End 'Forced Arbitration,' Ex-Fox Host Carlson Urges House

By **Christopher Cole**

Law360 (February 11, 2021, 8:59 PM EST) -- Former Fox News host Gretchen Carlson, whose sexual harassment suit against network chief Roger Ailes helped pave the way for the #MeToo movement, urged lawmakers Thursday to block mandatory arbitration clauses like the one she narrowly escaped by settling with Fox.

Carlson joined legal experts before a U.S. House of Representatives panel weighing Democratic proposals to limit required arbitration in areas such as employment, consumer actions, antitrust and civil rights. Republicans sounded alarms about nixing mandatory arbitration entirely but agreed with Carlson that secrecy in sexual harassment cases remains a problem.

The TV journalist, who reached a multimillion-dollar deal to resolve her suit with Fox in 2016 before it could go to arbitration, contended the secrecy around such proceedings acts as a shield for companies against publicity and further complaints about workplace misconduct.

"Other women don't know that it's happening to other people because of the secrecy," she told a House Judiciary subcommittee, saying that her own Fox contract's fine print, which she did not fully grasp upon signing, mandated strictly confidential arbitration. "Companies don't want you to know their dirty laundry."

For workers facing harassment, she said, "It's like they become invisible, because they're not allowed to tell their story."

Carlson's testimony, and that of several witnesses both for and against the growing use of arbitration clauses, took place as Democrats renewed a legislative drive to limit companies' use of such language in contracts. But an arbitration proponent blasted attempts to undermine the process, saying it saves vast amounts of time and money, often to the benefit of individuals.

Rep. Hank Johnson, D-Ga., reintroduced Thursday the Forced Arbitration Injustice Repeal Act, or FAIR, to forbid the enforcement of contract clauses requiring that disputes go to arbitration rather than the courts. A version of the same bill **cleared the House** with scant GOP support in September 2019. That bill was dead on arrival in the Senate under Republican leadership but might have a better chance now that Democrats hold a slim majority.

Critics of required arbitration say it short-circuits employees' and consumers' Article III rights to a day in court when they have grievances by immediately routing the dispute to a private, binding resolution process that often tips in favor of the company.

Though the individual may read the contract in advance, they say, the stipulation itself is not optional and comes as part of a take-it-or-leave-it proposition that leaves consumers and workers with little choice but to sign.

Rep. Mary Gay Scanlon, D-Pa., noted that in the legal world that is known as a contract of adhesion, where the side that wrote the agreement has the leverage, which means "in plain English, the company has you over a barrel."

Carlson, who has long advocated in Congress for mandatory arbitration reform and pushed for passage of Johnson's earlier bill, said had it not been for the Ailes suit's publicity, her contract clause would have kept the harassment allegations in the dark. "Why do we have to force this on people? Why don't we give them a choice?"

Supporters of the arbitration process bristled at the idea that U.S. companies are exercising the clauses rampantly to hide accusations of workplace misconduct, particularly with respect to **sexual harassment**.

"I really take offense at that," said G. Roger King, senior labor and employment counsel for the HR Policy Association, to the subcommittee, calling it an "absolutely unfair" characterization of how the private resolution process works. "Let's not paint the picture in an incorrect way here."

King strongly defended arbitration, telling Congress that the process often works in favor of citizens who otherwise have little recourse in an overburdened judicial system where few cases go to trial. The American Arbitration Association maintains low caps on filing fees, he said, which are sometimes covered by the organization, and he rebutted the notion that defendant corporations get to pick their own arbitrators.

King said he was "not here to condone any kind of sexual harassment, hostility in the workplace or the like." His point was rather that arbitration has "many positive attributes."

Johnson's measure to clamp down on the process has it "backwards," he said, considering that courts today are totally overrun and that employers are going to have even more advantages in that venue. "I would call this the 'forced litigation act,' if you will."

Johnson chaired Thursday's hearing in place of Rep. David Cicilline, D-R.I., who was diverted to the Senate floor as an impeachment manager. Johnson said he was pressing the arbitration bill because people are being "tricked" into a secret process where they have little control.

The clauses are obscured in the contracts, Johnson said, and Americans "shouldn't need a law degree to go about their daily lives" with everything from job agreements to TV purchases and software updates. "You find yourself pitted against a multimillion-dollar corporate legal department," he said. "They force you into binding arbitration because it benefits them, and it's at your expense."

The panel brought out two more witnesses to argue there must be reform to cut down use of the binding clauses: Myriam Gilles, a professor at Yeshiva University's Cardozo School of Law, and Amazon Marketplace seller Jacob Weiss.

Gilles said that arbitration clauses are "buried in the fine print of take-it-or-leave-it contracts" and if an individual gets ripped off "those customers or employees are essentially powerless to do anything about it."

Weiss, the founder and president of OJ Commerce, told the panel that use of the Amazon sales platform requires signing away numerous rights, including a class action waiver, which is another tool that critics say companies use to stave off legal exposure.

Because of the maze of restrictions, merchants "give up before they even start," Weiss said, adding that they are "not looking for a handout, we are just looking for a fair system."

Amazon told the congressional panel during a Big Tech probe last year that its contract with merchants does include the binding provision, and "while there is no judge or jury in arbitration, the arbitrator has the power to award the same damages and relief that a court could order, including injunctive and declaratory relief and statutory damages."

Amazon said then in written answers that the agreement "provides that any dispute resolution proceedings will be conducted only on an individual basis," but that "a seller may pursue in small claims court, rather than in arbitration, any claims that qualify for small claims treatment."

Also, "either party may go to court to enjoin infringement or other misuse of intellectual property rights," Amazon said.

King from the HR Policy Association, along with Republicans, floated several measures that could compromise between getting rid of mandatory arbitration altogether and doing nothing at all — especially as it relates to sexual harassment complaints. King said, for example, that the House should look more closely at alternative dispute resolution.

Rep. Darrell Issa, R-Calif., asked if it would "improve the law" to split the issue of secrecy around sex and race discrimination proceedings away from the concerns about damages that can be obtained from the arbitration process. King replied that would be a "much more thoughtful way to proceed."

Colorado Rep. Ken Buck, the panel's ranking Republican, said he finds the problem of sexual harassment "absolutely disgusting in terms of the scope and nature of it" and that it must be addressed so people know to report allegations.

Buck said the Democratic legislation, on the other hand, takes a "one size fits all" approach to dismantling the current system.

"Most of us agree, if there is a predator in the workplace, there should not be secrecy," he said. "That doesn't mean that arbitration by itself is a problem."

--Additional reporting by Andrew Kragie and Braden Campbell. Editing by Andrew Cohen.