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# The Politics of Arbitration

**By Marc Alexander**

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We are accustomed to a host of hot-button issues that are part of United States Supreme Court jurisprudence: right to life/women's right to choose; freedom to bear arms/gun control; exploitation of natural resources/environmental control; tightened/relaxed immigration laws; limitations on the right to vote/one person-one vote. Those issues are politically charged, and the Justices' opinions, like magnetic filings, are pulled to left and right poles on the Supreme Court. But arbitration? Yes, prosaic as the subject may seem, arbitration too creates a political fault line and contention among the Justices.

The legal/political fault line parallels an economic fault line that divides American

businesses from their consumers and employees.

From a liberal perspective, *The New York Times* recently published a blistering series of "Special Reports" highly critical of arbitration under titles such as *Arbitration Everywhere: Stacking the Deck of Justice, Privatizing Justice,* and *In Religious Arbitration, Scripture Is the Rule of Law.* These articles criticized arbitration for providing inadequate opportunities for employees and consumers to vindicate their rights and for benefitting business interests in outcomes.

From a conservative perspective, the United States Chamber of Commerce, the largest lobbying group in the United States and a powerful advocate of business interests, through its Institute for Legal Reform, responded vehemently to the NYT series in an article colorfully titled *Dog Bites Man: New York Times Prefers Lawyer-Controlled Class Actions over Fair Arbitration that Enables Individuals to Protect Themselves.* The Chamber of Commerce has been a major proponent of arbitration clauses and class action waivers in employment and consumer contracts. (http://www.instituteforlegalreform.com/resource/dog-bites-man-new-york-times-prefers-lawyer-controlled-class-actions-over-fair-arbitration-that-enables-individuals-to-protect-themselves).

The Consumer Financial Protection Bureau, a federal agency charged with protecting consumer interests, has studied and criticized the use of pre-dispute arbitration clauses in consumer contracts, including in consumer finance markets: credit cards, checking accounts, prepaid cards, payday loans, private student loans, and mobile wireless contracts. The CFPB concluded that few arbitrations involve small claims and that the amount of relief obtained by consumers in AAA arbitrations during 2010 and 2011 was under $400,000, compared to decisions in favor of companies requiring consumers to pay $2.8 million during the same period. By contrast, according to the study, "roughly 32 million consumers were eligible for relief through class action settlements in federal court each year." The CFPB claimed companies offering arbitration clauses in their contracts did not offer lower prices because they are not subject to class action lawsuits. Also, three out of four consumers surveyed did not know if they were subject to an arbitration clause.(http://files.consumer finance. gov/f/201503_cfpb_factsheet_arbitration-study.pdf).

Sharply contrasting are the views of the Chamber of Commerce, reflected in its following statement:

> A CFPB ban on pre-dispute arbitration helps only one group: class action plaintiffs' lawyers. Consumers will have fewer avenues and a longer process for resolving their disputes. The CFPB's own study concludes consumers walk away from class actions with about 30 bucks while each trial lawyer walks away with a million. [¶] Consumers should also not be fooled by rhetoric claiming to ban only certain types of consumer arbitration. A ban on "pre-dispute" arbitration is effectively a ban on all consumer arbitration. If a CFPB rule eliminates class action waivers, thus opening the litigation floodgates, then arbitration for most consumers will likely disappear.
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> (https://www.uschamber.com/press-release/us-chamber-statement-cfpb-field-hearing-arbitration).

An economic fault line also exists in employment cases. Indeed, it is received wisdom among plaintiffs' attorneys that employees do better in court than in arbitration, and empirical study appears to support this conclusion. For example, an abstract of An Empirical Study of Employment Arbitration: Case Outcomes and Processes, by Alexander Colvin, Associate Professor of Labor Relations and Conflict Resolution at Cornell, states that in a study of 3,945 cases arbitrated by the AAA:

> (1) the employee win rate amongst the cases was 21.4%, which is lower than employee win rates reported in employment litigation trials;

> (2) in cases won by employees, the median award amount was $36,500 and the mean was $109,858, both of which are substantially lower than award amounts reported in employment litigation.…

Furthermore,

> [t]he results provide strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases, which could be explained by various advantages accruing to larger organizations with greater resources and expertise in dispute resolution procedures.
>
> (http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles).

In contrast, the conservative Heritage Foundation has promoted arbitration of employment disputes, claiming "an employee pursuing a claim against his employer would need a claim worth at least $60,000 for an employment lawyer to be willing to litigate the case" and that 95 percent of employees in discrimination cases lack the resources to access the litigation system, so that "for them, 'it looks like arbitration — or nothing.'" (http://www.heritage.org/research/reports/2013/07/the-unfair-attack-on-arbitration-harming-consumers-by-eliminating-a-proven-dispute-resolution-system).

Recent Supreme Court cases support a trend to enforce arbitration clauses and class action waivers in arbitration, yet, even with this evident trend, there are ongoing left/right rifts, demonstrated by majority and dissenting opinions. A useful source for compiling recent SCOTUS opinions involving arbitration, the Supreme Court Database (http://supremecourtdatabase.org/), contains "over two hundred pieces of information about each case decided by the Court between the 1791 and 2014 terms." The database allows one to search and sort information by items such as identity of the court, topic, parties, legal provisions considered, and votes of the Justices. The database uses a multifactor scheme for coding opinions as "liberal" or "conservative." In the context of issues pertaining to economic activity, relevant factors equated with "liberal" include pro-government, anti-business, anti-employer, pro-competition, pro-injured person and, most significantly here, "pro-trial in arbitration." The reverse of the above is coded as "conservative."

*'During the last decade, several arbitration cases culled from the database demonstrate the conservative/liberal split of opinion, though the database and its conservative/liberal voting trend distinctions are fallible.'*

In chronological order, the database lists cases involving arbitration during the last ten years as follows: (1) *Buckeye Check Cashing, Inc. v. John Cardegna* (2006) 546 U.S. 440; (2) *Hall Street Assocs., L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576; (3) *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662; (4) *AT&T Mobility LLC v. Vincent Concepcion* (2011) 563 U.S. 333; (5) *KPMG LLP v. Robert Cocchi* (2011) 132 S.Ct. 23; (6) *Compucredit Corp. v. Wanda Greenwood* (2012) 132 S.Ct. 665; (7) *Marmet Health Care Center, Inc. v. Clayton Brown* (2012) 132 S.Ct. 1201; (8) *Oxford Health Plans LLC v. John Ivan Sutter* (2013) 133 S.Ct. 2064; (9) *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304; and (10) *BG Group PLC v. Republic of Argentina* (2014) 134 S.Ct. 1198. *DIRECTV v. Imburgia* (2015) 136 U.S. 463, the most recent SCOTUS arbitration decision, is not yet part of the database.

During the last decade, several arbitration cases culled from the database demonstrate the conservative/liberal split of opinion, though the database and its conservative/liberal voting trend distinctions are fallible. For example, the database classifies the decision in *Stolt-Nielsen* as "liberal" though the direction is conservative. Clearly the case involved a liberal/conservative split, but the trend was in the opposite direction, toward a conservative majority. In *Stolt-Nielsen*, the conservative majority consisted of Justices Scalia, Kennedy, Thomas, Roberts, and Alito, and the dissent consisted of Justices Stevens, Ginsburg, and Breyer. The majority held that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Perhaps the database coded this as not enforcing arbitration and therefore as tending towards a "liberal" direction. However, the liberal dissenters focused on the denial of *class* arbitration, and its potential consequences for the vindication of rights. "When adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights." (*Stolt-Nielsen, supra*, 559 U.S. at p. 699.)

*'Since it was decided in 2011, the influential* Concepcion *case has been cited over 500 times in other cases — a sobering fact considering that it was a 5–4 decision, its author is no longer with us, and today the liberal and conservative wings of the Court are routinely described as "4–4."'*

Availability of a pragmatic remedy for class members with small claims, the concern of the liberal Justices in *Stolt-Nielsen*, has been a repeated concern of the liberal Justices in arbitration cases.

In *Concepcion*, the voting coalitions were 5 to 4, with Justice Scalia penning the opinion for the conservative majority. Justices Kennedy, Roberts, Alito, and Thomas voted with Justice Scalia. Justices Ginsburg, Sotomayor, and Kagan joined in Justice Breyer's dissent — a picture-perfect conservative/liberal split. The Court held that the FAA preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. The holding abrogated California's *Discover Bank* rule, which had been based on a rationale that small consumer cases cannot be effectively addressed without class actions. Indeed, the majority viewed class arbitration as interfering with "fundamental aspects of arbitration" — its bilateral nature, informality, speed, and lower cost. Expressing concern for the protection of consumers, Justice Breyer wrote in dissent,

> In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT&T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that " 'the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.'"… What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? (*AT&T Mobility, supra*, 563 U.S. at p. 365 [dis. opn. of Breyer, J.].)

Since it was decided in 2011, the influential *Concepcion* case has been cited over 500 times in other cases — a sobering fact considering that it was a 5–4 decision, its author is no longer with us, and today the liberal and conservative wings of the Court are routinely described as "4–4."

In *CompuCredit v. Wanda Greenwood*, a consumer arbitration case, the Court held, in a majority opinion authored by Justice Scalia, that Credit Repair Organization Act provisions requiring credit repair organizations to disclose to consumers their right to sue for violations of CROA and prohibiting waiver of any right under CROA did not preclude enforcement of an arbitration agreement. The concurring Justices, Sotomayor and Kagan, believed the case was a close one because language in CROA requiring a disclosure to consumers of their "right to sue" might be construed to mean that Congress believed there was "a right to sue" in court. However, finding the statutory construction arguments to be "in equipoise," the concurring Justices acknowledged that the party objecting to arbitration had not carried its burden.

Dissenting, Justice Ginsburg observed that a congressionally mandated disclosure statement referred to a "right to sue." "Congress enacted the CROA," she wrote, "with vulnerable consumers in mind — consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration." (*CompuCredit, supra*, 132 S.Ct. at p. 676.) While a reading of "right to sue" could be read by the conservative majority to simply connote vindication of one's rights rather than a lawsuit, Justice Ginsburg suggested such a reading was only comprehensible to one "trained to 'think like a lawyer.' "

*American Express v. Italian Colors Restaurant* resulted in another clear conservative/liberal split with Justices Scalia, Kennedy, Roberts, and Alito voting with the majority; Justice Thomas concurring; Justices Ginsburg, Breyer, and Kagan dissenting; and Justice Sotomayor not participating. Again writing for the majority, Justice Scalia considered "whether a contractual waiver of class

arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." (133 S.Ct. at p. 2307.) The majority opinion held that the contractual waiver of class arbitration is enforceable, even though plaintiff's cost of individually arbitrating the statutory claim exceeds the potential recovery.

Italian Colors Restaurant and other merchants accepting Amex cards had brought an antitrust lawsuit, alleging Amex exercised monopoly power to charge rates 30% higher than competing credit cards. The liberal dissenters argued that arbitration should not be enforced when, as here, it resulted in the merchants' inability to vindicate federal statutory rights. This is a liberal perspective: for every right, there should be a remedy. Justice Kagan wrote in dissent:

> So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability — even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.
>
> And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad. (*Am. Express, supra*, 133 S.Ct. at 2313 [dis. opn. of Kagan, J.].)

In *DIRECTV v. Imburgia*, consumers entered into binding arbitration agreements with class action waivers with their direct broadcast satellite service provider. The service agreements, providing that the entire arbitration provision was unenforceable if the "law of your state" made class arbitration waivers unenforceable, were drafted at a time when the *Discover Bank* holding, which was subsequently invalidated by *Concepcion*, made class arbitration waivers unenforceable.

Justice Breyer delivered the Court's opinion, joined by Justices Roberts, Scalia, Kennedy, Alito, and Kagan. The underlying question of contract law framed by Justice Breyer was "whether the 'law of your state' included *invalid* California law." (*DIRECTV, supra*, 136 S.Ct. at p. 463.) The majority held that "law of your state" did not mean invalid law that had been preempted by the FAA and *Concepcion*. Justice Thomas dissented, restating his outlier position that the FAA does not apply to proceedings in state courts, and Justice Ginsburg authored a dissent joined by Justice Sotomayor.

*'Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum together.'*

*DIRECTV* may be limited by its determination that a contractual reference to "law of the state" must mean California law that is valid under *Concepcion* and federal preemption principles. Even so, the Ginsburg/Sotomayor dissent displays ongoing concern among liberal Justices that SCOTUS jurisprudence relating to arbitration is not doing enough to protect consumers. "It has become routine, in a large part due to this Court's decisions, for powerful economic

enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.... This Court reads that provision in a manner most protective of the drafting enterprise. I would read it, as the California court did, to give the customer, not the drafter, the benefit of the doubt." (*DIRECTV, supra*, 136 S.Ct. at p. 471 [dis. opn. of Ginsburg, J.].)

In majority and dissenting opinions, *Morris v. Ernst & Young*, No. 13-16599 (9th Cir. 8/22/16) (*Morris*) frames the split of opinion about the enforceability of clauses in employment contracts requiring the resolution of disputes by individual arbitration. The majority opinion, authored by Chief Judge Thomas, holds an employer violates sections 7 and 8 of the NLRA by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms of conditions of employment. Judge Thomas identifies "a core right to concerted activity" established by the NLRA. "Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum together. The structure of the Ernst & Young contract prevents that."

The majority opinion explains that the holding does not uniquely burden arbitration: "The contract here would face the same NLRA troubles if Ernst & Young required its employees to use only courts, or only rolls of the dice or tarot cards, to resolve workplace disputes – so long as the exclusive forum provision is coupled with a restriction on concerted activity in that forum. At its heart, this is a labor case, not an arbitration case."

Judge Ikuta vigorously dissents, arguing that the FAA preempts the federal court from not enforcing the arbitration agreement, and that the panel's holding is counter to recent Supreme Court case law, as well as case law of the Second, Fifth, and Eighth Circuits, concluding that "the NLRA does not invalidate collective action waivers in arbitration agreements."

*Morris* also illustrates the politics of arbitration. Judge Ikuta, who clerked for Judge Kozinski and Justice O'Connor, was nominated for the Ninth Circuit by President George W. Bush. Judge Thomas was nominated by President Bill Clinton for a seat on the Ninth Circuit. Judge Hurwitz was nominated by President Barack Obama. *Morris* could serve as a springboard for sending divergent opinions about the enforceability of arbitration provisions used to prevent "concerted activity" by employees to the Supreme Court for review.

During the last decade, three of the most significant majority opinions enforcing arbitration clauses and underscoring the unavailability of class arbitration have been authored by Justice Scalia: *Stolt-Nielsen*, *Concepcion*, and *Italian Colors Restaurants*. In those three cases there were three or four dissenters among the liberal Justices. With the death of Justice Scalia and delay in the appointment process, liberal and conservative voting coalitions are more likely to break 4–4 in close cases testing political and economic biases of the Justices. Addressing enforceability of arbitration agreements, consumers' and employees' opportunities to vindicate their rights, and recourse to class arbitration and litigation may continue to test those biases. Appointment of a ninth Justice to the Court remains undecided as of the writing of this article. When it is decided, the politics of the appointment process and the next Justice will inevitably impact the polarized politics of arbitration and the outcome of arbitration cases affecting the rights of business owners, consumers, and employees.

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