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2nd Circ. Offers Insight On 'Class Arbitration' Questions

By **Gilbert Samberg**


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Law360, New York (July 27, 2017, 11:25 AM EDT) -- In a recent series of articles, we asked whether "class arbitration" — meaning the utilization of a Federal Rules of Civil Procedure 23 class action protocol in an arbitration proceeding — is ultimately viable. Given the nature of arbitration, we suggested that it arguably is not. We noted that the U.S. Supreme Court and various courts of appeal had examined several related procedural questions, but that they had not gotten to the core issues that would ultimately determine the viability of a class arbitration award.

The Second Circuit has now begun to nibble at such questions, beginning with its decision on July 24, 2017, in Jock, et al. v. Sterling Jewelers Inc., No. 15-3947, which upset a lower court's confirmation of an arbitrator's "class certification award," whereby a class of tens of thousands of sex discrimination claimants had been recognized in an arbitration. The question on appeal to the Second Circuit was "whether the arbitrator had the authority to certify a class that included absent class members, i.e., employees other than the named plaintiffs and those who had opted into the class."

The court noted that its review of a district court's decision to confirm an arbitration award would be de novo regarding legal questions. And the court's focus would be on whether the arbitrator had the power to reach a certain issue, not whether the arbitrator correctly decided that issue.

Ultimately, the court of appeals vacated the district court's order, which had confirmed (in part) the arbitrator's class certification award, "for further consideration of whether the arbitrator exceeded her authority in certifying a class that contained absent class members who had not opted in."

The court of appeals did not disagree that it had previously acknowledged that the issue of whether the arbitration agreement in question permitted class arbitration had been squarely presented to the arbitrator. However, it pointed out that it had not previously addressed "whether the arbitrator had the power to bind absent class members to class arbitration given that they … never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place." In that regard, the court cited the Supreme Court's prior decisions in Oxford Health and Stolt-Nielsen.

Indeed, the court saw a parallel in Sterling Jewelers with the progression of the Supreme Court's analysis in Oxford Health, where the apex court "wrestled solely with the question of whether an arbitrator to whom the parties had submitted the issue acted within his authority in finding that a contract provided for class arbitration." However, the Second Circuit pointed out, the Oxford Health court did not speak to "whether an arbitrator in that scenario also has the authority to certify a class containing absent class members." In that regard, the Second Circuit pointed to Supreme Court Justice Samuel Alito's concurrence in Oxford Health (joined by Justice Clarence Thomas) as additional support for its conclusion. ("[I]t is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a class-wide basis which arbitration procedures are to be used." Oxford Health, 133 S.Ct. at 2072 (Alito, J.).)

The Supreme Court has thus far addressed a few issues concerning "class arbitration," including (a) the fundamental significance of the arbitration agreement; (b) the enforceability of a purported contractual waiver of class arbitration; and (c) the extent of and criteria for judicial review of an arbitrator's award concerning the permissibility of class arbitration. On the other hand, the Supreme Court has not yet focused on the ultimate viability and enforceability, or the res judicata effects, of a class arbitration award (a) vis-à-vis a noncontracting, nonparticipating "class" member, or (b) vis-à-vis a party to an arbitration agreement who made no bilateral agreement with such a class member to arbitrate. Thus, the Supreme Court has not squarely addressed questions that directly concern whether a class arbitration mechanism is fundamentally incompatible with the private contractual nature of arbitration or otherwise nonviable.

The Supreme Court has noted, largely in dictum, certain difficulties in trying to graft the codified and procedurally demanding judicial class action mechanism onto the relatively informal, flexible and presumably streamlined private dispute resolution process of arbitration. And the Justices have voiced reservations concerning the inherent nature of "class arbitration."

Every arbitration is essentially the creation of a bilateral agreement. Indeed, the mutual promises that comprise a bilateral arbitration agreement establish the jurisdiction of the arbitral panel with respect to the parties and the subject matter of the proceeding, identify the procedures to be employed, and constitute the basis for enforcing any resulting award. Yet "class arbitration," by its nature, (1) would give arbitrators jurisdiction over persons who are not parties to or deemed bound by that agreement; (2) would compel a contracting party to engage in a private dispute resolution proceeding against strangers to the agreement on which the proceeding is founded; and (3) would bind both the contracting parties and such strangers to an award, and the preclusive effects of that award, issued in a proceeding in which some or all did not agree to participate and from which there are few practical means of appeal.

One wonders how a group of noncontracting persons can be made parties to a private proceeding if they have not, or the contracting adverse party has not, or both have not, agreed to that. Conversely, how can a contracting party, who agreed to arbitrate certain disputes between it and a contract counter-party, be compelled to do so also against noncontracting, nonparticipating "class" members? What would be the effect of an eventual arbitral award in such circumstances? Would it bind noncontracting parties, nonparticipating parties and nonconsenting (unwilling) parties? And would it be subject to vacatur under Federal Arbitration Act § 10(a)(4) because the arbitrator will have exceeded his power, which derives solely from the underlying arbitration agreement?

Recent decisions by the Supreme Court have largely concerned the enforceability of a purported waiver of class arbitration in a contractual arbitration clause, and they have more or less implicitly assumed that class arbitration is indeed a viable mechanism. But the court has not had occasion yet to grapple directly with that or similar questions. (Perhaps ideally, the core question will eventually be presented to the court in the form of a challenge to the enforceability of a class arbitration award.) Thus, the court has not had to resolve the question of whether "class arbitration" is ultimately an untenable oxymoron.

Many issues require judicial determination before we can confidently conclude whether "class arbitration" indeed has jurisprudential clothes and is sustainable. The Second Circuit's Sterling Jewelers decision may be the first of many shoes to drop, as the federal courts encounter and must decide fundamental questions concerning the viability of "class arbitration."

Gilbert A. Samberg is a member of Mintz Levin Cohn Ferris Glovsky and Popeo PC based in the firm's New York office. He is a commercial litigator and arbitration practitioner who focuses on international financial, commercial and technology-related disputes.