2010 Arbitration Decisions of the United States Supreme Court:

Stolt-Nielsen S.A. v. AnimalFeeds International Corp. and *Rent-A-Center v. Jackson*

by Richard A. Eastman

This year the United States Supreme Court has issued two important, even dramatic, decisions relating to arbitration law, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[1] decided in April, dealing with class arbitrations and arbitrators exceeding their powers, and *Rent-A-Center West, Inc. v. Jackson*,[2] decided in June of this year, dealing with the allocation of power between court and arbitrator ("*Rent-A-Center"*).

Summary of the Two Cases

Stolt-Nielsen arose as an anti-trust case. Stolt-Nielsen and its co-petitioners (hereafter simply Stolt-Nielsen) are shipping companies providing shipping services on space charter ("parcel charter") for edible oils. Respondent AnimalFeeds was a customer ("charterer"). Investigation by the United States Justice Department revealed that a number of ocean carriers including Stolt-Nielsen were engaging in illegal price-fixing. AnimalFeeds then commenced a civil antitrust action against Stolt-Nielsen as a class action in the federal courts. Other charterers had brought similar suits, and all were consolidated. Before consolidation, the Federal Court of Appeals for the Second Circuit had ruled in another of the cases that the dispute was to be arbitrated,[3] and in *Stolt-Nielsen*, the Court stated "The parties agree that . . . AnimalFeeds and Petitioners must arbitrate their antitrust dispute."[4]

AnimalFeeds served Stolt-Nielsen with a demand for class arbitration, designating New York City as the venue and seeking to represent "a class of '[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [Stolt-Nielsen] at any time during the period from August 1, 1998, to November 30, 2002.'"[5] The parties then, by agreement, submitted the subject of class arbitration to a panel of three distinguished arbitrators.[6] The arbitrators concluded that the arbitration clause allowed for class arbitration. Stolt-Nielsen then applied to the District Court for the Southern District of New York to vacate the award. The District Court did vacate the award, finding that "the arbitrators' decision was made in 'manifest disregard' of the law . . . ."[7] The Second Circuit reversed, finding that there had been no manifest disregard of the law and therefore that the arbitrators' decision should be allowed to stand.[8]

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1 559 U.S. ___ (2010)

2 561 US ___ (2010)

3 *JLM Industries, Inc. v. Stolt-Nielsen S. A.*, 387 F 3d 163, 183 (2d Cir 2004).

4 559 U.S. ___, slip opinion at 3.

5 559 U.S. ___, slip opinion at 3, quoting the Second Circuit opinion below, 548 F 3d 85, 87 (2d Cir 2008).

6 The panel of three arbitrators included Kenneth Feinberg and Gerald Aksen, both very well known and respected arbitrators.

7 435 F. Supp. 2d 382, 384–385 (SDNY 2006). "Manifest disregard" is beyond the scope of this note.

8 *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

Justice Alito wrote for a majority of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Over-ruling the Second Circuit, the Court held that the arbitral panel had "imposed its own policy choice and thus exceeded its powers."[9] Then, rather than sending the matter back for reconsideration by the arbitrators, the Court proceeded to decide the underlying issue of class action arbitration.[10] Reiterating the principle that no party can be made to arbitrate unless it has agreed to do so, the Court found no basis for any agreement on the part of Stolt-Nielsen to participate in class action arbitration.[11] In reaching this finding, the Court effectively withdrew the implicit approval of class action arbitration conveyed by the plurality opinion in *Green Tree Financial Corp. v. Bazzle*,[12] and appears to have made the issue of when class action arbitration is permissible an issue preemptively governed by the FAA.[13]

Justice Ginsburg wrote a dissent in which Justices Stevens and Breyer joined.[14] The dissent first objected on procedural grounds, saying that the arbitrators' decision was not an award and was too preliminary a decision to qualify for vacatur. Further, were the Court to reach the merits, the dissent would have rejected the application for vacatur of the arbitrators' decision.[15] The dissent also attempts to limit the scope of the decision by pointing out statements in the majority opinion that "Class arbitration may be ordered if 'there is a contractual basis for concluding that the part[ies] *agreed*' 'to submit to class arbitration'" and "'We have no occasion to decide what contractual basis may support a

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9 559 U.S. ___, slip opinion at 12.

10 "Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators." 559 U.S. ___, slip opinion at 12, citing 9 USC §10(b), which provides "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." It is not at all clear to the author of this note why the Court had the power to decide the matter in lieu of the arbitrators. See 9 USC §11 stating limited situations in which a court may modify or correct an award, none of which seem to apply to the action of the Court in *Stolt-Nielsen.*

11 559 U.S. ___, slip opinion at 20. The Court's ability to decide the case as it did may have been helped by the supplemental arbitration agreement, which expressly stated that the arbitration agreement was "silent" as to class action arbitration, and which AnimalFeed's counsel had explained on the record meant that "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." Slip opinion at 4.

12 539 U. S. 444 (2003). *Bazzle* is mentioned on almost every one of the first 16 pages of the *Stolt-Nielsen* opinion, and discussed and explained by the Court at slip pages 12-16. See discussion of *Bazzle* below, notes 35 through 44 and related text.

13 "While the interpretation of an arbitration agreement is generally a matter of state law (citing *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. ___, ___ (2009) (slip op., at 6); *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987)), the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)." 559 U.S. ___, slip opinion at17.

14 Justice Sotomayor took no part in the case**.**

15 559 U.S. ___, slip dissent at 1.

finding that the parties agreed to authorize class-action arbitration.'"), as well as the majority's mention that "the parties [here] are sophisticated business entities," and "that it is customary for the shipper to choose the charter party that is used for a particular shipment." The dissent suggests that ". . . these qualifications limit the scope of the Court's decision . . . ."[16]

Rent-A-Center also started in the courts. Respondent Jackson filed an employment-discrimination suit against Rent-A-Center, his former employer, in Federal District Court. Rent-A-Center moved to compel arbitration, based on an arbitration agreement Jackson had entered with Rent-A-Center in connection with his employment. Jackson opposed the motion asserting that the arbitration agreement was unconscionable under Nevada law. Rent-A-Center argued that the issue of unconscionability was to be decided by the arbitrator.

The arbitration agreement had been entered as a separate document from Jackson's contract of employment and the claim of unconscionability was asserted with regard to the arbitration agreement itself, not any term of employment. The arbitration agreement contained a clause specifically delegating to the arbitrator the power to resolve challenges to the enforceability of the arbitration agreement.

In *Rent-A-Center* , the Court once again showed its strongly supportive policy towards arbitration with a new and surprising elaboration of the "separability" doctrine of *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*[17] to create a new rule of separability of specific clauses within the arbitration agreement . Justice Scalia's opinion, in which Justices Roberts, Thomas, Alito and Kennedy joined, separates the clause delegating to the arbitrator of the competence to decide on the enforceability of the agreement, and thereby decide his own jurisdiction, from the rest of the arbitration agreement, and rules that in order to avoid submitting the issue of unconscionability to the arbitrator, the party challenging arbitration must object, not to the arbitration agreement as a whole, but to that specific delegation clause. Since Jackson had not specifically attacked the delegation of this power of decision to the arbitrator as unconscionable, he lost his effort to have the issue of unconscionability decided by the court: it was for the arbitrator.

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[16] 559 U.S. ___, slip dissent at 13. These "qualifications" points though seem to the author to be overcome by the logic and vehemence of the majority opinion. However, at least one knowledgeable commentators also feels that the *Stolt-Nielsen* rule would not necessarily apply in consumer and employee contexts, relying on some of the same passages of the majority opinion. Stipanowich, *Outcome Over Clarity*, *http://www.cpradr.org/tabid/45/articleType/ArticleView/articleId/587/Default.aspx*. It has also been suggested that where the state law is clear that class action arbitrations are permitted, as in California, the *Stolt-Nielsen* rationale will not interfere with them. See discussion of *Stolt-Nielsen* at http://www.thecomplexlitigator.com/post-data/2010/5/3/stolt-nielsen-s-a-et-al-v-animalfeeds-international-corp-les.html. Space does not allow full discussion of these issues but the author is skeptical of this reasoning if a case were to reach the Supreme Court in its current configuration.

[17] 388 US 395 (1967)

Justice Stevens wrote a dissent in which the "liberal" wing of the court, Justices Breyer, Ginsburg and Sotomayor, joined. Justice Stevens called the decision "fantastic," in an obviously pejorative sense.

Both *Stolt-Nielsen* and *Rent-A-Center* resonate in the context of the arbitration jurisprudence leading up to them and we will talk about that below. First let's compare the two cases. In the *Stolt-Nielsen* case, the Court's conservative majority reached down and overturned the decision of an eminent panel of well-known American arbitrators, finding that they had overstepped their powers, then decided the issue on the merits and in the course of doing so effectively outlawed class arbitrations in the United States as a matter of federal law. In *Rent-A-Center*, on the other hand, the Court created new law by extending the "separability" doctrine to discrete parts of the arbitration agreement, and in so doing created a powerful new barrier to lower courts looking to void arbitration agreements on the basis of unconscionability. On the one hand an apparent attack on arbitration, on the other an extraordinary elaboration of existing doctrine to extend the reach of arbitration. Do the two decisions have anything in common?

Absolutely. Forget doctrine and look at the results in the two cases. What they have in common is the trend of their results to support corporate business interests by undermining legal protections for consumers, employees and other victims of corporate over-reaching.

Let's put these results in context. The United States Supreme Court by its decisions over the years has made itself the ultimate source of United States arbitration law. The Federal Arbitration Act, 9 United States Code §§1 - 16 ("FAA"), as construed and glossed by the Supreme Court, has become the basic United States statute governing arbitration. It preempts inconsistent state law[18] and applies to the full extent of Congress' power to legislate regarding commerce,[19] so that there is virtually no category of dispute which is not arbitrable.[20]

Many consumer advocates, state courts, federal judges, state governments, congressmen and legal scholars alike have been increasingly critical as the Court's jurisprudence has relied on preemptive use of the FAA to enforce arbitration agreements in contracts of adhesion, that is in employment contracts, and contracts between corporations and their consumer customers. It has been difficult, however, to find ways to get around the Supreme Court's doctrine that the FAA preempts state law which is contrary to its purposes.

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18 *Southland Corporation v Keating*, 465 U.S. 1 (1984)

19 *Allied-Bruce Terminix Companies, Inc v Dobson*, 513 US 265 (1995).

20 Arbitrable issues include anti-trust claims, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 628–40 (1985), the Securities Acts, *Scherk v Alberto-Culver Co*, 417 U.S. 506, 511–20 (1974), most employment contracts, *Circuit City Stores, Inc v Adams*, 532 US 105, 109 (2001), statutory age discrimination claims, *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, 35 (1991) (expanded by lower courts to all forms of employment discrimination, e.*g. EEOC v Luce, Forward, Hamilton & Scripps*, 345 F3d 742, 748–49 (9th Cir 2003)). The Court has held that the FAA preempts a California statute voiding contracts to arbitrate wage disputes. *Perry v Thomas*, 482 U.S. 483 (1987).

Both class action arbitration, involved in *Stolt-Nielsen*, and the doctrine of unconscionability, involved in *Rent-A-Center*, were tools to ameliorate the situation.

Let's start with class action arbitrations.

Consolidation or joinder of arbitration cases has generally not been possible under the FAA absent the agreement of the parties. Cases raising this issue involved parties to related transactions with common issues of law or fact, in which a party sought consolidation to avoid duplication of effort and inconsistent results , but another party or parties would not agree to consolidation.[21] However, some considerable number of state courts did allow consolidation in the absence of contractual provision therefor,[22] and a number of states introduced provision in their own local state arbitration laws for consolidation or joinder of arbitration proceedings by order of court under certain circumstances.[23] In 2000 the Revised Uniform Arbitration Act (RUAA) was issued by the Commissioners on Uniform State Laws, containing a consolidation provision.[24] The RUAA has been adopted by 14 states and the District of Columbia.[25] Since 4 other states have separately enacted

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[21] Cases not allowing consolidation include, *e.g., Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999); *Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 107 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Co. v. Lincoln Nat'l Life Ins. Co.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam); *Del E. Webb Constr. v. Richardson Hosp. Auth*., 823 F.2d 145 (5th Cir 1987) ("[U]nder Sec. 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration."); *Weyerhaeuser Co. v Western Seas Shipping Co*, 743 F.2d 635 (9th Cir. 1985). On the other hand, a divided panel of the First Circuit had held that consolidation of arbitrations in the face of a silent arbitration clause was permissible if applicable state arbitration law authorized it. *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 3 (lst Cir. 1988).

[22] See, e.g., *Grover-Diamond Associates v. American Arbitration Association*, 297Minn. 324, 211 N.W.2d 787 (Minn. 1973); *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977) ("it is no longer open to serious dispute that there is judicial power to order consolidation of arbitration proceedings"); *Episcopal Housing Corp. v. Federal Ins. Co.*, 273 S.C. 181 (1979); *see also New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), cert denied, 489 U.S. 1077 (1989)(consolidation ordered under state arbitration law providing for same); *Litton Bionetics, Inc. v. Glen Constr. Co.*, 292 Md. 34, 437 A.2d 208 (1981); *Polshek v. Bergen Cty. Iron Works*, 142 N.J. Super. 516, 362 A.2d 63 (Ch. Div. 1976); *Exber v. Sletten Constr. Co.*, 558 P.2d 517 (Nev. 1976); *Plaza Dev. Serv. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App. 1988).

[23] *See* Cal. Civ. Proc. Code §1281.3 (enacted 1978) (consolidation); Ga. Code Ann. § 9-9-6 (enacted 1978) (the California and Georgia provisions are identical); Mass. Gen. Laws Ann. ch. 251, § 2A (consolidation); N.J. Stat. Ann. § 2A-23A-3 (West 2000) (consolidation); S.C. Code Ann. § 15-48-60 (Cum. Supp. 2000) (joinder); Utah Code Ann. § 78-31a-9 (1996) (joinder).

[24] RUAA, SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

[25] As of 2010, the RUAA has been enacted in Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah

provisions for consolidation or joinder of arbitrations,[26] and two states have established the rule by court decision, [27] a substantial minority of state arbitration laws countenance consolidation in the absence of contractual provision for it.

The relatively wide acceptance of consolidation of arbitration at the state level contributed to the willingness to order class action arbitration.[28] The pressure for class action arbitration grew directly out of the widening scope of the FAA and FAA preemption described above. Particularly as regards cases involving disputes between corporations and consumers and employees, state courts and legislatures were concerned that individual claims could not be pursued economically and therefore, where enforceable arbitration clauses governed, it was appropriate to allow class action arbitration. An early case implementing class action arbitration was *Keating v. Superior Court,*[29] a decision of the California Supreme Court. In that case, a group of 7-Eleven franchisees sought to invalidate an arbitration agreement between them and franchisor Southland Corporation and proceed with class action litigation. The California Supreme Court held that the arbitration agreement was enforceable for most of the claims[30] and as to those claims, held that class-wide arbitration was permissible under California law when the arbitration agreement was silent regarding class action arbitration, and that the arbitration should go forward as a class action. Subsequently class action arbitration was an accepted phenomenon in California law.[31]

Courts in some other states followed suit.[32]

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and Washington. It was introduced in the legislatures of Alabama, Massachusetts and Pennsylvania in 2010. From the website of the National Conference of Commissioners on Uniform State Laws at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp visited September 9, 2010.

26 California, Georgia, Massachusetts and South Carolina, as noted in note 23 *supra*. Utah has subsequently adopted the RUAA as stated in note 25.

27 New York and Maryland. See note 22 above.

28 An indication of the trend is *Illinois Farmers Insurance Company v. Glass Service Company, Inc.*, 683 N.W.2d 792 (Minn. 2004) where 5700 cases were ordered consolidated by the Minnesota Supreme Court.

29 31 Cal.3d 584, 613-614, (1982) overruled on other grounds *sub nom Southland Corp. v. Keating* 465 U.S. 1 (1984).

30 As to anti-trust claims, it held that they were not arbitrable, a finding reversed by the United States Supreme Court in *Southland,* above notes 18 and 29. Class action arbitration had not been raised as a federal question in the California courts and the U.S. Supreme Court therefore did not address it.

31 *See, e.g., Sanders v. Kinko's, Inc.* 99 Cal.App.4th 1106 (Cal DCA 2002); *Blue Cross of California v. Superior Court* 67 Cal.App.4th 42 (Cal DCA 1998). In due course California courts faced with arbitration clauses expressly excluding class action arbitration held them unconscionable. *Szetela v. Discover Bank* 97 Cal.App.4th 1094 (Cal DCA 2002); *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). *See also Ting v. AT&T*, 319 F.3d 1126 (9th Cir 2003).

32 *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 596 A.2d 860 864 (1991); *Gammaro v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673 (D. Minn. 1993).

On the other hand in *Champ v. Siegel Trading Co*., the Seventh Circuit rejected class arbitration where the contract was silent about it,[33] citing the many federal appeals court decisions rejecting consolidation of arbitrations where the contract was silent on consolidation, and particularly *Government of United Kingdom v. Boeing Co*. [34] A number of other courts followed the *Champ* decision.[35]

This brings us to the *Bazzle* case, in which the South Carolina Supreme Court had ordered class action arbitration,[36] citing *Keating*[37] and its own prior decision allowing consolidation of arbitration proceedings.[38] The Respondents in *Bazzle* had asserted claims for violations of South Carolina statutory requirements in consumer loan procedures and had recovered very substantial monetary awards in class action arbitrations, one of which had been held pursuant to a court order and the other of which had been made into a class action by decision of the arbitrator (the same arbitrator in both proceedings, which had been consolidated). The South Carolina Supreme Court upheld the awards.

The United States Supreme Court's decision in *Bazzle* is very well known because the outcome before the United States Supreme Court seemed to indicate that that Court had effectively blessed class action arbitration. Indeed Justice Breyer's opinion itself states that certiorari had been granted to determine whether the decision of the lower court that class action arbitration could be ordered where the contract was silent was consistent with the FAA.[39] However, the actual issue on which the case was resolved was whether it was for court or arbitrator to determine whether the contract of the parties allowed class action arbitration or not. The decision of a plurality of justices in an opinion written by Justice Breyer [40] was that the arbitrator should decide: "The question here . . . is *what kind of arbitration proceeding* the parties agreed to….It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. " [41]

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33 55 F.3d 269 (7th Cir. 1995).

34 55 F.3d at 274-275. The cases cited are listed in note 22 above.

35 E.g. *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Dominium Austin Partners, L.L.C. v. Eraerson*, 248 F.3d 720, 728-729 (8th Cir. 2001); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (citing *Champ); Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (dicta citing *Champ).*

36 *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 356-358 (SC 2002).

37 Above, note 29. The South Carolina Supreme Court noted that the California Supreme Court had alluded to consolidation in its decision first allowing class arbitration.

38 *Plaza Dev. Serv. v. Joe Harden Builder, Inc* , above note 22.

39 See note 12 above; 539 US at 447.

40 Justice Breyer's opinion was joined by only 3 other Justices, Scalia, Souter and Ginsburg.

41 539 US at 452-453. The rationale of the decision that the issue was one of procedure and that procedural matters are for decision by the arbitrators followed a line of previous Supreme Court decisions on similar lines, most recently *Howsam v. Dean Witter Reynolds, Inc.* 537 U. S. 79 (2002) (timeliness of claim under NASD Arbitration Rules for the arbitrator).

It is interesting to note what the other Justices hearing *Bazzle* thought. Justice Stevens wrote a separate opinion in which he stated that he would have affirmed the decision below but joined with the plurality in order to allow the Court to make a decision.[42] Justice Thomas dissented on the basis that the FAA did not apply to state proceedings.[43] The then Chief Justice Rehnquist wrote a dissent,[44] in which Justices O'Connor and Kennedy joined, and in which he said that the decision on class action was for the courts not arbitrator, that the contract being silent on the subject did not allow for class actions and therefore it was contrary to the FAA, which applied with preemptive effect, to allow class action arbitrations to go forward: in short, the rule which eventually prevailed in *Stolt-Nielsen*.

Even though the precedential value of *Bazzle* was dubious given the variety of views on the Court as then constituted, a number of courts faced with the issue of class action arbitrations followed its lead. [45] The *Bazzle* decision legitimized class action arbitrations, which proliferated. The American Arbitration Association adopted a policy on class arbitrations as well as Supplementary Rules for administering class action arbitrations, and likewise JAMS adopted class action rules.[46] It has been reported that in arbitrations being administered under the AAA's class arbitration rules up to August 2008, sixty-seven arbitral tribunals issued rulings as to class action permissibility, and in all but two the tribunal held that a silent clause permits class arbitration, [47] and in 27 cases in which the tribunal had passed on class certification, 15 had granted certification and 12 had denied

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42 539 U.S. at 454-455.

43 539 US at 460.

44 539 U.S. at 455 et seq.

45 *Kinkel v. Cingular Wireless LLC,* 857 N.E.2d 250, 262 (Ill. 2006) ("the United States Supreme Court held in *[Bazzle]* that class actions may be arbitrated when the agreement between the parties is silent on the question."); *Shroyer v. New Cingufar Wireless Servs., Inc.,* 498 F.3d 976, 992 (9th Cir. 2007) (*Bazzle* is "an implicit endorsement by a majority of the Court of class arbitration procedures as consistent with the Federal Arbitration Act."); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (in an antitrust class action, the First Circuit reversed a district court decision denying enforcement of Comcast's arbitration provision, severed a class waiver provision and compelled class arbitration); *Cheng v. Oxford Health Plans Inc*., 846 N.Y.S.2d 16 (1st Dep't 2007) (per curiam) (approving class action arbitration).

46 AM. ARBITRATION ASS'N., AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003) and AM. ARBITRATION ASS'N., AAA POLICY ON CLASS ARBITRATIONS (2005). As of September 12, 2010, these could still be found on the AAA website at http://www.adr.org; click on "Arbitration"; then click on "Commercial Rules"; next click on "Class Arbitration."JAMS, Class Action Procedures (2005), As of September 12, 2010 a 2009 version could be found at http://www.jamsadr.com/rules-class-action-procedures/. These rules are modeled on the Federal Rules of Civil Procedure governing class actions and provide for stages of consideration, the first being whether the arbitration clause allows class action arbitration, the second being certification of a class. See generally Baker, Class Action Arbitration, 10 Cardozo Journal of Conflict Resolution 335, 339 et seq (2009).

47 Baker, above note 46, at 348.

it.[48] No cases had reached an award on the merits, "there being a tendency . . . to settle after . . . class certification . . . ."[49]

However, some other courts, such as the Seventh Circuit Federal Court of Appeals, did not find *Bazzle* to be binding precedent allowing class action arbitration when the agreement was silent.[50] This led to the curious result that the Illinois State courts would allow class action arbitration following *Bazzle* while federal courts in Illinois would follow the Seventh Circuit rule not allowing class action arbitration where the agreement was silent.

It was in this context that the Supreme Court granted certiorari in *Stolt-Nielsen*. The changed make-up of the court clearly had led to a majority now favoring the position of dissenting Chief Justice Rehnquist in *Bazzle*, and the result we know. The flourishing practice of class action arbitration in states like California is now preemptively abolished by the ruling in *Stolt-Nielsen*,[51] since it is very unlikely that any corporation preparing standard form contracts will voluntarily provide in its arbitration clause for class-action arbitration. The status of the many state laws allowing for consolidation of arbitrations is in grave doubt. Consumers are effectively cut off from any economic way to vindicate their rights where the individual damage claim or other remedy cannot be economically arbitrated.

Now let's turn to *Rent-A-Center*, and its "fantastic" *ratio decidendi*.

The doctrine of unconscionability has been an avenue for ameliorating the situation of comsumers and employees facing arbitration clauses, because of the wording of the FAA itself. Section 2 of the FAA renders agreements to arbitrate valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Such grounds include unconscionability[52] as well, for example, as fraud or duress. The Supreme

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48 Baker, above note 46, at 353.

49 Baker, above note 46, at 354.

50 *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006) ("[W]e cannot identify a single rationale endorsed by a majority of the Court [in *Bazzle]* .... The Justices' rationales do not overlap.").

51 Subject to the possible limits on the scope of the opinion discerned by Justice Ginsberg in dissent and some other commentators. See note 16 *supra*.

52 An early English case defined unconscionability as a bargain "such as no man in his sense and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law take notice." *Earl of Chesterfield v Janssen*, [1750] 28 Eng. Rep. 82, 100 (Ch.). A New York court said "[T]he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under (*sic*) the other because of a significant disparity in bargaining power." *Rowe v Great Atlantic & Pacific Tea Co*, 46 NY2d 62, 69, 385 NE2d 566, 412 NYS2d 827 (1978).

Court has recognized that such grounds are bases for challenge of arbitration agreements, provided that arbitration agreements are held to the same standard as contracts generally.[53]

A noticeable trend has developed for parties not wishing to arbitrate to raise state contract law challenges to the arbitration clause and unconscionability has been the most common basis for such challenges.[54] Under the *Prima Paint* doctrine, so long as the challenge was to the arbitration clause and not to the contract as a whole, such challenges are largely decided by courts.

As a general matter, unconscionability is difficult to establish: "Most claims of unconscionability fail."[55] However, success rates for claims of unconscionability involving arbitration clauses have been extremely high: In one study, 75%![56]

Probably because of the tension involved in over-ruling local courts in matters of state law, the Supreme Court has not taken cases in which lower courts found arbitration clauses to be unconscionable or otherwise invalidated them purportedly based on grounds of general application for the invalidation of contracts.

Rent-A-Center is therefore very significant in the domestic United States setting. By finding a doctrinal way to refer the decision on unconscionability to the arbitrator, the Court was able to decide the case based on the FAA, and at the same time trump the use by lower courts of the doctrine of unconscionability and similar state law rules to frustrate the Court's strong policy in favor of arbitration.

It may be anticipated that from now on clauses giving the arbitrator power to decide its own jurisdiction similar to that before the Court in *Rent-A-Center* will be widely adopted by United States lawyers drafting arbitration agreements. Indeed, many arbitration rules already expressly provide for the arbitral tribunal's power to determine its jurisdiction,[57] which are normally regarded as forming part of the arbitration agreement providing for their application.

It remains to be seen whether legislation current or future may modify the results in *Stolt-Nielsen* and *Rent-A-Center*. The "Dodd-Frank Wall Street Reform and Consumer

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53 *Perry v. Thomas* 482 US at 492-493; *see also Doctor's Associates, Inc* v *Casarotto*, 517 US 681, 687 (1996).

54 In a study reported by Bruhl, "The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law," 83 NYU Law Journal 1420 (2008), the number of claims of unconscionability regarding arbitration clauses increased from near zero to around 80 per year in the period 1994 through 2007, and the percentage of court cases involving arbitration in which a claim of unconscionability is raised increased likewise in the same period from almost zero to 18%.

55 7 JOSE M. PERILLO, CORBIN ON CONTRACTS § 29.4 (rev ed 2002).

56 DiMatteo & Rich, "A Consent Theory of Unconscionability," 33 Fla State U L R 1067, 1113 (2006).

57 See, e.g., American Arbitration Association Commercial Rules R-7 and International Arbitration Rules Art. 15; ICC Arbitration Rules Art. 6(2); LCIA Rules Art. 23(1); CPR Rules, Rule 8; JAMS Rule 11 (c).

Protection Act"[58] ("Dodd-Frank") became law in July 2010. Dodd-Frank creates a "Bureau of Consumer Financial Protection" (BCFP), with jurisdiction over consumer contracts for the sale of financial products and services. BCFP will be authorized to ban or regulate predispute arbitration clauses in contracts under its jurisdiction.[59] Also, under Dodd-Frank the U.S. Securities and Exchange Commission will have authority to ban or regulate predispute arbitration agreements in contracts between customers and broker-dealers.[60] There is also currently pending proposed legislation called the "Arbitration Fairness Act" which if enacted would disallow binding predispute arbitration clauses altogether in consumer, employment, franchise and statutory civil rights cases.

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58 Pub.L. 111-203, H.R. 4173 (became law July 21, 2010).

59 Dodd-Frank §1028. Strictly speaking the law mandates a study of such pre-dispute arbitration clauses, potentially to be followed by bans or restrictions.

60 Dodd-Frank §921, adding 15 USC §78o to the United States Code.