#MeToo and Separating Arbitration from Non-Disclosure Agreements

By Ann-Elizabeth Ostrager and Lisa M. Ebersole

Introduction

In response to the #MeToo movement and national attention on sexual harassment in the workplace, a number of states have enacted laws purporting to prohibit or limit pre-dispute agreements that require arbitration of sexual harassment claims. This summer, these proposed provisions began to be tested in federal court. Consistent with clear Supreme Court precedent favoring enforcement of arbitration agreements and interpreting the Federal Arbitration Act (FAA) expansively, Judge Denise Cote of the Southern District of New York ruled in Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (S.D.N.Y. June 26, 2019), that one such law, Section 7515 of the New York Civil Practice Law and Rules (NYCPLR), is preempted by the FAA.[1]

In light of the trajectory set by Supreme Court authority and rulings like Latif—and absent congressional action on the FAA—state legislatures may seek to enact prohibitions on confidentiality clauses, or impose other conditions on arbitration that arguably avoid a preemption problem by not undermining the "fundamental attributes" of arbitration as a method of dispute resolution.

Preemption

The Supreme Court has consistently ruled in favor of an expansive reading of the FAA, and declined to find exceptions to its application. The Court has found that employment contracts are subject to the FAA (*Circuit City Stores, Inc. v. Adams*),[2] that arbitration agreements are valid in cases of personal injury and wrongful death (*Marmet Health Care Center v. Brown*),[3] that arbitration clauses prohibiting class action litigation and compelling the arbitration of antitrust claims are enforceable (*American Express Co., et al. v. Italian Colors Restaurant*),[4] and that arbitration agreements forbidding arbitration on a class level are valid (*Epic Systems Corp. v. Lewis*).[5] *Latif* followed suit.

The 2018-2019 New York State budget created § 7515 of the NYCPLR, which provided that no written contract shall contain a mandatory arbitration clause for claims of sexual harassment. In *Latif*, a former employee of Morgan Stanley filed an employment discrimination claim alleging that he was subjected to harassment based on his sexual orientation and religion. Latif, however, had agreed to mandatory arbitration of all claims against Morgan Stanley, including sexual harassment claims, when he signed his employment contract. Morgan Stanley filed a motion to compel Latif to arbitrate his claims, arguing that § 7515 was preempted by the FAA, which provides that an agreement to arbitrate "shall be valid irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[6] and applies to all arbitration agreements affecting interstate commerce.

Looking to the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion* that "[w]hen state law prohibits outright the arbitration of a particular type of claim . . . [t]he conflicting rule is displaced by the FAA,"[7] Judge Cote granted Morgan Stanley's motion and ordered the parties to proceed according to the terms of their pre-dispute arbitration agreement.[8] Judge Cote also found that § 7515 specifically targeted arbitration, and thus is not a broad defense applicable to "any contract," i.e., defenses such as unconscionability and duress.[9]

In a footnote, Judge Cote also addressed New York State Senate Bill S6577, which had been passed just days earlier, and which seeks to expand the ban on arbitration agreements for sexual harassment claims found in § 7515 to a ban on arbitration agreements for all claims of unlawful discrimination. Although not yet signed into law at the time, Judge Cote wrote that S6577, would "for the same reasons," "not provide a defense to the enforcement of the Arbitration Agreement."[10]

Limitations on the Use of Non-Disclosure Agreements

Much of the controversy surrounding mandatory arbitration agreements in sexual harassment cases has focused on the "silencing" effect of arbitration[11] that employment agreements requiring any future proceedings be kept confidential result in employers and perpetrators of harassment avoiding accountability and appropriate

penalties. However, this is more centrally a critique of confidentiality clauses, rather than arbitration itself.

A second provision of S6577, signed by the governor in August, amends § 5003-b of the NYCPLR to expand a ban on nondisclosure agreements for "any settlement, agreement, or other resolution of any claim, the factual foundation for which involves discrimination," subject to some exceptions, like where nondisclosure is the complainant's preference.[12] This ban was previously applicable only to sexual harassment claims in § 7515. Unlike the outright ban on clauses requiring arbitration, there is an argument that a prohibition on confidentiality clauses would not be preempted by federal law because it does not undermine a "fundamental attribute" of arbitration, nor does it clearly disfavor arbitration specifically.

In addition to laws that directly prohibit arbitration of a particular type of claim, the Supreme Court has found that state laws, which apply a general contract or equity defense in a manner that disfavors arbitration, or laws that undermine a "fundamental attribute" of arbitration, are preempted by the FAA. As the Court in *Concepcion* explained, "[a]n obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."[13] In that example, the general defenses that a condition is unconscionable or against public policy are being employed in a manner that disfavors arbitration. The disproportionate impact on arbitration would ultimately subject such a case to FAA preemption.[14]

A law undermining a "fundamental attribute" of arbitration will also be preempted by the FAA; Justice Gorsuch in *Epic Systems Corp. v. Lewis*, wrote that "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration."[15] The Supreme Court has suggested that fundamental attributes of arbitration include speed, simplicity, inexpensiveness, informality, and the traditional individualized process,[16] but has not yet included confidentiality on this list. There is no law requiring confidentiality in arbitration and barring confidentiality clauses does not necessarily interfere with the primary goals and characteristics of arbitration. In fact, the American Arbitration Association Statement of Ethical Principles specifies that "the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement."[17] The JAMS rules and the Revised Uniform Arbitration Act both contain *permissive* provisions allowing an arbitrator to issue a protective order to prohibit disclosure of confidential or privileged information.[18] Nonetheless, it remains an open avenue to argue that barring confidentiality agreements indirectly threatens what has become a core quality of arbitration.

Key Takeaways

- Consistent with a clear trend at the Supreme Court favoring enforcement of arbitration agreements, a court in the Southern District of New York has ruled that N.Y. 7515, which purports to prohibit pre-dispute agreements to arbitrate sexual harassment claims, is preempted by the FAA.
- Similar state statutes that contain outright prohibitions on arbitration or that implicitly disfavor arbitration are also likely preempted by the FAA.
- Legislation that bans confidentiality requirements in settlement or arbitration of discrimination claims, such as the language in NY S6577, may not be preempted by the FAA. The same goes for other conditions of an arbitration/settlement agreement that do not affect the "fundamental attributes" of arbitration.

Conclusion

Prohibitions on confidentiality could be one way that states will try to constrain arbitration around sexual harassment and discrimination claims without running into a preemption problem. These bans in combination with the effect of extralegal pressure from the public to end the use of arbitration in discrimination cases generally may offer the most promising avenue of change, other than the unlikely event of congressional action on the FAA.[19]

Endnotes

1. Plaintiff has filed a notice of appeal with the Second Circuit.
2. 532 U.S. 105 (2001).
3. 565 U.S. 530 (2012).
4. 570 U.S. 228 (2013).
5. 138 S. Ct. 1612 (2018).
6. 9 U.S.C. § 2.
7. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 339, 341 (2011).
8. *Latif v. Morgan Stanley & Co. LLC*, No. 18CV11528 (DLC), 2019 WL 2610985, at *1 (S.D.N.Y. June 26, 2019).
9. *Id.* at 3; *Epic Sys. Corp.* 138 S. Ct. at 1622.
10. *Latif*, 2019 WL 2610985, at n.2.
11. *See, e.g.*, Julia Carpenter, *The ways companies silence women at work*, CNN Money (April 18, 2018), https://money.cnn.com/2018/04/18/pf/forced-arbitration-sexual-harassment/index.html?iid=EL; Elizabeth Dias and Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, Time (October 21, 2016), https://time.com/4540111/arbitration-clauses-sexual-harassment/.
12. S.B. S6577, 2019-2020 Leg. Sess. (N.Y. 2019).
13. *Concepcion*, 563 U.S. at 341-42.
14. The analysis in *Latif* together with this reasoning from *Concepcion* suggests that other recent state laws targeting arbitration in sexual harassment and discrimination claims may also be subject to

preemption. Though no other law contains an outright prohibition on arbitration for a particular type of claim like New York, the New Jersey, Washington, Vermont and Maryland laws prohibit waiver of an available substantive or procedural right in relation to a sexual harassment or discrimination claim, in effect barring pre-dispute agreements to arbitrate in those circumstances. *See Epic Sys. Corp.*, 138 S. Ct. at 1623 ("Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today.") (citing *Concepcion*, 523 U.S. at 342).

15. *Epic Sys. Corp.*, 138 S. Ct. at 1622.
16. *Id*. at 1623; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).
17. AAA Statement of Ethical Principles, Am. Arbitration Ass'n, https://www.adr.org/StatementofEthicalPrinciples (last visited 8/27/2019).
18. *See, e.g.*, Uniform Arbitration Act (revised 2000) § 17e; JAMS Comprehensive Arbitration Rules & Procedures, Rule 26(b).
19. The authors thank Emily T.L. Armbruster, a summer associate with Sullivan & Cromwell LLP, for her substantial contributions to this article.

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