case law with regard to the enforceability of mandatory binding arbitration agreements?
- How pervasive is the use of mandatory binding arbitration agreements in the State of California?
- Are mandatory binding arbitration agreements beneficial from the perspective of consumers, employees, employers, and businesses? Why or why not?
- In light of federal preemption hurdles, how might the state be able to protect or improve the integrity of arbitration as an alternative dispute resolution tool?
- How do/how can arbitrators help ensure that people on both sides are treated fairly when involved in an arbitration arising out of a mandatory arbitration clause?
- What redress does a consumer or employee have under existing law if they believe ethical rules have been violated, or that incorrect laws or standards have been applied by the arbitrator in their case?
- What are the current ethical rules that apply to arbitrators and arbitration provider organizations? Are the current ethical rules effective in ensuring fairness and in combatting actual or perceived conflicts of interest?
- Are there ways to improve consumer and employee confidence and enhance the integrity of arbitration as an effective and fair form of alternative dispute resolution?

<u>Arbitration, Generally</u>

As noted above, arbitration is a form of dispute resolution that operates as an alternative to the court system. Alternative dispute resolution (or "ADR") such as arbitration, mediation, or settlement conferences, is said to usually be less formal, less expensive, and less time-consuming. As described on the California courts' website, the benefits of ADR, depending on the process used and the circumstances of the particular case, may include: saving time, saving money, increasing the ability of parties to shape

[1] An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who adheres to the contract with little choice of the terms. (Black's Law Dictionary, *Contract of Adhesion* (8th Ed.) p. 342.)

the process and the outcome, preserving relationships (by being less adversarial or hostile), increasing party satisfaction, and improving attorney-client relationships. (*See* California Courts, the Judicial Branch of California, *ADR Types & Benefits*, <http://www.courts.ca.gov/3074.htm#tab4538> [as of Feb. 22, 2016].)

Under California law, there are two distinguishable types of arbitration: judicial arbitration (also known as court-annexed arbitration, governed under Code of Civil Procedure Sections 1141.10 -1141.31) and private arbitrations (also commonly known as "contractual," "voluntary," or "nonjudicial" arbitrations; governed under Code of Civil Procedure Section 1280 et seq.). Contractual arbitration differs markedly from judicial arbitration, as explained by the California Supreme Court, in some very basic ways:

- As to commencement, contractual arbitration arises solely out of an arbitration agreement, specifically, a written arbitration agreement between the parties, whereas judicial arbitration may be imposed upon the parties whether or not they agree in writing or otherwise.
- As to process, contractual arbitration allows the parties to an arbitration agreement to select the arbitrator, whereas judicial arbitration, absent a stipulation, selects the arbitrator by operation of law.
- Contractual arbitration allows the parties to an arbitration agreement to define the arbitrator's powers, whereas judicial arbitration defines the arbitrator's powers by operation of law.
- Contractual arbitration does not permit full and unconditional discovery, whereas judicial arbitration does.
- Contractual arbitration dispenses with any necessity to observe the rules of evidence and procedure, whereas judicial arbitration, although it does make certain modifications, does not.
- Contractual arbitration generally frees the arbitrator from making a decision in accordance with the law, whereas judicial arbitration does not (providing that, in judicial arbitration, the arbitrator has the power "to decide the law and facts of the case and make an award accordingly").
- As to a decision, contractual arbitration generally results in a binding and final decision, whereas judicial arbitration generally does not.

(Toker, California Arbitration and Mediation Practice Guide, Court-Connected ADR, 1.5(a)(1), citing *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 344-345; other internal citations omitted.)

"Contractual" or "Private" Arbitrations

As discussed above, contractual arbitration agreements are often used when one or both sides to the agreement desire to have any disputes arising under the contract arbitrated by private arbitrators, rather than resolved by a court or jury. More frequently, however, it appears that such arbitration clauses are being unilaterally imposed by one party on the other in contracts of adhesion. These mandatory arbitration clauses are usually "binding," which limits the ability of the parties to move their dispute to court if they are unsatisfied with the outcome. As a practical matter, when such "take-it-or-leave-it" contracts are used by companies in the consumer context and the employment context, wherein the parties frequently possess unequal bargaining power, the prospective consumer or employee is left with the choice: to sign or not sign. As a result of that choice, if the consumer or employee does not sign the contract, then they do not get the job, cannot purchase the item, or obtain the services sought.

In recent years, there have been frequent discussions about the merits and benefits of mandatory binding private arbitration as an alternative forum to the civil justice system. Supporters of arbitration may argue that arbitration is a more efficient and less costly manner of resolving legal disputes, especially in light of budgetary cuts to the judiciary branch over recent years. Critics of private arbitration may contend that it is an unregulated industry, which can be costly, unreceptive, and biased against consumers. They may argue that this type of arbitration can create an uneven playing field.

Over the years, consumer and employee advocates have asserted that boilerplate form contracts are problematic because: arbitrators can disregard the law and can issue binding decisions that are legally enforceable but generally not reviewable by a court (*see Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1); arbitrators can conduct arbitrations without allowing for discovery, complying with the rules of evidence, or explaining their decisions in written opinions (Code Civ. Proc. Secs. 1283.1, 1282.2, and 1283.4); and arbitrations may be conducted in private with no public scrutiny (*Ting v. AT&T*, 182 F.Supp.2d 902 (N.D. Cal. 2002), affirmed, 319 F.3d 1126 (9th Cir. 2003).)

Critics' concerns are compounded by the fact that there are little, if any, regulations or legal standards imposed on arbitrators or their decisions. Regardless of the level or type of mistake, or even misconduct, by the arbitrator, the grounds on which a court will allow judicial review of an arbitration are extremely narrow. (*See Moncharsh v. Heiley & Blase* (1992) 3 Cal.4th 1 (holding that a court is not permitted to vacate an arbitration award based on errors of law by the arbitrator, except for certain narrow

exceptions).) As a matter of statutory law, the relief that a court may grant to a party to the arbitration is limited to a potential vacatur of the award. If the court vacates the award under any of the circumstances listed in statute, the court may order a rehearing before new arbitrators or, in some cases, order a rehearing before the original arbitrators. (Code Civ. Proc. Sec. 1286.2.[2])

II. Brief Overview of Federal Preemption and Recent Court Cases Interpreting the Federal Arbitration Act

Federal Preemption and the FAA, Generally

The Federal Arbitration Act (FAA) was enacted by the United States Congress in 1925 in response to widespread judicial hostility to arbitration agreements. Section 2 of the FAA, the primary substantive provision of the Act, generally provides that a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (*See* 9 U.S.C. Sec. 2; similar language is contained within the California Arbitration Act at Code Civ. Proc. Sec. 1281.)

Separately, as a general matter, Article VI, Paragraph 2 of the United States Constitution—the "Supremacy Clause"—establishes that the federal Constitution, including federal laws made pursuant to it and treaties made under its authority, constitute the supreme law of the land. In other words, states are bound by the "supreme law," and in cases where the federal government has acted pursuant to its constitutional authority and there is a conflict between federal and state law on the same issue, federal law generally takes precedence (i.e., "preempts" state law) and must be applied.

The issue of federal preemption under the Supremacy Clause in the U.S. Constitution is generally both one of *express* preemption (when a federal statute explicitly confirms

[2] Under subdivision (a) of this section, the court is generally required to vacate the award if: (1) the award was procured by corruption, fraud or other undue means; (2) there was corruption in any of the arbitrators; (3) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator; (4) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; (5) the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title; or (6) an arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.

Congress's intention to preempt state law) and *implied* preemption (which can arise in two ways: where the federal law is so pervasive as to imply that Congress intended to "occupy the field" in that area of law or where there is a conflict between federal and state law). Recent cases interpreting the FAA have made it increasingly difficult for states, by way of either judicially crafted rules or state legislation, to determine whether the use of private arbitration clauses under certain circumstances are unconscionable or against public policy, or to otherwise address or prevent some of the problems associated with mandatory binding arbitration.

Generally, as the 9th Circuit Court of Appeals recently explained in the 2015 case of *Sakkab v. Luxottica Retail N. Am., Inc*. (2015) 803 F.3d 425, 431-432:

> While "[t]he FAA contains no express pre-emptive provision" and does not "reflect a congressional intent to occupy the entire field of arbitration," [citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ*. (1989) 489 U.S. 468, 477] it preempts state law "to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" [citing *id*., quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67].
>
> The final clause of [Sec.] 2, [the FAA's] saving clause, "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." [Citing *AT&T Mobility v. Concepcion* (2011) 131 S. Ct. 1740, 1746 (internal citations omitted).] Even if a state-law rule is "generally applicable," it is preempted if it conflicts with the FAA's objectives. [Citing *Concepcion*, 131 S. Ct. at 1748.]

The following appendix provides a brief, chronological overview of some recent, significant cases surrounding issues of preemption and the interpretation of the FAA by the U.S. Supreme Court, the California Supreme Court, and the 9th Circuit Federal Court of Appeal. These summaries are only of a select number of cases that are relevant to questions of federal preemption. The appendix provides a snapshot of the general court holdings of oft-cited cases in discussing FAA preemption and is not intended to be comprehensive.

Appendix of Decisions

Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83:

The California Supreme Court held that Fair Employment and Housing Act claims would be arbitrable *if* the arbitration permits vindication of the plaintiffs' statutory rights. (*Id*. at 90 (emphasis in original).) The court also held that the agreement at hand possessed a damages limitation that is contrary to public policy, and that it was unconscionably unilateral. (*Id*. at 91.) Finally, the court held that the entire arbitration agreement involved was unenforceable because it was not possible to make the agreement enforceable by severing the offending provisions. (*Id*. at 127.) More generally, the court set forth the standard for finding unconscionability in a contract. As stated by the court, unconscionability requires both "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results," though they need not be present in the same degree. (*Id*. at 114 (internal citations omitted).)

Discover Bank v. Superior Court of Los Angeles (2005) 36 Cal.4th 148:

The California Supreme Court held that when a class action waiver: (1) is found in a consumer contract of adhesion; (2) the dispute between the contracting parties predictably involves small amounts of damages; and (3) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then the waiver is unconscionable under California law and should not be enforced because that waiver effectively exempts a party "'from responsibility for [its] own fraud, or willful injury to the person or property of another.'" (*Id*. at 162-163.) This "*Discover Bank* rule" was abrogated in *AT&T Mobility LLC v. Concepcion,* below.

Gentry v. Superior Court (2007) 42 Cal. 4th 443:

The California Supreme Court announced an unconscionability rule that takes into consideration whether individual arbitration is an effective dispute resolution mechanism for employees when directly compared to the advantages of a class action. In considering whether class arbitration waivers in employment arbitration agreements may be enforced, the court concluded that "at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. Accordingly, such class arbitration waivers should not be enforced if a trial court determines, based on the factors discussed below, that class arbitration

would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Id*. at 450.)

In *Iskanian v. CLS Transportation of Los Angeles*, below, however, the California Supreme Court concluded that this ruling in *Gentry* (insofar as it refused to enforce a class waiver in the arbitration agreement) has been abrogated by the U.S. Supreme Court precedent in *AT&T v. Concepcion*, also below.

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (2010) 559 U.S. 662:

The U.S. Supreme Court held that under the FAA, a party may not be compelled to submit class claims to arbitration unless there is a contractual basis for concluding that the party agreed to it. The Court explained that while in certain contexts, it is appropriate to presume that parties who enter into an arbitration agreement implicitly authorize the arbitrator to adopt procedures that are necessary to give effect to the parties' agreement, "[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." (*Id*. at 685.)

AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333:

The U.S. Supreme Court overruled a lower court decision finding a class waiver in an arbitration agreement unconscionable pursuant to California's *Discover Bank* rule. The Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id*. at 344.) The Court held that state laws containing procedures that are inconsistent with the FAA are not valid and, as such, "'because it stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA." (*Id*. at 352.)

The Court emphasized that the FAA prohibits judicial hostility to arbitration agreements, and that the FAA reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." (*Id*. at 339, internal citations omitted.) Notably, the Court recognized that, "[s]tates remain free to take steps addressing the concerns that attend contracts of adhesion—for example requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted." (*Id*. at 347, fn. 6.)

Sonic-Calabasas A, Inc. v. Moreno (2011) 51 Cal.4th 659 (*Sonic I*) and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal. 4th 1109 (*Sonic II)*:

The California Supreme Court in *Sonic I* held that it is contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing (a dispute resolution forum established by the Legislature to assist employees in recovering wages owed). (51 Cal.4th 659, 684, 687.) The court further held that its rule prohibiting waiver of a Berman hearing does not discriminate against arbitration agreements and is therefore not preempted by the FAA. (*Id*. at 695.) The U.S. Supreme Court granted certiorari, vacated the judgment, and remanded the case to the California Supreme Court for consideration in light of *Concepcion*, which clarified the limitations that the FAA imposes on a state's capacity to enforce its rules of unconscionability on parties to arbitration agreements. (*Sonic-Calabasas A, Inc., Petitioner v. Moreno* (2011) 132 S. Ct. 496.)

In *Sonic II*, the California Supreme Court concluded, in light of *Concepcion*, that compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration and the approach taken in *Sonic I* would be inconsistent with the FAA. As such, the *Sonic II* court held that the FAA preempts California's rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment. (57 Cal. 4th 1109, 1124.) At the same time, however, the court concluded that:

> [S]tate courts may continue to enforce unconscionability rules that do not "interfere[ ] with fundamental attributes of arbitration." [Citing *Concepcion*, 563 U.S. 333, 344.] Although a court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer. As we explained in *Sonic I* and reiterate below, the Berman statutes confer important benefits on wage claimants by lowering the costs of pursuing their claims and by ensuring that they are able to enforce judgments in their favor. There is no reason why an arbitral forum cannot provide these benefits, and an employee's surrender of such benefits does not necessarily make the agreement unconscionable. The fundamental fairness of the bargain, as with all contracts, will depend on what benefits the employee received under the agreement's substantive terms and the totality of circumstances surrounding the formation of the agreement. (*Id*. at 1124-1125.)

Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal. 4th 348:

The California Supreme Court held that the FAA did not preempt a state rule that bars the waiver of representative claims under the Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code Sec. 2698 et seq.[3] The court reasoned that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude the California Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf, and, as such, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract. (*Id*. at 360.)

Separately, the California Supreme Court held that its 2007 ruling in *Gentry v. Superior Court*, above, insofar as it refused to enforce a term in the arbitration agreement on grounds of public policy and unconscionability, would be preempted by the FAA and had thus been abrogated by the 2011 U.S. Supreme Court's decision in *Concepcion*. (*Id*. at 359-360.)

American Express Co. v. Italian Colors Rest. (2013) 133 S.Ct. 2304:

The U.S. Supreme Court, in an action alleging violations of federal antitrust laws, held that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. A class action waiver in an arbitration agreement must be enforced, even if the cost of individually arbitrating a federal statutory claim exceeds the potential recovery and renders arbitration economically infeasible. As stated by the Court, "[t]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." (*Id*. at 2309.)

The Court rejected the plaintiff's argument that the "effective vindication" exception[4] to the FAA requires the availability of class arbitrations to bring claims, such as antitrust claims:

> The exception finds its origin in the desire to prevent "prospective waiver of a party's *right to pursue* statutory remedies[.]" That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And

[3] PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state."

[4] As first established in the U.S. Supreme Court case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*. (1985) 473 U.S. 614, 637, fn.19, the "effective vindication" exception expresses a judicial willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies."

> it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. [. . .] But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. [. . .]. (*Id*. at 2310-2311 (internal citations removed).)

Lastly, the Court emphasized that it specifically rejected the argument that class arbitration is necessary to prosecute claims "that might otherwise slip through the legal system" in its *Concepcion* decision. (*Id*. at 2311.)

Sakkab v. Luxottica Retail North America, Inc. (2015) 803 F.3d 425, 427:

The 9th Circuit held that the FAA did not preempt the California rule announced in *Iskanian* (the *Iskanian* rule), above, which bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement. The court held that, following the logic of *Concepcion*, the *Iskanian* rule is a "generally applicable" contract defense that may be preserved by the FAA's saving clause (*see* 9 U.S.C. Sec. 2), provided that it did not conflict with the FAA's purposes. (*Id*. at 431-432.) To that end, the court further held that the *Iskanian* rule did not conflict with the FAA's purposes because it left parties free to adopt the kinds of informal procedures normally available in arbitration and only prohibited them from opting out of the central feature of the PAGA private enforcement scheme, which is the right to act as a private attorney general to recover the full measure of penalties the state could recover. (*Id*. at 439.)

Sanchez v. Valencia Holding (2015) 61 Cal. 4th 899:

The California Supreme Court held that the anti-waiver provision of the Consumer Legal Remedies Act (CLRA) (s*ee* Civ. Code Secs. 1750-1784), is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA. The Court further determined that the plaintiff's "argument that enforcing the CLRA's anti-waiver provision merely puts arbitration agreements on an equal footing with other contracts is unavailing. *Concepcion* held that a state rule can be preempted not only when it facially discriminates against arbitration but also when it disfavors arbitration as applied." According to the court, "*Concepcion* further held that a state rule invalidating class waivers interferes with arbitration's fundamental attributes of speed and efficiency, and thus disfavors arbitration as a practical matter." (*Id*. at 924 (internal citations omitted).)

DirecTV, Inc. v. Imburgia (2015) 136 S. Ct. 463:

The U.S. Supreme Court, reversing a California Court of Appeal decision, upheld an arbitration provision in a DirecTV service agreement that included a class-arbitration waiver, despite the fact that: (1) the agreement specified that the entire arbitration provision was unenforceable if the "law of [the consumer's] state" made class-arbitration waivers unenforceable[5]; and (2) California law (both at the time that the contract was entered into and the time that the case was initiated) made class arbitration waivers unenforceable under certain circumstances pursuant to the 2005 *Discover Bank* rule, which was not abrogated and held preempted until 2011, nearly three years after the initiation of this case, by *AT&T v. Concepcion*.

The Court stressed that the issue at hand in *DirecTV* was not whether the lower court's decision was a correct statement of California law but, rather, whether it was consistent with the FAA. To that end, the Court held that the California Court of Appeal's interpretation is preempted by the FAA and thus the court must enforce the arbitration agreement. (*Id*. at 471.)

[5] The agreement also otherwise declared that the arbitration clause was governed by the FAA.