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PERSPECTIVE

Who decides if class arbitration is allowed?

By Deborah Crandall Saxe

Employees or former employees who have signed pre-dispute arbitration agreements as a condition of employment often file class actions against their employers in court. If the employer moves to compel arbitration in a timely manner and the agreement is found to be enforceable, the court must compel arbitration under the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA).

Many employers file motions to compel arbitration on an individual (non-class) basis and trial courts routinely grant such motions without seeming to realize that they present two distinct questions: Is the arbitration agreement enforceable, and does the arbitration agreement permit class proceedings? The second question presents its own question: Does the court have authority to decide it or is it a question for the arbitrator?

If the arbitration agreement contains a broad delegation clause, the second question is to be decided by the arbitrator. The U.S. Supreme Court in *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79 (2002), made clear that the question of whether the parties have submitted a particular dispute to arbitration is an issue for judicial determination unless the parties clearly and unmistakably provided otherwise. Here is an example of such a clause: "The Arbitrator, and not any federal, state, or local court or agency shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including ... any claim that all or any part of this Agreement is void or voidable."

This kind of clause gives the arbitrator authority to decide the second question, whether or not it is considered to be a "question of arbitrability," because parties "clearly and unmistakably" delegated that question to the arbitrator. *See Rent- A-Center West Inc. v. Jackson*, 561 U.S. 63 (2010). Some courts find a clear and unmistakable intent for the arbitrator to decide such questions from the fact that an arbitration agreement references the AAA or JAMS Employment Rules, both of which say it is up to the arbitrator to decide if class arbitration is available.


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If the arbitration agreement does not contain a clear and unmistakable delegation of the second question to the arbitrator, however, *Howsam* requires a court to determine if the second question is a "question of arbitrability" for the court to decide or, instead, is a procedural question for the arbitrator. Howsam distinguishes "questions of arbitrability" from procedural questions, which are "presumptively not for the judge, but for an arbitrator to decide." This is, however, easier said than done.

In *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), a plurality held that the question of whether an arbitration agreement permits class arbitration is a procedural question to be decided by the arbitrator, not the court. However, there was no majority opinion on that subject in *Bazzle* and the Supreme Court's subsequent decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), almost always are distinguishable because the parties in *Stolt-Nielsen* had stipulated that they had reached no agreement on the subject of class arbitration and the parties in *Sutter* had stipulated that it was up to the arbitrator to decide whether or not the agreement permitted class arbitration. Neither of these circumstances is typical. More often, the plaintiff argues that the agreement permits class arbitration and the defendant argues that it does not, and the parties do not agree about whether it is up to the court or the arbitrator to decide.

The plurality in *Bazzle* found that the question of whether an arbitration agreement permits class arbitration is a procedural question to be decided by an arbitrator. However, the Supreme Court went out of its way in *Stolt-Nielsen* and *Sutter* to emphasize that there was no majority opinion on the subject in *Bazzle* and the federal courts of appeal are split. The 10th U.S. Circuit of Appeals has held it is a procedural question for the arbitrator, while the 3rd and 6th Circuits have concluded that it is a "gateway" issue for the court.

The California Supreme Court is poised to provide an answer. It has granted review in several cases presenting the question and the lead case, *Sandquist v. Lebo Automotive*, S220812, was argued on May 3. In Sandquist, the trial court granted a defendant's motion to compel arbitration of a putative class action on an individual (non-class) basis and the Court of Appeal reversed, finding the trial court had no authority to decide whether or not the arbitration agreement permits class arbitration because it is a procedural question for the arbitrator. The California Supreme Court's decision in *Sandquist* most likely will not end the debate because the U.S. Supreme Court still can weigh in later, but it hopefully will provide at least a temporary answer for California courts, arbitrators and litigators.

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