I. Alternative Dispute Resolution

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A. Introduction

The *Epic Systems* trilogy of labor arbitration cases[1] was the most important commercial matter on the U.S. Supreme Court's calendar this term. More than 25 million American workers have workplace agreements requiring them to resolve employment disputes through individual arbitration, waiving any right to participate in class or collective dispute resolution. The question presented to the Supreme Court was whether these arbitration agreements are enforceable, given the alleged conflict between two federal statutes: the National Labor Relations Act (NLRA)[2] and the Federal Arbitration Act (FAA).[3] The NLRA guarantees employees the right to engage in "concerted activities" in pursuit of "mutual aid or protection,"[4] and the National Labor Relations Board (NLRB) held it is an "unfair labor practice" to require employees to waive participation in class or collective actions.[5] By contrast, the FAA mandates that courts enforce arbitration agreements according to their terms, including any waiver of the right to class

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1. The Supreme Court granted certiorari to hear three separate cases, which were consolidated for purposes of briefing and oral argument. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-300); Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307) (hereinafter referred to as the "*Epic Systems* trilogy").
2. 29 U.S.C. §§ 151–169 (2012).
3. 9 U.S.C. §§ 1–16 (2012).
4. 29 U.S.C. § 157 (2012).
5. *See In re* D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012).

action dispute resolution. Employers prevailed in a 5 to 4 decision, where Justice Neil Gorsuch's majority decision drew a lengthy and contentious dissenting opinion from Justice Ruth Bader Ginsburg.

This Report briefly describes the legislative history of the FAA as it relates to labor and employment contracts and the adoption by the NLRB in 2012 of a rule holding that NLRA § 7 creates a "substantive right" by employees to class or collective resolution of labor disputes. Many observers thought this NLRB rule presented the plaintiffs' bar with its best hope for thwarting employers' use of mandatory, pre-dispute arbitration to prevent employees from filing class or collective litigation. The Report then describes the key points of the Supreme Court's ruling, including how the Court's expansive construction of the FAA is likely to impact future employer-employee relations; consumer disputes where class waivers are included in adhesion contracts; and federal administrative regulations adopted during the Obama administration that purport to bar use of mandatory, pre-dispute arbitration agreements in a wide variety of federal contracts.

B. The FAA's Legislative History and Development of the NLRB's Rule

When Congress enacted the FAA in 1925, the statute's legislative history suggests it was intended to apply only to maritime transactions and commercial contracts.[6] Organized labor nevertheless opposed the bill, fearing it might authorize federal judicial enforcement of arbitration clauses in employment contracts.[7] An amendment was offered to § 1 of the FAA by then Secretary of Commerce Herbert Hoover to exclude application of the FAA to "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[8] At the time, this was thought to preclude application of the FAA in labor disputes.[9]

But over time, the Supreme Court both broadened its view of the scope of the FAA and limited the breadth of the Act's labor exclusion. In *Gilmer v. Interstate/Johnson Lane Corp.*,[10] the Supreme Court held for the first time that em-

6. The original bill was drafted by the Committee on Commerce, Trade and Commercial Law of the American Bar Association to further "the principle of *commercial* arbitration." *See* Report of the Forty-third Annual Meeting of the American Bar Association, 45 A.B.A. Rep. 75 (1920) (emphasis added). Members of Congress understood the bill was "to enforce an agreement in *commercial* contract and *admiralty* contracts." 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham) (emphasis added).

7. *See* Proceedings of the Twenty-sixth Annual Convention of the International Seamen's Union of America at 203–04 (1923). Subsequently, in 1935, § 301 of the NLRA, 29 U.S.C. § 185 (2012), authorized judicial enforcement of collective bargaining agreements, including arbitration clauses.

8. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 127 (2001) (Stevens, J. recounting Hoover's proposed amendment from the legislative history of the Act).

9. *Id.* ("History amply supports the proposition that it was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.") (Stevens, J., dissenting).

10. 500 U.S. 20 (1991).

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ployers could include provisions in workplace agreements requiring employees to arbitrate disputes, and that statutory claims arising under the federal labor laws could be arbitrated rather than litigated in court. Ten years later, in *Circuit City Stores*, the Court held that the phrase Secretary Hoover proposed in FAA § 1—"contract of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—did not exempt all contracts of employment from application of the FAA, but only those of "transportation workers."[11] This allowed FAA § 2 to apply to a large number of employment agreements.

There was substantial disagreement over the proper application of *Gilmer*. The General Counsel of the NRLB prepared a "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies."[12] The General Counsel Memo advised the NLRB's regional directors that *Gilmer* "determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution."[13] It further advised that an "employer does not violate section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration."[14] In short, as long as an arbitration agreement did not suggest an employee was waiving statutory rights to present claims to the NLRB, the General Counsel Memo concluded it was not an unfair labor practice to require or enforce a *Gilmer* agreement compelling individual arbitration.[15]

The Board members of the NLRB did not accept the legal framework advocated in the General Counsel's Memo. The Board held in *In re D.R. Horton, Inc.*[16] that an employer commits an unfair labor practice by requiring its employees to arbitrate disputes related to their employment on an individual basis.

Initially, the NLRB's *Horton* rule met with near unanimous opposition in the courts. The U.S. Court of Appeals for the Fifth Circuit[17] declined to enforce the NLRB's *Horton* decision, as did the Second[18] and Eighth Circuits.[19] For three years, the circuit courts were aligned against the NLRB's position.[20] This changed

11. *Circuit City*, 532 U.S. at 109.

12. NLRB, Office of the Gen. Counsel, Memorandum GC 10-06, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies (June 16, 2010), https://www.nlrb.gov/publications/general-counsel-memos [hereinafter General Counsel Memo].

13. *Id*. at 2.

14. *Id*.

15. *Id*. at 6 ("no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and that no Section 7 right is violated when that individual agreement is enforced.").

16. 357 N.L.R.B. 2277 (2012).

17. D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013).

18. Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 297–98 n.8 (2d Cir. 2013).

19. Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).

20. The Fifth Circuit reaffirmed its *In re D.R. Horton* decision in *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d. 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 909 (Jan. 13, 2017) (No. 16-307).

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when first the Seventh Circuit,[21] and then the Ninth Circuit,[22] elected to enforce the NLRB's *Horton* rule. The circuit split resulted in the Supreme Court granting certiorari to hear what has become known as the *Epic Systems* trilogy of cases.

Shortly after the Supreme Court granted certiorari, the circuit split enlarged, as the Sixth Circuit[23] joined the Seventh and Ninth Circuits in upholding the NLRB's *Horton* rule. The division worsened when the U.S. Solicitor General, who supported the NLRB's position during certiorari briefing, switched sides after President Trump's election. The result was that the United States filed two briefs: one by the NLRB asserting NLRA § 7 created a substantive right for employees to participate in class or collective actions, and one by the Solicitor General denying the existence of any such right and urging that arbitration agreements should be enforced as drafted.[24] Given the depth of division on this issue, no one was surprised when the Supreme Court reached a 5 to 4 split decision with the conservatives prevailing. Nevertheless, the rationale advanced by the majority further broadens the scope of the FAA at the expense of long-standing labor laws.

C. The Supreme Court's Decision in the *Epic Systems* Trilogy

1. The Court Holds the Two Federal Statutes Do Not Conflict

The Court's decision starts from the premise that there is no material—let alone fundamental—conflict between the FAA's requirement that arbitration agreements, including class waivers, must be enforced as drafted by the parties, and the NLRA's protection in § 7 of concerted activities by employees for mutual aid or protection.

Justice Gorsuch started his analysis by stating: "It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another."[25] Consequently, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'"[26]

The majority gave effect to both federal statutes by identifying the primary spheres of influence of each Act. With respect to the NLRA, the majority identified its primary sphere of influence as "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose

21. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285).

22. Morris v. Ernst & Young, L.L.P., 834 F.3d 1147 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-300).

23. *See* N.L.R.B. v. Alternative Entm't, Inc., 858 F.3d 393 (6th Cir. 2017).

24. Justice Gorsuch commented twice on the Government's bifurcated position, using the split to argue that the NLRB's § 7 "substantive right" to class adjudication, and the alleged conflict between the NLRA and the FAA, were both newly perceived and disputed within the Government.

25. Epic Sys. Corp. v. Lewis, No. 16-285, Ernst & Young, LLP v. Morris, No. 16-300, N.L.R.B. v. Murphy Oil USA, Inc., No. 16-307, Slip Op. at 2 (May 21, 2018) (hereinafter "Slip Op. at __").

26. *Id*. at 10, citing Morton v. Mancari, 417 U.S. 535, 551 (1974).

of collective bargaining or other mutual aid or protection."[27] By contrast, the FAA's primary sphere of influence is the strict enforcement of the terms of an arbitration agreement, including any procedural rules specified by the parties to govern their arbitration. The Court stated:

> The NLRA secures to employees rights to organize unions and bargain collectively, but says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.[28]

2. The Court Finds No § 7 Right to Class or Collective Action

The Court held NLRA § 7 was totally silent—"[n]othing in the NLRA even whispers to us"—about creation of a right to class or collective dispute resolution.[29] The Court said this was not surprising since such procedures were "hardly known when the NLRA was adopted in 1935."[30] Federal Rule of Civil Procedure 23 providing for class actions was not adopted until 1966, and while some forms of collective actions existed in 1935, Congress's "failure to mention them only reinforces that the statute doesn't speak to such procedures."[31]

The Court analyzed both the specific language of § 7 and the regulatory regime applicable to each of the "concerted activities" referenced in § 7 and found no evidence that the NLRA intended to control litigation or arbitration procedures by creating a right to class or collective dispute resolution.[32] The

27. 29 U.S.C. § 157. The Court found the quoted language did not reflect a clear and manifest congressional command to displace the FAA.

28. Slip Op. at 2.

29. *Id*. at 13. The closest the Supreme Court has come to addressing whether NLRA § 7 creates a right to collective litigation was its decision in *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978). There, the Court recognized that a number of district and circuit courts had "held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," adding a footnote to its opinion collecting a number of NLRB cases and cases from three circuit courts. *Id*. at 565–66. However, the issue was not whether § 7 granted substantive rights to participate in class dispute resolution, but whether it "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Id*. The Supreme Court concluded its footnote with the disclaimer: "We do not address here the question of what may constitute 'concerted' activities in this context." *Id*.

30. Slip Op. at 11.

31. *Id.* at 11–12.

32. The Court noted that the NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U.S.C. § 159; explains employees' and employers' obligations to bargain collectively, § 158(d); conscribes certain labor organization practices, §§ 158(a)(3), (b); addresses concerted activities such as picketing, § 158(b)(7), and strikes, § 163; and even sets rules for adjudicatory proceedings under the NLRA itself, §§ 160, 161. "But missing entirely from this careful regime," the Court stated, "is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration." Slip Op. at 13. The Court concluded: ". . . it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7

Court concluded that the employees failed to satisfy the "heavy burden" of showing from the plain words of the statute any congressional intention either to repeal the FAA by implication, or to stay the normal operation of that statute, which was enacted a decade before the NLRA.[33]

With respect to statutory construction, the Court found the catchall term "concerted activities" relied on by the NLRB "appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively."[34] This suggests, the Court stated, that the "other concerted activities" should be of like kind as the denominated protected activities, which Justice Gorsuch characterized as "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound 'activities' of class and joint litigation."[35] The majority thus rejected that § 7 created a substantive right to class or collective arbitration or litigation.[36]

3. The Court Holds the FAA's "Savings Clause" Does Not Apply

The Court also rejected the argument, adopted by the Seventh and Ninth Circuits, that the FAA's "savings clause" invalidated the class waiver contained in the employers' arbitration agreements as a violation of NLRA § 7 rights. By its terms, the FAA's "savings clause" only allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[37] Congress intended this provision to preserve traditional state law defenses to contracts, such as fraud, duress, or unconscionability. It allows courts to revoke an arbitration agreement formed as a result of one of these prohibited circumstances.

Justice Gorsuch suggested there were multiple potential grounds on which the Supreme Court could have rested its decision overturning the Seventh and Ninth Circuit on the savings clause issue. These arguments included that: (1) the sav-

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yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place." *Id.*

33. *Id.* at 10.

34. *Id.* at 12 (quoting 29 U.S.C. § 157).

35. Slip Op. at 12 (quoting N.L.R.B. v. Alternative Entm't, Inc., 858 F.3d 393, 414–15 (6th Cir. 2017) (Sutton, J., concurring in party and dissenting in party) (emphasis deleted). The Supreme Court also rejected the NLRB's argument that it was entitled to *Chevron* deference in its interpretation of NLRA § 7 as applying to class and collective dispute resolution. The Court repeated its oft-mentioned observation that it has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." Slip Op. at 20.

36. It is also worth noting that the NLRA does not provide a private right of action. Under the NLRA, employee complaints can only be filed with the NLRB. The private cause of action for the employees in the *Epic Systems* trilogy of cases arises under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012). The FLSA provides for class actions, but only if employees specifically consent to and opt-in to such actions. Since the FLSA requires employers to opt-in, they plainly have the right not to participate, thus providing no support for the NLRB's conclusion that there is a substantive right to class or collective arbitration that cannot be waived by individual employees.

37. 9 U.S.C. § 2 (2012).

ings clause only applies to state law defenses, not defenses arising from federal statutes; (2) violation of the NLRA does not qualify as a ground for "revocation" of a contract;[38] and (3) NLRA § 7 does not actually render class and collective action waivers illegal.[39]

But the majority chose a broader ground on which to block application of the savings clause, stating that even if the three defenses listed above failed, the savings clause recognizes only defenses that apply to "any" contract. The savings clause "does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfere[ing] with fundamental attributes of arbitration.'"[40] The majority stated: "In this way the clause establishes a sort of equal treatment rule for arbitration contracts."[41] It protects arbitration agreements from application of any law, whether state or federal, and regardless of whether created by statute, regulation, or judge, that has no relevance or application except in the context of arbitration. If it is a law that applies only to arbitration, or has relevance or meaning only in the context of an arbitration agreement, then it is not protected by the savings clause because it does not apply to "any" contract.

Bilateral (one-on-one) arbitration is overwhelmingly the most common form of arbitration. The Court concluded the "fundamental attributes of arbitration" include a party's right to specify with whom it will arbitrate and the procedures by which the arbitration will proceed. Justice Gorsuch asserted on behalf of the Court that party autonomy to select the rules and procedures governing arbitration was protected "pretty absolutely" by the FAA:

> The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. *And this much the Arbitration Act seems to protect pretty absolutely*.[42]

38. Justice Clarence Thomas asserted this ground for rejecting the savings clause argument in his concurring opinion. He maintained that "grounds for revocation of a contract are those that concern 'the formation of the arbitration agreement.'" Epic Sys. Corp. v. Lewis, No. 16-285, Ernst & Young, LLP v. Morris, No. 16-300, N.L.R.B. v. Murphy Oil USA, Inc., No. 16-307, Concurring Slip Op. of Thomas, J. at 1 (May 21, 2018). The employees argued that the NLRA made it illegal to enforce the class waivers. But Justice Thomas argued that since illegality is a public policy defense, that defense is not within the scope of the FAA, as "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made." *Id*. at 2, citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 357 (2011).

39. Slip Op. at 6–7 (citations omitted).

40. Slip Op. at 7.

41. *Id*. This "equal treatment" doctrine first developed in *Concepcion*, 563 U.S. at 344, and was significantly enhanced in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–71 (2015), and *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421, 1426–28 (2017).

42. Slip Op. at 6 (Emphasis added). Epic Systems rejects "an argument that a contract is unenforceable *just because it requires bilateral arbitration*. . . ." *Id*. at 9. That defense will likely work only if the federal statute giving rise to the defense is one that qualifies under the Court's strict standard for expressing a "contrary congressional commend" limiting or barring arbitration under the FAA. Otherwise, as discussed above, the FAA's protection of class waivers is "pretty absolute."

In short, the Supreme Court relied on the broadest possible ground for rejecting the savings clause as a basis for invalidating the arbitration clauses in the *Epic Systems* trilogy of cases. It found the NLRB and the circuit courts construed the NLRA so as to interfere with a fundamental attribute of arbitration, namely party autonomy to decide with whom to arbitrate and under what procedures. This rationale forcefully narrows the grounds for any future reliance on the FAA savings clause as a basis for invalidating an arbitration agreement, likely including agency rules adopted to implement federal statutes that lack an explicit "contrary congressional command" against arbitration.[43]

D. The Impact of *Epic Systems* on the FAA and Arbitration

Epic Systems is arguably the Supreme Court's most significant arbitration decision since its decision in *AT&T Mobility LLC v. Concepcion*.[44] It is a material step forward in closing the circle on the Court's line of class action decisions extending over the past decade.[45] The Court's class action decision cases have allowed companies to eliminate their exposure to class action disputes by utilizing bilateral arbitration. Utilizing bilateral arbitration agreements also has the collateral effect of suppressing the total volume of claims. Competent counsel is substantially less likely to accept a contingent fee arrangement to arbitrate small claims on an individual basis. Further, most arbitrations have relatively high administrative costs, which suppresses filing of small claims because the amount in controversy is not sufficient to justify the cost of pursuing arbitration one claim at a time.

The *Epic Systems* decision clearly reinforces the Supreme Court's "business friendly" reputation. It lifts the risk to employers that the NLRB will assert an unfair labor practice charge and assess penalties merely for requiring employees to consent to bilateral arbitration of employment disputes. The likely result is that more employers will include mandatory, bilateral arbitration agreements as a condition of employment for at least some portion of their workforce.

It is also likely that companies subject to small consumers claims will increasingly include mandatory arbitration as part of their terms of service. Many other

43. *See* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104 (2012).

44. 563 U.S. 333 (2011).

45. Perhaps the most significant issue remaining concerning arbitration and class actions is the "who decides" question, namely will courts or arbitrators decide whether parties have consented to class arbitration if their arbitration agreement does not explicitly address that gateway issue. This issue was left open in the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662 (2010), holds that because of the vast differences between individual and class arbitration, arbitration is assumed to be bilateral unless the four corners of the arbitration agreement evidence party agreement to authorize class arbitration. *Stolt-Nielsen* does not resolve, however, whether courts or arbitrators should in the first instance make this determination. The Supreme Court granted certiorari on June 25, 2018 to hear a case raising the "who decides" question, Henry Schein v. Archer & White Sales, Inc., 878 F.3d 488 (5th Cir. 2017), *cert. granted*, 2018 WL 1280843 (U.S. June 25, 2018) (No. 17-1272).

businesses potentially subject to class actions based on contractual services, such as financial institutions, are also likely to increase their utilization of bilateral arbitration to avoid exposure to class action litigation. The Supreme Court's decision appears to give near absolute protection to the use of class action waivers in arbitration agreements.

In addition, it is likely that administrative agency rules adopted by the Obama administration, which have not already been blocked by the Trump administration or invalidated by Congress under the Congressional Review Act,[46] will be subject to challenge in court.

Finally, *Epic Systems* confirms the FAA's status as a "super statute." It applies to all arbitration agreements involving interstate commerce unless the parties specifically elect to apply a state arbitration act. As such, the FAA preempts most state statutes and state common laws that restrict, limit, or burden party rights to arbitrate according to the terms of their agreement. The FAA even applies to rights granted by other federal statutes, unless the competing federal statute contains a "contrary congressional command" prohibiting arbitration. Barring such a congressional command, the FAA and the competing federal statute will be "harmonized" in a manner to permit arbitration between the parties who contracted to arbitrate (and no other parties). And the arbitration will proceed according to the procedural rules agreed by the parties, even if the "agreement" to arbitrate is an employer-mandated condition of employment or contained in a consumer contract of adhesion.

46. Enacted as § 251 of the Contract with America Advancement Act of 1996, Pub. L. 104-121, 5 U.S.C. § 801 (2012). A more detailed discussion of Obama administration regulatory limitations on mandatory, pre-dispute arbitration agreements in found at John Jay Range, *Alternative Dispute Resolution*, *in* RECENT DEVELOPMENTS IN INFRASTRUCTURE AND REGULATED INDUSTRIES 18–20 (Millicent W. Ronnlund & Daniel J. Poynor, eds., 2017).