“Class arbitration” — the utilization of a class action mechanism in an arbitration proceeding — is considered by some to be the unicorn of ADR; desirable but elusive. Another view is that it is the Frankenstein’s monster of ADR – an anomalous hybrid of disparate parts that comprise a disconcerting and ultimately nonviable creation. And so let us ask, is “class arbitration” an oxymoron? Should it be viable given the essential nature of arbitration? And whither the emperor’s jurisprudential clothes?

We will explore various questions concerning “class arbitration” in a series of posts concerning the concept, its theoretical roots, the current state of the law, implementation of the mechanism, the significance and effects of a class arbitration award, etc.

The United States Supreme Court has noted certain difficulties in trying to graft the codified and procedurally demanding judicial class action mechanism onto the relatively informal, flexible and presumably streamlined private dispute resolution process of arbitration. And the Justices have voiced reservations concerning the nature of “class arbitration.” But the Supreme Court has not squarely addressed the question of whether a class arbitration mechanism is fundamentally fatally incompatible with the private contractual nature of arbitration or otherwise nonviable.

The Dilemmas

Every arbitration is essentially the creation of a private bilateral agreement. As such, one wonders how a group of non-contracting persons can be made parties to a private proceeding if they have not, or the contracting adverse party has not, or both have not, agreed to that. Conversely, how can a contracting party, who agreed to arbitrate certain disputes between it and a contract counter-party, be compelled to do so also against non-contracting, non-participating “class” members?

Moreover, what would be the effect of an eventual arbitral award in such circumstances? Would it bind non-contracting parties, non-participating parties, and non-consenting (unwilling) parties? And would it be subject to *vacatur* under FAA § 10(a)(4) because the arbitrator will have exceeded his power, which derives solely from the underlying arbitration agreement?

1. The Class Action Mechanism is a Creature of Codified Public Law

A class action is a complex litigation protocol, created and described by Fed. R. Civ. P. 23 (and 28 U.S.C. ch. 114, §§ 1711-15.) The principal purpose of the class action mechanism is “the efficiency and economy of litigation.” *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982). In addition to judicial economy, other justifications for it have included the following: (i) it provides a convenient and economical means of disposing of similar lawsuits; (ii) it spreads litigation costs among numerous litigants with similar claims; and (iii) protects a defendant from inconsistent obligations. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 338, 402-03 (1980).

The class action rules may cause persons to become members of a litigating class, and thus parties to a
litigation, without their affirmative consent and without the consent of their adversary. “Federal Rule of Civil Procedure 23 ... was ‘designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’ Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979).” American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2309 (2013). And, as the law of the land, all litigants and potential litigants are subject ab initio to the potential employment of this mechanism; it is part of the judicial litigation landscape.

However, neither Rule 23 nor any codified law like it applies to arbitrations.

2. Commercial Arbitration is a “Creature of Contract”


Hence, an agreement to arbitrate can in principle be invoked only by and among persons who are mutually bound by it. On the premise that commercial arbitration is an ADR method whose wellspring is a bilateral agreement, in principle, only (a) the parties to an arbitration agreement and (b) others who are deemed by law to be bound by that agreement, may be compelled or permitted to arbitrate.

Indeed, the mutual promises that comprise a bilateral arbitration agreement establish the jurisdiction of the arbitral panel with respect to the parties and the subject matter of the proceeding, identify the procedures to be employed, and constitute the basis for enforcing any resulting award. For example, “it is the language of the contract that defines the scope of disputes subject to arbitration.” EEOC v. Waffle House, Inc., 534 U.S. at 289, citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

Yet “class arbitration,” by its nature, (a) would give arbitrators jurisdiction over persons who are not parties to or deemed bound by that agreement, (b) would compel a contracting party to engage in a private dispute resolution proceeding against strangers to the agreement on which the proceeding is founded, and (c) would bind both the contracting parties and such strangers to an award, and the preclusive effects of that award, issued in a proceeding in which some or all did not agree to participate and from which there are few practical means of appeal.

The Supreme Court Has Reservations Regarding “Class Arbitration”

The Supreme Court has occasionally noted reservations concerning the compatibility of the class action mechanism with the arbitration process. See, e.g., Concepcion, 563 U.S. at 343, 131 S.Ct. at 1748; Stolt-Nielsen, 559 U.S. at 686; Italian Colors, 133 S.Ct. at 2319.

For example, Justice Scalia observed that “requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” Concepcion, 131 S.Ct. at 1748. Indeed, the Court has indicated that the notion of “class arbitration” is confounding, in part because of the inconsistencies between the formalities and public aspects of class actions and the informality and privacy of arbitration. See, e.g., Concepcion, 131 S.Ct. at 1750-51; Stolt-Nielsen, 559 U.S. at 687. Thus, while considering the enforceability of a class action waiver in an arbitration clause, the Supreme Court has noted various characteristic differences between a bilateral arbitration and a class action. See, e.g., Concepcion, 131 S.Ct. at 1750-51; Stolt-Nielsen, 559 U.S. at 687; Italian Colors, 133 S.Ct. 2304 (2013). For example, while one of the attractive aspects of arbitration is that the parties are free to create an ADR process of their own choosing in an arbitration agreement, see, e.g., Mastrobuono, 514 U.S. at 57, a class action is necessarily formulaic and strictly follows prescribed procedural rules.

The Court has also implied in dictum that it was concerned that “the arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.” Stolt-Nielsen, 559 U.S. at 686. (But the Court did not elaborate on this, nor make it the basis for decision.)

Unanswered Questions

Recent decisions by the Supreme Court have largely concerned the enforceability of a purported waiver of class arbitration in a contractual arbitration clause. While expressing reservations about the notion of “class
arbitration," the Court has not grappled with the question of whether it is ultimately an untenable oxymoron. Perhaps ideally, the question would be presented to the Court in the form of a challenge to the enforceability of a class arbitration award. But the Court has not been presented with such a case, and it has not had occasion to address the question of the jurisprudential viability of class arbitration. Accordingly, the Court’s pertinent decisions thus far have implicitly assumed that class arbitration is indeed a viable mechanism. But many questions require judicial answers before we can confidently conclude whether “class arbitration” indeed has jurisprudential clothes and is sustainable.

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