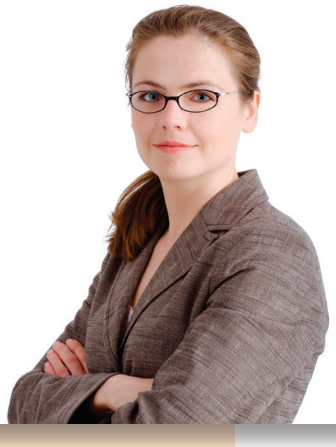

ARIZONA ADR FORUM

WINTER 2019

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FROM THE CHAIR

ROBERT J. ITKIN, JD

I am honored to serve as your Chair for 2018-19! I am surrounded by so many smart, compassionate neutrals in our Section and learn something new at almost every encounter.

I follow in the (big!) footsteps of three of these individuals – Maureen Beyers (Immediate Past Chair), Renee Gerstman (Past Chair before Maureen) and Steve Kramer (Chair-Elect). Each of you have been excellent leaders on the ADR Executive Council and have been very supportive to me personally.

Our Officers and Committee Chairs are doing fabulous work already. Here are just a couple of early sexamples:

- *Mark Lassiter and the CLE committee are off to a roaring start, having offered three programs already; the attendee reviews have been nothing short of outstanding.*
- *Rick Mahrle and the Convention Committee have already received the high honor of the President's Award for the day long presentation scheduled for the 2019 State Bar Convention.*

We will continue to look for ways to expand service to our membership, the public (commercial and consumer) and our profession generally. We will also look for opportunities to improve ADR laws and processes and expand awareness of ADR to the Arizona business community.

We welcome your suggestions, comments and participation. And please don't hesitate to reach out to me if I can be helpful to you in any way.

Gratefully,

Robb Itkin
ADR Section Chair
602-738-5000 mobile

Managing Director Robb Itkin has over 30 years of experience in finance, real estate, law, management, and receiverships. Prior to joining Simon Consulting, Mr. Itkin was a Senior Managing Director at the turnaround and restructuring firm MCA Financial Group, Ltd. and a partner at a national law firm where he represented business owners, real estate developers and lenders. He also held executive positions at Fortune 1000 and entrepreneurial companies and managed the legal functions of multi-billion dollar divisions of CIT and Finova.

STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcrazlaw.com

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BY_ Arlene Switzer Steinfield

A ROSH HASHANAH LEARNING MOMENT –

Civil Discourse is Alive and Well

During Rosh Hashanah, as I took stock of my actions over the past year, I couldn't help but think about how to make amends with those with whom I communicated in a less than respectful manner. This took me to the question of how to change the narrative of dissent when there is so much animosity within the country and an apparent unwillingness among many to hear and appreciate what others are saying when they don't align with our beliefs.

A brief encounter with a Dallas police officer on Rosh Hashanah morning gave me renewed hope. We were leaving services at our Temple as the next service was beginning. There were hundreds of people who were leaving and coming in at the same time. I overheard a Dallas police officer instruct his team members who were directing traffic to "shovel them in," referring to the congregants. Those surrounding me also heard the remark. Some gasped, some bristled, while other laughed nervously.

The vast majority of us immediately grasp the significance of this comment and the images it raises from the Holocaust. Especially for those who personally survived the Holocaust, have lost beloved family members to the Nazi regime, have family members or friends who are survivors, or who currently work with survivors to make their final years more comfortable, it is an image that it is too hideously painful to recall.

I approached the officer privately, thanked him for his dedicated service to protect us during High Holy Days services, and for all his hard work. I then told him that the phrase he used was difficult for us to hear, and explained why. I emphasized that I was sure he meant no harm. He could not have been more gracious. Before I could even finish, he told me that it was very insensitive on his part, and he was truly sorry. The encounter probably lasted no more than four minutes, and we shook hands warmly.

This interchange could have turned into a very uncomfortable discussion with tempers flaring and harsh accusations. It is a vision that we see on the news day in and day out. But it was just the opposite. I genuinely appreciate the work our Dallas police officers do for us and the sacrifices they make, especially in locales which may have heightened security concerns, such as our synagogues. He appeared grateful for a gentle lesson in tolerance and understanding.

But most importantly, at a time when cruel sentiments and insults seem to be an acceptable form of dialogue, and indeed encouraged in some circles, it was a refreshing moment of mutual respect and a demonstrated commitment to ensure the dignity of all. In recent years, civil discourse may have become passé to a number of citizens, including some of our government officials. But that moment gave me a sense of optimism. The police officer listened in a most respectful tone and did not try to disclaim any responsibility, shift the blame to others, or accuse me of being oversensitive. I was mindful that he should not feel attacked, but rather appreciated for his service and dedication. This exchange gave each of us the opportunity to understand the other's viewpoint.

So I continue to have hope that civility and respect for the dignity of human kind is not a thing of the past, and remains a moral imperative to which we must all continue to aspire. Rather than dividing us, our discussions must help us understand one another and set us on a better path.

Ms. Steinfield is Senior Counsel to Dykema in Dallas. Her practice focuses on the representation of management in labor and employment law and in mediating employment-related disputes. She also provides pro bono services to Holocaust survivors who are entitled to reparations for their labor in the ghettos and their incarceration in concentration camps during World War II.

How to Turn Business Lawyers into ... Prelitigation Mediation Advocates

BY ROBERT F. COPPLE, JD, P.HD.

My business lawyer friends often call to ask, "Bob, my client is involved in a prelitigation business dispute and we are going into mediation. Do you think it would be appropriate for me to serve as mediation counsel or do I have to get a litigator involved?" Almost always, I tell them "Yes, that would be entirely appropriate!" Then, after an hour of coaching, they are on their way, ready to take on this new role and use a new negotiation tool.

Particularly in the early stages of a business dispute, before pleadings have been filed and mounds of discovery collected, the business lawyer is likely to be the best mediation advocate. After all, who better knows the documents, parties and business issues?

The fact is that business lawyers are, by practice and definition, negotiators. But they tend to view mediation as a litigation technique. Business lawyers generally loathe litigation. It makes them anxious and gives them hives. It's contrary to the way they are used to negotiating. That is, seeking reasonable ground that will keep the agreement intact and incentivize the parties to cooperate going forward. Also, in litigation, their actions in putting together the agreement or deal may be subject to scrutiny.

And that's where my tutorial begins. Mediation is not a litigation technique or process. Instead, it is a facilitated negotiation that can be employed at any point in the dispute process. Mediation is most effective when the parties are stuck in their respective positions and need structured professional help to break the stalemate.

When business discussions have come to loggerheads, mediation can change the dynamic of the negotiations. The mediator, by evaluating the parties' positions and highlighting the risks, threats and costs of proceeding to trial, adds new variables to the equation with the goal of shifting deliberations toward resolution. By hearing what the independent mediator has to say about the case, clients may reconsider their entrenched positions. And when their positions have softened, the mediator can help the parties explore ways they can leave the dispute behind them and get back to business.

Early business dispute mediation has many advantages over waiting to open talks until litigation is underway:

- Repair and preserve business relationships before irreputable damage is done by the crush of litigation.
- Avoid disruption of the business, executives and supply chain.
- Party positions are often less crystallized then they will be as the dispute moves into litigation.

But the litigator will ask, "How can we possibly evaluate our case before we have completed document discovery, deposed key witness and, maybe, filed a motion or two?" The answer is that mediation is not a debate contest. It's not about who is right or wrong. Mediation is about resolving the dispute quickly, cost effectively and with as little collateral damage as possible. Oh, and if the business lawyer is concerned, its highly unlikely that there will be any pithy discussions of evidentiary or procedural issues, particularly at this early stage of the dispute.

The reality is that the parties are likely to already have the key documents and communications, as well as know the important issues. Short of some element of lying or fraud, it is often questionable just how much full discovery will contribute to an overall understanding of the dispute.

The business lawyer can easily find countless articles addressing mediation style, structure and strategy. I want to offer a few thoughts derived from my own experience as a mediator, arbitrator, negotiator and (recovering) litigator.

What are the Rules?

The short answer is, except for laws governing confidentiality, ethics and criminal behavior, there are no rules in mediation. There is, however, a process. The structure of that process may be suggested by the mediator or the parties may agree upon a process to be executed by the mediator. If there is a contractual Alternative Dispute Resolution agreement in effect, that provision will govern. For example, the ADR provision may establish when mediation is to occur following a claim of a breach or whether a particular ADR organization is to be used to administer the mediation. The American Arbitration Association and the CPR International Institute for Conflict Prevention & Resolution are two such administering organizations. But even then, if the parties agree, they may deviate from the ADR provision.

ROBERT F. COPPLE has a national reputation for providing successful solutions to prevent, manage, and resolve complex disputes. He is a trained alternative dispute resolution neutral and has been involved in hundreds of arbitrations and mediations covering a broad range of issues. He also consults with major corporations, government agencies, and public interest groups regarding complex negotiations, litigation strategy planning, crisis management, and data security and management.

Robert Copple's career encompasses 20 years of high level law firm practice and Fortune 50 corporate legal management, as well as national level professional and academic projects.

He practiced with the law firms of Sherman & Howard and Parcel, Mauro, Hultin & Spaanstra in Denver and Lewis and Roca in Phoenix.

Mediation Confidentiality

Mediation is generally considered to be a confidential process. A number of states have statutes declaring communications during mediation to be confidential and privileged. Likewise, because a mediation is a form of settlement discussion, Rule 408 of the Federal Rules of Evidence and its state equivalents apply. Under Rule 408, settlement discussions between the parties are not admissible in the parties' litigation. So, during the mediation, communications between the parties and between the individual parties and the mediator are considered confidential.

Selecting a Mediator

Mediators come from a variety of backgrounds with different legal expertise. Since we are talking about business disputes, you will want to find a mediator with commercial experience. In addition, you will want to focus on mediation style. For example, some mediators are facilitators who try to nudge the parties together without expressing opinions regarding the merits of the case. Others, including me, are more evaluative and are willing to gently challenge the parties on their positions. There are often times in mediation when I feel like I'm the third negotiator in the room, and I may very well be. There is, however, one mediator characteristic that I think is crucial and that is preparedness. Personally, I try to be as prepared as possible when I walk into a mediation. Our time together is short, and I don't want to waste it. It is very discouraging for the parties and counsel to have to spend the first half of the mediation day teaching the mediator about the case.

Preparing Your Client

Take the time to prepare your client for the mediation. Explain the process and the role of the mediator. Patience in mediation is a virtue and your client should not bolt when the first low ball or unreasonably high offer is laid on the table. It takes time for positions to soften. The client needs to be committed to going the distance. Discuss your realistic settlement goals and how you might want to structure offers. And, be sure the client has settlement authority to make the deal during the mediation. You don't want to have to leave the room and call Mother Russia every time a new offer is made.

Mediation Statement

Mediation statements or position papers can either be confidential to the mediator or shared with the opposing party. I prefer that the parties exchange statements so that each side knows the others position and arguments before we walk in. That way, I don't have to waste valuable time trying to explain to each what the other is claiming. I also hold pre-mediation telephone conferences with each counsel to allow them to address personal, financial or confidential issues and to tell me what they think will move their client. Write the statement to read like a story. The statement should set out legal arguments with supporting facts. Key documents can be attached. The tone of the statement ought to be low key and avoid bluster and vitriolic attacks. It is also helpful if, somewhere in the statement, there is the expression of a sincere desire to settle the dispute

The Joint Conference & Opening Statement

Mediators may differ, but, when possible, I prefer to start the mediation with a joint conference and each side making an opening statement. The reason is that often this is the first time the parties get to hear the unfiltered version of each other's positions, which can inject a new element of doubt into their decision making. These verbal statements, like the written statement, should be in the tone of, say, an appellate argument without threats or accusations and demonstrate a desire to resolve the dispute today. Oh, and every so often, something astounding can happen. Once, in a tech-based dispute, I asked the parties if they had anything to say. The husband and wife plaintiffs and owners of the business burst into tears as they described their affection and concern for the defendant, their former partner. After getting over my initial surprise, I had to quickly alter my mediation strategy. That one was resolved 12 hours later with handshakes and hugs; a very uncommon occurrence at the end of mediation.

Negotiating & Offers

As I said above, mediation takes time. It is, however, amazing how fast the process can move once the adversarial edges have been worn down a bit and the parties decide that they want to settle. Try to avoid unreasonably high or low offers. An expression of a willingness to move can often (but not always) illicit a similar response. I have mediated cases where, for example, the plaintiff was demanding $500,000. Once the defendant put a low, but real money offer of $50,000 on the table, the Plaintiff's next offer dropped dramatically, and the dispute ultimately settled for $100,000. Keep in mind that in many commercial disputes, the total damages claim is made up of a range of hard to soft damages. Once the parties are seriously seeking resolution, the soft damages tend to melt away.

How to Handle Litigation Noise

It's not uncommon for opposing counsel to get into litigation bluster and threats. In one my mediations during opening statements, counsel explained that "We're not here to settle. We're here to show you how strong our case is." (me with head in hands) In reality, that kind of hollow noise usually identifies an unprepared and less than stellar lawyer. Good litigators understand the difference between negotiation and litigation, and usually avoid that type of meaningless and unhelpful expression. When you are so confronted, your best courses of action are to ignore it or declare shenanigans. "We are here in good faith to attempt to resolve this dispute and expect you to do the same." The lawyer may not get it, but his client will.

Thank you for taking the time to read my article.

BUSINESS LAWYER, BRAVELY GO FORTH INTO MEDIATION. I HOPE TO SEE YOU THERE!

Whitaker Chalk
Attorneys & Counselors

The Arbitration Newsletter
Originally published by
Whitaker Chalk Swindle & Schwartz PLLC
John Allen Chalk, Sr., Editor,
October, 2018
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.

The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
(John Allen Chalk, Sr., Editor)

October, 2018

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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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Elusive Arbitrability and Confusing Presumptions
JPay, Inc. v. Kobel[2]

"At issue [here] is a question at the intersection of arbitration and class action jurisprudence, a question that has been expressly left open by the Supreme Court and which comes to [the 11th] Circuit as a matter of first impression."[3] Substantively, the issues in JPay arose from complaints of exorbitant fees for money transfers provided by JPay, a Miami-based company that provides fee-for-service amenities to prisoners like video chats, music downloads, and money transfers into prisoner accounts.[4]

Petitioners sought to represent a class of "[a]ll natural persons who paid a fee to JPay for electronic money-transfer services and who agreed to arbitrate their claims with [JPay]."[5] JPay sought declaratory relief, in attempt to stay class arbitration and to compel Petitioners to arbitrate their claims independently. Petitioners then moved to compel arbitration on the question of whether class arbitration was available under the agreement. Petitioners asserted that the agreement mandated that all questions of arbitrability, including the availability of class action arbitration, were questions for the Arbitrator to decide. JPay then moved for summary judgement, arguing that it had only agreed to arbitrate on a bilateral basis, and did not consent to class arbitration. JPay also urged that a court not an arbitrator, is the proper person to decide the class arbitration question.

The District Court held that the availability of class arbitration was a substantive "question of arbitrability" presumptively for the court to decide. The court then denied the motion to compel arbitration.[6] The Court granted JPay's motion for summary judgement opining that the agreement

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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 Morgan Parker, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.
[2] No. 17-13611, 2018 U.S. App. LEXIS 26609 (11th Cir. 2018).
[3] *Id.* at *1.
[4] *Id.* at *2-4.
[5] *Id.* at *5.
[6] *Id.* at *7.

was silent as to the availability of class arbitration, and that availability could not be implied from the agreement.[7] Petitioners appealed to the 11th Circuit.

The first question that must be answered is: What is an arbitrability question? "Arbitrability" refers to whether or not arbitrators have the authority to rule on a dispute. The arbitrator's power is derived from the arbitration agreement as a matter of contract. Therefore, questions of arbitrability concern whether or not the agreement gives the arbitrator authority to rule on a specific question.

But who decides questions of arbitrability? The court or the arbitrator? The 11th Circuit, following long standing Supreme Court jurisprudence, noted that questions of arbitrability, often described as potentially dispositive "gateway" questions, are presumptively for the courts to decide.[8] "[A]s the Supreme Court put it, arbitrability questions are 'rather arcane,'" and cannot be presumed to have crossed the parties' minds when negotiating the terms of the binding agreement.[9] "Courts cannot assume that parties would want these kinds of questions to be arbitrated unless an agreement evinces a clear and unmistakable intent to send them to arbitration."[10] Therefore, courts should presume that the question of arbitrability remains with the court.[11] However, this presumption can be overcome with clear and unmistakable evidence of the parties' intent to have the arbitrator determine questions of arbitrability.[12]

With this background information the Court posed two questions: 1) "whether the availability of class arbitration is a question of arbitrability, presumptively for the courts to decide"[13] and 2) "whether the words the parties used in their agreement 'clearly and unmistakably provide' that the parties intended to overcome the default presumption and delegate the question to arbitration."[14] The first question posed a challenge for the 11th Circuit; there was no binding Supreme Court or Circuit precedent to follow. In a line of cases beginning with a non-binding plurality decision in *Bazzle*,[15] the Supreme Court has often discussed class action arbitrability, but has intentionally left open who decides class action arbitration.[16] So, deciding without controlling

[7] *Id.*
[8] *Id.* at *10 (citing, Rent-A-Ctr. W. Inc., v. Jackson, 561 U.S 63, 68-69 (2010)).
[9] *Id.* at *10, *12 (citing, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995); AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 655 (1986) ("[T]he question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.")).
[10] *Id.* at *3.
[11] This is different than the more common presumption in favor of arbitration when the scope of an arbitration clause is at issue. When, a contract is ambiguous or silent on the parties' intent to arbitrate an issue, the default presumptions are to resolve ambiguities and inconsistencies in favor of arbitration. *See, E.g.,* citing Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83 (2002).
[12] *JPay,* 2018 U.S. App. LEXIS 26609, at *11 (citing *Howsam*, 537 U.S. at 83; *First Options of Chicago*, 514 U.S. at 945; *AT&T Techs*., 475 U.S. at 655; Jones v. Waffle House, Inc., 866 F.3d 1257, 1267 (11th Cir. 2017)).
[13] *Id.* at *11.
[14] *Id.* at *11-12.
[15] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).
[16] Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569-70 n.6 (2013) ("this Court has not yet decided whether the availability of class arbitration is a question of arbitrability."); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) ("The decision in Bazzle left [class action arbitrability] question open"); S. Communs. Servs. v. Thomas, 720 F.3d 1352, 1358 n.6 (11th Cir. 2013) ("Like the Supreme Court, we also have not decided whether the availability of class arbitration is a question of arbitrability.").

precedent, the 11th Circuit answered the first question that "the availability of class arbitration is a question of arbitrability, presumptively for the courts to decide."[17]

The court described the availability of class arbitration as a potentially dispositive gateway or threshold question. Class availability opens a "gateway" to arbitration for potentially thousands of absent class members, and if class arbitration is unavailable, that gateway will slam shut.[18] Additionally, as these claims are often individually for a small amount, "no single bilateral arbitration would be rational."[19] Therefore, the availability of class arbitration may be the only functional way to "remove the economic barrier blocking the 'gateway' to arbitration for many plaintiffs."[20]

This determination, however, does not conclusively determine that the availability of class arbitration is a question of arbitrability.[21] Many "gateway" questions dispose of claims, but "questions of arbitrability only arise in the 'narrow circumstance where contracting parties would likely have expected a court to decide the gateway matter'."[22] The only two categories of questions that have been recognized as falling within these "narrow circumstances" are whether parties are bound by an arbitration clause, and whether the arbitration clause in a concededly binding contract applies to a particular type of controversy.[23]

Here, the Court determines that the availability of class arbitration "fits squarely in the second category."[24] The availability of class arbitration is neither a matter connected to the merits of the case, nor is it a matter of basic procedure that an arbitrator is tasked to decide, it is a matter of contract interpretation.[25] The procedural and substantive differences between class and bilateral arbitration are substantial. Thus, the Court held it likely that "contracting parties would expect a court to decide whether they will arbitrate bilaterally or on a class basis."[26] The question of class availability is presumptively with the court so as not to force parties to arbitrate so serious a question in the absence of a clear and unmistakable indication of the parties' intent.

The Court then addressed the second question: Did the parties in JPay express their clear and unmistakable intent to have an arbitrator decide questions of arbitrability, thus overcoming the presumption that arbitrability is for the court to decide? Supreme Court precedent is clear that "parties can agree to arbitrate 'gateway' questions of arbitrability because arbitration is a matter

[17] *JPay*, 2018 U.S. App. LEXIS 26609, at *15.
[18] *Id.* at *16.
[19] *Id.* at *16.
[20] *Id.* at *17.
[21] *Id.*
[22] *Id.* at *17 (citing *Howsam*, 537 U.S. at 83.).
[23] *Id.* at *18.
[24] *Id.*
[25] This view is consistent with that of four other Circuits. 6th Circuit: Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013); 3rd Circuit: Opalinski v. Robert Half International, Inc., 761 F.3d 326, 333-35 (3d Cir. 2014); 8th Circuit: Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 971-72 (8th Cir. 2017); 4th Circuit: Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 874-77 (4th Cir. 2016). However, the California Supreme Court and the 5th Circuit both express a contrary view. *See* Sandquist v. Lebo Auto. Inc., 376 P.3d 506, 522-23 (Cal. 2016); Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193, 197 (5th Cir. 2016).
[26] *JPay*, 2018 U.S. App. LEXIS 26609, at *26.

of contract."[27] Thus, the Court simply had to review the language of JPay's contract for clear and unmistakable intent to delegate questions of class action availability to the arbitrator.

First, the Court noted that the inclusion of references to the AAA Commercial Arbitration Rules throughout the contract delegates questions of arbitrability to the arbitrator.[28] Second, the express terms of the agreement state that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration."[29] Third, the agreement states that the parties agree "to arbitrate any and all such disputes, claims and controversies."[30] The use of such sweeping language, clearly and unmistakably denotes the parties' unequivocal intent to have an arbitrator determine issues of arbitrability.

As the Court had already determined that the availability of class arbitration was a gateway question of arbitrability, then the delegation of arbitrability questions to an arbitrator by the clear and unmistakable terms of the agreement necessarily included the question of the availability of class arbitration. The Court vacated the trial court's order on JPay's Cross Motion for Summary Judgment, reversed the trial court's order denying the motion to compel arbitration, and remanded the case with instructions that the Demand be referred to arbitration.

OBSERVATIONS

1. The legal precedent on who determines class arbitration availability and arbitrability remains unclear. This 11th Circuit case only widens the Circuit split.[31] This case gives SCOTUS another opportunity to consider the issue and settle the growing circuit split.

2. This case is another example of how critical arbitrability decisions will be determined based on interpretation of the terms (including rebuttal presumptions) in the arbitration agreement.

3. This case leaves parties to arbitration clauses with uncertainty as they are now faced with the possibility of class arbitration that they never intended. It highlights the importance of careful contract drafting to limit or authorize potential class arbitrations.

4. This case demonstrates the ill-defined "gateway" as contrasted with "arbitrability" questions. It appears from this case that "gateway" may be a synonym for "arbitrability," while leaving hints that "gateway" questions may be a more general term than "arbitrability" questions.[32]

5. This case places class action arbitration within the traditional second question of "scope,"[33] although leaving open the question of whether or not the "clear and unmistakable" standard is now to be considered a third question or part of the "scope" question in the motion to compel procedure.

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[27] *Id.* at *27 (internal quotations omitted) (citing Rent-A-Ctr., W., Inc., 561 U.S. at 68-69).
[28] *Id.* at *29-35. 11th Circuit precedent dictates that the incorporation of AAA rules shows clear and unmistakable intent to delegate arbitrability questions. *See* Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327 (11th Cir. 2005); U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308 (11th Cir. 2014); and Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 2018 WL 3866335 (2018).
[29] *JPay*, 2018 U.S. App. LEXIS 26609, at *35-38. The 11th Circuit also has binding precedent interpreting similar language. *See E.g.*, Jones ,, 866 F.3d at 1267 (interpreting a contract stating that "the Arbitrator . . . shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement"); Martinez v. Carnival Corp., 744 F.3d 1240, 1245-46 (11th Cir. 2014) (interpreting a delegation of "any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination.").
[30] JPay, 2018 U.S. App. LEXIS 26609, at *38-39.
[31] *See* supra fn. 25.
[32] *Id.* at *17-19.
[33] *Id.* at *18.

from the editor

by Thom Cope

Once again, I need to thank my contributors to this newsletter. Please feel free to submit any articles you feel are worthy of publishing or being re-printed in our newsletter.

This edition features a "guest" author, Arlene Switzer Steinfield. She is a Dallas Attorney. I read this article in the College of Labor and Employment newsletter and she graciously granted permission for us to re-print it. I took editorial license to include this as I believe how we deal with issues and each other, especially as neutrals and those practicing before courts and neutrals means lot. With incivility surrounding us in government and sometimes with our peers, it seems important to read an article such as that penned by Ms. Steinfield.

I trust you will find the articles in this edition instructive on several levels.

Best for a great 2019.
Thom