LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, SEPTEMBER 10, 2019

PERSPECTIVE

Arbitration Wars: A report from the front

By Anthony J. Oncidi

Daily Journal photo

Justice Ming Chin's spirited dissent: 'Today, the majority holds that an arbitration agreement is substantively unconscionable — and therefore unenforceable — precisely because it prescribes procedures that, according to the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I.'

For better or worse, California obstinately continues to go its own way on the issue of workplace arbitration. Two recent developments — passage by the state Legislature of a bill that would outlaw arbitration and a confounding new opinion from the California Supreme Court — prove once again that the U.S. Supreme Court has much work left to do here in the Golden State.

Against the backdrop of these developments, of course, looms the Federal Arbitration Act, which was enacted in 1925 "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The *Concepcion* court recognized that this erstwhile hostility to arbitration "had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 406 (2d Cir. 1959)).

Although *Concepcion* and a handful of more recent opinions from the U.S. Supreme Court have sought, whack-a-mole style, to stamp out still more "devices and formulas" aimed at invalidating arbitration, California just keeps breeding moles.

On Sept. 5, the California Legislature passed Assembly Bill 51 and sent it to Gov. Gavin Newsom for his signature — he has not yet indicated whether he will sign it. Assembly Bill 51 would make it a criminal misdemeanor for a person to require an applicant or employee to "waive any right, forum or procedure" for a violation of the California Fair Employment and Housing Act or the Labor Code, including the right to file and pursue a civil action in court.

This is the third time in four years the California Legislature has attempted to outlaw arbitration in the workplace; Gov. Jerry Brown vetoed two previous measures, refusing as recently as last September to sign a law similar to Assembly Bill 51 because "this bill plainly violates federal law." (Gov. Brown's Message Returning AB 3080 without his Signature (Sept. 30, 2018)).

In the wake of the Me Too movement, the state of New York passed a law last year (New York Law, N.Y.C.P.L.R. Section 7515), which also was intended to prohibit "mandatory arbitration clauses." Section 7515 remained standing for all of 11 months before being struck down by a federal court on FAA preemption grounds. *See Latif v. Morgan Stanley & Co.*, 2019 WL 2610985 (S.D.N.Y. June 26, 2019). In short, it is not clear what California hopes to accomplish by enacting Assembly Bill 51 — other than to virtue signal its extreme distaste for arbitration.

So, what's really at stake in the Arbitration Wars? This dispute is somewhat reminiscent of the "Wars of Religion" that roiled Western Europe 400 years ago in that both sides claim to be fighting about one thing when in truth they're actually battling about something entirely different.

The plaintiffs bar claims it doesn't like arbitration for a dozen different reasons, chief among which are that the confidential nature of the proceeding allows bad actors to hide their misdeeds (easy solution: excise the confidentiality provision); arbitrators prefer employers because the arbitrator is hoping to get selected for the next case (this is a canard because both sides must consent to the arbitrator); and there's usually no right of appeal (this affects both sides equally).

On the other hand, the defense bar claims it likes arbitration because it's faster and cheaper than civil litigation (not really) and it's usually private so there's less dirty laundry airing that goes on (sometimes).

In reality, plaintiffs dislike arbitration (and employers prefer it) because juries tend to give employees much higher damage awards than does the typical, garden-variety arbitrator. Since plaintiffs' lawyers usually prosecute employment claims on a contingency-fee basis (taking

up to 50% of any settlement or judgment), no plaintiff's lawyer wants to be in front of some reasonable factfinder who is inclined to award lower average amounts than a riled-up jury might. In fact, many plaintiffs' lawyers will simply drop the case or the client once they find out about the arbitration agreement.

And one need not look much further than the headlines to see what juries in California are doing to employers with alarming regularity these days: $31 million to a dental supply company employee (who suffered only $5,000 in lost wages before getting another job); $15.4 million to a Los Angeles Times columnist (who was not even fired); $15.4 million to a 53-year-old Jack in the Box employee (who was called "grandma" by a coworker); $8 million to a Chipotle employee (who was believed to have stolen money); $13 million to a university oncologist (who was interrupted during meetings and called a "diva" and an "angry woman"); and $18.6 million to an Allstate employee (who was terminated after being arrested for domestic violence).

To top it all off, the California Supreme Court has just added another piece to the puzzle palace that is arbitration jurisprudence in this state with its recent opinion in *OTO, LLC v. Kho*, 2019 DJDAR 8320 (Aug. 29, 2019). In order to best understand the court's opinion, it's advisable to start with Justice Ming Chin's spirited dissent: "Today, the majority holds that an arbitration agreement is substantively unconscionable — and therefore unenforceable — precisely because it prescribes procedures that, according to the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I" (citations omitted).

In short, the majority of the court invalidated an arbitration agreement because it incorporated too many of the "intricacies of civil litigation" — even while recognizing that in the past the court had struck down arbitration agreements because they had incorporated too few such "intricacies." *See Armendariz v. Foundation Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000).

Missing from this analysis, of course, is the answer to the following vital question: What's a California employer supposed to do now? One cannot read *OTO* and come away with a clear understanding of how an employer can be sure it has drafted the perfect "Goldilocks" arbitration agreement that is neither too much like civil litigation nor too dissimilar from it so that it's just "litigation-y" enough to meet the court's fastidious standards.

There is no question what the U.S. Supreme Court will do with *OTO* if it can find the time to correct yet another fine mess in this area. After all, the California Supreme Court has at least twice before gotten FAA preemption wrong according to the U.S. Supreme Court in *Concepcion*, abrogating *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and *Sonic-Calabasas A Inc. v. Moreno*, 565 U.S. 973, vacating 51 Cal. 4th 659 (2011).

Perhaps the U.S. Supreme Court will finally come to recognize that with approximately 12% of the U.S. population and almost 15% of the nation's GDP, California deserves at least a proportionate share of the high court's docket!

Anthony J. Oncidi *is a partner in and the chair of the West Coast Labor and Employment Department of Proskauer Rose LLP in Los Angeles. His email address is aoncidi@proskauer.com.*