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A Transformation From Public Law Litigation To Private Arbitration

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Introduction

In 1976, Abram Chayes, Felix Frankfurter Professor of Law at Harvard, described a transformation of civil adjudication from the previous traditional model of plaintiff v. defendant to "a new model of civil litigation" called "public law litigation."[1] In the traditional model, litigation is "a vehicle for settling disputes between private parties about private rights."[2] In the public law model, "litigation is the vindication of constitutional or statutory *policies*." Five years later, Chayes's initial favorable assessment and prognosis of public law litigation was tempered even more by rulings of the Burger Court, but he still believed that "the development in question can be affected only marginally even by sustained resistance in the Supreme Court. "[3] Thirty-two years after Chayes's second article, it is fair to ask whether a transformation of the public law model is not occurring such that the future of dispute resolution between private parties will be largely in the form of arbitration between one or few claimants and one or few respondents[4] or, as in international commercial arbitrations, between one or more private parties and a foreign sovereign.[5]

Two doctrinal developments in the Supreme Court invite this question. First, the Court's class action rulings (the procedural device used in the past to conduct public law aggregate litigation) have evinced considerable discomfort with its usefulness and effectiveness to compensate injured victims. Second, the Court's rulings have displayed strong support for non-class arbitrations, consistent in the main with the Federal Arbitration Act of 1925 (FAA).[6] We can say of the 2012-13 Term that the Court's rulings "showed a distaste for class action suits and a deference to arbitration agreements." [7] The transformation Chayes described coupled procedural innovations in class actions with expansion of equitable doctrines. The potential transformation I suggest here combines curtailment of the class action in litigation and in arbitration with broadening of the scope for non-class arbitration. In this article, I briefly describe the Supreme Court developments to which I allude and provide preliminary comments that hopefully will help practitioners avoid some of the pitfalls of the arbitrations of the future.

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Class Actions

After liberalization of the class action by Federal Rule of Civil Procedure 23 in 1966, the procedure was idealized as a reform that promised the ability to aggregate many small claims too small for efficient adjudication into one action of typical claims raising common issues of law or fact in which the claimants were represented by an adequate court-approved representative(s) and class counsel resulting in a judgment binding the class. Adequacy of representation, determined by the court, overcame the objection of classical legal theory that persons who are not parties before the court should not have their rights determined and incorporated in a judgment that binds them. The class procedure was thought to promote efficiency in conducting judicial business, and due process for class members not before the court was deemed satisfied by the adequacy of the class representative and the absent members' opportunity either to opt out, after notice, or to grant implicit consent to participation in the case from inaction.[8] And defendants would benefit from a judgment binding on all class members who are part of the action and avoid the pitfalls and costs of defending multiple small claims seriatim. In retrospect, the promise of that ideal has proven illusory.

Some less-than-meritorious damage class actions under Rule 23(b)(3) were certified that resulted in unwarranted settlements.[9] Much as the denial of class certification meant the "death knell" of the class action, the granting of certification created "hydraulic pressure" on defendants to settle.[10] As a result, the dynamics of settlement discussions in class actions, pre- or post-certification, not infrequently culminated in settlements that greatly benefited class counsel and awarded minuscule compensation to class members and, in the early years, nothing more than "coupon settlements" for the class.[11] More recently, in cases where the class settlement fund is not fully distributed to class members, some courts have allowed the undistributed amount to be given to class counsel's or defendants' favorite charity (without benefit to the class) based on a misapplication of the *cy pres* doctrine from the law of trust.[12] Indeed, some judges have used the doctrine to distribute leftover class settlement amounts to *their* favorite charity.[13] The Supreme Court has stepped in with recent rulings that will curtail use of the class action in the future. In both assessment of potential class-wide liability and proof of damages, the Court mandates that the required element of Rule 23(a) to show common issues of fact or law, including a

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method to prove class-wide damages, must be strictly enforced in the determination to certify the class.[14]

Arbitrations

Arbitration is a contract between two or more parties to bypass the public adjudicatory process and to resolve their dispute in a private setting.[15] Therefore, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[16] Any ambiguity or silence in an arbitration contract concerning whether a particular dispute has been committed to a private forum is in the first instance presumptively subject to judicial interpretation of what the courts call "arbitrability" – namely, whether the parties have a valid arbitration agreement and whether the agreement governs the specific dispute sought to be arbitrated.[17] The courts will not set aside an arbitral award except in rare instances.[18]

The Court has remained steadfast in strict enforcement of arbitration agreements. Arbitration agreements must be enforced even if the consequence is that meritorious claims cannot be vindicated because the economic value of the claim is substantially less than the costs of arbitration.[19] A state cannot, consistent with the FAA, apply a rule of law that in its application disfavors arbitration contracts.[20] Where the parties agree that their agreement has committed an issue to resolution by an arbitrator, the Court will uphold the arbitrator's ruling, even if the decision allows for class arbitration absent express language in their contract.[21]

Arbitration Practice Tips

Harold Nicolson, a distinguished British diplomat, observed that the "essential to good diplomacy is precision. The main enemy of good diplomacy is imprecision."[22] Just as with diplomacy, so too with arbitration agreements: silence or imprecision on an important issue is a vice to be avoided. With this in mind, the following practice tips may be helpful to avoid in the arbitration agreements of the future the vices of the past.

First. Since arbitration requires consent, be sure to say clearly what you are agreeing to arbitrate and what may not be arbitrated.

Second. The choice made regarding class arbitration should be stated clearly and in unmistakable terms.

Third. In consumer contracts, the *Concepcion* agreement is a model worth duplicating.

- Keep the mechanism for consumer-initiated disputes simple and provide easy access to it on the company's website.
- Provide for fast claim resolution, say, within 30 days of notice of dispute being filed.
- Make the Demand for Arbitration available on the company's website. The company should agree to pay all costs of arbitration of non-frivolous claims.
- Allow for arbitration to take place at a location convenient for the consumer. For claims below a certain monetary value, give the consumer the choice of arbitration in person, by telephone, or based on written submissions. Grant either party the option of filing a small claims court case in lieu of arbitration.
- The company should waive any claims for legal fees from the consumer. The company should agree to pay the legal fees of the consumer if the consumer prevails, up to a certain amount based on the value of the claim and the amount of the award.
- If the consumer gets an award greater than the company's pre-arbitration settlement offer, agree to pay the consumer a minimum recovery of a percentage above the award and twice the amount of legal fees.
- Grant the arbitrator authority to award any form of individual relief, including injunctive relief and punitive damages.
- If class arbitration is prohibited, put the language in bold and capitalized in the consumer agreement, require the consumer to read it and specifically initial that part of the agreement, and give the consumer a few days within which to rescind the agreement if the person does not want to agree to arbitrate without class arbitration being available.

Fourth. A person not a party to an arbitration agreement cannot be compelled to arbitrate under that agreement, except, for example, where the nonparty is a parent of or related to a party to the arbitration agreement.

Fifth. A nonparty to an arbitration agreement may, however, request an arbitration against a party: (1) merely making the request necessarily implies the nonparty's consent to arbitrate under the arbitration contract or (2) the agreement, e.g., a bilateral investment treaty, may represent a unilateral offer by a state to arbitrate under certain conditions precedent, which the private nonparty accepts by requesting arbitration under the agreement.

Conclusion

With the economic downturn leading clients to put even more pressure on outside lawyers to reduce their fees, and with the workload of the courts increasing significantly without concomitant increase in the number of available judges to dispose of the courts' work, the judicial developments described in this article are likely the effects (not entirely the cause) of increasing use of arbitration (and its cousin, mediation) to resolve disputes. The advocate of the future needs to become more familiar with these doctrinal developments and, to borrow a phrase from Justice Brandeis, must become more of a counsel to the situation in representing clients to resolve disputes efficiently and at least cost.

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1. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), *reprinted in* David Kennedy & William W. Fisher III eds., The Canon of American Legal Thought 619-44 (2006).
2. *Id*. at 1281 (footnote omitted).
3. Chayes, *The Supreme Court, 1981 Term. Foreword: Public Law Litigation and the Burger Court,* 96 Harv. L. Rev. 4, 8 (1982-1983).
4. *See* Judith Resnik, "Renting Judges for Secret Rulings," *N.Y. Times,* Sat., March 1, 2014, at A19 (describing Delaware Chancery court 2009 law that would have permitted litigants with "at least $1 million at stake and [who] were willing to pay $12,000 in filing fees and $6,000 a day thereafter . . . [to] use Delaware's chancery judges and courtrooms for what was called an 'arbitration' that produced enforceable legal judgments."). The law was invalidated on First Amendment grounds. *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 2014 U.S. Lexis 1984 (U.S., March 2014).
5. *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).
6. 9 U.S.C. §1 et seq.
7. A. E. Dick Howard, "Ten Things the 2012-13 Term Tells You about the Roberts Court," *The American Oxonian,* Winter 2014, vol. CI, no. 1, 13, at 17.
8. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985).
9. This may have been an outgrowth of the Court's ruling in *Eisen v. Carlyle & Jacquelin*, 417 U.S. 156, 177-78 (1974), that a preliminary hearing on the merits to allocate costs of class notice was not permitted under Rule 23(c)(2). At the class certification stage, courts are more willing now to conduct rigorous review of the Rule 23(a) standards even if the issues go to the merits of a claim.
10. *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds,* 571 F.3d 672, 677-678 (7th Cir. 2009) (class actions entail risk of "in terrorem" settlements).
11. David Streitfeld, "Plaintiff Maligns Deal in Silicon Valley Suit," *N.Y. Times,* May 12, 2014, at B1 (proposed class settlement "greatly benefit[ing]" the company defendants, the plaintiffs' lawyers, but "it would give the class members a few thousand dollars each, if that").
12. *Mirfasini v. Fleet Mortgage Corp*., 356 F.3d 781, 784 (7th Cir. 2004).
13. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 2009 U.S. Dist. Lexis 122334 or 687 F. Supp. 2nd 1.
14. *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
15. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
16. *Steelworkers v. Warrior & Gulf Nav. Co*., 363 U.S. 574, 582 (1960).
17. *Green Tree Fin. Corp. v.* Bazzle, 539 U.S. 444, 452 (2003).
18. 9 U.S.C. §10. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010).
19. *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013).
20. *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011).
21. *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064 (2013).
22. Harold Nicolson, PEACEMAKING-1919, at 207 (2001).