



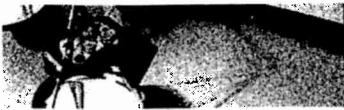
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- 11 *Ibid.*
 12 *Ibid* at *18–19.
 13 *Ibid* at *21–22.
 14 *Ibid* at *21 (alterations in original) (quoting *Housam v Dean Witter Reynolds, Inc*, 537 US 79, 84 (2002)).
 15 *Ibid* at * 21–22.
 16 *Ibid* at *21 (alterations in original) (quoting *Bell v Cendant Corp*, 293 F 3d 563, 566 (2d Cir 2002)).
 17 *Ibid* at *23, 26; see BIT, art VI ¶ 3(a) (ii).
 18 United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, GA Res 31/98, art 21 ¶ 1 (28 April 1976). The rules were amended in 2010; they maintain the tribunal's jurisdiction to determine arbitrability. See UNCITRAL Arbitration Rules (as Revised in 2010), GA Res 65/22, art 23 ¶ 1, UN Doc A/65/465 (6 December 2010) ('The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.')
- 19 2011 US App LEXIS 5351, at *23–24.
 20 *Ibid* at *29.
 21 *Ibid* at *31.
 22 *Ibid* at *38–39.
 23 *Ibid* at *41–42.
 24 *Ghassabian v Hematian*, No 08 Civ 4400 (SAS), 2008 US Dist LEXIS 65557, at *4–7 (SDNY 27 August 2008).
 25 *Oppenheimer & Co, Inc v Deutsche Bank AG*, No 09 Civ 8154 (LAP), 2009 US Dist LEXIS 117369, at *5–7 (SDNY 16 December 2009).
 26 2011 US App LEXIS 5351, at *14 n6; see also *Jock v Sterling Jewelers, Inc*, No 08 Civ 2875 (JSR), 2010 US Dist LEXIS 132759 (SDNY 10 December 2010) (enjoining arbitrations that threatened to moot plaintiffs' appeal of a prior district court decision).
 27 *Societe Generale de Surveillance, SA v Raytheon European Mgmt & Sys Co*, 643 F 2d 863, 867–68 (1st Cir 1981); see also *Republic of Ecuador*, 2010 US Dist LEXIS 25487, at *5.
 28 See, eg, NY CPLR 7503(b), (c) (McKinney 2006).

AT&T Mobility LLC v Concepcion: US Supreme Court upholds the validity of class action arbitration waivers

In April 2011, the US Supreme Court issued an opinion that effectively upheld the validity of class action arbitration waiver provisions in consumer contracts. Specifically, in *AT&T Mobility LLC v Concepcion*,¹ the Court held, in a divided decision, that Section 2 of the Federal Arbitration Act (FAA)² pre-empted a California Supreme Court decision that had found that the waiver in consumer contracts of the right to bring arbitration class actions was unconscionable and unenforceable.

By validating the inclusion of class action arbitration waivers in consumer contracts, the *AT&T Mobility* decision carries significant negative ramifications for the ability of consumers to join together and bring classwide arbitrations against corporate providers of consumer goods and services. Moreover, by pre-empting the states from prohibiting the use of class action arbitration waiver provisions, the decision also signifies a significant doctrinal shift by the Court in favour of parties' freedom to draft arbitration

provisions as they like and away from the ability of state courts to fashion their own arbitration contract jurisprudence. No less interesting, the decision demonstrates that a majority of today's Court has considerable scepticism about the very feasibility and expedience of classwide arbitration procedures.

The FAA and California's *Discover Bank* rule

Congress enacted the FAA in 1925 as a direct response to 'widespread judicial hostility to arbitration agreements'.³ The purpose of the FAA, at its most fundamental level, was to promote the use of arbitration as an alternative method of dispute resolution, and to prevent the courts from interfering with the freedom of parties to choose arbitration in lieu of litigation.

In this regard, Section 2 of the FAA provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity*

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for the revocation of any contract' (emphasis added). This final qualification to the enforcement of arbitration agreements – what is commonly referred to as the 'saving clause' – was intended to put arbitration agreements on equal footing with any other types of agreements. That is, the FAA mandates that the US courts must enforce arbitration agreements so long as they are not invalidated by generally applicable defences that would render *any* other type of contract unenforceable, such as fraud, duress or unconscionability.

Under Californian law, courts may refuse to enforce a contract as 'unconscionable' if it leads to an 'overly harsh' or 'one-sided' result attributable to unequal bargaining power between the parties at the time the contractual relationship was created.⁴ This is generally consistent with the law of most of other US states.

In the case of *Discover Bank v Superior Court*,⁵ California's highest court applied the unconscionability doctrine to class action waivers in consumer agreements. In pertinent part, the California Supreme Court held as follows:

'[W]hen [a class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when 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 . . . such [class-action] waivers are unconscionable under California law and should not be enforced.'⁶

In short, the California Supreme Court ruled that it is unconscionable for a corporate provider of goods or services to include a class action waiver in certain consumer contracts. The court made clear that this rule 'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements'.⁷

Rejection of California's *Discover Bank* rule as an improper restriction on the parties' freedom to arbitrate

At issue in *AT&T Mobility* was whether California's '*Discover Bank* rule' expanded the contract defence of 'unconscionability', as it applied to arbitration agreements, to such a degree that it was pre-empted by the FAA. In

other words, the Supreme Court was asked to consider whether '[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'⁸

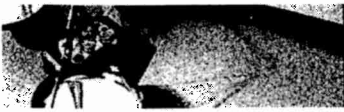
In *AT&T Mobility*, the respondents entered into a contract for the purchase of mobile phone service from the petitioner, AT&T. The contract contained an arbitration provision that required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding'.⁹ When a dispute later arose between the parties, over a \$30.22 charge by AT&T that respondents contended was a breach of the agreement, the respondents filed a complaint in California federal court that was later consolidated with a putative class action.

Upon being sued in the courts, AT&T moved to compel arbitration of respondents' claim pursuant to the terms of the contract. Although the District Court found that the arbitration clause provided for a 'quick, easy to use' resolution of potential claims, it nevertheless followed the *Discover Bank* rule and denied AT&T's motion. Specifically, the District Court 'found that the arbitration agreement was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.'¹⁰ On appeal, the Ninth Circuit Court of Appeals affirmed, explaining that the *Discover Bank* rule was 'a refinement of the unconscionability analysis applicable to contracts generally.'¹¹ The appellate court therefore determined that the rule fell within the saving clause of Section 2 of the FAA.

In a five to four split, the US Supreme Court reversed the Ninth Circuit decision. Writing for the majority, Justice Scalia articulated the basis for the Court's decision as follows:

'When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.'¹²

In other words, the Court determined that the *Discover Bank* rule had 'a disproportionate impact on arbitration agreements'.¹³ Justice Scalia likened the *Discover Bank* rule to a rule



that outlawed arbitration agreements that did not provide for judicially monitored discovery. Justice Scalia reasoned that just as American-style discovery is antithetical to the concept of a streamlined arbitration process, so are the burdensome requirements of a class action. Parties may, of course, choose to provide for class action arbitration procedures in their arbitration agreements; but the government, so reasoned Justice Scalia, cannot force this choice on contracting parties.

Not surprisingly, the opinion by Justice Scalia emphasised that agreements need to be enforced in accord with the intent of the parties. The 'principal purpose' of the FAA, Justice Scalia explained, 'is to "ensur[e] that private arbitration agreements are enforced according to their terms".¹⁴ Because the parties in *AT&T Mobility* had agreed to a class action waiver, the majority reasoned that the arbitration agreement should be enforced as it was written.

For its part, the minority was more concerned with preserving the authority of state courts to develop and apply their own rules regarding contract defences such as unconscionability. The *Discover Bank* rule, the minority argued, accomplishes 'just what [Section 2 of the FAA] requires, namely, puts agreements to arbitrate and agreement to litigate "upon the same footing".¹⁵ In this respect, the minority emphasised that the *Discover Bank* rule applies equally to contracts with litigation clauses and contracts with arbitration clauses and, thus, cannot, as Justice Scalia ruled, discriminate against or disproportionately affect arbitration agreements.

A demonstrable scepticism to the feasibility of class arbitration

Arguably, the majority could have based its ruling simply on its finding that the *Discover Bank* rule had a disproportionate effect on arbitration agreements. Rather than stop there, however, the majority took the opportunity to offer a number of rather pointed criticisms about the feasibility of class action arbitration.

Citing its decision in *Stolt-Nielsen SA v AnimalFeeds Int'l Corp.*,¹⁶ which rejected an arbitration panel's attempt to impose class arbitration procedures where the parties had not provided for it in their agreement, the majority identified three principal concerns with class arbitration. First, the majority

observed that 'class arbitration sacrifices the principal advantage of arbitration ... and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'¹⁷ Secondly, the majority opined that 'class arbitration requires procedural formality... [and we] find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.'¹⁸ Thirdly, the majority stated that class arbitration 'greatly increases the risks to defendants'.¹⁹ As Justice Scalia explained, although defendants may be willing to accept the 'risks of arbitration' (eg, no appeal right) when the arbitration is between two parties, 'when damages allegedly owed to tens of thousands of potential claimants are aggregated... the risk of an error will often become unacceptable.'²⁰

In sum, the majority questioned whether class arbitration was capable of providing 'efficient and speedy dispute resolution', which it identified as one of the principal goals of the FAA.²¹ The majority flatly offered its opinion that '[a]rbitration is poorly suited to the higher stakes of class litigation'.²²

The minority opinion, authored by Justice Breyer, disagreed with the majority's various criticisms of class action arbitration and, not surprisingly, viewed class arbitration from a decidedly more consumer-orientated perspective. For instance, whereas the majority was concerned that the alleged 'risk of error' inherent in arbitration would pose an unacceptable danger to corporate defendants in the class action setting, the minority feared that, without the availability of class action arbitration procedures, 'small-dollar claimants' would never pursue their arbitration claims because no 'rational lawyer' would represent them for such a small recovery.²³ The minority also took issue with the majority's view that the alleged inefficiencies inherent in class arbitration would discourage parties from entering into arbitration agreements providing for class arbitration procedures. The minority explained that 'if incentives are at issue, the relevant comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions.'²⁴ Citing an amicus brief submitted by the American Arbitration Association, the minority pointed out that, on average, class arbitration takes less time to resolve than judicial class actions.

Ramifications of *AT&T Mobility* for consumers, both in the US and internationally

Today, legal 'fine print' can be found everywhere – lightly printed on the back of sales receipts, embedded in checkout screens for online purchases, and buried in the paperwork associated with all forms of consumer services. Therefore, the significance of the *AT&T Mobility* decision should not be understated: whether a consumer resides in Los Angeles or London, Miami or Mumbai, Peoria or Paris, he or she should not expect the availability of class arbitration procedures against American companies. In fact, some might view the Supreme Court's rejection of California's *Discover Bank* rule as a de facto endorsement of class arbitration waivers. And with that endorsement, such waivers are almost certain to flourish in fine print everywhere.

Of course, while *AT&T Mobility* pre-empts the states from invalidating consumer arbitration agreements that require the waiver of classwide arbitration procedures, it does not prevent consumers from refusing to sign contracts that contain such waivers. One may reasonably question, however, whether any international company would agree to renegotiate an arbitration provision on behalf of a single customer.

Notes

- 1 2011 US LEXIS 3367 (2011).
- 2 9 USC § 2.
- 3 *AT&T Mobility*, 2011 US LEXIS 3367, at **9 (citing *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576, 581 (2008)).
- 4 *AT&T Mobility*, 2011 US LEXIS 3367, at **11 (citing California cases).
- 5 36 Cal 4th 148 (Cal 2005).
- 6 *Ibid* at 162-63.
- 7 *Ibid* at 165-66.
- 8 *AT&T Mobility*, 2011 US LEXIS 3367, at **18.
- 9 *Ibid* at **5.
- 10 *Ibid* at **8-9.
- 11 *Laster v AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir 2009).
- 12 *AT&T Mobility*, 2011 US LEXIS 3367, at **14.
- 13 *Ibid* at **15.
- 14 *Ibid* at **18.
- 15 *Ibid* at **47 (Breyer J, dissenting).
- 16 130 S Ct 1758 (2010).
- 17 *AT&T Mobility*, 2011 US LEXIS 3367, at **25-26.
- 18 *Ibid* at **28.
- 19 *Ibid* at **28.
- 20 *Ibid* at **29.
- 21 *Ibid* at **21.
- 22 *Ibid* at **29.
- 23 *Ibid* at **55.
- 24 *Ibid* at **51.

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New York courts make it easier to seize assets to satisfy an award

An arbitration award is of little value unless it can be converted into cash. Although the New York Convention and statutes in many countries establish procedures to enforce an award, a stubborn adversary can still make it difficult to satisfy an award. Recent developments create powerful tools to satisfy an award in New York state and federal courts. Before the arbitration is commenced, a party can apply to a New York court to attach

assets if 'the award to which the applicant may be entitled may be rendered ineffectual' without attachment.¹ Once a final award has been issued and confirmed as a judgment, a party can ask the court to seize assets of the debtor held by any party found in New York – including assets the third party holds outside of New York. Because New York is an international financial centre, the New York courts now can reach many assets held around the world to satisfy an award.