Arbitration Law Review

Volume 4 *Yearbook on Arbitration and Mediation* Article 26

7-1-2012

Are Arbitrators Right Even When They Are Wrong?: Second Circuit Upholds Arbitral Ruling Allowing Implicit Reference to Class Arbitration

Dustin Morgan

ARE ARBITRATORS RIGHT EVEN WHEN THEY ARE WRONG?: SECOND CIRCUIT UPHOLDS ARBITRAL RULING ALLOWING IMPLICIT REFERENCE TO CLASS ARBITRATION

Dustin Morgan*

I. INTRODUCTION

In *Jock v. Sterling Jewelers Inc.*, the Second Circuit reversed a district court decision vacating an arbitral award that determined the arbitrator could properly rule on a class certification motion that would allow Jock ("Plaintiff") and similarly situated plaintiffs to arbitrate discrimination claims against Sterling Jewelers ("Defendant").[1] The Second Circuit reasoned that the district court improperly applied the Federal Arbitration Act's ("FAA") Section 10(a)(4) grounds for vacatur; the district court ruled that the arbitrator improperly interpreted the law rather than undertaking the proper inquiry, which was whether the arbitrator had authority to rule under both the arbitral agreement and governing law.[2] The court reasoned that the Supreme Court's ruling in *Stolt-Nielsen v. AnimalFeeds Int'l Corp*. did not prohibit arbitrators from finding an implicit agreement allowing for class arbitration.[3] The court stated that FAA section 10—notably section 10(a)(4)—should be interpreted narrowly in order to promote the recourse to arbitration and the enforcement of arbitral awards.[4] Challenges to arbitral awards brought under Section 10(a)(4) should only be upheld where the arbitrator "consider[s] issues beyond those the parties have submitted for her consideration, or reach[s] issues clearly prohibited by law or by the terms of the parties' agreement."[5] Reviewing courts should not engage in a review that asks whether the arbitrator correctly interpreted the law or reached the right result.[6] Finally, the court held that the Defendant's interpretation of *Stolt-Nielsen* as requiring the explicit reference to class arbitration was unpersuasive.[7] The court interpreted *Stolt-Nielsen* to prohibit class arbitration only where the parties have agreed that the arbitral agreement is silent on the class arbitration issue.[8] The dissent would have required a more express reference to class arbitration to allow the arbitrator to rule on class certification.[9] This decision may settle the proper inquiry when considering motions for vacatur under FAA Section 10. But this clarity may come at the price of confusion regarding the ability of arbitrators to consider motions for class arbitration.

---

* Dustin Morgan is an Associate Editor of The Yearbook on Arbitration and Mediation and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

[1] *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115 (2d Cir. 2011).

[2] *Id*.

[3] *Id*. at 121.

[4] *Id*. at 121–22.

[5] *Id*. at 122.

[6] *Id*. at 124.

[7] *Id*. at 125.

[8] *Id*.

[9] *Id*. at 129.

II. BACKGROUND

Plaintiff filed a discrimination charge against her employer, Sterling Jewelers with the Equal Employment Opportunity Commission ("EEOC") in May 2005.[10] Plaintiff alleged that Sterling violated Title VII of the Civil Rights Act of 1964 and the Equal Pay Act by paying female employees less than their male counterparts.[11] Eighteen other female plaintiffs also filed charges against Sterling with the EEOC.[12] Jock and the other employees initiated the dispute resolution mechanism mandated by their employment contracts.[13] The mechanism, referred to as RESOLVE, outlined a three-step resolution process.[14] The process first allowed Sterling to make an initial determination after viewing the employee's complaint.[15] If the employee was dissatisfied with Sterling's determination they could then refer their complaint to a mediator or panel of employees appointed by Sterling.[16] Finally, employees could refer the dispute to arbitration in accordance with the rules of the American Arbitration Association ("AAA").[17] Employment with Sterling was conditioned upon acceptance of the RESOLVE dispute resolution system.[18]

In January 2008, the EEOC issued a letter outlining its findings; it found that Sterling had violated both Title VII and the Equal Pay Act through discriminatory compensation and promotion policies.[19] After learning of the EEOC's findings, Jock and the other Plaintiffs filed a class action lawsuit in United States District Court for the Southern District of New York, alleging violations of Title VII and the Equal Pay Act.[20] Shortly after, Plaintiffs filed a demand for class arbitration with the AAA advancing similar claims.[21] Plaintiffs then moved to stay the litigation in district court pending the outcome of arbitration.[22]

In June 2008, the district court granted the Plaintiffs' motion to stay litigation pending arbitration.[23] The parties submitted to the arbitrator the question of whether the RESOLVE mechanism permitted resolution by class arbitration.[24] The arbitrator issued an interim award finding that class arbitration was not prohibited by the RESOLVE mechanism and agreeing to hear a future class certification motion.[25] In so ruling the arbitrator relied on the RESOVE mechanism's language, which provided:

---

[10] *Id*. at 115.
[11] *Id*.; 42 U.S.C. § 2000e (2006); 29 U.S.C. § 206(d) (2006).
[12] *Jock*, 646 F.3d at 115.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 116.
[17] *Id*.; AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *available at* http://www.adr.org/aaa/faces/rules/.
[18] *Jock*, 646 F.3d at 116.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.

> I hereby utilize the Sterling RESOLVE program to pursue any dispute, claim, or controversy ("claim") against Sterling . . . regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a [sic] appropriate court, including but not limited to, claims under . . . Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991, . . . the Fair Labor Standards Act. . . . I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program. The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.[26]

The arbitrator, using Ohio law as mandated by the RESOLVE clause, determined that because Sterling had the ability to prevent recourse to class arbitration but failed to do so, the Plaintiffs must be allowed to pursue this procedural device.[27] The arbitrator also allowed both parties to seek either confirmation or vacatur of this interim award.[28]

In June 2009 Sterling moved to vacate the arbitrator's interim award in district court.[29] The district court ruled that the arbitrator did not exceed her powers or rule in manifest disregard of the law, and in effect, confirmed the award.[30] The court relied heavily on the Second Circuit's determination in *Stolt-Nielsen* and declined to stay the action pending the Supreme Court's resolution of the impending appeal.[31] In January 2010 Sterling appealed the district court's decision.[32] Before the Second Circuit ruled on the appeal the Supreme Court rendered its decision in *Stolt-Nielsen*.[33] Consequently, Sterling moved the district court to reconsider its original judgment pursuant to Federal Rules of Civil Procedure 62.1 and 60(b); the Second Circuit held the appeal in abeyance pending the decision by the district court on Sterling's motion.[34]

In July 2010 the district court issued an opinion stating that if jurisdiction were restored "it would reconsider its [previous] order and vacate the arbitrator's award that permitted the plaintiffs to pursue class certification."[35] The district court concluded that "in light of the

---

[26] *Id*. at 116–17.

[27] *Id*. at 117; *see also* Montgomery v. Bd. of Educ., 131 N.E. 497, 498 (Ohio 1921) ("The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract.").

[28] *Jock*, 646 F.3d at 117.

[29] *Id*.

[30] *Id*. at 117–18; Jock v. Sterling Jewelers, Inc., 564 F. Supp. 2d 307, 312–13 (S.D.N.Y. 2008).

[31] *Jock*, 646 F.3d at 118; *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 548 F.3d 85, 99 (2d Cir. 2008) (finding that the arbitrators did not exceed their powers by allowing class arbitration where the arbitral clause was silent on the class arbitration issue).

[32] *Jock*, 646 F.3d at 118.

[33] *Id*.; *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (holding determination of whether class arbitration is appropriate is for the court, not the arbitrator, to decide and that there must be a clear intent to allow class arbitration in the arbitral clause for the procedural device to be appropriate).

[34] *Jock*, 646 F.3d at 118.

[35] *Id*. (citing Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010)).

Supreme Court's decision in [*Stolt-Nielsen*] 'the arbitrator's construction of the RESOLVE agreements as permitting class certification was in excess of her powers and therefore cannot be upheld.'"[36] The district court ruled that its prior analysis, asking whether there was intent to preclude class arbitration, was inconsistent with *Stolt-Nielsen* and found that there was insufficient evidence in the arbitral clause necessary to find the requisite intent required to allow class arbitration.[37] In August 2010, the Second Circuit restored jurisdiction in accordance with Sterling's petition and the district court subsequently granted Sterling's motion for vacatur of the arbitrator's interim award.[38]

III. COURT'S ANALYSIS

A. Effect of Stolt-Nielsen on the Implied References to Class Arbitration

In considering the issue of whether the arbitrator properly allowed the Plaintiffs to submit a motion for class certification, in their arbitration against Sterling, the Second Circuit first examined the effects *Stolt-Nielsen* would have on the dispute.[39] The court first recognized that the Supreme Court's decision in *Stolt-Nielsen* allows courts to grant vacatur under FAA Section 10 where the arbitrator refuses to rely on the arbitral agreement and instead makes a public policy determination.[40] The court quickly limited this broad pronouncement by noting that the facts of *Stolt-Nielsen* were unique. Here, the parties conceded that the arbitral clause was silent on the class arbitration issue; because the arbitrator went beyond the language of the contract, the decision to allow class arbitration amounted to a policy decision beyond the language of the contract.[41]

The Second Circuit viewed the silence in *Stolt-Nielsen* as a factor that distinguished that dispute from the present case.[42] The stipulation in *Stolt-Nielsen* indicated that the parties were in complete agreement both about the inclusion of class arbitration within the contract and the intent to allow class arbitration.[43] Despite this stipulation, the arbitrator allowed class arbitration and the Court was forced to articulate a rule that allows for recourse to class arbitration where "there is a contractual basis for concluding that the party *agreed* to do so."[44] The Court refused to hold that there must be an express contractual provision allowing for class arbitration, leaving open the possibility that the courts could find an implied agreement.[45] This implicit agreement, however,

[36] *Jock*, 646 F.3d at 118 (citing Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010)).

[37] *Id*.

[38] *Id*.

[39] *Id*. at 119.

[40] *Id*.; *see Stolt-Nielsen*, 130 S. Ct. at 1767-68; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[41] *Jock*, 646 F.3d at 119; *see also Stolt-Nielsen*, 130 S. Ct. at 1768, 1774–75.

[42] *Jock*, 646 F.3d at 120.

[43] *Id*.; *see also Stolt-Nielsen*, 130 S. Ct. at 1770, 1781.

[44] *Jock*, 646 F.3d at 121 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

[45] *Id*.

may not be "infer[red] solely from the fact of the parties' agreement to arbitrate."[46] Silence on the issue of class arbitration alone cannot give rise to a finding of an implied agreement.[47]

B. Authority to Vacate Under FAA Section 10

The Second Circuit recognized that the four grounds for vacatur articulated in FAA Section 10, as well as the common law ground of manifest disregard, must be interpreted narrowly so as to promote the enforcement of arbitral awards.[48] This narrow interpretation requires that courts only vacate awards where one of the enumerated grounds is "affirmatively shown to exist."[49] Accordingly, Section 10(a)(4) has been interpreted narrowly so as to allow vacatur only where the arbitrator has ruled on a question not submitted or reached a conclusion on an issue prohibited either by the arbitral clause or law.[50] The inquiry under Section 10(a)(4) is limited to whether the arbitrator had the power to rule on a particular issue, not whether the arbitrator made the correct determination; review for legal error is impermissible.[51] Emphasizing the high hurdle required of a movant in order to prevail under 10(a)(4), the Court in *Stolt-Nielsen* articulated the circumstances in which an arbitrator "exceeds his powers":

> It is not enough . . . to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.[52]

It is from this narrow standard that the Second Circuit was tasked with determining whether the district court's decision to vacate the arbitrator's interim award was proper.

The Second Circuit reasoned that the district court's inquiry should have been limited to whether "the parties had submitted to the arbitrator the question of whether their arbitration agreement permitted class arbitration and . . . whether the agreement or the law categorically prohibited the arbitrator from reaching that issue."[53] Instead of engaging in this narrow inquiry, the district court focused on whether the arbitrator correctly interpreted the arbitral agreement.[54]

---

[46] *Id*. (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

[47] *Id*.; *Stolt-Nielsen*, 130 S. Ct. at 1776 ("[T]he 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."). Several other cases have adopted or expanded on the nature of class arbitration. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750-51 (2011) (finding the change from bilateral to class arbitration is a fundamental one that drastically changes the underlying nature of the dispute).

[48] *Jock*, 646 F.3d at 121.

[49] *Id*. (citing Wall Street Assocs., L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994)).

[50] *Id.*; *see also* ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co., 564 F.3d 81, 85 (2d Cir. 2009); Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002); *accord* Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009) (reasoning that arbitral awards may be vacated under the manifest disregard standard); *but see* Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) ("[M]anifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.").

[51] *Jock*, 646 F.3d at 122; *see also Westerbeke*, 304 F.3d at 220 ("Section 10(a)(4) does not permit vacatur for legal errors.").

[52] *Jock*, 646 F.3d at 122 (citing *Stolt-Nielsen*, 130 S. Ct. at 1767) (internal quotation marks and citations omitted).

[53] *Id*. at 123.

[54] *Id*.

Applying this standard, the Second Circuit found the lower court to err based on a subtle distinction between facts found in the case at hand with the facts in *Stolt-Nielson.* Here, the Plaintiffs' conceded that there was no *explicit* reference to class arbitration in the arbitral clause. But even if there is no *explicit* agreement, such a finding does not necessarily confer the same "silent" status bestowed upon the agreement examined in *Stolt-Nielson.*[55] To the contrary, the question of whether the agreement *implicitly* permitted class arbitration was still squarely in dispute and was thus properly before the arbitrator.[56] And with the issue not rendered moot by the Plaintiffs' concession, the arbitrator could not exceed her authority under the arbitration agreement by entertaining the question of whether class proceedings would be proper.[57] This finding, coupled with the Second Circuit's interpretation of the holding in *Stolt-Nielsen*—that there is no bright-line rule that would prevent finding an implicit agreement to undergo class arbitration—formed the basis as to why the district court erred in vacating the award under Section 10(a)(4).[58]

C. Dismissal of Sterling's Interpretation of Stolt-Nielsen

In distinguishing the district court's determination from *Stolt-Nielsen*, the Second Circuit relied on a narrow reading of the term "silence" within the opinion.[59] Sterling argued that because the arbitrator found that the arbitral agreement merely did not prohibit class arbitration, rather than making the express finding that the agreement allowed arbitration, the arbitrator exceeded her authority.[60] The court dismissed this argument because it assumed a legal standard that had not been introduced at the time of the decision; *Stolt-Nielsen* had yet to be decided, and in the court's opinion, the district court also incorrectly interpreted the case law.[61] *Stolt-Nielsen* does not require that the intent to allow class arbitration be expressly stated; the decision merely limits that arbitrator's authority to rely on public policy and go beyond the agreement when making a determination.[62] Since the arbitrator relied on the agreement in allowing class arbitration, the reliance on *Stolt-Nielsen* to support vacatur was unfounded.[63]

In support of its determination, the Second Circuit affirmed that under *Stolt-Nielsen* the FAA defines federal arbitration law[64], but it refused to hold that state law is irrelevant in making determinations about the parties' intent.[65] The court stated that "a primary concern for the Court in *Stolt-Nielsen* was that the arbitration panel based its holding on public policy grounds, rather than looking to the FAA, maritime, or state law."[66] *Stolt-Nielsen* implicitly allows for reliance on state law where the parties intent regarding class arbitration cannot be readily determined.[67]

---

[55] *Id*.
[56] *Id*. at 124.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 125.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 125–26; *see also Stolt-Nielsen*, 130 S. Ct. at 1776 n.10.
[63] *Jock*, 646 F.3d at 126.
[64] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (arguing that the FAA creates federal substantive arbitration law).
[65] *Jock*, 646 F.3d at 126.
[66] *Id*. (citing *Stolt-Nielsen*, 130 S. Ct. at 1768–69).
[67] *Id*.

Therefore, the arbitrator's reliance on Ohio law in determining that the RESOLVE program allows class arbitration does not stand in opposition to Supreme Court precedent.[68]

D. Dissent's Interpretation of Stolt-Nielsen

The dissent in *Jock* read *Stolt-Nielsen* as creating a bright-line test for determining whether an arbitrator can impose class arbitration on contracting parties; the arbitrator can impose class arbitration only where the arbitral clause expressly allows for this procedural measure.[69] The dissent refused to distinguish *Stolt-Nielsen* and rejected the arguments presented by the majority opinion for doing so.[70] The dissent expressly rejected the idea that *Stolt-Nielsen* supports the finding of implied agreements to arbitrate on a class-wide basis and argued that the FAA, not state law, presents the uniform national law governing the interpretation of arbitral agreements.[71] The dissent would create a bright-line rule whereby parties would have to explicitly state that class arbitration is allowed for recourse to the procedural device to be appropriate.[72]

IV. SIGNIFICANCE

Jock v. Sterling highlights a struggle between important ideals within the arbitration system. The Second Circuit was faced with a choice between confirming an arbitral award and enforcing an arbitral contract as written. The Supreme Court has stressed the ideals of freedom of contract and the enforcement of arbitral awards over the past half-century.[73] By overturning the district court's decision to vacate the arbitrator's interim award, the Second Circuit implicitly reiterated the ideal that enforcement of arbitral awards still serve as vital to maintaining the viability of arbitration. *Jock*'s ruling can thus serve as clear guidance for district courts struggling to understand the extent to which a court is to defer to an arbitrator's decision.

But while *Jock* may promote uniformity and efficiency within the judicial confirmation process, it may come at the cost of clarity regarding the more precise capability of arbitrators to mandate class arbitration. Both *AT&T Mobility LLC v. Concepcion* and *Stolt-Nielsen* seem to clearly establish the Supreme Court's opinion about class arbitration: the procedure fundamentally alters the nature of the arbitral adjudication and thus may be proper only when found as consistent with the contracting parties' intent when originally agreeing to submit disputes to "arbitration."[74] The Supreme Court's views on the matter thus seem incompatible with the Second Circuit's ruling in *Jock*, which may very well be read as an attempt to rationalize how the arbitrator could have found class proceedings consistent with the parties' intent as embodied in their arbitral clause. *Stolt-Nielson*'s holding is now cloudier in the Second Circuit, as district

---

[68] *Id*. at 127.

[69] *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 128 (2d Cir. 2011) (Winter, C.J., dissenting).

[70] *Id*.

[71] *Id*. at 130–31.

[72] *Id*. at 132–33.

[73] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (arguing arbitration is a matter of consent and agreements to arbitrate can be freely structured by parties); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (finding freedom of contract principles require parties to be clear in their intent to allow class arbitration); Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989) (ruling that freedom of contract principles dictate that parties should be allowed to structure arbitral agreements as they see fit).

[74] *AT&T Mobility*, 131 S. Ct. at 1750-52; *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

courts are left to consider the effect of any distinguishable fact when deciding upon a motion to vacate the arbitrators interim award that calls for class proceedings.

V. CONCLUSION

The Supreme Court has been relatively consistent within its series of arbitration decisions. The Court has articulated a doctrine that is friendly to arbitration, and cases have articulated bright-line rules that favor the recourse to arbitration, freedom to decide method of dispute resolution, and confirmation of awards. In recent years the Court has also articulated a doctrine that has been hostile to class action and class arbitration.[75] In both *AT&T Mobility* and *Stolt-Nielsen* the Court seemed to be resoundingly clear; the decision of whether class arbitration is proper is left to the court, this mechanism changes the arbitral process, and class arbitration is proper only where the intent to resort to this procedural mechanism can be clearly established from the arbitral clause.[76] Whether these decisions were rightly decided or not is still a matter of debate, but these decisions did seem to provide a level of clarity to a highly contentious area of arbitration law in the United States.

The Second Circuit in *Jock* may have done irreparable harm to this clarity. The court, by allowing intent to resort to class arbitration to be implicitly determined, may have opened up new questions within a seemingly settled area of arbitration law. Courts within the jurisdiction will now have to determine what type of language constitutes an implicit reference to class arbitration, how far the parties must go before the procedural mechanism will be allowed, and whether the courts or arbitrator will have the final word regarding whether class arbitration is appropriate in an individual matter. These questions can only be answered in a case-by-case manner, costing both the court system and individual litigants money. While the Second Circuit may justify this decision by citing a preference to the confirmation of arbitral awards, this doctrine was justified to promote cost-effectiveness and efficiency that the court may have eroded by implicitly overturning Supreme Court precedents that provided clarity to a complicated and highly-contentious issue.

[75] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[76] *See AT&T Mobility*, 131 S. Ct. at 1750–52; *Stolt-Nielsen*, 130 S. Ct. at 1775–76.