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**VALIDITY OF THE MANDATORY ARBITRATION
AGREEMENTS UNDER THE U.S. FEDERAL ARBITRATION
ACT**

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ABSTRACT

The United Nations Forum on Business and Human Rights had from 27-29 November, 2017 convened in Geneva and the central theme for discussion was on “Access to Effective Remedy.” With the growing importance of the UN Guiding Principles on Business and Human Rights, a working group of people specializing in international law had proposed to make arbitration the means through which human right abuses in businesses could be addressed. This paper argues that though international arbitration could be a good way of solving disputes of this nature, one cannot ignore the ill effects it could have on the victims. It discusses briefly about the History of the Federal Arbitration Act in the United States of America. It also examines the approach taken by the Judiciary both at the federal and state level in America and how has their interpretation paved way for the recent legislative developments in the 115th Congress. Furthermore, it discusses the importance of consent

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between the parties when entering into employment agreements and how could it affect the rights of the workers.

With the increasingly globalized world that we live in, these disputes do not necessarily arise in all the parties residing and belonging to the same jurisdiction. The paper will conclude with plausible solutions will be offered to address the loopholes present if the international arbitration mechanism is used in its current form.

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I. INTRODUCTION

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the UN Guiding Principles on Business and Human Rights.⁵⁴ This right has also been accepted in other internationally recognized legal instruments like Article 8 of the Universal Declaration of Human Rights which states: “*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*”⁵⁵ What is imperative therefore is recognition of the importance of access to legal remedy to victims.

With the advent of globalization, there has been an enormous rise in the transactions across the globe. When parties conduct business beyond their territorial jurisdiction, they increasingly prefer to rely on a neutral party to solve their disputes. Over the course of arbitration's history in the United States, it was first embraced as the preferred mechanism to resolve labour relations disputes, principally arising under collective bargaining agreements in the work place. The flood of such disputes in the post-WWII industrial age would have drowned any judicial system in a tsunami of work place disputes, had arbitration not sailed to the court's rescue.⁵⁶ As arbitration wove its way into the fabric of many

⁵⁴ Office of the High Commissioner, *OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses*, U.N. HUMAN RIGHTS (August 2019), available at <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> [hereinafter “OHCHR Accountability and Remedy Project”].

⁵⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁵⁶ 86 Am. Jur. Trials, §111 (2002).

other commercial disputes (i.e., construction, securities, international, pension, no-fault insurance, patent, real estate and more), the courts began to infuse the essence of their labour arbitration holdings into court cases involving other claims. By the beginning of the 21st Century, judicial holdings in widespread commercial disputes began to mimic, with surprising similarity, the decisional logic once limited to the labour relations arena. In viewing the judicial intervention in arbitration, the major sea change that has affected nearly every arbitration outside the public sector is the near pre-emptory effect of the Federal Arbitration Act. The U.S. Supreme Court has vehemently upheld the validity of the mandatory arbitration agreements under the U.S. Federal Arbitration Act.

A judicial proceeding could be time consuming, expensive and could also lead to a biased decision if the proceeding is taking place in the territory of one of the parties to a transaction. However, a blanket ban on the parties' right to litigation and enforcing mandatory arbitration agreements even in situations when such a forum becomes unavailable or when the collective rights of one class of parties is at risk, can have significant effect on the rights of the parties. The article examines the effect that the mandatory arbitration clauses have on the rights of the litigants especially when unequal bargaining power exists between the parties.

II. HISTORY OF THE FEDERAL ARBITRATION ACT

The Federal Arbitration Agreement [hereinafter "FAA"] was passed in 1925 by the Congress as a measure to reduce the hostility of the

judiciary towards the arbitration agreements.⁵⁷ The Federal Arbitration Act was enacted in the United States of America in 1925 to ensure the validity and enforcement of arbitration agreements in any “*maritime transaction or ... contract evidencing a transaction involving commerce*.”⁵⁸ The legislative history of the Act suggests that Congress intended it to serve two purposes: first, to affirm the validity of arbitration agreements as binding contract provisions in their own right; and second, to curb costly and time-consuming litigation that was clogging federal and state dockets in the wake of the Industrial Revolution.⁵⁹

While the FAA came into force over 90 years ago, only recently have federal courts and state courts started universally applying the FAA to all disputes involving interstate commerce in whatever court they may be filed.⁶⁰ Section 2 of the Federal Arbitration Act, which is at the heart of the Act provides;

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

⁵⁷ Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses within Contracts of Adhesion*, 91 NEB. L. REV. 666, 668 (2013).

⁵⁸ Federal Arbitration Act, 9 U.S.C. § 2 (2006) [*hereinafter* “Arb Act”].

⁵⁹ Benjamin D. Tievsky, *The Federal Arbitration Act After Alafabco: A Case Analysis*, 11 CARDOZO J. CONFLICT RESOL. 675, 678 (2010).

⁶⁰ *Id.*

*enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*⁶¹

The genesis of the discussion on the validity of mandatory arbitration in U.S.A. can be traced back to the case of *Red Cross Line v. Atlantic Fruit Co.*⁶² where the Court had discussed about the Arbitration law of New York (Consol. Laws, c. 72), enacted on April 19, 1920 (Laws 1920, c. 275), and amended on March 1, 1921 (Laws 1921, c. 14), which declares that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties “*shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*”⁶³ The court in this case had mandated arbitration in a dispute related to a maritime contract. The Court’s decision in *Red Cross Line v. Atlantic Fruit Company* is believed to have opened the door for federal legislation that recognized the validity of arbitration agreements.⁶⁴

Though the Courts have agreed that the arbitration clause essentially forms the subject matter of contract law⁶⁵, the Court has been proactive in taking a pro-arbitration approach by applying Section 2 of the Federal Arbitration Act.⁶⁶ The U.S Supreme Court made it clear that the Federal Arbitration Act has made it explicit through its policy that

⁶¹ Arb Act, *supra* note 57.

⁶² *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

⁶³ *Id.* at 264.

⁶⁴ JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT (2017) [*hereinafter* “Shimabukuro”].

⁶⁵ *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 1 (2013) [*hereinafter* “Am. Ex.”].

⁶⁶ Arb Act, *supra* note 57.

disputes of all kinds should be preferably settled through the medium of arbitration.⁶⁷

III. RELEVANCE OF MANDATORY ARBITRATION AGREEMENT IN LIGHT OF THE INTEGRAL TEST

In light of the Supreme Court's pro-arbitration approach, the Seventh Circuit in *Green v. U.S. Cash Advance Illinois, LLC*,⁶⁸ held that an arbitration agreement between the consumer and lender would have to be enforced in the event of dispute. The arbitration agreement in this case had made National Arbitration Forum to be the forum in case of dispute between the parties. National Arbitration Forum due to an agreement with the Minnesota Attorney General had stopped taking consumer disputes.⁶⁹ Though the forum had made this agreement with the Attorney General prior to the loan taken by consumer, the parties had not amended the language of the arbitration agreement. In spite of the non-availability of a forum, the court still held that the arbitration agreement between the parties should be enforced. In its opinion, the majority rejected what is known as the Integral Part Test, which has been used by the Third, Fifth and Eleventh circuits in cases involving similar facts.⁷⁰ The Eleventh, Ninth, and Third Circuits have held that Section 5 of the FAA allows a court to appoint substitute arbitrators when the specified, unavailable forum is not 'integral' to the arbitration agreement. The Second and Fifth

⁶⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁶⁸ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013) [*hereinafter* "Green"].

⁶⁹ *Id.* at 789.

⁷⁰ *Id.* at 791.

Circuits have also recognized that this Section 5 allows a court to appoint substitute arbitrators unless the unavailable forum was ‘integral’ or ‘central’ to the arbitration agreement.

However, the Second and Fifth Circuits, unlike the Eleventh, Ninth, and Third Circuits, have found unavailable forums to be integral or central to the arbitration agreement and have refused to appoint substitute arbitrators in some instances. Adding another dimension to the split among the courts, the Seventh Circuit recently rejected using the standard of whether the forum was integral to the parties’ agreement and held that Section 5 enables the court to appoint substitute arbitrators when “*for any reason something has gone wrong.*”⁷¹

Justice Hamilton in the *Green* case also didn’t agree with the Integral Test and opined that if the arbitration forum that is specified in the arbitration agreement becomes unavailable, it renders the agreement void and the parties should be permitted to proceed with litigation. He also contended that the practicality of the majority opinion is that, a court might use the Federal Arbitration Act to authorize a ‘wholesale re-write of the parties’ contract’ when there was a mistake by both the parties to a substantial term of the contract.⁷²

What is essentially meant by being integral to an agreement by the parties is a highly contested issue since establishing the understanding of

⁷¹ Christopher J. Karacic & Howard S. Suskin, *When the Arbitration Forum Is Unavailable: What Happens Next?*, AMERICAN BAR ASSOCIATION (Feb 06, 2014), available at <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2014/when-arbitration-forum-is-unavailable-what-happens-next/>.

⁷² *Green*, *supra* note 68 at 793 (Hamilton, J. dissenting).

the parties with respect to the disputed integral term in the contract is extremely difficult. Therefore, the chances of mandatory arbitration agreements being misused given the pro-arbitration approach being taken by the Supreme Court increases. It is difficult to imagine how arbitration could be mandated if the very forum becomes unavailable. Not letting the parties proceed with litigation also in a sense shows that the fact that courts might actually decide the manner in which the contract would take place without letting the parties decide the terms of the contract will follow some economic implications for the parties too.

IV. CONFLICT BETWEEN THE FEDERAL ARBITRATION ACT AND OTHER FEDERAL LAWS

A. CONFLICT BETWEEN FEDERAL ARBITRATION ACT AND NATIONAL LABOUR RELATIONS ACT

The U.S. Supreme Court on May 21, 2018 in *Epic Systems Corp. v. Lewis*,⁷³ upheld the validity of employment contracts in which employees give up their right to collective litigation against their employer.⁷⁴ The Court dealt with the conflict between two federal statutes namely the Federal Arbitration Act and the National Labour Relations Act. Section 7 of the NLRA guarantees that “[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or

⁷³ *Epic Systems. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

⁷⁴ *Epic Systems Corp v. Lewis*, 132 HARV. L. REV. 427, (Nov. 2018), available at <https://harvardlawreview.org/2018/11/epic-systems-corp-v-lewis/> [hereinafter “Epic Systems”].

other mutual aid or protection”⁷⁵ whereas Section 2 of the Federal Arbitration Act states that the arbitration agreements “*shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*”⁷⁶ However, the Federal Arbitration Act does not require enforcement of an agreement that waives a person’s substantive rights guaranteed by another statute, nor does it require arbitration of a statutory claim if the statute giving rise to that claim expresses a ‘contrary congressional command.’⁷⁷ The primary question that has been addressed in this case is whether the workers had a right to collective litigation against their employers if their employers had made them a party to arbitration agreements that waived their right to collective litigation.

The Supreme Court held that:

- Federal Arbitration Act's (FAA) saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law; and
- the provision of National Labour Relations Act (NLRA), which guarantees the workers their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, does not reflect a clearly

⁷⁵ National Labor Relations Act, 29 U.S.C. § 157 (2012).

⁷⁶ Arb Act, *supra* note 57.

⁷⁷ Epic Systems, *supra* note 74.

expressed and manifested congressional intention to displace the FAA and to outlaw class and collective action waivers.⁷⁸

Therefore, the employment contracts requiring the employees to give up their collective litigation rights and mandating arbitration were held to be valid.

B. CONFLICT BETWEEN FEDERAL ARBITRATION ACT AND FEDERAL ANTITRUST LAWS

The Supreme Court in *American Express Co. v. Italian Colors Restaurant*,⁷⁹ had considered whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.⁸⁰ A group of merchants that had accepted the American Express card had challenged a class arbitration waiver on the ground that it contravened the policies of federal antitrust law.⁸¹ The respondents had brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards. This tying arrangement, respondents said had violated the federal antitrust law. Supreme Court observed that the enforcement of an arbitration agreement pursuant to the Federal

⁷⁸ Epic Systems, *supra* note 74.

⁷⁹ Am. Ex, *supra* note 65.

⁸⁰ *Id.* at 2307.

⁸¹ *Id.* at 2306.

Arbitration Act may be overridden by a ‘contrary congressional command’ against arbitration.⁸² However the Supreme Court noted that the federal antitrust law’s legislative intent was not to override the Federal Arbitration Act and held that the cost of individually pursuing arbitration should not be seen as a violation of rights of respondents under the federal antitrust laws. The Court explained: “[t]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”⁸³

The Supreme Court has predominantly taken an arbitration friendly approach in dealing with the conflict of the Federal Arbitration Act and other Federal Laws. While arbitration has been an effective means of resolving dispute, a blanket ban on the collective rights of the consumers/merchants can lead to a hostile environment in the economy. Such an approach can also lead to misuse of contracts by employers who usually possess better bargaining powers vis a vis the employees. They are at a greater risk of being forced into accepting the contract and its terms laid down by the employee. For workers with relatively weak financial status, this not only means being forced to sign employment contracts on the terms of the employers, but also weaker rights during the course of their employment. What could be termed as consent of the employee might actually not be the case given their circumstances. Mandatory arbitration agreements therefore do not necessarily imply a positive and cost reducing affair for the parties involved.

⁸² *Am. Ex.*, *supra* note 65 at 2309.

⁸³ *Id.* at 2311.

V. PRE-EMPTION OF THE FEDERAL ARBITRATION ACT OVER THE STATE LAWS

The Court has repeatedly held that the FAA will displace state laws or judicial rules that prohibit the arbitration of a particular kind of claim. In one of the first of its FAA pre-emption cases, *Southland Corporation v. Keating*, the Court held that the Act superseded a state provision that effectively compelled resolution of a dispute exclusively through the courts.⁸⁴ In a 7-2 opinion written by Chief Justice Burger, the Court reversed the lower court, concluding in relevant parts that the FAA applied in state courts, pre-empted the state statute's prohibition on the arbitration of claims. The Court stated that “*in enacting §2 of the [FAA], Congress declared a national policy favouring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims*” that the parties choose to resolve through arbitration.⁸⁵

The court has also discussed in various cases about the ‘saving clause’ in section 2 of the Federal Arbitration Act which states that an arbitration agreement may be invalidated “*upon such grounds as exist at law or in equity for the revocation of any contract.*”⁸⁶ Supreme Court in the case of *AT&T Mobility LLC v. Concepcion*,⁸⁷ had held that the saving clause does

⁸⁴ Shimabukuro, *supra* note 64 at 7.

⁸⁵ *Id.*

⁸⁶ Arb Act, *supra* note 57.

⁸⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

not “*preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.*”⁸⁸

The court also has held that the Federal Arbitration Act might pre-empt even laws governing contracts in state as held in *Kindred Nursing Centers Limited Partnership v. Clark*,⁸⁹ where the state law of Kentucky required that an individual when executing a power of attorney agreement had to mandatorily waive its right to trial. The U.S. Supreme Court held that such a mandatory requirement “*singles out arbitration agreements for disfavoured treatment.*”⁹⁰ The U.S. Supreme Court in this case had reversed and vacated the judgement given by the Supreme Court of Kentucky. The Apex Court had held that Kentucky’s laws had placed arbitration agreements on the same footing with other contracts which were in violation of the Federal Arbitration Act.⁹¹

Supreme Court in *Doctor’s Associates, Inc. v. Casarotto*,⁹² held that the state law conditioned enforcement of an arbitration agreement on compliance with a notice requirement that was inapplicable to contracts generally, the Court concluded that the FAA overrode the state requirement.⁹³ What is clear based on various judgements given by the U.S. Supreme Court is that the manner in which arbitration agreements can be used by the states is limited. While there might be state laws that will regulate the arbitration agreement and its validity, enforceability and

⁸⁸ *Id.* at 343.

⁸⁹ *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017).

⁹⁰ *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017) at 1425.

⁹¹ *Id.* at 1426-27.

⁹² *Doctor’s Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

⁹³ *Id.*

revocability, if state laws impose requirements that do not favour the arbitration agreement or are inconsistent with the intent and policy of the Federal Arbitration Act, then the state laws will be pre-empted by the federal act. Also as discussed in the *Concepcion Case*, it can also be seen that Courts also possess the powers to render certain arbitration agreements invalid under the saving clause of the Federal Arbitration Act. What still remains undecided however is how legitimate it is to render an arbitration agreement invalid considering that at the heart of an arbitration agreement essentially lies the will of the parties. However, establishing how freely the parties entered into a transaction is a question dependent on evidence and case to case basis.

VI. ANALYSIS OF THE RECENT FEDERAL AND LEGISLATIVE DEVELOPMENTS IN LIGHT OF THE SUPREME COURT'S PRO-ARBITRATION APPROACH

In light of the Supreme Court's pro-arbitration approach and the pre-emption of the Federal Arbitration Act which limits the powers of the state to render invalid mandatory arbitration agreements, some federal agencies have taken steps to regulate the manner in which arbitration agreements are mandated under certain circumstances. The Consumer Financial Protection Bureau on July 19, 2017 issued a final rule which made the insertion of arbitration clauses in agreements before dispute for certain financial products and services, mandatory.⁹⁴ This rule was issued

⁹⁴ Arbitration Agreement Regulation for Bureau of Consumer Financial Protection, 82 Fed. Reg. 33, 210 (July 19, 2017).

by the Bureau after Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which had given Consumer Financial Protection Bureau the authority to a study related to the arbitration agreements between the consumer and financial institutions, also gave the Bureau the power to limit or prohibit the mandatory arbitration agreement if it finds that such a an agreement will be against the public interest and consumer protection.⁹⁵ In the Press Release of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Senators File Resolution Disapproving of CFPB Arbitration Rule of July 20, 2017, some Congress Members can be seen opposing the powers given to the Bureau suggesting that this would harm the consumers who would prefer expedited mechanism of dispute resolution.

A second development was seen in 2016 when the Centre for Medicare and Medicaid Services which is a part of the Department of Health and Human Services had issued a rule in relation to the participation of nursing homes and other long term facilities in Medicare and Medicaid.⁹⁶ One requirement of the new rule that received considerable attention was a prohibition on a covered facility entering into a binding arbitration agreement with a resident (or the resident's representative) prior to a dispute arising between the parties.⁹⁷ Pursuant to this rule, there was a long litigation against the Centre for Medicare and Medicaid Services with the plaintiffs contending that the Centre did not

⁹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518 (2015).

⁹⁶ Reform of Requirement for Long-Term Care Facilities for Department of Health and Human Services, 81 Fed. Reg. 68, 688 (Oct. 4, 2016).

⁹⁷ *Id.* at 68, 790.

possess the authority to limit the usage of arbitration as a means of dispute resolution in light of the Federal Arbitration Act.⁹⁸ However the Centre had later revised its approach to be consistent with, reducing unnecessary costs for the residents.

VII. IMPORTANCE OF CONSENT BETWEEN THE PARTIES WHEN ENTERING INTO EMPLOYMENT AGREEMENTS

International Treaties and Domestic Laws of countries have consistently required consent between the parties as a prerequisite to entering into any contract. Thus, a party can only bring its dispute to arbitration – and bar either party from invoking the jurisdiction of otherwise competent courts – where there is an agreement to arbitrate.⁹⁹ According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (also popularly known as the New York Convention), a written arbitration agreement or an arbitration clause should be present within the agreement concerned. This signifies that there should be proof of consent amongst the parties concerned in order to enforce the arbitral award.¹⁰⁰ The UNCITRAL Model Law on International Commercial Arbitration also states that if the parties were under some incapacity while entering into the arbitration agreement, or if the agreement does not adhere to the law of the country where the award

⁹⁸ Am. Health Care Ass'n v. Burwell, 217 F.Supp.3d 921, 925 (N.D. Miss. 2016).

⁹⁹ Benson Lim and Adriana Uson, *Relooking at Consent in Arbitration*, KLUWER ARBITRATION BLOG (February 12, 2019), available at <http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/>.

¹⁰⁰ United Nations Convention on the Regulation and Enforcement of Foreign Arbitral Awards art. II (1), II (ii), V, June 10, 1958, 330 U.N.T.S. 243.

was made, the recognition and enforcement of the arbitral award may be refused.¹⁰¹

The Supreme Court in United States of America discussed the importance of consent in agreements in *Volt Information Sciences v Leland Stanford, Jr. University*,¹⁰² and stated that “[a]rbitration under the [Federal Arbitration Act] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit...” In the *Astro v. Lippo* dispute, *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV* appeal,¹⁰³ the Singapore Court of Appeal grappled with the question of whether an unsuccessful party to an international arbitration award rendered in Singapore (a domestic international award) can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.¹⁰⁴ The Court of Appeals stated that “[a]n arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent is evinced in the arbitration agreement.” The Supreme Court of India in the case of *Kerala State Electricity Board and Anr. vs. Kurien E. Kathilal and Anr.*¹⁰⁵ held that jurisdictional pre-condition for reference to arbitration is that the parties should seek a reference or submission to

¹⁰¹ UNCITRAL Model Law on International Commercial Arbitration, Art. 35, 36, June 21, 1985, 24 ILM 1302.

¹⁰² *Volt Information Sciences v Leland Stanford, Jr. University* 489 U.S. 468 (1989).

¹⁰³ *PT First Media TBK v. Astro Nusantara International BV*, 226 SGCA 57 (2013).

¹⁰⁴ Ben Jolley, *Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards*, KLUWER ARBITRATION BLOG (November 29, 2013), available at <http://arbitrationblog.kluwerarbitration.com/2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remediestoenforcement-available-for-domestic-international-awards/?print=pdf>.

¹⁰⁵ *Kerala State Electricity Board. v. Kurien E. Kathilal*, (2000) 6 SCC 293 (India).

arbitration. In the absence of an arbitration agreement, a court can refer parties to arbitration only with the written consent of the parties by way of a joint application; and oral consent given by the counsels for parties without a written memo of instruction does not fulfil the requirements under Section 89 of the Code of Civil Procedure, 1908.¹⁰⁶ When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High court should not have referred the parties to arbitration.

While it is clear that the international treaties and judiciaries in various parts of the world do see consent of the parties in arbitration agreements as of paramount importance, however there has been increasing concern over seeing this consent as forced consent.¹⁰⁷ The Supreme Court of United States of America in 1889 defined an unconscionable contract as “*one that 'no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other.*” That definition has changed over time because it does not address today's unconscionable contracts, where individuals and even companies have little choice but to accept what they would not, in their ‘senses,’ otherwise accept because they will not be able to conduct the business, get the loan or credit card or, especially in today's economy, the job, unless

¹⁰⁶ Siddharth Ratho, Kshama Loya Modani & Vyapak Desai, *Referring parties to Arbitration? Oral consent between Counsels not enough, holds Supreme Court of India*, NISHITH DESAI ASSOCIATES (April 02, 2018), available at <http://nishithdesai.com/information/news-storage/news-details/article/referring-parties-to-arbitration-oralconsentbetween-counsel-s-not-enough-holds-supreme-court-of-i.html>.

¹⁰⁷ David S. Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW, 24(1). 1-69 (2003).

they agree to it. Yet powerful corporations today freely draft contracts that no honest man would accept.¹⁰⁸

These ‘take it or leave it’ mandatory arbitration agreements fit the classic hornbook definition of an unlawful contract of adhesion,¹⁰⁹ because employers offer them on a take-it-or-leave-it basis. It is interesting to note that Supreme Court of United States of America did not hold such agreements to be unlawful contracts of adhesion. In *Circuit City Stores, Inc. v. Adams*,¹¹⁰ though employees working in the transportation industry were excluded from the application of contracts providing mandatory arbitration clauses, however validity and enforceability of such mandatory arbitration clauses under the Federal Arbitration Act was upheld.¹¹¹

However, with the increasing knowledge amongst the workers about their rights, there have been instances of multinationals being forced to revamp their employment terms. Most recently, Google after facing protests from thousands of workers announced that it will no longer require its employees to sign forced arbitration agreements which at its heart target the rights of workers and prevent them from

¹⁰⁸ Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap Sophisticated Parties Too*, J. DISP. RESOL. (2010) 246, 269, available at <https://scholarship.law.missouri.edu/jdr/vol2010/iss2/2>.

¹⁰⁹ Law Journal Editorial Board, *Mandatory Arbitration Clauses are Contracts of Adhesion*, NEW JERSEY LAW JOURNAL, (November 2018), available at <https://www.law.com/njlawjournal/2018/11/02/mandatory-arbitration-clausesarecontracts-of-adhesion/>.

¹¹⁰ *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002).

¹¹¹ The case was remanded back to the Ninth Circuit which held that under the Californian Law, the mandatory arbitration agreement was not valid. Adams was therefore allowed to file a lawsuit in the Courts of California.

approaching court if they suffer injuries, harassment or other consequences arising out of working at a company. Company officials said that the new policy would go into effect on March 21, and it would apply to all of its workers around the globe. However, the new policy would not apply to claims that have already been settled by arbitration, according to an Axios report. Workers will also still have the option of going to arbitration if they wish to do so.¹¹² That corporations are powerful and their behaviour is sometimes detrimental to human rights and therefore it becomes imperative for the state to intervene and protect the rights of the victims.

VIII. LEGISLATIVE DEVELOPMENTS IN THE 115TH CONGRESS

Due to growing concerns over the ill effects of the mandatory arbitration agreement on the employees/workers, the following advancements have been made in the 115th Congress:

Arbitration Fairness Act, 2017: This bill prohibits a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. The validity and enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. This bill excludes arbitration

¹¹² Christopher Maynard, *Google to end forced arbitration agreements for employees*, CONSUMER AFFAIRS (February 2019), available at <https://www.consumeraffairs.com/news/google-to-end-forced-arbitration-agreements-for-employees-022219.html>.

provisions in a contract between an employer and a labour organization or between labour organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy.¹¹³

Restoring Statutory Rights and Interests of the States Act of 2017: This Bill has been introduced to restrict the use of pre-dispute arbitration agreements. This bill seeks to amend Section 2 of the Federal Arbitration Act to invalidate arbitration agreements between parties in certain commercial contracts or transactions if they require arbitration of a claim for damages or injunctive relief brought by an individual or a small business arising from the alleged violation of a federal or state statute, the U.S. Constitution, or a state constitution, unless the written agreement to arbitrate is entered into by both parties after the claim has arisen and pertains solely to an existing claim.¹¹⁴ The Bill also seeks to amend the saving clause of the Federal Arbitration Act and proposes that the grounds upon which a contract with an arbitration agreement is revocable shall include federal or state statutes or court findings that prohibit an agreement to arbitrate if the agreement is unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law or public policy.¹¹⁵ The Bill also proposes that a

¹¹³ Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 3 (2017).

¹¹⁴ Restoring Statutory Rights and Interests of the States Act of 2017, S. 550, 115th Cong. § 3 (2017) [*hereinafter* “Statutory Rights”].

¹¹⁵ *Id.*

court, rather than an arbitrator, shall determine whether an arbitration agreement is enforceable.¹¹⁶

Safety Over Arbitration Act of 2017: This bill would permit arbitration as a means to resolve a dispute when there are ‘alleging facts relevant to a hazard to public health or safety’ only if all parties consent to arbitration in writing after the dispute arises. In cases when arbitration is chosen, the arbitrator must provide a written explanation of the basis for any award or other outcome.¹¹⁷

Court Legal Access and Student Support (CLASS) Act of 2017: This Bill has been introduced to address the availability of arbitration in college enrolment disputes. If this bill becomes a law, provisions of the Federal Arbitration Act which promote the enforcement of arbitration agreements would not be applicable to the enrolment agreements between students and institutions of higher education.¹¹⁸

Since 2014, the Office of the UN High Commissioner for Human Rights (OHCHR) has also led a project entitled the Accountability and Remedy Project (ARP), which is aimed at supporting more effective implementation of the Third Pillar of the UNGPs.¹¹⁹ It was launched with a view of contributing to a fairer and more effective system of domestic

¹¹⁶ Statutory Rights, *supra* note 114.

¹¹⁷ Safety Over Arbitration Act of 2017, S. 542, 115th Cong. § 2 (2017).

¹¹⁸ Court Legal Access and Student Support (CLASS) Act of 2017, S. 553, 115th Cong. § 2 (2017).

¹¹⁹ OHCHR Accountability and Remedy Project, *supra* note 54.

law remedies in cases of business involvement in severe human rights abuses.¹²⁰

IX. CONCLUSION

It is important for any country to promote its economy, foreign investment and employment for its citizens to have a well-established mechanism for dispute resolution. Due to the growing number of cases, it is also not possible for the courts to provide speedy decisions. Therefore, reliance on Arbitration, an alternative form of dispute resolution is imperative. It is imminent that the judiciary in United States of America has upheld the validity of mandatory arbitration agreements under the Federal Arbitration Act across varied nature of disputes. Therefore, importance of arbitration cannot be ignored. However, when a very one-sided approach is taken by the judiciary regarding upholding the validity of the mandatory arbitration agreements, the very purpose of preferring an alternative mode of dispute resolution is defeated. At the very heart of an arbitration proceeding, lies the will of the parties to let a neutral third party decide about their dispute. Arbitration is preferred over litigation since litigation is not only time consuming but also costly and hampers the economic status of all the parties involved. In light of the same, I feel that the bills that have been introduced in the 115th Congress to restrict the usage of mandatory arbitration agreements is a natural extension in response to the judiciary's staunch one-sided view. Justice delivery and free consent of the parties is at the heart of all economic transactions. A

¹²⁰ OHCHR Accountability and Remedy Project, *supra* note 54.

judicial atmosphere that promotes arbitration might be good, but in light of the cases discussed, also has ill implications especially when workers' rights are concerned. Whether its arbitration or litigation, what is ultimately important is that justice is delivered, the rights of the weaker sections of the society are protected, they do not face adversities due to their status in the society and their collective rights are respected.

Therefore, the efforts to restrict the usage of mandatory arbitration agreements in my opinion is the correct way forward. Further ensuring that right at the genesis of the agreements, if parties have equal bargaining powers and are not coerced into agreeing to the companies' terms, the ill effects of mandatory arbitration agreements can be solved to a larger extent. It is also important to note that both arbitration and litigation share a complementary approach. Importance of both forms of dispute resolution cannot be undermined. However, it is important that care is taken by the legislature and the judiciary to ensure that there is not a univocal strategy to mandate only one form of dispute resolution. Mandating one style would ultimately lead to graver disputes which would lead to multiplicity of cases and hinder the crux of efficient dispute resolution.