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Stolt-Nielsen, Silence and Class Arbitration: "*Same As It Ever Was*"*

In the year since the U.S. Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010)--heralded by some as the end of class actions--lower courts have grappled with two key questions left open by the high court. Their answers so far suggest that *Stolt-Nielsen* is not a game-changer, but rather a gloss on the *status quo*.

And these courts also are suggesting, strongly, that silence is not golden: Contract drafters must exclude class arbitration directly, specifically, and explicitly, or still risk an invitation to litigation over who decides on permitting a representative action.

The issue in *Stolt-Nielsen* was whether the parties' arbitration agreement permitted class arbitration or whether claims could only be arbitrated on an individual basis. The agreement did not contain any reference to class arbitration. An arbitral panel had found that the contract permitted class arbitration.

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Stolt-Nielsen then sought a vacatur in federal court. The case eventually made its way to the Supreme Court, which agreed that the arbitration panel had exceeded its power under the Federal Arbitration Act. The Court said that the panel, rather than identifying the appropriate rule of law and applying it to the facts at hand, "impos[ed] its own brand of industrial justice."

The Court first confronted, but left open, an ambiguity created by *Bazzle v. Green Tree Financial Corp.*, 539 U.S. 444 (2003), in attempting to resolve the question of whether court or arbitrator should

decide if an arbitration agreement permits class arbitration when the agreement does not contain express class arbitration language. *Stolt-Nielsen*, 130 S. Ct. at 1771.

The *Bazzle* Court, however, only managed to produce a plurality opinion in favor of the arbitrator deciding the question. The plurality determined that, in certain limited "gateway matters," such as whether the parties have a valid agreement to arbitrate, a court should make the decision--but the question of whether an agreement permits class arbitration "does not fall into this narrow exception." *Bazzle*, 539 U.S. at 452.

After *Bazzle*, many courts had assumed that the question had been decided, but *Stolt-Nielsen* emphasized that the question remained open. 130 S. Ct. at 1771-72.

In its 5-4 decision, the *Stolt-Nielsen* Court set out to "establish the rule to be applied in deciding whether class arbitration is permitted." *Id*. Conveniently, the parties had stipulated in arbitration that their agreement was "silent" as to class arbitration. The Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. at 1775 (emphasis in the original).

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But the Court left unclear what that contractual basis may be. It noted only that express language referring to class arbitration was not always required but that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id*.

Since, according to the Court, the parties' stipulation of silence as to class arbitration resolved the question of their intent, the arbitral panel exceeded its authority by interpreting the agreement to permit class arbitration.

WHO IS THE DECIDER?

The *Bazzle* plurality remains persuasive after *Stolt-Nielsen*.

In *Vilches v. Travelers Co.*, 413 Fed. Appx. 487 (3d Cir. Feb. 9, 2011)(available at www.ca3.uscourts.gov/opinarch/102888np.pdf), the court held that the district court should not have decided the class arbitration issue and erred in granting summary judgment to defendant when it determined that, because the plaintiffs had received adequate notice of a waiver of class arbitration, the waiver was binding on them. It ordered the case to arbitration on the question of whether the agreement permitted class arbitration.

Similarly, in *Guida v. Home Savings of America Inc.*, 2011 WL 2550467 (E.D.N.Y. June 28, 2011)(available here: http://law.justia.com/cases/federal/district-courts/new-york/nyedce/2:2011cv00009/312979/14), the court noted that: "[W]here, as here, there is disagreement over whether the agreement to arbitrate permits class arbitration and the agreement does not explicitly address this issue, the ability to proceed on a class basis is a procedural question involving contract interpretation and is therefore for the arbitrator to decide in the first instance." *Id*. at *2.

The court rejected the argument that "*Stolt-Nielsen* implies that whether plaintiffs can proceed as a class in arbitration is such a fundamental issue that it is closer to one of arbitrability [which courts must decide] than procedure [which arbitrators must decide]" *Id*. at 4.

The court noted that *Stolt-Nielsen* clarified *Bazzle*'s plurality holding--that class arbitration was a question for the arbitrator to decide--and "did not indicate that . . . *Bazzle* was incorrect. . . ." *Id*. See also *Vazquez v. Servicemaster Global Holding*, No. 09-cv-05148-SI, 2011 WL 2565574 (N.D. Cal. June 29, 2011)(noting that *Stolt-Nielsen* "clarified that the question remains open" and referring class arbitration question to arbitrator for resolution); *Opalinski v. Robert Half Int'l Inc.*, 2011WL 4729009 (D.N.J. Oct. 6, 2011)(available at http://docs.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2010cv02069/240858/67/)("where contractual silence is implicated the arbitrator and not a court should decide whether a contract was indeed silent on the issue of class arbitration"). Likewise, state courts are treating the class arbitration question as one for the arbitrator to resolve. See, e.g. *JetBlue Airways Corp. v. Stephenson*, 2011 WL 4976197 (N.Y. App. Div. 1st Dep't., Oct. 20, 2011) (affirming denial of motion to compel individual arbitration pursuant to parties' agreement, which did not reference class arbitration, because class arbitration question was a "procedural one" for the arbitrator).

A DIFFERENT CLASS VIEW

By contrast, however, New York Southern District Magistrate Judge James C. Francis IV has decided that, in some circumstances, the class question is appropriate for judicial resolution where the purported class arbitration has statutory implications. *Chen-Oster v. Goldman Sachs & Co.*, 785 F. Supp. 2d 394 (S.D.N.Y. April 28, 2011), reconsideration denied (July 7, 2011)(available at www.publicjustice.net/Repository/Files/Chen-OstervGoldmanSachs-orderDenyingDefendantsMotion-070711.pdf). *Chen-Oster* was a putative Title VII class action where the plaintiffs alleged that their former employer engaged in a "pattern or practice" of gender discrimination. The court acknowledged that generally the question of class arbitration "is an issue of contract interpretation properly left to the arbitrator," but nevertheless held that, because both parties agreed that the court was the appropriate forum for resolution of the dispute and the questions "raised by the parties require determination of the scope and enforceability of the arbitration clause," the court was the appropriate decision-maker.

> **"The court rejected the argument that "*Stolt-Nielsen* implies that whether plaintiffs can proceed as a class in arbitration is such a fundamental issue that it is closer to one of arbitrability [which courts must decide] than procedure [which arbitrators must decide]" *Id.* at 4."**

Contrary to courts like *Vilches* and *Guida*, the *Chen-Oster* court noted that "*Stolt-Nielsen* opened the door to judicial determination of the issue. . . ." *Id*.

Ultimately, Magistrate Judge Francis denied the employer's motion to stay the litigation and compel arbitration because Title VII "pattern or practice" claims can only be brought on a class basis and, according to Judge Francis, the parties' agreement precluded representative claims in arbitration. *Id*.

This *Chen-Oster* ruling, if it stands, may inform some decisions to take up the interpretive question itself, at least in instances where an unambiguous statutory right to a representative action is asserted. See also *Vazquez*, 2011 WL 2565574 at *3 ("[I]f . . . the question of class arbitration needed to be answered in order for the Court to determine whether a party waived its right to arbitrate, it would

be a question for the Court. *Here, however, the arbitration clause is enforceable regardless of whether it permits or precludes class certification.*") (emphasis added).

WHAT TO DO ABOUT SILENCE?

Thus far, courts have resolved the *Stolt-Nielsen* quandary regarding silence as to class arbitration by simply holding that *Stolt-Nielsen* is consistent with preexisting case law, which refers the interpretive question of contractual silence to arbitrators and applies a deferential standard of review in determining whether to vacate an arbitrator's interpretation.

These courts have held that the contractual interpretation will stand, so long as the issue was properly before the arbitrator and the arbitrator's interpretation, *first*, focused on the intent of the parties, *second*, addressed *Stolt-Nielsen* itself, and, *third*, did not rely on considerations of public policy. See, e.g., *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. July 1, 2011)(reversing vacatur of an arbitral award that had interpreted the parties' agreement to permit class arbitration); *Spradlin v. Trump Ruffin Tower I, LLC*, 2011 WL 2295067, at *2 (D. Nev. June 6, 2011)(available at http://law.justia.com/cases/federal/district-courts/nevada/nvdce/2:2008cv01428/62433/29) (refusing to vacate an arbitral award holding that the parties' agreement did not permit class arbitration; vacatur is appropriate only when the "mode of the arbitrator's decision was one of policy-making"); *Sutter v. Oxford Health Plans LLC*, 2011 WL 734933 (D.N.J. Feb. 22, 2011)(refusing to vacate an arbitral award; the arbitrator "performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [he] examined the parties' intent, and gave effect to the arbitration agreement.").

In *Jock*, the court reversed an order by U.S. District Judge Jed S. Rakoff, of New York, that vacated an arbitral award in light of *Stolt-Nielsen*. Judge Rakoff had found the arbitrator's interpretation of the arbitration agreements was "plainly incompatible" with *Stolt-Nielsen*. 646 F.3d at 118.

The Second U.S. Circuit Court of Appeals found that Judge Rakoff imposed his own view that the parties' agreement to arbitrate "any dispute, claim, or controversy" did not permit class arbitration. This was error because an arbitrator only exceeded her powers under the FAA by considering issues beyond those submitted for consideration, and by reaching issues clearly prohibited by law or the terms of the parties' agreement. The appellate panel said, "[W]e do not consider whether the arbitrator correctly decided the issue. . . . We will uphold an award so long as the arbitrator offers a barely colorable justification for the outcome reached." *Id*. at 122 (internal quotations omitted).

There is obvious tension between this deferential standard, and the *Stolt-Nielsen* Supreme Court holding that the arbitral panel exceeded its powers. The *Jock* court explained that the key to resolving this tension is the *Stolt-Nielsen* Court's "interpretation of the parties' 'silence' . . ." *Id*. at 120.

In his *Jock* dissent, Circuit Judge Ralph K. Winter noted that the "silence" in *Stolt-Nielsen* "simply reflected the fact that each party recognized that the arbitration clause neither specifically authorized nor specifically prohibited class arbitration." *Id*. at 128. The *Jock* majority, however, said that the Supreme Court interpreted the "silence" to mean that the parties themselves agreed that they had not reached any agreement on the issue of class arbitration. *Id*. at 120. The practical consequence of favoring one interpretation over the other is significant.

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Indeed, if Judge Winter is correct, then the *Stolt-Nielsen* implications would be quite broad. Any arbitrator who held that an agreement not referring to class arbitration, in fact, did permit it arguably would have exceeded his or her power since such a case would be indistinguishable from *Stolt-Nielsen*. But, "[i]f *Stolt-Nielsen* resolves only the effect of a *sui generis* and idiosyncratic stipulation of the parties . . . ," it runs the risk of becoming an "insignificant precedent. . . ." *Id*. at 129, n. 2 (Winter, J.).

Courts addressing the issue have disagreed with Judge Winter's position, and have found that the Supreme Court interpreted the *Stolt-Nielsen* "silence" to mean that the parties agreed that they had not reached an agreement on the issue. See, e.g., *Chen-Oster*, 785 F. Supp. 2d 394; *Guida*, 2011 WL 2550467, at *4; *Vazquez*, 2011 WL 2565574 at *3, n. 1.; *Opalinski*, 2011 WL 4729009, at *3.

Moreover, the language the Court actually used in *Stolt-Nielsen* could not have been clearer as to the interpretation the Court was giving to the parties' stipulation: "[T]he parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." 130 S. Ct. at 1768.

Thus, the post–*Stolt-Nielsen* discussion on questions of the scope of arbitrators' interpretive authority looks remarkably similar to the pre–*Stolt-Nielsen* answer. The parties' intent controls, but the

arbitrator decides what that intent was; once the arbitrator has done so, courts may defer in all but the most egregious cases of error.

WHAT THIS MEANS FOR BUSINESSES

Businesses hoping to avoid class actions or class arbitrations should not expect to do so simply by relying on arbitration clauses that do not reference class arbitration.

Nor should businesses expect to have the opportunity to convince a court, as opposed to an arbitrator, that the parties intended such an arbitration clause to bar class arbitration.

Rather, silence in this regard may be an invitation to costly disputes about who should decide questions of the parties' intent.

For those businesses that want to substitute contractual arbitration on an individual basis for all manner of court litigation, a better approach would be to draft arbitration clauses containing clear language that expressly: (A) waives the parties' right to commence or participate in any representative, class, collective, or consolidated action; and (B) requires resolution of all disputes in arbitration on a purely individual basis.

Arbitration clause drafting, as always, requires care. The definition of a "dispute" that would be subject to contractual arbitration should include, "any claim that the [Individual] may assert in any individual, representative or collective capacity or as part of a class."

In addition, in the provision by which both parties waive any right that either of them may have to a jury trial or to a court proceeding or trial of any dispute(s)--except with respect to a court proceeding for provisional remedies or in aid of arbitration--the arbitration agreement would state:

> To the fullest extent permitted by law, the [Individual] expressly waives any right he or she may have to commence or participate in any representative, class, collective or consolidated action(s) or Dispute(s) in court, in arbitration or in any other forum, that may pertain to the subject matter of any Dispute(s), and is required individually to resolve any and all such Dispute(s) pursuant to this [arbitration policy and procedure].

In the end, only a tightly framed arbitration agreement, reflecting these express terms, may avoid unnecessary litigation and sparring before the arbitrator over the issue of silence.