U.S. Supreme Court Rules on Enforceability of Individual Arbitration Agreements in Employment Contracts

On 21 May 2018, the U.S. Supreme Court (the ***Supreme Court***) handed down its decision in *Epic Systems Corp. v. Lewis* finding that arbitration agreements in which an employee agrees to arbitrate any claims against an employer on an individual rather than on a class or collective basis are enforceable and are not in violation of the National Labor Relations Act (the ***NLRA***).

The judgment concerned three consolidated cases: *Epic Systems Corp. v. Lewis*; *Ernst & Young LLP v. Morris* and *NLRB v. Murphy Oil USA, Inc.* As the Court noted, the three cases differed in detail but not in substance.

In previous decisions (see: *AT&T Mobility v. Concepcion*; *American Express Co. v. Italian Colors Restaurant*; *DIRECTV, Inc. v. Imburgia*), the Supreme Court had already ruled that companies were entitled to include individual arbitration clauses in their consumer contracts which explicitly precluded those consumers from resorting to class arbitration. In the

present case, the Supreme Court had to rule on whether companies could also include individual arbitration clauses in their contract with their employees which required those employees to waive their rights to participate in class and collective actions.

In the case at hand, the employees firstly relied on the saving clause in the Federal Arbitration Act (***FAA***) which allows courts to refuse to enforce arbitration agreements "*upon such grounds as exist at law or in equity for the revocation of any contract*". More precisely, the employees argued that this saving clause applied in their case (and that therefore their arbitration clause inserted in their contracts should be disregarded) since the NLRA rendered "*their particular class and collective action waiver illegal*".

However, the Supreme Court reasoned that the saving clause provided for in the FAA only recognizes "*generally applicable contract defences*" (such as fraud, duress or unconscionability) that apply to "*any contract*". This saving clause does not apply to defences that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. In this regard, the employees' objection that agreements required individualized arbitration proceedings which conflicted with the NLRA does not constitute a generally applicable contract defense and therefore cannot be accepted.

Secondly, the employees argued that the NLRA overrides the requirement in the FAA to enforce arbitration agreements. In this regard, they relied on Section 7 of the NLRA which guarantee employees "*the right to self-organization, to form, join or assist labor organizations, to bargain collectively* […]*, and to engage in other concerted practices for the purpose of collective bargaining or other mutual aid or protection*".

However, the Supreme Court rejected that argument. According

to the Supreme Court, the employees didn't show a "*clear and manifest*" congressional intention to displace the FAA with the NLRA. According to the Supreme Court, Section 7 of the NLRA "*focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in* [Section] *7, since those procedures were hardly known when the NLRA was adopted in 1935*".

A dissenting judgment was written by Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan. The dissent focused on the fact that one of the main purposes of the NLRA was to redress the imbalance between employers and employees. Throughout the dissent, it was emphasised that class and collective actions help overcome the problem that small recoveries discourage individuals to bring actions defending their rights. The dissent was of the view that the result of the majority opinion is that "[e]*mployers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favour of skirting legal obligations*".

In response, the majority submitted that the "*dissent retreat*[ed] *to policy arguments*" and maintained that while the policy may be debatable, the law is clear: "*Congress has instructed that arbitration agreements like those before* [it] *must be enforced as written*".
