The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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CLASS ARBITRATION IS "ARBITRABILITY QUESTION"

OPALINSKI et al. v. ROBERT HALF INTERNATIONAL, INC. et al. 761 F.3d 326 (3d. Cir. 2014)

The Third Circuit has now joined the Sixth Circuit[2] in deciding that whether an arbitration agreement authorizes class arbitration ("in the context of an otherwise silent contract")[3] is for the court—not the arbitrator—to decide.[4] Two former employees of Robert Half International, Inc. ("RHI") brought a Fair Labor Standards Act ("FLSA") lawsuit against RHI for overtime pay based on improper classification as overtime-exempt employees under the FLSA. RHI asked the court to compel individual arbitrations of all claims by the two individual claimants. The District Court ordered arbitration and also held that class arbitration was for the arbitrator to decide. The arbitrator ruled in a partial award that the parties' arbitration agreement permitted classwide arbitration. RHI asked the District Court to vacate the arbitrator's partial award, which the District Court denied.[5] The Third Circuit characterized "[t]he crux of the appeal" as "who decides—that is, should the availability of classwide arbitration have been decided by the arbitrator or by the District Court?" Stated another way, the Third Circuit, rephrased the question to state: "Is the availability of classwide arbitration a 'question of arbitrability'?"[6] It then answered, "Yes."[7]

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

[3] *Opalinski et al. v. Robert Half Int'l, Inc. et al.*, 761 F.3d 326, 330, 333 (3d. Cir. 2014).

[4] *Id.* at 326. Who decides what parties and what disputes go to arbitration is generally known as the "arbitrability question." *See Opalinski*, 761 F.3d at 330 (*citing Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S.Ct. 1920, 131 L.Ed2d 985 (1994)).

[5] *Id.* at 329.

[6] *Id.* at 331.

[7] *Id.* at 332 ("We now hold that whether an agreement provides for classwide arbitration is a 'question of arbitability' to be decided by the District Court.").

The Third Circuit relied on a trilogy of U.S. Supreme Court cases[8] to conclude: "Accordingly, we read the Supreme Court as characterizing the permissibility of classwide arbitration not solely as a question of procedure or contract interpretation but as a substantive gateway dispute qualitatively separate from deciding an individual quarrel."[9] But a careful parsing of this Third Circuit reading of these prior U.S. Supreme Court cases suggests that this is less than a conclusive interpretation. The classwide arbitrability question is altered by the Third Circuit to "whose claims" have the parties agreed to arbitrate (as opposed to "what claims" are to be arbitrated).[10] The classwide arbitrability question is further conditioned to be "**not solely**" a procedural or contract interpretation question. The question is further shaded as "qualitatively separate" from an "individual quarrel." The Third Circuit rationale for its holding is based on two section headings, both of which use the word "implicates."[11] Classwide arbitration "implicates whose claims the arbitrator may resolve" and "implicates the type of controversy submitted to arbitration." This language seems to depart from the straightforward arbitrability questions[12] of (1) have the parties agreed to arbitrate and (2) what claims have the parties agreed to arbitrate?

The Third Circuit refused to accept *Green Tree*'s "arbitrability question" decision about classwide arbitration (*i.e.*, for the arbitrator) because it was a plurality decision.[13] It also refused to rely on its earlier decision in *Quilloin v. Tenet HealthSys. Philadelphia, Inc.* (*i.e.*, classwide arbitration *not* a question of arbitrability)[14] because the one sentence in question was "*dictum*" since the parties had agreed in *Quilloin* to let the arbitrator make the classwide arbitration determination.

The Third Circuit further supported its decision that classwide arbitration was an "arbitrability question" for the courts by citing to the Sixth Circuit's decision in *Reed Elsevier, Inc. v. Crockett*.[15] The Sixth Circuit also relied on the same U.S. Supreme Court trilogy that the Third Circuit cited – *Concepcion, Oxford Health,* and *Stolt–Nielsen*.[16] RHI's citation to First, Second, and Eleventh Circuits in support of classwide arbitration as the arbitrator's decision was decisively rejected by the Third Circuit.[17] Citing "the fundamental differences between classwide and bilateral arbitration, and the consequences of proceeding with one rather than the other," the Third Circuit concludes that "the availability of classwide arbitrability is a substantive

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[8] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *Oxford Health Plans LLC v. Sutter, -- U.S. --, 133 S.Ct. 2064, 186 L.Ed2d 113 (2013); AT&T Mobiity LLC v. Concepcion,* --U.S.--, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

[9] *Opalinski*, 761 F.3d at 334.

[10] *Id.* at 332 ("1. The availability of class arbitration **implicates whose claims** the arbitrator may resolve.") (Emphasis added.).

[11] *Id.* at 332-33.

[12] Briefly described at *Id.* at 330-31, *citing and quoting Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2001).

[13] *Id.* at 331.

[14] *Id.* (Saying that "whether class action is prohibited is a question of interpretation and procedure for the arbitrator.").

[15] 734 F.3d 594, 599 (6th Cir. 2013).

[16] *Opalinski*, 761 F.3d at 334.

[17] *Id.* ("This is untrue, as none of those Circuits ruled, or even expressed a view, on the issue before us.").

gateway question rather than a procedural one" and, therefore "the availability of class arbitration is a 'question of arbitrability'."[18]

The Court recognizes that "the parties [may] clearly and unmistakably provide" for class arbitration[19] and that arbitration is "fundamentally a creature of contract" with the arbitrator's authority "derived from" the parties' arbitration agreement.[20] But in this case there is no mention in the parties' arbitration agreement of "arbitration for a wider group."[21] This contract silence coupled with "the critical differences between individual and class arbitration and the significant consequences of that determination," prompts the Third Circuit to hold "that the availability of class arbitration is a 'question of arbitrability' for a court to decide unless the parties unmistakably provide otherwise."[22]

OBSERVATIONS

1. It appears we now have a split of circuits that may encourage the U.S. Supreme Court to address arbitrability of class arbitration where the parties have not been clear about this issue in their arbitration agreements.

2. Any parties wanting the arbitrator to decide all arbitrability questions, expressly including class arbitration, should so "unmistakably" state in the arbitration agreement.

3. The decision to give or not give the arbitrator the power to decide arbitrability questions appears to involve more issues than traditionally thought.

4. "Unless otherwise agreed" may not be clear and unmistakable enough in an arbitration agreement to give the arbitrator the power to decide all arbitrability questions, including class arbitration.

5. Although this "arbitrability question" was raised at the "partial award" stage, it could have been raised on appeal earlier in the process thereby reducing the cost of the issue resolution.[23]

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[18] *Id.* at 335.
[19] *Id., citing Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 335-36.
[23] *Id.* at 335 ("This case is remanded for the District Court to determine whether Appellees' employment agreements call for classwide arbitration.").