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Class Arbitrability Questions After 11th Circ. JPay Ruling

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(October 16, 2018, 12:39 PM EDT)


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The U.S. Supreme Court has pointed out consistently in recent years that the relatively new construct of "class arbitration" is very different from your uncle's classic bilateral arbitration. ("Class arbitration" signifies the utilization of a class action protocol (Federal Rule of Civil Procedure 23) in an arbitration proceeding.) One might expect, therefore, that the adjudication of issues concerning the one would differ from the adjudication of the same issues concerning the other. Delegation of the arbitrability question is one such issue. Have the lower federal courts adopted such a view? Count the Eleventh Circuit as another that, in JPay Inc. v. Kobel, has decided against it, and that whether the "class arbitrability" issue has been delegated to an arbitrator should be adjudicated using the same criteria as are applied to that issue with respect to bilateral arbitration.[1]

Arguably, two questions uniquely concern the delegation of class arbitrability:

1. Considering the differences between class arbitration and bilateral arbitration, how "clear and unmistakable" must the parties' manifestation of consent to delegation be in order to take that issue away from the court; and

2. Who is bound by such a delegation of the class arbitrability issue?

One may question the Eleventh Circuit's answer to the first question (the circuit courts are split on that issue), and whether or not it got that right, it did not reach the second question, which looms with respect to many class arbitration-related matters — that is, who is bound by such class arbitration-related decisions? A paraphrase of a lyric from the musical "Funny Girl" comes to mind: "everything they've got's about right, but the damn thing don't come out right."

The JPay Decision

In JPay, the court of appeals addressed two issues: (1) whether the permissibility of a "class arbitration" procedure is a gateway "arbitrability" question; and, if so, (2) whether the parties had clearly and unmistakably manifested in their agreement an intent to delegate that question to an arbitrator, thus overcoming the doctrinal presumption that such a question should be determined by the court.[2]

In sum, the court of appeals (1) affirmed the district court's determination that the availability of class arbitration is a gateway question of arbitrability that is presumptively for the court to decide;[3] (2) agreed also that the class arbitrability issue is not to be considered delegated to an arbitrator "unless an agreement evinces a clear and unmistakable intent to send [it] to arbitration"; and (3) found that the terms of the arbitration agreement in question expressed the parties' intent to arbitrate the class arbitrability question.[4] "Thus, an arbitrator will decide whether the arbitration can proceed on a class basis."[5]

The last decision merits review. The JPay court found that the arbitration agreement in question clearly and unmistakably manifested the parties' intent to delegate the class arbitrability question to an arbitrator because that agreement (1) incorporated by reference certain rules of the American Arbitration Association, or AAA; (2) stated that "the ability to arbitrate the dispute, claim or controversy shall ... be determined in the arbitration"; and (3) was broad in scope, providing that the parties would arbitrate all of their disputes relating to the commercial agreement in question.

JPay provided services, including electronic money transfers, to enable friends and family of prison inmates around the country to purchase goods and services on the inmates' behalf. The plaintiffs Cynthia Kobel and Shalanda Houston alleged that JPay violated a Florida consumer protection statute and breached a contractual obligation by charging exorbitant transfer fees (and using those funds to pay kickbacks to corrections officials). The plaintiffs demanded arbitration on behalf of themselves and a class of JPay money transfer services customers.[6] JPay challenged the "class arbitration" element by filing a declaratory judgment action in Florida state court and moving for summary judgment in that regard. After removal, the federal district court held that the arbitrability question was presumptively for it to decide, and that there was no clear and unmistakable contractual manifestation that the parties intended otherwise. It thereupon granted summary judgment to JPay, holding that the arbitration could not proceed as a class arbitration.[7] The court of appeals reversed in part, determining that the contracting parties had delegated the class arbitrability issue to the arbitrator, and hence that it was not for the court to decide.

The arbitration agreement in JPay's terms of service provided for arbitration (a) of claims for less than $10,000 under the American Arbitration Association Arbitration Rules for the Resolution of Consumer-Related Disputes; and (b) of other disputes under the AAA's Commercial Arbitration Rules, or CAR.[8] It also provided that "the ability to arbitrate the dispute, claim, or controversy shall … be determined in the arbitration."

The Eleventh Circuit's Analysis

The JPay decision was that court's first holding that the availability of class arbitration is an arbitrability question and presumptively for the court to decide.[9] (The U.S. Supreme Court has not yet decided that question.[10])

Turning to its second issue, the majority found that the arbitration agreement clearly and unmistakably manifested the parties' intention to delegate the class arbitrability question to the arbitrator.[11] In doing so, the court in effect held that a "clear and unmistakable" manifestation of such intent need not be an express statement, but may be inferred in the same way that it may be inferred with regard to bilateral arbitration.[12] For example, incorporation by reference in a bilateral arbitration agreement of arbitration institutional rules that provide for the determination of arbitrability issues by the arbitrator

— e.g., the AAA's CAR R-7 — suffices as a "clear and unmistakable" manifestation of the parties' intent to delegate the bilateral arbitrability issue to an arbitrator. The Eleventh Circuit held that the rule is no different with regard to class arbitrability.

The court determined that the incorporation in JPay's terms of service of two sets of AAA rules[13] in the alternative "clearly and unmistakably" gave the arbitrator power to rule on his own jurisdiction, thus delegating the class arbitrability question to the arbitrator.[14] That was because:
in [the Eleventh] Circuit, JPay need not have consented to rules specifically contemplating class proceedings in order to have delegated the question of class availability via incorporation of AAA rules.[15]

JPay had argued that stronger indicia should be required — e.g., express reference to class arbitration, to the availability of class arbitration, to the AAA's Supplementary Rules for Class Arbitration, or to who decides the class arbitrability issue.[16] The Eleventh Circuit rejected that argument. It saw no reason to distinguish one arbitrability question from others.[17]

In contrast, the Third, Sixth and Eighth Circuits have held that "incorporation of the AAA Rules by reference served to delegate questions of arbitrability generally, but ... does not delegate the specific question of class action availability."[18] The Eleventh Circuit declined to follow those authorities, but relied on its own precedents — i.e., Spirit Airlines Inc. v. Maizes, Terminix Int'l Co. v. Palmer Ranch LP, and U.S. Neutraceuticals LLC v. Syanotech Corp.[19] — in order to reach its different conclusion.

Furthermore, while the JPay arbitration clause did not mention class arbitrability or arbitration, it did provide that "the ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration." The Eleventh Circuit found that such a statement was an independent "unequivocal" expression of the parties' wish to have the arbitrator decide all arbitrability issues. And in that regard, the court opined that "the fact that JPay's Terms of Service are written in bilateral terms ... does not change the fact that questions of class arbitrability have unmistakably been delegated."[20] However, the language on which the court relied arguably referred to claim arbitrability rather than party arbitrability. But, critically in this regard, the Eleventh Circuit considered class arbitration as "a class-based claim" — that is, a unique type of "claim" — rather than as a unique type of proceeding that would consider the claims of many persons as a group.[21]

Distinguishing Bilateral Arbitration and Class Arbitration

Should the adjudication of an issue concerning "class arbitration" be the same as that for a comparable issue with respect to bilateral arbitration?

The Eleventh Circuit acknowledged that "[c]lass arbitration is very different from bilateral arbitration in several important ways identified by the [Supreme] Court": (1) bilateral arbitration is designed to be more efficient than litigation, but class arbitration forfeits such relative efficiency; (2) class arbitration is less confidential; (3) class arbitration aims to bind absent persons, whereas bilateral arbitration would not; (4) class arbitration increases the defendant's potential liability but provides only the same limited scope of judicial review as for bilateral arbitration.[22] Also, class arbitration is far more time-consuming and complex than bilateral arbitration, requiring greater allocations of resources and attention and possibly different counsel.[23] Ultimately "class arbitration is, therefore, a different 'type' of proceeding ..."[24] "If class proceedings are available, the arbitration is fundamentally changed."[25]

The Eleventh Circuit stated that it "[did] not want to force parties to arbitrate so serious a question [as class arbitrability] in the absence of a clear and unmistakable indication that they wanted to do so."[26] And yet, despite the substantial differences between class and bilateral arbitration, and the consequent disadvantages that would be visited upon a party participating in a class arbitration, the court held that the parties' "clear and unmistakable" indication of their intention to delegate an arbitrability question need be no different for class arbitrability than it is for bilateral arbitrability.

In partial explanation, the Eleventh Circuit opined that the analyses made by the Supreme Court in Stolt-Nielsen and Concepcion, concerning the "merits" determination of whether class arbitration was available according to the terms of the arbitration agreements there were, based on concerns — that is, the substantial distinctions between class and bilateral arbitrations — that "do not apply, as a doctrinal matter, to the "who decides" question of contractual intent to delegate."[27] That is, "[t]extual analysis of the agreement to determine the parties' intent [regarding delegation] does not implicate the fact that class arbitration is less efficient, less confidential, and higher stakes [than bilateral arbitration]."[28]

The obvious means of distinguishing the criteria applicable to the two types of arbitration would have been to require an express delegation of the class arbitrability question to an arbitrator, while permitting delegation with respect to bilateral arbitrability to be found by implication (as is the case currently). The Eleventh Circuit declined to do that.[29]

Who Is Bound? The Dilemma of the Nonparty, Nonappearing Putative Class Member

The question that was not considered in JPay (nor by any of the other circuit courts) is who is bound by a determination of the class arbitrability delegation question? Why is this an issue? First, arguably, any determination regarding "class arbitrability" — whether by a court or by an arbitrator — could only bind the parties to the arbitration agreement in question. An arbitrator would have no contractual basis to bind nonsignatory, nonappearing potential class members, and a court would not have personal jurisdiction over any of those unidentified nonappearing potential arbitration class members. Second, such nonsignatory, nonappearing putative class members will have given no manifestation of intent to delegate any issue to anyone.

The arbitrability delegation issue before the Eleventh Circuit was essentially a contract dispute. The court scrupulously agreed that arbitration "is a matter of contract and of consent,"[30] and it confirmed that arbitrators derive their authority to resolve disputes from the parties' agreement in advance to submit such grievances to arbitration.[31] Moreover,

courts may not require arbitration beyond the scope of the contractual agreement, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'[32]

So too, the circuit court was aware that "allowing a class proceeding means determining the rights of many parties who are not actively involved, not represented by their own counsel, and, in all likelihood, not paying attention."[33] And the court noted that questions of arbitrability include the fundamental question of whether particular parties are bound by an arbitration clause.[34]

Yet, the Eleventh Circuit made it clear that it was not addressing the "who is bound" question. It noted that the Supreme Court, in Howsam v. Dean Witter Reynolds Inc., had identified two categories of questions of arbitrability that are presumptively for the courts to decide — (1) questions about whether parties are bound by a given arbitration clause (party arbitrability), and (2) questions about whether an arbitration clause in a binding contract applies to a particular type of controversy (claim arbitrability).[35] The Eleventh Circuit was "confident" that the availability of class arbitration falls in the

second Howsam category, and therefore "we need not decide the more difficult question whether it falls in [the] first one."[36] Critically, as noted earlier, the Eleventh Circuit considered class arbitration as "a class-based claim," that is, a unique type of "claim," rather than as a unique type of proceeding that would consider the claims of many persons as a group.[37] It opined that "class availability does not relate to whether any particular party is bound to arbitrate its claims, but whether they may be arbitrated together."[38] This is in contrast with the Third Circuit's opinion that the availability of class arbitration relates to the first Howsam question because the inclusion or exclusion of absent class members concerns "whose claims an arbitrator may decide."[39]

In any case, the issue with which we must contend eventually is whether any determination concerning delegation of the class arbitrability issue binds unidentified nonappearing, nonsignatories of the controlling arbitration agreement. In that regard, one must wonder about the significance of any bilateral agreement — implied or express — concerning delegation of that issue. First, the nonsignatory, nonappearing putative class members did not and indeed could not agree to it. Indeed, what clear and unmistakable manifestation of intention did any such potential member of an uncertified class give? Thus, for example,

Courts have generally found that agreements that do not mention or reference a particular non-signatory do not clearly or unmistakably evidence an agreement by that non-signatory to have an arbitrator determine whether the agreement is arbitrable.[40]

Moreover, a nonsignatory to an arbitration agreement could not be deemed to have clearly and unmistakably delegated arbitrability issues to an arbitrator without illogically putting the cart before the horse. While it might conceivably be determined ultimately that a nonsignatory is bound by the pertinent arbitration agreement, how could that person be deemed a party to any delegation indicium in that arbitration clause before such a determination could be made. Thus, for example, the Texas Supreme Court ruled that the incorporation of AAA rules in an arbitration clause did not delegate arbitrability issues to an arbitrator when one of the parties to that dispute was a nonsignatory to the arbitration agreement in question.[41]

Furthermore, a court adjudicating the delegation issue arguably would not have personal jurisdiction over the unidentified nonappearing potential class members.

Moreover, 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."[42] A nonappearing, nonsignatory has not committed him or herself to be bound by any aspect of an arbitration agreement. (Granted, an arbitration agreement may be deemed to bind a party who did not sign it,[43] by the operation of regular principles of state law regarding contract, agency, estoppel, etc.[44] But theories like estoppel, which a nonsignatory might invoke in order to compel a signatory of a bilateral arbitration agreement to arbitrate, would require active advocacy by a litigant with respect to particular facts. By definition, a nonsignatory, nonappearing putative class member would not be an active litigant. Nor would such a potential class member take any other necessary steps thereafter — e.g., to seek consolidation of his/her new arbitral proceeding with an arbitral proceeding commenced by another class member.[45]

So what should be the effect upon a nonsignatory, nonappearing putative class member of any manifestation of bilateral agreement to delegation of arbitrability questions? None. Indeed, such a nonsignatory, nonappearing potential class member arguably could not be bound by any manifestation of delegation, whether implied or express, in a bilateral arbitral agreement.[46]

The particular question was taken up recently by Judge Jed Rakoff of the Southern District of New York in a case on remand from the Second Circuit, in which the court of appeals had pointed 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 [the absent putative class members] ... never consented to the arbitrator determining whether class arbitration was permissible under the agreement in [the] first place."[47] The district court in effect faced the question of whether nonsignatory, nonappearing putative class members could be deemed to have delegated the class arbitrability issue to an arbitrator, no matter what the parties to the arbitration agreement had agreed among themselves. 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 proceeding before her."[48]

The Third Circuit too relied on U.S. Supreme Court Justice Samuel Alito's concurring opinion in Oxford Health Plans LLC v. Sutter 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."[49]

Thus, whether a delegation of class arbitrability was deemed to have been effected (a) by the adoption of AAA arbitration rules in a bilateral arbitration agreement, or (b) by way of ad hoc consent by the parties to such an agreement, still a nonsignatory, nonappearing potential class member arguably did not agree or consent and could not be deemed bound as a party to such a delegation (or to its consequences).

Such questions of effect (who is bound?), unique to the jurisprudence of "class arbitrability," will have to be addressed by the U.S. Supreme Court eventually.

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[1] See JPay Inc. v. Kobel, 2018 U.S. App. LEXIS 26609 (11th Cir. Sept. 19, 2018).

[2] JPay at *2.

[3] This Eleventh Circuit ruling was consistent with corresponding decisions by the Third, Fourth, Sixth and Eighth Circuits, but contrary to decisions by the Fifth Circuit and the California Supreme Court. See JPay at *26.

[4] JPay at *3.

[5] Id.

[6] JPay at *5.

[7] Id. at *6-*7.

[8] JPay at *4. The arbitration clause also provided that the parties' agreement to arbitrate "may be specifically enforced by legal proceedings in any court of competent jurisdiction." Id. at *5. The Court of Appeals evidently ignored that term.

[9] JPay at *15.

[10] See Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569-70n. 2 (2013).

[11] JPay at *11-12.

[12] The U.S. Supreme Court has not yet had to address the criterion for delegation of the class arbitrability issue. See also Stolt-Nielsen, 559 U.S. at 680. (The parties agreed that they had "expressly assigned ... to the arbitration panel the question of whether a class was available.")

[13] The Commercial Arbitration Rules of the AAA give the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." JPay at *30; see AAA CAR R-7(a). The corresponding provision in the AAA Consumer Arbitration Rules is R-14(a).

And by adopting any of the AAA Rules, the parties also effectively incorporated the AAA's Supplementary Rules for Class Arbitrations (SRCA). See SRCA 1. The SRCA contains the following two arguably inconsistent provisions: SRCA 3 provides that "upon appointment, the arbitrator shall determine as a threshold matter ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class . ..." SRCA 1(c) provides that "whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under the Supplementary Rules, the arbitrator shall follow the order of the court."

[14] JPay at *31-*32.

[15] JPay at *33.

[16] JPay at *44-*45.

[17] See JPay at *47-*48.

[18] JPay at *39.

[19] See Spirit Airlines Inc. v. Maizes, 899 F.3d 1230 (11th Cir. 2018); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327 (11th Cir. 2005); U.S. Neutraceuticals LLC v. Syanotech Corp., 769 F.3d 1308 (11th Cir. 2014).

[20] JPay at *38.

[21] See e.g., JPay at *49.

[22] JPay at *19-*20.The Circuit Court relied on the Supreme Court's Stolt-Nielsen decision. JPay at *21, citing Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686-87 (2010).

[23] JPay at *16.

[24] Id. at *20.

[25] Id. at *21-*22.

[26] JPay at *26.

[27] JPay at *42.

[28] JPay at *43.

[29] The Eleventh Circuit also found that "JPay and its users expressly delegated questions of arbitrability." JPay at *27. However, see the critique in that regard, above.

[30] JPay at *7.

[31] Id. at *7-*8, citing AT&T Techs. Inc. vs. Comm'ns Workers of Am., 475 U.S. 643, 648-49 (1986).

[32] JPay at *8, citing United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[33] JPay at *15-*16.

[34] JPay at *12.

[35] Id. at *18, citing Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 84 (2002).

[36] Id. at *18 n.2.

[37] See, e.g., JPay at *49.

[38] Id.

[39] Id., citing Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014).

[40] McKenna Long & Aldridge LLP v. Ironshore Specialty Ins. Co., 2015 U.S. Dist. LEXIS 3347 at *14-15 (S.D.N.Y. Jan. 12, 2015), cited in Charlotte Student Housing DST v. Schoate Construction Co., 2018 NCDC 88 (Aug. 24, 2018) at Op. ¶ 19.

[41] See Jodie James Farms v. Altman Group, 2018 Tex. LEXIS 405 (Tex. May 11, 2018).

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

[43] First Options, 514 U.S. at 943-946 (1995).

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

[45] See, e.g., LCIA Arbitration Rules 22.1(viii-x).)

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

[47] Jock v. Sterling Jewelers, 284 F.Supp.3d 566, 569 (S.D.N.Y 2018).

[48] Jock, 284 F.Supp.3d at 571 ("[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 as the relevant individuals and businesses have bound themselves"). Accord, Chesapeake Appalachia LLC v. Scalp Petroleum LLC, 809 F.3d 746 (3d Cir. 2016).

[49] Chesapeake, 2015 WL 53860 at *15, citing Oxford Health Plans, 133 S.Ct. 2064, 2071-72 (2013).