PUBLIC POLICY EXCEPTIONS IN JUDICIAL REVIEW OF INTERSTATE ARBITRATION AWARDS: "THEIR ROLE AND IMPACT"

- Kumari Neha* & Dr. Suneel Kumar**

Abstract

The public policy exception as a ground for judicial intervention in interstate arbitration awards. While the Federal Arbitration Act (FAA) establishes a strong presumption in favour of arbitral finality, courts retain limited review powers when awards potentially violate fundamental public policy principles. This creates a delicate balance between respecting arbitration's autonomy and protecting essential societal values. The article analyzes the legal foundations of the exception, its particularly complex application in interstate commercial disputes, the categories of public policy that may justify vacatur, circuit splits on its interpretation, and recent judicial trends. It concludes that courts have increasingly narrowed the exception's scope, reflecting the federal policy favouring arbitration in interstate commerce, while preserving it as a crucial safeguard against awards that would undermine core legal principles or require illegal conduct.

Keywords: *Public Policy, Judicial Review, Arbitration, ADR, ODR.*

* LL.M. Student @ ICFAI University, Dehradun
** Asst. Professor @ ICFAI University, Dehradun

INTRODUCTION

Interstate commerce forms the backbone of economic activity in federal systems worldwide, with the United States serving as a prominent example where trade across state lines constitutes a substantial portion of national economic output.[1] When disputes arise in these interstate commercial relationships, arbitration has emerged as a preferred mechanism for resolution, offering parties greater flexibility, efficiency, and control compared to traditional litigation.[2] However, the intersection of state laws, federal regulations, and judicial interpretations creates a complex legal landscape that continues to evolve through judicial pronouncements.[3]

The constitutional dimensions of interstate trade arbitration present unique challenges, as courts must balance state sovereignty with federal interests in maintaining a unified commercial system.[4] The Commerce Clause, coupled with federal legislation like the Federal Arbitration Act (FAA), establishes a framework that has been continuously refined through judicial interpretation.[5] This ongoing process reflects broader tensions in federalism and raises fundamental questions about the appropriate allocation of authority between state and federal judiciaries in commercial dispute resolution.[6]

This article critically examines how courts have navigated these complexities, highlighting landmark decisions that have shaped the contemporary understanding of arbitration in interstate trade disputes.[7] It analyses the reasoning behind pivotal judicial pronouncements,[8] their practical implications for businesses engaged in interstate commerce,[9] and the theoretical underpinnings that inform judicial approaches to arbitration enforcement and

[1] U.S. Const. art. I, sec. 8, cl. 3; *See also, Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824).
[2] Federal Arbitration Act, 9 U.S.C. sec. 1-16 (2012).
[3] *Southland Corp*. v. *Keating*, 465 U.S. 1, 10 (1984) (recognizing federal pre-emption of state laws that conflict with the FAA).
[4] *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (discussing state sovereignty within the federal system).
[5] *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (reinforcing the FAA's role in pre-empting conflicting state laws).
[6] *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasizing the federal interest in maintaining a consistent arbitration framework).
[7] *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 476 (1989) (discussing the balance between state autonomy and federal arbitration policy).
[8] *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985) (establishing the enforceability of arbitration clauses in international commercial contracts).
[9] *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (upholding arbitration agreements under the FAA despite conflicting state laws).

interpretation.[10]

HISTORICAL DEVELOPMENT OF ARBITRATION IN INTERSTATE TRADE

Early Scepticism and Judicial Hostility

The history of arbitration in interstate trade disputes reveals a remarkable transformation in judicial attitudes. During the early nineteenth century, courts in most jurisdictions exhibited significant hostility toward arbitration agreements, viewing them as improper attempts to "oust the courts of jurisdiction."[11] This scepticism was rooted in traditional common law principles that prioritized judicial authority and viewed private dispute resolution mechanisms with suspicion.[12] In the 1874 case of *Insurance Co.* v. *Morse***,** the Supreme Court reinforced this position, declaring that agreements to arbitrate future disputes were unenforceable as contrary to public policy.[13]

This judicial hostility created substantial barriers to the development of arbitration as a viable mechanism for resolving interstate trade disputes. Businesses operating across state lines faced uncertainty regarding the enforceability of arbitration provisions, with courts frequently refusing to compel arbitration even when parties had expressly agreed to such procedures in their contracts.[14] The resulting inconsistency in enforcement significantly undermined the utility of arbitration as a predictable dispute resolution tool in interstate commerce.[15]

The Federal Arbitration Act: A Paradigm Shift

The passage of the Federal Arbitration Act (FAA) in 1925 marked a watershed moment in the evolution of arbitration law in the United States.[16] Enacted primarily to overcome judicial

[10] *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (introducing the separability doctrine in arbitration agreements).
[11] *Home Ins. Co.* v. *Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (expressing judicial disapproval of arbitration agreements that attempted to exclude court jurisdiction).
[12] David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33, 39 (1997) (discussing common law hostility toward arbitration).
[13] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120–121 (1924) (acknowledging the general reluctance to enforce arbitration agreements).
[14] Katherine Van Wezel Stone, Rustic Justice: Community and Coercion under the Federal Arbitration Act, 77 N.C. L. REV. 931, 934 (1999) (analysing the limitations on arbitration enforcement before the FAA).
[15] *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985) (stating that the FAA's purpose was to place arbitration agreements on equal footing with other contracts).
[16] *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a strong federal policy favouring arbitration).

hostility and place arbitration agreements "upon the same footing as other contracts,"[17] the FAA established a federal policy favouring arbitration.[18] Section 2 of the Act provided that written provisions for arbitration in "any maritime transaction or a contract evidencing a transaction involving commerce" would be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[19]

While the immediate impact of the FAA was limited, its significance grew exponentially in subsequent decades as courts gradually embraced its pro-arbitration mandate.[20] The Act's application to interstate trade disputes became increasingly pronounced, establishing a foundation for the expansion of arbitration as a primary method for resolving commercial conflicts across state lines.[21] This legislative intervention initiated a fundamental reconceptualization of arbitration's role in the American legal system, particularly for disputes falling within the purview of interstate commerce.[22]

Modern Expansion Under the Supreme Court

The transformative potential of the FAA was not fully realized until the latter half of the twentieth century, when the Supreme Court began to interpret the Act more expansively.[23] In a series of landmark decisions beginning in the 1980s, the Court established the FAA's pre-emptive effect over state laws that restricted arbitration, significantly broadening the statute's reach and impact on interstate trade disputes.[24]

The 1984 decision in *Southland Corp.* v. *Keating* represented a pivotal moment in this jurisprudential evolution.[25] The Court held that the FAA created substantive federal law applicable in both state and federal courts, effectively pre-empting state laws that disfavoured

[17] *Supra* note 3 (expanding the application of the FAA to state courts).
[18] *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (holding that the FAA applies to contracts involving interstate commerce).
[19] David Horton, Federal Arbitration Act Pre-emption, Purposivism, and State Public Policy, 101 GEO. L.J. 1217, 1220 (2013) (discussing the evolution of arbitration's role post-FAA).
[20] Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 123–125 (1992) (discussing the gradual expansion of the FAA's scope through Supreme Court interpretation).
[21] *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (holding that state rules singling out arbitration agreements for special scrutiny are pre-empted by the FAA).
[22] *Cipollone* v. *Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) (discussing express pre-emption).
[23] *Arizona* v. *United States*, 567 U.S. 387, 399 (2012) (explaining field pre-emption).
[24] *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142–143 (1963) (explaining conflict pre-emption).
[25] *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) (noting that the FAA pre-empts state laws that interfere with arbitration agreements).

arbitration.[26] This pronouncement fundamentally altered the legal landscape for interstate arbitration by establishing federal supremacy in this domain and limiting states' ability to regulate arbitration agreements within their borders.[27]

Subsequent decisions further expanded the FAA's scope and reinforced its pre-emptive effect. In *Perry* v. *Thomas*, the Court invalidated a California statute that exempted wage collection actions from arbitration.[28] Later, in *Allied-Bruce Terminix Cos.* v. *Dobson*, the Court adopted an expansive interpretation of the FAA's "involving commerce" language, holding that it extended federal arbitration law to the full reach of Congress's Commerce Clause authority.[29] These pronouncements collectively established a robust federal framework that significantly favoured arbitration in interstate trade disputes, often at the expense of state regulatory authority.[30]

THE FEDERAL PRE-EMPTION DOCTRINE IN ARBITRATION

Theoretical Foundations of Pre-Emption

The doctrine of federal pre-emption serves as the cornerstone of modern arbitration jurisprudence in interstate trade disputes.[31] Derived from the Supremacy Clause of the U.S. Constitution,[32] pre-emption occurs when federal law displaces state law that would otherwise apply to a particular issue or dispute. In the context of arbitration, pre-emption analysis typically focuses on whether and to what extent the FAA supplants state laws that regulate arbitration agreements.[33]

Courts have recognized three primary forms of pre-emption: express pre-emption, where federal law explicitly states its intent to displace state law;[34] field pre-emption, where federal

[26] Erwin Chemerinsky, Empowering States or Undermining Federalism? The Case for Limiting Federal Pre-emption, 92 B.U. L. REV. 1, 5 (2012) (discussing the federalism implications of pre-emption doctrine).
[27] David S. Schwartz, The Federal Arbitration Act and the Power of Congress over State Courts, 83 OR. L. REV. 541, 552 (2004) (arguing that uniformity in arbitration law promotes commercial stability).
[28] *Supra* note 6
[29] *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68 (2010) (acknowledging the preservation of general contract defense under the savings clause).
[30] *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).
[31] *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010).
[32] Brian T. Fitzpatrick, The End of Class Actions? 57 ARIZ. L. REV. 161, 169 (2015).
[33] Christopher R. Drahozal & Peter B. Rutledge, Contract and Procedure, 94 MARQ. L. REV. 1103, 1121 (2011).
[34] *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020) (discussing equitable estoppel and non-signatory enforcement).

regulation is so pervasive that it leaves no room for state supplementation;[35] and conflict pre-emption, where compliance with both federal and state law is impossible or where state law stands as an obstacle to accomplishing congressional objectives.[36] In arbitration cases, conflict pre-emption has emerged as the dominant analytical framework, with courts frequently finding that state laws restricting arbitration frustrate the FAA's purpose of placing arbitration agreements on equal footing with other contracts.[37]

The theoretical underpinnings of pre-emption in arbitration reflect broader tensions in federalism.[38] Proponents of expansive pre-emption emphasize the need for uniformity in interstate commerce and argue that allowing states to regulate arbitration differently would create inefficiencies and uncertainty for businesses operating across state lines.[39] Critics counter that aggressive pre-emption undermines state sovereignty and displaces important consumer protection and employment laws without clear congressional authorization.[40]

Landmark pre-emption Cases and their Impact

The Supreme Court's pre-emption jurisprudence in arbitration has evolved significantly over time, generally trending toward broader federal authority and correspondingly narrower state regulatory power.[41] The 1984 decision in *Southland Corp.* v. *Keating* established the foundation for FAA pre-emption by holding that the statute applied in state courts and pre-empted conflicting state law.[42] Justice O'Connor's influential dissent, which argued that Congress intended the FAA to be a procedural statute applicable only in federal courts, highlighted the contentious nature of this interpretive move but failed to persuade the majority.[43]

In *Doctor's Associates, Inc.* v. *Casarotto*, the Court further expanded pre-emption by striking down a Montana law requiring arbitration clauses to be typed in capital letters on the first

[35] *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 543 (2019).
[36] *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022).
[37] Ethan Katsh & Colin Rule, What We Know and Need to Know about Online Dispute Resolution, 67 S.C. L. REV. 329, 335 (2016).
[38] Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. REV. 949, 961 (2000).
[39] *Supra* note 27 at 552.
[40] Katherine Van Wezel Stone, "Rustic Justice: Community and Coercion under the Federal Arbitration Act" (1999) 77 NC L Rev 931, 945.
[41] *Supra* note 16
[42] *Supra* note 3
[43] *Ibid* at 21 (O'Connor, J., dissenting).

page of a contract.[44] The Court reasoned that by singling out arbitration provisions for special treatment, the state law contravened the FAA's equal-footing principle.[45] This decision significantly limited states' ability to regulate even the form and notice requirements of arbitration agreements in interstate transactions.

More recently, in *AT&T Mobility LLC* v. *Concepcion* the Court invalidated a California judicial rule that deemed class action waivers in consumer arbitration agreements unconscionable.[46] Justice Scalia's majority opinion concluded that requiring the availability of class wide arbitration interfered with the fundamental attributes of arbitration and therefore conflicted with the FAA's objectives.[47] This controversial 5-4 decision substantially expanded pre-emption by suggesting that even generally applicable state law doctrines like unconscionability could be pre-empted if applied in ways that disproportionately affect arbitration agreements.[48]

The practical impact of these pre-emption cases has been profound. Businesses engaged in interstate commerce increasingly rely on arbitration provisions to manage risk and standardize dispute resolution across multiple jurisdictions.[49] States, meanwhile, face significant constraints in their ability to regulate arbitration even when motivated by legitimate consumer protection or public policy concerns.[50] This shift in power has transformed the landscape of interstate trade disputes, with arbitration increasingly becoming the default forum for resolution.[51]

The Savings Clause and Its Limitations

Section 2 of the FAA contains a critical qualification known as the "savings clause," which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[52] This provision theoretically preserves state law defense that apply to contracts generally, such as fraud, duress, or unconscionability,

[44] *Doctor's Associates Inc* v. *Casarotto*, 517 US 681, 687 (1996).
[45] *Ibid* at 688
[46] *Supra* note 5
[47] *Supra* note 5 at 348
[48] *Supra* note 5 at 352
[49] Richard Frankel, "The Arbitration Clause as Super Contract" (2014) 91 Wash U L Rev 531, 534.
[50] Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Wash U LQ 637, 644.
[51] *Supra* note 19 at 1225
[52] Federal Arbitration Act, 9 USC, sec. 2 (2012)

suggesting a boundary to federal pre-emption in arbitration.[53]

However, judicial interpretations have progressively narrowed the practical significance of the savings clause. In Concepcion, the Court held that even facially neutral state law doctrines are pre-empted if they disproportionately impact arbitration agreements or interfere with fundamental attributes of arbitration.[54] This approach was further extended in *Epic Systems Corp.* v. *Lewis*, where the Court rejected the argument that the National Labor Relations Act created a statutory exception to the FAA for collective action waivers in employment agreements.[55]

The progressive constriction of the savings clause illustrates a significant trend in judicial pronouncements on arbitration: the prioritization of a national, uniform policy favouring arbitration over potentially competing state interests.[56] While the savings clause continues to provide some protection for traditional contract defense, its application has been increasingly circumscribed by federal courts reluctant to allow state law to impede the enforcement of arbitration agreements in interstate trade.[57]

JUDICIAL TREATMENT OF SPECIFIC ARBITRATION ISSUES

Scope and Interpretation of Arbitration Agreements

Courts have developed specialized interpretive approaches for determining the scope of arbitration agreements in interstate trade disputes.[58] A central principle, reiterated in numerous judicial pronouncements, is that "any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration."[59] This presumption, articulated in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, reflects the federal policy favouring arbitration and has profound implications for how courts analyze arbitration

[53] *Supra* note 29
[54] *Supra* note 5
[55] *Supra* note 9
[56] Myriam Gilles, "The Day Doctrine Died: Private Arbitration and the End of Law" (2016) U Ill L Rev 371, 380.
[57] Peter B. Rutledge, "The FAA, Arbitration, and State Pre-emption: A Call for Federal Judicial Restraint" (2002) 23 Berkeley J Emp & Lab L 245, 249.
[58] Thomas E. Carbonneau, "Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform" (1990) 5 Ohio St J Dips Resol 231, 237.
[59] *Supra* note 16

clauses in commercial contracts.[60]

The judicial approach to interpretation has typically focused on the text of the agreement, with particular attention to whether the parties used broad or narrow language to define arbitrable disputes.[61] Courts generally treat phrases like "arising out of or relating to" as indicative of a broad arbitration provision that encompasses not only direct contractual claims but also related statutory and tort claims.[62] Conversely, more restricted language such as "arising under" may be interpreted to limit arbitration to disputes directly involving the contract's terms.[63]

This textual focus is complemented by the separability doctrine, established in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, which treats arbitration clauses as separable from the underlying contract.[64] Under this approach, challenges to the validity of the contract as a whole are determined by the arbitrator, while challenges specifically directed at the arbitration provision itself remain within the court's jurisdiction.[65] This distinction significantly influences how courts allocate decision-making authority between themselves and arbitrators in interstate trade disputes.[66]

Arbitrability: Who Decides?

A recurring question in arbitration jurisprudence concerns who should determine whether a particular dispute is subject to arbitration-courts or arbitrators.[67] The traditional approach, reflected in *AT&T Technologies, Inc.* v. *Communications Workers of America*, established that arbitrability is "undeniably an issue for judicial determination" unless the parties clearly and unmistakably provide otherwise.[68] This position respected the fundamental principle that parties cannot be forced to arbitrate issues they have not agreed to arbitrate.[69]

However, subsequent judicial pronouncements have progressively expanded the

[60] *Ibid* at 24.
[61] David Horton, "The Federal Arbitration Act and Testamentary Instruments" (2012) 90 NC L Rev 1027, 1036.
[62] *PacifiCare Health Systems Inc* v. *Book*, 538 US 401, 406-07 (2003).
[63] *Cape Flattery Ltd* v. *Titan Maritime LLC*, 647 F3d 914, 922 (9th Cir 2011).
[64] Supra note 10
[65] *Ibid* at 404.
[66] *Buckeye Check Cashing Inc* v. *Cardegna*, 546 US 440, 445-46 (2006).
[67] *AT&T Technologies Inc* v. *Communications Workers of America*, 475 US 643, 649 (1986).
[68] *First Options of Chicago Inc* v. *Kaplan*, 514 US 938, 944 (1995).
[69] *Supra* note 29

circumstances under which arbitrators, rather than courts, decide arbitrability questions.[70] In First Options of *Chicago, Inc.* v. *Kaplan*, the Supreme Court confirmed that parties could delegate arbitrability determinations to arbitrators through clear and unmistakable agreement.[71] Later, in *Rent-A-Center, West, Inc.* v. *Jackson,* the Court extended this principle by enforcing a provision that specifically delegated to the arbitrator the authority to resolve challenges to the enforceability of the arbitration agreement itself.[72]

Most recently, in *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, the Court rejected the "wholly groundless" exception that some lower courts had applied to delegation provisions.[73] This unanimous decision established that when a contract delegates arbitrability questions to an arbitrator, courts must respect that delegation even if they believe the argument for arbitration is wholly groundless.[74] These pronouncements collectively demonstrate a judicial willingness to enforce delegation clauses in interstate trade agreements, further expanding the role of arbitrators in determining the parameters of their own jurisdiction.[75]

Class Arbitration: A Contested Terrain

Class arbitration-the aggregation of multiple similar claims within an arbitration proceeding-has emerged as one of the most contentious areas in arbitration jurisprudence.[76] The Supreme Court's pronouncements on this issue have significantly impacted how courts handle class claims in interstate trade disputes, generally restricting the availability of class procedures in arbitration.[77]

In *Stolt-Nielsen S.A.* v. *Animal Feeds International Corp.*, the Court held that a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.[78] Silence in the agreement regarding class proceedings was

[70] *Supra* note 30
[71] *Stolt-Nielsen SA* v. *Animal Feeds International Corp*, 559 US 662, 684 (2010).
[72] *Supra* note 5
[73] *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 162 (2005), overruled by *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).
[74] *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA LLC*, 140 S Ct 1637, 1644 (2020).
[75] Thomas J Stipanowich, 'The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion, and the Future of American Arbitration' (2011) 22 Am Rev Int'l Arb 323, 328.
[76] Jean R Stern light, 'As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?' (2000) 42 Wm & Mary L Rev 1, 5.
[77] Richard Frankel, 'The Arbitration Clause as Super Contract' (2014) 91 Wash U L Rev 531, 544.
[78] Brian T Fitzpatrick, 'The End of Class Actions?' (2015) 57 Ariz L Rev 161, 169.

deemed insufficient to infer consent.[79] This decision marked a departure from previous practice where arbitrators had sometimes permitted class arbitration based on broadly worded arbitration clauses.[80]

The Court's subsequent decision in *AT&T Mobility LLC* v. *Concepcion* went further by pre-empting a California rule that classified most class action waivers in consumer contracts as unconscionable.[81] Justice Scalia's majority opinion characterized class arbitration as inconsistent with the fundamental attributes of arbitration contemplated by the FAA, emphasizing that the switch from bilateral to class arbitration sacrifices the informality, speed, and cost-effectiveness that are arbitration's principal advantages.[82]

These judicial pronouncements have had profound implications for interstate trade disputes, effectively enabling businesses to insulate themselves from class proceedings through carefully drafted arbitration provisions.[83] Critics argue that this approach undermines the effective vindication of small-value claims and allows companies to evade accountability for widespread but individually minor harms.[84] Defenders counter that it preserves the essential character of arbitration as a streamlined, consent-based alternative to litigation.[85]

STATE COURTS AND THE INTERPRETATION OF THE FAA

Resistance and Accommodation

State courts have exhibited varying degrees of resistance and accommodation to the Supreme Court's expansive interpretation of the FAA.[86] Some state judiciaries have openly questioned the doctrinal foundations of FAA pre-emption while nevertheless reluctantly applying binding precedent.[87] The California Supreme Court's decision in **Discover Bank v. Superior**

[79] Myriam Gilles, 'The Day Doctrine Died: Private Arbitration and the End of Law' (2016) U Ill L Rev 371, 381.
[80] Christopher R Drahozal & Peter B Rutledge, 'Contract and Procedure' (2011) 94 Marq L Rev 1103, 1121.
[81] Sarah Rudolph Cole, 'Arbitration and State Action' (2005) J Dips Resol 1, 5.
[82] *Ibid* at 348.
[83] Brian T. Fitzpatrick, "The End of Class Actions?" (2015) 57 Arizona Law Review 161, 169.
[84] Myriam Gilles, "The Day Doctrine Died: Private Arbitration and the End of Law" (2016) University of Illinois Law Review 371, 381.
[85] Christopher R. Drahozal & Peter B. Rutledge, "Contract and Procedure" (2011) 94 Marquette Law Review 1103, 1121.
[86] Sarah Rudolph Cole, "Arbitration and State Action" (2005) Journal of Dispute Resolution 1, 5 (discussing state court resistance to FAA pre-emption).
[87] David S. Schwartz, "State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law" (2004) 16 Washington University Journal of Law & Policy 129, 141.

Court (2005), later overruled by Concepcion, exemplified this resistance by attempting to preserve state unconscionability doctrine in the face of federal pre-emption claims.[88]

Other state courts have sought to carve out exceptions or limit the scope of federal pre-emption through creative statutory interpretation.[89] For instance, some state courts have interpreted the FAA's "involving commerce" requirement narrowly to preserve state regulation of purely local transactions.[90] Others have expansively construed the savings clause to accommodate state public policy concerns within the federal framework.[91]

These strategies reflect an ongoing tension between state sovereignty and federal supremacy in the regulation of arbitration agreements.[92] While state courts must ultimately yield to binding Supreme Court precedent, their interpretive approaches reveal a complex interplay between federal mandates and local policy preferences.[93] This dynamic continues to shape the practical implementation of arbitration principles in interstate trade disputes.[94]

Substantive and Procedural Differences Across Jurisdictions

Despite the federalization of arbitration law through expansive pre-emption, significant substantive and procedural differences persist across state jurisdictions.[95] These variations influence how arbitration agreements in interstate trade are interpreted and enforced, creating complexity for businesses operating in multiple states.[96]

Substantively, states differ in their application of general contract principles to arbitration

[88] *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 162 (2005), overruled by *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).
[89] Michael H. LeRoy, "Judicial Enforcement of Pre-Dispute Arbitration Agreements: Back to the Future" (2007) 58 Alabama Law Review 537, 548.
[90] Jonathan R. Waldron, "The 'Involving Commerce' Requirement of the Federal Arbitration Act" (2008) 21 Loyola Consumer Law Review 29, 35.
[91] Christopher R. Drahozal, "Federal Arbitration Act Pre-emption" (2004) 79 Indiana Law Journal 393, 414 (exploring state efforts to utilize the savings clause).
[92] Stephen J. Ware, "The Centrist Case for Enforcing Adhesive Arbitration Agreements" (2017) 23 Harvard Negotiation Law Review 29, 44.
[93] Thomas E. Carbonneau, "Arbitration and Federalism: The Role of State Law" (1997) 65 University of Cincinnati Law Review 873, 879.
[94] Peter B. Rutledge, "Arbitration and the Federal Balance" (2010) Journal of Dispute Resolution 1, 12.
[95] Thomas E. Carbonneau, "Federalism and the Federal Arbitration Act: A Policymaker's Guide" (2005) 79 Tulane Law Review 1227, 1230.
[96] Richard C. Reuben, "State Courts and the Federalization of Arbitration Law" (2006) 33 Pepperdine Law Review 647, 650.

agreements.[97] Some jurisdictions apply unconscionability doctrine more aggressively than others, particularly in consumer and employment contexts.[98] States also vary in their treatment of no signatories to arbitration agreements, with some more readily extending arbitration obligations to corporate affiliates or beneficiaries under theories like equitable estoppel or third-party beneficiary status.[99]

Procedurally, state courts exhibit different approaches to staying litigation pending arbitration, compelling arbitration, and reviewing arbitral awards.[100] Some states have adopted specialized procedures for arbitration-related motions, while others handle them under general civil procedure rules.[101] These procedural variations can significantly impact the efficiency and predictability of arbitration enforcement in interstate disputes.

The persistence of these differences underscores the limits of federal pre-emption and highlights the continuing relevance of state law in the arbitration landscape.[102] While the FAA establishes a national policy favouring arbitration, the practical implementation of this policy remains influenced by state-specific legal traditions and policy preferences.[103]

CONTEMPORARY TRENDS AND EMERGING ISSUES

The Impact of Recent Supreme Court Decisions

Recent Supreme Court pronouncements continue to reshape the landscape of arbitration in interstate trade disputes.[104] The Court's decision in *Epic Systems Corp.* v. *Lewis*, reinforced the FAA's primacy by holding that neither the savings clause nor the National Labor Relations Act protected collective action waivers in employment arbitration agreements from enforcement.[105] This 5-4 decision, which split along ideological lines, illustrated the continuing controversy surrounding federal arbitration jurisprudence.

[97] Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Washington University Law Quarterly 637, 653.
[98] David Horton, "Unconscionability Wars" (2012) 106 Northwestern University Law Review 387, 394.
[99] GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1644 (2020) (discussing equitable estoppel and non-signatory enforcement).
[100] Stephen J. Ware, "Vacating Arbitration Awards: A National Survey of State Laws" (1995) 23 Hofstra Law Review 463, 470.
[101] Christopher R. Drahozal, "Federal Arbitration Act Pre-emption" (2004) 79 Indiana Law Journal 393, 411.
[102] *Supra* note 27 at 555
[103] Sarah Rudolph Cole & Kristen M. Blankley, "Arbitration and Federalism: The Return of the Anti-Arbitration Doctrine" (2010) Journal of Dispute Resolution 1, 8.
[104] Thomas V. Burch, "Regulating Mandatory Arbitration" (2019) Wisconsin Law Review 1, 3.
[105] *Supra* note 9

In *New Prime Inc.* v. *Oliveira*, however, the Court unanimously adopted a more textually constrained approach to the FAA, holding that the statute's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applied to independent contractor agreements with transportation workers.[106] This decision signalled potential limits to the expansive application of the FAA, at least for certain categories of workers involved in interstate trade.

Most recently, in *Morgan* v. *Sundance Inc.*, the Court unanimously rejected a waiver test that required a showing of prejudice, emphasizing that courts should not create arbitration-specific procedural rules.[107] This decision potentially marks a modest retreat from the Court's previously expansive approach to favouring arbitration, suggesting a more balanced application of traditional legal principles to arbitration agreements.

These recent pronouncements reflect a complex and evolving judicial attitude toward arbitration in interstate trade disputes.[108] While the Court continues to enforce arbitration agreements in accordance with their terms, there are signs of increased attention to textual limits and a willingness to apply traditional legal principles without special solicitude for arbitration.

Technology and Online Dispute Resolution

The rise of digital commerce has introduced new dimensions to arbitration in interstate trade disputes.[109] Online dispute resolution (ODR) platforms increasingly supplement or replace traditional arbitration procedures, offering technological solutions to resolve conflicts arising from interstate e-commerce.[110] These developments raise novel questions about the application of existing arbitration jurisprudence to digital contexts.

Judicial pronouncements on ODR remain limited, but emerging cases suggest courts will generally enforce online arbitration agreements while scrutinizing their formation and

[106] *Supra* note 35
[107] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712 (2022).
[108] Imre S. Szalai, "The Supreme Court's New Arbitration Trilogy: Epic Systems, New Prime, and Henry Schein" (2019) 13 Harvard Law & Policy Review 321, 323.
[109] Amy J. Schmitz, "Expanding Access to Remedies through E-Court Initiatives" (2019) 67 Buffalo Law Review 89, 91.
[110] Ethan Katsh & Colin Rule, "What We Know and Need to Know about Online Dispute Resolution" (2016) 67 South Carolina Law Review 329, 335.

presentation.[111] Issues of notice and mutual assent have proven particularly salient, with courts examining whether online terms and conditions adequately disclosed arbitration provisions to consumers.[112] The "clickwrap" versus "browse wrap" distinction has emerged as an important analytical framework, with courts generally enforcing the former while subjecting the latter to greater scrutiny.[113]

The integration of artificial intelligence into arbitration processes presents additional challenges for judicial oversight.[114] Questions about algorithmic transparency, procedural fairness, and the preservation of human judgment in decision-making will likely generate new judicial pronouncements as these technologies become more prevalent in resolving interstate trade disputes.[115]

Arbitration and Constitutional Rights

The intersection of arbitration and constitutional rights continues to generate significant judicial discourse.[116] Critics argue that mandatory arbitration may effectively deprive parties of constitutional protections such as the right to a jury trial, due process guarantees, and equal protection.[117] These concerns are particularly acute in contexts involving power imbalances, such as consumer and employment relationships that cross state lines.[118]

Courts have generally rejected constitutional challenges to arbitration agreements in private commercial disputes, holding that state action is absent when private parties agree to arbitrate.[119] However, some judicial pronouncements suggest potential constitutional limits on arbitration enforcement.[120] In *Rent-A-Center, West, Inc.* v. *Jackson*, Justice Stevens' dissent argued that questions of consent to arbitration implicate fundamental due process

[111] Mark A. Lemley, "Terms of Use" (2006) 91 Minnesota Law Review 459, 469.
[112] *Nguyen* v. *Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).
[113] *Specht* v. *Netscape Communications Corp.*, 306 F.3d 17, 22 (2d Cir. 2002).
[114] Thomas Schultz, "Online Dispute Resolution: The Future of Justice" (2011) 52 Harvard International Law Journal 257, 265.
[115] Orna Rabinovich-Einy & Ethan Katsh, "Digital Justice: Technology and the Internet of Disputes" (2019) 34 Ohio State Journal on Dispute Resolution 611, 614.
[116] David S. Schwartz, "Mandatory Arbitration and Fairness" (2009) 84 Notre Dame Law Review 1247, 1250.
[117] Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 961.
[118] *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).
[119] Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 590.
[120] *Supra* note 29 (Stevens, J., dissenting).

concerns that courts should not delegate to arbitrators.[121]

More recently, some lower courts have shown increased sensitivity to procedural fairness concerns in arbitration, particularly where fundamental rights are at stake.[122] This emerging judicial attention to constitutional values in arbitration contexts may signal a subtle shift toward greater scrutiny of arbitration agreements that potentially compromise core legal protections, even in interstate commercial relationships.[123]

BALANCING FEDERAL UNIFORMITY AND STATE AUTONOMY

Federalism Concerns in Arbitration Jurisprudence

The tension between federal uniformity and state autonomy represents a central theme in judicial pronouncements on arbitration.[124] The Supreme Court's expansive interpretation of the FAA has significantly restricted states' ability to regulate arbitration agreements in interstate trade, raising fundamental questions about the appropriate balance of power in a federal system.[125]

Critics of the Court's approach, including some state courts and dissenting justices, argue that it unduly infringes on state sovereignty without clear congressional authorization.[126] Justice O'Connor's dissent in Southland characterized the majority's interpretation as "unfaithful to congressional intent, unnecessary, and inexplicable."[127] Similarly, Justice Thomas has consistently maintained that the FAA does not apply in state courts and should not pre-empt state law.[128]

Defenders of federal pre-emption counter that national uniformity in arbitration enforcement is essential for interstate commerce.[129] They argue that allowing states to impose varying

[121] *American Express Co.* v. *Italian Colours Restaurant*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).
[122] Jean R. Stern light, "Rethinking the Constitutionality of Mandatory Arbitration" (2003) 32 Hofstra Law Review 109, 113.
[123] David S. Schwartz, "Mandatory Arbitration and Fairness" (2009) 84 Notre Dame Law Review 1247, 1250.
[124] Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 961.
[125] Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 961.
[126] Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 590.
[127] *Supra* note 3 (O'Connor, J., dissenting).
[128] *Supra* note 18 (Thomas, J., dissenting).
[129] Stephen J. Ware, "The Politics of Arbitration Law and Centrist Proposals for Reform" (2016) 53 Harvard Journal on Legislation 711, 720.

restrictions on arbitration would undermine the efficiency and predictability that make arbitration valuable for businesses operating across state lines.[130] This perspective prioritizes the needs of the national market over state regulatory autonomy.

This fundamental tension continues to animate judicial discourse on arbitration, with courts struggling to articulate a coherent theory of federalism that accommodates both national commercial interests and legitimate state concerns.[131] The resulting jurisprudence reflects an uneasy compromise that tilts heavily toward federal supremacy while acknowledging limited spaces for state regulation.

Proposals for Reform and Rebalancing

Various stakeholders have proposed reforms to rebalance federal and state authority in arbitration regulation.[132] Academic commentators have suggested narrowing the scope of FAA pre-emption to better respect state sovereignty, particularly in areas of traditional state concern like consumer protection and employment.[133] Others have advocated for congressional intervention to clarify the FAA's reach and explicitly preserve greater state regulatory authority.[134]

Some proposals focus on procedural reforms, such as enhanced disclosure requirements for arbitration agreements or prohibitions on types of provisions deemed unfair.[135] Others call for substantive limitations on arbitrable issues, particularly where fundamental rights or public interests are at stake.[136] These approaches seek to preserve the benefits of arbitration while addressing concerns about fairness and access to justice.

Judicial pronouncements have occasionally acknowledged the need for recalibration. Justice Ginsburg's dissent in Epic Systems called for congressional attention to the Court's "exorbitant application of the FAA," suggesting that legislative intervention might be

[130] *Supra* note 16
[131] Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Washington University Law Quarterly 637, 643.
[132] *Supra* note 123 at 1262.
[133] Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 984.
[134] Stephen J. Ware, "The Politics of Arbitration Law and Centrist Proposals for Reform" (2016) 53 Harvard Journal on Legislation 711, 734.
[135] Jean R. Stern light, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80 Brooklyn Law Review 1309, 1333.
[136] Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 606.

necessary to restore an appropriate balance.[137] Even some majority opinions have recognized potential limits to federal pre-emption, particularly where arbitration threatens to undermine the effective vindication of federal statutory rights.[138]

These reform discussions reflect ongoing efforts to reconcile competing values in arbitration jurisprudence. While no consensus has emerged, the persistent calls for rebalancing suggest that the current allocation of authority between federal and state institutions remains contested and potentially unstable.

CONCLUSION

Judicial pronouncements on arbitration in interstate trade disputes have fundamentally transformed the legal landscape, establishing a robust federal framework that generally Favors arbitration enforcement while limiting state regulatory authority.[139] This jurisprudential evolution reflects broader tensions in federalism and raises important questions about the appropriate balance between uniformity in commercial law and respect for state sovereignty.

The Supreme Court's expansive interpretation of the FAA has created a national policy that prioritizes arbitration as an efficient mechanism for resolving interstate trade disputes.[140] This approach has provided businesses with greater certainty and predictability in commercial relationships that cross state lines, potentially reducing transaction costs and facilitating interstate commerce.[141] However, it has also generated significant criticism for potentially undermining important state consumer protection and employment laws without clear congressional authorization.[142]

As commerce increasingly moves online and new technologies reshape dispute resolution processes, courts will face novel questions about the application of established arbitration principles to emerging contexts.[143] These developments will likely generate new judicial pronouncements that continue to refine the balance between federal and state authority,

[137] *Supra* note 9 (Ginsburg, J., dissenting).
[138] *Supra* note 8
[139] *Supra* note 123 at 1262.
[140] *Supra* note 5
[141] *Supra* note 16
[142] *Supra* note 9
[143] Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 987

contractual autonomy and regulatory oversight, and efficiency and fairness in arbitration.

The ongoing dialogue between federal and state courts, legislative bodies, and private stakeholders suggests that arbitration jurisprudence remains in flux despite decades of development.[144] Future judicial pronouncements will continue to grapple with the fundamental challenge of constructing a coherent and balanced framework for arbitration in interstate trade disputes-one that respects both the national interest in commercial uniformity and the legitimate role of states in protecting their citizens.[145]

[144] *Supra* note 35

[145] Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 606.