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Who Can Decide Whether 'Class Arbitration' Is Authorized?

By **Gilbert Samberg** (July 30, 2018, 12:10 PM EDT)


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Who may determine whether "class arbitration" has been authorized by the parties to an arbitration agreement — a court, an arbitrator, either? Considering the nature of "class arbitration," is this a special case of the arbitrability delegation issue, or is this issue sui generis? And what does exploring the issue reveal about the larger question of **whether "class arbitration" is an oxymoron**?

The starting point for any analysis concerning arbitration is that it is a creature of contract. It is what the parties to an arbitration agreement have agreed it shall be.

It appears that the U.S. Supreme Court will get to opine during its next term on whether an arbitration agreement that says nothing about class arbitration can be interpreted to constitute consent by the parties to permit class arbitration.[1] But when will the Supreme Court specify who may decide that question?

May the class arbitrability issue be delegated to an arbitrator by the parties to an arbitration agreement, or must it always be decided by a court? In that regard, what is the significance of the distinguishing factor that, unlike a determination concerning delegation of an arbitrability issue with respect to a bilateral arbitration, a determination concerning delegation of the class arbitrability issue would purport to bind nonparties to (or at least nonsignatories of) the controlling arbitration agreement. Could it? And if it could not, what are the implications concerning "class arbitration" generally?

In general, a court presumptively is to decide gateway arbitrability issues unless the parties to an arbitration agreement have clearly and unmistakably manifested their intention to delegate those issues to an arbitrator.[2] And since the Supreme Court's First Options decision in that regard, many courts have held that incorporation by reference of institutional arbitration rules, such as those of the American Arbitration Association, that provide for the arbitral panel's authority to decide issues concerning its jurisdiction, see, e.g., AAA Commercial Arbitration Rule 7, sufficiently manifests the parties' intention to delegate arbitrability issues.[3]

The AAA rules in particular also potentially give rise to a unique situation with respect to the delegation issue as it concerns class arbitrability. The AAA Supplementary Rules for Class Arbitrations, or SRCA, (effective Oct. 8, 2003) apply to "any dispute arising out of [a] an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where [b] a party submits a dispute to arbitration on behalf of or against a class or purported class ..." SRCA 1(a). And, when applicable, the SRCA authorizes the arbitrator to interpret the operative arbitration clause for these purposes:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award'). SRCA 3.

If incorporation by reference of AAA arbitration rules is sufficient to manifest clearly and unmistakably the parties' intention to delegate arbitrability issues to an arbitrator in the first instance, then that conclusion arguably should obtain as well regarding the class arbitrability issue if (1) any AAA rules are adopted in an arbitration agreement, and (2) one party to that agreement purports to commence a class arbitration.

Yet, one wonders about the significance of any bilateral agreement concerning delegation of the class arbitrability issue. First, the nonsignatory nonappearing putative class members arguably would not be bound by such a delegation, to which they did not and arguably could not agree. (Indeed, such putative

class members arguably are not bound by the relevant bilateral arbitration agreement at all. Nor would a signatory of that agreement be involuntarily contractually bound vis-à-vis such putative class members.) Moreover, a court adjudicating the delegation issue arguably would not have personal jurisdiction over such putative class members.

Generally speaking, the main concern of a court considering an arbitration agreement "is to faithfully reflect the reasonable expectations of those who commit themselves to be bound."[4] A nonsignatory has not apparently committed him or herself to be bound by any aspect of the arbitration agreement in question, nor has a signatory apparently made any agreement vis-a-vis a nonsignatory. (Nevertheless, an arbitration agreement may be deemed to bind a party who did not sign it[5] by the operation of regular principles of state law regarding contract, agency, estoppel, etc.[6] But that sort of analysis typically concerns questions of party arbitrability, not the threshold question of delegation.)

So what should be the effect of the incorporation by reference in an arbitration agreement of arbitration rules that include a delegation provision if one of the identified arbitration parties — a nonappearing putative class member — did not sign that agreement? Could such a nonsignatory be deemed to have clearly and unmistakably delegated the class arbitrability issue to an arbitrator?[7] It seems both logical and prudent for a court not to simply postulate that an arbitration agreement binds nonsignatories, especially before determining who should decide that issue. Hence, while the signatories of an arbitration agreement that delegates class arbitrability issues to an arbitrator could be bound by such a delegation, the nonparty nonappearing putative class members arguably could not. As Supreme Court Justice Samuel Alito pointed out,

> at least where absent class members have not been required to opt in, it 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.[8]

Thus, the object of a purported delegation of the class arbitrability issue arguably could not be fully achieved.

Issues concerning class arbitrability therefore logically should be nondelegable and for the court to determine.

In Jock v. Sterling Jewelers,[9] Judge Jed Rakoff of the Southern District of New York considered, among other things, issues that illustrated the need to bind nonparties to a contract in order to make class arbitration work. An arbitrator had issued a class determination award, or CDA, that in effect "certified" a class of more than 70,000 absent (nonparticipating, non-opt-in) sex discrimination claimant-employees, and the employer (Sterling Jewelers) moved to vacate the CDA. Sterling argued both the delegation issue and the merits issue concerning class arbitrability. Regarding delegation, it argued that absent class members had never (a) submitted to the arbitrator's authority generally or (b) agreed to submit the class arbitrability issue in particular to the arbitrator for determination. The question was "whether the arbitrator had the authority to certify a 70,000-person class because the named plaintiffs and the defendant submitted the question of whether the [arbitration] agreement allowed for class procedures to the arbitrator."[10] The Second Circuit had remanded the case to Judge Rakoff after pointing out that the district court had not "squarely address[ed] whether the arbitrator had the power to bind absent class members to class arbitration given that they [the absent members] unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in [the] first place."[11]

Notably, Sterling Jewelers itself (ad hoc) had requested the arbitrator to resolve the class arbitration issue. The question remained, however, whether putative class members who were not parties to the arbitration agreement in question, and who had not otherwise appeared in the arbitration, could be deemed to have delegated the class arbitrability issue to the arbitrator.

Judge Rakoff held that "the arbitrator ... had no authority to decide whether the [agreement in question] permitted class action procedures for anyone other than the named parties who chose to present her with that question and those other individuals who chose to opt in to the proceedings before her."[12]

> [A]rbitrators are not judges. Nowhere in the Federal Arbitration Act does Congress confer upon these private citizens the power to bind individuals and businesses except insofar the relevant individuals and businesses have bound themselves.[13]

Thus, whether a delegation was effected (a) by the adoption of AAA arbitration rules in the individual arbitration agreements between Sterling and each of its respective employees, or (b) by way of an ad hoc consent by Sterling and one (or more) of its contract counterparties, still the nonparty nonappearing

potential class members arguably did not agree or consent and could not be bound. (And the court did not reach the question of whether a signatory of the relevant arbitration agreement could be deemed bound by such an "agreement" vis-à-vis a putative class member who unilaterally "opted in" to the arbitration.) This latest decision in the Jock saga is on appeal to the Second Circuit.

In 2016, the Third Circuit held in Chesapeake Appalachia v. Scout Petroleum, for similar reasons, that courts are to decide whether an arbitration agreement permits class arbitration, even if the arbitration agreement in question incorporates the arbitration rules of the American Arbitration Association.[14] Among other things, the Third Circuit too relied on Supreme Court Justice Alito's concurring opinion in Oxford Health Plans LLC. v. Sutter,[15] that "courts should be wary of concluding that the availability of class-wide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent."[16] Moreover, the Chesapeake court noted the Supreme Court's comment that "classwide arbitration 'is not arbitration as envisioned by the [Federal Arbitration Act].'"[17]

More recently, the Eighth Circuit ruled in Catamaran Crop. v. Towncrest Pharmacy that the determination of the class arbitrability issue is for a court, not an arbitrator, for a different reason — "because of the fundamental differences between bilateral and class arbitration."[18] It held that incorporation by reference of the AAA arbitration rules was not a clear and unmistakable delegation of that particular arbitrability issue. (However, this court implied that an explicit delegation in an arbitration agreement of that issue to an arbitrator would be enforced.) In Catamaran, the district court had held that the incorporation by reference in the relevant arbitration agreement of the AAA's arbitration rules included the AAA's SRCA with its delegation provision (SRCA 3), and therefore an arbitrator could determine the class arbitrability issue. It had relied on "precedent analyzing bilateral arbitration."

On appeal, the Eighth Circuit relied on its interpretations of prior Supreme Court opinions in Stolt-Nielsen and Oxford Health, and on the characteristics that distinguished bilateral arbitration from class arbitration as articulated by the Supreme Court in its decision in AT&T Mobility v. Concepcion.[19] The Catamaran court determined that the question of class arbitrability "is substantive in nature and requires judicial determination." That is, it was a threshold or gateway issue of arbitrability, which is presumptively "for judicial determination unless the parties clearly and unmistakably provide otherwise."[20] The appellate court then distinguished prior Eighth Circuit decisions, which had found the incorporation of AAA arbitration rules to be a sufficient manifestation of the parties' intent to delegate arbitrability questions concerning bilateral arbitration, maintaining that those courts "never grappled with the fundamental changes in the underlying controversy that arise when dealing with class arbitration." The Eighth Circuit court thus opined that the authorities for the proposition that incorporation of AAA arbitration rules sufficiently manifested agreement to delegate the class arbitrability question to the arbitrator were inapposite.

In sum, the current consensus is that "class arbitrability" is a threshold "substantive" issue that is presumptively for the court to decide. At least two questions then follow: (1) is that issue for the court exclusively to decide (arguably yes); and (2) who would be bound by a determination of the delegation issue in that regard (arguably only the signatories to the governing arbitration agreement). Hopefully the nature of "class arbitration" will be fully elucidated in time by the Supreme Court.

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[1] See Lamps Plus Inc. v. Varela, No. 17-988, 2018 WL 398496 (U.S. April 30, 2018).

[2] E.g., First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[3] See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1283-84 (10th Cir. 2017); T.Co Metals v. Dempsey Rpe & Suppl y, 592 F.3d 329 (2d Cir. 2010); Qualcomm, inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006); Contec Corp. v. Remote Solution Co., Ltd., 398 F.3d 205 (2d Cir. 2005).

[4] Leadertex Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 28 (2d Cir. 1995).

[5] First Options of Chicago v. Kaplan, 514 U.S. 938, 943-46 (1995)

[6] E.g., Arthur Andersen LLP v. Carlisle, 129 S.Ct. 1896 (2009)

[7] See, "Can Arbitrability Questions Concerning a Non-Signatory to the Arbitration Agreement be "Delegated" to an Arbitrator?", ADR: Advice from the Trenches (Mintz Levin blog) (June 27, 2018).

[8] Oxford Health Plans v. Sutter, 559 U.S. 564, 574-75 (2013) (Alito, J., concurring).

[9] Jock v. Sterling Jewlers, 284 F.Supp.3d 566 (S.D.N.Y. 2018)

[10] Jock, 284 F.Supp.3d at 570.

[11] Id. at 569.

[12] Jock, 284 F. Supp. 3d at 571.

[13] Id.

[14] Chesapeake Appalachia LLC v. Scout Petroleum LLC, 809 F.3d 746, 2016 WL 53860 (3d Cir. Jan. 5, 2016). Accord, Reed Elsevier Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013), cert. den., 134 S.Ct. 2291 (2014); Huffman v. Hilltop Cos., 740 F.3d 391 (6th Cir. 2014).

[15] 133 S.Ct. 2064, 2071-72 (2013)

[16] Chesapeake, 2015 WL 53860 at *15, quoting Opalinsky v. Robert Half Int'l Inc., 761 F.3d 326, 333 (3rd Cir. 2014), cert. den., 135 S.Ct. 1530 (2015).

[17] Chesapeake, 2015 WL 53860 at *15, citing AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1750, 1751-53 (2011).

[18] Catamaran Corp. v. Towncrest Pharmacy, 2017 U.S. App. LEXIS 13689 (8th Cir. July 28, 2017).

[19] See Catamaran, 2017 U.S. App. LEXIS 13689 at *8-*10.

[20] Howsam v. Dean Whitter Reynolds Inc., 537 U.S. 79, 83 (2002).