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Second Circuit endorses class arbitration

by James F. Bogan III

Takeaway: The concept of class arbitration has recently faced stiff headwinds. In *Lamps Plus, Inc. v. Varella*, 139 S. Ct. 1407 (2019), the Supreme Court ruled that a party cannot be required to participate in a class arbitration unless the parties' arbitration agreement *explicitly* authorizes class arbitration. Because agreements expressly authorizing class arbitration generally do not exist, we thought that the *Lamps Plus* ruling – for the most part – signaled the end of class arbitration. *See What the Lamps Plus court did not say about class arbitration* (May 13, 2019). But in *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617 (2d Cir. 2019), the Second Circuit recently reminded us that class arbitration works just fine, so long as the entire putative class executed identical arbitration agreements and those agreements incorporated the rules of the American Arbitration Association (AAA). Because the AAA's rules authorize an arbitrator to decide the class issue, an arbitrator is (according to the Second Circuit) authorized to decide the class issue, under the theory the incorporation of those rules "clearly and unmistakably" give the arbitrator the authority to decide the issue. If you are an employer and it is your objective that any arbitration be conducted on an individual (and not on a class) basis, the *Jock* case is yet another reminder of the danger of blindly incorporating arbitration rules into an arbitration agreement – especially one that does not contain a class action waiver.

Plaintiff Laryssa Jock, a retail sales employee of Sterling Jewelers Inc. ("Sterling"), sued Sterling over 10 years ago (in 2008), claiming that she and other female employees were paid less than their male counterparts, in violation of Title VII of the Civil Rights Act of 1964. The case was arbitrated, pursuant to Sterling's "RESOLVE Program" agreement, in which all Sterling employees agreed to compulsory arbitration, further providing that "[t]he Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction[,]" that "[q]uestions of arbitrability" and "procedural questions" "shall be decided by the arbitrator," and also that any arbitration would be conducted "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association." Ultimately, the arbitrator certified a class of roughly 44,000 women with respect to the plaintiffs' Title VII disparate impact claims for declaratory and injunctive relief. This class of 44,000 women consisted of Ms. Jock and other individually-named plaintiffs as well as other claimants who had specifically opted *in* to the class arbitration proceeding. But the Southern District of New York vacated the arbitrator's class certification ruling, holding that the arbitrator could not bind absent class members to class procedures under an arbitration agreement that did not explicitly authorize class arbitration, even if the named parties had agreed to submit the class issue to the arbitrator. *Jock v. Sterling Jewelers Inc.*, 284 F. Supp. 3d 566 (S.D.N.Y. 2018).

On appeal, the Second Circuit reversed, ruling that the entire class had agreed that the arbitrator could decide the class issue because each employee had agreed to the same "RESOLVE Program" agreement. The appellate court observed that the incorporation of the AAA rules into the RESOLVE Program agreement gave the arbitrator the power under those rules to decide issues of arbitrability. Because the

arbitrator had the power to decide the class issue, the district court was not free to second-guess that decision, even though it disagreed with the arbitrator's reasoning. This was so even though the Supreme Court's recent decision in *Lamps Plus* held that a party cannot be forced to participate in a class arbitration unless the arbitration agreement *explicitly* authorizes class arbitration. In the Second Circuit's view, the key distinguishing factor of *Lamps Plus* was that it was clear in that case that the district court (and not an arbitrator) had the power to resolve the class issue. But because the "RESOLVE Program" agreement "clearly and unmistakably" delegated the class issue to the arbitrator, her decision to certify the class had to be upheld, even if Sterling could show, by reference to the *Lamps Plus* decision and other authorities, that the arbitrator committed an error of law in certifying a class. It appears that drafting errors on Sterling's part led to the arbitrator's decision to certify a class, because it is not difficult to draft an arbitration agreement that unambiguously precludes class arbitration. While it might seem convenient to incorporate the AAA rules, those rules not only authorize class arbitration, but the rules assign virtually all decision-making authority to the arbitrator. Any employer that puts in place an arbitration program and which does not intend to expose itself to class arbitration procedure must take the precise (and easy) step of setting out a class action waiver in the arbitration agreement and not blindly incorporating arbitral rules.