



# WATCHING DIRECTV: The Recent Case of *DIRECTV, Inc. v. Imburgia* and Its Impact on Arbitration

By Elliott Gurnick

IN DECEMBER 2015, THE U.S. Supreme Court ruled in favor of DIRECTV's motion to compel arbitration in *DIRECTV, Inc. v. Imburgia*.<sup>1</sup> The case concerned the phrase "law of your state" in an arbitration agreement, and whether these words refer only to valid state law, or also encompass invalid state law.

The suit, a class action by DIRECTV customers challenging early termination fees, began in

Los Angeles Superior Court, which denied DIRECTV's motion to compel arbitration. The arbitration clause waived class actions. The trial court ruled partly based on California law prohibiting class action waivers in arbitration agreements.<sup>2</sup> The court also considered a provision in the arbitration clause that purported to invalidate the agreement to arbitrate if state law prohibited class action waivers.

The California Court of Appeal upheld the trial court ruling and the California Supreme Court declined

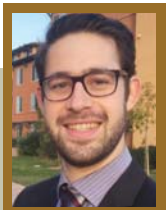
to hear the case.<sup>3</sup> The U.S. Supreme Court granted certiorari and reversed, ruling that DIRECTV's motion to compel arbitration should have been granted. The high court ruled 6-3, in an opinion by Justice Breyer, that the Federal Arbitration Act (FAA), under which class action waivers are permitted, preempts California law, which prohibits them. FAA preemption overcame the California state law prohibition of class action waivers. That neutralized the agreement's provision purporting to void the arbitration agreement.

This Supreme Court decision reinforces FAA preemption, and clarifies the rule that courts must treat agreements to arbitrate equally with other contracts. The decision also indicates that although an arbitration agreement may choose any body of law to govern the agreement (even, in the Court's words, "the law of Tibet" or "of pre-revolutionary Russia"<sup>4</sup>), the choice must be clearly specified.

This article discusses key aspects of the *DIRECTV* decision, its effects, the scope of the FAA, and some of the decision's teachings for lawyers drafting arbitration agreements.

## Case Summary

Amy Imburgia, a California resident, subscribed to DIRECTV. Her agreement included an arbitration clause<sup>5</sup> which prohibited either party from bringing a class action, but said "the entire arbitration provision was unenforceable if 'the law of your state' made class-arbitration waivers unenforceable."<sup>6</sup> In view of the California Supreme Court's prohibition of such waivers,<sup>7</sup> the self-destruct language of the arbitration clause appeared to render DIRECTV's agreement unenforceable. The trial court and Court of Appeal both ruled



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to this effect, rejecting DIRECTV's motion to compel arbitration.

In 2005, the California Supreme Court had ruled in *Discover Bank v. Superior Court*<sup>8</sup> that class action waivers in consumer contracts are unenforceable. After *Discover Bank*, the U.S. Supreme Court ruled, in *AT&T Mobility LLC v. Concepcion*,<sup>9</sup> that Section 2 of the FAA<sup>10</sup> preempts the *Discover Bank* Rule.<sup>11</sup> In other words, the FAA, as applied by the Supreme Court in *AT&T*, invalidates the rule adopted by the California Supreme Court, refusing to enforce class action waivers in arbitration agreements.

The interplay of these decisions raised the question in *DIRECTV* whether the scope of the phrase "law of your state" referred only to valid state law, or would be construed to encompass invalid law (the invalidated rule of *Discover Bank* that voided class action waivers). The U.S. Supreme Court held that "law of your state" should be construed to mean "valid state law" only. Therefore, this phrase in the *DIRECTV* arbitration agreement referred only to valid California law and did not refer to the *Discover Bank* rule (which is invalid law). Thus, the Supreme Court ruled that the *DIRECTV* arbitration agreement was valid and enforceable.<sup>12</sup>

The Court's logic was that arbitration contracts must be "on equal footing with all other contracts."<sup>13</sup> By rendering the agreement unenforceable, California treated the phrase, "law of your state" to include invalid state law, since the law applied by the California court (in *Discover Bank*) was superseded by the FAA. "Absent any indication in the contract that [law of your state] is meant to refer to invalid state law," and absent reference to any contract case that interprets similar language to include invalid state law, the U.S. Supreme Court held that "law of your

state" is unambiguous, "and takes its ordinary meaning: valid state law."<sup>14</sup>

### Effects of the DIRECTV Decision

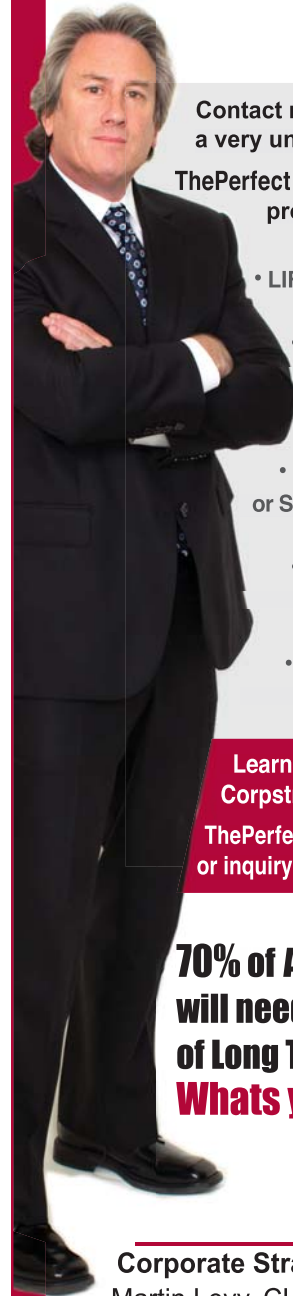
The Supreme Court's affirmation that the FAA preempts state law encourages lawyers to become or remain familiar with the scope of the FAA. Lawyers who litigate or draft arbitration clauses may frequently need to consider the FAA. Rather than multiple sets of laws governing interstate arbitrations, the FAA provides a single nationwide set of rules governing arbitration involving parties in multiple states, or commerce that Congress can regulate or parties who agreed to have the FAA apply. Thus, lawyers working with arbitration agreements in commercial settings can look to the FAA as the applicable law. Lawyers must also be familiar with relevant state law, for example, California's arbitration act,<sup>15</sup> and potentially international law, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, for arbitrations outside the scope of the FAA.

The Supreme Court in *DIRECTV* also repeated the rule that courts must place arbitration agreements on the same footing as other contracts.<sup>16</sup> As a result, the potential exists that contract cases in other fields may be precedent for cases concerning arbitration agreements. Lawyers working with arbitration agreements will devote attention to reviewing a wider range of contract cases to extract relevant law. Contract lawyers may also draft arbitration agreements with greater confidence, knowing the applicable rules are those governing contracts generally.

The FAA allows parties to invoke any body of law to govern their arbitration agreements. "The Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs

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some or all of its provisions.”<sup>17</sup> However, lawyers should specify clearly and unambiguously which law they wish to select. While DIRECTV prevailed in the Supreme Court, and may now compel Ms. Imburgia to arbitrate, had DIRECTV specified clearly which body of law would govern, it could have avoided years of litigation, or at least prevailed in the trial court in its motion to compel arbitration.

### Overview of Federal Arbitration Act

The FAA establishes a framework for enforcement of arbitration agreements. It provides that arbitration agreements in general “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>18</sup> Under the FAA, if a party to an arbitration agreement brings suit, any of the other parties may ask the court to stay proceedings and compel the parties to proceed with arbitration “in the manner provided for in such agreement.”<sup>19</sup>

The FAA also addresses arbitration procedure. It allows an arbitration agreement to select an arbitrator or set forth a procedure for selection of the arbitrator, “but if no method be provided...[or if a party fails] to avail himself of such method, [or if there is] a lapse in the naming of an arbitrator...[or] filling a vacancy...then upon the application of either party

to the controversy the court shall designate and appoint an arbitrator.”<sup>20</sup> The FAA also lets parties call witnesses and obtain process to compel them to appear. The FAA even provides for holding persons in contempt who fail to appear.<sup>21</sup> However, compulsion to appear and contempt must be sought and obtained in federal district court.<sup>22</sup>


The FAA includes procedure for enforcing an arbitral award. “At any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award.”<sup>23</sup> The court must grant the award “unless the award is vacated, modified, or corrected.”<sup>24</sup> The FAA establishes when a court may vacate an arbitral award, including when the award was obtained by corruption, fraud, or undue means, partial corruption, or when an arbitrator is guilty of certain misconduct.<sup>25</sup> The FAA permits awards to be modified or corrected, such as when an evident miscalculation has occurred.<sup>26</sup> Section 16 of the FAA contains provisions concerning appeal from certain actions of the court relating to arbitration.<sup>27</sup>

### Considerations for Arbitration Drafters

Lawyers drafting arbitration agreements should consider availing clients of the FAA. Lawyers can expressly incorporate FAA procedure into arbitration agreements. Doing

so invokes the FAA’s provisions for compelling arbitration, appointment of arbitrators, compelling witnesses and obtaining and enforcing awards.

Drafters may wish to consider and try to anticipate potential developments in the law and address these in the arbitration clause. Long-term forward thinking can provide an advantage to those seeking to strengthen the enforceability of their arbitration clause. Courts are likely to uphold arbitration where the agreement’s language is clear, unambiguous, and takes reasonably foreseeable changes in the law into account.

Lawyers working with arbitration agreements should try to keep in mind general contract law principles because these govern arbitration agreements. The rule that courts must treat arbitration agreements on equal footing with other contracts means precedents in all manner of contract cases may apply to disputes over arbitration agreements. 

<sup>1</sup> *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).  
<sup>2</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005) (ruling that at least in some circumstances, in California, class action waivers in consumer contracts of adhesion are unenforceable).  
<sup>3</sup> *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 467 (2015).  
<sup>4</sup> *Id.* at 468.  
<sup>5</sup> *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).  
<sup>6</sup> *Id.* at 464.  
<sup>7</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005).  
<sup>8</sup> *Id.*  
<sup>9</sup> *AT&T Mobility LLC v. Concepcion* 563 U.S. 333, 356 (2011).  
<sup>10</sup> 9 U.S.C. §2.  
<sup>11</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005).  
<sup>12</sup> *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 471 (2015).  
<sup>13</sup> *Id.* at 475 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).  
<sup>14</sup> *Id.* at 469.  
<sup>15</sup> Cal. Civ. Proc. Code §1281-1288.8.  
<sup>16</sup> *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 475 (2015) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).  
<sup>17</sup> *Id.* at 468.  
<sup>18</sup> 9 U.S.C. §2.  
<sup>19</sup> 9 U.S.C. § 3-4.  
<sup>20</sup> 9 U.S.C. §5.  
<sup>21</sup> 9 U.S.C. §7.  
<sup>22</sup> *Id.*  
<sup>23</sup> 9 U.S.C. §9.  
<sup>24</sup> 9 U.S.C. §10.  
<sup>25</sup> 9 U.S.C. §11.  
<sup>26</sup> 9 U.S.C. §15.  
<sup>27</sup> 9 U.S.C. §16.

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