American Arbitration Association
Commercial and Class Action Arbitration Tribunal

Case #11 114 01884 04

In the Matter of Arbitration Between:

Anthony Hobby

and

Snap-on Tools Company, LLC

PRELIMINARY AWARD ON HOBBY'S REQUEST TO ALLOW CLASS ACTION (CLAUSE CONSTRUCTION AWARD)

I, THE UNDERSIGNED ARBITRATOR, having been designated and sworn in accordance with the arbitration agreement entered into between Claimant, Anthony Hobby and Respondent Snap-on Tools Company, LLC, dated October 18, 2001 and pursuant to the Order of the Honorable Faith S. Hochberg, United States District Court Judge for the District of New Jersey, by Order and Opinion entered July 1, 2004 in the case styled *Reeves, et al v. Snap-on Tools Company, LLC, et al,* Case No. 03-4563 (FSH), the Commercial Arbitration Rules of the American Arbitration Association (AAA), as supplemented by the Supplementary Rules for Class Arbitrations, and pursuant to Preliminary Scheduling Order #1 in this proceeding, enter this Partial Award Granting the Request by Hobby for Permission to Pursue Class Treatment of his claims.

Introduction

It is my view that this case reflects some of the difficulties that are encountered and that will proliferate as the result of a number of court decisions, both international and domestic, that place initial responsibility for determining significant "gateway" issues in the hands of arbitrators rather than courts. These issues are sometimes called "jurisdictional" or "arbitrability" issues. Internationally, they often fall under the concept known as "Kompetenz, kompetenz" although the definitions of "arbitrability" and "jurisdiction" differ significantly between U.S. and international authorities.

When these gateway issues arise in the context of disputes between parties with an imbalance of power at contract formation, "contracts of adhesion" courts have developed rules of contract interpretation that often provide the only means of developing a rational basis for decision since the only real "intent" at issue is that of the party who drafted the contract.

Under the Supplementary Rules for Class Arbitrations adopted by the AAA following the decision of the U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003) individual arbitrators must, in the following words of The Honorable Charles A. Flynn, Jr., (District Court Judge, Retired) in his Clause Construction Award entered September 2, 2004 in *Hearthside Restaurant, Inc., et al v. Qwest Dex, Inc., et al,* AAA Class Action Docket, (www.adr.org) Case No. 11 147 00357 04 predict how courts would decide these issues.

> "However, after Bazzle, it is clear, and the parties agree, that the issue of whether class action relief is available is to be decided by the arbitrator not the courts. The parties further agree that the arbitrator must apply Minnesota [the law chosen in the contract] substantive law, that is the law of the state where the contract is entered into, in deciding the issue. Since there is no post Bazzle case directly on point, the arbitrator is left to anticipate the decision of the Minnesota Supreme Court when and it if is presented with an appropriate case."

The issue here presented starts with the decision of the U.S. District Court for the District of New Jersey, pursuant to which this matter has been entrusted to me and similar claims against Snap-on Tools[1] have been entrusted to other arbitrators. The scope of this arbitration was initially defined by the Order of the Honorable Faith S. Hochberg, United States District Court Judge for the District of New Jersey, by Order and Opinion entered July 1, 2004 in the case styled *Reeves, et al v. Snap-on Tools Company, LLC, et al,* Case No. 03-4563 (FSH) as follows:

> "At this early stage of the dispute between the parties, the Plaintiffs have not yet made a showing, based on the Johnson standard, that they will be precluded from vindicating their legal rights absent the ability to pursue their claims through joinder or class action. The Court must therefore balance the rights of the Plaintiffs to later make such a showing and the policy that weighs against intruding into the arbitral process. Prima Paint Corp., 388 U.S. at 404; Teamsters Local 623 v. United Parcel Service, Inc., 786 F. Supp. 509, 511 (E.D. Pa. 1992). This Court notes that the Plaintiffs' allegations do seem suitable for joinder or class action in that they may require the Plaintiffs to establish a pattern of conduct whereby dealers are consistently lured into nonviable business arrangements. The Federal Arbitration Act itself does not foreclose class arbitration. Green Tree Financial Corp. v. Bazzle, 123 S. Ct. at 2408. Thus, the arbitrators should first determine whether the Plaintiffs can make the required showing that they will be precluded from seeking redress for alleged violations of their rights without class action or joinder. If the arbitrators make such a finding, the provision precluding class action and/or joinder shall not be enforceable. Absent such a finding, the arbitrators may enforce the provision.

[1] Hobby also named Snap-on Credit as a Respondent in this arbitration, but for various reasons the claims against Snap-on Credit are not ripe for determination by me at this time in these proceedings.

Thus, Judge Hochberg, applying the decisions of the U.S. Supreme Court in *Prima Paint* and *Bazzle*, referred what appears to be a very narrow issue to me for determination. Snap-on Tools has consistently argued before me that the narrow issue framed by Judge Hochberg is the only matter presented for consideration at this stage of the proceedings.

However, the issue has proven to be more complicated because of what I perceive as a significant difference between the decisions of Florida courts and the decisions of federal courts in this area. Additionally, at the oral argument on Hobby's Motion for Permission to Pursue Class Treatment of his claims (Clause Construction Award), Hobby asserted, apparently for the first time, that the language of the Snap-on Tools' standard form agreement, in fact does not bar class treatment of claims pursued in arbitration, an argument that was apparently not asserted before Judge Hochberg. While facially inconsistent with the arguments presented to Judge Hochberg, I believe I must also address the substance of this argument under the law of Florida.

The Contract Language and Applicable Law

The standard form contract between Tools and its franchisees includes the following provisions relevant to the issues at this stage of these proceedings (Rule 3 Clause Construction Phase):

25. *Dispute Resolution.*

A. Arbitration.

> "Except as otherwise provided in Section 25.B, any controversy or dispute arising out of, or relating to the Dealership or this Agreement including, but not limited to, any claim by Standard Franchisee, concerning the entry into, performance under, nonrenewel of, or termination of, this Agreement; any claim against a past or present employee, officer, director, agent or affiliate of Snap-on; any claim of breach of this Agreement; and any claims arising under state or federal laws, including any statutes, rules, or regulations, shall be submitted to final and binding arbitration as the sole and exclusive remedy for any such controversy or dispute…
>
> "The right and duty of the parties to this Agreement to resolve any disputes by arbitration shall be governed exclusively by the Federal Arbitration Act, as amended, and arbitration shall take place according to the commercial arbitration rules of the American Arbitration Association in effect as of the date the demand for arbitration is filed…
>
> …

"Unless prohibited by applicable law, (i) no arbitration under Section 25 shall include, by consolidation, joinder ***or in any other manner***, any person ***other than Standard Franchisee and Snap-on and any other person in privity with or claiming through, in the right of or on behalf of Standard Franchisee*** or Snap-on, unless both Standard Franchisee and Snap-on consent in writing,…[emphasis added]

26. *Governing Law*

"This Agreement shall be governed by, and construed in accordance with, the laws of the state in which the Snap-on Branch Office is located to which Standard Franchisee was assigned at the time this Agreement was executed, except to the extent that the Federal Arbitration Act shall apply in accordance with Section 25 above."

The Federal Arbitration Act (FAA) applies as to procedural issues, but Florida law applies as to substantive issues, to the extent they are not preempted by the FAA itself. Unfortunately, it is not easy to determine what issues are "procedural" and what issues are "substantive." The very issue framed by Judge Hochberg necessarily contemplates the impact of a procedural rule (class treatment of claims) upon a substantive right (federal and/or state statutorily created causes of action).

Given that I have observed a large chasm between decisions of the Florida Supreme Court (and intermediate appellate courts in Florida) on the one hand and decisions of the United States Supreme Court (and federal appellate courts) on the other hand, with respect to the roles of courts and arbitrators in "gateway" issues, it is my view that the outcome here could be different depending on which law applies to each determinative issue. *Compare Cardegna v. Buckeye Check Cashing, Inc.,* 894 So.2d 860 (Fla. 2005) with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (U.S. 1967) and *Bess v. Check Express,* 294 F.3d 1298 (11th Cir. 2002). In addition, although both parties seek to square them with one another, a fair reading of *Johnson v. West Suburban Bank,* 225 F.3d 366 (3rd Cir. 2000) and *Powertel v. Bexley,* 743 So.2d 570 (Fla. 1st DCA 1999) makes it difficult to conclude that these two courts would reach the same conclusion as to the issues presented in this arbitration…or probably any arbitration dispute involving consumer class action claims.

In this setting, the U.S. Supreme Court has determined that arbitrators should make these decisions, so I will do my best.

Summary of the Parties' Positions

Hobby asserts two essential categories of arguments.

First, Hobby argues, pursuant to the issue framed by Judge Hochberg's Order, that he will be precluded from seeking redress for alleged violations of his statutory rights (primarily under the Florida Deceptive and Unfair Trade Practices Act – FDUTPA) if he is denied the right to seek class action status for his claims because he cannot meaningfully pursue them individually. This argument has essentially two sub-parts. In sub-part one, Hobby argues, based largely on *Powertel,* that he cannot meaningfully pursue his claim for a public injunction against the alleged unfair, unconscionable and deceptive pattern of business practices absent the ability to seek class action status. In sub-part two, Hobby argues that due to certain barriers constructed by Snap-on in its Standard Form Franchise Agreement, in light of the costs involved, Hobby cannot effectively pursue his claim that Snap-on Tools engages in a pattern of deceptive conduct if he is denied the right to seek class status.

Second, Hobby argues that the language employed by Snap-on Tools in its Standard Form Franchise Agreement does not, in fact, preclude class action treatment of his claims in arbitration.

Snap-on Tools responds to the first category of arguments, relying largely on *Johnson* and distinguishing *Powertel* factually, by arguing that Hobby's claim is sufficiently large monetarily and that the right to recover his attorney fees pursuant to various statutes, makes it entirely feasible for Hobby to vindicate his rights on an individual basis. Snap-on Tools also argues that under *Johnson* and the FAA (including non-binding authority from other states), state substantive laws may not trump the strong public policy compelling the enforcement of arbitration clauses.

With respect to Hobby's contract language argument, in addition to characterizing it as an "epiphany" Snap-on Tools argues that it is simply an incorrect reading of the language of the Standard Form Franchise Agreement.

The parties' arguments are far more elegant and nuanced than this summary, but I believe they are all fairly included within these general categories.

Analysis

Historical Context

Transfer, joinder and consolidation of parties and claims are extraordinarily difficult issues in the context of arbitration, which is, by its very DNA, supposed to be a creature of contract. A class action is essentially transfer, joinder and consolidation on steroids. Transfer, joinder and consolidation have perplexed arbitration practitioners in the international realm and in the domestic construction industry for decades. The arbitration laws of some nations (e.g., Article 1046[2] of the Netherlands Arbitration Act -

[2] In addition to Article 1046 of the Netherlands Arbitration Act, Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration* (2003) note that the new Italian company law contains provisions allowing for a joinder or measures having at least the same effect (*see* Carrara, *International Arbitration Law Review* 2004, 8) and comment further as follows:
"Historically, the Dutch construction industry was the driving force behind the inclusion of this rule in the Netherlands laws and is also the main user of the provision. On average three requests for consolidation are made per year and are usually granted. In these cases it is not the arbitration tribunal that orders consolidation but the courts."

which provides for consolidation of arbitrations with "connected" subject matters, as well as a mechanism - application to the President of the Amsterdam District Court - to effect same) and states (e.g., the Massachusetts Arbitration Act) provide some help in resolving the problems of consolidation of claims in arbitration that are subject to these particular statutes. On the other hand, in France, agreements that provide for consolidation of claims may be voided as against public policy unless they give all parties equal rights in naming arbitrators.

Ireland's Arbitration (International Commercial) Act of 1998 provides as follows:

> 9 — (1) The parties to an arbitration agreement may agree—
> (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
> (b) that concurrent hearings shall be held, on such terms as may be agreed.
>
> (2) The arbitral tribunal has no power to order consolidation of proceedings or concurrent hearings unless the parties agree to confer such power on that tribunal.

Many of the International Commercial Arbitration Acts in Canada (there are 13 of them), provide that the local court may "on the application of the parties to 2 or more arbitration proceedings" order the arbitration proceedings to be consolidated on terms it considers just. They also allow the court to order proceedings to be heard at the same time or one immediately after the other or any arbitration to be stayed until after the determination of any other of them. However, at least 2 courts (Ontario and Alberta) have held that this authority can only be exercised where all the parties agree and will not be exercised on the motion of a single party, opposed by others.

Under the provisions of Article 1125(2) of the North American Free Trade Agreement:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal:
> (a) shall assume jurisdiction over, and hear and determine together, all or part of the claims;
> (b) shall assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

A recent decision of the English Court of Appeal addressed this issue. In *Lincoln National Life Insurance Co v. Sun Life Assurance Co of Canada* [2004] EWCA Civ 1660 (Judgment of 10/12/04) – Lord Justice Mance wrote, at para. 68 of the Judgment:

> "Arbitration is [in contrast to litigation] a consensual, private affair between the particular parties to a particular arbitration agreement. The resulting inability to enforce the solutions of joinder of parties or proceedings in arbitration, or to try connected arbitrations together other than by consent, is well-recognised – though the popularity of arbitration may indicate that this inability is not often inconvenient or that perceived advantages of arbitration, including confidentiality and privacy, are seen as outweighing any inconvenience. Different arbitrations on closely inter-linked issues may as a result lead to different results, even where, as in the present case, the evidence before one tribunal is very largely the same as that before the other. The arbitrators in each arbitration are appointed to decide the disputes in that arbitration between the particular parties to that arbitration. The privacy and confidentiality attaching to arbitration underline this; and even if they do not lead to non-parties remaining ignorant of an earlier arbitration award, they are calculated to lead to difficulties in obtaining access, and about the scope of any access, to material relating to that award."

This is by no means an exhaustive review of the courts and legislative bodies that have addressed these issues. However, it provides some broader context for the issues addressed by the U.S. Supreme Court in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003). The same struggle reflected around the world is apparent in the plurality and the dissenting opinions in the Supreme Court's *Bazzle* decision, though the issue is framed in terms of class treatment rather than transfer, joinder or consolidation. As the plurality opinion, authored by Justice Breyer stated:

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. See generally *Howsam, supra.* See also *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (whether an arbitration agreement survives a corporate merger); *AT & T, supra*, at 651-652, 106 S.Ct. 1415 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).
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> The question here--whether the contracts forbid class arbitration--does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options,* the question is not whether the parties

> wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. 514 U.S., at 942-945, 115 S.Ct. 1920. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide. Cf. *Howsam, supra*, at 83, 123 S.Ct. 588 (finding for roughly similar reasons that the arbitrator should determine a certain procedural "gateway matter").

In dissent, Chief Justice Rehnquist wrote:

> Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt, supra*, at 479, 109 S.Ct. 1248. 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." App. 34. Each contract expressly defines "us" as petitioner, and "you" as the respondent or respondents named in that specific contract. *Id.,* at 33 (" '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 ***2411** 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. To be sure, the arbitrator that administered the proceedings was "selected by [petitioner] with consent of" the Bazzles, Lackey, and the Buggses. *Id.,* at 34-36. But petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well. Petitioner may well have chosen different arbitrators for some or all of these other disputes; indeed, it would have been reasonable for petitioner to do so, in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single

> arbitrator. As petitioner correctly concedes, Brief for Petitioner 32, 42, the FAA does not prohibit parties from choosing to proceed on a class-wide basis. Here, however, the parties simply did not so choose.

Thus, the venerable concept of arbitration has now been conscripted into the world of consumer[3] class actions and, the AAA has adopted rules that attempt to implement the U.S. Supreme Court's plurality decision[4] that arbitrators shall make these gateway determinations in the area of class actions. Pursuant to the plurality opinion in *Bazzle* and Rule 3 of the AAA's Supplementary Rules, arbitrators must attempt to determine whether the parties intended when they executed standard form agreements to exclude class action claims and, if so, whether under the applicable law of the various states, such exclusions are enforceable.

Hobby's Arguments Based on Powertel and Johnson

I have carefully considered the arguments and evidence presented by Hobby and Snap-on Tools regarding the issue framed by Judge Hochberg's Order. I start by observing that although each party attempts to make arguments fit within the holdings or the expressed exceptions of both *Johnson* and *Powertel,* I believe it is most probable that Snap-on Tools has the better of this argument.

Relying on footnote 2 of the *Johnson* opinion, Hobby's argument that the arbitration agreement he has with Snap-on Tools fits "the definition of the 'different case' referred to in *Johnson*" misses the mark. Snap-on Tools correctly reads footnote two of *Johnson* as requiring that Hobby show this arbitration forum presents barriers to Hobby's individual rights, not those of the public in general to have a public injunction entered.

Snap-on Tools also correctly points out the factual distinctions between the claim in *Powertel* and those pursued by Hobby. Even with the incentive of statutory attorney fees, such as those provided by FDUTPA, it is hard to imagine that a claim such as the one in *Powertel,* with a very small individual value, would ever be pursued without the benefit of a class mechanism. In contrast, Hobby's individual claim is substantial. This does not mean that it is inappropriate for class treatment…only that class treatment is not essential to insure that the claims are pursued.

The issue then is whether, as noted by Judge Hochberg, the nature of Hobby's claims, involving "allegations… that may require the Plaintiffs to establish a pattern of conduct whereby dealers are consistently lured into nonviable business arrangements" makes them appropriate for class treatment. Although this is a serious concern, it is one that I believe can be adequately addressed through the increased scope of permissible

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[3] Most other countries do not permit mandatory arbitration to be forced on consumers, but England appears to permit it under circumstances similar to the AAA's Consumer Due Process Protocol, through a series of industry-specific dispute resolution schemes implemented by the Chartered Institute of Arbitrators. www.arbitrators.org

[4] To further muddy the waters, Justice Thomas also dissented, but on the ground that the FAA does not preempt state laws in this area. Interestingly, his dissent would appear to square with the decision of the majority of the Florida Supreme Court in *Buckeye.*

discovery permitted by Judge Hochberg's order modifying the contract's limitations. In this regard, I was troubled by Snap-on Tools' initial reliance on its original contract limitations regarding the scope of discovery during this stage of the proceedings. However, Snap-on appears to have receded from that initially aggressive stance with respect to discovery. In the event this arbitration proceeds as an individual claim by Hobby, the scope of discovery permissible to insure Hobby a fair opportunity to pursue his claims must be quite broad.

Hobby's argument that the public injunction policy of FDUTPA requires that he be permitted to pursue class treatment of his FDUTPA claims presents the most direct potential conflict between Florida substantive law and the FAA. While the decisions cited by Snap-on Tools to support its contention that the FAA preempts this argument (*Lewis Tree Serv., Inc. v. Lucent Tech., Inc.* 239 F. Supp. 2d 332 (S.D.N.Y. 2002): and *Pyburn v. Bill Heard Chevrolet,* 63 S.W. 3rd 351 (Tenn. Ct. App. 2001)) are not binding, they are certainly instructive. Nonetheless, the Florida Supreme Court has recently departed from a directly contrary decision of the U.S. Court of Appeals for the Eleventh Circuit regarding the ultimate "gateway" issue in arbitration…whether a court or arbitrators must decide in the first instance if a contract containing an arbitration provision is void. *Cardegna v. Buckeye Check Cashing, Inc.,* 894 So.2d 860 (Fla. 2005) The only basis for rejecting the contrary authority of the 11th Circuit was the fact that in *Buckeye,* the Florida Arbitration Act was controlling.

Thus, if forced to predict how the Florida Supreme Court would decide this precise issue, I would predict that it would probably accept Hobby's argument under the right set of facts. However, in light of my decision based on Hobby's second argument, I don't have to base this decision on that difficult prediction.

Hobby's Argument Based on the Contract Language

Snap-on Tools properly characterizes Hobby's argument that the Standard Form Franchisee Agreement does not bar class action treatment of claims as an "epiphany." It is clear to me that this argument was never advanced before Judge Hochberg and was not advanced in Hobby's moving papers before me. It was first presented at the oral argument on Hobby's motion. Nevertheless, I believe it is appropriate for me to consider it and I believe it has merit. I am sympathetic to the frustration of counsel for Snap-on Tools at having to shoot a moving target. However, I believe I have given both parties adequate opportunity to respond, even to recently minted arguments.

In my view, the plurality decision in *Bazzle* places the burden on any party seeking to use a mandatory arbitration clause as a bar to class treatment of claims to establish such "intent" by the clear expression of the language in the contract. Snap-on Tools has not and cannot, in my view, meet that burden based on the language of its present Standard Franchise Agreement. Snap-on Tools argues that although the words "class action" do not appear in the text of Section 25 of the Standard Franchise Agreement, the phrase "or in any other manner" was clearly intended to include class actions within the prohibition.

Hobby contends that the phrase "either Standard Franchisee and Snap-on and any other person in privity with or claiming through, or in the right of or on behalf of Standard Franchisee or Snap-on" contemplates the possibility that a class representative might bring claims on behalf of other franchisees with identical contract language. Hobby cites a series of canons of contract interpretation to support its argument. I consider the following principles of contract construction as significant in reaching my decision as to this issue: (1) Ambiguities in adhesion contracts are interpreted against the drafting party. *Ware Else, Inc. v. Ofstein,* 856 So. 2d 1079 (5th DCA 2003); (2) The express mention of some matters suggests an intent not to include matters not expressly mentioned. *Shumrak v. Broken Sound Club, Inc.,* 30 Fla. L. Weekly D. 694, 2005 Fla. App., Lexis 4035 (4th DCA, March 9, 2005); (3) Where a contract is susceptible to an interpretation that gives effect to *all* of its provisions, the court should select that interpretation over an alternative interpretation that relies on negation of some of the contractual provisions. *Kipp v. Kipp*, 844 So.2d 691, 693, fn. 2 (4th DCA 2003); and, most ironically (4) Any doubt about the scope of an arbitration agreement should be resolved in favor of including, not excluding, matters of substance and procedure to be arbitrated. *Mitsubishi v. Soler,* 473 U.S. 614 (1985)

Applying these principles, I conclude that Article 25 of the Standard Franchise Agreement does not preclude class treatment of claims in a proper setting.

It is entirely appropriate to read the words "or in any other manner" as precluding a procedure such as the transfer of multiple claims by different franchisees against Snap-on Tools to a single arbitrator without consolidation or joinder. This would be similar to the procedure authorized by 1125 of the North American Free Trade Agreement referenced above. It is also consistent with the prohibition against collateral estoppel contained in Article 25 of the Standard Franchise Agreement. In fact, apparently prompted by the April 27, 2005 Opinion and Order of Judge Hochberg relating to Snap-on Credit, both Snap-on Tools and Snap-on Credit proposed such a transfer, without consolidation or joinder of this arbitration with others pending before the AAA. I do not mean to suggest that this was the reason for the AAA's decision not to transfer all these cases to a single arbitrator. However, the intent to prevent transfer of multiple claims to a single decision maker, without joinder or consolidation, provides meaning for the words "or in any other manner."

On the other hand, the language "in the right of or on behalf of Standard Franchisee or Tools" can certainly be interpreted to permit class treatment, with absent members of a putative class given an opportunity to opt out of any class that might be certified. By permitting absent putative class members to opt out, the other provisions of the Standard Franchise Agreement precluding collateral estoppel could also be preserved.

At the very least, Article 25 is ambiguous and therefore must be construed against Snap-on Tools. This interpretation has the added salutary effect of resolving this unique dispute about the scope of arbitration to include the broadest scope of substantive and procedural issues within the arbitration agreement. It therefore, in an ironic fashion, serves the strong public policy favoring enforcement of arbitration agreements.

Conclusion

The U.S. Supreme Court has placed enormous faith and confidence in arbitrators and arbitral institutions to handle all nature of disputes, including class actions, and to make decisions about what disputes the parties intended to submit to the arbitrators. I have serious doubts about the wisdom of the court's decision to vest arbitrators with responsibility for these gateway issues.[5] However, the AAA has reacted swiftly by adopting rules to address the unique due process concerns presented by class action arbitrations.

In an attempt to make this Partial Award as clear as possible for review by Judge Hochberg, I summarize my Award as follows:

1. I conclude that the Standard Franchise Agreement entered between Hobby and Snap-on Tools does not preclude class treatment of claims that may otherwise be appropriate for class treatment. I make no determination as to whether the claims are in fact proper for class treatment at this stage of the proceedings.

2. If Judge Hochberg concludes that I am wrong about the language in Article 25 of the Standard Franchise Agreement, or determines that Hobby

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[5] A few examples of the problems I see with the trend that vests arbitrators with such broad powers to determine the scope of their own proceedings are:

(1) In the class action setting, multi-tiered determinations are all being made by a single arbitrator (at least under the AAA Supplementary Rules) who, in the event a class is ultimately certified, must then also serve as the final decision maker on the merits. Although there are certainly similar obligations imposed on judges (e.g. in cases where preliminary injunctive relief is granted), in the class action setting, there is usually a jury that makes the ultimate determination on the merits.

(2) Also in the class action setting, due process requirements caused the AAA to adopt a series of "stays" in the processing of class arbitrations so that courts could review and approve the progress of the claims. It is questionable whether such a procedure comports with the long stated goal of arbitration to act as a faster, cheaper, better alternative to litigation.

(3) Outside the class action setting, pursuant to the Supreme Court decision in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995), arbitrators are presumed to determine whether a claim is "arbitrable" only if the parties state so clearly in the agreement. Otherwise, an arbitrator's determination as to an issue of arbitrability is reviewable *de novo* on appeal, but only after the entry of a final award.

(4) In this case, a potential issue relating to the assertion of the attorney client privilege to prevent production of certain documents arose. The arbitration process does not have a built-in system to permit someone other than the arbitrator to conduct the required *in camera* inspection. Fortunately, the very competent counsel for both parties in this case agreed to the designation of an eminently qualified former judge who conducted the review and determined the propriety of the asserted privileges.

(5) Finally, the most significant concern I have is that in the arbitration setting, determinations of jurisdiction and arbitrability are fraught with financial conflicts of interest for the arbitrator that most in the arbitration world either deny or are unwilling to discuss.

> waived the right to assert this contract construction argument before me, I conclude that preclusion of class treatment for Hobby's claims will not prevent Hobby from vindicating his individual rights under the claims he asserts, provided an adequate scope of discovery is permitted, commensurate with the scope of discovery that might be permitted in state or federal courts hearing similar claims.

Pursuant to Rule 3 of the Supplementary Rules for Class Arbitrations, I stay all proceedings in this matter for a period of 30 days to permit any party to move before Judge Hochberg or any other court of competent jurisdiction to confirm or vacate this Clause Construction Award.

IT IS SO ORDERED.

I, Joseph M. Matthews, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Dated: ____________________ ______________________________

Arbitrator's Signature