Stolt –Neilsen, Rent-A-Center and Granite Rock, the US Supreme Court's undistinguished 2010 trilogy

In the first half of 2010, the US Supreme Court issued three decisions on arbitration and jurisdiction, each with major problems associated with the majority's approach. *Stolt -Neilsen* v. *Animalfeeds International* provides the right answer to the wrong question about class action arbitration and in so doing may have given the US the broadest modern definition of excess of jurisdiction. *Rent-A-Centre v. Jackson* involves the wrong decision being reached as a result of reliance on the type of pleading point which should have been taken in Stolt-Neilsen but just creates unfairness and inaccuracy in Rent-A-Centre. Finally, in *Granite Rock*, there is a strong suspicion that adherence to procedural formalities may have led the Supreme Court to miss the factually correct answer.

Oddly, the majority wrongly appeals to separability in *Rent-A-Centre* and perhaps equally incorrectly failed to do so in *Granite Rock.* In *Stolt-Neilsen*, the correct application of competence-competence would probably have produced the opposite result whereas in Rent-A-Centre, the Court relied on separability when it should have been considering a combination of competence-competence and the severability of contracts, not that of the arbitration clause from the main contract. This conceptual muddle is worrying because it makes difficult cases increasingly difficult to predict with the attendant litigation risks involved.

***Stolt -Neilsen* v. *Animalfeeds International* – the US Supreme Court gives what may be the right answer to the wrong question**

The US Supreme Court, in its April 2010 decision, *Stolt-Neilsen S.A.* v. *AnimalFeeds International Corp.*[1], reached what appears at first sight to be a perfectly reasonable result. It ruled that an arbitrator cannot insist on a class action arbitration without the consent of all the parties concerned. In doing so, the court appeared justifiably keen to put a stop to the enthusiasm for class action arbitration inspired by its confusing decision in *Green Tree Financial Corp* v. *Bazzle*.[2] Yet, the facts of the case give rise to real concerns that the result is wrong. The reasoning of the majority also makes one suspect a broadening of the definition of excess of jurisdiction well beyond the position of the English House of Lords decision in *Lesotho Highlands* [3] into an indefinable form of merits review.

***Green Tree* v. *Bazzle* – a necessary preliminary**

To understand *Stolt-Neilsen*, a brief overview of *Green Tree* v. *Bazzle* is vital. Green Tree put a standard arbitration clause in a group of its loans to various consumers. The clause said that all

> "disputes… arising from or relating to this contract or the relationships which result from this contracts shall be resolved by binding arbitration by one arbitrators selected by us with consent of you… the arbitration shall have all powers provided by the law…"

The clause was silent on whether class action arbitration could occur. The South Carolina Courts certified a class action and referred the parties to arbitration at the same time. Consequently, the arbitrator administered the arbitration as a class action. Mr and Mrs Bazzle sought to enforce the

[1] 559 U.S. _ (2010)
[2] 539 U.S. 444 (2003)
[3] *Lesotho Highlands Development Authority* v. *Impregilo SpA* [2006] 1 AC 221

award. The Supreme Court of South Carolina decided that its state law permitted class arbitration and affirmed the decision to confirm the award (the US equivalent of an exequatur).

Breyer J, for what at least appeared at first sight to be the majority, reversed this decision but only because he concluded that it was a matter for the arbitrator to decide whether the arbitration clause permitted a class-action arbitration. The arbitrator had not made such a ruling because of the prior class certification. The central feature of the *Green Tree v. Bazzle* decision was that

- the parties had clearly all agreed to arbitration pursuant to the clause and
- the clause referred all disputes arising out of or relating to their contract or relationships resulting from it to the arbitrator to decide.

It followed from obiter remarks by Breyer J in *First Options* v. *Kaplan*[4] that this was a matter for the arbitrator not the court to determine.

The decision in *Green Tree* v. *Bazzle* was at best unhelpful. The parties had to refer their cases back to the arbitrator. He in turn was left none the wiser as to whether a class action process was acceptable. The Supreme Court seemed to draw a distinction not known in other legal systems between questions relating to the validity and scope of the arbitration clause and those concerning the limits of the actual reference to arbitration. Matters on the second subject but not the first were for the arbitrator to determine including the identity of the parties to the reference. The English High Court had rejected this approach in the *Eastern Saga*[5] as in fact had the Second Circuit in the *Boeing* case which barred consolidated arbitrations in the absence of the parties' agreement. [6]

Stolt-Neilsen – the facts

Stolt-Neilsen was one of a number of shipowners involved in this case in the parcel tanker business. They let out compartments in their vessels to customers shipping liquids. AnimalFeeds ships ingredients for animal feed around the world on Stolt-Neilsen's and the other appellants' ships under the Vegoilvoy charterparty. The arbitration clause is pretty standard fare:

> "Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer ear appointing an arbitrator…. The two thus chosen.. shall nominate a third arbitrator… Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act…"

AnimalFeeds brought a class action alleging illegal price-fixing by the various shipowners with whom it was shipping its goods under the same charterparty form following a Department of Justice investigation. This action was referred to arbitration. AnimalFeeds served Stolt-Neilsen and the other shipowners with a demand for class arbitration seeking to represent all the other shippers using the firms' ships during the relevant period. If the arbitration had gone ahead without Stolt-Neilsen's agreement, the result, the annulment of the resulting award, would have been hard to

[4] *First Options of Chicago In, Inc.* v. *Kaplan*, 514 U.S. 938 at 943 (1995)
[5] *Oxford Shipping Company Limited* v. *Nippon Yusen Kaisha (the "Eastern Saga")* [1984] 2 Lloyd's Rep.373.

disagree with. The arbitration clause could not be construed as permitting the participation in any resulting arbitration of any litigant that was not a party to the charterparty concerned.

The problem is that the Petitioner and Respondent actually entered into an agreement "providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations"". Rule 3 requires an arbitrator to decide whether the arbitration clause allows the arbitration to proceed "on behalf of or against a class".

AnimalFeeds ran three arguments in favour of class action arbitration in this case:

> 1) where, as in this case, the arbitration clause is silent on class treatment, *Green Tree v. Green Tree v. Bazzle* permits class action arbitration;
> 2) the clause should be construed as permitting class action arbitration as a matter of public policy; and
> 3) the clause would be unconscionable if it forbade class arbitration.

The arbitrators concluded that applying the customs and usages of the maritime trade, the clause allowed class arbitration. According to the Supreme Court majority, the panel rejected (correctly) the first argument, ignored the last one and based its decision on public policy. The tribunal noted also that the expert evidence did not demonstrate an "inten[t] to preclude class arbitration". Stolt-Neilsen applied to vacate the arbitrator's award or decision on this point. The District Court vacated on the basis of manifest disregard of the law. The Court of Appeals took the opposite view.

The scope of review allowed by the Supreme Court

If the Supreme Court had just been reviewing an arbitrator's decision to conduct a class action arbitration in the absence of any party agreement on the subject, it would not have been difficult for the Supreme Court to have ruled that this was an excess of jurisdiction, a ground for vacatur (setting aside) under section 10(a)(4) of the Federal Arbitration Act. The arbitrators' jurisdiction would have been limited to conducting references between the parties to the contract on the basis of which their jurisdiction rested.

However, with the parties' separate submission agreement of this jurisdictional question to the arbitrator's, the review standard would normally be rather different. The Court was now reviewing a ruling on an issue clearly presented to the arbitrators by the parties who had agreed to the decision being made by that form of tribunal. The obvious answer and the one on which the two lower courts had rested their decision was "manifest disregard of the law".

This ground for setting aside the award had emerged from an almost throw-away remark by the Supreme Court in the long overruled decision in *Wilko* v. *Swan*[7] *in 1953* which was trying to explain why Securities Act claims should not be arbitrable in the light of the way that awards could only be reviewed not for error of law but manifest disregard of it. In the recent *Hall Street* case,[8] the now retired Souter J suggested that perhaps manifest disregard had had its day although he was trying to

[7] *Wilko* v. *Swan*, 346 U. S. 427 at 436–437 (1953) the decision in which was overruled by *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 US 477 (1989).
[8] *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U.S. 576 at 585 (2008)

decide the quite different issue of whether the parties could expand by contract the statutory grounds for vacating an award.

In a tradition that goes back at least to the 1967 Prima Paints decision,[9] the Court dodged the issue using a footnote, this time number 3:

> "We do not decide whether "manifest disregard" survives our decision in *Hall Street*… as an independent ground for review or as a judicial gloss on the enumerated grounds vacatur set forth in 9 U.S.C. §10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant… legal principle, appreciated that the principle controlled the outcome of the disputed issue, and nonetheless wilfully flouted the governing law by refusing to apply it". Assuming… that such a standard applies, we find it satisfied…"

So, the Court concludes that the arbitrators manifestly disregarded the law without determining whether this is actually a standard for setting aside.

In any event, Alito J begins his opinion by setting out the Petitioners' argument on the standard of review which later in the same paragraph he appears to adopt. An arbitrator's decision may be unenforceable as an excess of jurisdiction when the arbitrator

> "strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of … justice' that his decision may be unenforceable".

Alito J continues, explaining:

> "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."

The key to the decision lies in the way in which AnimalFeeds accepted in its submissions to the arbitrators that the arbitration clause was silent on the issue of class arbitration. Alito J regarded acceptance of the second submission, namely that the arbitration clause should be construed to permit class arbitration as a matter of public policy, as inherently an excess of jurisdiction and its reliance in doing so on arbitration awards rather than published judgements. The Justice says:

> "Because the parties agreed their agreement was "silent" in the senses that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation."

Alito J seems to think that had the arbitrators looked at the FAA, federal maritime law or New York law, identified an applicable rule from those sources and reached the wrong result through that process, this would not have involved an excess of jurisdiction. The reliance on arbitration decisions were criticized on the basis that this was done without explaining which rule of law they purported to apply. Instead of seeking a rule of law from the three sources on which the parties had relied to determine the result where the parties had stipulated that their arbitration clause was silent on the subject,

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[9] *Prima Paints Corp* v. *Flood & Conklin Mfg. Co*., 388 US 395 at 402-403 nn 8-9 (1967).

> "the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."

It considered only

> "whether there was any good reason not to follow that consensus [developed in other arbitration awards] in this case".

The parties' intention could not have been legitimate basis for the arbitrators' decision because "the parties were in complete agreement regarding their intent "in that the charterparty was silent on class action arbitration and there was no other relevant evidence on the subject." It was an excess of jurisdiction to impute the parties an intention to have or allow such a proceeding where the contract was silent on the subject and no legal rule could be relied upon to support such a conclusion.

So, reaching a decision, not on the basis of a rule of law derived from any legal sources argued as being relevant and not being able to rely on the parties' intention since none was expressed, was an excess of jurisdiction. On a judicial review scale, this allows less review than the Swiss Concordat's Article 36(f) "arbitraire" (to be replaced by Article 393(e) of the Code de proc□dure civile on 1st November 2011) or the section 69 Arbitration Act 1996 appeal on a question of law for which leave is granted if the award is obviously wrong as a matter of law (or probably wrong in cases of general importance). There is an element of not addressing one's mind to the issue of identifying a rule of law where the parties have not agreed to a non-legal standard.

Of course, the appeal under a question of law can be excluded by the parties' agreement in an English case and the Concordat (like its successor the CPC) only applies in practice to domestic arbitration. The English right to exclude an appeal may explain why the House of Lords in *Lesotho Highlands* [10] laid down one of the most restrictive excess of jurisdiction definitions. Essentially, if the arbitrator has jurisdiction to deal with the dispute and issues a remedy which is not barred by the arbitration agreement, no excess issue arises in English law. In particular, a failure to apply a provision of the Arbitration Act and by clear implication a refusal to apply the law chosen by the parties is not an excess of jurisdiction under English law. *Stolt-Neilsen* would not have been decided the same way in English law without an appeal on a question of law.

Elsewhere, France and Holland have grounds for setting aside where the arbitrator has failed to "conform to the mission entrusted to him"[11] although there is a striking lack of caselaw on this subject. In the 1970s and 1980s, there was French, Swedish and English case law which rejected attempts to challenge awards for "denaturing" the parties' contract.[12] By contrast, though, the US 8th Circuit appeared to go in the opposite direction in the much ignored *Inter-City Gas Corporation* v. *Boise Cascade Corporation*.[13]

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[10] *Lesotho Highlands Development Authority* v. *Impregilo SpA* [2006] 1 AC 221

[11] Code de procédure civile, Art. 15032(3) & Burgerlijke Rechswordering, Article 1065(1)(c)

[12] For France, see *Soci□té européenne d'□tude et d'entreprises* c/ *République fédérale de Yougoslavie*, Cour d'appel de Paris, 20 December 1984, [1987] *Rev. Arb.* 328 and Cour de cassation, 14 June 1977 {1978] *Rev. Arb.* 363 & *G.P.L.A.* c/ *Canal Harbour Worms Co.,* Cour d'appel de Paris, 20 December 1984, [1987] *Rev. Arb.* 49, for Sweden, see 1934 *NJA* 491 at 493. For England, see *James Laing, Son & Co. (M/C) Ltd* v. *Eastcheap Dried Fruit Company* [1961] 2 Lloyd's Rep 277 at 283.

[13] 845 F 2d 184 (8th Cir. 1988)

Alito J's definition of excess of jurisdiction is worryingly close to the 8th Circuit's. He insists that an arbitrator when not asked to apply a non-legal standard must

- seek to identify a rule of decision from a legal system (regardless of whether it is the wrong one), and
- purport to apply it.

That is also pretty similar to manifest disregard of the law. It is also worryingly similar to the Swiss CPC for domestic cases:

> "elle repose sur des constatations manifestement contraires aux faits résultant du dossier ou parce qu'elle constitue une violation manifeste du droit ou de l'équité"
>
> "It is based on findings manifestly contrary to the facts on the file or because it constitutes a manifest breach of the law or equity."

The actual decision

Alito J felt that there was no point in sending the case back to the arbitrators on the basis that the answer to the question submitted to them was obvious. He began by pointing out that state law normally governs the interpretation of an arbitration clause. However, this is subject to the Federal Arbitration Act's imposition of a rule that arbitration "is a matter of consent". Section 2 makes any written arbitration agreement coming within the statute valid

> "save upon such grounds as exist at law or in equity for the revocation of any contract".

A party could not be compelled to submit to class action arbitration unless "there is a contractual basis for concluding that the party *agreed* to do so." Since the parties stipulated that they had not reached any agreement on the issue, the arbitrator's conclusion was

> "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."

The arbitrator could not imply a term here because class-action arbitration:

> "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

Alito J, in common with judges around the world, refused to imply an agreement to a multi-party arbitration in the absence of any statutory provision or any expression of the parties' consent.

While class actions are something of a US phenomenon, the connected issue of multi-party arbitration has been discussed for many years around the world.[14] The problem is that arbitration is not designed very well for coping with multiple parties.

[14] For more on this, see Chartered Institute of Arbitrator's Practice Guidelines on Multi-Party Arbitrations http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/, first published in 72 *Arbitration* 151 (2006). The author's views going back to 1989 and some of the vast amounts of literature on this subject even before then can be found in A Samuel, *Jurisdictional Problems*

While courts can make rulings based on the convenience of the proceedings as to who should participate, the private contractual nature of the arbitral process tends to preclude or obstruct such exercises of discretion. There is nothing to stop parties drafting a multi-party clause which gives the arbitrator appointed typically by a third party the ability to rule on the convenience or otherwise of multi-party proceedings. More commonly, institutional rules have provisions for dealing with these issues in a variety of ways, some requiring express consent and others implying it from the agreement to arbitrate under the rules concerned.[15] Non-institutional multi-party clauses risk encountering the French *Dutco*[16] problem of not allowing each party to appoint an arbitrator, particularly if the number of potential parties are infinite. This favours the use of institutional arbitration if a multi-party problem could arise.

Famously, Dutch law[17] copied the Hong Kong Ordinance rules for domestic arbitration in allowing a court to make such decisions. While Court rulings in these countries are rare, this may be because knowing what a judge would decide leads the parties to agree to it anyway.

Ultimately, to have a multi-party case, one needs either

- the parties' express agreement to such a proceeding;
- their agreement to a set of rules which require or allow it at the discretion of either
  - the institution or
  - the arbitrator to be appointed by it; or
- legislative will in the place of arbitration to give the decision on this subject to either a court or an arbitrator.

In this particular case, neither of these three elements were present. It does not mean that they should not be. Different parties will clearly have different interests in consolidation, some will want to

- exclude particular parties,
- avoid being a party themselves,
- join in an arbitration typically as a claimant or net counter-claimant

These interests are often not obvious until the dispute has arisen. *Stolt-Neilsen* is very good example of this. The parties were not anticipating an antitrust claim being brought when they entered into the original charterparty containing the arbitration clause although the nature of the type of market involved actually made it broadly sensible to have anticipated multiple claims.

The creation of presumptions or implied terms about the parties' agreement to arbitrate is typically a matter for arbitration legislation, something famously reflected in Schedule 1 of the English 1889 Act with its list of implied terms each of which could be excluded by the parties' agreement. There is

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in International Commercial Arbitration, : A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Kluwer, Zurich 1989 at pp. 106-117.

[15] These are set out in section 4.2 of Chartered Institute of Arbitrator's Practice Guidelines on Multi-Party Arbitrations http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/, first published in 72 *Arbitration* 151 (2006)

[16] *Siemens AG & BKMI Industrienlagen GmbH* c/ *Dutco Construction Co.*, Cass. Civ. 7 Jan 1992 [1992] *Rev. Arb.* 470.

[17] Burgerlijke Rechswordering Art 1046 & Hong Kong Arbitration Ordinance Section 6B.

much to be said for a presumption in favour of multi-party arbitrations with the arbitrator determining who should participate. However, the legislative provisions have to be drafted with some care to decide how linked and similar the contracts need to be to attract such treatment. In the meantime, the appointing bodies have provisions of varying strength in this area which should be the subject of discussions at least internally.

So what became of *Green Tree* v. *Bazzle*?

There is a long tradition of US Supreme Court adjudication not tackling issues which do not come up for decision. In general, this is admirable and avoids some of the worst excesses of judicial legislation in other countries.[18] However, in the arbitration field, this can produce unfortunate results with bad precedents and even obiter remarks remaining alive for decades without having any coherent place in the legal system.[19]

It is reasonably obvious from Alito J's remarks that he thinks that *Green Tree v. Bazzle* 's conclusion that the question of whether class action is permissible is for the arbitrators is just wrong. Instead of saying that, the Justice concludes that this conclusion is not the precedent to be derived from *Green Tree v. Bazzle* . The majority in that case depended on the judgement of Stevens J who declined to decide that the matter of class action arbitration was a matter for the arbitrator because that the petitioner never raised it. Stevens J concluded (unlike the minority and certainly contrary to Alito J's views) that the Supreme Court of South Carolina was right to order class action arbitration. He changed his decision to ensure that there was a majority in favour of one disposition in the case and indicated that he preferred the view of the plurality.

Alito J then points out that it is clear that the parties expressly submitted this issue to the arbitrator anyway. This was acceptable although his judgement on the merits of the class-action question make it reasonably clear that there was only one possible correct answer! Theoretically, though, the arbitrator could have tried to apply a legal standard suggested by the parties and reached the wrong result and that would presumably have not been an excess of jurisdiction.

Alito rejected the view that *Green Tree v. Bazzle* decided the standards to be applied in deciding on whether to hold a class-action. Only Stevens J thought that the South Carolina Supreme Court was right to insist on class action arbitration.

Alito J has probably neutralised *Green Tree* v. *Bazzle* as a decision with his analysis of the various Justices' views. It would have been so much better if he had just said what he almost certainly thinks, namely that the plurality was wrong and Rehnquist CJ was right to give negative answers to both questions of whether the arbitrator ordinarily has the power to reach binding decisions on whether to hold a class-action and whether such proceedings are appropriate under the FAA in the absence of the parties' agreement. Awkwardly, Scalia J writing for the majority in the subsequent

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[18] For famous English examples, see *Pioneer Shipping* v. *B.T.P. Tioxide ("The Nema")* [1982] A.C. 724 & *Antaios Compania Naviera S.A.* v. *Salen Rederierna A.B. ("The Antaios")* [1985] A.C. 193.

[19] The Court has missed perfectly good opportunities in recent years to kill off the obiter dicta in *Wilko* v. *Swan*, 346 U. S. 427 at 436–437 (1953) & the aberrant decision in *Volt Information Science* v. *Trustees of Stanford University*, 489 U.S. 468 (1989) in *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U.S. 576 at 585 (2008) and *Preston* v. *Ferrer* 552 U.S. 346 (2008).

Rent-A-Center, West, Inc. v. *Jackson*[20] with which Alito J concurred referred quite unnecessarily to the plurality opinion in *Green Tree v. Bazzle* with apparent approval. This really does not help the development of US arbitration law.

The Bigger Picture

There is something of an explanation for Alito J's adoption of the widest standard for excess of jurisdiction review in any major arbitration centre in the start of his judgement:

> "We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act".

The problem is that the facts of the case did not make that the issue. They posed the question as to the extent of the arbitrator's jurisdiction to decide to order class action in the event that the arbitration clause is silent and the parties have submitted the question specifically to the arbitrator not a court. Alito J has effectively blocked class action arbitration in the absence of some indication in the agreement that the parties have agreed on it. That is probably a reasonable outcome in terms of arbitration law.

Green Tree v. *Bazzle* seems to have been all but neutered even though ironically the parties' express submission of the class-action question to the arbitrator actually rendered the ruling in the earlier decision irrelevant. Nobody will weep for *Green Tree* v. *Bazzle.* It is a complete muddle and Alito J's explanation of how there was no actual majority for the decision probably reduces it to the history books. It would have been better if the Court had made clear its rejection of the idea that the limits of the reference to the arbitration and its parties is ultimately a matter upon which it is for the courts not the arbitrators to make the final decision.

The biggest concern about *Stolt-Neilsen* is the breadth of review for excess of jurisdiction left for other cases. The English House of Lords *Lesotho Highlands* approach[21] has been solidly rejected. In the US, it is not good enough that the arbitrator had jurisdiction over the dispute and issued a remedy not prohibited by the agreement. He or she must go further. Unless the parties have agreed to a non-legal standard, the arbitrator must seek a rule of decision from a legal system and purport to apply it to the facts in some way. He or she can identify the wrong legal rule and even the incorrect legal system and can misapply it. However, the arbitrator must be seen if challenged to have gone through this process.

Stolt-Neilsen does not contain any indication as to the result of the time-honoured issue of how to treat an arbitrator who ignores an express choice of law. That was not in issue and can await another time. Equally, Alito J's painful fence sitting on manifest disregard of the law makes it unclear as to whether the basis for overturning the arbitrator's decision in *Stolt-Neilsen* represents the maximum limits of the merits review permitted as part of the FAA's control for excess of jurisdiction. The

[20] 561 U.S. _ (2010)
[21] *Lesotho Highlands Development Authority* v. *Impregilo SpA* [2006] 1 AC 221.

Supreme Court has opened up the possibility of quite broad merits review when dicta in *Hall Street*[22] seemed to suggest the end of manifest disregard.

The likely consequence of both the uncertainty and the breadth of review indicated in *Stolt-Neilsen* is an increase in applications to set aside awards on the merits that ultimately fail, always the worst possible outcome since the award is not "corrected" and yet the parties are dragged through a further stage of proceedings. This is more serious in a country such as the US where the courts only rarely award attorney's fees to the winning side.

The judgement may be seized upon as suggesting that the type of agreement entered into in this case that submits a jurisdictional issue to the arbitrators does not work. That would involve rejecting what was said by Breyer J in *First Options* v. *Kaplan*. It would also be an incorrect analysis of Alito J's judgement. The later makes it clear that it was perfectly acceptable for the parties to submit their dispute about class-actions to the arbitrator. *Stolt-Neilsen* seems to state that the arbitrators' decision would have been honoured even if it was wrong had the arbitrator's selected one of the legal systems argued about as applicable and purported to apply a legal rule in it to the facts. Alito J did not purport to limit the applicability of *Kompetenz-Kompetenz* agreements or expand the court's power to review the resulting decisions. Equally, though, unlike the English *Emanuel Collocotronis* decision from the 1980s, the Court is not showing any particular deference to a ruling made as a result of such an agreement as compared with an ordinary pre-dispute arbitration clause.

So, was the majority in *Stolt-Neilsen* right? No. The arbitrators were given the power to determine whether they had the power to order a class action arbitration by the parties' agreement. They gave a positive answer to that question which by definition was one of the alternative outcomes on which the parties had agreed. Unless the arbitrators had done something in reaching that decision which contravened either the parties' agreement or public policy, there was no reason to regard the result however incorrect as an excess of jurisdiction. Alito J has built in a further element of excess of jurisdiction, the idea that an award of any type can be challenged if the arbitrators failed to select a rule of decision or law and purport to apply it. That has no basis in the Federal Arbitration Act or in any notion of arbitral jurisdiction.

What about the overall result? According to Alito J, the charterers apparently selected the charterparty form not the shipowners. They could and should have amended the standard form to include a provision for class arbitration if they had wanted it. They should have done this anyway because in the event of any problem with the ship, the different cargo owners are likely to have similar claims against the owner.

On the facts, the overall outcome of multiple arbitral proceedings between the various charterers and shipowners on one price-fixing conspiracy is absurd. Ideally, the US Government should bring proceedings which if successful would result in the payment of compensation to the charterers. This would on the lines of the action brought and found not referable to arbitration in *EEOC* v. *Waffle House, Inc.*[23] In practice that is unlikely to occur, running counter to the triple damages tradition

[22] *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U.S. 576 at 585 (2008)
[23] 534 U.S. 279 (2002).

of the Sherman Act.[24] In the circumstances, an institutional or federal statutory rule allowing consolidation of cases brought under identical or connected arbitration clauses at either the discretion of the arbitrator or an arbitral organization would have made more sense. However, no such rule was actually in place here. Since the charterers could have imposed such a provision in the charterparty arbitration clause but did not do so, one finds it hard to be too sympathetic to them. Nevertheless, this case is a valuable reminder that arbitration law reform does need seize the nettle and provide for consolidation in the absence of contrary agreement. That, though, has been true for many years.

As one probably says goodbye to the notion of class-action arbitration under the Federal Arbitration Act at least in the absence of the parties' agreement, one should not ignore the real reason for class action in cases like *Green Tree v. Bazzle , (*although not in *Stolt-Neilsen).* This is the failure of the Federal Arbitration Act to exclude consumer arbitration and an equal inability in the US to install proper free consumer dispute resolution mechanisms more suited to mass claims handling than arbitration. An Ombudsman approach would obviate the need for these disfiguring cases to make their way to the US Supreme Court.

Final thoughts

Stolt-Neilsen has left the USA with the widest definition of excess of jurisdiction of the major arbitration centres which gives rise to concern at an increase or at the least the absence of a decrease in setting aside proceedings brought to attack the merits. The Court's failure to fix the limits of such review clearly as a result of missing the opportunity to rule on whether manifest disregard exists has exacerbated the situation.

The poor decision in *Green Tree* v. *Bazzle* which seemed to hand binding power to decide on whether to hold class action arbitrations to the arbitrator regardless of the contents of the arbitration agreement appears to have been distinguished out of existence. Where the parties' agreement is silent on the subject, the court has made it clear that an arbitrator would be wrong to hold a class-action arbitration. This resolves much of the confusion left behind by *Green Tree* v. *Bazzle*. In this sense, *Stolt-Neilsen* represents the right answer to the wrong question.

The bigger issue left behind is the treatment of mass claims by arbitration in the absence of general lack of legislative will to impose sensible solutions. For consumer protection, this is a major issue as the facts in *Green Tree* v. *Bazzle* show. Equally, here, where there are mass public law claims, the private attorney general idea behind the type of claims brought in *Stolt-Neilsen* does not work well in the arbitration context any more than it did in practice in the *MitsubishiMotors Corp.* v. *Soler Chrysler Plymouth* case.[25] If states believe in such notions as consumer protection and the private enforcement of public law claims, they really need to legislate properly or at least consider seriously

[24] One might also say that it runs counter to the most famous arbitration case concerning that Act: *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985). However, in practice Soler was never able to bring its case through arbitration because of its insolvency which might have been avoided by effective Government action. On this see *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 814 F. 2d 844 1987) & A Samuel, *Jurisdictional Problems in International Commercial Arbitration, : A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law*, Kluwer, Zurich 1989 at p. 143.

[25] 473 U.S. 614 (1985).

the dispute resolution aspects of them. This would at least ensure that the public view on the competing priorities involved finds a proper reflection in this essential area rather than the slightly hit-and-miss interpretation of arbitration legislation and various public law statutes.

***Rent-A-Center* v. *Jackson*- another unfortunate US Supreme Court decision – on *Kompetenz-Kompetenz* not separability**

Rent-A-Center, West, Inc. v. *Jackson* is yet another 5-4 split decision by the US Supreme Court on a jurisdictional issue where the minority is probably right and the majority's decision is intellectually incoherent.

The major problem here is that since a pleading point may have been vital for the result, the whole decision may mean very little. However, it will almost certainly spawn a series of decisions by lower courts reaching contradictory results. As with a number of other cases in recent times, the problem stems from a refusal by the US authorities to accept that certain types of disputes where the parties are of radically different bargaining power should not be submitted to arbitration, but either put through a process appropriately negotiated through collective bargaining or a public entity like an industrial tribunal.

Antonio Jackson filed an employment discrimination suit in the US District Court for Nevada. His former employer applied to have this claim referred to arbitration. As a condition of working for the Claimant, Mr Jackson had to agree to arbitration of all claims including discrimination. The agreement continued:

> "The Arbitrator, and not any federal, state or local court or agency shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including but not limited to any claim that all or any part of this Agreement is void or voidable."

Jackson challenged the applicability of the agreement on the basis that it was unconscionable, a basis available under Nevada state contract law for challenging unfair contracts. The Ninth Circuit concluded that the decision on the unconscionability point was for the court not the arbitrator.

The majority judgement by Scalia J begins by concluding that the parties can always agree to arbitrate "gateway" arbitrability questions. Unfortunately, the two cases quoted in support of this are *Howsam*[26] which actually decides that limitation issues are assumed not to be jurisdictional and *Green Tree* v. *Bazzle* which Alito J in *Stolt-Neilsen* had correctly explained was a plurality decision due very little respect.

Scalia J starts with a classical description of separability, requiring the challenge to the contract to relate to the arbitration agreement. Here, though, the arbitration agreement was actually separate already from the employment arrangement. Almost in a blink of an eye, the Justice goes from logical to wrong saying:

[26] *Howsam* v. *Dean Witter Reynolds, Inc.* , 537 U.S. 79 (2002)

> "In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of remainder of the contract."

Actually, Scalia J is talking about a different concept altogether. His judgement refers to the blue pencil test traditionally applied to contracts that are illegal or contrary to public policy. There is no reason why that cannot apply to a claim that the agreement is unconscionable if the court can just excise any offending provisions.

The mistake comes two sentences later:

> "unless Jackson challenged the delegation provision specifically, we must treat it as valid under §2."

Poor Mr Jackson challenged the entire agreement as unconscionable not just the provision that appeared to give the power to determine this question to the arbitrator. The agreement to arbitrate was not negotiable, did not cover claims that the employer was likely to bring against the employee only the other way around, limited his right to take depositions and involved fee-splitting.

The point is that at least the first point affects the delegation provision. It was not negotiable too. The limits on depositions may also affect Mr Jackson's ability to challenge the conscionability of the agreement.

In any event, the Supreme Court has decided that a provision referring matters of jurisdiction to an arbitrator gives the arbitrator not the Court the power to decide on whether the agreement to arbitrate is unconscionable so long as the party challenging the arbitration does not expressly attack the provision giving the arbitrator this power.

Contrary to the way this case is presented by both majority and dissent, this case is not about separability in its traditional sense at all. It concerns the construction of an arbitration clause under the Federal Arbitration Act. That, of course, is a logical impossibility since the *Erie* case concluded that Federal Common Law did not exist. Scalia J should instead have been relying on the state law of Nevada's approach to contract construction and the blue pencil test it would apply to an unconscionable agreement.

The Court is actually discussing the old German version of *Kompetenz-Kompetenz*, the agreement to submit a jurisdictional dispute to arbitration as it should have been in Stolt-Neilsen where there was just such an agreement. However, here the policy drivers are different to those involved in separability. Separabilty is a presumption that the arbitration clause in a contract survives a problem with the main contract on the basis that the parties are assumed not to want different aspects of the dispute between them to be resolved by different fora. A *Kompetenz-Kompetenz* agreement must be properly proved to displace the normal assumptions that apply here.

What this case is really about is the majority's reliance on what is nothing more than a pleading point in declining to deny the arbitrator's jurisdiction over the unconscionability point because the party failed to say explicitly that it found the delegation of this power to the arbitrator itself to be unconscionable. Lawyers in future cases will not make that mistake.

On the subject of the severability of unacceptable provisions in an arbitration agreement, there are three positions that the Court could have taken. First, it could have concluded that the unacceptable features of the clause could be removed but that since the parties had still freely agreed to arbitrate, the arbitrator could deal with the rest of the dispute. This essentially was the decision taken by Court of Appeals in *Bauhinia*[27] in 1987 where an unenforceable provision to arbitrate in Iran was replaced by a more "civilised" solution of arbitration in the US even though the parties had not agreed to that. Secondly, it could have decided that the lack of negotiability and one-sidedness of the agreement affected the whole contract and struck it down. The third conclusion is the one reached by the Court, namely that since the delegation provision has not been challenged, the problem is for the arbitrator to deal with.

In a recent English case, *Jivraj* v. *Hashwani*,[28] the Court of Appeal, without the benefit of the third option because there was no delegation provision in the agreement, similar to that in *Rent-A-Center*, opted for the second solution. Actually, the first would have made more sense. There, the parties agreed to arbitrate before a Tribunal consisting of members of the Ismaili Community. One party appointed a non-Ismaili arbitrator. The court concluded that the arbitration clause was unenforceable since it discriminated on the grounds of religion contrary to a European Directive. The Court wrongly concluded that the parties' unacceptable desire for an Ismaili Tribunal deciding the case on the basis of English law should be met by litigating their dispute through the English courts if they could not privately agree an alternative arbitration arrangement.

Otherwise, one is dismayed to see Scalia apparently relying on the plurality opinion in *Green Tree* v. *Bazzle* which caused so much chaos in *Stolt-Neilsen* and Alito J who had effectively laid that case to rest, concurring with Scalia J. The dissent of Stevens J, after making some sensible points about the fact that unconscionability in this case is likely to affect the delegation provision, then veers off into an attack on separability and the Supreme Court decision in *Prima Paints* which weakens the otherwise convincing minority view. Again, it defies belief that some of the Justices concurring with Stevens J did not insist on indicating that their concurrence was limited to the first part of the judgement.

In the end, it is most unsatisfactory that a potentially important case on unconscionability was derailed by the majority essentially refusing to decide the point on the basis of a procedural argument. This contrasts with the way in which Alito J in Stolt-Neilsen decided a point that did not really come up for consideration as to the appropriateness of class-action arbitration in the absence of any express agreement on the point.

Granite Rock v. International Brotherhood of Teamsters – the third of an undistinguished trilogy

Granite Rock v. *International Brotherhood of Teamsters* concerned an arbitration clause in a collective bargaining agreement. Nevertheless, it raises the same types of competence-competence issues that in different ways *Stolt-Neilsen* and *Rent-A-Centre* also dealt with. Strangely, the dissenting opinion of Sottomayor J correctly applies separability to the problem while tackling an issue which the majority refused to consider. As with *Rent-A-Centre*, the Court did this because the

[27] *Bauhinia Corporation* v. *China National Machinery & Equipment Import & Export Cor.,* 819 F.2d 247 (9th Cir. 1987)
[28] ([2010] EWCA Civ 712

issue was not properly raised before the lower court. One is equally left with the strong suspicion that the Court reached the wrong decision on the merits.

In June 2004, the local union, Local, supported by the Teamsters its parent, started a strike against Granite Rock after the collective bargaining agreement between them expired. On July 2nd, the parties agreed to new terms but failed to agree on the fate of strike-related damage. So, IBT told Local to continue striking. Granite Rock sued them both. It sought an injunction against the strike on the basis that the underlying dispute over the post-July strike was arbitrable under the new agreement. The unions replied that the new agreement was never validly ratified by its members.

A jury decided that the new agreement was ratified on July 2nd. The Court therefore referred the breach of contract claims relating to strike action after but not before that date to arbitration. The Ninth Circuit reversed on the basis that the ratification dispute was for the arbitrators. After bending over backwards in *Rent-A-Center* to find arbitrator jurisdiction over a jurisdictional problem, the majority here did the opposite. It could be wrong on both occasions.

Thomas J writing for the majority takes the classical position that a question of whether an arbitration clause covers a dispute is a matter for the court to decide. The issue was when the agreement containing the arbitration clause came into existence through ratification. Since the date on which the agreement was ratified determines whether the arbitration clause's provisions apply to the dispute, that was a matter for the court.

Thomas J also correctly concludes that by seeking an injunction in court to stop the strike so that matters could be referred to arbitration did not constitute a waiver of the right to arbitrate.

Sottomayor J dissented largely on the basis of the facts. The parties executed a CBA definitely by December 2004. The terms made the agreement effective from May 1st 2004. The Justice neatly points out the flaw in Thomas J's argument once one accepts that there was definitely an agreement between the parties made retrospective to May. The issue is not when the new agreement came into force but the time period covered by the arbitration clause.

The problem with this case is that as with *Rent-A-Centre* too much hinges on the way in which the case was pleaded and the evidence which readers cannot see. One can like Thomas J's rigorous application of traditional arbitration concepts. At the same time, a doubt sneaks in that the Court was considering the wrong point. Sottomayor J may well be right to say that the agreement was made retrospective as to the arbitration provision. In any event, that was the issue not the birth date of the CBA. Indeed the logic of the dissent is that the matter should be referred to the District Court for a ruling on whether the arbitration clause covered the dispute in question regardless of the start date of the CBA.

There is no reason why the parties cannot, after a labour or any other dispute has arisen, retrospectively submit a dispute to arbitration even as part of a general agreement. It happened in *Stott-Nielsen*. Oddly, we have a separability issue, since the date of formation of the agreement is not relevant, only the scope of the arbitration clause. Thomas J, though sidesteps that by following Scalia J's approach in *Rent-A-Center* and refusing to deal with an argument that the Unions failed to raise in front of the Court of Appeals or in response to certiorari.

While one can understand Thomas J's feelings about adherence to the procedural rules, it seems a shame that the wrong result has to be reached (in possibly two out of the three cases discussed here) if that is what it is. He is on stronger ground than Scalia J in *Stott-Nielsen* where the key point was all but expressly slammed into the pleadings.

Perhaps, one can rescue from all of this some sensible things. Thomas J has re-asserted the Court's normal role in resolving jurisdictional disputes in the US in a reasonably sensible way. At the same time, one should be aware that a later agreement can subject a dispute that has already happened to arbitration.

Overall

US Supreme Court watchers knowing that three arbitration cases were coming up for decision in early 2010 looked forward to clarification about class actions, the scope of merits review, unconscionability, competence-competence and even perhaps some separability.

For the wrong reasons, the Court in *Stolt*-Neilsen delivered welcome clarity on class actions. In *Rent-A*-Center, the court relied on some unworthy pleading points to dodge the unconscionability argument which was a huge shame. It, nevertheless, showed the English Court of Appeal how to sever the unacceptable parts of an arbitration clause from the whole. Unfortunately, it probably demonstrated this in the wrong case factually and did so purporting to rely on separability which has not application to the problem in question. The Court's refusal to consider a previously unargued point in *Granite Rock* may have some merit. Nevertheless, one is left with the suspicion that the minority was right on the facts to apply separability to the question of when the contract commenced. The issue was not that but the date of the events covered by the arbitration clause.

There is increasing discussion of the need to improve the conceptual understanding of key arbitration concepts. The Supreme Court's efforts are just some more examples of people from whom one expects more bandying around concepts like separability without a clear grasp of what they mean. The arbitration community has some educating to do.