[Cite as *Shakoor v. VXI Global Solutions*, 2015-Ohio-2587.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LaSHONNA SHAKOOR, ET AL.,	)	CASE NO. 14 MA 59
	)	
PLAINTIFFS-APPELLEES,	)	
	)	
VS.	)	OPINION
	)	
VXI GLOBAL SOLUTIONS, INC.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CV3183

JUDGMENT: Reversed and Remanded.

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 16, 2015

[Cite as *Shakoor v. VXI Global Solutions*, 2015-Ohio-2587.]

APPEARANCES:

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[Cite as *Shakoor v. VXI Global Solutions*, 2015-Ohio-2587.]

ROBB, J.

{¶1} Defendant-appellant VXI Global Solutions, Inc. (VXI) ("Appellant") appeals the decision of the Mahoning County Common Pleas Court granting Plaintiffs-Appellees Lashonna Shakoor and Anzel Milini's ("Appellees") motion to stay litigation pending arbitration and denying Appellent's motion to compel individual arbitration. The issue in this case is whether the arbitration agreement between the parties allows the arbitrator to determine whether the contract allows for class arbitration. The trial court in granting and denying the motions held that the agreement authorized the arbitrator to determine whether the agreement allowed for class arbitration.

{¶2} In reviewing the issue, this court holds that the agreement is silent as to whether the trial court or the arbitrator determines whether the agreement permits class arbitration. Class arbitration is a gateway issue and gateway issues are determined by the judiciary. Therefore, the trial court's decision is reversed and the cause remanded for the trial court to determine whether the arbitration agreement allows for class arbitration.

Statement of the Case

{¶3} On November 8, 2013, Appellees filed a class action complaint against Appellant in the Mahoning County Common Pleas Court. In the complaint the Appellees asserted that Appellent, who operates call centers in Youngstown, Canton and Cincinnati, Ohio, violated the Ohio Minimum Fair Wage Standards Act. Specifically, Appellees asserted that they and other employees of Appellant were required to perform certain work before clocking in, such as starting and logging into Appellant's computer system, logging into Appellant's numerous software applications, and starting and logging into Appellant's phone system. Appellees asserted that this unpaid work constituted a part of their principal activities, was requested by Appellant, and was performed for Appellant's benefit.

{¶4} Appellant filed an answer on January 14, 2014. Appellant denied the allegations of violating the Ohio Minimum Fair Wage Standards Act. It further

asserted that the claims are not subject to class certification and a class action. As an affirmative defense, Appellant asserted that the complaint is barred, in whole or in part, by the employment contract which contained a Mutual Agreement to Arbitrate Claims (arbitration agreement); it asserted that the complaint must be dismissed or stayed pursuant to R.C. 2711.02.

{¶5} Two weeks later, Appellant filed an amended answer and counterclaim. 1/28/14 Amended Answer and Counterclaim. This filing is very similar to the January 14, 2014 answer, however, a counterclaim was added. This counterclaim was based on the arbitration agreement. It asserted that the claim raised in the complaint was subject to the arbitration agreement and further indicated that the arbitration agreement does not provide for arbitration as a class. Appellant asked the court to declare that it may move to compel individual arbitration.

{¶6} On February 18, 2014, Appellees filed a motion to stay pending arbitration pursuant to R.C 2711.02(B). They asserted that it was not until the receipt of Appellant's answer that they recalled signing the arbitration agreement. Appellees stated that on February 5, 2014 they filed a demand for arbitration with the American Arbitration Association (AAA). They agree with Appellant that the claim raised is subject to arbitration.

{¶7} In March 2014, Appellant filed a response to the Appellees' stay motion. It asserted that while the claim is subject to arbitration, Appellant never agreed to class arbitration. Appellant argued that when Appellees filed the demand for arbitration with AAA they requested class arbitration. Appellant argued that the arbitration agreement does not provide for class arbitration. Appellant moved to compel Appellees to individual arbitration. 3/18/14 Motion. In this motion, Appellant argued that the determination of whether class arbitration is permitted by the arbitration agreement is a question for the court to decide. It then proceeded to set forth its argument that the arbitration agreement does not allow for class arbitration.

{¶8} Appellees filed a response on March 25, 2014, supporting its motion to stay the proceeding pending arbitration. In that motion, they asserted that the arbitration agreement provides that, "[t]he Arbitrator has the exclusive authority to

resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement. They contended that the provision means that the arbitrator has the authority to decide whether the contract allows for class arbitration.

{¶9} In April 2014, Appellees filed a motion in opposition to Appellant's cross motion to compel individual arbitration. That motion essentially raised the same arguments asserted in the March 25, 2014 motion to stay the proceeding pending arbitration.

{¶10} Appellant responded by filing its own motion in support of its motion to compel individual arbitration. 4/9/14 Reply.

{¶11} After considering the parties arguments, the trial court sustained the motion to stay the matter pending arbitration, but denied the motion to compel individual arbitration. 5/2/14 J.E. Specifically, the trial court found that the claim concerning Ohio's Minimum Fair Wage Standards Act fell within the parameters of the arbitration agreement. It further stated that the agreement allowed for the arbitrator, not any state or local court, to have the exclusive authority to resolve any dispute relating to interpretation of the agreement. As to the issue of class arbitration, which it framed as a "procedural issue," it found that "[d]ue to the clear language of the Agreement providing that such disputes be determined by the Arbitrator, the Court will not address that issue, but will acknowledge that the language of the Agreement does not explicitly mention 'class arbitrations.'" 5/2/14 J.E. Thus, the trial court determined that the decision of whether the agreement permits class arbitration is for the arbitrator to decide.

{¶12} Appellant timely appeals from that decision.

Standard of Review

{¶13} In rendering its May 2, 2014 judgment the trial court ruled on two motions. One was a stay motion made pursuant to R.C. 2711.02(B), which provides:

> If an action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is

> referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02(B).

{¶14} The second motion was a request to enforce the arbitration agreement pursuant to R.C. 2711.03. Division (A) of this statute states that, "[t]he party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement." R.C. 2711.03(A).

{¶15} In ruling on these motions there were two questions presented to the court. The first was whether the claim raised in the complaint was a matter that was required to be arbitrated due to the language of the arbitration agreement. Both parties in the trial court filings agreed the claim that Appellant violated the Ohio Minimum Fair Wage Standards Act is an arbitrable claim. Even on appeal the parties agree the claim presented is arbitrable.

{¶16} The crux of this appeal deals with the second issue that was presented to the trial court. This second issue concerned class arbitration as opposed to individual arbitration. The specific question the trial court was asked to decide was who determines whether the arbitration agreement allows for class arbitration; is it the court or arbitrator? As discussed above, the trial court determined that pursuant to the arbitration agreement, the arbitrator decides whether or not the arbitration agreement allows for class arbitration.

{¶17} On those bases, the trial court granted the request for stay, but denied the motion to compel individual arbitration.

{¶18} We have previously explained that a reviewing court "generally applies an abuse of discretion standard to a trial court's decision regarding a stay pending arbitration" under R.C. 2711.02(B*). Riggs v. Patriot Energy Partners, L.L.C.*, 7th Dist.

11 CA 877, 2014-Ohio-558, ¶ 12. However, there are exceptions to that general rule. *Id.* at ¶ 13. One such exception is "when the error alleged is solely a matter of law." *Id.*

{¶19} In this case that exception applies to the question of whether the arbitration agreement permits the arbitrator to determine if the agreement allows for class arbitration. With that standard in mind, we now turn to the merits of the appeal.

First Assignment of Error

"The trial court erred in holding that the arbitration agreements provided for the arbitrator rather than the court to determine whether class arbitration was authorized under the agreements."

{¶20} The Ohio Supreme Court has consistently held that, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20 quoting *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 648–649, 106 S.Ct. 1415 (1986). "[T]he question of arbitrability – whether a[n] * * * agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination, unless the parties "clearly and unmistakably provide otherwise." *Academy of Med. of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 12, quoting *AT&T Technologies Inc.* at 649.

{¶21} Therefore, when a trial court is deciding whether or not to grant a motion to compel arbitration, "the proper focus is whether the parties actually agreed to arbitrate the issue, i.e., the scope of the arbitration clause." *Taylor* at ¶ 20, citing *Equal Emp. Opportunity Comm. v. Waffle House*, 534 U.S. 279, 294, 122 S.Ct. 754 (2002). In Ohio arbitration is favored and any ambiguities in the language of a contract containing an arbitration provision should be resolved in favor of arbitration. However, that does not mean that courts can "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Taylor* at ¶ 20 quoting *Waffle House*.

{¶22} Here, the trial court looked to the agreement to determine whether the issues raised were arbitrable. The trial court found that Appellee's claims for wages that were raised in the complaint were arbitrable claims pursuant to the language in provision 1, Claims Covered by this Agreement. It also found the language in provision 4 - "The Arbitrator * * * shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this agreement * * *" – meant that the arbitrator was required to determine whether the agreement allowed for class arbitration.

{¶23} Appellant argues on appeal that these two holdings are inconsistent with each other and that the language of the agreement does not clearly provide the arbitrator with the authority to decide whether the agreement allows for class arbitration. In other words, it is Appellant's position that the issue of whether the agreement allows for class arbitration is a decision that must be made by the trial court because the contract does not clearly and unmistakably provide that the parties agreed that the arbitrator, and not the court, would decide arbitrability.

{¶24} Appellees disagree. They assert that the trial court correctly determined that the contract authorizes the arbitrator to determine whether class arbitration is allowed by the contract. Furthermore, they assert there is no prejudice to Appellant if the arbitrator determines whether the contract allows for class arbitration because the AAA rules for arbitration allow for two automatic opportunities to challenge the arbitrator's decision in court.

{¶25} Given the trial court's holding and the parties' arguments, the basic issue presented to this court is who determines whether the arbitration agreement allows for class arbitration – is it the court or the arbitrator? This basic question encompasses two complex questions. Given the specific language of the contract in this case, is the arbitrator authorized to determine arbitrability? If so, is the question of whether class arbitration is allowed by the contract a question of arbitrability?

{¶26} Our analysis starts with the second more specific question. As previously stated, the question of arbitrability is typically an issue for the judiciary, unless the parties "clearly and unmistakably provide otherwise." *Academy of Med. of*

Cincinnati, 2006-Ohio-657 at ¶ 12, quoting *AT&T Technologies Inc.* at 649. However, that statement raises the question as to what issues fall within the question of arbitrability. Our sister district has aptly indicated that the kind of issues that fall within the question of arbitrability is not always clear. *Bachrach v. Cornwell Quality Tools Co.*, 9th Dist. No. 27113, 2014-Ohio-5778, ¶ 9, citing *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,* 734 F.3d 594, 597–598 (6th Cir.2013). Courts have made a distinction between threshold or gateway questions and procedural or subsidiary questions. *Bachrach* at ¶10.

{¶27} Gateway issues are typically issues for the court unless the contract provides otherwise. Subsidiary issues are typically issues that the arbitrator is to decide. Subsidiary issues have been defined as questions that "grow of the dispute and bear on its final disposition." *Crockett*, 734 F.3d at 597. The Ninth Appellate District has further explained the distinction as follows:

> A threshold question is a "narrow circumstance where contracting parties would likely have expected a court to have decided the [ ] matter." *Id.* at 83. Thus, "[i]f the contract [between the parties] is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions." *BG Group, PLC v. Republic of Argentina,* —– U.S. ——– , 134 S.Ct. 1198, 1206 (2014). Those presumptions include that the courts, not the arbitrators, decide: (1) whether the claims fall within the arbitration agreement, *Academy of Medicine of Cincinnati* at ¶ 11–14, and (2) whether the arbitration agreement is legally enforceable, *see Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 2009–Ohio–2054, ¶ 19–20.
>
> On the other hand, it is presumed that the parties intended arbitrators, not courts, to decide disputes about procedural or "subsidiary questions." *BG Group, PLC* at 1207; *Reed Elsevier, Inc.* at 597. "Subsidiary questions grow out of the dispute and bear on its final disposition, and they include, for example, issues related to

> waiver, delay, or whether a condition precedent to arbitrability has been fulfilled." (Internal quotations, citations, and alterations omitted.) *Reed Elsevier, Inc.* at 597.

Id. at ¶ 10-11.

{¶28} The issue before the Ninth Appellate District was, "when the contract between the parties is silent, is the determination that a case may be arbitrated as a class a threshold or subsidiary matter." *Id*. at ¶ 12. Our sister court relied on the reasoning of the Sixth Circuit Court of Appeals when it found that it is a gateway issue to be decided by the judiciary. *Id*; *Academy of Med. of Cincinnati*, 108 Ohio St.3d at 188 (The Ohio Supreme Court has recognized that state courts may rely on a federal standard in applying Ohio law on the issue of arbitrability.). In doing so, the Ninth Appellate District appropriately recognized that there is a split among the Federal Circuit and District Courts as to whether the issue is a gateway or subsidiary issue.

{¶29} The confusion of whether class arbitration is a gateway or subsidiary issue began with two United States Supreme Court decisions – *Bazzle* and *Stolt-Nielsen*.

{¶30} In *Bazzle*, a plurality of the court determined that the issue of whether a contract allows for class arbitration is a subsidiary question:

> 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 *453 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").

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452-453, 123 S.Ct. 2402 (2003) (plurality opinion).

{¶31} Justice Stevens concurred in the judgment vacating and remanding. However, in doing so he did not endorse the plurality's rationale but instead stated that "arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator." *Id*. at 455.

{¶32} In 2010, the United States Supreme Court reviewed its *Bazzle* decision. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S.Ct. 1758 (2010). In *Stolt-Nielsen*, the Court acknowledged that *Bazzle* was only a plurality decision. However, it did not reach an ultimate decision on whether class arbitration was a gateway issue or if it was a subsidiary issue because the parties had stipulated that there was no agreement on the question. *Id*. at 687. Thus, the Court concluded that the parties could not be compelled to submit their dispute to class arbitration. *Id*.

{¶33} In reaching this conclusion, the Court explained that a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. *Id*. at 684. The High Court further explained:

> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator,

to decide." This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action

> arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

(Internal Citations Omitted). *Id.* at 684-87.

{¶34} Following *Stolt-Nielsen*, federal appellate courts have disagreed on whether class arbitration is a gateway or subsidiary issue. The Sixth Circuit has clearly stated that it is a gateway issue and provided two reasons for such conclusion. First, it cited the language in *Stolt-Nielsen*, that it cannot be presumed that the parties consented to class arbitration simply by agreeing to submit their dispute to an arbitrator. *Crockett*, 734 F.3d at 598. Second, it referenced the differences between bilateral and class arbitration that were discussed in *Stolt-Nielsen*. *Id*. The court concluded that the question of whether the parties agreed to class arbitration is "vastly more consequential than even the gateway question of whether they agreed to arbitrate bilaterally." *Id*. at 599. It then reasoned that "[a]n incorrect answer in favor of classwide arbitration would 'forc[e] parties to arbitrate' not merely a single 'matter that they may well not have agreed to arbitrate[,] but thousands of them." *Id*.

{¶35} The Federal Third Circuit Court of Appeals agrees with the Sixth Circuit. *Opalinski v. Robert Half Internatl. Inc.,* 761 F.3d 326, 332 (3d Cir.2014). *See also Chesapeake Appalachia, L.L.C., v. Scout Petroleum et al.*, M.D.Pa. No. 4:14-CV-0620 (Dec. 19, 2014); *Chesapeake Appalachia, L.L.C. v. Burkett et al*., M.D.Pa. No. 3:13-3073 (Oct. 17, 2014) (stating that although it is typically a gateway question, the language of the agreement, incorporation of the AAA rules into the agreement, gave the arbitrator the authority to decide the matter of class arbitration). However, there are other federal courts that have stated it is a question for the arbitrator to decide and these courts relied on *Bazzle* to reach this conclusion. *Guida v. Home Savings*

of Am., Inc., 793 F.Supp.2d 611, 615–619 (E.D.New York 2011) (issue is procedural and for the arbitrator to decide); *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.,* 671 F.3d 635, 636, 638–640 (7th Cir.2011) (upholding its prior decision that arbitrator decides); *Harrison v. Legal Helpers Debt Resolution, L.L.C.*, D.C.Minn. No. 12-2145 (Aug. 22, 2014) (although *Bazzle* lacked a controlling majority, it provides guidance).

{¶36} Considering all the above, we are in agreement with our sister district's decision in *Bachrach* which adopted the Federal Sixth Circuit Court of Appeal's decision in *Crockett* that class arbitration is an issue for the judiciary, unless the agreement specifies otherwise. *Bachrach* at ¶ 13. Accordingly, we hold that the decision of whether the contract permits an arbitrable claim to proceed through class arbitration is a question of arbitrability, i.e. a gateway issue, and is an issue for the judiciary unless the agreement specifies otherwise.

{¶37} This leads us to the first complex question set forth above – does the specific language of the contract, authorize the arbitrator to determine arbitrability?

{¶38} Here, the trial court relied on two provisions in the contract, provisions 1 and 4, to find that the contract permitted the arbitrator to determine if the contract allows for class arbitration. Provision 1 is labeled "Claims Covered by this Agreement" and provides:

> The Claims covered by this agreement include, but are not limited to, claims for wages, bonuses, commissions or any other form of compensation; claims for breach of any contract, express or implied; tort claims; claims for discrimination or harassment, including but not limited to discrimination or harassment based on race, sex, religion, national origin, age, marital status, physical or mental disability, medical condition or sexual orientation; claims for benefits except as excluded in the following paragraph; and all claims for violation of any federal, state or other governmental law, statute, ordinance.[sic] Executive Order or regulation; claims by the Company for injunctive and/or equitable relief for, among other claims, unfair competition, the

> use or unauthorized disclosure or misappropriation of trade secrets or client information, the disclosure of any other confidential information or the violation of any confidentiality agreement which may be in effect between me and the Company.

Arbitration Agreement, Provision 1.

{¶39} Admittedly, the claim that Appellant violated the Ohio Minimum Fair Wage Standards Act is an arbitrable claim. This provision, however, does not clearly and unmistakably provide that the issue of arbitrability is to be decided by the arbitrator or that class arbitration is available. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute * * * so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920 (1995), (internal citations omitted) citing *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. at 649 (parties may agree to arbitrate arbitrability). Provision 1 does not indicate the parties agreed to submit the question of arbitrability to the arbitrator, and accordingly does not support the trial court's conclusion that the arbitrator is permitted to determine if the contract allows for the claim to proceed through class arbitration.

{¶40} The second provision relied upon by the trial court is titled "Arbitration Procedures" and it provides, in pertinent part:

> The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. **The Arbitrator, and not any federal, state or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this agreement including but not limited to any claim that all or any part of this Agreement is void or potentially void.**

(Emphasis added) Arbitration Agreement, Provision 4.

{¶41} This clause does provide the arbitrator with authority to resolve disputes related to interpretation and enforceability of the contract. However, this clause does not specifically mention class arbitration or make any other reference which can lead us to hold that the parties agreed the arbitrator, not the court, is to determine whether the contract permits the arbitrable claim to proceed through class arbitration. The importance of this distinction is noted by the ways that class-action arbitration changes the nature of arbitration as explained by the United States Supreme Court in *Stolt-Nielsen*. As the Sixth Circuit Court of Appeals explained in *Crockett*, the question of whether the parties agreed to class arbitration is "vastly more consequential than even the gateway question of whether they agreed to arbitrate bilaterally. *Crockett*, 734 F.3d at 599. Provision 4 does not provide a clear and unmistakable statement that the parties agreed the arbitrator is authorized to determine if the contract allows for class arbitration.

{¶42} In holding as such, we acknowledge that there is a line of federal cases that have determined that incorporation of the American Arbitration Association rules in the agreement is an implicit agreement to authorize class arbitration even though the words "class arbitration" is not used. *Marriott Ownership Resorts, Inc. v. Flynn*, D.Haw. No. CIV. 14-00372 JMS, 2014 WL 7076827 (Dec. 11, 2014).

{¶43} The District Court of Hawaii has recently held that an arbitration agreement which states that certain disputes "shall . . . be submitted to arbitration in accordance with the commercial arbitration rules of the AAA" is an indication that the parties agreed to have an arbitrator determine if the agreement allows for class arbitration. In doing so it referenced the AAA commercial arbitration rules, which state in Rule 7(a) that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.*, quoting the AAA rules. The court further explained that an agreement to the AAA's commercial arbitration rules includes an agreement to the AAA Supplementary Rules for Class Arbitration. The Supplementary Rules provide:

> "These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class."

Id. quoting AAA Suppl. Rule 1(a).

> Rule 3 of the Supplementary Rules further provides:
>
> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.

Id. quoting AAA Suppl. Rule 3.

{¶44} The District Court of Hawaii then explained that many courts have held that "consent to any of the AAA's substantive rules also constitutes consent to the Supplementary Rules and, if a dispute that otherwise would be arbitrated under the AAA rules involves a purported class, then the proceeding is governed by both the AAA rules and the AAA Supplementary Rules for Class Arbitrations." *Id*. quoting *Burkett,* M.D.Pa. No. 3:13-3073 (Oct. 17, 2014) (citing *Bergman v. Spruce Peak Realty, LLC,* 2011 WL 5523329, (D.Vt.Nov.14, 2011) (relying upon the Supplementary Rules when referring class arbitration issue to the arbitrator, where parties agreed to "the Commercial Arbitration Rules of the AAA") and citing *Southern Communications Services., Inc. v. Thomas,* 829 F.Supp.2d 1324, 1336–1338

(N.D.Ga.2011) (holding that AAA Wireless Industry Arbitration Rules "incorporate the AAA Supplementary Rules for Class Arbitrations, which gave the arbitrator the power to decide whether the Arbitration Clause implicitly authorized class proceedings"); and *Yahoo! Inc.,* 836 F.Supp.2d at 1011–12 (holding that parties' agreement to AAA National Rules for the Resolution of Employment Disputes also constituted agreement to the Supplementary Rules)). *See, also, e.g., Price v. NCR Corp.,* 908 F.Supp.2d 935, 945 (N.D.Ill.2012) ("[T]he parties' agreement to proceed 'under the AAA's rules' incorporates the Supplementary Rules for Class Arbitrations.)

{¶45} In the instant case, provision 4 of the agreement provides that, "The Company and I agree that, except as provided in this Agreement, any arbitration shall be conducted in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") before an arbitrator who is a retired judge (the "Arbitrator")."

{¶46} We disagree with the determination in *Flynn* that incorporation of the AAA rules, not supplementary rules, without more is an indication that the arbitrator is authorized to determine if the parties agreed to arbitration. We do so based on the *Crockett* decision and the language in the arbitration agreement in *Crockett*.

The arbitration clause in *Crockett* provided:

> Except as provided below, any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of or in connection with this Order (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA").

Crockett, 734 F.3d at 599.

{¶47} The Sixth Circuit found that the language did not clearly and unmistakably indicate that class arbitration is a question for the arbitrator. As aforementioned, its principle reason to conclude as such was because the clause

does not mention "class arbitration." Furthermore, while the Supplemental Rules of the AAA allow for class arbitration the supplemental rules were not specifically mentioned in the *Crockett* agreement, just as they are not mentioned in the agreement before us. Although the AAA rules are referenced in general that is not sufficient to conclude that the parties agreed the arbitrator was authorized to determine if the agreement permits class arbitration.

{¶48} Our determination that class arbitration is a gateway issue to be decided by the judiciary unless the contract specifies otherwise and that the contract did not provide otherwise, is not altered by Appellees alternative argument that no prejudice results from the arbitrator deciding whether the contract allows for class arbitration. Appellees assert there is no prejudice because the parties have automatic opportunities, pursuant to the AAA arbitration rules, to go to court to challenge the arbitrator's decision on whether the arbitration may proceed as a class action. We find no merit with this argument. If the contract does not permit the arbitrator to decide whether the contract allows for class arbitration; the matter should be decided by the court, not the arbitrator. As aforementioned, the Ohio Supreme Court has consistently held that arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute that it did not agree to submit. *Taylor*, 2011-Ohio-5262 at ¶ 20 quoting *AT&T Technologies, Inc.,* 475 U.S. at 648–649. Therefore, Appellees contention that no prejudice results by allowing the arbitrator to decide whether the contract allows for class arbitration is incorrect. Error results when the arbitrator does not have authority to determine the class arbitration issue. Consequently, this argument presented by Appellees fails.

{¶49} In conclusion, this assignment of error has merit. The trial court incorrectly determined that the arbitrator was authorized under the contract to determine if the contract permits class arbitration. The determination of whether the contract permits class arbitration is to be decided by the trial court. Consequently, the matter is reversed and remanded for that determination.

Second and Third Assignments of Error

"The trial court erred by denying Appellant's motion to compel individual arbitration because the arbitration agreements do not authorize classwide arbitration."

"The trial court erred by granting plaintiffs' motion to stay without first ordering individual arbitration."

{¶50} Our resolution of the first assignment of error renders these assignments of error moot. Accordingly, they will not be addressed.

Conclusion

{¶51} For the reasons expressed in the opinion rendered herein the first assignment of error has merit. The agreement between the parties is silent as to whether the trial court or the arbitrator determines if class arbitration is permitted. The issue of class arbitration is a gateway issue. Therefore, whether the contract allows for class arbitration is a question for the judiciary to decide. That determination renders the second and third assignments of error moot. Accordingly, the trial court's decision is hereby reversed and remanded. Upon remand, the trial court is instructed to determine what the contract allows; specifically, did the parties agree that arbitration would include class arbitration?

Donofrio, P.J., concurs.

DeGenaro, J., concurs.