Emory International Law Review

Volume 38 | Issue 4

2024

Class Action Waivers in Arbitration Agreements: The Twenty-First Century Arbitration Battleground and Implications for the E.U. Countries

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CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS: THE TWENTY-FIRST CENTURY ARBITRATION BATTLEGROUND AND IMPLICATIONS FOR THE E.U. COUNTRIES

Linda S. Mullenix[*]

ABSTRACT

Without doubt the U.S. Supreme Court in the twenty-first century has been obsessed with the problem of corporate attorneys' inclusion of class action waivers in arbitration agreements. This article traces the emergence of the class action waiver issue, which developed in tandem with the plaintiffs' embrace and proliferation of class action litigation at the end of the twentieth century. The discussion comments on plaintiffs' initial attempts to request and secure class arbitration where the arbitration clauses were silent, culminating in Supreme Court's opinion permitting arbitrators to determine this issue. With the Court opening the door to possible classwide arbitration, corporate lawyers regrouped to rethink the wording of their mandatory arbitration agreements, to specifically prohibit classwide arbitration. These corporate efforts and the successive redrafting of arbitration agreements prompted a series of class action waiver appeals to the Supreme Court, with the Court construing ever changing class action waiver formulations. Since 2010, the Court has decided eight class action appeals dealing with issues relating to class action waivers in arbitration agreements. The article analyzes the Court's series of decisions relating to class action waiver provisions, focusing on the Court's consistent repudiation of classwide arbitration as antithetical to the original concept of bilateral arbitration. The article observes that despite the Court's clear rejection of almost all class action waiver provisions, plaintiffs' attorneys regroup and repeatedly seek classwide arbitration by state legislative initiatives and construing arbitration agreements within the contours of the Court's evolving class waiver jurisprudence. The article concludes with observations about class arbitration in other countries, and the implications of class action

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waivers for European Union countries that have recently implemented class action and collective redress procedures.

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INTRODUCTION

If there is a fixed and constant star in the Supreme Court's (Court) arbitration firmament, it is the Court's repeated repudiation of attempt by plaintiffs' attorneys to seek courts to validate the ability of arbitral tribunals to conduct arbitration on a classwide basis. For twenty years, beginning in 2003, the Court consistently declined plaintiffs' appeals to allow arbitration clauses to be construed to permit classwide arbitration. Even more remarkable, plaintiffs' attorneys have kept trying to convince courts to permit classwide arbitration. Despite the Court's repeated rejections, plaintiffs' attorneys keep regrouping to strategically recast approaches to classwide arbitration. In nearly every effort, the Court has doubled down on disallowing classwide arbitration.

Prior to 2003, courts did not encounter issues relating to classwide arbitration. When defendants invoked arbitration clauses as a defense to a civil action, the court's job was to determine whether a valid and enforceable contractual arbitration provision mandated dismissal of the action and recourse to arbitration. The conventional arbitration model that the defendant invoked consisted of bilateral arbitration: the contracting parties having agreed to have any disputes under the contract be resolved by an arbitrator mutually agreed upon by the parties. Until 2003, no plaintiffs seeking to avoid arbitration ever suggested to a court that if arbitration was mandated, then the plaintiffs' desire was that the arbitration be conducted on a classwide basis. Certainly, no defendant, in seeking arbitration, ever asked a court that it be conducted on a classwide basis.

In 2003, in a case appealed to the Supreme Court, plaintiffs involved in a civil lawsuit did precisely that: they asked the court to order a classwide arbitration where the relevant arbitration provision was silent concerning whether an arbitration could be conducted on a classwide basis.[1] As a question of first impression, the Court in *Green Tree Financial v. Bazzle*[2] punted this decision back to the arbitrator. The Court left it to the arbitrator to decide whether to conduct the arbitration on a classwide basis.[3] But in a stunning example of perhaps unintended consequences, the Court's decision opened a floodgate of litigation over class action arbitration.

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1 *See* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
2 *See id.*
3 *Id.* at 454.

Corporate counsel, the drafters of arbitration clauses, soon learned the lesson of *Bazzle*: to avoid an arbitrator determining to permit classwide arbitration in the face of a silent arbitration clause, the arbitration provision had to be vocal and specific about disallowing classwide arbitration. The word went out to corporate counsel, with a drafting suggestion to henceforth include language constituting a "class action waiver." A class action waiver says what it intends: the arbitration clause is not to be construed to enable classwide arbitration. By signing and agreeing to an arbitration clause, the prospective plaintiff has waived his or her right to pursue arbitration on behalf of a class.

As soon as class action waivers appeared in arbitration clauses, plaintiffs' attorneys began two decades of challenging such provisions. Creative attorneys turned to state legislative enactments to accomplish an end-run around the implications of *Bazzle* and its progeny. The advent of class action waiver provisions inspired a cascade of challenges in a variety of contexts. With each successive change and challenge, the Supreme Court adamantly communicated its continuing refusal to invalidate class action waiver provisions. The Court announced, over and over: thou shall have arbitration; it shall be bilateral arbitration, and it shall not be class arbitration.

Part I of this article documents the history of the development of arbitration class action waivers and judicial analysis of these attempts by the plaintiffs' bar to permit classwide arbitration. Its centerpiece is a discussion of the Court's most recent class action arbitration decision, *Viking Cruises, Inc. v. Moriana*,[4] which provides a comprehensive roadmap of the Court's class action waiver jurisprudence. This section chronicles the successive narrative history of the Supreme Court's class action waiver decisions, arising in ever-changing contexts. This narrative history documents the jurisprudential consistency of the Court's decisions relating to class action waivers.

Part II discusses the competing rationales for allowing or disallowing classwide arbitration based on the interests of plaintiffs, defendants, courts, and arbitral tribunals. This discussion focuses on the Supreme Court's analysis of the marked procedural differences between bilateral arbitration and collective class action litigation, as the basis for rejecting classwide arbitration. In addition, the Court repeatedly has educated litigators that the notion of classwide arbitration contravenes the mandate of the Federal Arbitration Act. This discussion concludes that the Court consistently has held that the prospect of

[4] *See* Viking River Cruises, Inc. v. Moriana, 596 U.S. 639 (2022).

classwide arbitration undermines and defeats the historic benefits of arbitration as opposed to litigation.

Part III discusses the use of class actions in arbitrations domestically in other countries, as well as in international arbitration. In contrast to the United States, other countries have been receptive to classwide arbitration, and the American doctrine of class action waivers seems not to have gained traction abroad. This section concludes with observations about the possible implications of the American class action waiver doctrine for European Union countries that have, within recent times, enacted class action rules or other collective redress mechanisms.

In conclusion, the chapter ends by noting that American class action waivers are here to stay, and these are virtually impossible for plaintiffs' counsel to overcome when they are incorporated into an arbitration agreement. However, given the fact that the Court has reviewed multiple arbitration class action waiver appeals in the twenty-first century, it seems likely that there remains some unanswered context in which plaintiffs attempt to avoid application of a class action waiver. Furthermore, the relatively underdeveloped concept of classwide arbitration in other countries presents an arbitration landscape to watch, as these countries develop their domestic class action and collective redress jurisprudence. It remains to be seen whether the doctrine of class action waivers gain traction outside the United States.

I. THE EVOLUTION OF THE CLASS ACTION WAIVER ISSUE: A NARRATIVE HISTORY

During the 2022 Supreme Court Term, the Court was confronted with its most recent variation on the theme of class actions waivers in arbitration agreements, in *Viking River Cruises, Inc. v. Moriana*.[5] In this case, an appeal from the California Court of Appeals, the Supreme Court was asked to address whether the Federal Arbitration Act preempted California state's Private Attorneys General Act (PAGA),[6] when a plaintiff in a labor dispute sought to pursue relief for hundreds of individuals and the State of California, pursuant to a bilateral arbitration agreement that the plaintiff signed.

Because the *Viking Cruises* decision represents the Court's most recent pronouncement on the subject of class action waivers, it provides a good basis

[5] *See id.*
[6] CAL. LAB. CODE § 2699(a) (West 2016).

for understanding the jurisprudential context in which the Court was asked about another variation of class action waivers in arbitration agreements. The decision proves an excellent survey of the Court's preceding pronouncements about class action waivers in arbitration agreements.

A. Viking River Cruises v. Moriana: A Case Study Class Action Waiver Litigation

1. The Arbitration Agreement and the California Private Attorney General's Action

The facts in *Vikings Rivers Cruises, Inc*. were simple and straightforward. Viking employed Angie Moriana as a sales representative for its cruises for approximately one year from May 2016 to June 2017.[7] Before she began working for Viking, she signed a bilateral arbitration agreement and agreed to arbitrate any dispute that arose out of or related to her employment.[8] The agreement provided that if a dispute arose, she would use individualized arbitration rather than class, collective, representative, or private attorney general action proceedings—essentially a broad class action waiver.[9] The agreement specified that Moriana could opt out of the collective redress limitation by checking a box.[10] She did not.[11]

After Moriana left Viking's employment, she filed an action in California state court pursuant to California's Private Attorney General's Act of 2004 (PAGA).[12] Her complaint against Viking stated that it was a representative action brought on behalf of all current and former aggrieved employees, seeking recovery of civil penalties for Viking's violation of numerous provisions of the California Labor Code.[13] Moriana's complaint sought relief for herself and other employees, including but not limited to ocean specialists, outbound sales agents, inbound sales agents, travel agent desk, inside sales, direct group sales, reservation sales agents, air department agents, and "any other job title with substantially similar duties and responsibilities."[14]

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[7] *Viking River Cruises*, 596 U.S. at 647–48.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Second Am. Comp., Moriana v. Viking River Cruises, Inc., 2018 WL 11590092, ¶¶ 1–4 (Cal. Super Nov. 28, 2018).
[13] *Id.*
[14] *Id.*

For herself, Moriana claimed a California Labor Code violation alleging Viking failed to timely pay her final wages after her employment ended.[15] On behalf of the other employees represented in the PAGA action, Moriana brought claims alleging that Viking failed to comply with Labor Code provisions for minimum wages, overtime wages, meal periods, rest periods, timing of pay, and pay statements.[16] Her one-count complaint alleged a single PAGA representative claim for civil penalties on behalf of the State of California.[17]

The California legislature enacted PAGA in 2003 to address problems with lax state enforcement of the Labor Code.[18] It essentially empowered aggrieved employees to act as the state's agent or proxy to bring suit as a private attorney general to recover civil penalties on behalf of the state.[19] The government entity on whose behalf the plaintiff filed a PAGA action was the real party in interest.[20] Pursuant to PAGA, an employee might seek civil penalties not only for herself for violation of Labor Code provisions, but for all employees of the same employer.[21] Prior to filing a PAGA lawsuit, an employee was required to first pursue relief through the state Labor Workforce and Development Agency.[22] If the administrative agency declined to pursue the employee's complaint or failed to respond, the aggrieved employee might then file a PAGA lawsuit, which the private plaintiff controlled entirely without any state action.[23]

PAGA provides for civil penalties of $100 for each aggrieved employee for each pay period after the first violation of a Labor Code provision and $200 for any subsequent violation.[24] If the employees prevail, they are also entitled to twenty-five percent of any assessed penalties with the seventy-five percent remitted to the state.[25] A prevailing plaintiff's attorney is entitled to reasonable fees and costs, but in practice plaintiffs' attorneys pursing PAGA litigation typically subtract their fees from the original aggregated award, rather than just the twenty-five percent awarded to the employees.[26] If a plaintiff prevails,

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15 *Id.* ¶¶ 5–6.
16 *Id.*
17 *Id.* ¶ 6.
18 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
19 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
20 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
21 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
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24 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
25 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.
26 *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.

accumulated penalties may be sizeable.[27] The California Supreme Court, in a decision referred to as *Iskanian*, described the PAGA representative action as a type of *qui tam* action.[28]

In response to Moriana's complaint, Viking moved to compel bilateral arbitration under her employment agreement and to stay the court proceedings.[29] The state court denied the motion.[30] The court relied on the *Iskanian* rule—that an arbitration agreement in which an employee agreed to bilateral arbitration and to forgo bringing a PAGA claim amounted to a kind of class action waiver and was unenforceable as a violation of state public policy.[31]

The court further held that a state PAGA claim was outside the FAA and was not impliedly preempted by federal law.[32] Following *Iskanian*, the Ninth Circuit agreed with the California Supreme Court that the FAA does not preempt California law prohibiting waiver of the right to pursue PAGA claims.[33] On appeal, the California Court of Appeals affirmed the trial court's denial of bilateral arbitration, and the California Supreme Court declined to exercise its discretionary review on December 9, 2020.[34]

2. The Viking Cruises Class Action Waiver Problem in Historical Context

Viking's appeal implicated the intersection of the FAA with California's PAGA statute and the considerable body of federal and state case law concerning the enforceability of bilateral arbitration clauses that contain class action or any form of collective redress waiver. By the time of the *Viking Cruises* appeal, the Supreme Court had already considered the issue of class action waivers multiple times in the preceding twenty years in a variety of different contexts. The Court consistently invalidated class action waivers and held that the FAA preempted and overrode state law that would restrict or prohibit collective arbitration or litigation.[35] The Court consistently found in favor of defendants' rights to enforce bilateral arbitration.[36]

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[27] *See Viking River Cruises*, 596 U.S. at 643–44; Cal. Lab. Code Ann. para. 2699 et seq.

[28] Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348 (2014).

[29] Moriana v. Viking River Cruises, Inc. 2019 WL 13401150, 1 (Cal. Super Mar. 7, 2019).

[30] *Id.*

[31] *Id.*

[32] United States Arbitration Act, Pub. L. 68-401, 43 Stat. 883, codified at 9 U.S.C. Ch.1 (1925).

[33] Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425 (9th Cir. 2015).

[34] Moriana v. Viking River Cruises, Inc., 2020 WL 5584508, 1 (Cal. App. 2 Dist., Sept. 18, 2020 (unpublished, reviewed denied Dec. 9, 2020)).

[35] *See, e.g.*, AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).

[36] *See id.*

The Court's various arbitration cases have been decided in the context of broad federal arbitration principles. After many years in which courts disfavored arbitration, the Court at the beginning of the twenty-first century reversed course and held that the FAA embodied a legislative preference for settling disputes through arbitration.[37] In 2010, the Court reaffirmed its view that arbitration agreements are binding contracts that courts should construe and apply according to their terms, typically through bilateral arbitration.[38]

The FAA provides that any contractual provision to settle a dispute "shall be valid, irrevocable, and enforceable, save on such grounds as exist at law or in equity for the revocation of any contract."[39] In construing § 2 of the FAA, the Court has indicated that courts should rigorously enforce arbitration agreements according to their terms, including the agreed arbitration parties and arbitration rules.[40] The Act provides that courts shall stay any litigation pending the resolution of arbitral claims.[41] Furthermore, the Court has held that the FAA preempts state law rules that would interfere with enforcement of bilateral arbitration.[42]

The latter language of § 2 is known as the FAA "savings" clause because it permits courts to invalidate arbitration agreements for common contract defenses such as fraud, duress, or unconscionability.[43] However, the Court, in construing the § 2 savings clause, has indicated that this provision offers plaintiffs no asylum from other purported defenses that disfavor arbitration, such as class action waivers.[44]

Plaintiffs conventionally contend that class action waivers are particularly objectionable in circumstances where bad actor defendants harm large numbers of consumers involving small sums of damages. In such instances, bilateral arbitration unfairly favors defendants, while class action litigation empowers groups of plaintiffs with small individual damages. Therefore, the waiver of class action litigation in arbitration agreements unfairly impacts potential plaintiffs who should be able to pursue class litigation rather than be bound to bilateral litigation.

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37 Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000).
38 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).
39 9 U.S.C. § 2 (1947).
40 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
41 9 U.S.C. § 3 (1947).
42 *Id.*
43 See 9 U.S.C. § 2 (1947).
44 Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1622 (2018).

Prior to the *Viking Cruises* litigation, the California Supreme Court, in its *Discover Bank* decision agreed with this view and ruled that an arbitration clause that contained a class action waiver was unenforceable because it would exculpate the defendant from liability for wrongdoing involving small sums of damages.[45] Under the *Discover Bank* rule, a class action waiver contained in an arbitration agreement would be unenforceable when the agreement was a consumer contract of adhesion, the dispute involved predictably small amounts of damages, and where the plaintiff 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."[46]

The Supreme Court overruled *Discover Bank* in a 5-4 decision in *AT&T Mobility LLC v. Concepcion.*[47] In *Concepcion,* two consumers sued AT&T claiming that the cell phone company deceptively advertised that they would receive a free cell phone as part of their wireless plan.[48] They filed a class action lawsuit in California federal court, and AT&T asked the court to dismiss the action because the plaintiffs had signed a contract agreeing to individual arbitration rather than a class action.[49] AT&T's arbitration provision was designed to facilitate the resolution of small claims through arbitration.[50] The district court and Ninth Circuit upheld the plaintiff's right to pursue class action relief based on California's *Discover Bank* rule.[51]

On appeal, the Supreme Court held that the FAA preempted state laws that prohibited contracts disallowing classwide arbitration.[52] Consequently, businesses might require consumers to bring claims only through bilateral arbitration rather than in court as class litigation. Writing for the majority, Justice Antonin Scalia focused on the impact of California's *Discover Bank* rule, which he opined had caused courts to invalidate many arbitration agreements since its pronouncement.[53] The rule violated the federal policy in favor of bilateral arbitration, and therefore the FAA preempted the *Discover Bank* rule.[54]

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45 Discover Bank v. Superior Court, 30 Cal.Rptr.3d 76 (Cal. 2005).
46 *Id.* at 87.
47 *See Concepcion,* 563 U.S. 333 (2011).
48 *Id.* at 337.
49 *Id.*
50 *Id.*
51 *Id.* at 338.
52 *Id.* at 352.
53 *Id.* at 346–47.
54 *Id.* at 352.

In yet another variation of an attempted strategic use of classwide arbitration, the Court in *Epic Systems Corp. v. Lewis* returned to its analysis of the enforceability of class action waivers in litigation that plaintiffs pursued under the National Labor Relations Act of 1935.[55] In another 5-4 split decision, the Court again ruled that arbitration agreements requiring individual arbitration were enforceable under the FAA, regardless of the collective action provisions set out in the NLRA and the Fair Labor Standards Act of 1938. The statutes empowered employees to form trade unions and to take collective actions against employers for unfair labor practices. Epic Systems, a Wisconsin healthcare software company, required employees to agree to a policy that required individual arbitration of any disputes. An employee sued the company in federal court as a collective action under the FLSA. Epic moved to dismiss based on the arbitration agreement, but the district and appellate courts refused this request. The Supreme Court reversed, mandating bilateral arbitration. The Court rejected the plaintiffs' arguments that the FAA's savings clause invalidated the prohibition against collective action.

In 2019, the Court turned to the problem of ambiguous language in arbitration agreements that did not authorize or disallow classwide arbitration.[56] The Ninth Circuit invoked the doctrine that in such circumstances any ambiguity was to be resolved against the provision's drafter. In yet another 5-4 decision, the Court's majority reversed and held that the FAA preempted the application of the common law contract doctrine governing ambiguous language. This contravened the FAA, because applying the doctrine would interfere with the fundamental attributes of arbitration.

3. The Viking Cruises Arguments to the Supreme Court

In the context of these arbitration decisions, Viking asked the Court to determine whether a plaintiff can avoid bilateral arbitration by recourse to California's Private Attorney General Act. Viking contended that California state courts followed the *Concepcion* and *Epic* decisions when a party to an arbitration agreement tried to assert class action claims but refused to do so when a party asserted representative claims under PAGA. Viking suggested that the effect of PAGA was to circumvent the Court's *Concepcion* and *Epic* decisions and have "merely caused FAA-defying representational litigation to shift

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[55] *Epic Sys. Corp.*, 138 S. Ct. at 1631; National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, codified at 29 U.S.C. §§ 151–169.

[56] *Lamps Plus*, 139 S. Ct. 1410 (2019).

form."[57] The core teachings of the Court's *Concepcion* and *Epic* decisions, according to Viking Cruises, was that courts may not use state-law defenses to declare individualized arbitration off limits when the parties agreed to bilateral arbitration.

Viking claimed that the only noticeable factual difference between this case and *Concepcion* was that instead of pursuing a class action, Moriana pursued litigation on behalf of hundreds of other individuals as a representative action under PAGA. Indeed, Viking contended that there was no meaningful difference between the class action in *Concepcion*, the collective action in *Epic*, and the representative action under PAGA. Consequently, the Court "ha[d] repeatedly made clear that state laws that target arbitration in general, or traditional bilateral arbitration in particular, for disfavored treatment are preempted by the FAA."[58]

Viking advanced a wholesale attack against California's *Iskanian* decision and strenuously argued that the *Iskanian* rule was incompatible with the FAA. The defendant's core argument was that the FAA preempted the *Iskanian* rule. According to Viking, that decision denied California employers the benefits of agreed bilateral arbitration and the guarantees of the FAA. Under *Iskanian*, plaintiffs who should be arbitrating their individual claims in bilateral arbitration instead are just amending their class action complaints to assert representative PAGA claims and proceeding, "as if *Concepcion* and *Epic* never happened."[59]

According to Viking Cruises, the chief consequence of California's *Iskanian* rule was to vastly expand the scope of employment disputes. Given PAGA's provision for substantial statutory penalties and damage awards, PAGA actions had increased defendants' risks for those sued under the statute. Thus, the central question was whether California "may circumvent *Concepcion* and *Epic* by authorizing functionally identical representative actions and declaring such actions 'outside the FAA"s coverage.'"[60]

As a policy matter, Viking and numerous business amici noted the deleterious effects of PAGA and the *Iskanian* rule in California, citing an abundance of statistics in the rate of PAGA filings.[61] The *Iskanian* rule had

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[57] Brief for Petitioner, Viking River Cruises, Inc. v. Moriana, 2022 WL 327146, 1 (Jan. 31, 2022).

[58] Brief for Petitioner, Viking River Cruises, Inc. v. Moriana, No. 20-1573, 2022 WL 327146, 18 (U.S.) (Appellate Brief).

[59] Brief for Petitioner, Viking Cruises, Inc. v. Moriana, 2022 WL 327146, 17–18 (Jan. 31, 2022).

[60] *Id.*

[61] *See, e.g.*, Brief of the Chamber of Commerce as Amicus Curiae in Support of Petitioner, and the National Federation of Independent Businesses, Viking River Cruises, Inc. v. Moriana, 2022 WL 409718 (Feb. 7, 2022);

encouraged lawyers to file hundreds of PAGA demands "at a 17-a-day clip, initiating lawsuits implicating tens of thousands of employees at a time, and extracting millions of dollars from employers for whom representative PAGA claims have become another tax for doing business in California."[62] Viking suggested that this was not what the Court intended in *Concepcion* and *Epic* or what Congress intended in the FAA; therefore, the Court should once again hold that the FAA preempted state laws that interfered with the enforcement of bilateral arbitration agreements.

In response, Moriana argued that although the Court had held that the FAA required courts to enforce agreements to arbitrate claims bilaterally, the Court has never held that the FAA requires enforcement of agreements that flatly bar statutory causes of action in the public interest, such as PAGA. Recasting the dispute, the respondent argued that the case was not about whether a California party might be required to arbitrate a PAGA claim. Instead, the appeal concerned whether an arbitration contract can forfeit a PAGA claim. The respondent contended that California law prohibited contractual waivers of statutory protections that were enacted for public reasons, including the right to bring a PAGA action. Nothing in the FAA text or purposes empowered corporate defendants with superior bargaining power to immunize themselves from all such claims.

The respondent asserted that California had a long-standing anti-waiver rule, and nothing in the FAA's language invalidated the anti-waiver rule. The FAA favored the enforcement of arbitration agreements, not provisions to preclude them. This principle applied to Viking's preclusion of all PAGA claims, even if they were asserted in arbitration. Various provisions of the FAA confirmed the Congressional intent for deciding arbitrable controversies, not precluding them. The FAA said nothing about agreements to strip parties of the right to pursue state public policy claims in all forums. The respondent rejected Viking's contention that the FAA impliedly preempted California's anti-waiver rule. There was no intent in the FAA to immunize defendants from state law liabilities.

Further, the plaintiff contended that PAGA created no conflicts with the purposes and objectives of the FAA. PAGA actions were bilateral proceedings

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Brief of Retail Litigation Center, Inc., and the National Retail Federation as Amicus Curiae in Support of Viking River Cruises, Inc., 2022 WL 209724 (Feb. 7, 2022).

[62] Brief for Petitioner, Viking River Cruises, Inc. v. Moriana, No. 20-1573, 2022 WL 327146, 13 (U.S.) (Appellate Brief).

in which a single plaintiff asserted a claim as the state's representative. PAGA actions did require any special procedures that were incompatible with the fundamental attributes of arbitration. PAGA suits did not aggregate the claims of multiple individuals, nor do they trigger procedures due process protections required in class actions or other collective procedures. If a PAGA claim was sent to arbitration it would proceed in the same way as any bilateral arbitration, thus ensuring streamlined, cost-efficient resolution of grievances.

Moreover, the FAA did not authorize waivers of claims, including PAGA claims, merely because they were complex or involved potentially sizeable penalties or damages, or might require evidence about the impact of the defendant's impact on others. The respondent noted that for decades the Court had recognized that arbitration was well suited for resolving complex, high stakes cases such as antitrust, securities fraud, RICO, and ADEA claims. The arbitration of such complex litigation might and had entailed consideration of evidence bearing on the effects of a defendant's conduct on third parties.

The respondent argued that the FAA did not preempt California's anti-waiver rule because it came within the Section 2 saving clause of the FAA. California had a longstanding rule prohibiting waivers of laws enacted for a public purpose. PAGA was just such a law, enacted for a public purpose. PAGA therefore was encompassed by the § 2 savings clause, which exempted from FAA preemption any neutral, non-discriminatory state ground for revocation of any contract. The respondent contended that no arbitration contract – or any other contract – might waive public policy rights. In addition, the respondent pointed to the Court's repeated pronouncements that the savings clause created a federal equal-treat rule for arbitration agreements; that is, that the enforceability of arbitration agreements was subject to all applicable contract defenses. California's rule prohibiting contractual waivers, as applied to PAGA, was just such an applicable contract defense.

Moreover, PAGA claims belonged to the state. If the FAA preempted the state from asserting those claims through its agent because of preemption, that would bind the state to a contract to which it was not a party. "Extending the FAA to impose such a limitation on the State's law enforcement functions would require clear authorization that the FAA does not provide."[63] The Court had repeatedly held that arbitration was a matter of consent of the parties. In this litigation, California did not consent to waive its statutory right to civil penalties

[63] Brief for Respondent at 12, Viking River Cruises, Inc. v. Moriana, 596 U.S. 639 (2022) (No. 20-1573), 2022 WL 673144.

under PAGA. Enforcing the waiver against California's claim would turn a plaintiff's agreement to arbitrate their individual claims into a waiver of a nonparty's statutory remedies.

The respondent further rejected the notion that the PAGA anti-waiver rule permitted litigants to circumvent the Court's *Concepcion* decision by relabeling class actions as a representative lawsuit. The respondent contended that this argument was mistaken and reached too far, because if correct, then defendants could immunize themselves from all variations of representative actions, including *qui tam* actions, ERISA claims brought on behalf of benefit plans, shareholder derivative claims brought on behalf of corporations, and claims by trustees or beneficiaries on behalf of trusts. All were representative actions in the same way as PAGA suits. "An enforceable ban on all 'private attorney general' actions could sweep even more broadly."[64]

Finally, the respondent counterargued that Viking's policy arguments were meritless. The respondent refuted that argument that plaintiffs may evade *Concepcion* and *Epic* merely by changing the label "class action" in their pleadings and substituting with a "PAGA action."[65] PAGA actions were unlike class actions. In PAGA actions, a plaintiff was limited to seeking civil penalties on behalf of the state for a one-year limitation period. Compensatory damages were not available under PAGA. Furthermore, violations of the California Labor Code were rampant, with weak and ineffective agency enforcement.

Considering this reality, the respondent suggested that statistics cited by Viking and its amici "d[id] nothing to support their assertion that PAGA claims were incompatible with arbitration." "Their fundamental objection [was] that there are too many PAGA claims, and that this Court rather than the California Legislature should curtail the availability of PAGA to benefit the subset of California businesses that compete unfairly by cutting labor costs in violation of the Labor Code."[66] The respondent argued that the adoption of Viking's position, "would have far-reaching negative consequences." If the Court upheld Viking's position, then "opportunistic companies would not hesitate to apply their arbitration language beyond PAGA to apply to other state law representative actions," such as *qui tam* actions. The respondent concluded by urging the Court not to grant potential defendants, an unfettered power to choose which claims may be brought against them.

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64 *Id.* at 13.
65 *Id.* at 12.
66 *Id.* at 47.

4. The Supreme Court Speaks: Viking Cruises Lines v. Moriana *(2022)*

On June 15, 2022, the Court handed down a nearly unanimous decision in *Viking River Cruises*, authored by Justice Samuel Alito.[67] The court held that Viking River was entitled to enforce its arbitration clause against its former employees' individual PAGA claim. In so doing, the Court abrogated California's *Iskanian* precedent, and held that the employee lacked statutory standing to maintain her representative PAGA claims.[68]

The Court, construing the FAA, concluded that the FAA preempted any state rule that discriminated on its face against arbitration. Section 2 of the FAA protected the right to enforce arbitration agreements.[69] That right would not be a meaningful right to arbitrate if state law could be used to transform traditional individualized arbitration into "litigation it was meant to displace," through the imposition of procedures that were at odds with arbitration's informal nature.[70]

The Court noted that arbitration was strictly a matter of consent and a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there was a contractual basis for concluding that the party agreed to do so.[71] The Court indicated that an arbitration agreement was a specialized kind of forum selection clause that posited not only the situs of suit, but also the procedure to be used in resolving it. Arbitration agreements did not alter substantive rights, but merely changed how those rights would be processed.[72]

The Court further noted that, as a corollary to the principle that arbitration was a matter of consent, a party could be forced to arbitrate only those specific issues it specifically agreed to submit to arbitration. Parties could not be coerced, through a classwide procedure, to arbitrate a claim, issues, or dispute absent an affirmative contractual basis for concluding the party agreed to do so. Thus, California state law could not condition the enforceability of an arbitration agreement on the availability of a procedural mechanism which permits a party to expand the scope of the arbitration by introducing claims the parties had not

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[67] *Viking River Cruises*, 142 U.S. at 1906.

[68] *Id.* at 1920–24.

[69] *Id.* at 1917 (first citing *Concepcion*, 563 U.S. at 339–340; then citing *Epic Sys.*, 138 U.S. at 1621–22).

[70] *Viking River Cruises*, 142 U.S. at 1918 (first citing Epic Sys. Corp. v. Lewis, 138 U.S. 1612, 1623 (2018); then citing AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 352 (2011)).

[71] *Id.* at 1918 (first citing Lamps Plus, Inc. v. Varela, 139 U.S. 1407, 1412 (2019) (first citing Epic Sys. Corp. v. Lewis, 138 U.S. 1612, 1621–23 (2018); then citing AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 347–48 (2011)).

[72] *Viking River Cruises*, 142 U.S. at 1919.

jointly agree to arbitrate. A state rule imposing an expansive concept of joinder would defeat parties' ability to control which claims were subject to arbitration.[73]

Apart from the textual discussion of FAA preemption doctrine as it applied to arbitration clauses, the Court also considered and weighed the policy arguments advanced by the parties. Viking and its numerous business amici supplied the Court with compelling statistics about the flood of PAGA cases after the California Supreme Court determined that PAGA actions were beyond the reach of federal preemption. The plaintiffs pleaded on behalf of California employees whom they contended were exploited by California employers. This situation was compounded by ineffectual state agency enforcement of the California labor laws. They pointed out that if the Court adopted Viking's position and disallowed exclusion of PAGA suits in arbitration agreements, employers would not only continue to list PAGA as an exclusion, but would continue to expand their list of prohibited actions in arbitration agreements.

The Court's decision in *Viking River Cruises* may not yet be the last word on the fate of *qui tam* actions and other types of collective redress that have not yet come before the Court. Whether *qui tam* actions will survive the anti-collective bias of the Court regarding bilateral arbitration agreements may be the next test case for litigants and the courts in the ever-flourishing arbitration vineyard.

II. PARSING THE SIGNIFICANCE OF THE SUPREME COURT'S CLASS ACTION WAIVER JURISPRUDENCE

A. The Persistence of the Arbitration Class Action Waiver Problem

Over the past twenty years, the Supreme Court has repeatedly returned to the problem of arbitration agreements that have attempted to restrict class action or collective redress procedures in lieu of bilateral arbitration. One would have thought that by now the Court would have sorted out every possible combination and permutation of arbitration language intended to foreclose collective procedures in arbitration agreements. But the enduring persistence and recurrence of new variation of these cases proves otherwise.

The frequent recurrence of the class action waiver problem illustrates the dynamic relationship between the Court's pronouncements on the subject and

[73] *Id.* at 1923–24.

attorney responses to the changing legal landscape of arbitration clauses. On the one hand, potential defendants—chiefly corporate entities—have responded to the Court's evolving jurisprudence by perfecting the art of arbitration clause drafting. With each successive Court opinion, and to immunize themselves from having to engage in any form of collective arbitration or litigation, corporate counsel have expanded and elaborately defined the list of arbitration exclusions (other than bilateral arbitration). On the other hand, plaintiffs' attorneys have proven equally adept at devising means to pursue collective relief notwithstanding carefully crafted arbitration language specifically designed to describe and prohibit every possible collective procedure.

Viewed in this historical context, the *Viking* appeal was yet the latest chapter in the arbitration class action waiver saga. It returned the Court to a consideration of federal preemption under the FAA of state anti-waiver laws. It asked the Court to consider the latest twist in this narrative, namely a California state statute that purportedly created a representational procedure on behalf of the state.[74] In deciding this appeal, the Court revisited the reach of its *Concepcion* and *Epic* decisions, counterbalanced by the California Supreme Court's determination that PAGA actions lie outside the *Concepcion* and *Epic* pronouncements.[75]

A review of the Court's class action waiver appeals illustrates the many variations of attempted classwide arbitration the Court repeatedly has rejected. What is noteworthy is that many, although not all, of the class action waiver appeals have commanded a unanimous Court decision.

1. Ambiguous or Silent Class Arbitration Agreements

The Court has three times visited the issue whether a district court may authorize classwide arbitration when an arbitration clause is either silent or ambiguous as to the ability to conduct classwide arbitration.[76] In all instances, the Court has repudiated the ability of plaintiffs to accomplish a classwide arbitration where the agreement is either ambiguous or silent concerning the availability of classwide arbitration.

In the most recent revisitation of this issue, the Court in *Lamps Plus* was faced with an arbitration agreement between an employee and his employer concerning a data breach.[77] He sued in California federal court on behalf of a

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[74] *See id.* at 1915–16.
[75] *See id.* at 1917–18.
[76] *Lamps Plus*, 139 U.S. 1407 (2019); *Stolt-Nielsen*, 559 U.S. 662 (2010); *Bazzle*, 539 U.S. at 444.
[77] *Lamps Plus*, 139 U.S. at 1413.

putative class of employees.[78] The arbitration agreement was ambiguous concerning whether the employee could pursue classwide arbitration, and California contract principles relating to contract ambiguity applied, which would have allowed for the classwide arbitration.[79] Under California contract principles, ambiguous provisions of a contract are to be construed against the drafter of the agreement, and therefore the Ninth Circuit concluded that the arbitration agreement between the employee and employer could be construed against Lamps Plus, and allow classwide arbitration.[80]

On appeal, the Court held that, consistent with the FAA, an ambiguous agreement could not provide the necessary contractual basis for compelling classwide arbitration.[81] This conclusion followed directly from the Court's 2010 decision in *Stolt-Nielsen,* in which the court held that an arbitration agreement that was silent as to classwide arbitration could not provide a basis for court ordered class arbitration.[82] The Court simply held that its decision in *Stolt-Nielsen* controlled the question in *Lamps Plus*.[83] In addition, and anticipating the *Viking River Cruises* appeal, the Court held that state law was preempted to the extent that it stood as an obstacle to the accomplishment and execution of the purposes of the FAA.[84]

Relying heavily on the Court's decision in *Stolt-Nielsen* and its series of previous arbitration opinions, the Court doubled down on its conclusion of the many ways in which class arbitration was antithetical to the FAA's concept of bilateral arbitration. Because of the crucial differences between individual and class arbitration, where an agreement was silent or ambiguous, there was reason to doubt the parties' mutual consent to resolve their dispute through classwide arbitration.[85] The Court's decision aligned with its previous refusals to infer consent when it came to fundamental arbitration questions.[86] Thus, the Court had many times indicated that it would not seek to resolve ambiguous contracts by asking who had drafted the agreement. Instead, the FAA provided the default rule for resolving the ambiguity, which requires bilateral arbitration.[87]

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78 *Id.*
79 *Id.* at 1414.
80 *Id.*
81 *Id.* at 1419.
82 *Id.* at 1416.
83 *Id.* at 1416.
84 *Id.* at 1415.
85 *Id.* at 1416.
86 *Id.*
87 *Id.* at 1418.

2. Class Action Waivers and Collective Action Procedures Under the Fair Labor Standards Act and the National Labor Relations Act

In another attempt to seek classwide arbitration, the employees invoked the collective procedures provided by the Fair Labor Standards Act (FLSA),[88] under the National Labor Relations Act (NLRA).[89] This appeal consolidated three separate employee cases, alleging various alleged violations of the FLSA relating to salary and overtime provisions. The collective action provisions of the FLSA allow for group proceedings, but the Court has never read a right to class actions into the FLSA collective action provision.[90] The employees also sought to certify a class action under state law. The employees had all signed arbitration agreements that specified individualized arbitration, with claims pertaining to different employees to be heard in separate proceedings.[91] This case, then, did not involve an arbitration agreement that was either silent or ambiguous as to the nature of the agreed arbitration procedure.

After a convoluted series of appeals through various federal appellate courts, the Supreme Court resolved the ultimate question whether the Arbitration Act savings clause permitted the employees to have their disputes resolved through classwide arbitration.[92] The employees claimed that the savings clause, which allowed courts to refuse to enforce arbitration agreements on grounds that existed at law or equity for the revocation of any contract, applied.[93] The employees argued that the NLRA provision that allowed collective action under the FSLA, rendered class and collective action waivers illegal.[94]

The Court, in a decision by Justice Neil Gorsuch, emphatically rejected this argument.[95] The Court noted that the employees were not seeking to invalidate their arbitration agreements based on contract defenses such as fraud, duress, or unconscionability, but rather because the agreements would force them to arbitrate individually.[96] The savings clause was of no avail based on this theory, because the employees' argument sought "to interfere with one of arbitration's fundamental attributes," namely bilateral arbitration.[97]

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88 Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 216(b).
89 *Epic Sys. Corp.*, 138 U.S. at 1612.
90 *Id.* at 1619.
91 *Id.*
92 *Id.* at 1621.
93 *Id.* at 1622.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*

The Court concluded that as a matter of law, Congress, in the Federal Arbitration Act, instructed federal courts to enforce arbitration agreements according to their terms, including terms for individualized proceedings.[98] The NLRA did not offer a conflicting command to allow for collective arbitration.[99] The NLRA secured employees the rights to organize unions and collectively bargain, but it said nothing about how courts or arbitrators must resolve legal disputes in an arbitral forum.[100] The FAA and the NLRA had long enjoyed separate spheres of influence and neither permitted the Court to declare the parties' agreement unlawful or unenforceable.[101]

3. The California Class Action Waiver Cases: Preemption of State Law

The Supreme Court in two appeals concerning contractual class action waivers has repeatedly ruled that the FAA preempts contrary California state law that would render class action waivers unenforceable.[102] The narrative of these cases illustrates the efforts of California to protect its citizens by enacting statutory provisions that contractual arbitration agreements drafted by defendants with class action waivers were void and unenforceable.

In 2011, the Court first encountered the California law in *AT & T Mobility v. Concepcion.*[103] California had enacted a statute that stated that class action waiver provisions in consumer contracts of adhesion involving small amounts of money were unconscionable and should not be enforced.[104] The California Supreme Court upheld this anti-class action waiver provision in a decision that became known as the *Discover Bank* rule.[105] On appeal to the Supreme Court in *Concepcion,* in a 5–4 decision, the Court's majority held that California's *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the FAA.[106] The FAA preempted and invalidated the Discover Bank rule.[107]

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98 *Id.* at 1624.
99 *Id.* at 1619.
100 *Id.*
101 *Id*.
102 See *Concepcion*, 563 U.S. 333; DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015).
103 *See Concepcion*, 563 U.S. 333.
104 Discover Bank v. Superior Ct., 113 P.3d 1100, 1110 (Cal. 2005).
105 *Id.*
106 *Concepcion*, 563 U.S. at 352.
107 *Id*. (citing U.S. Const., Art. VI, cl. 2).

In 2015, the Court revisited the issue of preemption of California state law in *DIRECTV, Inc. v. Imburgia*.[108] In this case, DIRECTV entered into a service agreement with its customers. A contract provision stated that claims asserted by either party would be resolved by arbitration but included a class action waiver that specified "[n]either you nor we shall be entitled to join or consolidate claim in arbitration."[109] In addition, the contract provided that if the "law of your state" made the waiver of class arbitration unenforceable, then the entire arbitration provision was unenforceable.[110] The contract further provided that the arbitration provision was to be governed by the FAA.[111]

A California appellate court held that, despite the Supreme Court's *Concepcion* holding, California law would find the class action waiver unenforceable, relying on provisions in California's Consumer Legal Remedies Act, rather than the *Discover Bank* rule.[112] The appellate court's decision turned on statutory construction of the meaning of the phrase "the law of your state." Finding the arbitration agreement language not ambiguous,[113] the Supreme Court held that the case fell well within the confines of well-established law. California's interpretation of the phrase "law of your state" did not place arbitration contracts on an equal footing with all other contracts.[114] The California appellate court's interpretation of that phrase, then, was preempted by the FAA.[115]

4. Class Action Waivers and the Effective Vindication Doctrine

In 2013, in *American Express Co. v. Italian Colors Restaurant*,[116] litigants attempted to overcome contractual class action waivers in arbitration agreements by arguing that the excessive costs of retaining an expert witness in an antitrust action would prevent them from effectively vindicating their claims in an individual action. Therefore, the only effective way that the plaintiffs could vindicate their antitrust claims and rights to recovery would be through classwide arbitration.

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108 *See Imburgia*, 136 S.Ct. 463.
109 *Id.* at 466.
110 *Id.*
111 *Id.*
112 *Id.* at 467, citing CAL. CIV. CODE §§ 1751, 1781(a) (West 1970).
113 *See Imburgia*, 136 S.Ct. 463.
114 *Id.* at 468.
115 *Id.* at 471.
116 *Italian Colors Rest.*, 133 S.Ct. at 2304.

Retail merchants who wished to offer consumers the option of payment through Amex were required to agree to an "Honor All Cards" policy: that is, they had to agree to accept Amex charge cards as well as its credit cards.[117] Italian Color Restaurant and other merchants filed a lawsuit in the Southern District of New York, alleging that Amex's "Honor All Cards" policy constituted an unlawful tying agreement under § 1 of the Sherman Antitrust Act.[118] They alleged that Amex had monopoly power which forced merchants to accept ordinary credit cards at thirty percent higher rates than the fees for identical bank-issued cards in competing networks, such as Visa and Mastercard.[119] To prove their tying claims, the plaintiffs would have had to define the relevant market, prove Amex's market power, prove that Amex used its market power in furtherance of its tying scheme, prove the anticompetitive effects, and calculate damages.[120]

Each merchant entered a "Card Acceptance Agreement" with Amex that included an arbitration provision requiring bilateral rather than classwide arbitration. The provision provided that "there shall be no right or authority for any Claims to be arbitrated on a class action basis."[121] When the merchants sued, Amex moved to compel arbitration.[122] However, the plaintiffs resisted, arguing that the arbitration clause precluded them from effectively vindicating their federal statutory rights under the Sherman Act in the arbitral forum.[123] In particular, the plaintiffs argued that the small individual amount of each plaintiff's claim rendered the costs of arbitrating to be prohibitive, because they could not prosecute their tying claim without at least one detailed antitrust market study.[124]

The plaintiffs presented the district court with expert witness testimony showing that the cost of obtaining the necessary antitrust market study would cost between $300,000 and one million dollars, an amount that exceeded the potential median damages of $5,252 for individual plaintiffs.[125] Arguing that such cost was prohibitive, the plaintiffs stated that this effectively prevented

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117 *Id.* at 2308.
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at 2304, 2308.
123 *Id.*
124 *Id.*
125 *Id.*

them from vindicating their federal statutory rights in arbitration—invoking the so-called "effective vindication" doctrine.[126]

Nonetheless, the district court granted the defendant's motion to compel arbitration and dismissed the plaintiffs' lawsuits, rejecting the plaintiffs' "prohibitive costs" and effective vindication arguments.[127] The Court of Appeals reversed, finding that the class action waiver provision in the mandatory arbitration clause was unenforceable.[128] While a further appeal was pending, the Court issued its decision in *AT&T Mobility LLC v. Concepcion*.

The Supreme Court, in an opinion authored by Justice Antonin Scalia, rejected the argument that the inability to effectively prosecute individual claims because of excessive expense could overcome a contractual class action waiver provision in an arbitration agreement.[129] Justice Scalia first noted that Congress enacted the FAA in response to widespread judicial hostility to arbitration.[130] The text of the FAA reflected the principle that arbitration was a matter of contract, and no contrary Congressional command required the Court to reject the waiver of class arbitration in the AMEX contracts.[131]

Rejecting the plaintiff's "effective vindication" argument, the Court noted that the antitrust laws did not guarantee an affordable procedural path to the vindication of every claim.[132] Moreover, the antitrust laws did not evince an intention to preclude a waiver of class action procedure.[133] The Sherman and Clayton antitrust acts did not mention class actions.[134] Congressional approval of Rule 23—the class action rule—did not establish an entitlement to a class action for vindication of statutory rights.[135]

The Court further concluded that its decision in *AT & T* Mobility "all but resolves this case."[136] The Court had invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law would fundamentally interfere with the fundamental attributes of arbitration. The Court

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126 *Id.*
127 *Id.* at 2307.
128 *Id.* at 2306.
129 *Id.* at 2307.
130 *Id.* at 2308–09.
131 *Id.* at 2309.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* at 2312.

had rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system.[137]

B. The Supreme Court's Views on the Unsuitability of Classwide Arbitration

In many of the Court's class action waiver decisions, in enforcing bilateral arbitration agreements as against a classwide arbitration, the Court has expressed jurisprudential and policy reasons for rejecting the option of a classwide arbitration. In the Court's most recent *Viking River Cruises* class action waiver appeal, for example, the Court noted that class action arbitration mandated procedural changes that were inconsistent with the individualized and informal mode of bilateral arbitration that the FAA contemplated.[138] Thus, California state law could not impose class procedures without presenting unwilling parties with an acceptable choice between being compelled to arbitrate using such procedures and forgoing arbitration altogether.[139]

The theme that classwide arbitration is different than bilateral arbitration is a refrain that the Court has repeated in its numerous class action waiver decisions. Because of the crucial differences between classwide and individual arbitration, the Court consistently has held that courts may not infer consent to participate in classwide arbitration without an affirmative contractual basis for concluding that a party agreed to do so. Silence (or ambiguity) is not enough; the FAA requires more.[140]

In *Lamps Plus*, the Court—citing *Stolt-Nielsen*—noted that class arbitration was not only markedly different than traditional individualized arbitration the FAA contemplated, but that it also undermined important benefits of that "familiar form of arbitration."[141] The task for courts and arbitrators is to give effect to the parties' intent in their agreement to forego the judicial process and submit their dispute to arbitration. Parties may shape arbitration agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration and arbitration rules.[142]

The Court indicated that it was important to recognize the fundamental differences between class arbitration and individualized arbitration that the FAA

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137 *Id.* at 2311.
138 *Viking River Cruises*, 142 U.S. at 1918.
139 *Id.* (quoting Stolt-Nielsen, 559 U.S. at 686).
140 *Lamps Plus*, 139 U.S. at 1461; *Stolt-Nielsen*, 559 U.S. at 687.
141 *Lamps Plus*, 139 U.S. at 1415 (citing Stolt-Nielsen, 559 U.S. at 684; Epic Systems, 138 U.S. at 1623).
142 *Id.*

envisioned.[143] In individual arbitration "parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[144] Class arbitration lacked those benefits. It sacrificed the principal benefit of individualized arbitration—its informality[145]—and made the process slower, more costly, "and more likely to generate procedural morass than final judgment."[146] In addition, class arbitration introduced new risks for both sides and raised serious due process concerns in "adjudicating the rights of absent class members, with only limited judicial review."[147]

III. ARBITRATION CLASS ACTION WAIVERS IN A COMPARATIVE CONTEXT

While the U.S. Supreme Court has devoted substantial attention to arbitration class action waivers and has inspired an outpouring of critical academic commentary, scholars and attorneys have paid less attention to the possibility of classwide arbitration in other countries that have class action or collective redress procedures.[148] With the advent of mandated class action and collective redress procedures now enacted in the twenty-seven E.U. countries, the implications for the possibility of classwide arbitration loom large. If classwide arbitration is to gain traction in E.U. countries, it will be accompanied with a host of complicated issues, including the enforceability of class action waivers, the necessity for claimant opt-in under domestic law, and problems of recognition and enforcement of arbitral awards.[149]

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143 *Id.* at 1416.

144 *Id.* (citing Stolt-Nielsen, 559 U.S. at 685).

145 *Id.* (citing Concepcion, 563 U.S. at 348).

146 *Id.*

147 *Id.* (citing Concepcion, 563 U.S. at 349; Stolt-Nielsen, 559 U.S. at 686).

148 *See generally* Francisco Blavi & Gonzalo Vial, *Class Actions in International Commercial Disputes*, 39 FORDHAM INT'L L. J. 791 (2016); Danny Leavitt, Note, *Disputing the Dispute: Amending International Arbitral Tribunal Rules to Require Secondary Consent for Class Arbitration*, 4 CREIGHTON INT'L & COMP. L. J. 15 (2013); Stacie I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. & COM. REG 921 (2012); Stacie I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, U. PA. J. INT'L L. 1 (2008) [hereinafter Strong, *Enforcing Class Arbitration*]; Jan-Krzysztof Dunn-Wasowicz, Note and Comment, C*ollective Redress in International Arbitration: An American Idea, A European Concept?*, 22 AM. REV. INT'L ARB. 285 (2011); Mica Nguyen Worthy, *Disputes That Raise Public Policy Issues: Special Problems in International Disputes*, 86 DEF. COUNS. J. 1 (2019).

149 Jan-Krzysztof Dunin-Wasowicz, *Collective Redress in International Arbitration: An American Idea, a European Concept?*, 22 AM. REV. OF INT'L ARB. 285, 309–10 (2011) [hereinafter Dunin-Wasowicz, *Collective Redress*].

The possibility of classwide arbitration falls into two categories. The first embraces countries that have considered the possibility of classwide arbitration as a part of domestic law. As will be seen, a few countries—in contrast to the United States—have permitted classwide arbitrations. However, some inroads are emerging. Sweden, for example, allows arbitration for "group actions on an opt-in basis.[150] The second category addresses the possibility of classwide arbitration under the auspices of international arbitral tribunals. Again, unlike the United States, international arbitral tribunals have recognized classwide arbitration albeit on a very ad hoc basis.

A. Classwide Arbitration in Domestic Legal Systems Outside the United States

To date, two countries have considered—as a matter of first impression—the possibility of permitting classwide arbitration under domestic law. Courts in both Canada and Colombia have suggested openness to the concept of classwide arbitration. In a Canadian case, a court had to consider an agreement that included a class action waiver.[151]

1. Canadian Class Arbitrations

Canadian provinces all have class actions provisions, and most are modeled on the American Rule 23. Notwithstanding the replication of the provisions of Rule 23, Canadian class action practice departs from American class action jurisprudence in several notable ways, such as lacking a predominance requirement for damage class actions. Canadian arbitration practice also has deviated from the American enforcement of class action waivers, instead permitting classwide arbitration in some circumstances. Whether classwide arbitration may proceed is a matter of statutory construction, focusing on the question "whether the courts decide that the right at issue . . . is a right to sue on a class-wide basis before the courts" or whether "the right conferred by class action legislation is simply a right to proceed on a class-wide basis," regardless of the venue.[152]

Canadian litigants attempted to interpose a version of the "effective vindication" argument against enforcement of a class action waiver in an

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[150] Blavi & Vial, *supra* note 148, at 796; Worthy, *supra* note 148, at 12.

[151] *See* Kanitz v. Rogers Cable Inc., [2002] 58 O.R. 3d 299 (Can.).

[152] Stacie I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, ARB. INTL'L 493, 498 (2010) [hereinafter Strong, *From Class to Collective*].

arbitration agreement in Ontario.[153] In this litigation, the plaintiffs filed a breach of contract lawsuit relating to the provision of cable and highspeed internet.[154] The defendants invoked a contract clause that provided for arbitration but forbade class proceedings.[155] In response, the plaintiffs argued the invalidity of the class action waiver on the grounds of unconscionability.[156] The plaintiffs argued that if the class action waiver was upheld then individual plaintiffs would be dissuaded from proceeding in individual arbitration because of the expense relative to the potential award recovery.[157] And the plaintiffs argued that giving effect to the class action waiver would defeat the purposes inherent in Ontario's Class Proceedings Act.[158]

The Ontario Superior Court rejected all the plaintiffs' arguments, including a finding that there was no unconscionability in the contract provision.[159] The court found the plaintiffs' "effective vindication" argument unpersuasive because of a lack of evidence showing that individual plaintiffs had been dissuaded from pursuing arbitration.[160] The court rejected the argument that the plaintiffs would be more likely to proceed as a class and thereby be protected from adverse costs in case of a loss.[161] Finally, the court rejected the argument that giving effect to the class action waiver would violate public policy under Ontario's Class Proceedings Act.[162]

However, the court opined that a type of class arbitration might be permitted under consolidation provisions in the Ontario Arbitration Act.[163] This could be accomplished by permitting an arbitrator to consolidate a number of individual arbitrations that raised the same issue.[164] This possibility undercut the plaintiffs' "effective vindication" argument that the class action waiver clause operated to erect an economic barrier barring the defendant's customers from efficiently seeking relief.[165]

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153 *See* Kanitz v. Rogers Cable Inc., [2002] 58 O.R. 3d 299 (Can.).
154 *Id*. para. 1.
155 *Id*. para. 8.
156 *Id*. para. 48.
157 *Id*. para. 44.
158 *Id*. para. 50.
159 *Id*. para. 56.
160 *Id*. para. 42.
161 *Id.*
162 *Id*. para. 50–51.
163 *Id*. para. 53.
164 *Id.*
165 *Id.*, referring to the Arbitration Act, S.O. 1991 c 17 § 20(1) (Can. Ont.) (permitting consolidation of individual arbitrations).

The Quebec Court of Appeals and Canadian Supreme Court signaled openness to the possibility of a class arbitration in a consumer protection class action brought against the Dell corporation relating to goods purchased on its website.[166] The online standard dispute resolution agreement provided that any dispute arising from online purchases would be arbitrated under the National Arbitrations Forum rules.[167] Dell sought to stay the class litigation and to compel arbitration.[168] The court generally held that the arbitration agreement was not enforceable because it had not been called to the consumers' attention. But the court further suggested that under some circumstances consumer claims could be arbitrated as a class.[169] The Supreme Court of Canada dismissed the class action and sent the litigation to arbitration.[170] Although the court did not explicitly endorse class arbitration, the court rejected the argument that a class action, as a matter of public policy, could not be submitted to arbitration.[171]

2. Colombian Class Arbitrations

The Colombian Supreme Court, in a 2003 decision, held that an arbitration agreement contained in the bylaws of a financial institution did not limit the types of claims that could be submitted to arbitration.[172] The underlying litigation involved a shareholder class action lawsuit resulting from the merger of two financial institutions. The defending parties contended that class actions in Colombia were subject to the exclusive jurisdiction of the domestic courts and therefore could not be pursued in arbitration.[173] The Colombian Supreme Court disagreed. However, the Court's decision did not broadly affirm the right to classwide arbitration in Colombia. Rather, the Court allowed the arbitrators to decide whether "the existence of an arbitration agreement in a common shareholder agreement could give rise to a collective claim."[174] The Court

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166 Dell Computer Corp. v. Union des consommateurs, [2005] Q.C.C.A. 570, rev'd, [2007], 2 S.C.R. 801, digest by Alvarez digest for Institute for Transnational Arbitration (ITA), available at http://www.kluwerarbitration.com, cited by Strong, *Enforcing Class Arbitration*, *supra* note 148, at 52.

167 *See id.*

168 *See id.*

169 *See id.*

170 *See id.*

171 Dunin-Wasowicz, *Collective Redress*, *supra* note 149, at 289–290.

172 Valencia (Colombia) v. Bancolombia (Colombia), Apr. 24, 2003 – Arbitral tribunal from the Bogota Chamber of Commerce, digest by Eudorado Zuleta for Institute of Transnational Arbitration (ITA), cited in Blavi and Vial, *supra* note 148, at n.88.

173 *See id.*

174 Strong, *From Class to Collective*, *supra* note 152, at 498. The Court held that "Arbitral Tribunals have no jurisdiction in principle to rule upon class actions, since the pertinent decision would involve or affect every individual that finds himself/herself under the same causal link which caused individual damages . . . However,

further held that arbitrators have the same duties and powers as a court and therefore they have competence to resolve class claims.[175]

B. Classwide Arbitration in International Arbitration Tribunals

1. The International Chamber of Commerce and the London Court of International Arbitration

The two most prominent international arbitral tribunals are the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The rules and regulations of both institutions are silent regarding the possibility of classwide arbitration and provide no guidance or guidelines for conducting classwide arbitration, including procedures relating to class certification, class representatives, notice, confidentiality, and costs. In addition, international treaties are silent regarding classwide arbitration.[176] In 2005 the ICC issued a statement indicating that class litigation had "adverse consequences for business and consumers, outweighing the perceived benefits to society."[177]

2. The International Centre for Settlement of Disputes

Other international arbitration tribunals have permitted large consolidated or mass arbitrations but have not embraced class arbitration specifically. In a much-noted decision from the International Centre for Settlement of Investment Disputes (ICSID), the ICSID permitted collective relief to more than 190,000 Italian parties suing Argentina.[178] The tribunal determined that the only effective way to provide relief to the mass of claimants, in protecting a substantive contract right, was through a collective proceeding.[179] However, the tribunal distinguished this collective proceeding from American-style class litigation because each claimant was identified and consented to the tribunal's collective

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a different conclusion may arise regarding the shareholders of a Corporation, since these have accepted the inclusion of an arbitration agreement in the bylaws." Strong, *Enforcing Class Arbitration*, *supra* note 148, at 49.

175 Strong, *Enforcing Class Arbitration*, *supra* note 148, at 49.

176 Blavi & Vial, *supra* note 148, at 808.

177 Gabrielle Nater-Bass, *Class Action Arbitration: A New Challenge?*, 27 ASA BULL. 671, 671 (2009); Worthy, *supra* note 148, at 12. Blavi and Vial suggest that if this is the opinion of the ICC then it is hardly likely that the ICC would support classwide arbitration. Blavi & Vial, *supra* note 148, at 808.

178 Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 190 (Aug. 4, 2011).

179 *Id.*

arbitration (rather than the American practice of claimants represented by a class representative.[180]

One commentator has argued, after the Argentina decision, that the Administrative Council for the Centre should modify the Arbitration rules for the governing convention to specify that it rejects consent to classwide arbitration, "even if arbitral tribunals title them as 'hybrid,' as the Argentinian proceeding, unless parties explicitly agree to classwide arbitration.[181]

CONCLUSION

The Supreme Court's class action waiver jurisprudence has been highly consistent in upholding contractual class action waiver provisions and rejecting the possibility of classwide arbitration. The Court has consistently so held when litigants have challenged class action waivers in a variety of different contexts: silent and ambiguous contract language, countervailing state law provisions, federal collective action statutes, and plaintiffs' claims to the inability to effectively vindicate individual rights, except through class proceedings. No matter what variation of challenges to class action waiver provisions, the Court unswervingly has upheld these provisions.

The arc of class action waiver provisions in arbitration agreements manifests a learning curve in the 21st century by the corporate counsel who draft arbitration provisions. Because of the many challenges to arbitration provisions, counsel have learned to carefully craft arbitration provisions that are exceedingly clear to forbid classwide arbitration, if the corporate entity so desires. Thus, counsel have learned the importance that the arbitration clauses neither be silent nor ambiguous about excluding classwide arbitration. One may trace class action waiver language over the course of the 21st century to understand attorneys' integration of judicial decisions into a nuanced evolution of class waiver provisions.

Although the Court's class action waiver jurisprudence consistently has upheld these provisions, the Court's decisions have not been unanimous or without controversy. A number of the Court's decisions have been rendered on

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[180] The tribunal suggested that its approved proceeding seemed "to be a sort of hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with feature similar to representative proceedings due to the high number of claimants involved." *Id.* ¶ 191.

[181] Leavitt, *Disputing the Dispute*, *supra* note 148, at 20. "Potential risks are involved from allowing class arbitration to progress to arbitral tribunals – and ultimately awarded – without a clear statement requiring 'consent' to be express." *Id.*

5-4 split votes, with the Court's liberal wing dissenting from majority opinions validating contractual class action waivers. While the dissenters' opinions hew to technical constructions of underlying statutes, in many instances the dissenting opinions reflect the jurisprudential and ideological view that upholding class action waivers, in many instances, harms consumers and employees in their efforts to hold bad actor defendants accountable. In this view, the law favors corporate defendants as drafters of contractual arbitration agreements who—with the Court's imprimatur—can frustrate or deny the efforts of weaker, powerless individuals to obtain the advantages of collective action in an arbitral forum. However, to date, the dissenters have failed to command enough votes to invalidate contractual class action waiver provisions.

It also is worth noting that nothing prohibits classwide arbitration, by agreement. Classwide arbitration can and does occur under the auspices of the American Arbitration Association[182] and other entities, such as JAMS.[183] This suggests that there are instances where corporate defendants strategically perceive an advantage to be gained by classwide arbitration, rather than individual arbitration. The fact that in some circumstances corporate defendants will agree to classwide arbitration suggests that their stalwart opposition to classwide arbitration in their contractual agreements is situational and perhaps not entirely principled. When it suits the strategic goals of corporate defendants, they will agree to classwide arbitration. The lesson here is that the corporate defendants, in considering the prospect of arbitration, are likely to act to maintain control over when, if, and how classwide arbitration may occur.

But in the interim, we may continue to expect more litigation in the United States over arbitration agreements with class action waivers in contexts not yet explored by the courts. Whatever new circumstances arise, it is a fair bet that the current conservative Supreme Court will continue to uphold the FAA's desire for bilateral arbitration, as against plaintiffs' challenges to class action waiver provisions.

In addition, with the advent of class action and collective redress procedures in the twenty-seven European Union countries, one might expect the development of classwide arbitration along with the issue of class action waivers. Countries that have been confronted with issues of classwide arbitration

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[182] *See Class Arbitrations*, AMER. ARB. ASSOC., https://www.adr.org/ClassArbitration (last visited Apr. 1, 2024).

[183] *See Class Action Procedures*, JAMS, https://www.jamsadr.com/rules-class-action-procedures/ (last visited Apr. 1, 2024).

as a matter of first impression show awareness of the American *Stolt-Nielsen* decision and its many progeny cases. Initial indications suggest that some countries apart from the United States are more receptive to classwide arbitration, especially if it can be configured as a group consolidation of individual arbitrations. The issue of claimant opt-in to classwide arbitration will loom large in civil law countries that have adopted class action or collective redress procedures that require opt-in to group procedures. However, class arbitration outside the United States is a nascent concept, and it remains to be seen how individual countries will embrace classwide arbitration or turn to American-style class action waivers. Commentators have suggested that "the future evolution of the class action in international arbitration heavily hinges not only on the type of claims brought by the claimants, but also what arbitrators will decide to do."[184]

[184] Dunin-Wasowicz, *supra* note 149, at 290.