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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WHO DECIDES?
TEXAS SUPREME COURT DECISION ON CLASS ARBITRATION

Robinson v. Home Owners Management Enterprises, Inc.[2]

In the last few years, the U.S. Supreme Court has twice addressed the issue of class arbitration availability.[3] First, the Court determined that arbitration agreements that are silent on the issue of class arbitration do not provide the necessary contractual basis to conclude that the parties agreed to class arbitration.[4] Then in 2019, the Court similarly held that ambiguity cannot provide the necessary contractual basis to conclude that the parties agreed to class arbitration.[5] These rulings leave some unanswered questions though, such as who decides if the arbitration agreement permits class arbitration – the court or the arbitrator?

In the 2004 case *In re Wood*, the Texas Supreme Court addressed this issue and held that the arbitrator decides if an arbitration agreement permits or prohibits class arbitration.[6] Relying on the U.S. Supreme Court's decision in *Green Tree Financial Co. v. Bazzle*, the Texas Court held that arbitrators should "rule on class certification issues when the contract commits all disputes arising out of the agreement to the arbitrator."[7] In late 2019, however, the Texas Supreme Court effectively overruled this decision.[8]

In *Robinson v. Home Owners Management Enterprises, Inc.*, the Texas Supreme Court held that class arbitration availability is a "gateway issue" for the court to resolve unless the arbitration

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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. My thanks to Brandie Moser, a third-year law student at Texas A&M School of Law, for her drafting assistance.

[2] 590 S.W.3d 518 (Tex. 2019) (applying the FAA).

[3] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

[4] *Stolt-Nielsen*, 559 U.S. at 687.

[5] *Lamps Plus*, 139 S. Ct. at 1415.

[6] 140 S.W.3d 367 (Tex. 2004) (per curiam) (applying the FAA and the AAA commercial arbitration rules).

[7] *Id.* at 368-69 ("The United States Supreme Court held that, where parties agreed to submit all disputes to an arbitrator under the Federal Arbitration Act, issues of class arbitration are for the arbitrator to decide.").

[8] *Robinson*, 590 S.W.3d at 528.

agreement clearly and unmistakably delegates the issue to the arbitrator.[9] In making this decision, the Court considered the evolution of class arbitration jurisprudence since 2004.[10] The Court noted that: (1) the U.S. Supreme Court has since clarified that *Bazzle* left the "who decides" question unanswered; (2) the U.S. Supreme Court has "flagged that the issue might be a question of arbitrability"; and (3) every federal circuit court that has considered the issue has determined that the availability of class arbitrability is generally an issue for the courts to decide.[11] Thus, the Texas Court felt compelled to reverse *In re Wood* in order to evolve with the jurisprudential developments.

In reversing *In re Wood*, the *Robinson* Court determined that class arbitration was a "gateway issue" as opposed to a "subsidiary issue."[12] To emphasize the distinction, the Court explained that:

> "Gateway arbitrability issues are distinct from procedural or subsidiary questions that grow out of an arbitrable dispute and are presumptively for an arbitrator to decide. Examples include fulfillment of prerequisites to arbitration; limitations, notice, laches, estoppel, and the like; and waiver of limitations periods, claims, or defenses."[13]

The Court also explained the two rationales supporting this holding. First, "the availability of class arbitration invokes contract-formation issues because it implicates whether a presently binding and enforceable agreement to arbitrate exists as to each class member."[14] Additionally, "class action arbitration is so fundamentally different from bilateral arbitration that it implicates the type of controversy the parties agreed to submit to arbitration."[15] Both of these rationales are rooted in the notion that the law, while often favoring arbitration, should avoid compelling arbitration of issues that were reasonably expected to be resolved by a judge.

OBSERVATIONS

1. *Robinson* explains the respective presumptions that apply to "gateway arbitrability issues" (for the court) and to "procedural or subsidiary questions" (for the arbitrator).

2. These two presumptions affect what evidence is needed in each of these distinct proceedings.

3. *Robinson* is not a "delegation" case; there was no delegation language in the parties' arbitration agreements.[16]

4. There was no reference to "class arbitration" in the parties' arbitration agreements.

5. No arbitration rules were adopted in the parties' arbitration agreements.

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[9] *Id.* at 531.
[10] *Id.* at 528-29.
[11] *Id.* (internal quotation marks omitted).
[12] Id. at 531.
[13] *Id.* at 525-26 (internal quotation marks omitted).
[14] *Id.* at 529.
[15] *Id.*
[16] Although the Court recognized the availability of clear and unmistakable delegation to parties in arbitration. *Id.* at 522.