

**Use of ADR Procedures to Resolve Complex
Employment Discrimination Litigation
From a Plaintiffs' Perspective: No Thanks.**

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Arbitration of employment discrimination claims – be it a hybrid like “med/arb” and “arb/med” or pure arbitration – at least from a plaintiff’s perspective, offers no real advantages. To the contrary, it appears that the two main objectives of “cram-down” arbitration of employment disputes are (1) to discourage the filing of these claims in the first place and (2) to eliminate the possibility of class action litigation. Once forced into arbitration, the claimant is at a distinct disadvantage due to inequities in information access relative to the employer, the lack of public transparency, the lack of meaningful appellate review, and the “repeat player” dynamic.

For the plaintiffs’ class action lawyer’s perspective, take these complaints and multiply them by a hundred – or a thousand, depending on the size of the class. To the above concerns one must now add whether the arbitral forum will, as an initial matter, even permit a class in any given case. If so, practitioners on both sides of the fence must then struggle to reconcile arbitration’s relaxed procedural and discovery rules with the need, for example, to produce detailed

and critical statistical expert reports that typically synthesize huge volumes of data.

Again, from the perspective of putative class counsel, arbitration simply isn't the preferred forum for class discrimination claims. For all of these reasons, it isn't a stretch to wonder whether a defendant really wants to litigate a class case in arbitration. Admittedly, defense counsel has an interest in using an arbitration agreement as a ruse to render the class case a non-starter from the get-go. As noted by Robert M. Jaworski and Henry H. Cronk, for example (in the lending context):

Recognizing the dangers of class action litigation, over the past several years many lenders have attempted to avoid this risk by inserting into their loan documents mandatory arbitration clauses (which typically, either expressly or by silence, prohibit class treatment of borrower grievances).

Jaworski & Cronk, *Mortgage Lenders' New Regulator: The Plaintiffs' Bar*, 57 *Business Lawyer* 1275 (2002). Jean R. Sternlight, though perhaps overstating the case overall, tracks similar candor on behalf of some of the management bar in her thorough article *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. & Mary L. Rev.* 1 (2000), where she quotes defense lawyer Edward Dunham Wood describing the value of arbitration in the franchising context:

Franchisors with an arbitration clause in their franchise agreements have an effect tool for managing these new class action risks Absent unusual

circumstances . . . the franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration . . . many (and perhaps most) of the putative class members may never do that . . .

Id. at p.10 (citing Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L.J. 141 (1997)).¹ Indeed, Sternlight points out that at least one arbitral tribunal as of the writing of her article was expressly marketing itself to business as the anti-class-action arbitral forum. Id. at 72 and n.278 (“The National Arbitration Forum has marketed its rules to corporations in part with the assurance that its rules do not allow for class actions.”).² Faced with this, other commentators’ bromides about arbitration’s efficiencies and fairness aside, what plaintiff’s lawyer wants to accept the invitation into that thicket, especially with a meritorious and complex class discrimination claim?

Med/Arb, Arb/Med

Accepting then the general thrust of the above – that arbitration is a thicket into which defendants seek to throw a putative class – we can note that some thickets are thornier than others, from any perspective. A stark difference,

¹ Samuel Estreicher, a pioneer in advocating pushing employment cases to arbitration, has made such a point recently as well. See Samuel Estreicher and Michael Puma, *Arbitration and Class Actions After Bazzle*, 58 OCT Disp. Resol. J. 13 (2003) (“Although the matter is not free of doubt, we believe a carefully worded arbitration agreement may effectively preclude a litigant’s initiation of, or participation in, class action litigation and classwide arbitration as well.”).

² As it happens, the NAF’s Rule 19.A still only allows for consolidation on consent of all parties. See <http://www.arb-forum.com/code/part3.asp>

for example, can be drawn between two arbitral hybrids with nearly indistinguishable names: “med/arb” and “arb/med.”

Briefly, “med/arb” is a hybrid of mediation and arbitration, wherein the neutral acts first as a mediator in an attempt to guide the parties into a negotiated disposition of the matter. “Arb/med,” as might be expected, entails the reverse: the neutral acts first as an arbitrator, hearing the evidence, drafting an award and, generally, sealing the award and, before unsealing, attempting to guide the parties to a settlement.

The majority of experienced lawyers (on both sides of the adverse line) and neutrals would agree that, of the two, “med/arb” is by factors more troubling. The structure encourages both parties to ratchet up the gamesmanship and posturing in the mediation phase as a hedge for the possible arbitration to come. And worse, should the matter shift to arbitration, the neutral has had ample opportunity to have her well poisoned with extraneous facts and knowledge about each side’s tactics and positions before the first word of opening argument. “Arb/med,” while not suffering from the defects particular to “med/arb,” still suffers from the defects particular to arbitration in general.

As a practical matter, the distinction may be fairly meaningless in the class context. If “med/arb” or “arb/med” procedures have been used in class-based employment discrimination cases at all, they have presumably been used sparingly to date.

Class Arbitration

As noted in the initial going, the most troubling aspect of arbitration from class counsel's perspective is that it is currently being used by defendants as a means of stamping out the class device altogether. Whether or not this will prove a successful strategy in the long run, the water has been sufficiently muddied at the moment.

A. Courts or Arbitrators Declining to Allow Class or Consolidated Arbitration Proceedings

Before the Supreme Court's decision in *Green Tree v. Bazzle*, 539 U.S. 444 (2003), lower courts holding that silence in an arbitration agreement precluded availability of the class device have stressed that Section 4 of the FAA requires that courts enforce arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. These courts have reasoned, essentially, that if an arbitration agreement does not have a term allowing class proceedings, then allowing class proceedings is not "in accordance with the terms of the agreement." Thus, parties to an arbitration agreement cannot proceed as a class unless the arbitration agreement specifically provides for use of the class procedure. The leading case among those taking this approach is *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir.1995);³ See also *Gray v. Conseco, Inc.*,

³ The Seventh Circuit specifically rejected the argument that forclosing the possibility of class proceedings did not "give adequate consideration to a district court's authority under Rule 81(a)(3) to apply Rule 23 and order these individual arbitration disputes to proceed on a class basis. Rule 81(a)(3) provides, in pertinent part, that '[i]n proceedings under Title 9, U.S.C., relating to arbitration [the FAA]... [the Federal Rules of Civil Procedure] apply only to the extent that matters of procedure are not provided for in those statutes.'

2001 WL 1081347 (C.D. Cal. 2001); *McCarthy v. Providential Corp.*, 1994 WL 387852 (N.D. Cal. 1994); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993).

All of these cases reached this conclusion by relying upon the much more substantial body of federal appellate case law addressing the question of whether consolidated (as opposed to class) proceedings could be compelled under arbitration agreements that are silent with respect to consolidation. A considerable majority of appellate courts to address the issue have held that in the presence of silence courts cannot compel consolidation of arbitration proceedings. As indicated above, the rationale of these courts is simply to read FAA Section 4's requirement that courts enforce arbitration "in accordance with the terms of the agreement" to preclude enforcement of terms not expressly provided in the agreement. *See, e.g., Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir.1993) ("district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); *American Centennial Ins. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir.1991) ("district court is without power to consolidate arbitration proceedings, over the objection of a party to the

Fed.R.Civ.P. 81(a)(3).” The court rejected the plaintiffs’ (plausible) argument that because the FAA is silent on the matter of class arbitration, Rule 81(a)(3) allows a district court to apply Rule 23 to certify a class in arbitration. Courts have also rejected the argument that FRCP 42 (allowing district judges to order consolidation of litigation) provides a basis for them to order consolidation of arbitrations. *In Re Coastal Shipping and Southern Petroleum*, 812 F.Supp. 396, 402 (S.D.N.Y.1993); *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F.Supp. 1510, 1514 (S.D.N.Y.1985).

arbitration agreement, when the agreement is silent regarding consolidation"); *Baessler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir.1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir.1989) (same); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir.1987) (same); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (same), *cert. denied*, 469 U.S. 1061 (1984); *Balfour, Guthrie and Co. v. Commercial Metals Co.*, 93 Wash.2d 199, 202, 607 P.2d 856, 857 (1980) (same).

Had Justice Rehnquist's dissent in *Bazzle* been the majority holding, this line of cases would still be good law.

As we stated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131: "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide."

* * * *

Here, the parties saw fit to agree that any disputes arising out of the contracts shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. Each contract expressly defines "us" as petitioner, and "you" as the respondent or respondents named in that specific contract. (" 'We' and 'us' means the Seller *above*, its successors and assigns"; " 'You' and 'your' means each Buyer *above* and guarantor, jointly and severally" (emphasis added)). The contract also specifies that it governs all "disputes ... arising from ... *this* contract or the relationships which result from *this* contract." *Id.*, at 34 (emphasis added). These provisions, which the plurality simply ignores, see *ante*, at 2406, make

quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer. While the observation of the Supreme Court of South Carolina that the agreement of the parties was silent as to the availability of class-wide arbitration is literally true, the imposition of class-wide arbitration contravenes the just-quoted provision about the selection of an arbitrator.

Id. at 456-9.

B. Courts or Arbitrators Allowing Class or Consolidated Arbitration Proceedings

Even prior to *Bazzle*, a number of state courts had held that where an arbitration agreement is silent, considerations of equity and efficiency suggest class treatment should be an available procedural device. *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 596 A.2d 860, 862-863 (1991) (“In finding that the arbitration agreement, agreed to by [the parties], will encompass a class action dispute, this Court is merely giving full weight to the wording of the [arbitration agreement], i.e. ‘any controversy.’ Such a procedural avenue is consistent with this state's and the national impetus towards allowing all disputes to be decided in arbitration unless the contract specifically says otherwise.”); *Blue Cross v. Superior Court*, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779, 790 (1998), *cert. denied*, 527 U.S. 1003, 119 S.Ct. 2338, 144 L.Ed.2d 235 (1999). The two AAA arbitration decisions to address the issue – both of which were wage and hour cases – reached the same conclusion. *Sherie Goldstein et al. vs. Ibase Consulting et al.*

http://www.adr.org/upload/LIVESITE/Rules_Procedures/Topics

[Interest/GoldteinAwad.pdf](#)); *Erin Cole and Nick Kaufman et al. vs. Long John*

Silver's Restaurant et al.

With respect to allowing consolidated arbitration proceedings, contrary to the large weight of federal authority (pre-*Bazzle*), the First Circuit had held that where an agreement is silent, a district court can order consolidated arbitration, even though the opportunity for consolidation is not made an express term of the agreement. *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989). While it must be stressed that the court relied upon the fact that Massachusetts law governing arbitration had a consolidation provision, nevertheless the logic of efficiency that the court articulated has an independent force. The court stated:

The Massachusetts arbitration consolidation provision, as appellants seek to enforce it, does not in any way limit "the broad principle of enforceability" of private agreements to arbitrate. There is no attempt here to divert a case from arbitration to court. Massachusetts seeks only to make more efficient the process of arbitrating. Although the Supreme Court has held that agreements to arbitrate must be enforced "even if the result is 'piecemeal' litigation," *Dean Witter Reynolds*, 470 U.S. at 221, 105 S.Ct. at 1242, the Court also has recognized the Act's endorsement of "speedy and efficient decisionmaking," *id.* at 219, 105 S.Ct. at 1241. We fail to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision.

C. The Bazzle Factor

After several years of federal appellate court decisions declining to order classwide arbitration unless specifically authorized in the arbitration agreement, the Supreme Court waded into the fray and punted the question of classwide

arbitrability out of the federal courts and into the arbitral forum. *Green Tree v. Bazzle*, 539 U.S. 444 (2003). The plurality opinion declared classwide arbitrability to be a “question of contract interpretation . . . for the arbitrator, not the courts, to decide.” *Id.* at 453.

Bazzle involved a contract with a nexus in South Carolina. Justice Stevens’ concurrence notes that “Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. [351 S.C. 244, 262-266 \(2002\)](#). There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina.” *Id.* at 455-6. After the Supreme Court’s decision, the arbitrator quickly confirmed that his own independent review of the arbitration agreements was that they permitted class arbitration, and the South Carolina courts accordingly let the multi-million dollar awards against Green Tree stand. The result of *Bazzle* was a clear endorsement of an arbitrator’s authority to conduct an arbitration proceeding on a class-wide basis, at least in the absence of unambiguous language in the arbitration clause forbidding class actions.

D. Express Class Action Bans and Unconscionability

With arbitrators likely to find that arbitration clauses that are silent as to class actions do not preclude class action arbitration, employers’ strong desire to avoid class actions may result in a surge in arbitration clauses that expressly ban class actions. Such provisions can already be found in the consumer and

banking context. Such express bans directly confront the issue of unconscionability.

Several courts, particularly in California, have held unconscionable arbitration clauses found in certain adhesion contracts that expressly ban class actions. *Szetela v Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002), *cert denied*, 537 U.S. 1226 (2003)(involving consumer protection claims); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

Szetela found procedural unconscionability based on the fact that it was a “take it or leave it” contract. 118 Cal Rptr. 2d at 867. In terms of substantive unconscionability, these courts are particularly concerned with the practical implications of precluding class action, namely undermining enforcement of the law. Faced with low-value claims, few if any consumers would likely press their rights in individual arbitration, thus leaving the company with a “license to push the boundaries of good business practices to their furthest limits.” *Id.* at 868.

However, the courts are by no means uniform in finding class action bans unconscionable. See *Pick v. Discover Financial Services, Inc.*, 2001 WL 1180278 (D. Del. 2001)(“It is generally accepted that arbitration clauses are not unconscionable because they preclude class actions.”). Moreover, unconscionability is a fact-specific determination. Post-*Bazzle*, the issue of unconscionability as a check on arbitration clauses is likely to be decided, at least in the first instance, by the arbitrator rather than the court.

E. **Clarity is Needed**

The arbitrator and arbitral forum, of course, do have the power to impose some order on the potential chaos. Perhaps the best way to do so is for each forum to adopt rules of construction that give the forum's arbitrators guidance and structure on how to achieve uniform and fair results in interpreting arbitration agreements. Indeed, on November 12, 2004, one major arbitral forum, JAMS, exercised its post-*Bazzele* power to set just such a clear policy:

JAMS takes the position that it is inappropriate for a Company to restrict the right of a consumer to be a member of a class action arbitration or to initiate a class action arbitration. Accordingly, JAMS will not enforce these clauses in class action arbitrations and will require that they be waived in individual cases. If a consumer arbitration clause which otherwise meets JAMS Minimum Standards of Fairness contains a class action preclusion clause, JAMS will handle such arbitrations in the following manner:

1. If the arbitration is an individual arbitration filed by a consumer against the Company imposing the clause, then JAMS will take the individual case if the Counsel for the Plaintiff waives the inclusion of the clause. If there is no waiver, JAMS will decline the case.
2. If the arbitration is an individual case referred to JAMS from a court after the plaintiff has first filed a law suit and the defendant has requested removal to arbitration, JAMS will take the individual case if Counsel for the Plaintiff waives the inclusion of the clause or the court has stricken the clause. If there is no waiver and the court has not stricken the clause, JAMS will decline the case.
3. If a class action arbitration is filed at JAMS and there is a class action preclusion clause, JAMS will accept the case and not enforce the clause.

JAMS hopes Companies that impose arbitration on consumers will remove class action preclusion clauses from the arbitration clause understanding that the inclusion of such clauses is an unfair restriction on the rights of the consumer.

See JAMS Policy Regarding Use of Class Action Preclusion Clauses, at <http://www.jamsadr.com/Images/PDF/JAMS-Policy-Class-Action-Preclusion-Clauses.doc>.

The American Arbitration Association issued a policy statement that also addresses *Bazzle*:

American Arbitration Association Policy on Class Arbitration

In its June 23, 2003 decision in *Green Tree Financial Corp. v. Bazzle*, the United States Supreme Court held that where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit their dispute to an arbitrator or to the Association. The arbitrability of class arbitrations where the parties' agreement precludes such relief is a developing area of the law, and the Association awaits further guidance from the courts on this issue.

While the authors admit bias, this is the right approach and a good start. Again, in (we would venture) every case, the employer has drafted the

agreement. If the agreement is silent as to the availability of classwide arbitration, the employer has chosen to draft it this way. Basic and longstanding principles of contract construction dictate that ambiguity be construed against the drafter. *See, e.g., Greaves v. Public Service Mutual, Inc.*, 5 N.Y.2d 120, 155 N.E.2d 390, 181 N.Y.S.2d 489 (1959). If the employer wishes to bar classwide arbitration outright, they should do so, with the understanding that they leave themselves vulnerable to possible invalidation of the agreement as unconscionable.

* * *

Ultimately, class counsel's best approach to the arbitration problem may be to test the waters as their docket dictates. As noted above, the authors have every reason to suspect that employers' distaste for class actions, rather than any love for arbitration, is driving the push to arbitration. When faced with a class case that is compelled into individual arbitration, it may be best to push ahead with arbitration for every claimant that can be identified, and put to the test the theory that the efficiencies inherent in class litigation are somehow outweighed by its perceived drawbacks.