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Introduction to the *Arbitrator as Judge . . . And Judge of Jurisdiction* Symposium

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INTRODUCTION TO *THE ARBITRATOR AS JUDGE… AND JUDGE OF JURISDICTION* SYMPOSIUM

By
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In the first several years of its institutional existence, the Yearbook on Arbitration and Mediation has produced comprehensive annual accounts of arbitration law. This year's symposium exceeds even the lofty standards of prior compilations. In addition to the Dean's generous funding, the student editors did a magnificent job of preparation and organization. Their undertakings were undergirded by the willingness of outstanding scholars to contribute to the endeavor. The authors are acknowledged leaders in the field of arbitration. Their articles are of exceptional quality; as Justice Benjamin Cardozo might have said, they "betoken" a rigorous and perspicacious analysis of contemporary developments in U.S. arbitration law. The articles are well-crafted, of substantial depth, and elegant; they educate and elucidate. Each one of them testifies to professional excellence.

The symposium originated in a time of anxiety and indeterminacy in the U.S. law of arbitration. The authors did not benefit from the return to the familiarity of supportive doctrine supplied by *AT&T Mobility v. Concepcion*. Every article, to some degree and in some fashion, addresses the reasoning and holding in the recent rulings of the oracle of U.S. arbitration law, the U.S. Supreme Court. *Stolt-Nielsen v. AnimalFeeds* portended a reversal of judicial deference to arbitration and a return to a hostile supervisory posture on the basis of the integrity of law. A nineteenth century overhang seemed to be creeping into twenty-first century federal law. A Court that had recently, albeit unsuccessfully, invited lower courts to eliminate "manifest disregard" concluded that maritime arbitrators specifically authorized to rule by the parties and having conducted an extensive

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hearing on the matter, exceeded their powers by rendering an award that lacked any legal basis. The determination not only announced a *de facto* reversal of the plurality holding in *Bazzle*, but also suggested that judicial review and legally correct results were now the applicable standard in vacatur proceedings. The subsequent ruling in *Rent-A-Center v. Jackson* seemed to confirm the substantial shift in the judicial role in policing arbitral awards under U.S. law. There, the Court carved out a judicial function in assessing the contractual validity of a "Kaplan delegation" of jurisdictional authority to the arbitrators to decide jurisdiction by creating a would-be second separability doctrine. Parties had the right to expand the adjudicatory authority of arbitrators, but the investiture needed, at least upon occasion, to be validated by a court of law.

As Professor Park aptly points out, the ruling in *Stolt-Nielsen* substantially undermines arbitral finality, an essential feature of an effective and useful arbitral process. As every modern law of arbitration indicates, the functionality of arbitration is reduced or eliminated by greater judicial presence in, and authority over, the arbitral process. Either the arbitral revolution was being quashed by a counter-revolution initiated by arbitration's principal proponent or *Stolt-Nielsen* and *Rent-A-Center* were, like *Volt Information Sciences, Inc.*, a lapse, a momentary failure in the Court's sense of doctrinal direction. A great deal depended on the future course of the law, access to civil justice in the United States and the ability of international merchants to conduct global trade and commerce. It was as if arbitral autonomy and arbitrator sovereignty, propounded by *Kaplan*, *Howsam*, and *Bazzle*, had been discredited overnight and made subordinate to the dictates of substantive due process under law. It seemed as though the arbitration empire was in profound decline and collapsing. Judicially-acceptable results became the watchword of American arbitration law.

Some observers opined that the underlying motive for these atypical decisions resided with the Court's pro-business bias and its dislike of class litigation. The latter was a disguised tax on business activities and a block to

economic efficiency. Class action waivers in arbitration contracts rid the system of these untoward restrictions. Eradicating class action was a necessary conclusion, no matter the short-term impact on arbitration. The leftist commentary decried the Court's suppression of legal rights for the consumer and the immunity afforded to business interests. A group of well-known and exhaustively analyzed cases addressed the issue of class action in arbitration. *Bazzle* centered upon the permissibility of class action in arbitration under the governing arbitral clause, as did *Stolt-Nielsen* and, a bit later, *AT&T Mobilty*. In the two latter cases, the Court at least acknowledged the class action dimension of the litigation by stating that bilateral class action or litigation was radically different from multilateral class action in terms of time, money, organization, and complexity. In all of these cases, however, the Court's holding essentially ignored class action and focused upon the power to regulate the arbitral process. First, arbitrators could interpret the content of arbitral clauses and determine their meaning and content in the same way they could construe the main contract. Second, however, the power of interpretation did not allow arbitrators to find content that simply was not there. They could not interpret when the arbitral agreement was silent on a particular matter: silence was silence. It did not become a whisper. The gap or omission of language was deafening. Arbitrators could not reinvent the protocol for a transaction. Third, state courts applying a hospitable state statute on arbitration could not elaborate decisional rules (on class action waiver) that "discriminated" against arbitral contracts as contracts. The rules' exclusive application to arbitration agreements rendered them illegal, although the courts were evaluating the contracts on their own unique terms. Federal preemption applied. In effect, the application and reaffirmation of federal preemption principles was an indirect means of restraining the impact of class action on civil litigation.

As Professor Park notes further, the recent cases have divided the Court along an ideological fault line. Previously, only *Volt Information Sciences, Inc.*, among the forty-odd arbitration cases, had that impact upon the Court. Majorities

were generally neutral and somewhat larger, reflecting Court agreement on the utility and necessity of arbitration in the American legal process. Dissents were isolated and circumstantial, limited to addressing a particular juridical issue or interest. The Court's practice on arbitration had been forged over a half century and the essential percepts were firmly molded into law: privatization, contract freedom, federalization, wide arbitrability, and very extensive judicial deference. Politics and ideological convictions were largely absent from the discussions, reasoning, and the rulings. Indeed, it would be difficult to see Justice Breyer or Ginsburg, and former Justices Souter or Stevens as enemies of arbitration, despite their liberal leanings. At this stage, newly-appointed Justices Sotomayor and Kagan have not directly addressed the issue of arbitration.

The Court, however, grouped ideologically on the vexed question of class arbitration and class action waivers. The enforcement of suspect adhesive arbitration agreements is the most controversial question in modern American arbitration law. As Professors Schmitz and Stipanowich point out, it has brought another player, the U.S. Congress, to the decision-making stage on arbitration. Although its current appearance there seems more powerful and forceful (at least prior to the last mid-term elections), the Congress has voiced its opposition to the work of the Court on arbitration for some two decades. It was always a minority expression. It generally took the form of the Civil Right Protection Procedures Act. The effort to debase arbitration is rooted in a rights protection argument and now is described as the Fairness in Arbitration Act. The bill is an ideological 'shotgun" blast intended to decimate arbitration in disparate-party situations and corporate America's use of it in those circumstances. It proposes a radical reconstruction of arbitration's role in American society and reaffirms the hackneyed belief in the would-be protective virtues of adversarial litigation before courts. In the end, it is a misguided endeavor that denies American consumers and employees the benefit of economical, expert, and enforceable adjudication.

Be that as it may, the Court retains its status as the primary provider of

content to the U.S. law of arbitration. It is unfortunate that the Court divided ideologically and could not surmount the differences in political allegiance. The law and society desperately need an example of a dialogue that can be productive and yield results for the larger public interest. The ideological encampment on the issue of class action waivers is unbending, partisan, and counterproductive. It allows both sides to be irresponsible and puerile, to sit on their respective stoops, hurl insults at each other, and describe their opponents as hateful and corrupt. It is a practice that has devastated Middle Eastern politics. As Professor Larson pointedly states, arbitration is, in the final analysis, here to stay. Budget shortfalls are so significant at both the state and federal levels that maintaining the present court system will itself be a very difficult challenge. Authorizing new courts to handle the volume of litigation is literally inconceivable. Therefore, rather than throwing insults or emasculating arbitration by poisonous legislative proposals, the goal should be to preserve the availability and effectiveness of arbitration while being vigilant about its procedural and contractual fairness. The authors of the symposium have done us the great service of preparing the necessary groundwork for this grand enterprise of reaching a workable solution.