Supreme Court Eradicates Another Obstacle to Arbitration

The Supreme Court declares yet another California state law preempted by the FAA but sets the stage for potential future controversy in Viking River Cruises, Inc. v. Moriana.

By Anthony Michael Sabino

Reminiscent of its landmark holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___ (No. 20-1573) (June 15, 2022), has found yet another construct of California state law to be preempted by the strong federal policy favoring arbitration codified in the Federal Arbitration Act (FAA). 9 U.S.C. § 1, *et seq*. This time, the local promulgation at issue was the California Labor Code Private Attorneys General Act (PAGA), recently explained in "*Postmates and the Enforcement of Arbitration Agreements*," American Bar Association, Section of Litigation Alternative Dispute Resolution (May 12, 2022), as part of our analysis of *Postmates, LLC v. Rimler*, ___ U.S. ___ (No. 21-119) (petition for *certiorari* filed July 26, 2021), a nearly identical controversy that will, most likely, not be reviewed by the Justices now.

In the case at bar, the lower courts applied the PAGA to void both Moriana's contractual agreement to arbitrate all individual controversies with Viking (her former employer), and her concomitant waiver of any right to bring or participate in collective action. Given that the California enactment enlists individuals to sue on behalf of the state, as well as fellow employees, *Viking* understandably incorporates a detailed discussion of representative litigation (citing shareholder derivative lawsuits as one example).

Writing for a nearly unanimous Court, Justice Alito found that the law's procedural mechanism "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration,' and 'the rules by which they will arbitrate,'" *quoting Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (2019). The PAGA's primary defect was its "expansive rule of joinder," which allowed an aggrieved employee to "superadd new claims . . . regardless of whether the agreement . . . committed those claims to arbitration."

California's statutory scheme defied the fundamental principle that arbitration is a matter of consent, not coercion, a maxim postulated by the same jurist over a decade ago in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). Left unchecked, the PAGA "would defeat the ability of parties to control which claims are subject to arbitration," contrary to the precept set forth in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), that an agreement to arbitrate is enforceable only to the extent of the issues the parties specifically agreed to submit to arbitration.

The supreme tribunal further criticized the state rule for its imposition of a Hobson's choice. "The only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding" (emphasis in the original), thereby opening the portal to "a massive number of claims . . . in a single-package suit."

Reiterating *Concepcion*'s warning that arbitration is ill-equipped to such higher stakes disputes, given the absence of appellate review, and the risk of *in terrorem* settlements, the high bench concluded that a statute which compels arbitration on such an order of magnitude "effectively coerces parties to opt for a judicial forum rather than . . . realize the benefits of private dispute resolution," an outcome "incompatible with the FAA." *See also* Epic Systems Corp. v. Lewis, 584 U.S. ___ (2018). Accordingly, the Supreme Court ardently proclaimed that, "States cannot coerce individuals into foregoing arbitration by taking the individualized and informal *procedures* characteristic of traditional arbitration off the table" (emphasis in the original).

For these reasons, *Viking* returned only Moriana's individual claims to the arbitral forum and declared that the FAA superseded both the PAGA and its cohort of supportive state court rulings, to the extent those local constructs compelled the petitioner to choose between arbitrating potentially limitless claims or foregoing arbitration altogether.

Before concluding, we must voice our concerns that the majority has sown the seeds for subsequent controversy, for reason of Justice Alito's erudite comparison of class actions with representative litigation, and his assertion that nothing in the FAA categorically preempts the latter. Note that three Justices, led by Justice Barrett, deemed that segment of the opinion unnecessary, even while concurring in the substance of the judgment. And, finally, while Justice Sotomayor heartily concurred in full, her separate comments can easily be interpreted as a frank invitation to California and like-minded jurisdictions to reappraise their own representative action statutes, mindful of the pitfalls identified in the case at bar.

For now, *Viking* takes its place in the pantheon of high Court landmarks enforcing valid agreements to arbitrate. But it may yet presage future proclamations by the Supreme Court regarding not only arbitration, but other modalities of dispute resolution as well.

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