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The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights

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THE POLITICS OF CLASS ACTION ARBITRATION:

JURISDICTIONAL LEGITIMACY AND VINDICATION OF CONTRACT RIGHTS

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I. THE PROBLEMATIC NATURE OF COLLECTIVE ACTION

A. TWO CASES, ONE THEME

Exactly one year apart, the U.S. Supreme Court decided two cases on "class arbitration" proceedings, one about international shipping and the other on consumer purchases of mobile telephones. Each decision inflicted damage on a claimant's right to invoke collective action in arbitrations. Read together, the opinions serve as a prism through which to refract key elements in an increasingly politicized debate on the legal framework for arbitration, particularly within the United States.

In *Stolt-Nielsen v. AnimalFeeds*, an arbitral tribunal had been constituted to hear antitrust claims arising from maritime agreements for transport of liquids such as food oils and chemicals.[1] Asked to interpret a series of charter parties negotiated by experienced business managers, the tribunal rendered a unanimous award saying that the contract language permitted class proceedings. Having determined that the agreements authorized class arbitration, the arbitrators' next job would have been to determine whether the case should in fact go forward on that basis, an exercise involving evaluation of various criteria, such as the existence of common questions of law and fact, relevant to the appropriateness of class rather than bilateral action. Only then would the tribunal proceed to rule on the merits of the claims.

The arbitrators never got the chance to take the next steps, however. A majority of the Supreme Court decided that by

1. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010). Opinion by Justice Alito joined by Justices Roberts, Scalia, Thomas and Kennedy. Dissent by Justice Ginsburg joined by Justices Breyer and Stevens. Justice Sotomayor took no part in the case, having been on the Second Circuit during the appeal, but later joined the dissenters in another decision about arbitral jurisdiction, *Rent-A-Center v. Jackson*, 130 S. Ct. 2772 (2010). This latter case did not involve class proceedings, but rather allocation of authority between arbitrators and courts in deciding the validity of an arbitration clause in an employment contract that the worker said was unconscionable. An opinion by Justice Scalia, joined by Justices Roberts, Alito, Thomas and Kennedy, held the challenge to be a matter for the arbitrator. A dissent by Justice Stevens, joined by Justices Ginsburg, Breyer and Sotomayor, argued that the matter lay within the purview of courts.

construing the contracts as having authorized class arbitration, the arbitral tribunal exceeded its authority. The award was then remanded to the lower court to be vacated.[2] For the majority, respondents' failure to consent to class proceedings trumped any efficiency benefits from collective arbitration such as the sharing of costs that might otherwise inhibit pursuit of claims.

Twelve months later, in *AT&T Mobility v. Concepcion*, the same Court addressed arbitration arising from a federal court action brought by consumers against the manufacturer of cellular telephones.[3] The standard-form sales contracts provided for arbitration, but prohibited class proceedings. Relying on an earlier California judicial ruling striking down such prohibitions as unconscionable, the lower federal courts refused to compel arbitration. The Supreme Court reversed on the basis that state rules barring class action waivers ran afoul of federal law.[4]

Vigorous dissents were issued in each instance. In *Stolt-Nielsen* the dissenters contended that the arbitral process had not yet reached a point ripe for judicial review. Moreover, the arbitrators were simply doing what the parties instructed them when designating the AAA Supplementary Rules on Class Arbitration as the framework for the arbitration. In *AT&T Mobility*, the dissent authored by Justice Breyer stressed the advantages of class arbitration, and argued that the California rule on waivers fell within the role accorded to state

2. A federal district court had initially vacated the award for "manifest disregard of the law," but was then reversed by the Second Circuit Court of Appeals. Although accepting that "manifest disregard" existed as a ground for annulment, the Court of Appeals considered that the standard had not been met under the facts of the instant case.

3. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Justice Scalia delivered the opinion of the Court, joined by Justices Roberts, Alito, Thomas and Kennedy. The dissent by Justice Breyer was joined by Justices Ginsburg, Sotomayor and Kagan. Following *Stolt-Nielsen*, Justice Kagan had been appointed by President Obama to succeed Justice Stevens, who had earlier expressed serious concerns about arbitration in a dissent in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 666 (1985).

4. *AT&T Mobility* at 1753. The majority's reasoning was adopted by the Ninth Circuit in *Kilgore v. KeyBank, Nat. Ass'n*, 637 F.3d 947 (2012), in which the court held that a California law prohibiting arbitration of claims for public injunctive relief was not a ground that "exist[s] at law or in equity for the revocation of *any* contract," and was accordingly preempted to the extent that it purported to invalidate agreements to arbitrate such claims.

law in determining the validity of arbitration agreements.

The comment triggered by these cases has explored the dispute resolution's fairness, a capacious notion that incorporates a responsibility to hear before deciding (due process), respect for the contours of arbitral jurisdiction (whether imposed by contract or public policy) and the general duty of impartiality and independence.[5] Controversy has addressed not only the fairness of the format for adjudication, whether collective or bilateral, but also that of the forum, whether public courts or private arbitration.[6]

B. POLITICS AND JUDICIAL ATTITUDES

The ideological overtones of these two decisions will not escape careful observers, aware of how class arbitration in the United States tends to implicate passions associated with "business vs. consumer" conflicts. Indeed, shortly after *AT&T Mobility*, the New York Times carried a scathing editorial describing the decision as "a devastating blow to consumer rights" that would "bar many Americans from enforcing their rights in court [and in many cases] from enforcing rights at all."[7]

In the context of current American political debate, four of the five judges striking down the award in *Stolt-Nielsen*, and confirming the class waivers in *AT&T Mobility*, would be described as conservative: Justices Alito, Roberts, Scalia and Thomas.[8] The dissents came from Court members all of whom would be considered to the left of those in the majority: Justices Ginsburg, Stevens, Breyer and Sotomayor, along with Justice Kagan, whom President Obama appointed to

5. *See generally* William W. Park, *Les devoirs de l'arbitre: ni un pour tous, ni tous pour un*, 2011 CAHIERS DE L'ARBITRAGE 13 (2011).

6. *See generally* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011); Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2011). *See also* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011), exploring class proceedings in court as well as arbitration.

7. Editorial, *Gutting Class Action*, N.Y. TIMES, 12 May 2011, http://www.nytimes.com/2011/05/13/opinion/13fri1.html.

8. In each case they were joined by Justice Kennedy, often deemed a centrist swing vote.

succeed Justice Stevens after his retirement.

Normally inclined to endorse arbitration as consistent with freedom of contract,[9] the right side of the American political spectrum remains skeptical about class proceedings, seen as a tool of lawyers taking cases on a contingency basis for a portion of the judgment or settlement. By contrast, for those thought of as leaning to the left politically, class actions present themselves as a mechanism to promote consumer and employment claims which, because of the small individual recovery, might not otherwise be brought either in court or in arbitration.

Support of class action arbitration does not necessarily mean satisfaction with arbitration itself. Within the United States, complaints against arbitration of consumer and employment disputes have been raised not only by journalists, but also by legal scholars in popular as well as academic literature. Arbitration has often been portrayed as a way to sidestep the perceived safeguards of a civil jury in favor of more "pro-business" arbitrators.[10] A quarter century ago, in the landmark *Mitsubishi* decision allowing arbitration of anti-trust claims, a dissent by Justice Stevens declared that "[c]onsideration of

9. For comment on arbitration by a scholar usually associated with the "law and economics" movement, see Eric A Posner, *Arbitration and the Harmonization of International Commercial Law*, 39 VA. J. INT'L L. 647 (1999). See also Eric A Posner, *Should International Arbitration Awards be Reviewable*, 94 AM. SOCIETY INT'L LAW PROC. 126 (2000), suggesting that courts "should not review arbitration awards except to ensure that arbitrators have jurisdiction and do not violate mandatory legal rules." Professor Posner continues that nothing in his analysis turns on whether arbitrators are better or worse than courts sin general, but rather what is important is that "parties have the freedom to choose between arbitration and courts." In what appears as an article of faith he adds, "If they have this freedom, they will simply choose the superior forum." *Id.*

10. *See* Amalia D. Kessler, Op-Ed., *Stuck in Arbitration*, N.Y. TIMES, 7 March 2012, at A27. Professor Kessler argues that "arbitration decisions do not need to be based on the law; arbitrators have their own procedures, and some studies have found that they are systematically biased in favor of the companies that hire them," and that "ordinary citizens are increasingly being forced into arbitration under the guise of free contract." *Id. Compare* Thomas Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 991 (2012), in which the author proposes "a public rating system assessing the fairness of arbitration programs associated with contracts for consumer goods or services, or individual employment contracts—what we call an 'Arbitration Fairness Index.'"

a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator."[11]

Resistance to arbitration from the liberal side of the aisle has also worked its way into legislation reducing the vitality of arbitration clauses in consumer and employment contracts.[12] Notably, the pending Arbitration Fairness Act provides that "no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute."[13] The bill's preamble includes a proposed finding that "decisions by the Supreme Court of the United States have changed the meaning of the [Federal Arbitration] Act" so that it now extends to consumer and employment disputes in a way that "undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions."[14]

Politicization of arbitration in the United States derives in large measure from two idiosyncrasies of American legal culture. The first lies in the absence of any general nation-wide statute to insulate consumers and employees from abusive arbitration arrangements. The second rests in the availability of civil juries to decide ordinary contract cases. Arbitration thus commends itself to those with doubts about the reliability of such juries, often perceived as rendering unreasonable verdicts tainted with bias against manufacturers and employers.[15]

11. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 666 (1985).

12. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223. *See also* Department of Defense Regulation Restricting the Use of Mandatory Arbitration Agreements, 48 C.F.R. §§ 212, 222, 252 (2010).

13. Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 402 (introduced 12 May 2011 by Sen. Franken). *See also* Department of Defense Regulation Restricting the Use of Mandatory Arbitration Agreements, 48 C.F.R. §§ 212, 222, 252 (2010).

14. *Id.*

15. For an intriguing case on the law applicable to determination of whether class actions are permissible even outside the arbitration context, see Shady Gove Orthopedic Associates v. Allstate Insurance Co., 130 S. Ct. 1431 (2010).

With greater or lesser degrees of nuance, political scientists and journalists attempt to chart the ideology on judicial decisions, in the sense that certain judges tend to vote together.[16] The so-called "Martin-Quinn Scores" use a scale with negative numbers translating to liberalism and positive numbers translating to conservatism. Thus Justice Douglas, considered a very liberal judge, received an average ideological score of minus 4, while a score of positive 4.30 was accorded the conservative Justice Rehnquist.[17]

Less successful has been the establishment of any intellectually rigorous way to connect the dots among the disparate questions that work their way into the right-left debate, such as criminal procedure, competition law, health care, taxes, gun control, a Christmas crèche on the village green, campaign finance, affirmative action, gay marriage, and abortion. Notions of being a "fiscal" rather than a "social" conservative, which appeal to many Americans, provide some refinement on the theme, while still leaving open what exactly makes a position left or right.[18]

16. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). Explaining the "attitudinal" model of Supreme Court decisions, the authors venture, "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal." *Id.* at 86. For a journalist's take, see Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all.

17. *See generally* Andrew Martin, Kevin Quinn, & Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275 (2005); Lee Epstein, Andrew Martin, Kevin Quinn & Jeffrey Segal, *Ideological Drift among Supreme Court Justices: Who, When and How Important*, 101 NW. U. L. REV. 1483 (2007); Lee Epstein, Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 99 (2008). For comment on the Martin-Quinn scores, see Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Asses Supreme Court Justices, with Special Attention to the Problem of Ideological Draft*, 101 NW. L. REV. 1891 (2007). *See also* Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67 (2005).

18. Traditionally, American conservatives would have seen themselves as cautious toward change, claiming hallmarks of small government and free enterprise as exemplified in classic works by William F. Buckley (GOD AND MAN AT YALE, 1952) and Barry Goldwater (CONSCIENCE OF A CONSERVATIVE, 1960). By contrast, liberal figures such as Kingman Brewster and William Sloane Coffin would claim trademarks as advocates for greater social and economic equality. *See generally* Geoffrey Kabaservice, THE GUARDIANS (2004); Warren Goldstein, WILLIAM SLONE COFFIN JR. (2004). Of course, such characterizations suffer in the

Likewise, it is less than self-evident how such inclinations have come to figure so prominently in the area of arbitration, with its protean quality of changing from context to context. The choice to arbitrate, rather than proceed to otherwise competent courts, justifies itself differently depending on whether the final and binding private adjudication relates to labor disputes, construction contracts, commercial transactions, international finance, or investor allegations of host state expropriation, to mention just a few of arbitration's incarnations.

The elusiveness of political categories in arbitration also manifests itself through inter-temporal shifts from one generation to another. A half century ago, liberal judges tended to wax eloquent about the benefits of arbitration, in the context of labor disputes[19] or construction cases,[20] providing many "pro-arbitration" passages that have since become *locus classicus*. In all instances, labels remain highly sensitive to cultural and geographical context. The bar to arbitration of consumer disputes, while radical in the United States, has long been the norm in Europe.[21]

The complexity of arbitration's political ideology also presented itself in the investor-state dispute resolution provisions of the U.S.-

current world of "neoconservatives" and the Occupy Wall Street movement, with some traditional conservatives lamenting a movement hijacked by oversimplified capitalism and imprudent foreign adventure, and some on the left worrying that protest movements lack focused programs.

19. See the opinions by Justice Douglas, a classic liberal, in the "pro-arbitration" decisions in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) and the so-called "Steelworkers Trilogy," which includes United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564; United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574; United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

20. *See, e.g.*, Moses H. Cone Mem. Hosp. v. Mercury Construction, 460 U.S. 1 (1983), where Justice Brennan, considered a liberal, wrote for the majority which ordered arbitration, while the dissent was penned by Justice Rehnquist, a conservative.

21. The European Union has long restricted consumer arbitration. European Council Directive 93/13/EEC, implemented through national legislation such as the English Arbitration Act of 1996, §§ 89-91. Even apart from the EU Directive, many European countries restrict consumer arbitration by statute. In France, a pre-dispute *clause compromissoire* (contrasted to the post-dispute *compromis*) has long been valid only as between merchants (*commerçants*) or persons contracting with respect to a professional activity. CODE CIVIL [C. CIV.] art. 2061 (Fr.).

Korean Free Trade Agreement, contested by the South Korean left but likely to appear progressive to those living north of the 38th parallel.[22] After the ruling conservative Saenuri Party succeeded in having the Free Trade Agreement adopted in late 2011, the more liberal opposition proposed renegotiation of the treaty's investor-state arbitration provisions, arguing that arbitration's alleged impartiality was more illusion than reality. [23]

C. ENTER INVESTOR PROTECTION

A few months after the decision in *AT&T Mobility*, the tribunal in an international arbitration known as *Abaclat* rendered a jurisdictional award which wrestled with similar questions about class arbitration.[24] The claims had been brought by an association acting as agent for approximately sixty thousand Italian bondholders,[25] including some added after the claims were initially filed, dissatisfied by Argentine debt restructuring following the 2001 economic crisis.

Filed pursuant to the Italian-Argentine investment treaty, the

22. *See generally* Chung Min-uck, *Opposition Pledges to Scrap KORUS FTA After Taking Power*, KOR. TIMES, Feb. 8, 2012, http://www.koreatimes.co.kr/www/news/nation/2012/02/116_104431.html.

23. Discussion focused *inter alia* on the 1998 NAFTA arbitration in the *Loewen* case, which rejected a Canadian request for compensation in connection with a Mississippi state court trial generally considered xenophobic from start to finish. One Korean press report cited political pressure on Abner Mikva, an arbitrator in the *Loewen* case, by a U.S. Justice Department official who suggested that the arbitral tribunal should deny liability because "if we [the United States] lose this case we would lose NAFTA." Jung Eun-joo, *Unearthed Documents Illustrate Pitfalls of ISD Clause*, HANKYOREH, 3 January 2012, English.hani.co.kr/. On *Loewen*, see generally William W. Park & Guillermo Aguilar Alvarez, *The New Face of Investment Arbitration*, 28 YALE J. INT'L L. 365 (2003).

24. Abaclat & Others (formerly Giovanna A Beccara & Others) v. Argentine Republic, ICSID Case No. ARB 07/5, Decision on Jurisdiction and Admissibility, majority opinion by Pierre Tercier and Albert Jan van den Berg, 4 August 2011; dissent by Georges Abi-Saab, 28 October 2011. As is well-known to those familiar with investor state arbitration, awards rendered pursuant to the rule of International Centre for Settlement of Investment Disputes, a World Bank affiliate, are often published with consent of the parties.

25. The *Associazione per la Tutela degli Investitori in Titoli Argentini*, often called "Task Force Argentina" (or TFA) filed its claim on 14 September 2006. For procedural reasons a Registration Notice by the ICSID Secretariat did not follow until November 7, 2007.

Abaclat case took a different direction from the U.S. Supreme Court decisions. The majority took jurisdiction over the collectively-filed claims, while the dissenting arbitrator expressed concerns about the appropriateness of such proceedings.[26] Citing both *Stolt-Nielsen* and *AT&T Mobility*, the dissent endorsed the reasoning in both judgments as underscoring the fundamental differences between bilateral and class representative proceedings, which, he wrote, required some "special consent of the parties" not to be assumed from a simple commitment to arbitrate.[27]

International arbitration between investors and host states implicates a shift in the political labels of those for or against class proceedings. Financial interests, considered as relatively conservative in the sense of resisting uncompensated governmental takings, urge investor-state arbitration beyond the traditional bilateral paradigm. Any jurisdictional risks stemming from the atypical dynamics of class proceedings seem outweighed by the prospect of enhancing the vindication of contract rights.

In *Abaclat* the majority saw the "mass action" not as a matter not of jurisdiction, but rather of procedural "admissibility" presenting few comparisons to American-style class-action arbitration. The majority emphasized that the tribunal had jurisdiction over each individual claim, and found that no separate, specific consent required with regard to the *form* of the proceeding. According to the majority, "Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could [lose] such jurisdiction where the number of Claimants outgrows a certain threshold."[28]

D. TAXONOMY: CLASS ACTIONS, CONSOLIDATION AND JOINDER

For American and non-American audiences alike, confusion may exist between "class" and "consolidated" arbitration.[29] The former

26. Abaclat & Others (formerly Giovanna A Beccara & Others) v. Argentine Republic, ICSID Case No. ARB 07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011).

27. *Id.* Abi-Saab Dissent, ¶¶ 150-53.

28. *Id.* Majority Award, ¶ 490.

29. On the distinction between consolidated and class proceedings, see generally Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV.

would normally be contemplated when stakes in any individual case remain small enough to make bilateral arbitration impractical from a cost standpoint. By contrast, consolidation implicates several cases each of which would proceed on a stand-alone basis, but which present related parties as well as common issues of law and fact, making it more economical for the claims to be heard together by a single tribunal.

In "class" arbitration, self-selected claimants represent others entitled to similar or analogous recovery. Assuming the relevant contract language can be construed to permit class arbitration, an arbitral tribunal would normally need to decide whether class proceedings justify themselves according to the types of factors relevant in class actions brought in federal court. Such criteria include not only common issues, but also a finding that the representatives and their counsel will fairly and adequately protect the class interests.

Consolidation, on the other hand, involves independent but related actions, without any one individual or entity standing as representative for others, even if each side engages a team of common counsel. Consequently, concerns about the fairness of group representation would normally be absent.[30] All of the lawsuits would otherwise go forward individually. Consolidation simply promotes efficiency.[31]

The difference between "class" and "consolidated" proceedings was recently addressed in an appellate decision involving insurance arbitration, where the court essentially left the arbitral tribunal to decide (as an initial matter, at least) whether to consolidate several proceedings.[32] Following Florida litigation by healthcare providers against every Blue Cross insurance plan in the United States, a dozen

LITIG. 495 (1990); Richard Jeydel, Consolidation, Joinder and Class Actions, 57 DISPUTE RESOL. J. 2 (Nov. 2002 – Jan. 2003).

30. In judicially-ordered consolidation, a judge would normally have discretion to consolidate without regard to the type of safeguards which impose themselves on class proceedings, such as the adequacy of counsel. Compare consolidation pursuant to Federal Rules of Civil Procedure, Rule 42(a), with class actions pursuant to Rule 23 of Federal Rules of Civil Procedure.

31. *See Id.*; FED. R. CIV. P. 23, 24(a).

32. See Judge Easterbrook's opinion in Blue Cross Blue Shield of Mass. v. BCS Ins. Co., 671 F.3d 635, 639 (7th Cir. 2011).

plans requested indemnity from their captive insurer pursuant to an errors-and-omissions policy. Failing to get satisfaction, the plans filed consolidated arbitration claims against the captive, which asked a federal district court to order what it called "de-consolidation" of the proceedings.

Declining to hear an appeal from a lower court decision appointing a third arbitrator, and refusing to de-consolidate the proceedings, the Court of Appeals addressed the special aspects of class arbitration.[33] These included the importance of determining adequacy of representation, and the prospect that a respondent might face one large claim for aggregate damages rather than simply a multiplicity of potential, yet unrealized, small arbitrations.

Had the case been brought on a "class" basis, the appellate court seemed to accept that judicial intervention may have been appropriate, to ascertain whether the parties had in fact agreed to something other than bilateral arbitration. However, the proceedings at issue merely consolidated several cases that would otherwise have been brought individually, thus presenting no urgency to remove the matter from arbitral determination, subject to whatever later judicial review might be open under the Federal Arbitration Act for excess of authority.

One final precision might be in order with respect to the exercise of "joining" parties in arbitration, sometimes referred to as "extending" the arbitration clause. Attempts to join parties to arbitral proceedings might be made as part of an offensive strategy, by a claimant seeking to add a respondent's parent company in the hope of insuring assets sufficient to satisfy any award. Or the tactic might be defensive, by a respondent seeking the benefit of an arbitral clause signed by an affiliate, as a prospect more appealing than an unwanted

33. In its attempt to persuade the Court of Appeals to hear the appeal, the captive insurer had styled its application as a motion to compel arbitration, which would have been easier under Section 16(a)(1)(B) of the Federal Arbitration Act, which permits appeal only from orders denying petitions for arbitration. The Court had little difficulty cutting through form to substance, and in so doing seemed to enjoy finding support both in Ludwig Wittgenstein's PHILOSOPHICAL INVESTIGATIONS. In passing, Judge Easterbrook also cited President Abraham Lincoln's question about how many legs a donkey would have if we call its tail a leg. *Id.* The answer, of course, was only four, since calling the tail a leg did not make it one.

American jury trial.[34]

In some instances the joinder might be pursued by reference to explicit provisions of institutional arbitration rules,[35] while in other events may be pressed simply by reference to general principles of alter ego, "corporate veil" piercing, or implied agency.[36] In all instances, however, the addition of a claimant or a respondent does not change the fundamental nature of the arbitration itself.

II. AWARD VACATUR AND CONTRACT INTERPRETATION

A. PARCEL TANKERS AND ANTI-TRUST

Few matters prove as slippery as the allocation of tasks between judges and arbitrators in commercial disputes. A choice to arbitrate implicates waiver of access to otherwise competent courts in favor of adjudication which is both private and binding. Respect for this bargain means that judges normally should not disturb an arbitrator's substantive conclusions.

34. The protean nature of collective arbitration has often been made even more complex by the term "mass" proceedings, often pressed into service for extraordinary events such as adjudication of Holocaust-related insurance claims through the ICHEIC process conducted in London, or claims to Swiss bank accounts through the Claims Resolution Tribunal in Zürich. *See* INTERNATIONAL MASS CLAIMS PROCESSES (Howard M. Holtzmann & Edda Kristjánsdóttir , eds., 2007).

35. *See, e.g.*, London Court of International Arbitration Rules, art. 21.1(h) (1998), *available at* http://www.lcia.org/DisputeResolutionServices/LCIA ArbitrationRules.aspx; International Chamber of Commerce Rules, art. 7 (2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (providing joinder procedures distinct from those of Article 10 related to consolidation).

36. American courts, of course, are well aware of the various theories on which non-signatories might be joined in arbitration. *See* Arthur Andersen v. Carlisle, 129 S. Ct. 1896 (2009) (addressing notions of third party beneficiaries). For an intriguing cross-Channel debate on the matter, see Dallah Real Estate & Tourism Holding Co. v. Gov't of Pakistan, [2010] UKSC 46. Although the British Supreme Court held that there was no justification to join the government of Pakistan, an analogous decision by the Paris *Cour d'appel* came to the opposite conclusion, dismissing a challenge to an award against the state. Cour d'appel [CA] de Paris, Case No. 09-28533, Feb. 17, 2011. *See generally* William W. Park, *Non-Signatories and International Contract*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 3 (Permanent Court of Arbitration, ed., 2009).

Unlike the merits of a dispute itself, however, an arbitrator's jurisdiction must necessarily fall within the province of judicial review. No reason exists for a court to defer to arbitrators on matters never given to them for decision. Courts understandably hesitate to enforce decisions by arbitrators who have clearly ignored the contours of their mandate.

This sensible delineation of tasks inheres in most modern arbitration statutes, including the Federal Arbitration Act ("FAA"), which empowers courts to vacate awards "where the arbitrators exceeded their powers."[37] Award annulment would not be appropriate, however, simply because a judge disagrees with the award on questions of law or fact submitted to arbitration.[38]

The majority decision in *Stolt-Nielsen*,[39] although paying lip service to this division of labor, effectively ignored the distinction in their disposition of a case brought against owners of ships commonly known as Parcel Tankers, used to carry liquids. Alleging price-fixing and other anti-competitive practices,[40] the shippers that had chartered the vessels requested a single proceeding to address their combined claims, borrowing the term "class action arbitration" from American court procedures. All shippers (the owners' customers) had accepted charter parties (leases for use of the vessels) which included similar arbitration clauses.

Not surprisingly, the shippers would have seen benefit to collective proceedings, permitting them to muster greater legal firepower and to reduce legal costs which in turn would enhance the value of bringing the litigation.[41] By contrast, the owners preferred bilateral litigation strategy, which would have the effect of reducing the cost-benefit ration of the lawsuit for each claimant.

37. 9 U.S.C. §10(a)(4) (1925).

38. With respect to foreign awards, Article V of the 1958 New York Arbitration Convention applies a similar principle, denying recognition if the arbitration agreement was "not valid" or the award contains decisions "beyond the scope of the submission to arbitration."

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

40. In a companion criminal case, Stolt-Nielsen itself had admitted to engaging in an illegal cartel. United States v. Stolt-Nielsen, S.A., 524 F. Supp. 2d 586 (E.D. Pa. 2007).

41. *See generally* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE (2003).

After a district court had ordered the related actions to be heard together,[42] the parties agreed to constitute a tribunal pursuant to the American Arbitration Association's Supplementary Rules on Class Arbitration ("AAA Supplementary Rules") to address whether the various arbitrations could and should proceed on a class basis.[43] In a partial award, the arbitrators construed the arbitration clause to permit class arbitration, which might be ordered at a subsequent stage upon a finding of certain prerequisites, such as common questions of law and fact among the class members. That path must have seemed conducive to a more efficient process, with savings in time and cost from grouping related claims into a single case.

B. EXCESS OF AUTHORITY

1. The "Silent" Clause

The asserted efficiencies in class arbitration, with savings from combined claims, did not impress the ship owners, who sought to vacate the award for excess of authority. Ultimately a majority of the U.S. Supreme Court held that the arbitrators had exceeded their authority by imposing personal policy views, rather than deciding pursuant to applicable law.[44] Accordingly, the case was remanded to the lower court for further proceedings consistent with the Court's opinion, namely vacatur of the award.

The Court based its conclusion on a somewhat unusual feature of the case, which was a post-dispute stipulation concluded by the parties confirming that their contracts were silent on the matter of

42. *See In re* Parcel Tanker Shipping Services Antitrust Litigation, 296 F. Supp. 2d 1370, 1370-71 (J.P.M.L. 2003).

43. AnimalFeeds brought the claim on behalf of itself and all others similarly situated in a putative class action under FRCP Rule 23 against Stolt-Nielsen, Odfjell, Jo Tankers, and Tokyo Marine. *Id.* at 1371; FED. R. CIV. P. 23.

44. Justice Alito wrote:

> It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.

Stolt-Nielsen, 130 S. Ct. at 1767-68.

class action arbitrations, in the sense that "no agreement" had been reached.

Significantly, the Court did not say that parties must agree explicitly to class arbitration, but simply that the case at bar implicated no agreement, whether express or implied. Indeed, the Court added in a significant footnote "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[45] Consequently, not all arbitration clauses which are silent on class actions need be interpreted by federal courts as prohibiting class actions, at least absent a stipulation like the one in *Stolt-Nielsen* to the effect of "no agreement" on the matter.[46]

A strong dissent authored by Justice Ginsburg contended that the arbitrators were simply doing what the parties had instructed them. The AAA Supplementary Rules, accepted by all litigants, empowered arbitrators to decide whether the dispute should proceed on a class action basis.[47]

Under the facts of *Stolt-Nielsen*, the dissent's argument has significant force. No question was raised about the bona fide of the counsel representing the claimant shippers. All claimants appear to have agreed to arbitration with all respondents, leaving open however the question whether the arbitration should proceed on a

45. *See id.* at 1776 n.10.

46. *See Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2nd Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012). A group of retail sales employees filed a discrimination claim against their employer. The Court of Appeals held that the arbitrator did not exceed her authority in determining that arbitration agreement permitted employees to proceed with their effort to certify class in arbitration proceedings against employer.

47. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1777 (2010). Rule 3 of these AAA Supplementary Rules grants the arbitrators jurisdiction to determine whether the arbitration might, as a matter of contract, proceed on behalf of a class, assuming satisfaction of the relevant criteria for class certification set forth in Rule 4, which parallel factors in the Federal Rules of Civil Procedure. *See* American Arbitration Association, AAA's Supplementary Rules for Class Arbitration Rules 3 & 4, *available at* http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004129&_afrLoop=161453029587710&_afrWindowMode=0&_afrWindowId=fmy0ltmjz_171#%40%3F_afrWindowId%3Dfmy0ltmjz_171%26_afrLoop%3D161453029587710%26doc%3DADRSTG_004129%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dfmy0ltmjz_223 (last visited Nov. 2, 2012); *see also* FED. R. CIV. P. 23.

bilateral or a collective basis. Given that arbitration remains a creature of contract, there was nothing odd in the parties deciding to craft the scope of questions to be submitted to the arbitral tribunal, which through incorporation of the AAA Rules included interpretation of controverted charter-party contracts. One side said the contract language *did* permit class proceedings, to which "not so" was effectively the other side's reply.

Not all cases yield to such analysis however. One can imagine, for example, significant complications from an agreement to arbitrate the matter of class entitlement, but concluded by a self-appointed representative which did not in fact speak for a class, a matter discussed more fully below.

2. The Right Answer to the Wrong Question

In its zeal to send a signal on the admittedly problematic nature of class action arbitration, the majority conflated two distinct matters. The first relates to monitoring arbitral jurisdiction, which falls to courts. The second concerns substantive merits of the parties' dispute, which falls to arbitrators.[48]

The opinion by Justice Alito rightly noted the parties' post-dispute stipulation that the contract was silent in the sense of containing "no agreement" on class action arbitration. However, the litigants had unequivocally asked arbitrators, not judges to construe their *ex ante* intent on class arbitration.[49] Article 3 of the AAA Supplementary Rules, titled "Construction of the Arbitration Clause," provides the arbitrators with an explicit grant of jurisdiction as follows:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award").[50]

48. *See generally* William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, *in* 13 ICCA CONGRESS SERIES 55 (Albert Jan Van Den Berg ed., 2007).

49. Brief in Opposition at 2, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010).

50. American Arbitration Association, *supra* note 47. Moreover, Rule 3

The arbitrators were thus empowered by the parties to address whether the arbitration clause permitted the case to proceed on behalf of a class.[51] The litigants moved that question to the realm of the dispute's substance, which under the FAA normally remains within the purview of the arbitrators.

In essence, the majority gave the right answer to the wrong question. The relevant inquiry facing the Court was not, "What did the parties agree in general?" but the more limited issue, "What did the parties agree to arbitrate?" By accepting the AAA Supplementary Rules, the parties gave to the arbitrators the question of whether the contract allowed class action arbitration, thus generally precluding judicial second-guessing on that matter.[52] Courts might still intervene to monitor bias or lack of due process, but not to correct a simple mistake in the arbitrators' contract interpretation.[53]

The chief mischief of *Stolt-Nielsen* lies in its potential to decrease the finality of commercial arbitration, defeating the parties' aim that their dispute be decided by arbitrators rather than courts. Few would disagree that arbitrators must remain faithful to the parties' contract, not create new public policy.[54] Unfortunately, the majority opinion

recognizes that such a determination will be considered an award subject to review pursuant to the delineated grounds for vacatur, but no more, as provided in the FAA. The point of Rule 3 is to construe the contract, as a threshold matter, to determine whether the parties agreed to submit their dispute to class arbitration at all.

51. The applicability of these AAA procedures was explicitly recognized by the majority. *Stolt-Nielsen*, 130 S. Ct. at 1765.

52. For an example of a decision following this line of argument, see Southern Comm. Serv., Inc. v. Thomas, 829 F. Supp 2d 1324 (N.D. GA 2011), in which the District Court held that the arbitrator did not exceed his authority because, "the parties . . . specifically granted the arbitrator the power to interpret their agreement and decide whether it authorized class actions, both in writing and by their conduct." *Id.* at 1337.

53. *See* John M. Townsend, *The Rise and Fall of Class Arbitration*, 2011 AAA Y.B. ON ARB. & L. 395, 407 (2011) (opining that "The Supreme Court simply felt that the arbitrators got the answer wrong, but the statute provides no basis for a court to correct a mere error on the part of arbitrators"); *see also* S. I. Strong, *Opening More Doors Than It Closes*, 2010 LLOYD'S MAR. & CONSUMER L.Q. 565 (Nov. 2010), for a scholarly perspective on the effect of *Stolt-Nielsen* in future cases.

54. The *Stolt-Nielsen* majority opinion at 1767-68 declared that the award must be vacated because the tribunal simply "impose[d] its own view of sound policy regarding class arbitration."

took that general proposition as an avenue to justify award annulment simply because the arbitrators got it wrong on a question submitted for their determination. In doing so, the Court ruled on a substantive issue within the arbitrator's jurisdiction, thus exceeding the judiciary's own legitimate role in the process.

In this connection, one must again note what the Court did *not* do. No suggestion was made that collective action constitutes a non-arbitrable process by reason of some public policy for which the judiciary serves as guardian. Nor did the Court find that claimants' counsel would not adequately represent the interests of all shippers in the proceedings. Rather, the decision rested purely on a divergent interpretation of the contract language, with the reviewing judges reading the charter-parties differently from the arbitrators.

3. Substantive Merits vs. Arbitral Authority

In holding that the award should be vacated, the majority invoked excess of authority by the arbitral tribunal, one of the limited statutory grounds for vacatur under the FAA.[55] Under the facts of the case, however, the Court may well have blurred the distinction between excess of jurisdiction and simple mistake of law, dressing the latter in the garb of the former.

True enough, articulating a robust definition of excess of authority has often proved tenuous.[56] On the basis that litigants do not expressly empower arbitrators to make mistakes, at least one judge has gone so far as to suggest that errors always constitute an excess of authority.[57]

Such a stretch, however, ignores that the parties asked an arbitrator, not a judge, to decide the case, thus assuming the risk that

55. The exclusivity of the FAA as the source for vacatur grounds was declared by the U.S. Supreme Court in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

56. Attempts to define jurisdiction sometimes bring to mind the line by U.S. Supreme Court Justice Potter Stewart, admitting an inability to define "hard core" obscenity but adding, "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

57. The great English jurist Lord Denning once suggested (albeit in an administrative context) that "Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void." *See* LORD DENNING, THE DISCIPLINE OF THE LAW 74 (1979).

the arbitrator might get it wrong. Nothing in the FAA permits judges to impose their own views on matters submitted to arbitration. The integrity of the arbitral process requires not only that judges scrutinize gateway questions related to the contours of the litigants' agreement to arbitrate, but equally that courts respect the arbitrators' decisions on issues given to them for adjudication.

One might draw a distinction between two types of legitimacy. The first being legitimacy of the arbitral process, which might be threatened by arbitrators who exceed their consent-based jurisdiction. A second level of legitimacy relates to the role of the judiciary. A court can and should intervene to ensure the procedural fairness of hearings, in matters such as the right to be heard and respect for the arbitrator's mission. However, when courts begin second guessing an arbitrator's decision on the substance of the dispute entrusted to him by the litigants, arbitration awards cease to have the bargained-for finality expected by the litigants.

In this context, one may recall words used from an earlier U.S. Supreme Court decision addressing a dispute between a New York merchant and an Illinois store owner before arbitrators who ultimately awarded damages to the ill-treated storekeeper. Having lost in arbitration, the unhappy New Yorker succeeded in having the award set aside by a lower court. The Supreme Court reversed with the following reasoning:

> If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation.[58]

To extend jurisdictional analysis further than allowed pursuant to the FAA would permit any unhappy loser in a fair proceeding to renege on the bargain to arbitrate simply when a decision proves not to their liking.

There is nothing unusual in saying that parties express their intent to arbitrate matters which might otherwise be jurisdictional in nature.

58. Burchell v. Marsh, 58 U.S. 344, 349 (1855).

For example, allegations that the signature in an arbitration clause had been forged would normally give rise to a judicial review. Yet it would always be up to the parties to agree that the allegation of forgery should be arbitrated,[59] in which case the arbitrator would be the one to determine the genuineness of the signature.[60]

At some point, of course, arbitrators might simply invent a legal standard informed only by their personal policy preferences.[61] In such an instance, they would be exceeding their authority and detracting from arbitral legitimacy.

The facts of *Stolt-Nielsen*, however, do not lend themselves to painting the arbitrators as such wild cards. Although the Court's aversion to class arbitration proceedings may be understandable, the parties asked the arbitrators, not the courts, to construe their agreement by their adoption of the AAA Supplementary Rules. The arbitrators' understanding of the law had been made on the basis of the earlier U.S. Supreme Court decision where a mere plurality of the Court held that determinations on consolidation were for the arbitrators themselves. [62] The legacy of this case was anything but clear. None of the four opinions commanded a majority.

Although stressing that the award was not yet "ripe" for review, the opinion by Justice Ginsburg acknowledged the effect of the agreement to apply the AAA Supplementary Rules. Her dissent notes, "The parties' supplemental agreement, referring the class-

59. With respect to the very existence of an agreement to arbitrate (such as raised by the allegations of forgery), a separate post-dispute agreement to arbitrate would normally be needed to confer arbitral jurisdiction. By contrast, with respect to procedural matters (such as respect for time limits) the parties might well confer arbitral authority in a single contract containing a clear mandate to arbitrate. *See* Howsam v. Dean Witter, 537 U.S. 79 (2002) (addressing the right to interpret a requirement that arbitration be filed within six years after "the occurrence or event giving rise to the dispute").

60. Such delegation of jurisdictional authority in a separate agreement is exactly what happened in *Astro Valiente Compania Naviera v. Pakistan Ministry of Food & Agriculture* (The Emmanuel Colocotronis No. 2), [1982], 1 All E. R. 823, [1982] 1 Lloyd's Rep. 286 (QB Comm. Ct.) .

61. The sting in the majority's vacatur of the award lies in the line, "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767-68 (2010).

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

arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case."[63] Put differently, the job of construing the contract's scope on the matter of class arbitration had been expressly conferred on arbitrators, not judges.

C. OPT-IN FOR CLASS MEMBERS

The calculus for judicial intervention changes, however, if no subsequent agreement exists to refer the matter to construction pursuant to the AAA Supplementary Rules. Under the factual matrix of *Stolt-Nielsen*, everyone had in fact signed arbitration agreements. In such circumstances, the dangers, milder in magnitude when speaking in relative terms, were simply that arbitrators might erroneously presume an intent to permit collective (rather than bilateral) proceedings among entities that had already consented to renouncing their recourse to courts. The greater disruption lurks in the possible extension of class proceedings to include persons who never signed arbitration agreements at all, most likely the next step for those who press to import true American-style class proceedings into arbitration.[64]

The AAA Supplementary Rules provide criteria for class

63. *Stolt-Nielsen*, 130 S. Ct. at 1780. The plurality felt that the arbitrator should decide whether the parties' agreement allowed for class action arbitration. Justice Stevens concurred with the outcome but did not endorse its reasoning. The dissent by Chief Justice Rehnquist argued that the parties' contract demonstrated no consent to class action arbitration. The dissent by Justice Thomas noted that the case originated before South Carolina states courts, and contended that the FAA did not apply to state proceedings. In the context of the point made by Justice Thomas, it is interesting that *Stolt-Nielsen* implicated a maritime matter, falling within the purview of federal rather than state law.

64. Statutory court-ordered consolidation of arbitral proceedings is a different matter, given that all parties would presumably be subject to the relevant judicial jurisdiction. *See, e.g.*, MASS. GEN. LAWS ch. 251, § 2A (2010), allowing consolidation as provided in the Massachusetts Rules of Civil Procedure, which in Rule 42 permits joinder of actions "involving a common question of law or fact." Mass. R. Civ. P. 42 (2008). The provision was applied in *New England Energy v. Keystone Shipping*, 855 F.2d 1, 3 (1st Cir. 1988), which held that a federal district court could grant consolidation pursuant to Massachusetts state law where the parties' agreement was silent on such matter. *See also* Mass. Gen. Laws ch. 90, § 7N1/2 (1998), requiring non-voluntary arbitration of claims over allegedly defective vehicles.

certification, setting forth factors that largely parallel those in the Federal Rules of Civil Procedure, Rule 23. If arbitrators have found that the contract permits class action arbitration, they will proceed to determine whether the various proceedings should go forward on a class basis. Pursuant to prerequisites in Article 4 of those Supplementary Rules, one or more claimants may represent a class only if each of the following conditions is met:

> (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

The final prerequisite of Rule 4(6) speaks of each class member having entered into an agreement containing an arbitration clause substantially similar to the one signed by the class representative. The sounder approach to such language will be to require a true bilateral arbitration clause, not simply a unilateral post-dispute "opt-in" process. Lacking reciprocity, a unilateral "opt-in" would derogate from the abecedarian principle that arbitration (unlike court proceedings) presupposes genuine consent, not simply post-dispute attachment to a class for litigation convenience.

Under the facts of *Stolt-Nielsen*, all owners and all customers had agreed to arbitrate with each other through clauses in the charter-parties.[65] No question had been raised about the good faith or adequacy of the counsel representing the class in proceedings which simply moved things from bilateral to multilateral proceedings, without deeming into life an agreement to arbitrate where none had existed.

Class arbitration would change dramatically, however, if a unilateral "opt-in" process were to bring into the arbitration potential claimants with which respondents had never concluded any

65. *Stolt-Nielsen*, 130 S. Ct. at 1765.

arbitration agreement at all. Like marriage, commercial arbitration implicates mutual consent, not an open-ended option to be exercised by a host of partners.

III. FREEDOM OF CONTRACT AND CLASS ACTION WAIVERS

A. AT&T MOBILITY AND THE NATURE OF ARBITRATION

In *Stolt-Nielsen* an arbitral award had been rendered, with the courts coming into the act to second guess the arbitrators' decision. By contrast, judges may sometimes preclude arbitrators from ever hearing a matter at all, as happened when the validity of class actions waivers was called into question in *AT&T Mobility v. Concepcion.* [66]

In a consumer complaint against the manufacturer of cell phones, the standard-form sales contracts provided for arbitration but prohibited class proceedings. Relying on an earlier California judicial ruling striking down such prohibitions as unconscionable, the district court refused to compel arbitration.

The Supreme Court reversed, saying that the Federal Arbitration Act preempted state rules barring class-action waivers. Whether right or wrong, the majority opinion by Justice Scalia tended to obscure intellectually rigorous debate by suggesting that any switch from bilateral to class arbitration "sacrificed the principal advantage of arbitration—its informality."[67] He then noted that class arbitration requires procedural formality, to ensure adequate representation of absent class members, notice to absent members, and an opportunity to opt out, before concluding that Congress would not have left the imposition of such procedural requirements to an arbitrator.[68]

One can only speculate on where, in the Federal Arbitration Act or its legislative history, support might be found for such a single-

66. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), 563 U.S. -- (2011).

67. 131 S.Ct. at 1751.

68. The majority also noted, quite rightly, the risk of error increases during class proceedings, yet glossed over the many high-stakes arbitrations that already occur.

dimension view of the arbitral process, particularly in a world with a multitude of publications witnessing to arbitration of large multinational contract disputes and the increasingly public field of investor-state arbitration pursuant to bilateral investment treaties and free trade agreements. On its face at least, the Federal Arbitration Act says simply that arbitration agreements will be enforced according to their terms, whether such agreements relate to big contracts or small.

A sounder underpinning for the decision might have rested on the observation that the state-law doctrine invalidating class-action waivers (the so-called "Discovery Bank" rule) required certain categories of disputes to be litigated in court, rather than arbitrated. It was precisely this type of state "non-arbitrability" rules that the Federal Arbitration Act was intended to preempt.[69]

Although Justice Scalia did not provide much guidance on whether "manifest disregard of the law" continued as a separate ground for award vacatur, his opinion did cite the limited nature of judicial review as another ground for invalidating class-action waivers. According to the majority opinion, "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."[70]

The thoughtful concurrence by Justice Thomas provided what may be a more persuasive approach, looking first to Federal Arbitration Act Section 2 which makes an arbitration agreement valid except on grounds that may exist for contract revocation. He read that provision in tandem with Section 4, which calls for courts to compel arbitration "in accordance with the terms of the agreement." Construing the two sections together, the concurrence suggests that only state law contract defenses concerning *formation* of the arbitration agreement (such as fraud or duress) could serve as a basis to decline enforcement of the

69. *Id*. at 1752. The opinion by Justice Scalia did mention that Section 10 of the Federal Arbitration Act "focuses on misconduct rather than mistake" thus perhaps suggesting that any residual "manifest disregard" must be found as a subset of the excess of authority.

70. *Id.*

clause.[71]

The dissent by Justice Breyer stressed the advantages of class arbitration, and argued that the California rule on waivers fell within the role accorded to state law in determining the validity of arbitration agreements.[72] Asking rhetorically what rational lawyer would have agreed to represent the named claimants in the case, for the possibility of recovering $30.22 in damages, the dissent concluded that the alternative to class action would not be millions of individual actions, but none at all.[73]

B. LOWER COURT REACTIONS

1. Amex Merchants

Such decisions on class arbitration have already resulted in push-back from lower courts. In a multiple-stage antitrust case brought by merchants against a charge-card issuer, the Second Circuit invalidated class-action waivers in arbitration even after two remands for reconsideration.[74]

The named claimants, companies in California and New York as well as a national trade association, sought to represent all merchants which had agreed to accept Amex cards. Although happy for the business from "charge" cards (simply a means of payment), the merchants objected to having to honor "credit" cards permitting customers to finance purchases over time, apparently issued to a less-affluent group of customers than the charge card holders. Claimants argued that the Amex "Honor All Cards" policy constituted an illegal "tying" arrangement in violation of Section 1 of the Sherman Act.

The American Express card acceptance agreements allowed either side to resolve claims by arbitration. However, the contracts also provided that the choice of arbitration by either side precluded the

71. *Id.* at 1754.

72. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1756 (2011) (Breyer, J., dissenting).

73. *Id.*

74. *In re* American Express Merchants Litigation, ("Amex I"), 554 F.3d 300 (2d Cir. 2009); *In Re* American Express Merchants Litigation ("Amex II"), 634 F.3d 187 (2d Circ. 2011); *In re* American Express Merchants Litigation ("Amex III"), 667 F.3d 204(2d Cir. 2012).

merchant from participating "in a representative capacity or as a member of any class of claimants" during the arbitration proceedings.

Rightly or wrongly, the appellate court found that the high cost of "bilateral" arbitration would effectively preclude vindication of statutory rights. On the first reconsideration, directed in light of *Stolt-Nielsen*, as well as its second reconsideration, following *AT&T Mobility*, the Second Circuit found its original analysis unaffected, and declared the arbitration clause unenforceable. Relying on testimony of an economist who opined that the cost of an economic antitrust study might fall between "several thousand dollars" and "in excess of $1 million" the Court found the arbitration clause unenforceable.[75]

An order to arbitrate on a class-action basis was not an option in light of *Stolt-Nielsen*, which requires agreement on the matter. Thus the Second Circuit simply concluded that the arbitration clause itself was unenforceable, and remanded to the district court with instructions to deny the motion to compel arbitration. In doing so the appellate court was careful not to suggest that all class-action waivers were to be deemed per se unenforceable. Rather, its analysis rested on the proposition that in the instant case the only economically feasible means for enforcing rights under competition law via class action. If the arbitration clause precluded such proceedings, then the agreement to arbitrate was unenforceable.

Such an approach leaves litigants in a difficult position. If a contract contains a class-action waiver, a judge is unable to compel class proceedings. Yet the same judge might feel unable to grant a motion for non-class arbitration, considering bilateral proceedings to be unconscionable because the cost denies claimant an ability to enforce statutory rights on an individual basis. The dilemma is certain to stimulate practitioners to focus more on drafting arbitration clauses,[76] whether within the framework of consumer transactions or

75. *In re* American Express Merchants Litigation ("Amex III"), 667 F.3d 204, 212 (2d Cir. 2012) (citing testimony from one Gary L. French, Ph.D.).

76. *See* Paul Friedland & Michael Ottolenghi, *Drafting Class Action Clauses After Stolt-Nielsen*, 65 DISPUTE RESOL. J. 22 (May-October 2010), who suggest explicitly addressing the question of class action arbitration in the arbitration clause to avoid any confusion resulting from how future courts will interpret *Stolt-*

business-to-business contracts.[77]

2. Choice-of-Law Principles

In an interesting case decided as this essay goes to press, the Ninth Circuit Court of Appeal addressed the interaction of class action waivers and choice-of-law rules.[78] A federal district court sitting in the state of Washington had refused to compel arbitration and struck down an arbitration clause requiring bilateral arbitration, finding the clause "substantively" unconscionable pursuant to a Washington state law invalidating class action waivers in arbitration.

In light of the U.S. Supreme Court decision in *AT&T Mobility v. Concepcion*, the Ninth Circuit held that federal law preempted state law invalidating the class-action waiver. However, the case was remanded so that the lower court could examine *procedural* unconscionability, related to general contract defenses such as fraud and duress, not specific to arbitration.

The parties' agreement had provided for application of the law of the state of the plaintiff's billing address. Consequently, the district court was directed to examine the choice-of-law rules in Washington applicable to the procedural unconscionability arguments, which had not earlier been addressed.

IV. LOOKING TO THE FUTURE

Evaluating the recent class-action cases remains a daunting task, both descriptively and normatively. If scholars could predict the future they would likely be in another business. In particular, the peculiar facts of *Stolt-Nielsen* limit its precedential value, given that

Nielsen.

77. Justice Ginsburg's dissent noted that the parties in *Stolt-Nielsen* were sophisticated businesses with sufficient resources and experience to bargain, rather than parties subject to contracts of adhesion. Whether this argument cuts in favor or against a presumption to allow class action arbitration remains an open question. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1783 (2010).

78. Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012), reversing the U.S. District Court for the Western District of Washington. Federal courts exercising jurisdiction based on diversity of citizenship apply the choice-of-law rules of the forum state. Thus the district court was directed to look to the conflicts principles of the state of Washington.

the decision rests on an explicit "no agreement" stipulation not likely to be repeated if the parties resisting class arbitration have competent counsel.

The great risk of Stolt-Nielsen is that its approach will be pressed into service to justify award annulment in cases where judges differ with arbitrators on the substantive outcome of a case. Indeed, the decision enhances the prospect that arbitration will become mere foreplay to litigation, given how the Supreme Court ignored the litigants' explicit agreement to submit to arbitration the very question of whether class proceedings were authorized.

Likewise, the case will provide little guidance on factors that might demonstrate the parties' intent to permit class arbitration. In a key footnote, the majority in *Stolt-Nielsen* punts to future decisions the important question of how to define the contours of an agreement to class action proceedings, stating, "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[79]

Nor will the Court's discussion assist in addressing the much vexed matter of whether "manifest disregard of the law" continues to exist as an independent ground for review of arbitral awards.[80] *Stolt-Nielsen* says that if such a standard exists, it was satisfied under the facts of the case, thus leaving the vitality of the doctrine open to question.[81] In *AT&T Mobility* Justice Scalia does provide a

79. *See Stolt-Nielsen* 130 S. Ct. at 1782, n.10.

80. First introduced in dictum of the 1953 U.S. Supreme Court decision *Wilko v. Swann*, "manifest disregard of the law" has raised considerable concern in some quarters. See, e.g., the opinion by Chief Judge Posner in *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7 Cir. 1994), which refers to the doctrine as having been "[c]reated *ex nihilo* [as] a nonstatutory ground for setting aside arbitral awards." Judge Posner, continued: "If [manifest disregard] is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators 'exceeded their powers'—it is superfluous and confusing." *Id.*

81. *See Stolt-Nielsen*, 130 S. Ct. at 1768 n.3: "We do not decide whether 'manifest disregard' survives … 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." The Court then continued, "Assuming, arguendo, that such a standard applies, we find it satisfied for the reasons that follow [in the majority opinion]." Whether "manifest disregard of the law" exists as an independent ground for judicial review

tantalizing hint, saying that Section 10 of the Federal Arbitration Act "focuses on misconduct rather than mistake" thus perhaps suggesting that any residual "manifest disregard" must be found as a subset of the excess of authority.[82]

Whether judges outside the United States will stay court actions in conflict with class arbitration remains equally unclear. In the context of litigation in France or England, for example, it is far from evident that a court would refuse to hear a claim merely because the respondent, benefiting from no pre-existing arbitration agreement, had simply opted into American class arbitration.

V. CONCLUSION: EFFICIENCY AND CONSENT

Debate over class action arbitration highlights a stubborn tension in binding private dispute resolution. Collective action sometimes promotes a form of efficiency in the vindication of rights which enhances arbitration's role in promoting economic cooperation. Yet the legitimacy of the arbitral process depends on having claims decided in a manner consistent with the limits of arbitral authority contained in the parties' consent, respect for which does not always marry well with consent-based legitimacy.

Human nature being what it is, the character of the substantive claims to be decided often affects how competing considerations get weighed in resolving this tension between efficiency and consent-based legitimacy. Rightly or wrongly, claims of consumer fraud and employment discrimination evoke different "a priori" sympathies from those triggered by actions to enforce the rights of creditors or investors. Not infrequently, political, social and cultural predispositions affect how we balance costs and benefits of rival reactions to a perceived injustice.

In the domestic American context, collective arbitration may pit consumers against manufacturers, workers against their bosses, shippers against vessel owners. For the claimants, class proceedings provide as a more efficient path to recover damages for alleged fraud, unfair dismissal, or overcharging. Not surprisingly, the

of awards was put into doubt by the 2008 Supreme Court decision in *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008).

82. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011).

manufacturer, employer or ship owner, on the receiving end of the complaints, may see the process as a form of litigation terrorism conducted mainly to benefit the plaintiffs' lawyers.

A different color often attaches to collective arbitration in the international realm. The claimants might be well-heeled bondholders alleging expropriation of financial holdings by a developing country,[83] or venerable institutional investors asserting shareholders' rights against a large foreign oil company said to have close ties with the Kremlin.[84]

In each instance, arbitrators asked to interpret the contracts, as well as judges who review the awards and scholars who volunteer comment, may tend to evaluate procedural constraints of party consent in light of conscious or unconscious ideological inclinations. In this context, recourse to imprecise terms such as "left" and "right" will foster helpful analysis only if those labels serve as categories which beg for, rather than provide, enlightenment.

In the end, however, the health of arbitration will depend more on honest and mature debate than on ideology or dogma. In resolving tensions between efficiency and legitimacy, the soundest suggestions will remain imperfect, given that any proposal rests on words connected sequentially even while the reality of the conflict remains obstinately simultaneous in nature.

During the proceedings, arbitrators must be vigilant to respect constraints in the parties' agreement that might limit the format of arbitration to individual rather than collective claims. After the arbitration itself has ended, judges reviewing the award should remember that in the post-award stage of the arbitral process, the role of law consists principally in promoting the rule of law, in the sense of respect for fundamental to procedural fairness. Judicial enthusiasm for insuring the "right result" in contract construction should not normally outweigh the deference due to the arbitrators' good faith resolution of the questions entrusted to them by the litigants.

83. *See* discussion of the *Abaclat* case, *supra* note 24.

84. *See* JSC Surgutneflegaz v. President & Fellows of Harvard College, 167 Fed. Appx. 266 (2d Cir. 2006).