MINNESOTA LAWYER
SAINT PAUL LEGAL LEDGER
June 5, 2019
MINNLAWYER.COM

The Arbitration Delusion

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The arbitration delusion is a combination of two ideas that have coalesced over time to form an entirely false impression of the purpose and function of arbitration. The Federal Arbitration Act ("FAA") was passed in 1925 to address judicial hostility to the enforcement of contractual arbitration clauses. The legislative history makes clear that the FAA "… was designed to provide a means of dispute resolution particularly adapted to the settlement of commercial disputes." Congress observed that arbitration is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact-quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance and the like." Congress intended to afford merchants of relatively equal bargaining power a speedy and economical means of resolving commercial disputes. There is no support in the legislative history that Congress ever intended to compel arbitration where one party set the terms of an agreement while the other was left to "take it or leave it."

Over time the Supreme Court has veered away from the original intent of the drafters and has developed revisionist thinking on the FAA's purpose. In 1983, for the first time in the FAA's 58-year history in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)*, the Supreme Court found that the "FAA evinces a liberal federal policy favoring arbitration." The Supreme Court found a liberal federal policy favoring arbitration absent the existence of any discernible evidence in the legislative history.

Once the Supreme Court determined that there was a liberal federal policy favoring arbitration there began an almost limitless creep to the reach of the FAA. The FAA's original purpose was soon eclipsed by the Court's more expansive view. The FAA was soon applied to a host of securities and employment-based statutory claims. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc. 105 S. Ct. 3346 (1985); *Shearson/American Express Inc. v McMahon*, 107 S. Ct. 2332 (1987); *Gilmer v Interstate/Johnson Lane*, 111 S. Ct. 1647 (1991).

Arbitration has morphed far beyond its original intent. It now applies to employees who won't be hired unless they agree to arbitrate their employment disputes. It also applies to investors, bank customers, mobile-phone subscribers and internet users. It is nigh impossible to function in today's technological age without agreeing to terms that are set by a more powerful party to the contract on a "take it or leave it" basis.

The last three significant Supreme Court decisions on arbitration, not surprisingly, follow the conservative/liberal fault line that dominates most of the Court's hotly contested arbitration decisions. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The majority's rationale for continuing to extend the FAA's reach varies depending on the facts. While the facts and rationale may vary there are three universal truths that appear to drive the majority's thinking.

First, a contract is a contract regardless of the bargaining position of the parties. It does not appear to make a difference to the Court that in many contract settings one party has neither leverage nor bargaining power. In *American Express*, a merchant with a $30,000 claim against Amex, sought to bring a class action on Sherman Antitrust grounds. The contract between Amex and the merchant had a mandatory arbitration clause. The cost to the merchant of bringing the Sherman Act claim would have been prohibitive. Consequently, the merchant sought to bring a class action. The arbitration clause had a class-action-waiver provision as well as confidentiality and other provisions that would make pursuit of an individual claim a "fool's errand." In ordering the dispute to be submitted to arbitration, the majority made clear that "arbitration is a matter of contract…and courts must rigorously enforce arbitration agreements according to their terms." Lost in the strict adherence to that principle is the fundamental rationale and legislative history that served as the basis for the adoption of the FAA. As the dissent in American Express pointed out, Amex has successfully used the arbitration clause to effectively eliminate the merchant's right to seek relief under the Sherman Act. The FAA was never intended to deprive a party of the effective opportunity to challenge monopolistic conduct. According to the dissent, "In the hands of today's majority arbitration threatens to become… a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."

Second, in *Epic*, the Supreme Court reaffirmed the contract-is-a-contract theme and supported it with the time-worn delusion that arbitration provides an informal, efficient and inexpensive dispute-resolution process. Justice Gorsuch wrote, "in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolution for everyone involved." The notion that arbitration, is a less expensive, more informal and efficient proceeding harkens back to bygone days that have long since disappeared. American Arbitration Association and JAMS arbitration proceedings carry with them filing fees that are substantially greater than the filing fees associated with court proceedings. The cost of proceeding in arbitration including payment of significant arbitrator compensation, can be substantially greater than proceeding in court and in some cases is cost prohibitive to the vindication of a party's rights. The view that arbitration is quicker, more informal and cheaper is an outmoded view of modern-day arbitration.

The third truth on which the arbitration delusion relies is that employers and other parties that demand pre-dispute arbitration clauses in their agreements do so because "a prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results…." That is a relatively Pollyannaish view of the issue. As a practical matter, the party with the negotiating leverage includes an arbitration clause for the purpose of giving it a strategic advantage in any dispute -resolution process. Proof of that is found in every one-sided arbitration clause that includes language that limits the rights or remedies of the party without negotiating leverage. The Supreme Court has uniformly upheld those limitations even in situations where it left the employees with no meaningful or effective way of enforcing their rights.

A prime example of that is the recent decision in *Epic*. In her dissent, Justice Ginsburg compared the use of arbitration clauses that have the effect of limiting the rights and remedies of employees to the "yellow-dog" contracts of the 1920s. Yellow-dog agreements were contracts that employers required employees to sign in which the employee was forced to agree to not join a labor union. In Justice Ginsburg's view, an employer-mandated arbitration clause, which is not a product of arm's length negotiation and which severely limits an employee's rights, is not much better than the heinous yellow-dog contracts of the 1920s.

The Supreme Court has made clear that arbitration clauses are going to be rigorously enforced according to their terms without regard to their applicability in today's modern technological world. The only branch of government that can address the Supreme Court's interpretation and application of a law that is almost 100 years old, and outmoded in today's society, is Congress. Unfortunately, much needed reform is not likely to occur in today's polarized political climate.

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