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ARBITRATION POST-*AT&T MOBILITY V. CONCEPCION* AT THE AMERICAN ARBITRATION ASSOCIATION - A SERVICE PROVIDER'S PERSPECTIVE

Sandra K. Partridge*

I. INTRODUCTION

After the Supreme Court hands down an opinion about arbitration, scholars debate what it means to the law of arbitration and service providers decide how it will affect cases in practice. Some Court decisions change the manner and scope of the cases a provider may administer. *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*¹ and *AT&T Mobility v. Concepcion*² changed class action arbitration for ongoing and future cases.

Class arbitration began in earnest as a result of the Court's directive in 2003 in *Greentree Financial Corp. v. Bazzle* where the court allowed that an arbitration clause silent on the issue of class arbitration could be found by an arbitrator to permit class adjudication.³ Having selected arbitration rather than litigation, parties with small claims from the same contract were able to form putative classes and take steps to be certified and move their claims forward in arbitration. From this decision, arbitrators were viewed to have gained the authority to grant class status to groups of similarly situated Claimants⁴ and over the next eight years the American Arbitration Association ("AAA") saw 347 class arbitration cases filed under Class Arbitration Rules that were issued shortly after the *Bazzle* decision. Special panels of arbitrators, a public class action docket, and a dedicated team of case managers came into being as the AAA sought to administrate these cases fairly and openly.

A sea change to class arbitration arrived with *Stolt-Nielsen's* pronouncement that the arbitrators in that case exceeded their powers when they certified a putative class without a basis in law or express contractual evidence of the parties' desire to arbitrate as a class.⁵ Questions surfaced. Was class arbitration dead? As parties are unlikely to agree pre-dispute to a process that may apply to an unknown class for an unanticipated dispute, and even more unlikely to agree to class arbitration post-dispute, the Court appeared to raise significant questions about the viability of class arbitration. And if there were no class arbitrations, did state court rulings that class action waivers in arbitration agreements were unconscionable mean parties were required to arbitrate as individuals or to litigate their claims? Could the absence of arbitrators' authority to permit a class action arbitration to proceed where the arbitration agreement is silent on the issue

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¹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

³ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

⁴ *See id.*

⁵ *Stolt-Nielsen*, 130 S. Ct. at 1770.

mean that class arbitration cases would no longer be filed and the existing cases would be terminated?

In 2011, the Court held that a class action waiver contained in an arbitration agreement could be enforced thereby negating California's *Discover Bank* rule.⁶ In doing so, the Court directed the parties to arbitrate as individuals. In *AT&T Mobility v. Concepcion*, the Court referenced its prior holding in *Stolt-Nielsen*, stating:

We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the “changes brought about by the shift from bilateral arbitration to class-action arbitration” are “fundamental.”⁷

Further, when addressing the public policy arguments that were asserted in favor of class actions the Court held “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”⁸ Thus after *Concepcion*, arbitration clauses with class action waivers could be enforced despite the existence of states with common law that held to the contrary. The AAA's Consumer Due Process Protocols⁹ continued to be a cornerstone for protecting the rights of consumers with new disputes arbitrating as individuals. This paper looks at the AAA's experience administering class arbitrations from *Bazze* to post-*Concepcion* from a service provider's perspective.

II. *BAZZLE* ALLOWS CLASS ARBITRATION AND THE AMERICAN ARBITRATION ASSOCIATION RESPONDS

When *Greentree Financial Corp. v. Bazze* was decided in 2003, it was apparent that arbitration would be presented with novel questions regarding whether a class could be certified in arbitration and whether that question should be determined by the arbitrators.¹⁰ The American Arbitration Association recognized that its Commercial Rules then in effect, did not contain procedures that would adequately address the issues that *Bazze* suggests should be decided by arbitrators; namely whether an arbitration clause permits class proceedings and if it does, what procedures should be followed for the resolution of the class' claims. Arbitration had been, up to that point, an event primarily between individual parties and several multi-parties. Another consideration was the Class Arbitration Panel - what qualifications, experience and training should members of this panel possess?

On October 8, 2003, the American Arbitration Association developed its Supplementary Rules for Class Arbitration¹¹ and selected a national panel to hear cases under the new

⁶ See *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁷ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

⁸ See *id.* at 1753.

⁹ See *AAA Consumer Arbitration*, AM. ARB. ASS'N, http://www.adr.org/consumer_arbitration (last visited May 22, 2012).

¹⁰ See *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 452-53 (2003).

¹¹ See *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004129&_afLoop=421945609641502&_afWindowMode=0&_afWindowId=y4z8872x1_1#%40%3F_afWindowId%3Dy4z8872x1_1%26_afLoop%3D421945609641502%26doc%3DADRSTG_004129%26_afWindowMode%3D0%26_adf.ctrl-state%3Dy4z8872x1_53 (last visited May 22, 2012).

Supplementary Rules in combination with the underlying AAA Rules. The Supplementary Rules “shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (“AAA”) where a party submits a dispute to arbitration on behalf of or against a class or purported class.” In the Supplementary Rules, arbitrators first review the arbitration clause and then issue a partial final award determining whether the clause can permit class action arbitration. In the next phase, using the standards generally provided for in Federal Rule of Civil Procedure 23, arbitrators decide whether the class can be certified and issue a reasoned partial award. If the determination is that the class should be certified, the arbitrators will then hear the merits of the case and issue a final award. The Supplementary Rules provide that “at least one of the arbitrators shall be appointed from the AAA’s national roster of class arbitration arbitrators.”¹²

A set of minimum qualifications was developed for the AAA Class Arbitration Panel that includes: extensive class action experience - specifically where an individual has experience such that a substantial portion of her practice is devoted to litigating class action matters in arbitration or in other dispute resolution forums; experience with a broad range of practice areas and has knowledge of recent class action court decisions; experience with class action litigation as a state or federal judge; and extensive experience in conflict management and leadership role(s) in legal professional association(s).

In order to ensure class action arbitration would be a public and transparent process, and in an effort to protect absent class members, the AAA created a publicly available online docket of all class arbitrations. This searchable online docket allows users to track cases through each stage of the AAA Class Arbitration process, from the Clause Construction process through the final award.¹³ The names of the Claimants and their counsel as well as Respondent and their counsel are shown on the title page of the case. Also on this page is the disposition of the case and links to any activity including hearings, partial final awards, and dismissals. Additionally, the AAA posted a policy statement concerning the class arbitrations:

Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.¹⁴

¹² *Id.*

¹³ See *Searchable Class Arbitration Docket*, AM. ARB. ASS’N, <http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket> (last visited May 22, 2012).

¹⁴ *AAA Policy on Class Arbitrations*, AM. ARB. ASS’N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840 (last visited May 22, 2012).

III. AAA'S CLASS ARBITRATION DOCKET

Examination of the AAA's Class Arbitration Docket reveals the activity of the 347 class arbitrations filed with the AAA since the *Bazzle* decision in 2003. As of December 6, 2011, most of these cases had been closed (248) with the remaining cases ongoing (98). Upon filing, the cases were classified by the AAA as Commercial (182), Employment (133), and Construction (32) and a special team of case managers began administering the cases. After their selection, the arbitrators conducted the Clause Construction phase to determine whether the arbitration clause permitted arbitration under the Class Arbitration Supplementary Rules.

Nearly half of these cases (170) resulted in clause construction awards or stipulations; the majority of these awards (110) interpreted the arbitration clause to permit class arbitration while nineteen awards found the clause did not permit class arbitration. In an additional forty-one stipulations parties affirmatively agreed that the arbitration could proceed on a class-wide basis. Claims in fifty-six cases out of the 151 cases that could move forward were still at issue after the Clause Construction phase.

Settlements were reached in 131 cases; thirteen settled with consent awards and 118 settled without consent awards. The arbitrators certified slightly more than half the cases that proceeded to the Class Certification phase (29) and denied certification to the remaining classes (22) with an additional five cases reaching class certification by stipulation between the parties.

IV. *STOLT-NIELSEN*: THE EFFECT ON AAA'S CLASS ACTIONS

The *Stolt-Nielsen* decision created uncertainty in the class arbitrations being administered by the AAA at the time and an expected paucity of future filings. Arbitrators in the midst of the Clause Construction phase in particular were faced with new law mid-case. Arbitrators approached this new set of circumstances by allowing parties to bring forward arguments reflecting *Stolt-Nielsen*. Respondents in some ongoing cases successfully argued the Court's ruling in opposing a class process in Clause Construction and Class Certification phases.

In fact, the filing of class arbitrations did not cease post-*Stolt-Nielsen* as parties filed fifty-three class arbitration cases with AAA after the Court's decision. Because parties may still file demands for class arbitration under AAA's Class Arbitration Rules, Claimants have continued to seek class arbitration, often arguing to distinguish their case from that of *Stolt-Nielsen*. These arguments are based in limitations of the applicability of *Stolt-Nielsen* because the case was a business-to-business dispute rather than the present consumer or employee case. Or, parties argued that while the outcome was based on the Federal Arbitration Act (FAA),¹⁵ there were state contract law principles that would permit class arbitration. Or, parties cited a unique fact that existed in *Stolt-Nielsen* in that the parties stipulated that the arbitration clause was silent concerning class action:

¹⁵ See 9 U.S.C. §§ 1-16 (2006).

But the panel had no occasion to "ascertain the parties' intention" in the present case because the parties were in complete agreement regarding their intent. In the very next sentence after the one quoted above, the panel acknowledged that the parties in this case agreed that the Vegoilvoy charter party was "silent on whether [it] permit[ted] or preclude[d] class arbitration," but that the charter party was "not ambiguous so as to call for parol evidence." *Ibid.* This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.¹⁶

V. POST-CONCEPCION: WHERE WE ARE NOW AT AAA

After *Concepcion*, the class arbitration landscape was changed further by the Court's explanation of its ruling in *Stolt-Nielsen* as well as its holding concerning class action waivers. While *Stolt-Nielsen* addressed whether the Federal Arbitration Act permits class action proceedings where the contract did not expressly allow them, *Concepcion* decided whether the FAA requires the enforcement of an explicit class action waiver in light of state law that would hold to the contrary:

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt-Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under §10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation.¹⁷

As an alternative to filing a class action demand, members of the would-be class may instead file as individuals under AAA's Supplementary Procedures for Consumer-Related Disputes¹⁸ based on AAA's Consumer Due Process Protocols.¹⁹ This Protocol guarantees due process by assuring the right to representation, forbidding businesses from requiring an inconvenient forum, and cost-shifting from consumers to businesses. And, the Protocols require there be no limitations on damages, a neutral decision maker, and access to small claims court should a consumer prefer that forum.²⁰

The cost-shifting is arguably one of the most important guarantees of due process and access to justice for these claimants. Consumers with claims of \$10,000 or less pay one-half the arbitrators compensation but no more than a maximum of \$125, and for claims of more than

¹⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010).

¹⁷ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

¹⁸ See *Consumer-Related Disputes Supplementary Procedures*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/s/sitesearch/sitesearchdetail?doc=ADRSTG_015806&_afLoop=422949359255662&_afWindowMode=0&_afWindowId=y4z8872x1_382#%40%3F_afWindowId%3Dy4z8872x1_382%26_afLoop%3D422949359255662%26doc%3DADRSTG_015806%26_afWindowMode%3D0%26_adf.ctrl-state%3Dy4z8872x1_446 (last visited May 22, 2012).

¹⁹ See *Consumer Due Process Protocol*, principle 3.2 (1998), AM. ARB. ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited May 22, 2012).

²⁰ See *id.* at principle 4-5, 14.

\$10,000 but less than \$75,000, consumers pay a maximum of \$375.²¹ All other arbitration fees and arbitrator compensation are paid by businesses; compliance is ensured by a requirement that AAA receive, review, and approve the arbitration clauses of these contracts prior to their use and a further requirement that the clauses maintain their compliance with the due process protocols. Cases arising out of contracts with clauses not in compliance are refused administration by the AAA.

The AAA also makes data concerning the consumer cases it administers available on its website as a quarterly report indicating participants, claims activity, and costs of the individual arbitrations. The current file posted on AAA's website,²² shows data from the third quarter of 2011 and contains 64,471 records from 61,843 cases.

Northwestern University Law School's *Searle Civil Justice Institute Task Force on Consumer Arbitration* conducted a study of AAA consumer cases in 2009 and concluded in summary:

- Consumers won some relief in 53.3% of the cases they filed and recovered an average of \$19,255; business claimants won some relief in 83.6% of their cases and recovered an average of \$20,648.
- No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.²³

The Report also discussed the important issue of costs and access for consumers involved in individual arbitrations with businesses, in the case of AAA arbitrations where consumers filed demands against businesses.

The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.

In cases with claims seeking less than \$10,000, consumer claimants paid an average of \$96 (\$1 administrative fees + \$95 arbitrator fees). This amount increases to \$219 (\$15 administrative fees + \$204 arbitrator fees) for claims between \$10,000 and \$75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.

AAA consumer arbitration seems to be an expeditious way to resolve disputes.²⁴

While businesses may be increasingly drawn to arbitration in the consumer area as a result of *Concepcion*, these businesses must ensure their compliance with the AAA's Due Process

²¹ See *Consumer Arbitration Costs, Administrative Fee Waivers, and Pro Bono Arbitrators*, AM. ARB. ASS'N, <http://www.adr.org/aaa/faces/aoe/gc/consumer> (follow "Consumer Arbitration Costs, Administrative Fee Waivers, and Pro Bono Arbitrators" hyperlink).

²² See *Consumer Statistics*, AM. ARB. ASS'N, <http://www.adr.org/aaa/faces/aoe/gc/consumer> (follow "Consumer Arbitration Statistics" hyperlink).

²³ See SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION-PRELIMINARY REPORT, at xiii (Mar. 2009).

²⁴ *Id.*

protocols for consumer and employment disputes. The Searle study found that in practice, consumers participating in AAA arbitrations under the Consumer Due Process Supplement actually paid less than the fees specified in the AAA Rules.²⁵

Under AAA's Rules, consumers may also choose not to arbitrate post-dispute and instead select the option of filing in small claims court for claims up to the jurisdictional limits of the court. The AAA Commercial Rules provide a carve-out for consumer-related disputes whether filed by the consumer or the business.²⁶ In California the small claims court's limit of \$7,500 per claim and a general rule requiring self-representation can make this an attractive option for consumers, especially with the free small claims advisor service the state provides to explain court and enforcement procedures, help with claim or defense preparation, work out payment plans, and answer other questions.²⁷

VI. THE RESPONSE TO CONCEPCION

One salient factor of *Concepcion* is the provision in the arbitration clause for cases where Claimants recover more from the arbitrator than the last, best offer from AT&T. A self-imposed penalty of \$10,000 and payment of attorney's fees provides Claimants with small claims with a sizeable potential recovery for the small claim sizes that are customary in class litigation and arbitration. In the Court's view, these two factors demonstrate the likelihood a dispute will be resolved without the necessity of the Claimants banding together as class actions. The Court notes:

“Indeed, the District Court concluded that the *Concepcions* were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which “could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.”
Laster, 2008 WL 5216255, at *12.²⁸

Since *Concepcion* allowed AT&T's class action waiver to stand, certain law firms filed hundreds of individual arbitrations against AT&T aimed at stopping the company's bid to merge with a competing wireless provider and AT&T responded by filing suit in the Southern District of New York²⁹ seeking to stop them from filing many individual arbitration demands with AAA, one of which is “388 paragraphs in length and contains 641 footnotes.”³⁰ AT&T argued these claims should not be decided in arbitration because they were brought under the Clayton Act.³¹ The company cited its clause's provision that consumers were allowed to bring claims only in an “individual capacity” and not as a “class member in any purported class or representative proceeding”³² and noted that a Florida court granted AT&T Mobility a preliminary injunction in a

²⁵ *See id.*

²⁶ *See* Rule R-1, *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (June 1, 2010).

²⁷ *See* CAL. DEP'T OF CONSUMER AFFAIRS, *THE SMALL CLAIMS COURT: A GUIDE TO ITS PRACTICAL USE 4-7*, available at http://www.dca.ca.gov/publications/small_claims/small_claims.pdf (last visited Jan. 3, 2012).

²⁸ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

²⁹ *See AT&T Mobility LLC v. Gonnello*, 11 Civ. 5636, 2011 U.S. Dist. LEXIS 116420, at *1 (S.D.N.Y. Oct. 7, 2011).

³⁰ *Id.* at *2.

³¹ *See id.* at *6.

³² *Id.*

similar case finding “the customers' arbitration demands ‘bear the hallmarks of a class action.’”³³ The Southern District of New York court added “the Supreme Court upheld the validity of a clause both requiring that arbitration proceed on an individualized basis and prohibiting any form of class or representative action.”³⁴

In the end, the court in *Gonello* ruled that the attempt to stop the merger was outside the scope of the arbitration clause because “the parties withheld from the arbitrator the power to decide questions that would necessarily affect the rights of more than the parties to the dispute through the grant of declaratory or injunctive relief.”³⁵ Nonetheless, AT&T found itself arguing the other side of arbitrability from its position in *Concepcion*.

VII. SUMMARY

In summary, while the Court’s decisions in *Stolt-Nielsen* and *Concepcion* appeared to some to be a death knell for class arbitration, in practice there seems to be life for parties seeking a class arbitration dispute resolution process and for lawyers representing large numbers of consumers seeking redress for claims against businesses by bringing forward many individual small claims that businesses are required to pay for under the American Arbitration Association’s Consumer Due Process Protocols.

³³ *Id.* at *8 n.1.

³⁴ *Id.*

³⁵ *Gonello*, 2011 U.S. Dist. LEXIS 116420, at *4.