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Sixth Circuit: incorporation of AAA Rules delegates "gateway" issue of arbitrability to the arbitrator

by James F. Bogan III

Takeaway: We have written a number of articles about class arbitration. *See, e.g., Fifth Circuit: arbitrator's decision to conduct class arbitration cannot be vacated* (May 11, 2020). A key issue is whether the parties' arbitration agreement requires that an arbitrator decide the threshold issue of arbitrability. That is an issue reserved for courts to decide, unless the arbitration agreement assigns the issue to an arbitrator in a "clear and unmistakable" way. The issue can be critical because, if a federal court decides the class arbitration issue, then the proponent of class arbitration should lose, unless the arbitration agreement *explicitly* authorizes class arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). But if the arbitration agreement commits that "gateway" issue to an arbitrator and the arbitrator permits class arbitration, then the parties almost certainly will be held to that decision, even if the decision is later demonstrated to be wrong (with an important exception noted below). That is because, under the Federal Arbitration Act, an arbitrator's award cannot be vacated simply because the arbitrator misapplied the law.

In *Blanton v. Domino's Pizza Franchising, LLC* , --- F.3d. ---, No. 19-2388, 2020 WL 3263002 (6th Cir. June 17, 2020), the Sixth Circuit recently joined the chorus of federal courts holding that the incorporation of the Rules of the American Arbitration Association – which give an arbitrator the power to rule on his or her own jurisdiction as well as the scope of an arbitration agreement – provides clear and unmistakable evidence that the parties assigned the arbitrability issue to the arbitrator. The Third Circuit also recently so held in *Richardson v. Coverall North America*, --- Fed. Appx. ---, Nos. 18-3393, 18-3399, 2020 WL 2028523 (3d Cir. Apr. 28, 2020), ruling the incorporation of the AAA's rules provided clear and unmistakable evidence of delegation, even with respect to an "unsophisticated" party. The Sixth Circuit in *Blanton* cited cases in agreement from virtually every other circuit, further observing that "the one remaining circuit [the Seventh Circuit] has precedent suggesting that it would join this consensus." *Blanton*, 2020 WL 3263002, at *3.

In *Blanton and Richardson*, as in most cases involving "arbitrability" disputes, the party presumably having greater bargaining power in the parties' relationship (the franchisors in *Blanton*) presses the courts to send the arbitrability issue to the arbitrator. But as we cautioned in our May 11, 2020 post, compelling arbitration of an arbitrability dispute can be a pyrrhic victory if the arbitration agreement lacks a class action waiver or other unambiguous language mandating that arbitration proceed on an individual basis only. As soon as the parties allow an arbitrator to determine the arbitrability issue – including a dispute regarding the availability of class arbitration – they almost certainly will be stuck with the arbitrator's ruling on that issue, if there is any possible argument the arbitrator's ruling was based on the language in the arbitration agreement.

So, any employer intending to preclude class arbitration should not blindly incorporate arbitration rules

but also should include unambiguous language precluding class treatment. An arbitrator who disregards an explicit class action waiver and authorizes class arbitration would appear to exceed his or her authority under an arbitration agreement, with the result that any such award should be vacated, even under the difficult standard for vacating an award under the Federal Arbitration Act.