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Legal Sidebar

# Arbitration Law Update: The Supreme Court's October 2023 Term

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Many contracts contain arbitration agreements that waive the parties' right to litigate disputes in court and instead require them to submit legal claims to binding arbitration before a neutral third party. The Federal Arbitration Act (FAA) generally makes covered arbitration agreements "valid, irrevocable, and enforceable," and it requires federal and state courts to "rigorously" enforce the agreements according to their terms. The FAA's scope is broad, generally applying to any arbitration agreement found in a "contract evidencing a transaction involving commerce." Reflecting the FAA's significance, it is not uncommon for the Supreme Court to hear multiple cases arising under the FAA in a single term. This term, the Court heard three: *Bissonnette v. LePage Bakeries Park St., LLC*; *Smith v. Spizzirri*; and *Coinbase, Inc. v. Suski*.

FAA cases have at times resulted in sharply divided rulings that split the Supreme Court along perceived ideological lines, such as in cases addressing the enforceability of arbitration agreements that waive the right to bring class action claims in consumer and employment contexts. In its 2023 term, however, the Court issued unanimous decisions in each of the three FAA cases it heard. This Legal Sidebar briefly examines these cases and discusses considerations for Congress.

## *Bissonnette v. LePage Bakeries Park St., LLC*

*Bissonnette* is the latest in a series of cases in which the Supreme Court has interpreted the scope of the FAA's exemption for transportation workers. While Section 2 of the FAA applies the statute broadly to written arbitration agreements in contracts "involving commerce," Section 1 exempts from the FAA's scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Over two decades ago in *Circuit City Stores, Inc. v. Adams*, the Court held that the FAA's text and purpose require construing this exemption as limited to "transportation workers." In 2019, the Court next held in *New Prime Inc. v. Oliveira* that the exemption's reference to "contracts of employment" applies both to employer-employee agreements and to agreements with independent contractors. Three years later in *Southwest Airlines Co. v. Saxon*, the Court clarified the scope of Section 1's exemption in ruling that an airport ramp supervisor for Southwest Airlines was an exempt transportation worker. The Court explained in *Saxon* that "any class of workers directly involved in transporting goods across state or international borders" falls within the exemption. The ramp

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supervisor frequently loaded and unloaded planes as part of her duties, in addition to supervising other cargo loaders. In the Court's view, although airline employees who physically load and unload planes traveling across state lines might not themselves travel interstate, they are, "as a practical matter, part of the interstate transportation of goods."

The Court's decision in *Bissonnette* resolved a circuit split over whether transportation workers must also work for a company in the transportation industry to qualify for the Section 1 exemption. The plaintiffs in *Bissonnette* worked as distributors for a national bakery and sued the bakery for alleged violations of federal and state wage laws. When the bakery moved to compel arbitration of the distributors' claims, the distributors argued that they were transportation workers exempt from the FAA. The trial court disagreed and dismissed their case in favor of arbitration. A divided panel of the United States Court of Appeals for the Second Circuit affirmed the district court's decision, and then affirmed that decision again upon rehearing after reconsidering the issue in light of the Supreme Court's intervening *Saxon* opinion. According to the majority of the Second Circuit panel, the plaintiffs were not exempt transportation workers under the FAA because, although they drove trucks, the plaintiffs worked "in the bakery industry, not a transportation industry." In concluding that only workers in a transportation industry can qualify as exempt transportation workers, the panel majority explained that the FAA's reference to "seamen" and "railroad employees" places transportation workers "in the context of a transportation industry" and thus provides a "reliable principle" for interpreting the exemption. The panel majority further defined a "transportation industry" as one that "pegs its charges chiefly to the movement of goods or passengers, and [whose] predominant source of commercial revenue is generated by that movement." The "decisive fact" in the case, according to the majority, was that the customers were buying baked goods and not "the movement of the baked goods," which was "at most a component of total price."

The Supreme Court reversed the Second Circuit and held that there is no transportation-industry requirement in Section 1's exemption. The Court explained that an "industrywide" approach to the exemption conflicted with the text of Section 1 and the Court's reasoning in *Saxon*. In *Saxon*, the Court applied the exemption by first defining the "class of workers" to which a worker belongs, and then determining whether the relevant class is "engaged in foreign or interstate commerce." The *Saxon* Court reasoned that Section 1's use of the words "workers" and "engaged in" emphasizes the performance of work, and defining a relevant class of workers therefore requires focusing on the "actual work" that members of the class as a whole typically perform. The ramp supervisor in *Saxon* was thus "a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally." In rejecting a transportation industry requirement in *Bissonnette*, the Court emphasized that the "seamen" and "railroad employees" referenced in Section 1's residual clause are "connected by what they do, not for whom they do it."

The Court also expressed concern that a transportation-industry requirement could require extensive fact discovery and "mini-trials" to determine the nature of a company's services and resolve difficult line-drawing problems over whether a company's revenue derives primarily from shipping. Imposing such a test in order to decide a "simple motion to compel arbitration" would, in the Court's view, "breed litigation from a statute that seeks to avoid it." Additionally, the Court rejected the argument that "virtually all workers who load or unload goods" would be exempt from arbitration under the FAA without an implied transportation-industry requirement. According to the Court, the requirement that exempt transportation workers must have a "direct" and "necessary" role in the movement of goods across borders limits Section 1 to an "appropriately 'narrow' scope."

## *Smith v. Spizzirri*

In addition to making arbitration agreements enforceable, the FAA also creates procedural rights that apply when a dispute allegedly governed by an arbitration agreement is brought in federal court. Under Section 3 of the FAA, a party to an arbitration agreement faced with a federal lawsuit may request a stay

of the court case pending arbitration. The provision states that if a dispute is subject to arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." A stay pauses the judicial proceeding, but the court retains jurisdiction over the case. Relatedly, under Section 4, a party may seek to compel an adversary to resolve the dispute in arbitration pursuant to the agreement.

Staying a court case pending arbitration rather than dismissing it has a number of potential procedural consequences. Perhaps most significantly, when a court stays a case and orders the parties to arbitrate the dispute, the party opposing arbitration does not have the right to an immediate appeal of that interlocutory (i.e., nonfinal) order compelling arbitration. Instead, a party seeking to challenge the order compelling arbitration generally has to wait until the arbitration concludes, unless the district court and appellate court both agree to permit a discretionary appeal under 28 U.S.C. § 1292(b). In contrast, when a court dismisses a lawsuit rather than staying it, the court's dismissal order is a final decision subject to immediate appeal.

Although Section 3 says that a court "shall" issue a stay when the dispute is subject to arbitration, federal appellate courts had split over whether courts have discretion to dismiss instead of staying a case when all the claims are subject to arbitration. Judicial efficiency appears to be the most commonly invoked reason for dismissing an arbitrable case instead of staying it. Some courts have stated that staying a case when all the claims must be arbitrated would "serve no purpose" and "waste judicial resources."

*Spizzirri* held that when a party requests a stay of federal court proceedings under Section 3 of the FAA and the court determines that the dispute is subject to arbitration, the court must stay the proceedings instead of dismissing the case. Focusing on the ordinary meaning of the statutory text, the Supreme Court explained that Section 3's use of "shall" establishes "an obligation impervious to judicial discretion," and that the term "stay" means the "'temporary suspension' of legal proceedings, not the conclusive termination of such proceedings." The Court further observed that the FAA's structure and purpose support interpreting Section 3 as requiring a stay instead of dismissal. As discussed above, orders compelling arbitration normally are not immediately appealable under the FAA. In the Court's view, permitting a court to dismiss a suit subject to arbitration instead of staying it would "trigger[] the right to an immediate appeal where Congress sought to forbid such an appeal." The Court also viewed stays as consistent with the "supervisory role" that the FAA contemplates for courts. A number of FAA provisions give courts a potential ongoing role in assisting with arbitration proceedings, such as appointing arbitrators and enforcing subpoenas issued by arbitrators, and staying a case rather than dismissing it avoids "costs and complications" that could result if parties were required to file a new suit in court in order to avail themselves of those mechanisms.

## *Coinbase, Inc. v. Suski*

Under the FAA, contracting parties may agree to have an arbitrator rather than a court decide the merits of legal disputes that arise between them, such as a party's liability for alleged injuries. Using a provision known as a "delegation clause," the parties may also agree to have an arbitrator decide the threshold issue of whether a merits dispute is subject to arbitration (i.e., decide the "arbitrability" of the dispute).

In *Suski*, the Supreme Court addressed whether a court or an arbitrator decides the arbitrability of a dispute when the parties executed multiple contracts with potentially conflicting dispute resolution provisions. The plaintiffs in the underlying lawsuit had entered into two contracts with the cryptocurrency platform Coinbase. The first contract contained an arbitration provision with a delegation clause, but the second contract contained a provision appearing to send disputes to state or federal courts in California. The Court unanimously held that a court, not an arbitrator, must decide whether the second contract supersedes the first contract's delegation clause.

The Court began its analysis by reaffirming the principle that "arbitration is strictly a matter of consent" and is "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." The Court explained that although parties may agree to arbitrate whether a dispute is arbitrable, courts must determine that a valid agreement to arbitrate exists before referring an arbitrability dispute to arbitration. In the Court's view, although the first contract had "quite clearly" delegated arbitrability issues to the arbitrator, whether the parties' second contract superseded the delegation clause in the first contract boiled down to whether the parties had an agreement to arbitrate arbitrability and was therefore a question for courts and not the arbitrator. In a concurring opinion, Justice Gorsuch emphasized that whether arbitrability is a question for courts or the arbitrator "depends on what the parties have agreed."

## Considerations for Congress

The FAA has been the focus of debates over businesses' widespread use of arbitration agreements to avoid litigating disputes in court. Some commentators argue that arbitration agreements enforced under the FAA can provide a method for resolving disputes that is faster and more cost-effective and accessible than traditional court litigation. Others argue that arbitration agreements may unfairly shield defendants from liability, such as by precluding class litigation of claims that might be too small to justify the expense of an individual lawsuit.

A number of bills introduced in the 118th Congress would amend the FAA to limit or bar enforcement of arbitration agreements in certain contexts. For example, the Forced Arbitration Injustice Repeal Act, S.1376, would provide that pre-dispute arbitration agreements are not valid or enforceable with respect to certain employment, consumer, antitrust, and civil rights disputes. The Protecting Older Americans Act of 2023 (POAA), S.1979, as reported by the Senate Judiciary Committee, would more narrowly give plaintiffs the right to invalidate pre-dispute arbitration agreements with respect to cases related to age discrimination disputes. POAA would also require courts to determine arbitrability issues arising under an agreement to which POAA applies "irrespective of whether the agreement purports to delegate such determinations to an arbitrator."

The Supreme Court's decisions addressing the scope and application of the FAA may inform Congress's consideration of these and other legislative proposals to amend the statute. *Bissonnette*'s rejection of a transportation-industry requirement under Section 1 broadly increases the number of workers whose employment agreements are potentially exempt from the FAA, given that many manufacturers, retailers, and other companies whose primary business is not transportation use their own private fleets to ship goods. By some estimates, for instance, around 2 million truck drivers in the United States work in private truck fleets instead of for traditional trucking companies. *Spizzirri* closed a potential avenue for parties to immediately appeal court orders requiring them to arbitrate disputes, and it also made it easier in certain circumstances for parties to obtain federal court assistance with arbitration proceedings, such as enforcing an arbitrator's subpoenas. Although *Suski* involved uncommon factual circumstances (parties subject to multiple contracts with conflicting dispute resolution provisions), the Court's opinion clarifies the respective role of courts and arbitrators in deciding whether a dispute is subject to arbitration, while also reaffirming that delegation clauses are enforceable under the FAA.

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