

THE ENFORCEABILITY OF ARBITRATION CLAUSES IN MASSACHUSETTS

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I. INTRODUCTION

Parties subject to arbitration agreements have contested the interpretation and reach of the Federal Arbitration Act (“FAA” or “Act”) since it was enacted in 1925. (9 U.S.C. §§ 1 et seq.). While there is general consistency among federal and Massachusetts decisions in recognizing the FAA’s goal to promote the enforceability of arbitration agreements, recent United States Supreme Court decisions have called into question Massachusetts’ application of the FAA. The Supreme Court has held that the FAA preempts state substantive law when it is contrary to the FAA’s purpose and that state procedural law will also be preempted when the state procedures serve to defeat the substantive right to arbitration under the FAA. However, despite Massachusetts’ tendency to favor broad enforcement of the FAA, the Supreme Judicial Court has recently raised skepticism of pre-dispute arbitration agreements in certain employment and consumer contracts in light of the Supreme Court’s expansive rulings.

II. OVERVIEW

Massachusetts was the first colony to adopt laws supporting arbitration as a means of dispute resolution as early as 1632. However, it was not until 1925 that Congress enacted the FAA to combat the judiciary’s refusal to enforce agreements to arbitrate disputes. To promote arbitration as a means of alternative dispute resolution, Congress included Section 2 of the FAA, which “declared a policy favoring arbitration

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and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v Keating*, 465 U.S. 1, 10 (1984).

In addition to creating a public policy favoring arbitration, the FAA provides a number of different procedural and substantive requirements in arbitration. The Act addresses the requisite steps to enforce an agreement to arbitrate. These steps include filing actions to stay and to compel arbitration, the procedures for appointment of arbitrators, and the power of arbitrators to issue summons to compel witnesses and the production of documents. The Act further addresses the issuance of arbitrator awards, including enforcement, vacating and appealing awards. 9 U.S.C.A. §§ 1 to 16.

The grounds for vacating an award are quite limited. It has been consistently held that the FAA permits courts to vacate arbitration awards only under exceedingly narrow circumstances. The FAA provides that an arbitration award may be vacated in the following instances:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The Act states that arbitration awards violating public policy will be set aside by the courts. Notably, the most frequently cited reason for

vacating an arbitration award is an arbitrator's abuse of powers by exceeding the scope of an arbitration agreement. *See* Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, 747-48 (1996).

III. UNITED STATES SUPREME COURT DECISIONS

For nearly sixty years after the FAA was enacted, the Supreme Court left the enforceability of arbitration agreements largely undisturbed. Early cases rendered arbitration agreements enforceable, but preserved certain areas in which courts could reserve some discretion in the enforcement of arbitration clauses. However, beginning in the 1980's the Supreme Court began a shift towards an expansive interpretation of the FAA and stricter enforceability of arbitration agreements. Over the past four decades, the United States Supreme Court has expanded both federal substantive arbitration law and its applicability to state courts. Much of this expansion has been accomplished through a broad interpretation of when a contractual dispute may go to an arbitrator before it goes to a court.

In *Southland Corp. v. Keating*, the question presented was whether the FAA preempted the California Franchise Investment Law, which prohibited arbitration of disputes arising therefrom. 465 U.S. 1 (1984). The Supreme Court determined that the FAA created substantive, not procedural, law that applied in both federal and state courts. *Id.* Only a year later, the Supreme Court again expanded the reach of the FAA in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, holding that arbitration agreements are valid even with respect to claims arising under private anti-trust claims. 473 U.S. 614 (1985). The majority concluded that an arbitration clause does not require specific mention of a statute in order to compel the arbitration of claims arising under the statute. *Id.*

Furthermore, the Court stated that when in doubt as to the compatibility of federal law and the FAA, courts should construe statutes in favor of arbitration. *Id.* at 625.

Other impactful Supreme Court decisions depict how to procedurally challenge an arbitration clause. For example, *Buckeye Check Cashing v. Cardegna*, settled the dispute over whether a court or an arbitrator should first decide if a contract is void. 546 U.S. 440 (2006). The Court held that the distinction between a void and voidable contract was irrelevant *if* the parties agreed in writing to arbitrate contract related disputes. *Id.* at 446. Then, the arbitration clause is severable from the rest of the contract. If that agreement, considered alone, was fairly entered into, then any challenge to the underlying contract must be sent to the arbitrator to decide. *Id.* at 448-49. Now, in order challenge an arbitration clause in court, a party must specifically challenge the validity of the clause itself, even if claiming the contract as a whole is void and unenforceable. Otherwise, the validity of the contract will be determined in arbitration.

More recently, the Supreme Court dealt with issues concerning enforceability of arbitration clauses in employment contracts and limitations on the availability of class action lawsuits in consumer contracts. The Supreme Court's decisions confirm that pre-dispute arbitration agreements will be rigorously enforced even in regard to class action waivers. In *AT&T Mobility LLC v. Concepcion*, the Court considered whether a clause in a form arbitration agreement waiving a customer's right to bring a class action rendered the arbitration agreement unconscionable and unenforceable under California law. 131 S. Ct. 1740 (2011). The Court held that California case law prohibiting class action waivers in certain consumer contracts was invalid and preempted by the FAA, which requires an individualized evaluation of arbitration clauses to determine enforceability, rather than a blanket ban. *Id.* at 1750-52. The Court stated, “[w]hen state law prohibits outright the arbitration of a particular type of

claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Id.* at 1747. Accordingly, class action waivers in pre-dispute arbitration clauses in consumer contracts are now clearly enforceable. Moreover, in *American Express v. Italian Colors*, the Supreme Court also held that even when there are allegations of anti-trust violations, pre-dispute arbitration agreements prohibiting class actions are valid and enforceable. 131 S. Ct. 1740 (2011).

IV. ARBITRATION AGREEMENTS IN MASSACHUSETTS

The Massachusetts Uniform Arbitration Act, M.G.L. c. 251 (“Massachusetts Act”), is the Commonwealth’s version of the Federal Arbitration Act. The Massachusetts Act adopted the central provision of the FAA, which makes both pre and post dispute agreements to arbitrate “valid, enforceable and irrevocable,” except on the grounds for the revocation of other contracts. M.G.L. c. 251 § 1. Massachusetts has generally supported the Supreme Court’s trend in favor of supporting arbitration. As the Massachusetts Appeals Court noted, “[w]here parties agree to have their disputes resolved through arbitration --generally a procedure providing the advantages of speed, convenience, and low cost and guaranteeing neutrality -- the policy considerations for enforcing the agreement are strong.” *Aetna Casualty & Surety Co. v. Faris*, 27 Mass. App. Ct. 194, 196, rev. denied, 405 Mass. 1201 (1989).

Appropriately, Massachusetts falls in line with Supreme Court rulings on the broad enforceability of arbitration clauses and the limited events which permit vacating arbitration awards. However, there are notable distinctions between the SJC and the Supreme Court’s positions when addressing strong public policy concerns, especially with respect to employment and consumer contracts. As previously mentioned, under *Buckeye* and *Conception*, Massachusetts is only permitted to find a written arbitration agreement unenforceable after severing it

from the contract and making an individualized determination under state contract law. These cases also stand for the proposition that the FAA preempts contradictory state law and that states cannot pass laws inconsistent with the FAA mandate to broadly enforce agreements to arbitrate, even if such laws are “desirable for unrelated reasons.” *AT&T Mobility LLC*, 131 S. Ct. at 1753.

While most states permit broad arbitration provisions in employment contracts, including requiring that *all* employment disputes be resolved by arbitration, Massachusetts has joined the minority of states that require an employee to arbitrate statutory employment discrimination claims *only if* the employee has specifically agreed to do so in the employment contract. *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390 (2009). In *Warfield*, the SJC held that statutory employment discrimination claims are subject to arbitration only if the arbitration agreement states that they are, “in clear and unmistakable terms.” 454 Mass. at 398. The SJC contends that their decision in *Warfield* is not preempted by the FAA because “[o]ur State law principles of contract interpretation make clear that considerations of public policy plan an important role in the interpretation of contracts....” *Id.* at 397-98, 400 n. 16.

With respect to consumer concerns, in 1982, the SJC declared that the Massachusetts Consumer Protection Act, Chapter 93A, prohibited compelling a consumer plaintiff to arbitrate a Chapter 93A claim. *Hannon v. Original Gunitite Aquatech Pools, Inc.*, 385 Mass. 813 (1982). Later, in *McInnes v. LPL Financial LLC*, 466 Mass. 256, 265 (2013), *citing Granite Rock Co v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010), the SJC confirmed that a “court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.” *McInnes v. LPL Financial LLC*, 466 Mass. 256, 265 (2013), *citing Granite Rock Co v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). However, in light of the *Conception* and *Italian Colors* Supreme Court decisions, the SJC was compelled to hold that

even consumer protection claims must be referred to arbitration where the contract involves interstate commerce and the agreement to arbitrate is enforceable under the Federal Arbitration Act. *McInnes v. LPL Financial LLC*, 466 Mass. at 257.

The SJC at this time was also forced to reexamine and consider new reasoning in some of their prior decisions concerning Massachusetts' prohibition of class action suits in consumer contracts. In *Feeney v. Dell*, the Massachusetts Supreme Judicial Court considered the ability of individual plaintiffs with small-value claims to aggregate them against a retailer when all potential claimants had accepted an arbitration agreement with a class-waiver provision. The *Feeney* case involves a putative class action brought against Dell under Chapter 93A for charging customers Massachusetts sales tax on service contracts when no such tax was due. Originally, the SJC held that the arbitration agreement was unenforceable because it "contravenes Massachusetts public policy." 454 Mass. 192, 199 (2009). However, the SJC recognized that their earlier decision in *Feeney* was invalidated by the United States Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion* and issued a subsequent ruling (*Feeney II*).

The SJC issued *Feeney II*, recognizing that "*Concepcion* precludes the invalidation of class waiver provisions in arbitration clauses in consumer contracts, such as the one at issue here, where the reason for invalidation is that such waivers are contrary to the fundamental public policy of the Commonwealth." *Feeney v. Dell Inc.*, 465 Mass. 470, 473 (2013). In *Feeney II*, the SJC held that a court could still invalidate a class waiver in an arbitration agreement where it "determines, following an individualized factual inquiry, that class proceedings are the only viable way for a consumer plaintiff to bring a claim against a defendant, as may be the case where the claims are complex, the damages are demonstrably small and the arbitration agreement does not feature the safeguards found in the *Concepcion* agreement." *Id.* at 502.

However, this second decision was issued only days before the Supreme Court's ruling in *Italian Colors*, which invalidated prohibiting class action waivers in arbitration agreements where the plaintiffs would incur prohibitive costs to pursue their antitrust claims individually. Accordingly, the SJC was forced yet again to revise their decision and recognized that FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The SJC concluded that its analysis "no longer comports with the Supreme Court's interpretation of the FAA." See *Feeney, et al v. Dell, Inc., et al*, Lawyers Weekly No. 10-142-13 (August 1, 2013). While Massachusetts courts may still find ways to invalidate arbitration clauses on an individual basis, practitioners should be aware of the Supreme Court's preference favoring dispute resolution in arbitration.

V. CONCLUSION

While Massachusetts has endorsed the validity and enforceability of pre-dispute arbitration agreements, they continue to be skeptical when strong public policy interests are adversely affected. Notably, there is pending legislation that would support Massachusetts' resistance to bind consumers and employees to arbitration. The Arbitration Fairness Act was introduced in response to the series of Supreme Court decisions that have extended the FAA to encompass consumer and employment disputes creating serious public policy concerns. The proposed Arbitration Fairness Act would make any pre-dispute arbitration clause in employment, consumer or civil right disputes invalid and unenforceable. The enactment of the Arbitration Fairness Act should not be expected anytime soon. However, if the Arbitration Fairness Act does eventually pass, Massachusetts should expect more flexibility in the courts' ability to address public policy concerns.