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THE END OF ARBITRATION AS WE KNOW IT? ARBITRATION UNDER ATTACK

By
David Allen Larson*

I. INTRODUCTION

During the past few years arbitration has been under attack. Recent judicial decisions, newly enacted and proposed legislation, and populist sentiments are important and obviously can result in significant changes. But many of the criticisms leveled at arbitration can be addressed and, most significantly, there are practical and inescapable realities that will ensure arbitration's survival.

Arbitration's viability as a popular and effective dispute resolution process will continue as a result of powerful economic, cultural, and social developments. The increasing and worrisome inability of state governments to adequately fund the judiciary, combined with the fact that, as a society, we continue to integrate technology into every aspect of our lives, guarantees that arbitration will remain the dispute resolution process of choice in many circumstances. But we must keep in mind that as we move forward, practices and procedures that we take for granted today may no longer be available.

This article will explain how state governments' budget challenges and society's increasing migration to technology will strengthen arbitration's status as a convenient and effective dispute resolution process. The article will identify and discuss the most noteworthy attacks on arbitration and explain why these attacks will not be fatal. Finally, recent United States Supreme Court cases *Rent-A-Center, West, Inc. v. Jackson*¹ and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,²

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and pending United States Supreme Court case *AT&T Mobility v. Concepcion*,³ will be summarized and the impact of those cases on the future of arbitration will be discussed.

II. STATE GOVERNMENTS CANNOT ADEQUATELY FUND THE JUDICIARY

State governments around the country are experiencing unprecedented budget deficits and the situation may get worse before it gets better. In states where the median age of the population is rising, the situation in the author's state of Minnesota for example, an increasing number of residents will pay income tax at a lower rate when they retire than they are paying today and state revenues will decline as a result.⁴

California far and away is the state leader in terms of the largest dollar deficit with a stunning predicted budget deficit of \$24.5 billion.⁵ Other states with smaller overall budgets are similarly challenged. Illinois has a predicted \$15 billion deficit⁶ and Pennsylvania, our location for this well-planned and timely symposium, has a predicted deficit of \$4 billion.⁷ Minnesota originally had a

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¹ 130 S. Ct. 2772 (2010).

² 130 S. Ct. 1758 (2010).

³ No. 09-893 (U.S. argued Nov. 9, 2010). Docketed 09-893 (May 24, 2010).

⁴ Eric J. Magnuson, *The State of the Judiciary*, 67 no. 7 BENCH & BAR OF MINNESOTA 20, 23 (Aug. 2010).

⁵ California Officer of Legislative Analysis, *The 2011-2012 Budget: California's Fiscal Outlook* (2010), available at http://www.lao.ca.gov/reports/2010/bud/fiscal_outlook/fiscal_outlook_2010.aspx#chap1.

⁶ *Illinois Lawmakers Propose 75 Percent Income Tax Hike*, CBS Chicago, Jan. 6, 2011, <http://chicago.cbslocal.com/2011/01/06/tax-increase-plan-bigger-than-expected/> (last visited Apr. 10, 2011).

⁷ Brad Bumsed, *Pennsylvania's \$4 billion deficit not as high as other states*, PITTSBURGH TRIBUNE-REVIEW, Jan. 8, 2011, available at http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_717237.html.

projected deficit of \$6.2 billion⁸ but subsequently discovered that the projected deficit is “only” \$5 billion.⁹

So the desperate question that predictably will cause increased hand wringing is “what to do, what to do?” Given the dire circumstances, some are advocating across the board cuts in spending. On March 27, 2011 Minnesota Public Radio (MPR News) in cooperation with the Citizens League initiated an ongoing, online discussion that asks Minnesota residents to indicate whether they would support across the board spending cuts.¹⁰ Initiating the conversation, the MPR News online video cites a Wilder Foundation survey that reported that thirty percent of the Minnesota residents surveyed would support across the board cuts so long as the cuts were short term.¹¹

Anyone who pays attention to the media knows that many state legislators are determined to implement substantial cuts in spending. The Republican Party now controls both Houses in the Minnesota legislature, for example. On Feb. 10, 2011, new Democratic Gov. Mark Dayton vetoed a Republican-drafted budget proposal that cut \$824 million from the next 2-year budget and also cut an additional \$100 million from the current budget ending June 2011.¹²

In order to understand what cuts of this magnitude would mean for the court system one needs to know what it costs to operate the judicial branch. In Minnesota, the judiciary’s budget is allocated in the following manner:

⁸ MINN. OFFICE OF MGMT. & BUDGET, ECONOMIC FORECAST (Nov. 2010), *available at* <http://www.mmb.state.mn.us/doc/fu/10/summary-nov10.pdf>; Memorandum from Steve Sviggum, Comm’r of Minn. Mgmt. & Budget to the Legislative Reference Library, Chief Clerk of the House of Representatives, and Sec’y of the Senate (Dec. 2, 2010), *available at* <http://www.mmb.state.mn.us/doc/bonds/debt-cap/forecast-nov-10.pdf>.

⁹ MINN. OFFICE OF MGMT. & BUDGET, ECONOMIC FORECAST (Feb. 2011), *available at* <http://www.mmb.state.mn.us/doc/fu/11/summary-feb11.pdf>.

¹⁰ MPR News, March 27, 2011 <http://minnesota.publicradio.org/collections/special/columns/statewide/archive/rundown/>.

¹¹ *Id.* (found at 1:20 of the 1:42 video). Wilder Foundation report that thirty percent support across the board cuts.

¹² Mike Kaszuba, *Fight Is On As Dayton Vetoes GOP Cuts*, STARTRIBUNE, Feb. 11, 2011, <http://www.startribune.com/politics/local/115809399.html>.

- District Courts- \$247,384,000
- Supreme Court/State Court Administration- \$42,997,000
- Court of Appeals- \$10,178,000
- Total - \$300,559,000¹³

Even before the specter of across the board cuts raised its unsettling head, jurists were sounding the alarm that judicial standards could not be maintained at current funding levels. After just 2 years on the bench, Minnesota Supreme Court Chief Justice Eric Magnuson left the bench in June 2010. Chief Justice Magnuson had complained frequently and publicly that the court system was underfunded and facing a crisis. One month before resigning he declared he was "disappointed" that then Governor Tim Pawlenty proposed a cut to judicial budgets "at a time when our base budgets are already insufficient."¹⁴

On June 24, 2010, in his last speech to the Minnesota State Bar Association in the role of Chief Justice, Magnuson explained that the Minnesota Judicial branch had over 250 staff vacancies and twenty-four fewer judges than needed.¹⁵ As a result, for many cases the time required to finally bring the case to trial had doubled.¹⁶ It was taking more than a year to bring one out of every four serious felonies to trial; conciliation court cases required six to eight months before there was a hearing; and public services, staff hours and wages were being cut.¹⁷

State budgets are in turmoil and legislators must make significant cuts. Underfunded court systems that already were carefully rationing resources will have to find additional ways to reduce expenditures, which probably will require a further reduction in services. As a result and as a simple, practical matter, the

¹³ Minnesota Judicial Branch, *Fast Facts about the Judicial Branch*, <http://www.mncourts.gov/?page=432>.

¹⁴ Rachel E. Stassen-Berger, *Magnuson Steps Down As State's Chief Justice*, STARTRIBUNE, Mar. 11, 2010, <http://www.startribune.com/politics/87368147.html?source=error>.

¹⁵ Magnuson, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.*

Judiciary needs healthy arbitral institutions and smoothly functioning arbitral processes.

Because justice delayed is justice denied, due process demands that disputes be addressed as quickly and efficiently as possible, a task that becomes more challenging for court systems with every budget cut. The goal is not merely aspirational. State constitutions impose critical obligations on state court systems.¹⁸

Arbitration currently is, and increasingly will be, valued (and protected) as a way to mitigate pressures on the judiciary. At the risk of sounding too cynical, the author believes that judges will hesitate to write opinions that limit the enforceability of arbitration clauses or limit arbitrators' authority at the outset of a dispute. Judges will be strongly motivated to defer to arbitration when asked to stay arbitral proceedings because judges simply cannot afford to make an increasingly unmanageable situation even worse.

You may not be convinced, or not sufficiently cynical to believe, that financial exigencies will force judges to formulate and embrace a pro-arbitration jurisprudence that not only protects, but may exceed, the current deferential approach to arbitration. But budget challenges will require adaptations that will affirm, and perhaps strengthen, the role arbitration plays in the administration of justice, independent of the jurisprudential approaches that judges craft. As budgets continue to be cut, governors will be in no hurry to make judicial appointments and it is likely that judgeships may remain vacant for unprecedented amounts of time. And even though populations may increase, it may be difficult to persuade legislators to increase the number of judges accordingly.

As a result, courts may try (and may need) to integrate arbitration more formally and more closely into the judicial process. If there are not enough judges to handle all the demands on their time, then one solution would be to free judges

¹⁸ *Id.* (citing the words of former Minnesota Chief Justice Eric Magnuson, “[t]he first substantive provision of our constitution states the object of government is to provide for the ‘security, benefit and protection of the people.’ Government achieves this directive by making laws and enforcing them through its justice system. To fulfill this basic mandate, government must have a fully functioning justice system”).

from the more mundane of their responsibilities and allow them to concentrate on complex tasks. Rather than contemplating only the traditional option of essentially displacing the court system with arbitration, the time may have come for state court systems to consider increased reliance on arbitrators to handle discovery issues and preliminary motions. But even if this does not happen, arbitration will be protected and likely will increase.

III. TECHNOLOGY FACILITATED ARBITRATION – BARTIES WILL EXPECT/DEMAND IT

The author has been writing and speaking about technology mediated dispute resolution (TMDR) for the past decade and is convinced that dispute resolution processes increasingly will rely on technology.¹⁹ TMDR includes Online Dispute Resolution (ODR), but adds cellular telephones, satellite communications, tele-immersion, video conferencing, avatars and virtual personalities, and artificial intelligence software and devices (including robots). Technology is advancing and being embraced at, well, warp speed.²⁰ For instance, the average thirteen to seventeen year old teenager sends 3,339 text messages per month (more than 100 per day) and billions of tweets are sent per month.²¹

¹⁹ See David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO ST. J. ON DISP. RESOL. 105,105-07 (2010); David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629, 633-34 (2006); David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 U. TOL. L. REV. 213, 214 (2006); see generally, David Allen Larsen, *Online Dispute Resolution: Do You Know Where Your Children Are?*, 19 Negotiation J. 199 (2003).

²⁰ “Warp speed” is a term developed in science fiction to describe the way that space-time warps can be used to allow faster-than-light travel, MERRIAM-WEBSTER ONLINE, available at <http://www.merriam-webster.com/dictionary/warp%20speed>. It is, to put it simply, extraordinarily fast.

²¹ Katherine Rosman, *Y U Love Texts, H8 Calls*, WALL ST. J.,(Oct. 14, 2010), available at <http://online.wsj.com/article/SB10001424052748703673604575550201949192336.html?KEYWORDS=y+u+love+texts>.

We are in the midst of a Technology Revolution, the most significant cultural and social change since the industrial revolution. We are experiencing fundamental changes in the ways in which we communicate and interact through our reliance, and increasing dependence, on the Internet, digital technology and Web 2.0 (user created content). In our children we are witnessing a generation being raised on technology, learning to utilize technology intuitively (as digital natives) as opposed to the way that I, and probably you, understand technology (as digital immigrants). For many of us, traditional separations between work/personal time and physical/virtual reality are being eviscerated.

Generation Y is just one of the many terms used to describe young adults who also have been labeled “The Boomerang Generation” because of their inclination to move back in with their parents after living independently.²² Also known as Millennials, these individuals are the children of post WWII Baby Boomers with birth dates ranging somewhere from the late 1970s to the early 2000s.²³ Millennials embrace multiple forms of expression, three quarters have a profile on a social networking site, one in five have posted a video of themselves online, and many Millennials say their use of social media is what distinguishes their generation.²⁴ Text messaging is a preferred medium of communication (1.5 trillion text messages were sent in 2009,²⁵ which is two years ago and a veritable lifetime when it comes to technology) and one-third of online 18-29 year olds post or read status updates.²⁶

²² Deborah Rothberg, *Generation Y for Dummies*, eWeek.com (August 24, 2006) available at <http://www.eweek.com/c/a/IT-Management/Generation-Y-for-Dummies/>.

²³ Millennials (millennial generation), <http://whatis.techtarget.com/definition/millennials.html>.

²⁴ PEW RESEARCH CENTER, *Millennials a Portrait of the Generation Next* (2010), available at <http://pewsocialtrends.org/assets/pdf/millennials-confident-connected-open-to-change.pdf>.

²⁵ CTIA, *The Wireless Association Announces Semi-Annual Wireless Industry Survey Results* (2010), available at <http://www.ctia.org/media/press/body.cfm/prid/1936>.

²⁶ Amanda Lenhart, et al., *Social Media and Young Adults*, PEWINTERNET, Feb. 3, 2010, available at <http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx?r=1>.

This generation soon will enter adulthood. They not only will expect, they will demand, that the problem solvers and dispute resolvers they employ will be comfortable and capable with the technologies that they use on a daily, and hourly, basis. Fortunately, arbitration is well suited to technology facilitated communications. And with its streamlined procedures and flexibility, it certainly is better suited to TMDR than litigation.

Long time arbitrators, of course, have relied on technology for decades. Arbitrators have used the telephone and fax machine for many years, for instance, and have more recently added e-mail and perhaps video. “Document only” arbitrations have been available for decades and are essentially identical to the text based arbitrations that can take place online.²⁷ And even if a digital immigrant feels that he or she cannot function effectively as an arbitrator or as an advocate without physical (as opposed to virtual) face-to-face interaction, digital natives will not feel the same constraints.

Although it is beyond the scope of this article, it is worth noting that as we increase our understanding of the power and potential of artificial intelligence, we will be able to integrate artificial intelligence into our arbitral processes in ways that will lower the cost of arbitration while at the same time improving outcomes.²⁸

As arbitration integrates technology into its processes, we need to be attentive to potential dangers and new issues. Will technology mediated arbitration be so similar to traditional arbitration that we can rely on the same rules, or do we need to draft new rules? Should reviewability standards for technology facilitated arbitration, for example, be the same as the rules for traditional, off-line

²⁷ The author has served as the arbitrator in more than sixty document only arbitrations and perceives little difference between a document only arbitration and an arbitration that takes place online. In fact, because physical documents do not need to be exchanged, the online arbitration likely will proceed much more quickly. And if the parties decide they want to interact face to face, that interaction can be arranged much more quickly and inexpensively by using video rather than by making travel arrangements to a common destination.

²⁸ See David Allen Larson, “*Brother Can You Spare a Dime?*” *Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes*, 11 Nev. L.J. 523 (2011).

arbitration? More specifically, are we comfortable relying on the same limited scope of review that is available under the Federal Arbitration Act,²⁹ for instance, or do we need new standards of review that take into account the dangers inherent in technology? Will hardware and software discrepancies among the parties, or power imbalances due to familiarity with technology, mean that the scope of judicial review will have to expand? We may need to expand the scope of our award review and focus not only on the arbitrator's conduct, but the characteristics of the technology chosen and the way that technology is employed.

Anyone who has seen teenagers texting each other when they are on the opposite side of the same room understands that Millennials are not only comfortable with, but may prefer, technology facilitated communication. They will guarantee that increasing levels of technology will be integrated into our dispute resolution processes.

Arbitration can and will work with technology, but we must keep in mind that platform design matters. Technology Mediated Dispute Resolution will experience significant growth when TMDR service providers and neutrals follow rather than lead. When technology mediated arbitration platforms and formats are designed to track technology users' day to day practices and patterns, then technology facilitated arbitration will expand exponentially and arbitration's place in the world of dispute resolution processes will be enhanced.

²⁹ See Federal Arbitration Act, 9 U.S.C. §10 (2009). stating that an arbitral award may be vacated:

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

IV. ARBITRATION IS UNDER ATTACK

This section is not intended to be an exhaustive presentation of all the attacks that have been directed at arbitration, but rather is intended to illustrate the types of challenges being leveled, and the actions being taken, to limit arbitration. Arbitration has experienced increasing criticism in recent years and it would be disingenuous, and in fact dishonest, to maintain that all of the criticism is unwarranted. Courts, legislatures, and commentators have been specific about the arbitral procedures and practices that they believe must be reformed.

The attacks, however, will not prove fatal. Facing charges of unenforceability and unconscionably, companies are beginning to revise their arbitration agreements in order to make those agreements much more consumer friendly and, thus, ensure enforceability.³⁰ Combine this fact with the reality that court systems increasingly must rely on dispute resolution processes, along with the fact that arbitration is well-suited to technology facilitated communication, and the unavoidable conclusion is that arbitration will survive.

Much of the criticism regarding arbitration has been leveled at predispute mandatory arbitration provisions. Legislative efforts to limit predispute arbitration, for instance, include the Dodd-Frank Wall Street Reform and Consumer Protection Act,³¹ which provides a mandate for the new Bureau of Consumer Financial Protection to study and report to Congress regarding the use of mandatory predispute arbitration in consumer financial services.³² Based on its findings, the

³⁰ *See, e.g.*, The revised, more consumer friendly language in the arbitration agreement that is at issue in *AT&T Mobility v. Concepcion*, 131 S. Ct. 45 (U.S. 2010).

³¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010) (hereinafter 'Dodd-Frank Wall Street Reform Act'), 111th Cong. (2010).

³² *Id.* § 1028 (codified at 12 U.S.C.A. § 5518) ((a) STUDY AND REPORT.—The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and

Bureau has rulemaking authority to "prohibit or impose conditions or limitations on the use of" mandatory arbitration clauses."³³ This legislation also grants the Securities Exchange Commission substantial authority to regulate the use of arbitration to resolve securities disputes.³⁴ Mandatory arbitration is prohibited for securities fraud³⁵ and commodities fraud³⁶ whistleblowers. And mandatory arbitration cannot be required for mortgage and home equity loans.³⁷

Broad limiting provisions of the proposed Arbitration Fairness Act,³⁸ which at the time of this article still has not been enacted (and which frankly appears to have lost some of its initial momentum)³⁹ is a blatantly heated response to, and rejection of, predispute mandatory arbitration clauses. The presence of these clauses in consumer credit contracts, franchise agreements and employment contracts are the focus of this proposed legislation. The legislation asserts that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights."⁴⁰ The proposed legislation, which is short and to the point, declares in Section 2 that:

consumers in connection with the offering or providing of consumer financial products or services).

³³ *Id.* (b) FURTHER AUTHORITY.—The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a)).

³⁴ *Id.* § 921 (codified at 15 U.S.C.A. § 78o & § 80b-5).

³⁵ *Id.* § 922.

³⁶ Dodd-Frank Wall Street Reform Act § 748.

³⁷ *Id.* § 1414.

³⁸ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (hereinafter 'Arbitration Fairness Act of 2009').

³⁹ See *supra* note 3 and accompanying text (the author suspects that any momentum that has been lost regarding the Arbitration Fairness Act may be recaptured after the Supreme Court issues its decision in *AT&T Mobility v. Concepcion*).

⁴⁰ See Arbitration Fairness Act of 2009 § 4.

Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.⁴¹

At the time of this article, it appears that the proposed Arbitration Fairness Act has stalled and will not be enacted any time soon.⁴² Predispute mandatory arbitration clauses continue to be challenged as unenforceable, however, based on state contract law. Nonetheless, in the absence of sweeping prohibitive legislation, predispute arbitration agreements are not going to disappear. Arbitration agreements will not be held *per se* unenforceable on state common law grounds when those agreements are revised to be much more consumer/employee friendly in terms of costs, venue, timeliness and damages.

As the voices criticizing arbitration appear to get stronger, or at least louder, we learned on Jan. 20, 2011, that a historically stalwart proponent of deferral to arbitration, the National Labor Relations Board, may be changing course. Thus it may be appropriate to ask, “et tu NLRB?” In a recent Memorandum the Board’s General Counsel announced that:

[T]he Board’s current post-arbitral deferral policy is distinctly at odds with that which prevails in other areas of

⁴¹ See *id.* § 2 (one reasonably can assume that the drafters believe that arbitrators are ignoring the law and their own rules).

⁴² Deficit reduction concerns appear to the primary, and sometimes even the sole, focus of the national and state legislatures to the exclusion of other issues. *But see* the final sentence of this article before the Conclusion section, suggesting that the Supreme Court’s forthcoming decision in *AT&T Mobility v. Concepcion* may breathe new life into H.R. 1020, the Arbitration Fairness Act of 2009, Rep. Johnson, Henry Hank (introduced Feb 12, 2009), *infra* at pg. 36.

employment law. ...[it is] the Board's obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award, rather than providing an even lower standard of protection of statutory rights, as does the current deferral framework."⁴³
(emphasis added)

The General Counsel adds that:

[T]he party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) and the arbitrator correctly enunciated the applicable statutory principles, and applied them in deciding the issue.⁴⁴
(emphasis added)

The General Counsel concludes by stating that if the party urging deferral can satisfy this standard, then the Board should defer unless the award is "clearly repugnant."⁴⁵ An award is clearly repugnant if it reaches a result that is "palpably wrong."⁴⁶ Now required to explain a growing list of terms of art, the General Counsel adds that an arbitrator's award is palpably wrong if it "is not susceptible to an interpretation consistent with the Act."⁴⁷

⁴³ Acting General Counsel, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)1 and (3) cases to All Regional Directors, Officers-in-Charge, and Resident Officers of National Labor Relations Board (NLRB) General Counsel Memorandum GC 11-05 (Jan 20, 2011) *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d458043b761>.

⁴⁴ *Id.* at 6-7.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

Although labor arbitration is not subject to the Federal Arbitration Act, but instead falls under the jurisdiction of Section 301 of the Labor Management and Reporting Act of 1947,⁴⁸ the General Counsel's proposed change in enforcement policy is noteworthy. Anyone familiar with labor law is well acquainted with three Supreme Court cases decided in the 1960s commonly referred to as the Steelworkers Trilogy.⁴⁹ Those three cases implicitly acknowledge that disputes arising out of collective bargaining agreements number in the thousands every year and that our justice system depends upon experienced labor arbitrators to resolve those disputes. Arbitral awards were declared enforceable so long as an award "draws its essence from the collective bargaining agreement."⁵⁰ The Court declared in *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.* that:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.⁵¹

Back in the midst of the Great Depression when Congress was drafting the Wagner Act,⁵² the legislation that later became the National Labor Relations Act, Congress understood that if parties are allowed to control their own dispute resolution process it is more likely that parties will own, respect and honor the result of that process. In fact, the National Labor Relations Act states in no uncertain terms:

⁴⁸ Labor Management Relations Act (LMRA), 29 U.S.C. Sections 141-197 (enacted Jun 23, 1947).

⁴⁹ *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Ent. Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁵⁰ *Enter. Wheel & Car Corp.*, 363 U.S. at 597.

⁵¹ *Id.* at 599.

⁵² 49 Stat. 449 (1935).

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.⁵³ (emphasis added)

If parties are going to be allowed to own their disputes, then by definition judicial review must be limited. The parties will have to take responsibility for the process and results. The expectation is that parties will respect the arbitral awards generated by a dispute process they chose and designed and will not resort instead to actions that will lead to “industrial strife and unrest.” Once courts and administrative agencies expand their review and control of those awards, however, the sense that this result was “ours and we own it” begins to disappear.

The fact that the General Counsel is recommending that the National Relations Board expand its review of arbitral decisions suggests that the trust once accorded labor arbitrators is waning. The historically paramount goal of ensuring industrial peace by assuming a “hands off” approach to privately negotiated, collectively bargained, labor arbitration processes is being compromised by a new focus on both the conduct and competence of the arbitrators and the integrity of the arbitration process itself. But given the current climate the General Counsel may have concluded that it had little choice but to increase the degree of scrutiny

⁵³ 29 U.S.C. § 151 (2010).

arbitral awards receive, consistent with a general trend to increase scope of review on the “back end,” after the award has issued.

Finally, commentators have been battling back and forth regarding the merits of arbitration. Those familiar with the debate are well aware of the highly critical reports published by the nonprofit organization Public Citizen. Claiming “stunning” results that disadvantage consumers, biased decisionmakers, suspiciously secret proceedings, and a lack of due process protections,⁵⁴ Public Citizen’s attacks on the use of predispute binding arbitration in the credit card industry have been instrumental in exposing questionable and unfair practices in that industry. Other commentators asserted, however, that many of Public Citizen’s claims were exaggerated and that a closer look reveals that consumers were not nearly as disadvantaged as Public Citizen claimed.⁵⁵ Thus began an exchange among commentators challenging each other’s data and conclusions.⁵⁶

The Searle Civil Justice Institute Task Force on Consumer Arbitration then conducted a broad-based study of consumer arbitrations administered by the American Arbitration Association (AAA).⁵⁷ Described as an empirically based study, the 139 page (as published) Searle Report suggests that consumers do not fare nearly as badly in AAA’s arbitrations as many have claimed.⁵⁸ The Searle report concludes that much empirical work needs to be done, however, and that

⁵⁴ Public Citizen, *How the Credit Card Companies Ensnare Consumers*, p. 2 (Sept. 2007), <http://www.citizen.org/publications/publicationredirect.cfm?ID=7545>.

⁵⁵ See Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen*, Chamber of Commerce Institute for Legal Reform (2008), http://www.instituteforlegalreform.com/get_ilr_doc.php?docId=1091.

⁵⁶ Compare, e.g., Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (July 2008), <http://www.citizen.org/publications/publicationredirect.cfm?ID=7589>, with Sarah Rudolph Cole and Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 Disp. Resol. Magazine 1 (Fall 2008).

⁵⁷ Consumer Arbitration Task Force Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association*, Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law (March 2009).

⁵⁸ *Id.* at 111–112.

any conclusions that can be drawn from its research are limited.⁵⁹ Assuming the correctness of the Searle Institute's assertion that additional empirical work is essential, one can conclude that while commentators' articles may continue to inflame passions, those articles will not immediately determine the future of arbitration.

V. SUPREME COURT CASES

A. *Rent-A-Center West, Inc. v. Jackson*

In *Rent-A-Center West, Inc. v. Jackson*,⁶⁰ the plaintiff Jackson filed an employment discrimination suit in Nevada federal court against his former employer Rent-A-Center. Four years before filing this lawsuit, Jackson had signed a "Mutual Agreement to Arbitrate Claims" as a condition of employment.⁶¹ The "Claims Covered by Agreement" section provides for arbitration of all "past, present or future" disputes arising out of employment with Rent-A-Center.⁶² The "Arbitration Procedures" section adds that "the Arbitrator...shall have exclusive authority to resolve any dispute relating to the...enforceability...of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable."⁶³ At first glance it might appear that this provision is unambiguous and straightforward. The issue in this case, however, was whether the second provision, identified as the "delegation provision," is unenforceable because it is unconscionable.⁶⁴

In an opinion that references many of the seminal Supreme Court decisions regarding arbitration, the Court first notes that because arbitration is "a

⁵⁹ *Id.* at 113.

⁶⁰ *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

⁶¹ *Id.* at 2775.

⁶² *Id.* at 2777.

⁶³ *Id.*

⁶⁴ *Id.*

matter of contract,” parties can agree to arbitrate “arbitrability” questions.⁶⁵ Agreements to arbitrate “gateway” issues (such as the question of whether an arbitration agreement covers a specific issue) are merely additional, enforceable, antecedent arbitration agreements.⁶⁶ When parties clearly and unmistakably agree that arbitrators should decide whether parties have entered into a valid contract, courts should enforce that agreement.⁶⁷ Thus in *Rent-A-Center*, the Court embraces the position that when the enforceability of an arbitration agreement is in issue, the consent of the parties is the key consideration and we must respect the freedom of contract principle.

So what is the result when this analytical approach is applied to the *Rent-A-Center* facts? More precisely, who should decide whether the *Rent-A-Center* agreement was unconscionable, the arbitrator or a court? At present there are two possible kinds of arbitration agreement enforceability challenges: one specifically challenges the enforceability of the arbitration agreement and the other challenges the contract in its entirety.⁶⁸ Because Section 2 of the Federal Arbitration Act states that an arbitration provision is enforceable without reference to the validity of the contract in which it is contained,⁶⁹ a challenge to a contract in its entirety does not prevent enforcement of the specific agreement to arbitrate.⁷⁰

The fact that the agreements to arbitrate are severable, however, does not mean they cannot be challenged. If a party specifically challenges the agreement to

⁶⁵ *Rent-A-Center W.*, 130 S. Ct. at 2777 (referencing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *First Options of Chi. v. Kaplan*, 514 U.S. 938 (1995)).

⁶⁶ *Rent-A-Ctr, W.*, 130 S. Ct. at 2777-78.

⁶⁷ *Id.* at 2778 (citing *First Options of Chi.*, 514 U.S. at 938; *AT&T Tech., Inc. v. Commc’n Workers of Am.*, 475 U.S. 643 (1986)).

⁶⁸ *Id.* (citing *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006)).

⁶⁹ 9 U.S.C. § 2 (2008) (providing that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

⁷⁰ *Rent-A-Center, W.*, 130 S. Ct. at 2778.

arbitrate, then a federal court must consider that challenge.⁷¹ Because arbitration is a matter of consent, a court must first decide if parties agreed to arbitration. But if the challenge goes to the entire contract within which the arbitration agreement is contained, then the arbitrator resolves the issue.

The Court's analysis to this point was not new and had been clearly articulated in earlier cases. So why was it necessary for the Court to address the issue in *Rent-A-Center*? The agreement to arbitrate employment disputes was the only contract in *Rent-A-Center*, the arbitration agreement was not the subsection of a larger contract. The Court of Appeals for the Ninth Circuit had concluded that because the agreement to arbitrate was the *only* contract, then a challenge to that contract is a challenge to the arbitration provision itself.⁷²

The United States Supreme Court was unwilling to accept this modestly expansive interpretation of its prior holdings. The Court insisted that its rule had to be applied strictly and literally. Only when a party challenges the "precise agreement to arbitrate," must a court consider that challenge before ordering arbitration.⁷³ The rule does not depend upon the type of contract in issue. The fact that the only contract in *Rent-A-Center* was actually an arbitration agreement makes no difference. An agreement to arbitrate enforceability disputes is severable from an overlying agreement to arbitrate discrimination disputes and the agreement to arbitrate enforceability disputes must be challenged individually and specifically.

Jackson asserted that because the entire contract was unconscionable, the provision delegating decisional power to the arbitrator was meaningless. But because Jackson argued the entire contract was unconscionable, the arbitrator decides the issue. Justice Stevens's dissent, which was joined by three other Justices⁷⁴ and which criticizes the majority opinion on several different points,

⁷¹ *Id.*

⁷² Jackson v. Rent-A-Ctr W., Inc., 581 F.3d 912, 918-919 (2009).

⁷³ *Rent-A-Center, W.*, 130 S. Ct. at 2778.

⁷⁴ Justices Ginsburg, Breyer and Sotomayor.

echoes the words of the Ninth Circuit in one important respect. According to Stevens, the subject matter of this contract was exclusively arbitration and any challenge to the contract itself is necessarily a challenge to the arbitration agreement.⁷⁵ In other words, “[t]hey are one and the same.”⁷⁶

1. *Rent-A-Center* – Deference on the Front End

Although the Supreme Court’s decision in *Hall Street Associates v. Mattel*⁷⁷ subsequently has led to inconsistent interpretations in the United States Court of Appeals,⁷⁸ at least initially it appeared the Court had established a clear rule that Federal Arbitration Act “§§10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”⁷⁹

If judicial review is severely limited, then the issue of which questions the arbitrator decides becomes critical. There will not be a second look. *Rent-A-Center* champions freedom of contract when it confirms that parties can direct arbitrability questions to the arbitrator and away from the judicial system. The Court announced what appears to be a literal test. Challenge the enforceability of a contract that contains an arbitration delegation clause, and the arbitrator will resolve that question. Challenge the enforceability of the delegation provision itself and the court decides.

But if the goal is to protect freedom of contract, one has to ask – in *Rent-A-Center* was the Court protecting a contract that truly was freely negotiated? Should we “bend over backwards” and meticulously distinguish, separate and protect delegation provisions in all contracts, even adhesion contracts? Did Jackson actually intend to reserve this question for the arbitrator? And do we want as many cases as possible to go to arbitration?

⁷⁵ *Rent-A-Center, W.*, 130 S. Ct. at 2786-2787 (Stevens, J., dissenting).

⁷⁶ *Id.* at 2787 (Stevens, J., dissenting).

⁷⁷ *Hall Street Assocs. v. Mattel*, 552 U.S. 576 (2008).

⁷⁸ A split of authority has developed in the United States Courts of Appeal.

⁷⁹ *Hall Street Assocs.*, 552 U.S. at 577.

A strong argument can be made that the Supreme Court's arbitration jurisprudence is becoming less principled and more result oriented. The Supreme Court wants cases to be decided by arbitrators. At the beginning of a dispute, when determining who makes initial decisions, the Court appears determined to give arbitrators substantial authority. It is not unreasonable to suggest that in "budget challenged" times the Court has little choice. Appellate and trial court judges alike are going to be very deferential towards arbitration on the front end; that being, when determining whether judges or arbitrators get the first bite at the apple.

The question then becomes what happens when an arbitral award is issued? Will the Court be as deferential when it comes to judicial review?

B. Stolt-Nielsen S.A. v. AnimalFeeds International Corp

*Stolt-Nielsen S.A. v. AnimalFeeds International Corp*⁸⁰ (*Stolt-Nielsen*) arose out of a situation in which AnimalFeeds International Corp. was shipping goods using a standard contract (commonly called a Charter Party) that included an arbitration clause.⁸¹ The clause contained the following language:

Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment

⁸⁰ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

⁸¹ *Id.* at 1764-65.

of the Court shall be entered upon any award made by said arbitrator.⁸²

A Department of Justice investigation revealed an illegal price-fixing conspiracy that led to a class action lawsuit and the parties agreed they must arbitrate.⁸³ The parties then agreed to let arbitrators decide whether the arbitration agreement permits class arbitration, stipulating that the agreement was “silent” with regard to class arbitration.⁸⁴

The parties agreed to submit the class arbitration question to three arbitrators who were to “follow and be bound by Rules 3 through 7 of the American Arbitration Association’s Supplementary Rules for Class Arbitrations.”⁸⁵ Rule 3 directs the arbitrators to decide whether the arbitration clause permits class arbitration.⁸⁶ Based on a) post *Green Tree Financial Corp. v. Bazzle*⁸⁷ arbitral awards permitting class arbitration (but not mentioning whether those awards were based on the Federal Arbitration Act, New York law, or maritime law) and b) the lack of evidence of an intent to preclude class arbitration, the panel allowed class arbitration.⁸⁸

When Stolt-Nielsen filed an application in district court to vacate the award, the district court determined that the arbitrators acted in “manifest disregard of the law” and vacated the award.⁸⁹ The court explained that the arbitrators should have used choice of law analysis and applied federal maritime law requiring that contracts be interpreted according to custom and usage.⁹⁰

⁸² *Id.* at 1765.

⁸³ *Id.*

⁸⁴ *Id.* at 1766.

⁸⁵ *Stolt-Nielsen*, 130 S. Ct. at 1765 (internal quotations omitted).

⁸⁶ *Id.*

⁸⁷ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁸⁸ *Stolt-Nielsen*, 130 S.Ct. at 1766.

⁸⁹ *Id.*

⁹⁰ *Id.*

The United States Court of Appeals for the Second Circuit first agreed with the district court that the doctrine of manifest disregard of the law survived the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁹¹ The Second Circuit reversed the district court, however, and held that because no authority applying a maritime rule or New York law against class arbitration was cited, the arbitrators had not manifestly disregarded the law.⁹² There was nothing in New York case law that prohibited class arbitration.⁹³

The United States Supreme Court was not persuaded by the Second Circuit. The Court declared that the arbitrators' award must be vacated because the arbitrators had exceeded their authority and imposed their own policy choice instead of ruling based on the Federal Arbitration Act, maritime law, or New York law.⁹⁴

The Court explained that when an arbitration clause is "silent," the arbitration panel must identify the governing rule of law and should assume that the parties intend default rules to control.⁹⁵ An arbitration panel cannot ignore the fact that class arbitration is significantly different than bilateral arbitration when one considers cost, speed, and privacy.⁹⁶ And even though the same limited rules of judicial review apply to class arbitration that apply to bilateral arbitration, the stakes are as high as they are in class action litigation.⁹⁷ Therefore, because arbitration is a matter of consent, class arbitration simply cannot be imposed when the parties stipulate, as they did in this case, that they have not reached an agreement on this issue.⁹⁸

The dissent maintains that the majority acted much too aggressively and engaged in an improper *de novo* review of an award issued by experienced

⁹¹ *Rent-A-Center*, 130 S. Ct. at 2777.

⁹² *Stolt-Nielsen*, 130 S.Ct. at 1758, 1766.

⁹³ *Id.* at 1766-67.

⁹⁴ *Id.* at 1768-69.

⁹⁵ *Id.* at 1770.

⁹⁶ *Id.* at 1776.

⁹⁷ *Stolt-Nielsen*, 130 S.Ct. at 1776.

⁹⁸ *Id.*

arbitrators that had been selected by the parties.⁹⁹ According to the dissent, the panel decided only that the arbitration clause used in the parties' shipping contracts permits class arbitration.¹⁰⁰ The award was abstract, highly interlocutory, and did not decide if AnimalFeed's claims were appropriate for class action.¹⁰¹ Nor did the arbitrators identify any class or determine whether potential class members should be required to opt-in to the proceedings.¹⁰² This was a preliminary award, emphasized the dissent, and judicial review cannot be expanded by labeling it "Partial Final Award."¹⁰³ In fact, allowing piecemeal review of this nature will have the undesirable result of making arbitration more like litigation.¹⁰⁴ Judicial intervention by the majority at this juncture, asserted the dissent, was premature and violates the firm final-judgment rule of the federal court system.¹⁰⁵

The dissent appears to believe strongly that the parties did agree to be bound by the arbitrators' award and that, contrary to its explanation and analysis, the majority is rejecting the principle that arbitration is a matter of consent.

The dissent argued that the arbitrators' award was the determination to which the parties agreed, that the award was within the submission, that the award was an honest decision, and that there had been a full and fair hearing.¹⁰⁶ Federal Arbitration Act Section 10(a)(4) asks if arbitrators had the power to decide a particular issue.¹⁰⁷ The dissent was convinced that the parties' supplemental agreement referring the class arbitration question to the arbitrators unquestionably

⁹⁹ *Id.* at 1777 (Ginsburg, J., dissenting).

¹⁰⁰ *Id.* (Ginsburg, J., dissenting).

¹⁰¹ *Id.* at 1778 (Ginsburg, J., dissenting).

¹⁰² *Stolt-Nielsen*, 130 S. Ct. at 1778 (Ginsburg, J., dissenting).

¹⁰³ *Id.* at 1779 (Ginsburg, J., dissenting).

¹⁰⁴ *Id.* (Ginsburg, J., dissenting) (quoting *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283-285. (2d Cir. 1986) (Feinberg, J., dissenting)).

¹⁰⁵ *Id.* at 1779 (Ginsburg, J., dissenting).

¹⁰⁶ *See id.* at 1780 (Ginsburg, J., dissenting) (reciting grounds for vacatur as articulated in *Burchell v. Marsh*, 58 U.S. 344, 349, 17 How. 344, 349, 15 L.Ed. 96 (1855), subsequently codified in 9 U.S.C. § 10(a), and concluding that vacatur was not appropriate in *Stolt-Nielsen*).

¹⁰⁷ *See supra* note 29 for the text of The Federal Arbitration Act, 9 U.S.C. § 10.

gave the arbitrators the power to decide whether class arbitrations are permitted.¹⁰⁸ Additionally, the panel was convinced that the arbitration panel did not ignore the relevant law. In fact, according to the dissent, the arbitrators clearly explained that their decision to focus on the wording of the arbitration agreement as a basis for deciding whether the parties intended to permit class action was consistent with New York and maritime law.¹⁰⁹

Stolt-Nielsen was a five to three decision in which Justice Sotomayer did not participate. Although the Supreme Court acknowledges that arbitrators have the authority to adopt procedures necessary to implement parties' agreements, authorizing class actions without an expression of consent is not a mere procedural decision.¹¹⁰ In simple terms, class actions change the agreement.

The majority and dissenting justices analyze the question of whether the arbitral panel acted appropriately quite differently. The dissent believes that the arbitrators did not ignore the relevant law and, in fact, expressly explained that they acted based on their interpretation of New York law as articulated by the New York Court of Appeals.¹¹¹ According to their interpretation of the law, the arbitrators believed that they should concentrate on the language of the arbitration clause.¹¹²

Revealing a significantly different interpretation of the facts, the majority asserts that the arbitrators ignored the relevant law and that the arbitrators acted based upon their own version of sound policy.¹¹³ And perhaps more importantly in the long term, the majority thought it was necessary to intervene and vacate an arbitral award in spite of the dissent's argument that such intervention was premature and, in fact, interfered with the decision process the parties had chosen.

¹⁰⁸ *Stolt-Nielsen*, 130 S. Ct. at 1780 (Ginsburg, J., dissenting).

¹⁰⁹ *Id.* at 1781 (Ginsburg, J., dissenting).

¹¹⁰ *Id.* at 1776.

¹¹¹ *Id.* (Ginsburg, J., dissenting).

¹¹² *Id.* (Ginsburg, J., dissenting).

¹¹³ *Stolt-Nielsen*, 130 S. Ct. at 1768-69.

The *Stolt-Nielsen* majority's reference to *Hall Street Associates v. Mattel* also is noteworthy. Although it was possible, and perhaps reasonable, to conclude after *Hall Street* courts no longer could cite manifest disregard of the law as a basis for vacating an arbitral award, in *Stolt-Nielsen* the Court announces that "[w]e do not decide whether 'manifest disregard' survives ... *Hall Street Associates* ... as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."¹¹⁴ The Court recites AnimalFeeds' characterization of the standard as requiring proof that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."¹¹⁵ Assuming for the purposes of argument that the standard applied, the Court found that the arbitrators had manifestly disregarded the law in this case.¹¹⁶

1. *Stolt-Nielsen* – Deference on the Back End

During the earlier discussion of *Rent-A-Center*, the author suggested that on the front end; that being, before the arbitration begins, courts will be very deferential to arbitration. But *Stolt-Nielsen* suggests that on the back end, after arbitration has ended and an award has issued, courts will be much more willing to intervene. And the suggestion that manifest disregard of the law may still be available in spite of *Hall Street* indicates that the Court wants to ensure a fairly robust power of review. The Court, frankly, may not like all of the arbitral awards generated by its liberal deferral policy at the initiation of arbitration and may want to ensure that it has the power to vacate or reform awards that do not provide the results that the Court would prefer. The dissent in *Stolt-Nielsen* argues that the Court acted improperly and interfered with the dispute resolution process that the

¹¹⁴ *Id.* at 1768.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

parties had chosen. An important question is whether *Stolt-Nielsen* will have a dramatic impact or whether its application will be limited. While explaining that the arbitrators simply had imposed their own version of sound policy, the Court stated that the arbitrators should not have ignored industry custom and usage because those practices can reveal intent behind silence.¹¹⁷ In *Stolt-Nielsen* there was evidence that *a) sophisticated business parties b) in this particular industry* always avoid class arbitration.¹¹⁸ These facts should limit *Stolt-Nielsen* in future cases. Silence should be interpreted differently when the parties either are not similarly sophisticated or the evidence on custom and usage is not as one-sided.

If one suspects that the Court to is attempting to preserve, or even expand, the ability to review arbitration awards with which the Court disagrees, then in order to confirm or dispel that suspicion one has to consider the Court's possible motivations. Why should one suspect that the Court is comfortable giving arbitrators the first opportunity to resolve the dispute only so long as it gets to take a second look?

It might be, as the NLRB General Counsel explains in its recommended change in arbitral deferral policy, that the Court wants to ensure that statutory rights, especially civil rights, are protected. But recall that the Supreme Court interpreted Title VII of the Civil Rights Act of 1964¹¹⁹ so narrowly that Congress had to enact the Civil Rights Act of 1991.¹²⁰ Although the membership of the Supreme Court has changed since 1989, the time of the Supreme Court decisions¹²¹

¹¹⁷ *Id.* at 1769.

¹¹⁸ *Stolt-Nielsen*, 130 S. Ct. at 1769.

¹¹⁹ 42 U.S.C. §§ 2000e to 2000e17.

¹²⁰ P.L. 102 – 166, 105 Stat. 1071.

¹²¹ *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (current employees alleging unlawful racial harassment cannot recover under 42 U.S.C. § 1981 because harassment is not included in the protection provided for “making and enforcing contracts”); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (employers’ burden to prove business necessity in a disparate impact discrimination lawsuit identified as merely a burden of production (although prior cases had described the burden as one of persuasion)); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (the time limit for claiming unlawful discrimination based on a facially neutral seniority system begins to run at the time the seniority system is first adopted, not when the plaintiffs later are demoted as result of that

that prompted the Civil Rights Act of 1991, the author does not believe that most commentators would argue that the Supreme Court has become more concerned with protecting individual civil rights. In fact, more recently the Court so thoroughly eviscerated the Americans with Disabilities Act¹²² that Congress concluded that it needed to enact the Americans with Disabilities Act Amendments Act¹²³ to restore the intent and promise of the original Americans with Disabilities Act.

One might suggest that the Court believes arbitrators are inclined, although not guaranteed, to make pro-business decisions. This suggestion, of course, justifies an entirely separate article. But it is not reckless to suggest that arbitrators, who tend to be successful professionals and business people, and who may be subject to the controversial “repeat player” phenomenon,¹²⁴ might be predisposed (perhaps subconsciously if not consciously) to favor business interests. So the Court is comfortable construing arbitration clauses broadly to give arbitrators the first opportunity. But if the arbitrator strays, the Court wants to be able to adjust the arbitrators’ awards.

C. *AT&T Mobility v. Concepcion*

Although we do not yet have a decision, it makes sense in the context of this article to make a few observations regarding a case pending before the United

system); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (if an employee proves that membership in a protected class was a motivating factor for an adverse employment action, then the employer can avoid all liability by proving it would have made the same decision even though discrimination was a motivating factor); *Martin v. Wilks*, 490 U.S. 755 (1989) (although white fire fighters did not intervene when consent decrees were being entered in earlier employment discrimination proceedings, the firefighters still could challenge employment decisions taken pursuant to those decrees).

¹²² 42 U.S.C. §§ 12101-12213.

¹²³ P.L. 110-325, 122 Stat. 3553.

¹²⁴ See Lisa Blomgren Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 189 (1997) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324411.

States Supreme Court, *AT&T Mobility v. Concepcion*.¹²⁵ Although it is risky, perhaps even foolish, to predict the outcome in Supreme Court cases, recent Supreme Court jurisprudence regarding arbitration may provide helpful insights.

The case involves a consumer class action alleging AT&T advertised a second phone for free but then fraudulently charged tax on the “free phone.”¹²⁶ The service contract that consumers signed stated that, “CINGULAR and you agree that no Arbitrator has the authority to (1) award relief in excess of what this agreement provides; (2) award punitive damages or any other damages not measured by the prevailing party's actual damages; or (3) order consolidation or class arbitration.”¹²⁷ Nevertheless, a lawsuit was filed and subsequently AT&T revised the arbitration agreement with additional language favoring consumers.¹²⁸

The revised agreement states that if a customer prevails in arbitration and receives more than AT&T's final offer, AT&T will pay \$7500.00 plus double attorney fees.¹²⁹ Consumers have the right to pursue punitive damages; a convenient venue; in-person, telephone or desk arbitration; and a waiver of AT&T's right to recover attorneys' fees and costs.¹³⁰

The District Court found the agreement unconscionable,¹³¹ the Ninth Circuit affirmed,¹³² and Ninth Circuit added that the Federal Arbitration Act does not preempt California unconscionability law.¹³³ The question pending before the Supreme Court asks “[w]hether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures - here, class-wide arbitration - when those procedures are not

¹²⁵ 130 S.Ct. 3322, 176 L.Ed.2d 1218.

¹²⁶ *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) [hereinafter *AT&T Mobility*].

¹²⁷ *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255 (S.D. Cal.) at *2 (Not Reported in F.Supp.2d).

¹²⁸ *AT&T Mobility*, 584 F.3d. at 853.

¹²⁹ *Id.*

¹³⁰ *Id.* at 856 n.10.

¹³¹ 2008 WL 5216255 at *14.

¹³² *AT&T Mobility*, 584 F.3d. at 859.

¹³³ *Id.*

necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.”¹³⁴

AT&T is arguing that California courts apply unconscionability doctrine more strictly when they review arbitral class action prohibitions.¹³⁵ The Ninth Circuit had found the \$7500.00 dollar promise did not save the agreement and was, in fact, irrelevant because, to avoid that cost, AT&T’s final offer will be the face amount of the claim.¹³⁶ The specific question in this case thus becomes, when determining unconscionability, should a court consider effects on individuals other than the named plaintiffs and should the goal of deterrence be considered?

The case raises freedom of contract issues that have been determinative in recent cases and it has significant implications for consumers and employees (for example, regarding wage and hour claims). Large classes consisting of individuals who each possess small dollar amount claims arguably do not have an effective remedy available unless arbitration class actions are available. So what will happen in *AT&T Mobility*?

The Supreme Court has declared that parties may draft arbitration agreements that define the rules under which the arbitration will proceed.¹³⁷ And the Court appears to be adopting a deferential approach to arbitration at the initiation stage. But the Court believes class arbitration should be treated differently because it is distinguishable from bilateral arbitration in terms of speed, cost, privacy and damages. Emphasizing these differences, the Court in *Stolt-Nielsen* held that class arbitration cannot be compelled unless the parties expressly consent.

A very likely outcome in *AT&T Mobility* is that the Court will enforce the contract as written, class arbitration will not be allowed, and AT&T will win this case. When the Court refuses to allow class arbitration it can be argued that the

¹³⁴ Petition for Writ of Certiorari, 2010 WL 302265.

¹³⁵ Brief for Petitioner, 2010 WL 3017755 at *30-31.

¹³⁶ *AT&T Mobility*, 584 F.3d. at 855-56.

¹³⁷ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.* 489 U.S. 468, 479 (1989).

Court is not nearly as deferential to arbitration on the “front end” as the author maintains. If what the author suggests is true, then one would think that the Court would be more than happy to let arbitrators assume the burden of managing class actions.

The *AT&T Mobility* decision can be reconciled with the author’s assertions, however. Although the Court will not permit (defer to) class arbitrations in this instance, the Court will defer to the parties’ choice as expressly articulated in their arbitration agreement. Although the specific result in *AT&T Mobility* will be that one type of arbitration (class action) will not be allowed, this decision will be consistent with the freedom of contract and FAA preemption principles that ordinarily lead the court to defer to arbitration at the initial stages of a dispute. The Court will be acting consistently because it will defer to the arbitration agreement on the front end.¹³⁸

But this case will not change the fact that after an arbitration award has issued, the Court is not giving freedom of contract principles the same weight when it comes to the question of whether the Court should leave an arbitral award undisturbed. After an award has issued the Court appears to be less concerned with protecting the agreement to which the parties consented and more concerned with ensuring that the result is one with which the Court agrees. If the case is decided as the author anticipates, this decision will give new life to the currently stalled Arbitration Fairness Act.

VI. CONCLUSION

Arbitration is under attack, but it will survive. To meet their obligation to deliver justice in a timely manner, budget stressed judicial systems that no longer can process cases in a prompt and effective manner have no choice. They must

¹³⁸ The author also believes that a decision limiting the availability of class arbitration, which the Court has described as significantly different than the bilateral arbitration it favors, is a result with which the Court will be very comfortable.

create rules and issue judicial opinions that will ensure arbitration remains a viable alternative. And as our society becomes more technology dependent, arbitration is positioned to thrive because technology facilitated communication mediums can be integrated easily and seamlessly into arbitration processes. Although recently enacted and pending legislation limits, and even prohibits, arbitration in certain circumstances, the arbitration agreements that generated this legislative response are being revised and the momentum for additional legislative change appears to be dissipating, at least for the moment.

But it is becoming increasingly difficult to anticipate what the boundaries and limits of arbitration will be in the future. *Rent-A-Center v. Jackson* indicates that courts, citing freedom of contract, will be very deferential to arbitration at the initiation stage, or the “front end.” But *Stolt Nielsen S.A. v. AnimalFeeds International Corporation* suggests that courts will be much less deferential when it comes to reviewing and vacating arbitral awards, “the back end.” Courts will be less deferential even though the same freedom of contract principle relied on in *Rent-A-Center* supports the argument that the courts should leave the award, the result of the process the parties chose, alone.

The idea that the Supreme Court is developing an increasingly result-oriented approach to arbitral award reviewability may be quite cynical. But a Court that is very willing to give arbitrators great leeway to resolve disputes in the first instance may have second thoughts about losing control. The Court may want to guarantee that the final result is one with which it is comfortable. If courts are going to rule in ways that ensure the viability of arbitration because of the judiciary’s financial problems, and if the Supreme Court is going to construct an award reviewability approach designed to guarantee that it will get a second look at a dispute that was first deferred to arbitration, then it will be increasingly difficult to articulate a principled theory that explains the scope and intent of judicial review.