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Cases

New Prime v Oliveira: Statute Derails Arbitration of US Transportation Workers Claims

Steven P Caplow

Abstract

An interstate trucker filed a putative class action alleging underpayment by the trucking company that hired him to perform long-haul services as an independent contractor. The parties' agreement provided for arbitration of all disputes, and delegated issues of arbitrability to the arbitrator. Relying on these broad provisions, the trucking company sought to compel arbitration of the lawsuit. The US Supreme Court refused to compel arbitration of matter, and issued two important rulings under the FAA. First, withstanding the delegation language of the parties' arbitration provision, the court itself must decide the question of arbitrability. Secondly, the Act's "contracts of employment" exclusion applies to workers involved in interstate transportation, including workers classified as independent contractors.

Aided by a copy of the 1891 edition of the "*New English Dictionary*," the US Supreme Court navigated the contours of the s 1 employment exemption of the Federal Arbitration Act (FAA or Act).[1] The decision, *New Prime Inc v Oliveira*,[2] will help chart the tetanic shift caused by US companies' growing reliance on working relationships based on independent contractors and arbitration agreements. The effects of these trends comes into focus in this case, which involved the arbitrability of a putative class of independent contractors who work in the interstate transportation industry. Although too early to draw firm conclusions, the independent contractor-based decision offers US courts direction to adjudicate disputes involving this new economy.

In *New Prime*, the US Supreme Court unexpectedly declined to compel arbitration of wage and hour class action lawsuit brought by an interstate trucker working as an independent contractor. Notwithstanding language in the arbitration agreement delegating questions of arbitrability to the arbitrator, the court ruled that based on the sequencing of decision contemplated by the Act, a court, not the arbitrator, should decide in the first instance whether the claim was within the scope of the Act. The Supreme Court then affirmed the decision of the lower courts that claims of interstate transportation workers were outside the scope of the Act irrespective of whether the worker furnished services in the capacity of an employee or an independent contractor.

The suit arose when a long-haul trucker, Dominic Oliveira, filed a class action lawsuit in federal district court alleging that an interstate trucking company, New Prime, failed to pay its drivers the statutory minimum wage. Mr Oliveira joined New Prime as an unpaid apprentice.[3] He then completed a training program for which he received $4,200 to drive 30,000 miles (48,280 km).[4] During training, New Prime also docked his pay by $200 to

[1] Federal Arbitration Act 9 U.S.C. s1.
[2] *New Prime Inc v Oliveira* 139 S Ct 532 (2019).
[3] *Oliveira v New Prime* 857 F3d 7, 9 n2 (2017).
[4] *Oliveira v New Prime* 857 F3d 7, 9 n2 (2017) at [9].

repay a food allowance he had received during his apprenticeship.[5] Upon completion of the training program, Mr Oliveira signed documentation prepared by entities associated with New Prime to lease a truck, and purchase fuel and equipment that he used to haul loads for New Prime.[6] The lower court stated that New Prime "consistently shortchanged Mr Oliveira" for his work and described his compensation as "paltry".[7]

The terms of agreement between Mr Oliveira and New Prime designated him an independent contractor, and contained a broad arbitration clause. At the trial court level, New Prime unsuccessfully sought to compel arbitration of the dispute. On appeal, the First Circuit again declined to compel arbitration. The Supreme Court agreed to hear the case to decide two important issues. First, whether the arbitration agreement's delegation clause—which granted the arbitrator the authority to determine the arbitrability of the dispute—ousted the federal district court of the authority to decide the threshold question of whether the dispute was subject to arbitration. Secondly, whether the Act's exclusion of "contracts of employment" reaches contracts with independent contractors, or only contracts between employers and their employees.

1. Sequence matters—unlike challenges to enforceability, Prima Paint does not draw the boundaries of the Act

> "'Begin at the beginning', the King said, very gravely, 'and go on till you come to the end: then stop'. "Lewis Carroll, *Alice in Wonderland*

To start, the Supreme Court sets out the proper sequence for analysis of the arbitrability of the dispute. As often happens in these cases, Mr Oliveira filed his lawsuit in federal court. New Prime then sought to compel arbitration. As the Supreme Court put it:

> "If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§3 and 4 of the Act often require a court to stay litigation and compel arbitration."[8]

New Prime likely expected little difficulty in compelling arbitration because it had taken the precaution of including a delegation clause in the agreement granting the arbitrator the authority to decide the initial question of whether the parties' dispute was subject to arbitration. However, the Supreme Court's discussion of this issue offers an early hint that New Prime faced a difficult road ahead. The court begins its analysis with the observation that while the court's authority under the Act to compel arbitration may be "considerable, it isn't unconditional … no matter how emphatically [the parties] may express a preference for arbitration".[9]

If there is any suspense as to how the court will decide the first question, it comes to an abrupt end. The court quickly announces that the intermediate appellate court correctly determined a "court should decide for itself whether §1's 'contracts of employment' exclusion applies before ordering arbitration".[10] The court explains that it all comes down to the sequence of the Act's various provisions. "Sections 1[11] and 2[12] define the field in

[5] *Oliveira v New Prime* 857 F3d 7, 9 n2 (2017) at [10].
[6] *Oliveira v New Prime* 857 F3d 7, 9 n2 (2017) at [10].
[7] *Oliveira v New Prime* 857 F3d 7, 9 n2 (2017) at [11].
[8] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [537].
[9] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [537].
[10] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [537].
[11] Section 1 defines the meaning of "maritime transaction" and "commerce," and excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Despite the broad reference to "any other class of workers," the US Court earlier ruled that the Arbitration Act's exemption for employment contracts excluded only transportation workers' contracts. *Circuit City Stores Inc v Adams* 532 US 105 (2001) at [109].
[12] Section 2 provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

which Congress was legislating, and §§3[13] and 4[14] apply only to those contracts covered by those provisions."[15] Then, working through the same sections backwards, the court observes that the sections addressing enforcement (§§3 and 4) depend on whether these provisions are part of a maritime contract or a transaction involving commerce under §2, which in turn depends on the application of s 1's exception for certain "contracts of employment". In other words, only as to claims determined to be within the "field" of the Act, as defined by its first two sections, does the Act authorise a stay of the lawsuit and issuance of an order compelling arbitration.

For its part, New Prime "resists this straightforward understanding" by arguing that the arbitrator should resolve the dispute of s 1's application because of the delegation clause and the related severability principle".[16] Under bedrock rules the court set out in *Prima Paint*,[17] a court decides challenges as to the enforceability of just the arbitration clause itself, while the arbitrator (if authorised by the agreement) determines challenges that go to the entirety of the contract. So, for example, a court would decide allegations of fraud in the inducement to the agreement to arbitrate, while an arbitrator would decide allegations of fraud in the inducement that go to the entire agreement. The delegation clause empowers the arbitrator to decide broad challenges to the agreement as a whole, while under the related severability principle, courts treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the entire contract. However, the Supreme Court's sequencing approach confines these decision-making principles to challenges to enforceability arising under s 3 and s 4; they have no application to determining what the court calls "the boundaries" of the Act under s 1 and s 2. In all circumstances, *New Prime* directs courts to first decide for themselves whether the FAA's exclusion for contracts of certain transportation workers applies before ordering arbitration.

Over the last decade, the majority of the court's decisions has prioritised the parties' intention to arbitrate their disputes over other considerations. For this reason alone, the *New Prime* decision is noteworthy in its conclusion that the structure of the statute, not the parties' intent, determines the outcome. Court watchers will mark with surprise, the court's clear instruction for courts to evaluate challenges asserted under s 1 and s 2 without regard to the parties' express intent:

> "The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum."[18]

2. "Employment" means "work by workers" (not just by employees)

> "'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'. 'The question is', said Alice, 'whether you can make words mean so many different things'. 'The question is', said Humpty Dumpty, 'which is to be master—that's all'."Lewis Carroll, *Alice in Wonderland*

Having concluded that the court, not the arbitrator, must determine the merits of a s 1 challenge, the Supreme turned to the question of whether parties with the status of an

law or in equity for the revocation of any contract". The meaning of "maritime transaction" and "commerce" is set forth in s 1 of the Act.

[13] Section 3 requires a federal court in which suit has been brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement.

[14] Section 4 provides a federal remedy for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration", and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.

[15] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [538].

[16] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [538].

[17] *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US.395 at 403–04 (1967).

[18] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [537].

independent contractor can satisfy the s 1 "contracts of employment" exclusion. Making this case attractive to the Supreme Court, both parties agreed that Mr Oliveira's work with New Prime involved interstate commerce, and for purposes of the appeal he agreed to assume that his contracts with New Prime establish only an independent contractor relationship. This allowed the court to focus on the question of whether Congress intended the phrase "contracts of employment" in s 1 of the Act to include independent contractors.

When Congress enacted the FAA in 1925, as a result of existing legislation addressing dispute resolution for transportation workers, and legislative compromise, Congress carved out members of the transportation industry from the Act's purview. Section 1 of the Act says that "nothing herein" may be used to compel arbitration in disputes involving the "contracts of employment" for certain transportation workers. However, the words of the Act do not specify whether this "contracts of employment" exclusion refers to just an "employer employee" relationship (in common law parlance, a "master servant" relationship), or whether the Act's exclusion also includes transportation workers with the status of independent contractors. This left for the Supreme Court the question of whether Congress' use of term "employment" signaled an intent to exempt all interstate transportation workers from participating in federal arbitration (including independent contractors), or just employees.

Answering this question involved a question of statutory construction based on considering evidence of the contemporaneous use of the term "contract of employment" dating back to the FAA's enactment. The court found relatively little evidence that used this specific phrase. Further, both employees and independent contractors can provide services pursuant to an express or implied contract of hire. Accordingly, the etymology and use of the word "employment" (opposed to "contract" or "contract of employment") occupies most of the court's analysis. In particular, the court examined whether the word employment was directed at just employees, in which the employer has the right to control the details of work performance, or also independent contracts, who undertake specific projects free to choose the method for accomplishing it.

The court acknowledged that to "many lawyerly ears today", the term "contract of employment" invokes only the relationship between an employer and an employee.[19] However, the subject of examination did not involve the contemporary usage of the term "employment", but instead how Congress intended the word more than 100 years ago. This required looking through old dictionaries, statutes and cases of the time to establish the dominant understanding of the term back in 1925. The court studied records of early 20th century railroad strikes, and observed that at the time of the Act's passage, shipboard surgeons who tended injured sailors were considered "seamen" though they likely served in an independent contractor capacity.[20] After its review of the historical record, the Supreme Court concluded that "contract of employment" meant nothing more than an "agreement to perform work" with the result that "most people then would have understood" s 1 to exclude not only agreements with employees but also agreements that involve independent contractors.[21]

Review of the text itself further corroborated this conclusion. The court asks the reader to "[r]ecall that the Act excludes from its coverage "contracts of employment of … any … class of *workers* engaged in foreign or interstate commerce".[22] The court emphasises that immediately following its reference to "contracts of employment", Congress used the neighbouring term "worker", a term that "everyone agrees easily embraces independent contractors, opposed to a more restrictive word like "employee" or "servant". Conceding that this word choice "may not mean everything", it still supplied further evidence that

[19] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [539].
[20] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [542]–[43].
[21] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [539].
[22] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [541].

Congress used the term "contracts of employment" in a "broad sense to capture any contract for performance of work by workers".[23]

In the words of the court, "[u]nable to squeeze more from the statue's text" New Prime appealed to the court's often-referenced liberal federal policy favoring arbitration agreements.[24] However, the court refused to "pave over bumpy statutory texts in the name of more expeditiously advance a policy goal".[25] For the first time in recent memory, entreaty to effect the policy goals of arbitration fell short, and the Supreme Court unanimously affirmed the decision of the lower court that it lacked authority under the Act to compel arbitration of Mr Oliveira's lawsuit against New Prime.

[23] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [541].
[24] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [543].
[25] *New Prime Inc v Oliveira* 139 S Ct 532 (2019) at [543].