Kluwer Arbitration Blog

Class Arbitration In The United States Survives Another Battle, But Will It Survive The War?

Matthew A. Lee (Quinn Emanuel Urquhart & Sullivan, LLP) · Friday, June 21st, 2013

and Lucas Bento, Quinn Emanuel Urquhart & Sullivan, LLP, New York

The United States Supreme Court's recent decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. __ (2013) (the "Decision"), is the latest installment on whether class arbitration has met its end in the United States. For now, class arbitration survives, subject to the discretion of arbitrators and very limited review by courts. Specifically, the Supreme Court was unanimous in holding that an arbitral decision, "even arguably construing or applying the contract" to determine whether the parties have agreed to class arbitration, "must stand, regardless of a court's view of its (de)merits." (Decision at 4) This case preserves the role of arbitrators in determining whether the parties have agreed to class arbitration, and ensures that such decisions survive the limited judicial review allowed by §10(a)(4) of the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et. seq.*, so long as arbitrators follow the directions of the Supreme Court to tether their decisions to construction of the agreement between the parties.

However, one should not presume that this seemingly broad mandate for arbitrators, to make determinations regarding the applicability of class arbitration, free from rigorous court scrutiny, will be long-lived. In fact, whilst the Supreme Court opted for judicial deference to the consent of the parties to submit disputes to arbitration (and a very narrow construction of a court's powers of review under §10(a)(4)), it is clear from footnote 2 of the judgment that the larger war on who ultimately gets to make decisions about the availability of class arbitration will be fought in the near future as a "question of arbitrability." This post offers an analysis of how the Supreme Court has used this case to explicitly set up the title fight over the future of class arbitration in the United States.

The Underlying Facts:

Dr. John Sutter, a pediatrician, provided medical services to petitioner Oxford Health Plans LLC's ("Oxford") insureds subject to a fee-for-services contract that required binding arbitration of contractual disputes. When Sutter filed a proposed class action in New Jersey Superior Court, alleging that Oxford failed to fully and promptly pay him and other physicians with similar Oxford contracts, Oxford filed a motion to compel arbitration, which was granted by the Court. The fact that the parties agreed that the arbitrator should decide whether their contract authorized class arbitration is critical to the decision in this case. The arbitrator concluded that the contract authorized class arbitration even though the arbitration clause did not expressly refer to class

arbitration. Specifically, the arbitration clause stated:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

Oxford filed a motion in federal court to vacate the arbitrator's decision, claiming that he had "exceeded [his] powers" under §10(a)(4). The District Court denied the motion, and the Court of Appeals for the Third Circuit affirmed.

After the United State Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (holding that an arbitrator may employ class procedures only if the parties have authorized them), the arbitrator reaffirmed his conclusion that the contract permits class arbitration. Oxford then renewed its motion to vacate that decision under §10(a)(4). The District Court denied the motion, and the Court of Appeals for the Third Circuit affirmed.

The Decision:

Neither Justice Kagan's opinion for a unanimous Court, nor Justice Alito's concurring opinion (in which Justice Thomas joined), is in any way an endorsement of the arbitrator's construction of the arbitration clause at issue in this case. Both opinions go to great length to emphasize that "[n]othing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." (Decision at 8) Nonetheless, the Court emphasized the paramount importance of respecting the agreement and intent of the parties. Specifically, the Court noted, "[b]ecause the parties ?bargained for the arbitrator's construction of their agreement,? an arbitral decision ?even arguably construing or applying the contract? must stand, regardless of a court's view of its (de)merits." (Decision at 4, internal citations and quotation marks omitted). Indeed, the Court reiterated:

> "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." **The arbitrator's construction holds, however good, bad or ugly.** (Decision at 8, emphasis added; internal citations omitted).

Justice Kagan's opinion concluded by emphasizing that "Oxford chose arbitration, and it must now live with that choice." *Id.*

This case was limited to an assessment of whether the arbitrator had exceeded his powers under §10(a)(4). In arriving at an answer to that question, the Supreme Court focused its reasoning ***solely*** on whether the arbitrator interpreted the parties' contract, and refused (at least in the body of the discussion above the line) to be drawn into any discussion about whether the courts have the power to review whether an arbitrator has interpreted a contract correctly. The decision of the Court of Appeals for the Third Circuit in this matter had held that judicial review under §10(a)(4) is limited and so long as an arbitrator "makes a good faith attempt" to interpret the contract, "even serious

errors of law or fact will not subject his award to vacatur." 675 F. 3d 215, 220 (2012). It is important to note here that the Supreme Court granted certiorari in this case to address a circuit split on whether §10(a)(4) allows a court to vacate an arbitral award in this kind of circumstance where serious errors of law are alleged. *Compare*, the decision of the Court of Appeals for the Third Circuit holding vacatur not proper and *Jock v. Sterling Jewelers Inc.*, 646 F. 3d 113 (CA2 2011) (holding vacatur not proper), with *Reed v. Florida Metropolitan Univ., Inc.*, 681 F. 3d 630 (CA5 2012) (holding vacatur proper).

The Supreme Court held that §10(a)(4) does ***not*** allow a court to vacate an arbitral award simply because a court disagrees with an arbitrator's interpretation of when an arbitration clause includes an agreement to resolve disputes via class arbitration. More specifically, the Court cited *Stolt-Nielsen* as authority for the proposition that "[i]t is not enough . . . to show that the [arbitrator] committed an error – or even a serious error." (Decision at 4) Thus, in light of the fact that the arbitrator had interpreted the contract twice, based solely on "the parties' intent as evidenced by the words of the arbitration clause itself," the Supreme Court held that there was no basis for vacatur in this case. (*Id.* at 6) The Court reasoned that the arbitrator had been asked twice by the parties to interpret the contract, and that is what he did. Whilst that was apparently the end of the discussion, the Court nonetheless proceeded with an analysis of both *Stolt-Nielsen* and Oxford's arguments on the merits about why the arbitration clause had been misapplied. Interestingly enough, at the end of the Court's restatement of Oxford's argument why class action was not captured by the arbitration clause, the Court simply noted "[w]e reject this argument because, and only because, it is not properly addressed to a court." (Decision at 8)

In its analysis of *Stolt-Nielsen*, the Court noted 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." (Decision at 3) Furthermore, the Court held in *Stolt-Nielsen* that "an arbitration panel exceeded its powers under §10(a)(4) when it ordered a party to submit to class arbitration" where there was no evidence of consent of the parties to submit to class arbitration. (*Id.* 6) It is important to note that Oxford submitted that *Stolt-Nielsen* should be interpreted broadly to hold that in the absence of an *express* reference to class proceedings in an arbitration clause, there cannot be a contractual basis for concluding that the parties agreed to class arbitration; and an arbitrator exceeds their powers under §10(a)(4) if they choose to find otherwise. More specifically, Oxford submitted that a court may vacate "as ultra vires" an arbitral decision for misconstruing a contract to approve class proceedings. (*Id.* 6)

The Court refused to entertain Oxford's broad interpretation of *Stolt-Nielsen*, and explained the holding in *Stolt-Nieslen* on the narrow grounds that because the parties in that case had stipulated that they had never reached an agreement on class arbitration, then the arbitrator's decision approving class proceedings had to be vacated because, in the absence of such agreement, the arbitrator's had simply imposed their own view of sound policy. The Court specifically noted that it had "overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked any contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a ?sufficient? one." (*Id.* 6) This narrow reading of *Stolt-Nielsen* allowed the Court to easily distinguish this case on the grounds that the parties here had agreed that the arbitrator should decide whether their contract authorized class arbitration and the arbitrator did in fact interpret the contract in reaching the conclusion that the parties had agreed to class arbitration.

It is important to note that the Supreme Court's statement about not addressing the question of whether the arbitrator "got [the contract's] meaning right or wrong" is subject to the significant

caveat provided in footnote 2 of Justice Kagan's opinion for the unanimous Court. Specifically, it is noted:

> **We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions … are presumptively for *courts* to decide.** A ***court*** may therefore review an arbitrator's determination of such a matter de novo absent "clear[] and unmistakable[]" evidence that the parties wanted an arbitrator to resolve the dispute. *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. **But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. . . .** Indeed, Oxford submitted that issue to the arbitrator not once, but twice – and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability. (Decision at 5, footnote 2; emphasis added; internal citations omitted)

If the assessment of the availability of class arbitration as a "question of arbitrability" was not ripe for consideration immediately post-*Stolt-Nielsen*, the Supreme Court has certainly provided a very clear invitation for parties to make this argument now. There is no doubt that this passage is likely the prelude to the final chapter for those that have already expressed concern about the fate of class arbitration in the United States and the role that arbitrators will have, in assessing whether parties have consented to class arbitration, moving forward.

Just in case Justice Kagan's opinion was not clear enough, Justices Alito and Thomas offer an even narrower application of the holding in this case, whilst also making their disagreement with the arbitrator's interpretation even more explicit. Specifically, Justice Alito's opinion suggests that the arbitrator's interpretation of the contract should only apply to the parties that opt in, and not to "class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." (Decision at 11) Providing a further scolding of the arbitrator's decision, Justice Alito notes that "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination … [and] [t]he distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding in this case." (Decision at 11) Finally, Justice Alito's opinion concludes by noting that in the absence of concessions like Oxford's, the possibility of absent class members unfairly claiming the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one, "should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide." (*Id.* at 11-12)

Is this the Beginning of the End?

There are three important lessons that should be taken away from this case given its significance to both the future of class action arbitration in the United States and the role that arbitrators will play in having the final (or any) word on this issue.

First, this case provides some clarity with regard to the meaning and scope of *Stolt-Nielsen*. Feared as the death knell for class arbitration, *Stolt-Nielsen* held that a party may not be compelled under

the FAA to submit to class arbitration unless there is a contractual basis concluding that the party agreed to do so. In the aftermath of that case, it remained unclear whether the parties' consent to class arbitration must be affirmatively expressed or whether it could be implied from the arbitration agreement. Many assumed the former. But the Court in *Oxford* held that that is a matter for the arbitrator to decide as long as that decision was made within the scope of the arbitrator's authority. Thus, the "sole question" is whether the "arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." (Decision at 5) In *Stolt-Nielsen,* the Court found that the arbitration panel rested its decision on public policy arguments, and as such went beyond its interpretive role. As the Court in *Stolt-Nielsen* put it, "the task of an arbitrator is to interpret and enforce a contract, not to make public policy." (*Stolt-Nielsen* at 672) In other words, as long as the arbitrator's decision rests on an(y) interpretation of the arbitration agreement, courts should grant it considerable deference in deciding whether class arbitration is permitted under that agreement.

Second, the Court clearly resisted the temptation to interpret *Stolt-Nielsen* so broadly as to hold that an arbitrator would exceed their powers under §10(a)(4) when deciding to authorize class arbitration in the absence of express consent by the parties. This is not to suggest that the Supreme Court has settled the issue of whether courts have a role in directing whether an arbitration clause – silent on whether it allowed class arbitration – in fact allows such arbitration. The point here is that expansion of a court's powers of review under §10(a)(4) was *not* the appropriate vehicle for the Supreme Court to render a final determination on this issue. As such, what resulted was a decision that deferred to the agreement of the parties to have an arbitrator, as opposed to a court, determine whether class arbitration had been agreed to as part of the arbitration clause.

It should be noted that a broad sweeping ruling on the scope of review permitted under §10(a)(4), would have not only bound arbitrators to permit class arbitration only in cases where the arbitration clause *expressly* states that class action is available, but also, significantly expanded the powers that courts have to engage in a form of "merits review" of arbitral decisions. The latter would have been particularly antithetical to the Supreme Court's growing jurisprudence that favors consent of the parties and arbitration. No doubt, both class arbitration and arbitration more generally have avoided significant blows with this decision. Potential classes of plaintiffs are assisted because existing contracts with generally worded arbitration clauses (that do not explicitly refer to class arbitration) can still be stretched to indicate agreement of the parties to submit to class arbitration. This is important for those subject to existing contracts that cannot be amended to expressly state the intent of the parties to submit to class arbitration. Furthermore, this case provides arbitrators, and not judges, with broad discretion to permit or disallow class arbitration, so long as the arbitrator follows the Court's instructions to interpret the parties' contract in making such a determination (and following *AT&T Mobility v Concepcion* 131 S. Ct. 1740 (2011), so long as the agreement contained no waiver against class arbitration). That said, the battle is not over.

Finally, the Supreme Court has made clear that it is unanimous in the view that class arbitration *should not* be inferred from an arbitration clause that does not explicitly refer to class arbitration. Yet, although Justice Kagan's footnote 2 provides an invitation for parties to raise this issue as a "question of arbitrability," the Supreme Court has not hinted at how exactly it intends to interpret, or expand, its jurisprudence on "question[s] of arbitrability" to provide courts with the final say on this issue.

More specifically, it is not clear whether this issue would be treated as an extension of existing "question[s] of arbitrability" (namely, "certain gateways matters, such as whether parties have a

valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy") or whether the Supreme Court has the appetite to hold that a wholly separate "question of arbitrability" is applicable to this issue. (Decision at 5, footnote 2) The latter would clearly be an aggressive move to expand the class of questions that are presumptively for courts to decide – and directly conflict with the Supreme Court's existing jurisprudence that defers to consent of the parties and the policy in favor of arbitration. Before the academic commentary jumps totally back into a conversation consumed by the "death knell" of class arbitration, it is worth remembering that this case, itself, is a clear example of judicial restraint and deference to party consent and the discretion of arbitrators. Whilst the Supreme Court may have voiced clear frustration with the particular interpretation of the arbitrator in this case, its case law on questions concerning arbitration show that the Court has been consistent in not allowing discreet issues of interpretation to cloud its vision or judgment on issues of broader importance that have significant policy implications for arbitration as a whole.

Ultimately, if the tides are going to recede back in favor of determinations of the existence of an agreement to submit to class arbitration being a question presumptively for the *courts* to decide, then we can expect the Supreme Court to provide a limited and technical decision that achieves that goal whilst causing as little collateral damage as possible to the policy that favors arbitration in the United States. That change is likely to come via a limited expansion of the existing power that courts have to assess whether a concededly binding arbitration clause applies to a "certain type of controversy," namely class action proceedings. Nonetheless, at the moment, we have a situation where the Supreme Court has preserved the role of arbitrators, not courts, in exercising broad discretion to interpret the intentions of the parties on whether there is agreement to submit to class arbitration. We should not expect that status quo to be preserved for long.

Matthew Lee and Lucas Bento are associates at Quinn Emanuel Urquhart & Sullivan, LLP in New York and members of the firm's International Arbitration Group. The views expressed in this post are the authors' personal views, and do not reflect the opinions of Quinn Emanuel.

This entry was posted on Friday, June 21st, 2013 at 1:15 am and is filed under Arbitration, Class arbitration, United States
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.