School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola
*Loukas Mistelis**

AT&T MOBILITY LLC V. CONCEPCION ET UX.
CASE NO. 09-893 (131 S.CT 1740)

Case Report by Sara Susnjar**
Edited by Maria Kostytska ***

In a decision rendered on April 27, 2011, the United States Supreme Court considered whether the Federal Arbitration Act prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures. Interpreting Section 2 of the Federal Arbitration Act, the Court found that the Act preempts the State laws that prohibit contracts from disallowing class action lawsuits. Such law was previously upheld by the California Supreme Court in *Discover Banks v. Superior Court*, which held that class waivers in consumer arbitration agreements are unconscionable. This decision took a differing view to the majority decision in *Abaclat and Others v. Argentine Republic* (formerly known as *Giovanna a Beccara and Others v. Argentine Republic*), ICSID Case No. ARB/07/5.

Decision:	5-4; affirming Justices Scalia, Thomas, Roberts, Kennedy and Alito; dissenting Justices Breyer, Ginsburg, Sotomayor
Petitioners:	AT&T Mobility LLC
Counsel:	Andrew J. Pincus, Donald M. Falk, Evan M. Tager, Archis A. Parasharami, Kevin Ranlett, MAYER BROWN LLP, Neal Berinhout, AT&T MOBILITY LLC

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Respondent:	Vincent and Liza Concepcion
Counsel:	Deepak Gupta, Scott L. Nelson, Gregory A. Beck, PUBLIC CITIZEN LITIGATION GROUP, Kirk B. Hulett, Sarah P. Weber, HULETT HARPER STEWART, Craig M. Nicholas, Matthew B. Butler, Alex M. Tomasevic, NICHOLAS & BUTLER

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com.

** Sara Susnjar is an Associate at Winston & Strawn LLP focusing on international arbitration and international business transactions. She can be reached at ssusnjar@winston.com or +33 (0)1 53 64 81 33.

*** Maria Kostytska is Of Counsel at Winston & Strawn LLP, specializing in investor-State arbitration. She can be reached at mkostytska@winston.com or +33 (0)1 53 64 82 44.

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1. *Facts of the Case*

In February 2002, Vincent and Liza Concepcion (the "Concepcions") entered into an agreement for the sale and servicing of cellular telephones ("Agreement") with Cellular Wireless (acquired by AT&T in 2005 and renamed AT&T Mobility LCC ("AT&T") in 2007). The Agreement provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[1]

The Agreement allowed for unilateral amendments by AT&T. Some of these unilateral amendments were later made to the arbitration provisions after the conclusion of the Agreement. The revised Agreement provided that the "customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site."[2] The Agreement also contained other more detailed provisions stating that: in the event that the parties proceeded to arbitration, AT&T had to cover all costs for non-frivolous claims; the arbitration had to take place in the country where the customer was billed; for claims less than $10,000, the customer could choose if the arbitration would be in person, by telephone, or only by written submission; in lieu of arbitration, either party could bring a claim in small claims court; and the arbitrator could grant any form of individual relief (including injunctions and punitive damages). Nowhere did the Agreement state that disputing customers may initiate arbitration class action or any other class action procedures.

Even though the Agreement the Concepcions entered into was for free phones, the Concepcions were nonetheless charged $30.22 in sales tax. The sales tax was based on the phones' retail value. Failing to reach a suitable settlement with AT&T, in March 2006, the Concepcions chose to litigate.

2. *Procedural History*

In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The plaintiffs then sought to consolidate this complaint with a punitive class action, alleging that "AT&T had engaged in false advertising and fraud on the basis of the charged sales tax on the free phones".[3]

However, in Match 2008, AT&T moved to compel arbitration under the abovementioned terms of the Agreement. This motion was opposed by the Concepcions, who contended that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The district court denied AT&T's motion and held that the arbitration provision was unconscionable. The Court relied heavily on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (2005),

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[1] Decision ¶ 1744.
[2] *Id*.
[3] *Id*.

where the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.[4]

AT&T appealed, contending that the Federal Arbitration Act ("FAA") preempts state law. On October 27, 2009, he Ninth Circuit affirmed, also finding the arbitration provision unconscionable under California law.

3. *Legal Issues Before the U.S. Supreme Court*

AT&T petitioned to the U.S. Supreme Court arguing that the Concepcion's interpretations of California law discriminated against arbitration and that the Ninth Circuit judgment be reversed. The Supreme Court granted ***certiorari***.

(a) Unconscionability

Before the Supreme Court, the Concepcions argued that the lower courts should have refused enforcement of the arbitration provision of the AT&T contract because it was unconscionable when it was made. The Concepcions invoked *Discover Bank*, which placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration.[5] Therefore, they argued, California's unconscionably doctrine and California's policy against exculpation would be grounds for the revocation of the arbitration agreements.[6] They further cited Section 2 of the FAA which permits arbitration agreements to be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract".[7] The Concepcions's advanced an argument, based on *Discover Bank,* stating that under California law unconscionability requires a procedural element, focusing on oppression or surprise that resulted from unequal bargaining power and substantive elements, focusing on overly-harsh and one-sided results; the former which was present to find the arbitration agreement unconscionable.[8]

(b) Pro-arbitration purpose of the FAA

The Court rejected the Concepcions' argument and upheld the arbitration provision; raising as AT&T argued, that the FAA preempts state law. It found that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements "according to their terms as to facilitate streamlined proceedings".[9] Therefore, the availability of classwide arbitration, contrary to the Concepcions' suggestion, would interfere with fundamental attributes of arbitration and thus contradict the FAA. In this case, this is especially true since classwide arbitration was never mentioned in the Agreement.

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[4] Decision ¶ 1745.
[5] *Id.*
[6] Decision ¶ 1746.
[7] *Id.*
[8] *Id.*
[9] Decision ¶ 1748.

The Court recalled that the FAA was enacted in 1925 in response to widespread judicial hostility to arbitration as a means of promoting arbitration and ensuring that private arbitration agreements are enforced to their terms.[10] The Court went on to also quote FAA's text Section 2, which makes arbitration agreements "valid, irrevocable and enforceable"[11] as written, and the courts therefore must stay litigation of arbitral claims pending arbitration pursuant to the terms of the agreement, and must also compel arbitration upon motion of either party to the agreement.[12]

The Court further acknowledged the two goals of the FAA one being the enforcement of private agreements and the other being the efficient and speedy resolution, were both frustrated by the Concepcions.[13]

Thus, the Court reversed the Ninth Circuit ruling on three grounds. First, the switch from bilateral to class arbitration sacrifices the key advantages of arbitration and makes the process slower, more costly, and more likely to generate "procedural morass" than a final judgment.[14] Second, class arbitration requires procedural formality, which is inconsistent with an informal arbitration provision. If the arbitral procedures are informal, an absent class member would not be bound by the arbitration, especially since it would be difficult for an arbitrator to ensure that third parties' due process rights are protected.[15] Finally, class arbitration increases the risk for defendants as informal procedures do have a cost: errors would go uncorrected without the multilayered review.[16] While the Court acknowledged that class procedures may not necessarily be incompatible with arbitration, arbitration is a matter of contract and the FAA requires the courts to honor the expectations set forth therein. In this case, such expectations were not present in the Agreement between the Concepcions and AT&T.[17]

Therefore, the Court concluded that the *Discover Bank* decision was an obstacle to the "accomplishment and execution" of the FAA.[18]

4. *Decision*

The Court reversed the Ninth Circuit decision. It held that the California law, which regards class-action waivers in arbitration agreements unenforceable and unconscionable, is preempted by the FAA.

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[10] Decision ¶ 1748-1749.
[11] Decision ¶ 1748.
[12] *Id.*
[13] Decision ¶ 1749.
[14] Decision ¶ 1751.
[15] *Id.*
[16] Decision ¶ 1752-1753.
[17] *Id.*
[18] *Id.*

5. *Dissent*

(a) Consistent with the FAA

The dissent argued that the *Discover Bank* rule did not create a "blanket policy" in California against class action waivers in the consumer context, but rather represents the application of the more general unconscionability principle.[19] The dissent asserted that the courts applying California law have enforced class actions waivers only when the unconscionability standards were satisfied. Furthermore, the *Discover Bank* ruling was consistent with the FAA's language as it applied equally to class action litigation waivers found in contracts without arbitration agreements as it did to class action arbitration wavers in contracts with such agreements.[20]

(b) Consistent with the basic purpose of the FAA

The dissent argued that the *Discover Bank* ruling was consistent with the basic purpose behind the FAA. The dissent highlighted that Congress' objective in passing the FAA was to secure enforcement of agreements to arbitrate and that arbitration agreements are valid, irrevocable, and enforceable,[21] save "upon such grounds as exist at law or in equity for the revocation of any contract".

(c) Discover Bank is not obstacle to the FAA's objective

Finally, the dissent asserted that *Discover Bank* was not an obstacle to the accomplishment of the FAA's objective, nor did it discriminate (in practice) against arbitration. According to the dissent, *Discover Bank* did not increase the complexity of arbitration proceedings nor discourages parties from entering into arbitration agreements.[22]

The dissent argued that class arbitration is consistent with the use of arbitration, and nothing would contribute to the contrary idea argued by the majority.[23] Furthermore, the dissent noted that there is nothing to indicate, as the majority stated, that the *Discover Bank* rule will discourage arbitration, as the majority improperly compared the complexity of class arbitration with that of bilateral arbitration.[24] The dissent noted that the majority merely highlighted the disadvantages of class arbitrations as it saw them.

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[19] Decision ¶ 1756.
[20] Decision ¶ 1757.
[21] Decision ¶ 1758.
[22] *Id.*
[23] Decision ¶ 1759.
[24] *Id.*