

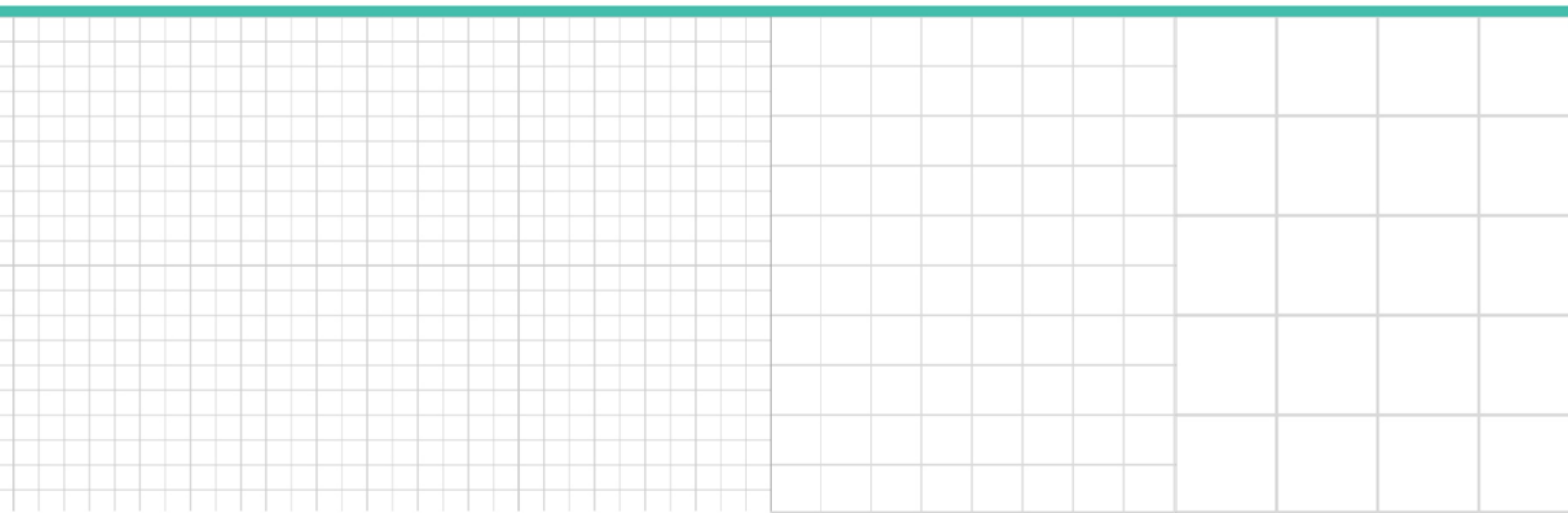


Professional Perspective

Class Arbitration Awards and Non-Party Class Members

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Class Arbitration Awards and Non-Party Class Members

Contributed by [Gilbert Samberg](#), [Mintz, Levin, Cohn, Ferris, Glovsky and Popeo](#)

A fundamental question concerning the legal viability of class arbitration is whether an arbitrator can issue an award that binds a person who is not a party to or otherwise bound by the arbitration agreement—e.g., a non-appearing non-party putative class member. The U.S. Supreme Court has signaled that this is a dubious proposition. However, in [Jock v. Sterling Jewelers](#), 942 F.3d 617 (2d Cir. 2019), the Second Circuit identified circumstances in which a court may not vacate an arbitral award permitting class arbitration, and the award may bind all putative members of a class, including non-appearing non-parties to the controlling arbitration agreement.

In [Jock](#), the Second Circuit considered a situation in which one party had entered into essentially the same bilateral arbitration agreement with many different counterparties, and addressed the question of whether the arbitrator in a proceeding based on one bilateral agreement had the power to bind parties to other separate but essentially identical agreements. The court effectively decided that it was not beyond the power of an arbitrator to bind non-signatory “absent class members” to its determination that class arbitration was permitted.

The [Jock](#) decision is significant to any company that uses a form arbitration clause in multiple contracts regarding the same or similar subject matter. It lends urgency to getting one's form(s) of arbitration agreement in order. For those seeking to assure that their arbitrations will be conducted exclusively as bilateral proceedings, the decision illustrates the importance of using a form of arbitration agreement that keeps the class arbitrability determination in the courts in the first instance, and includes an express prohibition of class and collective arbitration.

Jock in the District Court

In [Jock](#), the arbitrator had made a class certification determination that identified a class of approximately 44,000 employee-claimants “comprising the then 250 plaintiffs as well as other individuals who had neither submitted claims nor opted into the arbitration proceeding (“the absent class members”).” After the District Court's denial of respondent's motion to vacate the class determination and the Second Circuit's subsequent reversal and remand, the District Court vacated the arbitrator's class determination ruling. Relying in part on Justice Samuel Alito's concurrence in [Oxford Health Plans LLC v. Sutter](#), 569 U.S. 564 (2013), it found that the non-appearing non-party putative class members had not submitted themselves to the particular arbitrator's authority, and had not agreed to permit class procedures.

The Second Circuit's Decision

On appeal, the Second Circuit had to address three principal issues. First, did all of the members of the putative class—both the parties in the pending arbitration and the non-party non-participants—delegate authority to the particular arbitrator in the pending arbitral proceeding to determine the “class arbitrability” question? If so, should the arbitrator's determination that class arbitration was permitted have been vacated by the District Court? And, if not vacated, were the non-participating non-parties bound by the arbitrator's class arbitrability determination?

The Delegation Issue: Authority to Determine Arbitrability

As a preliminary matter, the Second Circuit in [Jock](#) determined that the class arbitrability issue in this case was for the arbitrator, rather than for a court, in the first instance.

First, the parties to the underlying arbitration had “squarely presented to the arbitrator” the issue of whether the operative arbitration agreement permitted class arbitration. Thus, the delegation issue was arguably resolved vis-à-vis the parties by ad hoc agreement in this instance.

Second, the operative arbitration agreement had provided that the arbitrator shall decide both questions of arbitrability and questions of procedure. While the Second Circuit indicated that it assumed without deciding that the availability of class arbitration is a question of arbitrability, the Court concluded that the availability of class arbitration is a matter for the arbitrator to decide under the terms of the relevant arbitration agreement, regardless of whether it is a question of arbitrability or “merely a procedural question.”

Third, the Court of Appeals agreed with the arbitrator that the arbitration agreement's incorporation of the rules of the American Arbitration Association, effectively including the class arbitrability delegation provision in its Supplementary Rules for Class Arbitration, "evinces agreement to have the arbitrator decide the question of class arbitrability." *Jock*, citing *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018). The Court took that to be "clear and unmistakable evidence" of an intent to delegate such issue to an arbitrator.

But, did these manifestations of the parties' agreement to delegate the class arbitrability issue to the arbitrator also bind the non-participant non-party putative class members? Or, were they otherwise bound to such a delegation?

The principal novel holding by the Court of Appeals in *Jock* was that while non-participating non-party putative class members had not even purported to opt into the underlying arbitration in question, each of them had signed an arbitration agreement with the same respondent that was identical to the agreement upon which the arbitration participants relied, and in doing so they had thereby "consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration." The Second Circuit opined that the non-party absent class members had bargained for the arbitrator's construction of their agreement with respect to class arbitrability no less than did the parties to the proceeding before that arbitrator. The Court viewed this as contractually express consent by each of the absent non-party class members, such that they were bound by the arbitrator's eventual determination of the class arbitrability issue.

Notably, the Second Circuit's rationale for this relied in part on references to class litigation procedures. The Court opined that its analysis was not affected by the fact that absent class members had not expressly submitted themselves to "this particular arbitrator's authority," because judicial class actions can routinely bind absent class members as part of mandatory or opt-out classes. The Court therefore reasoned that if any person is a party to an arbitration agreement that is identical to one before the active arbitrator, the arbitrator in that proceeding is empowered to decide class arbitrability, and to certify a class that includes non-appearing non-parties to the agreement at issue. "To hold otherwise would be inconsistent with the nature of class litigation and would in effect negate the power of the arbitrator to decide the question of class arbitrability." But, of course, arbitration is not litigation, and the Federal Rules of Civil Procedure do not apply in arbitration.

Deferential Judicial Review of Arbitral Award

The Second Circuit acknowledged that the District Court could have vacated the arbitrator's decision if the arbitrator had exceeded her powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. See FAA § 10(a)(4), 9 U.S.C. § 10(a)(4). However, the principle of extreme deference to the decisions of an arbitrator was critical to the Second Circuit's analysis.

The Second Circuit followed the Supreme Court's instruction that when parties "bargain[] for [an] arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." *Jock*, citing *Oxford Health*. Only if the arbitrator "issu[es] an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract" may a court overturn that determination.

The Court of Appeals therefore framed its inquiry as "whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue" and "not whether the arbitrator correctly decided that issue." As noted above, the Court eventually found that the arbitrator had acted within her authority in "purporting to bind the absent class members to class procedures." And that determination would stand, said the Court, "regardless of whether [it] is, as the District Court believes, 'wrong as a matter of law.'"

Binding Effect of Class Arbitrability Determination

The Second Circuit did not examine the merits of the arbitrator's Class Determination Award so much as defend it from scrutiny. It maintained that it was not for a court to decide "whether the arbitrator's class certification decision [in the affirmative] was correct on the merits of issues such as commonality and typicality"—issues that are to be addressed under the applicable AAA rules after a determination is made that class arbitration procedures were permitted by agreement. Rather, the Court decided—presumably on the same basis upon which it decided the delegation issue—"that the arbitrator had the authority to reach such issues even with respect to the absent class members."

Conclusion

This decision seems to be a bit of a turnabout by the Second Circuit, considering its earlier opinions in the *Jock* saga. The Second Circuit noted, for example, that its earlier decision “did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties [to the underlying arbitration], never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place.”

This decision also seems inconsistent with the recent trending of Supreme Court jurisprudence with respect to the notion of a “class arbitration” proceeding, which the Supreme Court has characterized as inherently inconsistent with the traditional notion of arbitration—i.e., a private bilateral proceeding.

In any case, the *Jock* saga continues. It has always seemed to be on a track to the U.S. Supreme Court, with the only uncertainties being how many issues would be presented and how long it would be before it was finally ripe for review. The Second Circuit's decision in the *Jock* case adds to the issues that the Supreme Court may eventually get to address, but works to delay its eventual reception there.