

# The Best of Times and the Worst of Times

## The Current Landscape of Mandatory Arbitration Clause Enforcement in Domestic Arbitration

By Virginia Neisler

**T**here is nothing new about arbitration, a method of alternative dispute resolution designed to settle disputes more efficiently, cheaper, and faster than litigation.<sup>1</sup> Today, mandatory arbitration clauses are ubiquitous in commercial contracts, social media terms and conditions, employment contracts, and more. These contracts, where one party in the weaker position (often a consumer or an employee) must either accept or reject the terms as written with no power to negotiate, are known as contracts of adhesion.<sup>2</sup> The widespread use of arbitration clauses—specifically, pre-dispute, forced arbitration agreements, often including class-action waivers found in adhesion contracts—has come under pressure.

### The criticisms

Critics of mandatory arbitration say the clauses deprive consumers and employees of their rights,<sup>3</sup> give an unfair advantage to large corporations,<sup>4</sup> and provide inadequate recourse for claims of civil rights abuses or sexual harassment.<sup>5</sup> Equifax's response to its major security breach, the fraudulent accounts scandal at Wells Fargo, and the #metoo movement have brought these issues to the forefront of public consciousness. In the legal field, law schools have expressed concern over "Biglaw" firms' use of mandatory arbitration clauses in summer associate contracts,<sup>6</sup> and law student groups have pushed for change.<sup>7</sup> Note that these are not criticisms of arbitration overall, but rather the practice of forcing arbitration in these specific circumstances through use of mandatory arbitration clauses in contracts of adhesion. This practice was expressly not

addressed by the Uniform Law Commission when drafting the Revised Uniform Arbitration Act,<sup>8</sup> which Michigan adopted in 2012.<sup>9</sup> The issue of adhesion contracts was only briefly noted in Michigan's bill analysis.<sup>10</sup>

### The law

The Federal Arbitration Act (FAA)<sup>11</sup>—with its mandate that arbitration agreements be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"<sup>12</sup>—is at the heart of the current legal discussion. The FAA preempts state law, making state efforts to limit the use of mandatory arbitration moot.<sup>13</sup> Those who favor excluding certain disputes from the reach of the FAA look to the latter half of the excerpted provision: the so-called "savings clause." Proponents of arbitration clause enforcement take a traditional freedom of contract view and read the savings clause narrowly.

### Recent actions

In July 2014, President Obama signed an executive order banning pre-dispute mandatory arbitration agreements for claims of sexual assault and sexual harassment and

violations of Title VII in new federal procurement contracts over \$1 million.<sup>14</sup> Congress officially disapproved the administrative rules passed to implement that order<sup>15</sup> using powers proscribed by the Congressional Review Act (CRA).<sup>16</sup>

The CRA, employed successfully only once by prior Congresses, has been used to reverse multiple instances of perceived regulatory or executive overreach in President Obama's so-called "midnight rules" in the current session.<sup>17</sup> Additionally, the Consumer Financial Protection Bureau issued a rule prohibiting certain financial institutions from using arbitration agreements that barred consumers from filing or participating in class-action suits.<sup>18</sup> Congress, again utilizing the CRA, passed a joint resolution to disapprove of the rule.<sup>19</sup>

The Supreme Court has also reinforced the FAA's preeminence and shown a preference for enforcing arbitration clauses over the years.<sup>20</sup> In June 2018, the Court handed down another pro-arbitration opinion.<sup>21</sup> In *Epic Systems Corp v Lewis*, employees argued that the National Labor Relations Act and the savings clause of the FAA read together should bar enforcement of mandatory arbitration clauses in which employees waived their right to participate in class,

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collective, or representative proceedings.<sup>22</sup> The Court decided by a 5–4 margin that neither law supersedes the requirement that arbitration agreements be enforced.<sup>23</sup>

Despite *Epic* and unprecedented use of the CRA, there has been increasing interest among congressional Democrats in amending the FAA. Since 2015, representatives have introduced 19 bills<sup>24</sup> to limit application of the FAA in certain types of disputes, 12 of which were introduced in the current Congress. In the prior 23 years, only 22 similar bills were introduced.<sup>25</sup>

Thus far, no bills have succeeded. But as the issue seems to be a largely partisan one, with Democrats favoring limitation of the FAA and Republicans favoring enforcement as is, it bears watching. Growing public concern about forced arbitration clauses and visible efforts to amend the law along with an upcoming change in House leadership mean the use of mandatory arbitration is likely to remain a contentious issue. ■



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