TIP OF AN ICEBERG FOR ARBITRATION TITANIC: H.R. 4445

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This article examines the tip of the iceberg that the United States' Titanic arbitration systems recently hit: Erosion of the Federal Arbitration Act as authority for mandatory arbitration under pre-dispute arbitration agreements and for pre-dispute joint, class, or collective action prohibitions or waivers.

On March 3, 2022, President Joseph R. Biden Jr. signed H.R. 4445, the amendment to Title 9 of the United States Code entitled "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," which became effective on that date as Public Law No. 117-90 under the power granted to Congress under Article I, Section 8, Clause 18—the Necessary and Proper Clause--of the U.S. Constitution. Sponsored and introduced on July 16, 2021 by House Representative Cheri Bustos, Democrat from the 17th Congressional District of Illinois, and Representative Morgan Griffith, Republican from Virginia, with co-sponsorship by 17 other Democrats and 8 Republicans (see Congressional Record Vol. 167 Number 125), the bill approved by the House Committee on the Judiciary and the House Rules Committee passed the House on February 7th by 335 yeas to 97 nays. The identical bill, introduced by Senator Lindsey Graham, Republican from South Carolina, and Senator Kirsten Gillibrand, Democrat from New York, passed the Senate on February 10th without amendment by voice vote. See https://www.govtrack.us/congress/bills/117/hr4445/cosponsors to learn whether your federal Representative co-sponsored the House bill.

The Author does not practice employment law, sexual assault or harassment law, or Constitutional law, or spend substantial time as an arbitrator resolving employment law disputes. This article is based solely on her online research.

Summary of H.R. 4445

H.R. 4445 defines "sexual assault dispute" as a dispute involving a nonconsensual sexual act or sexual conduct as those terms are defined in Section 2246 of Title 18 of the United States

Code or similar applicable Tribal or State law, including when the victim lacks capacity to consent, and defines "sexual harassment dispute" as a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law. The Act invites potential litigation because Section 2246 of Title 18 defines only "sexual act," not "sexual conduct," and, as some readers may remember from my presentation on May 19, 2021 about American Bar Association ("ABA") Model Rule of Professional Conduct Rule 8.4(g) in the webinar sponsored by the ABA Senior Lawyers Division Alternative Dispute Committee entitled "ADR for Transactional and New Attorneys," the term "sexual harassment" is not defined consistently or objectively by federal or state statute or judicial opinions.

H.R. 4445 amends the United States Arbitration Act, Title 9 of the United States Code Chapter 1, enacted February 12, 1925, commonly known as the Federal Arbitration Act, to add a new Chapter 4. Chapter 4 provides that, notwithstanding any other provision of the Federal Arbitration Act, at the election of the person alleging conduct constituting a sexual assault dispute or a sexual harassment dispute, or at the election of the named representative of a class or in a collective action alleging that conduct, no pre-dispute arbitration agreement precluding a party from filing a lawsuit in court, regardless when that agreement was signed, is valid or enforceable, and no pre-dispute prohibition or waiver of a joint, class, or collective action, regardless when that prohibition or waiver document was signed, is valid or enforceable, for any claim arising or accruing on or after the March 3rd effective date of the Act under Federal, Tribal, or State law and relating to the sexual assault dispute or the sexual harassment dispute, regardless whether the claim involves alleged conduct in a workplace.

Chapter 4 does not affect the enforceability of arbitration agreements, prohibitions, or waivers with respect to claims arising or accruing before March 3rd, regardless when the complaint, claim, or demand is served or filed. (Representative Bustos' original bill, if enacted, would have applied to all claims filed after its effective date regardless when the conduct constituting sexual assault or sexual harassment allegedly occurred, *i.e.*, regardless when the claim arose or accrued.)

And Chapter 4 does not affect the enforceability of arbitration agreements, prohibitions, or waivers concerning claims arising or accruing before the respective agreements or documents containing prohibitions or waivers were signed and exchanged between the parties.

Whether new Chapter 4 applies to a particular dispute must be determined under Federal law.

Whether Chapter 4 applies to an agreement to arbitrate, and the validity and enforceability of an agreement to which Chapter 4 applies, must be determined by a court, rather than by an arbitrator, (1) regardless whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing the arbitration agreement, and (2) regardless whether that agreement or waiver purports to delegate that determination of arbitrability to an arbitrator.

Constitutionality of H.R. 4445

Especially in the current United States Supreme Court climate, and recent indications that at least five of the current nine Justices of that Court are not necessarily wedded to the principle of judicial restraint (perhaps ironically, "throwing out the baby with the bathwater"), it is appropriate for us to the think about the viability of H.R. 4445, the new Chapter 4 of the Federal Arbitration Act, if challenged under the United States Constitution.

Chapter 4 purports to supersede, for claims to which Chapter 4 applies, the decision in First Options of Chicago, Inc. v. Kaplan *et al.*, 514 U.S. 938, 944-945, 115 S. Ct. 1920 (May 22, 1995), in which the U.S. Supreme Court, in Justice Breyer's majority opinion, held that:

(1) "a party can be forced to arbitrate only those issues it has specifically agreed to submit to arbitration,"

(2) any dispute as to the arbitrability of a matter shall be decided by a court, unless the parties have agreed that an arbitrator will make that determination,

(3) whether the parties have agreed that the arbitrator will determine arbitrability is determined under the applicable "ordinary state-law principles that govern the formation of contracts," the Court finding in this case that "the relevant state law here [Illinois law], for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration," and

(4) "[c]ourts should not assume that the parties agreed to arbitrate arbitrarily unless there is 'clea[r] and unmistakabl[e]' evidence that they did so," relying on the U.S. Supreme Court opinion in AT&T Technologies, Inc. v. Communications Workers of America *et. al*, 475 U.S. 643, 649 (1986).

Before he joined the Supreme Court, then private practice attorney John G. Roberts, Jr., representing the respondent in First Options of Chicago, Inc. v. Kaplan *et al.*, *supra*, argued that a court must decide arbitrability of a dispute even if the arbitration agreement between the parties to that dispute provides that the arbitrator will decide arbitrability. He lost on that issue but won his case based on the Supreme Court's determination that the respondent did not agree to arbitrate arbitrability.

Viability of the decision in First Options of Chicago, Inc. v. Kaplan *et al.*, *supra* and the more recent decision of the U.S. Supreme Court in Lamps Plus, Inc. *et al.* v. Frank Varela, 139 S. Ct. 1407 (argued October 29, 2018, decided April 24, 2019), of which the majority opinion by Justice Roberts held that a court cannot compel parties to arbitrate a claim, issue, or dispute on a classwide basis "unless [the arbitration agreement is not silent but, rather,] there is a[n unambiguous] contractual basis for concluding that the party agreed to do so," was most recently acknowledged by the U.S. Supreme Court in Justice Alito's majority opinion in Viking River Cruises, Inc. v. Angie Moriana, Supreme Court No. 20-1573 (argued March 30, 2022, decided June 15, 2022 on *certiorari* from the California Court of Appeal), an employment case, holding that the Federal Arbitration Act does not preempt a rule of California law that invalidates contractual waivers of the right to assert representative claims and consequential submission to arbitration of those representative claims under the arbitration agreement in that case, under California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code Ann. §2698 *et seq*. (West 2022) ("PAGA"), which, under California judicial precedent, are "a type of *qui tam* action" in which the employee plaintiff sues as an "agent or proxy" of the State of California. And, under a severability clause in that arbitration agreement, California law does not invalidate contractual waivers of the right to assert individual claims. Therefore, Petitioner Viking River Cruises, Inc. is entitled to compel arbitration of Respondent Moriana's individual claims. But the opinion continues in *dictum* that, although Respondent Moriana's non-individual claims in the lower courts "may not be dismissed simply because they are 'representative'. . . . PAGA provides

no mechanism to enable a court to adjudicate nonindividual [*i.e.*, representative] PAGA claims once an individual claim has been committed to a separate [*i.e.*, arbitration] proceeding. . . . As a result, [Respondent] Moriana lacks standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims [in the California courts]."

Justice Sotomayor, in her concurring opinion, adds graciously that "if this Court's understanding [about Respondent Moriana's statutory standing to litigate her 'nonindividual' claims separately in California state court] is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits."

Justice Barrett's short concurring opinion, exercising judicial restraint (with whom Justice Kavanaugh joins and Chief Justice Roberts joins except as otherwise stated in a footnote, concurring in part and concurring in the judgment), rejects text in the majority opinion that is unnecessary to the holding, "much of it [addressing] disputed state-law questions as well as arguments not pressed or passed upon in this case."

Justice Thomas' short dissenting opinion affirms his continued adherence to the view that the Federal Arbitration Act does not apply to proceedings in state courts, citing his earlier dissenting opinions, and concluding that the Federal Arbitration Act "does not require California's courts to enforce an arbitration agreement that forbids an employee to invoke [PAGA]. On that basis," he adds that he would affirm the judgment of the California Court of Appeal.

Neither Justice Alito's majority opinion, nor the concurring opinions by Justices Sotomayor and Barrett, nor the dissenting opinion by Justice Thomas, mentions H.R. 4445, enacted almost a month before oral argument in Viking River Cruises, Inc. v. Angie Moriana, *supra*.

Shortly before the decision in Lamps Plus, Inc. *et al.* v. Frank Varela, *supra*, in his majority opinion in the U.S. Supreme Court's decision in Henry Schein, Inc., *et al.* v. Archer and White Sales, Inc., 139 S. Ct. 524 (argued October 29, 2018, the same date as oral argument in Lamps Plus, Inc. *et al.* v. Frank Varela, *supra*, but decided January 8, 2019 on appeal from the federal

Court of Appeals), Justice Kavanaugh, relying on First Options of Chicago, Inc. v. Kaplan *et al.*, *supra,* held, "Under the [Federal Arbitration] Act and this Court's cases, the question of who decides [whether the arbitration agreement applies to a particular dispute] is itself a question of contract. The [Federal Arbitration] Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. . . . Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' The question presented in this case is whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act. We conclude that it is not. The [Federal Arbitration] Act does not contain a 'wholly groundless' exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President [Calvin Coolidge]. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." The issue in that case was whether the arbitration agreement delegated to the arbitrator the determination of arbitrability of a dispute regarding alleged violations of federal and state antitrust law, seeking monetary damages and injunctive relief. The arbitration agreement between the parties in that case stated, "Any dispute arising under or relating to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [defendants, including Henry Schein, Inc.]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. . . ." The majority opinion in Henry Schein, Inc., *et al.* v. Archer and White Sales, Inc., *supra*, did not decide whether this arbitration agreement delegated the arbitrability question to an arbitrator, and stated, "On remand, the Court of Appeals may address that issue in the first instance . . . ."

What do these recent U.S. Supreme Court precedents suggest about the likelihood that the Supreme Court as currently composed would approve a challenge to the constitutionality of new Chapter 4, which purports to limit applicability of the Federal Arbitration Act and enforceability of arbitration agreement provisions delegating to the arbitrator or arbitration panel the determination of arbitrability of a dispute that would be covered by the Federal Arbitration Act but for new Chapter 4?

The recent U.S. Supreme Court majority opinions, relying on longstanding U.S. Supreme Court precedents, suggest a reluctance by the current majority of that Court--perhaps excluding Justice Roberts and perhaps excluding Justice Thomas as to claims sought to be asserted in state court—to limit applicability of the Federal Arbitration Act and to restrict delegation to the arbitrator or arbitration panel of the determination of arbitrability of a case, even in employment and consumer cases.

For example, the Court might consider basing its declaration of unconstitutionality of new Chapter 4 on:

(1) Whether, under the power granted to Congress under Article I, Section 8, Clause 18 of the United States Constitution, Chapter 4 is "necessary and proper for carrying into execution" Congress' powers enumerated in Article I, Section 8 of the United States Constitution, *e.g.*, the power to regulate commerce, which was the constitutional authority for the Federal Arbitration Act, or

(2) Ambiguities in new Chapter 4, including (a) what Tribal or State laws are "similar" to Section 2246 of Title 18 of the United States Code, (b) what Tribal or State law is applicable to a "sexual harassment dispute" as that term is defined for the purposes of new Chapter 4, and (c) whether Chapter 4 applies to claims not involving sexual assault or sexual harassment that are included in the complaint alleging sexual assault or sexual harassment.

Most importantly for arbitrators and current and prospective representatives of parties to arbitration cases, what does New Chapter 4 of the Federal Arbitration Act mean for us?

Although (a) new Chapter 4 may be challenged, in whole or in part, as unconstitutional by a federal court, and (b) new Chapter 4 applies by its terms only to pre-dispute arbitration agreements and prohibitions and waivers of joint, class, or collective actions concerning sexual assault disputes and sexual harassment disputes, as those terms are defined for the purposes of new Chapter 4, it reflects concern by many federal legislators about (i) the fairness of the arbitration process generally to resolve employment-related and other disputes in which the bargaining power of the parties is unequal, and (ii) relative secrecy of the arbitration process, at least before issuance

of the final award, and the resulting inability of that process to influence future behavior of the respondent and the public generally.

Some states previously enacted legislation restricting the mandatory effectiveness of certain arbitration agreements. California and New York legislatures also are considering action to restrict the enforceability of pre-dispute arbitration agreements.

Civil rights advocates have urged prohibition of mandatory arbitration of employment discrimination, wage and hour, and other workplace law claims, in addition to sexual assault and sexual harassment claims.

Advocacy and rhetoric related to H.R. 4445 reveal the potential threat of further erosion of the Federal Arbitration Act.

For example:

In February 2018, Attorneys General from all 50 states, territories, and Washington, D.C., 56 in all, sent Congress a letter:

That letter called for passage of legislation "to protect the victims of sexual harassment in the workplace" and requested that Congress "ensure these victims' access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements."

The letter said that arbitration provisions may be beneficial in some contexts but not in sexual harassment claims: "Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are **not** trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process." [*Author's comment:* This assertion ignores the fact that many arbitrators are retired judges and arbitrators on professional platforms like the American Arbitration Association ("AAA") and the Financial Industry Regulatory Authority ("FINRA") receive extensive mandatory preliminary and ongoing training in the process and ethical requirements of arbitrators, including in *pro se* consumer and commercial cases.]

The Attorneys General cautioned regarding the “veil of secrecy” created by arbitration clauses, urging, “Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.”

*On November 17, 2021, House Judiciary Committee Chair Jerrold Nadler, Democrat from New York, observed***:**

"Arbitration was originally developed as an alternative to the court system for parties of relatively equal bargaining power to enter into voluntarily. In recent decades, however, forced arbitration clauses have become ubiquitous in our lives—largely in the form of take-it-or-leave-it contracts between very large companies and individual consumers. As a result of this trend, these clauses have rendered our court system, in which victims have far stronger protections, inaccessible to far too many.

"Nowhere is that trend more apparent—or problematic—than in the workplace. It is projected that, by 2024, 80 percent of private-sector workers will be forced to sign an arbitration clause when accepting employment. A full 80 percent of our fellow citizens.

"And consider that, over the past five years, employers prevailed over their employees in 98.1 percent of these arbitration cases. Buried deep in the fine print of the paperwork these employees were required to sign, they bound themselves to a system in which they are nearly guaranteed to fail, they foreclosed the possibility of ever having their day in court, and in nearly all of these instances, they even gave up the right ever to talk about their experience.

"But these numbers cannot capture the true human toll of forced arbitration.

"Earlier this year [*i.e.*, 1921], the Subcommittee on Antitrust, Commercial, and Administrative Law held a hearing examining the effect of forced arbitration clauses on our fundamental statutory rights and protections. There, Gretchen Carlson, who survived pervasive sexual harassment by Roger Ailes, the CEO and founder of Fox News, testified about the use of forced arbitration to silence victims of systemic sexual harassment.

"Professor Myriam Gilles of the Cardozo School of Law similarly explained how forced arbitration 'perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is

chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse.' [*Author's comment:* This statement ignores arbitration platform requirements that arbitrators be chosen and paid by both parties jointly and severally.]

"As Ms. Andowah Newton testified yesterday, no aspect of the contract with her employer was actually negotiable, including the forced arbitration clause. As a result, she was forced into an opaque system that limits discovery, does not include the protections of the Federal Rules of Evidence, and leads to secret rulings without oversight or scrutiny. By forcing her and others into silence—by denying them the option of seeking their day in court—forced arbitration allows toxic office cultures to flourish and emboldens sexual predators to operate with impunity. [*Author's comment:* This statement ignores the fact that arbitrators often refer to Federal Rules of Evidence for guidance when proposed by counsel to a party.]

"In a system that sides with the company 98 percent of the time, accusations of sexual assault will remain hidden forever. The company gets to pick the judge and the jury, truncate the discovery process, choose the law applied, and prevent all appeals. When the company wins, it can request that the victim pay its attorney's fees. [*Author's comment*: When the company wins in a court proceeding, it also can request that the victim pay its attorneys fees if the applicable law or arbitration agreement so provides.]

"H.R. 4445, the 'Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,' removes these barriers to justice for survivors of sexual assault or sexual harassment by giving them a real choice of whether to go to court or to arbitrate their claim.

"In doing so, H.R. 4445 ends this unjust—and frankly repulsive— system in which American companies are seemingly better off retaliating against victims of sexual assault than taking responsibility and holding the perpetrators to account.

"This legislation is supported by a broad coalition of public-interest organizations, including the National Alliance to End Sexual Violence, National Center on Domestic and Sexual Violence, National Coalition Against Domestic Violence, National Partnership for Women and Families, the Rape, Abuse and Incest National Network, and many others."

On February 1, 2022, President Biden endorsed the soon to be passed H.R. 4445, stating:

"Under current law, many employment and other contracts require binding arbitration for a wide range of matters before a dispute arises, which denies survivors the ability to decide whether to pursue their claim with the procedural protections provided by courts, and silences victims of abuse by forcing them into a confidential dispute forum without the right to appeal. More than 60 million Americans are subject to mandatory arbitration clauses in the workplace, often without realizing it until they come forward to bring a claim against their employer. The Report of the Co-Chairs of the U.S. Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace notes that between 50-75 percent of women have faced some form of unwanted or unwelcome sexual harassment in the workplace. Additionally, contracts for services may include mandatory arbitration clauses in the fine print that shield companies and businesses from being held publicly accountable for the harm caused.

"This legislation would amend the Federal Arbitration Act for disputes involving sexual assault and sexual harassment in order to stop employers and businesses from forcing employees and customers out of the court system and into arbitration. It would ensure that predispute arbitration clauses and waivers of the right to bring joint actions in cases of sexual assault or sexual harassment would not be valid or enforceable for cases that are filed under Federal, Tribal, or State law."

And on signing and effective day, March 3, 2022, Charlotte A. Burrows, Chair of the U.S. Equal Employment Opportunity Commission ("EEOC") *welcomed the effectiveness of H.R. 4445:*

In the same press release, EEOC Vice Chair Jocelyn Samuels equated "access to justice for robust protection of civil rights" with court proceedings rather than arbitration proceedings.

Chair Burrows explained:

"The EEOC cannot be forced into arbitration, nor are we bound by class action waivers in employment discrimination claims—including workplace sexual harassment disputes. . . . As a result, the EEOC has been on the front lines of preserving access to the legal system [in these cases]. But the EEOC only has sufficient resources to file suit in a small fraction of all charges of discrimination it receives, while pre-dispute arbitration agreements govern millions of workers in the United States. *** [I]n the worst cases, secrecy can shield serial harassers from accountability

and allow them to repeatedly abuse employees. Court decisions and orders make the identity of violators of the law and their conduct public, which can serve to influence behavior and deter sexual harassment and assault from occurring in the first place."

Our dilemma as arbitrators and current and prospective representatives of parties to arbitration cases is to determine how arbitration is likely to be limited and for what kinds of disputes, and how we can effectively prevent the demise of the arbitration process as a means to resolve a substantial number of types of disputes, especially employment and consumer disputes.

For example, our potential action items could include:

(1) Advocating federal legislation clarifying, in terms readily comprehensible by the general public, that an arbitration agreement or a document containing prohibition or waiver of joint, class, or collective action entered into after a claim arises or accrues, even in disputes alleging sexual assault or sexual harassment, remain enforceable by federal and state courts under federal, tribal, or state law.

(2) Clarifying that even pre-dispute arbitration agreements and documents containing prohibition or waiver of joint, class, or collective action in disputes not alleging sexual assault or sexual harassment remain enforceable by federal and state courts under federal, tribal, or state law.

(3) In order to attempt to ward off threatened further erosion of applicability of the Federal Arbitration Act, advocating proactively amendment of that Act to require (a) more extensive disclosure by the party requesting any arbitration agreement or document containing prohibition or waiver of joint, class, or collective action, whether pre-dispute, contemporaneous with dispute, or post-dispute, in plain English, or in any other language that is the primary language read by the other party, of the meaning and consequences of the other party's entering into that agreement or document, and (b) a 21 day minimum period for the other party to decide whether to sign that agreement or document and a seven day "cooling off period" after the other party has signed that agreement or document to revoke that agreement or document, in each case with written encouragement by the party requesting the agreement or document of the other party to consult with independent counsel during the respective period, similar to the

requirements of the Older Workers Benefit Protection Act ("OWBPA"), which is part of the Age Discrimination in Employment Act, and perhaps including other protections of OWBPA relating to waivers .

(4) Creating and promoting a public education and arbitration public relations and marketing program to demonstrate to the public the qualifications of and requirements (including extensive ongoing training, ethics rules, and restrictions on conflicts of interest and compensation) imposed upon arbitrators as a condition to their service in that capacity, the benefits of certain cases being resolved by arbitrators having education, background and experience relevant to the subject matter of the disputed claims as compared with resolution of those cases by generalist judges, the benefits to each party of certain cases being resolved in a privacy-preserving arbitration proceeding instead of a public court proceeding, how and by whom arbitrators are chosen and compensated, and the arbitration process, including the availability of discovery in appropriate cases, the applicability of Federal Rules of Evidence, and the circumstances in which a party may attain a reasoned award or seek vacatur of an award.

The Author invites readers of this article to email to her at karen@orlinlaw.com or to write to her at Karen J. Orlin, P.O. Box 7855, New York, NY 10116 their questions and comments about this article and their suggestions of further potential action items to promote preservation and improvement in the perception of the public of the arbitration process for resolving disputes fairly, sensitively to interests of all parties, effectively, efficiently, and economically.