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PERSPECTIVE

# New York courts at the Forefront of Arbitration Law

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A wide range of contracts — from securities and employment to consumer products and insurance — include clauses that mandate arbitration as the forum for dispute resolution. While not without a measure of controversy, there is no doubt that arbitration is firmly rooted in today's legal landscape.

The Federal Arbitration Act sets forth the legal framework governing arbitration provisions. The statute was enacted in 1925, in response to "widespread hostility to arbitration agreements." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Through the FAA, Congress sought to put arbitration agreements on par with other contracts by making them "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2.

Over the past three decades, the U.S. Supreme Court — albeit often closely split and sharply divided — has repeatedly enforced arbitration clauses against a range of challenges. The court has observed that arbitration "allow[s] for efficient, streamlined procedures" that "reduc[e] the cost and increas[e] the speed of dispute resolution," and reminded litigants that the FAA embodies "a liberal federal policy favoring arbitration agreements." *Concepcion*, 563 U.S. at 344-46. It has narrowly construed the FAA's saving clause, instructing that it does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 343. And the Supreme Court has broadly construed the FAA's preemptive reach: when a state law "prohibits outright" or "disfavors" arbitration, that "conflicting rule is displaced by the FAA." *Id*. at 341.

But states have not reacted uniformly to the displacement of their laws. Courts in New York and California in particular — two of the nation's most important commercial-law jurisdictions — have at times taken divergent paths in response to the Supreme Court's decisions.

New York state courts have embraced arbitration. That response should come as no surprise — the FAA itself was modeled after a New York statute that required courts to honor agreements to arbitrate. *See* Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803. Twice in the past year alone, the New York Court of Appeals unanimously reiterated its view


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(in line with the U.S. Supreme Court's position) that arbitration clauses are presumptively valid and enforceable. In *Monarch Consulting v. National Union Fire Insurance Co.*, the Court of Appeals held that the FAA superseded a provision of the California Insurance Code that did not specifically bar arbitration, and mandated that "the arbitration provisions be enforced as written." 26 N.Y.3d 659, 676 (2016). In *Cusimano v. Schnurr*, the Court of Appeals held that intrafamily real estate agreements affected interstate commerce, and were therefore covered by the FAA, because "the Supreme Court has made it abundantly clear that the FAA's reach is expansive." 26 N.Y.3d 391, 399-400 (2015). Notably, the court in *Cusimano* underscored the FAA's breadth even though the issue did not appear to be squarely presented, given that the plaintiff had waived the right to arbitrate. *Id*. at 400.

In contrast with New York, California state courts frequently evinced hostility to arbitration agreements, prompting the U.S. Supreme Court to step in and reverse rulings that relied on state law to curtail the enforceability of such agreements. For instance, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Perry v. Thomas*, 482 U.S. 483 (1987), and again in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Supreme Court abrogated California court decisions that had interpreted California statutes as limiting or precluding arbitration. More recently, in *Concepcion*, the court invalidated the California Supreme Court's so-called "*Discover Bank* rule," which barred certain class action waivers in arbitration agreements as unconscionable, on the ground that the state rule "prohibited outright the arbitration of a particular kind of claim." 563 U.S. at 341.

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In response, the California Supreme Court continued to insist that, "[a]fter *Concepcion*, courts may continue to apply the [state law] unconscionability doctrine to arbitration agreements," and cataloged examples of agreements that it would find unconscionable. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1142-45 (2013). It concluded that *Concepcion* "does not limit the unconscionability rules applicable to" non-class-waiver provisions in an arbitration agreement. *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 907 (2015). And the state high court also held that the FAA does not apply to an arbitration clause that waives a claim under the California Private Attorneys General Act, because such a statutory claim was not a private dispute that arose out of the contract. *Iskanian v. CLS Transp. L.A. LLC,* 59 Cal. 4th 348, 382-89 (2014).

Last December, in *DIRECTV Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the Supreme Court again rebuked the California courts for giving insufficient weight to the FAA's preemptive reach. Recall that, back in 2011, *Concepcion* held that the FAA preempted the California Supreme Court's *Discover Bank* rule, which had barred some class-action waivers in arbitration agreements. In *Imburgia*, the California intermediate appellate court held that class action waivers were nonetheless invalid. The court interpreted a contract term barring waivers that were unenforceable under "the law of your state" as meaning "the law of your state without considering the preemptive effect, if any, of the FAA." *Id*. at 472. The court then found the waiver unenforceable under its understanding of "California law" because *Concepcion* had not expressly preempted state statutes that embodied the *Discover Bank* rule. *Id*. at 467. The U.S. Supreme Court pointedly rejected both propositions. The court equated the state waiver-barring statute with the abrogated *Discover Bank* rule. *Id*. It held that "California's interpretation of the phrase 'law of your state'" was wrong; it meant "the law of your state to the extent it is not preempted by the FAA." *Id*. at 470-71. The bottom line: California's anti-arbitration statutes were preempted by the FAA. *Id*.

If the California courts continue on this path, the ultimate outcome will turn in part on the U.S. Supreme Court's willingness to grant certiorari in such cases. (The Court denied a petition for cert in *Iskanian* in January 2015; a recently filed petition challenges the California Court of Appeal over its application of the FAA's transportation worker exemption. *Air Liquide Indus. U.S. LP v. Garrido*, 15-1336 (U.S. May 3, 2016).) Over the past year, there are signs that the California Supreme Court is becoming more amenable to the U.S. Supreme Court's view of arbitration. In Sanchez, the California high court ultimately reversed the intermediate appellate court and held that the arbitration clause at issue was not substantively unconscionable. 61 Cal. 4th at 915-22. And earlier this year, the California Supreme Court held an arbitration agreement was not unconscionable where it did "no more than recite the procedural protections already secured" by statute and protected sensitive information from disclosure. *Baltazar v. Forever 21 Inc.*, 62 Cal. 4th 1237, 1247-50 (2016).

No matter how events unfold, as the cases in New York's and California's high courts demonstrate, the importance of arbitration shows no signs of subsiding.

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