U.S. Supreme Court Holds That Individualized Employer-Employee Arbitration Agreements Must Be Enforced As Written

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On May 21st, 2018, the Supreme Court of the United States in *Epic Systems Corp. v. Lewis* ("Epic Systems") held in a 5-4 majority that one-on-one mandatory arbitration agreements imposed by employers upon their employees must be enforced as written in accordance with the Federal Arbitration Act ("FAA"). The majority opinion, written by Justice Neil Gorsuch, reasoned that the FAA superseded the federal right of employees to bring claims in class or collective actions contained in the National Labor Relations Act ("NLRA") and the Fair Labor Standards Act ("FLSA").

Enacted in 1935 during U.S. President Franklin D. Roosevelt's New Deal Era, the NLRA established a "'fundamental right' [of employees] to join together to advance their common interests". The rationale was that by permitting workers to collectively confront employers with respect to the conditions of their employment, they would "gain strength […] in numbers" and avoid the threat of retaliation. Low-value minimum-wage and overtime claims could thus be brought on a collective level to equalize the employer-employee power imbalance, allowing employees to be an adequate match for the much stronger employers.

However, in recent years, the imposition of mandatory arbitration agreements by employers upon their employees has drastically risen, affecting over 50% of non-unionized companies in the United States (as opposed to 2% in 1992). According to Justice Ruth Bader Ginsburg, who criticized the *Epic Systems* majority decision as "egregiously wrong" in a scathing dissent, this exponential growth of individualized employer-imposed arbitration is a direct result of recent Supreme Court jurisprudence which has rendered "the cost-benefit balance of underpaying workers […] heavily in favor of [employers] skirting [their] legal obligations".

The FAA's Saving Clause

The *Epic Systems* majority decision debated what exceptions exist to the general requirement that arbitration agreements must be enforced by courts as written. It considered Section 2 of the FAA, or its "saving clause", which states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The majority examined divergent lower court opinions from the Fifth, Seventh, and Ninth Circuits. On the one hand, the Fifth Circuit held that no unfair labor practices were committed by requiring employees to sign individual arbitration agreements waiving their right to pursue class and collective actions. However, on the other hand, the Seventh and Ninth Circuits held that enforcing an arbitration agreement which violates a "substantive federal right" renders the agreement illegal and hence unenforceable under the FAA. They found that enforcing an agreement which requires individualized arbitration proceedings contravenes the "substantive federal right" contained in the NLRA which protects workers' right to engage in class or collective action.

This was indeed the position taken by the National Labor Relations Board's ("NLRB") General Counsel in 2012 that "employer-imposed contracts barring group litigation in any forum – arbitral or judicial – […] unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable."

However, the majority in *Epic Systems* drastically departed from the reasoning of the Seventh and Ninth Circuits and the NLRB, holding that the text of the FAA's "saving clause" only recognizes "defenses that apply to 'any' contract". As such, only general contractual defenses such as fraud, duress, or unconscionability can be invoked to invalidate an arbitration agreement under the FAA. This means that unless the arbitration agreements in question were extracted by fraud or duress, which would serve to invalidate any contract, the clear terms of an arbitration agreement, allegedly validly entered into, should prevail.

In her dissent, Justice Ginsburg criticized this reasoning, suggesting that the illegality of collective litigation waivers contained in employer-imposed arbitration clauses is what qualifies as an excludable contractual provision which would fall under the FAA's "saving clause".

She also highlighted Section 1 of the FAA which expressly excluded employment contracts from the scope of the FAA: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

In fact, the legislative history of the FAA shows that organized labor had objected to the application of arbitration in the employment context but were contented with the fact that the FAA clearly excluded workers from its scope. That understanding of the Section 1 exclusion in the FAA was confirmed in historic Supreme Court jurisprudence. For example in the 1967 *Prima Paint* case, the Supreme Court stated that "categories of contracts otherwise within the [FAA] but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the [FAA]."

However, more recent jurisprudence has gradually whittled away the employment contract exception in the FAA, beginning with the 1991 *Gilmer* case which authorized arbitration of claims under the Age Discrimination and Employment Act of 1967. Thereafter, the 2001 *Circuit City* case ruled that the employment exception should be construed narrowly, only to cover transportation workers. According to Justice Ginsburg, the resulting spike in the number of mandatory employer-imposed arbitration agreements in recent years is a direct result of that decision.

Individualized Arbitration Proceedings and the Issue of Consent (or Lack Thereof)

The *Epic Systems* majority also found issue with the invocation only of the "individualized nature" of the arbitration proceedings, suggesting that a contract cannot be unenforceable "just because it requires bilateral arbitration". It likened the employer-employee arbitration agreements prohibiting class actions to company-consumer arbitration agreements with class action waivers recently upheld as valid by the Supreme Court in the 5-4 split 2011 *AT&T Mobility LLC v. Concepcion* case (with Justice

Scalia writing for the majority rather than Justice Gorsuch). When discussing the *Concepcion* case, the *Epic Systems* majority held that in both the employer-employee and the company-consumer context, "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent".

However, in response, Justice Ginsburg's dissent highlights that by limiting employees to individualized arbitration proceedings, employers inherently prevent them from utilizing "existing, generally available procedures" to exercise their right to engage in "other concerted activities" as permitted by the NLRA. Employees should be able to use procedures such as joinder, class action litigation, and class arbitrations, permitted under the FLSA, Federal Rules on Civil Procedure, and for example the Supplementary Rules for Class Arbitrations established by the American Arbitration Association ("AAA").

Interestingly, Justice Ginsburg also took issue with the majority's use of the word "consent" when referring to individualized arbitration proceedings. She questioned whether the arbitration agreements between the employers and employees in the three lower court decisions in question were truly "bilateral" in nature and whether they were in fact "voluntary". Indeed, the employers Epic Systems and Ernst & Young in the Seventh and Ninth Circuit decisions respectively, had e-mailed their employees an arbitration agreement imposing individual arbitration, providing that if the employees continued employment, they would be deemed to have accepted those terms. It is debatable whether the employees sufficiently entered into the arbitration agreement on consensual terms.

Justice Ginsburg emphasized that the FAA was designed to apply to "voluntary, negotiated agreements" to arbitrate. It was never meant to support arbitration "where one party sets the terms of an agreement while the other is left to 'take it or leave it'."

The *Epic Systems* decision has served to further increase the divide between the position of the United States and that of France, for example, which has carved out an exception to the primacy of arbitration agreements when it comes to labor and employment disputes. In fact, according to Article L. 1411-4 of the French Labor Code, only the Labor Courts (*Conseils des Prud'hommes*) are competent to hear employment disputes and recourse to arbitration is hence prohibited. It remains to be seen how the United States and the various EU Member States will continue to diverge on this issue in the future, as class actions continue to take a foothold in Europe.

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