THE 2022 TERM WAS A MIXED BAG FOR ARBITRATION

by BLAINE H. EVANSON

In 2011, the Supreme Court decided *AT&T v. Concepcion*, reversing a California rule that had required invalidation of arbitration agreements that contained class action waivers. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Concepcion* was a watershed, articulating a strong version of preemption under the Federal Arbitration Act (FAA) that precludes many state-law barriers to bilateral arbitration.

Since *Concepcion*, the Court has issued a steady stream of arbitration decisions. But as the cases this Term illustrate, the decisions have not been one-sided. The Court ruled against federal court jurisdiction to confirm an arbitration award, sided with the plaintiffs on the issue of waiver and the scope of the Section 1 exemption, and overturned California's rule that prevented arbitration of individual claims under the Private Attorney General Act (PAGA).

In *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the Court ruled that federal jurisdiction to confirm or vacate an arbitral award must exist independent of the underlying controversy. Courts cannot "look through" to the underlying dispute to establish federal subject-matter jurisdiction in arbitration confirmation proceedings.

Under Section 4 of the FAA, a federal court has jurisdiction to compel arbitration if, "save for such agreement, [it] would have jurisdiction . . . [over the] subject matter of a suit arising out of the controversy between the parties." The Supreme Court had previously held that this provision requires federal courts to "look through" the arbitration petition to the underlying dispute, and if that dispute arose from a federal question sufficient for subject matter jurisdiction, then the federal court had jurisdiction to compel arbitration.

But *Badgerow* involved a motion to confirm an award following an already completed arbitration (which is governed by Section 10 of the FAA). And the question for the Court was whether the same "look through" standard should apply.

The Court, in an 8-1 opinion by Justice Kagan, ruled that federal jurisdiction to confirm or vacate an arbitration award must exist independent of the underlying controversy. The operative language in Section 4 (allowing courts to look through the arbitration to the underlying claims) is missing from Sections 9 and 10. Accordingly, although a federal court may have jurisdiction *before* arbitration to hear a party's motion to compel arbitration of a federal claim, that same court may not have federal question jurisdiction to enforce the resulting arbitration award. "Congress has made its call. We will not impose uniformity on the statute's non-uniform jurisdictional rules."

The Court also grounded its decision in the overarching pro-arbitration purpose of the FAA. "[T]he 'preeminent' purpose of the FAA was to overcome some judges' reluctance to enforce arbitration agreements when a party tried to sue in court instead." But, Justice Kagan explained, there was never "a similar congressional worry about judges' willingness to enforce arbitration awards already made."

Another case, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), involved the standard for determining whether a party has waived the right to enforce an arbitration agreement. The plaintiff brought a nationwide collective action against her employer to recover unpaid wages. The parties had signed an arbitration agreement, but Sundance litigated the case for nearly eight months— moving to dismiss, answering the complaint, asserting affirmative defenses, and participating in mediation—before moving to compel arbitration under the agreement.

The Eighth Circuit held that the plaintiff was required to prove not only that the employer knew of its right to arbitrate and acted inconsistently with that right, but also that the delay *prejudiced* the plaintiff. And because the plaintiff was unable to establish prejudice, the Eighth Circuit rejected the waiver argument and ordered arbitration.

The Supreme Court reversed because "prejudice" is not a generally applicable requirement in federal waiver law. And nothing in the FAA required or allowed such an arbitration-specific rule. Justice Kagan's opinion for the unanimous Court explained that "[t]he [FAA's] policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" Courts therefore must "not devise novel rules to favor arbitration over litigation." "[T]he FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."

In *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), the Court considered the scope of the FAA's Section 1 exemption for workers "engaged in foreign or interstate commerce."[1] The plaintiff worked as a ramp supervisor for Southwest Airlines, a position that frequently required her to physically load cargo onto airline flights. And although she had agreed to bilateral arbitration of wage disputes, she brought a class action against Southwest for wage and hour violations.

The plaintiff argued that the FAA did not require enforcement of the arbitration agreement because her job duties brought her within the Section 1 exemption. That exemption applies to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Supreme Court previously held that Section 1's residual clause covering workers engaged in foreign or interstate commerce applies only to "transportation workers."

The Court ruled 8-0 (with Justice Barrett recused) that a ramp agent supervisor who frequently moves baggage and other cargo on and off airplanes is a transportation worker exempt under Section 1 of the FAA.

Justice Thomas's opinion for the Court rejected the plaintiff's argument that Section 1 exempts her claim simply because she works in the transportation industry. "The word 'workers' directs the interpreter's attention to 'the *performance* of work.'" "Saxon is therefore a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally."

But the Court explained that "any class of workers directly involved in transporting goods across state or international borders falls within Section 1's exemption." "We think it . . . plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods." The Court, however, expressly declined to decide how the FAA's transportation-worker exemption applies to other industries and classes of workers whose duties are "further removed from the channels of interstate commerce or the actual crossing of borders."

Finally, the Court in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), held that individual claims arising under California's Labor Code Private Attorneys General Act (PAGA) can be compelled to arbitration.[2]

PAGA permits an employee to sue her employer for Labor Code violations on behalf of the State of California and to share in the recovery. The plaintiff was an employee of Viking River Cruises, and agreed to arbitrate all disputes and waived her ability to bring PAGA (or other representative) claims.

The plaintiff nonetheless brought a PAGA claim in California state court, alleging Labor Code violations affecting her and other employees, and seeking aggregated penalties for all of the alleged violations. And under the California Supreme Court's decision in *Iskanian v. CLS Transport Los Angeles, LLC*, 59 Cal. 4th 348 (2014), the PAGA waiver was unenforceable because a PAGA claim cannot be divided into "individual" and "representative" claims brought in separate proceedings. The California courts thus rejected Viking River's petition to compel arbitration.

The Supreme Court reversed, in an opinion by Justice Alito joined (at least in part) by seven other justices. Only Justice Thomas dissented, on the unique ground that the FAA does not apply to state court proceedings.

As to the individual PAGA claims, seven justices joined the portion of Justice Alito's opinion holding that California cannot preclude the division of PAGA actions into individual and non-individual claims. "[T]he FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case."

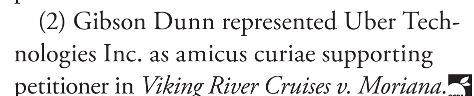
The Court also dismissed the non-individual claims. The majority held that "[u]nder PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." And "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." Accordingly, in addition to compelling the individual claims to arbitration, the Court dismissed the non-individual claims for lack of statutory standing. (The Chief Justice, as well as Justices Kavanaugh and Barrett, noted in a concurrence that they did not think it necessary to reach this question.)

In a Term full of conflict and controversy, the Supreme Court was able to achieve a good deal of consensus in a series of important and difficult arbitration cases. In these decisions, the Court adhered to the pro-arbitration policy enshrined in the FAA and articulated in *Concepcion*, while rejecting arbitration-specific rules that are not generally applicable in other contexts—whether they promote or inhibit arbitration.

ENDNOTES

(1) Gibson Dunn represented Uber Technologies Inc. as amicus curiae supporting petitioner in *Southwest v. Saxon*.

(2) Gibson Dunn represented Uber Technologies Inc. as amicus curiae supporting petitioner in *Viking River Cruises v. Moriana*.



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