Practice Pointers After *Oxford Health v. Sutter* – Having the Court Decide Whether Arbitration Permits a Class Action Can Be Decisive

Well-drafted arbitration class action waivers typically are broad, extending to the full range of statutory, contract and tort claims, and many companies rely on them in their consumer, commercial and employment contracts.[1] Where the arbitration agreement does not state a class waiver in so many words, or the party seeking class arbitration argues that the waiver should not be enforced, an important issue arises: Who should get to decide whether the contract allows for class arbitration – the court or the arbitrator?

The US Supreme Court's unanimous decision in *Oxford Health Plans v. Sutter*, 133 S.Ct. 2064 (June 10, 2013) (Kagan J.) serves as a stark reminder that the answer to "Who Decides?" often determines whether the defending business must contend with costly and unpredictable class action proceedings, along with the prospect of huge legal bills, or the need to defend only against manageable smaller-dollar individual claims. Many practitioners believe that arbitrators, who typically get paid more the longer the arbitration continues, are more likely to find class arbitration permitted under the parties' agreement than courts, which are focused more on disposing of their caseloads. This client alert explores the importance to businesses of raising the class arbitration issue in such a way as to maximize the probability that a court, and not an arbitrator, rules on the availability of class arbitration in the first instance by ensuring that the issue is treated as a threshold question of arbitrability for a judge, not an issue of contract construction for the arbitrator.

I. *Oxford Health Plans*: May the Deference Given to an Arbitrator's Interpretation of the Agreement Be Overcome?

Oxford Health Plans illustrates how much is at stake in the "Who Decides" question. In *Oxford*, a pediatrician filed a putative class action in New Jersey state court against the health insurer, alleging that Oxford had failed to reimburse the physicians as contractually promised. After Oxford successfully forced the case to arbitration, the parties agreed that the arbitrator should decide whether the contract allowed for class arbitration. The arbitrator found that the contract indeed permitted class arbitration, relying on the typical, standard-form direction that: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." This clause, the arbitrator reasoned, mandated arbitration of "the same universal class of disputes" that it barred the parties from bringing as a civil action in court. Because a class action "is plainly one of the possible forms of civil action that could be brought in a court," absent the agreement, the arbitrator held that the contract, on its face, allowed for class arbitration.

Oxford sought to vacate the arbitrator's decision on the ground that the arbitrator "exceeded his powers" under §10(a)(4) of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., in finding class arbitration permitted, but the federal district court and the Court of Appeals for the Third Circuit both rejected Oxford's contentions. See 05–CV–2198, 2005 WL 6795061 (D.N.J., Oct. 31, 2005), aff 'd, 227 Fed. Appx. 135 (3d Cir. 2007). Oxford then asked the arbitrator to reconsider after the Supreme Court decided

[1] See client alert, June 21, 2013 ("US Supreme Court Orders Strict Enforcement of Class Arbitration Waivers in *American Express Co. v. Italian Colors Restaurant* – A Contract Is a Contract Is a Contract").

Stolt-Nielsen S.A. v AnimalFeeds International Corp., 559 U.S. 662 (2010), which reversed an arbitration panel's decision to allow class arbitration because the arbitrators had ignored the parties' stipulation that they had reached "no agreement" on class arbitration. But the *Oxford* arbitrator concluded that *Stolt-Nielsen* did not affect his prior decision because he had found that the parties in fact had agreed to class arbitration. The federal district court again refused to overturn the arbitrator, and the Third Circuit agreed. 675 F.3d 215 (3d Cir. 2012).

In a rare display of unanimity on the subject of class arbitration, the US Supreme Court affirmed the Third Circuit. The Court in *Oxford* held that a court may not vacate an arbitrator's purportedly erroneous decision to allow class arbitration under the highly deferential standard of review of an arbitrator's decision under § 10(a)(4) of the FAA. To set aside the arbitrator, "[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." So long as the arbitrator is "even arguably construing or applying the contract," the arbitrator's decision must stand, whether "good, bad, or ugly." The Court distinguished *Stolt-Nielsen* in that the Court "overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures, not because it lacked, in *Oxford*'s terminology, a 'sufficient' one." In *Stolt-Nielsen*, the Court explained that the parties "had entered into an unusual stipulation that they had never reached an agreement on class arbitration," whereas no such stipulation controlled the arbitrator's resolution of the parties' contract dispute in *Oxford*. 133 S.Ct. at 2068, 2069, 2071.

Fortunately, the Court identified an alternative path open to businesses which, like Oxford, seek to have a court determine whether the contract allows for class arbitration. That is, the party resisting class arbitration could argue that "the availability of class arbitration is a so-called 'question of arbitrability.'" Questions of arbitrability include certain "gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," and they are "presumptively for courts to decide." But Oxford had waived this argument by submitting the class arbitration issue to the arbitrator twice. 133 S.Ct. at 2068 n. 2.

The concurring opinion of Justice Alito, joined by Justice Thomas, shows how central the "Who Decides" issue was in *Oxford*. Justice Alito expressed his view that the contract did *not* provide for class arbitration by its terms, and the arbitrator would have been overturned by the Court had *de novo* review been the standard. That is because the *Oxford* arbitrator had improperly inferred the parties' implicit agreement to class arbitration from nothing more than "the fact of the parties' agreement to arbitrate." Further, Justice Alito expressed serious doubt regarding the enforceability of a class arbitration award against absent class members who had not affirmatively opted in to the action, because there would otherwise be no basis for finding that they had "submitted themselves to th[e] arbitrator's authority in any way." This fact, according to Justice Alito, "should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide," as it would create the possibility that absent class members could claim the benefit of a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. *Id.* at 2071-2072.

II. Is the Availability of Class Arbitration a "Question of Arbitrability," and, If So, May the Arbitrator Decide the Issue Nonetheless?

The question of whether the availability of class arbitration is a "question of arbitrability" presumptively for the court, or a "question of contract interpretation" presumptively for the arbitrator, takes on crucial importance in the wake of *Oxford*. In the absence of further Supreme Court guidance, the outcome of "Who Decides" may hinge on the answers to two other questions. *First*, does the arbitration agreement

include an unambiguous class action waiver? *Second*, does the arbitration agreement "clearly and unmistakably" delegate questions of arbitrability to the arbitrator?

A. Does the Agreement Include an Express Class Action Waiver?

Where the contractual clause expressly waives class actions, courts generally have held that the enforceability of such a waiver is a "question of arbitrability" for the court to decide. *Emilio v. Sprint Spectrum*, 508 Fed.Appx. 3, 4 (2d Cir. Jan. 18, 2013). That is because the enforceability of such clauses presents "a gateway dispute about whether the parties are bound by a given arbitration clause." *American Express Merchants' Litigation*, 554 F.3d 300, 311 (2d Cir. 2009) (vacated on other grounds sub nom., *American Express Co. v. Italian Colors Restaurant*, 130 S.Ct. 2401 (2010)); accord *Puleo v. Chase Bank*, 605 F.3d 172, 180 (3d Cir. 2010) (collecting cases in the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits).

Where the arbitration agreement does not contain a clear class action waiver on the face of the contract, the issue is muddier. This is unsurprising in light of the Supreme Court's emphasis, in both *Stolt-Nielsen* and *Oxford*, that it had not yet decided the question.

Some courts have held that this issue should be treated as a matter of contract interpretation, and should thus be decided by the arbitrator. *Vilches v. The Travelers Companies, Inc.*, 413 Fed.App'x 487, 492 (3d Cir. Feb. 9, 2011); *Guida v. Home Sav. of Am.*, 793 F. Supp. 2d 611, 616 (E.D.N.Y. 2011); *Hesse v. Sprint Spectrum L.P.*, No. C06–0592JLR, 2012 WL 529419 (W.D. Wash. Feb. 17, 2012). Other courts have construed this issue, as had Justice Alito, as involving whether parties not before the court (putative class members) may be bound to the arbitration agreement, and thus treated it as one of arbitrability. *Mork v. Loram Maintenance of Way, Inc.*, 844 F. Supp. 2d 950, 953 (D. Minn. 2012). The issue has generated splits even within judicial districts. Compare *Price v. NCR Corp.*, 908 F. Supp. 2d 935 (N.D. Ill. 2012); and *Aracri v. Dillard's, Inc.*, No.10-cv-253, 2011 WL 1388613 (S.D. Ohio Mar. 29, 2011) (issue is for the arbitrator), with *Corrigan v. Domestic Linen Supply Co., Inc.*, No. 12 C 0575, 2012 WL 2977262, at *4 (N.D. Ill. July 20, 2012); and *Reed Elsevier, Inc. v. Crockett*, No. 3:10-cv-248, 2012 WL 604305, at *8 (S.D. Ohio Feb. 24, 2012) (issue is for the court).

It remains to be seen whether Justice Alito's *Oxford* concurrence shifts the tide toward finding the availability of class proceedings to be a question of arbitrability; so far, there has been no evidence of such an effect. But, as pointed out later, this concern may be overcome by deft draftsmanship and preemptive court action to compel or stay arbitration.

B. Does the Agreement Delegate Questions of Arbitrability to the Arbitrator?

A note of caution, however, is in order. The parties may expressly delegate resolution of threshold arbitrability questions to the arbitrator in their contract, so long as such delegation is "clear and unmistakable." *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2777 (Jun. 21, 2010). Of concern, some decisions have found the mere reference to the default rules of an arbitration provider to constitute such a "clear and unmistakable" delegation of authority to the arbitrator to decide questions of arbitrability.

For example, in *Emilio v. Sprint Spectrum*, 508 Fed.Appx. 3, 5 (2d Cir. Jan. 18, 2013), the district court overturned the arbitrator's ruling that refused to enforce a class action waiver. The Second Circuit, however, reversed the district court, on the ground that the arbitration agreement had "clearly and unmistakably" delegated "questions of arbitrability" to the arbitrator, based on its provision that "the then-applicable rules of JAMS will apply," specifically JAMS's "expedited procedures." Lo and behold,

the JAMS Comprehensive and Streamlined Arbitration Rules & Procedures provide, in turn, that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator."

To the same effect are decisions that contractual reference to the rules of the American Arbitration Association (AAA Rules) "clearly and unmistakably" delegates questions of arbitrability to the arbitrator, because the AAA Rules state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." See *Petrofac, Inc. v. DynMcDermott Petroleum Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir.2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed.Cir.2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332–33 (11th Cir.2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir.2005); but see *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 & 777 n.1 (10th Cir.1998).

Under this line of cases, even if Oxford *had* filed an action in court objecting to the arbitrator's authority to decide whether class arbitration was permitted, a court might have concluded that the agreement's reference to "the rules of the American Arbitration Association" meant that only the arbitrator could determine whether it permitted class arbitration.

III. Conclusion – Drafting and Practice Pointers

Four key lessons emerge from *Oxford Health Plans* and the unsettled legal landscape regarding 'questions of arbitrability' for businesses seeking to avoid class action proceedings in court and in arbitration.

First, companies should take care that any arbitration agreement include an express class action waiver. The agreement should both waive the parties' right to commence or participate in any representative, class, collective, consolidated or aggregate proceeding, and affirmatively require resolution of all disputes in a bilateral arbitration on a purely individual basis.

Second, if the company wishes to specify which arbitration provider's rules will govern, the agreement should state that, notwithstanding anything in those rules to the contrary, threshold questions regarding the availability of class, collective, consolidated or aggregate proceedings are to be decided by a court in the first instance.

Third, the party resisting class arbitration should, if at all possible, raise the question in court prior to arbitration, as a gateway issue, in an action to compel bilateral arbitration or to stay a purported class arbitration. As a procedural matter, courts have frequently granted "motions to compel individual arbitration" where the putative class action complaint was initially filed in court. *See*, *e.g.*, *Litman v. Cellco Partnership*, 655 F.3d 225, 227 (3d Cir. 2011); *Cruz v. Cingular Wireless*, 648 F.3d 1205, 1210 (11th Cir. 2011); *Shetiwy v. Midland Credit Management*, __ F. Supp. 2d __, 2013 WL 3530524, at *3 (S.D.N.Y. July 12, 2013). If the putative class representative seeks to initiate a class arbitration without filing in court, and the claims are governed by an arbitration agreement that does not allow for class proceedings, the party resisting class arbitration may file a court action pursuant to the FAA, 9 U.S.C. § 4 (or parallel state arbitration laws), to stay the purported class arbitration and compel bilateral arbitration.

Fourth, once the parties submit to the arbitrator the question of contractual interpretation regarding class arbitration, *Oxford* requires the arbitrator's determination on that score to be subject to layers of deference, making it virtually impossible to subsequently overturn even a clearly erroneous ruling.

Thus, the answer to "Who Decides" rests, first and foremost, in the hands of the deft drafter and, only then, in court to compel a bilateral arbitration and enforce the contractual exclusion of a class action.

For more information or inquiries regarding class action waivers and bilateral arbitration agreements, please contact Litigation Partner and Chair of Kaye Scholer's Alternative Dispute Resolution Practice, Jay W. Waks, or Litigation Associate Noah B. Peters, who assisted in preparing this alert.

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