Stolt-Nielsen, Silence and Class Arbitration: “Same as It Ever Was”*

BY JAY W. WAKS AND CARLOS L. LOPEZ

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

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

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

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

The Court first confronted, but declined to resolve, an ambiguity created by Bazzle v. Green Tree Financial Corp., 539 U.S. 444 (2003). The Bazzle Court attempted to resolve the question of whether court or arbitrator should decide if an arbitration agreement permits class arbitration when the agreement does not contain express class arbitration language. Stolt-Nielsen, 130 S. Ct. at 1771.

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

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

In its 5-4 decision, the Stolt-Nielsen Court set out to “establish the rule to be applied in deciding whether class arbitration is permitted.” Id. Conveniency, the parties had stipulated in arbitration that their agreement was “silent” as to class arbitration. The Court held


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**CPR News**

**THIS MONTH’S ONLINE CPR CLE: ‘MAKING MEDIATION WORK FOR YOU’**

The CPR Institute will present a cutting-edge skills session for online continuing legal education credit early this month. There is still time to register online.

And if you cannot attend the live Dec. 7, noon Eastern, one-hour webcast, “Making Mediation Work for You,” the program will be made available on demand a few days after the event for year-end CLE requirements.

The CPR Institute is an ADR content provider for WestLegalEdcenter.com, a division of Thomson Reuters. Individuals at CPR member organization automatically get a 25% discount as a member benefit when registering at the WestLegalEdcenter site. Most CPR member organizations already have an existing purchase agreement with WestLegalEdcenter, too.

The program presenters are veteran New York City mediators and trainers, Nancy Kramer (see www.nancykramermediation.com), and Barbara Swartz (see www.ccresolution.com). The audio program, which will be accredited in 32 jurisdictions nationwide, will help practitioners decide whether and when to mediate, and how to select the most appropriate mediator for the case.

After discussing the best methods for choosing a mediator, Kramer and Swartz will focus on how attorney-advocates and clients can achieve the best possible outcome. Participants will learn how to be well prepared for the ADR session and how to represent their clients most effectively.

All of CPR’s 35 current online seminars carry CLE credit in jurisdictions nationwide, including Ethics presentations. The CLE courses cover hot ADR topics, systems design, and the latest commercial conflict resolution practices. And now, 25 sessions are available as podcasts for CLE credit-on-the-go, where permitted.

Three new sessions were added last month to the CPR Institute’s online library of on-demand online courses. First, top in-house counsel present their views in “Early Case Assessment: How Corporations Decide What Dispute Resolution Mechanism is Right for Them.” The recording, from a Spring CPR Y-ADR event in Washington, D.C., at Milbank, Tweed, Hadley & McCloy, features five in-house lawyers from national firms, and provides not only practice help but also tips for using more ADR in your work.

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You've just spent $3,500 in legal fees preparing for an important mediation: getting the thing scheduled, gathering the critical evidence, undertaking a damages analysis, outlining a negotiation plan, preparing the killer mediation brief, and considering the dispute from every conceivable angle, including your adversary’s.

On top of that, you've shelled out $2,000 for your share of His Honor the Mediator's reasonable fee, arranged your schedule to clear the day, and managed to get your client to take the day off from work. You thought there was an excellent chance your case could settle, which was good because it looks like the two of you are just too far apart.

Sorry indeed. Your client will take $700,000, and you suspect the defendant will pay that much. Impasse? Really?

You look at your client’s concerned face. Did you really come this far, invest this much, get this close, only to walk away without a deal? Is there nothing you can do as the client’s advocate in mediation to salvage this thing, to recover momentum, to push the process to its natural end? Or when the mediator calls it quits, is that the end? Time to pack up the bags, head for the car, and start crafting your opening statement?

THE RESURRECTION

Rather than pack your bags, this is the time to unpack your superhero cape, if not the whole costume.

It is at the time of the stalled mediation that your client needs you the most. Anyone can get boxed in at a mediation. Your client doesn’t need you for that. It’s getting out of that box that is the challenge.

If a settlement exists that your client would love to see, and you are now in charge and start dictating how this is going to work. But it does mean taking a more direct approach to the negotiation and the exchange of information so critical to the process.

GET INFORMATION

For instance, do you know what is motivating your negotiating counterpart? Probably you have a good handle on your own side of the table and you know what your client’s true needs are. But have you figured out what is driving things in the other room?

A good mediator is trying to discover this very thing the moment he or she is engaged on a matter. After all, you don’t know how to approach or structure a possible resolution if you don’t know what is creating the problem in the first place.

Along the same lines, do you know what—or who—is causing the impasse? Even if you have a handle on what’s really driving the other room generally, what is impeding progress now? Is it a financial reason (“I have no money and no insurance.”), emotional (“I hate that guy and am not paying him a penny.”), personnel/authority (“The adjuster with authority is on vacation, again.”), business (“My cash flow is seasonal—and this ain’t the season.”), legal (“They claim they have a witness to the alleged demand by the boss for a foot rub, and we know they lied.”), or global (“Their theory of damages is, respectfully, hogwash.”)?

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With this information, you can begin to craft a negotiating strategy to sidestep the impasse. But how do you get the information to begin with?

ASK FOR IT

Easy. Ask for it. Start with the mediator. Ask him what the problem is in the other room. What's really holding things up? What are they thinking about? Why are they not moving?

What are they afraid of or concerned about? Who's really driving the boat?

 Heck, ask the mediator how high or low he thinks they are willing to go. If he doesn't know, ask him to find out. "It would really help us not only to reevaluate our own views, but to fashion an appropriate response to their last number if we had a better understanding of why our counterparts in the other room are holding fast at $500,000."

If the mediator is simply going to be a message carrier, then frame the discussions so he or she carries the messages that are useful to the ultimate goal—messages that start to peel back the lawyers' rhetoric and legal arguments, and get at what is really going on. If it seems like you could ask these questions even in a healthy mediation, you are right. It can only help.

Don't think the mediator will share this information with you? You would be surprised. Your counterparts in the next room might be just as frustrated as you are. They might be looking, like you, for a way out of the box they find themselves in. If they are thinking properly about it, they might be happy to share this information with you, just as you might be happy to share similar information with them.

LISTEN FOR IT

But even if the mediator doesn't answer your questions directly, you will be surprised at how much you can learn just by listening to the mediator, both with your ears and eyes. By listening carefully at what is said and not said, and by looking for nonverbal cues and clues, you will be amazed at what you discover about what is going on in the other room that can be helpful in crafting a successful resolution.

Remember, the mediator only knows what you and your counterpart said about the case, so if the mediator is discussing issues or facts that you didn't share with him, then he or she must have obtained this information from . . . guess who?

You now have a glimpse into the thinking and concerns of your counterpart. Use that glimpse wisely.

DO IT

If this doesn't provide the spark for renewed negotiations, consider having a private discussion with your counterpart.

The Mediator's Value

The ADR query: Is your neutral bringing his or her "A" game?

The problem: This case was going to settle. It is now stuck. Does this neutral know how to get past impasse?

The remedy: A take-charge plan for an advocate that puts the mediator back to work—not for you, but for your client.

No one is stopping you from walking down the hall to the other room, knocking on the door and inviting your opposing counsel to share a fresh cup of coffee and a few stale cookies out in the lobby. (A carefully timed restroom break can accomplish the same result.)

Your goal? At a macro level, to see if you can breathe some life into the negotiations. At a micro level, the goal is to explore what you couldn't get from the mediator—what is causing the impasse?

You can begin by finding some common ground, such as agreeing on how frustrating the mediation is—even a substandard mediation is good for something. From that bonding moment, start using your interpersonal skills, sincerity, and a little charm, to get a conversation started.

Express your desire to find a resolution that both clients can live with, since both clients need to be satisfied before a settlement can be reached. If he or she agrees with that goal—and who wouldn't, really—you are now sitting on the same side of the hypothetical table, together staring across at your common foe, The Dispute.

You can now brainstorm together to resolve your shared problem. You may get some momentum started and your fine mediator can help take it the rest of the way.

Granted, difficult personalities—not yours, of course, but that stubborn pig in the other room—may sabotage this storybook ending. But don't you at least owe your client the effort?

GET DANGEROUS

Still nothing? Maybe you need to negotiate a little more dangerously.

Think about letting the two principals talk to one another directly, without attorneys. With a good mediator, this is really not dangerous at all. A good mediator knows how to manage and control such a potentially incendiary interaction, and knows when (and when not) to try it. But an unbuffered meeting of principals? Really?

There are circumstances when this is exactly what is needed to get past an impasse. Then again, there are circumstances when this is a recipe for disaster, so you need to tread carefully here. But when it works, it really works.

For instance, a prominent mediator in the Southwest tells a story of how he took two former business partners embroiled in a partnership dissolution to a Buddhist temple and left them there alone for two hours. When the mediator returned, they were sitting side by side on the floor, reminiscing and telling stories. The dispute had been settled an hour earlier.

Do you have clients with a mutual desire to end the dispute? Do they have a foundation of trust to build on? Do they have a successful business history? Did they used to be friends? Are they of approximate equal bargaining power? Are they levelheaded and in control of their emotions? Do you think a failure in honest communication might be part of the problem?

If so, a face to face, without attorneys, may be appropriate. If you do choose to go this route, you will likely want the mediator
to be present to ensure mediation confidentiality. You will want to coach your client beforehand if there are any sensitive topics you don’t want raised.

Dangerous? Maybe. Foolhardy? Not in the right circumstances and with the right preparation on both sides.

A Buddhist temple apparently helps, but it is not mandatory.

**AN ADVOCATE’S PROPOSAL**

Let’s say you’ve done all you can to move things along . . . and the result is you have a brilliant idea for settling the case, one that satisfies both your client’s key goals, and appears to address the opposing party’s needs. Even the lawyers will like it.

The only problem is, if you propose it the other side will (a) reject it out of hand because you proposed it (they are a skeptical and suspicious lot in the other room); or (b) use it as a ceiling (or floor) and seek to negotiate a better deal based on that.

How do you get this presented?

This one is easy. Discuss it with your mediator so that the mediator adopts it as his or her own proposal, and then suggest he or she float the idea to the other party as a mediator suggestion. Or have the mediator consider presenting the idea to all participants at once, at a joint caucus, so it will be considered by the parties in a more unbiased light.

Can the mediator do this? Well, why not? He or she has adopted your idea; it’s now the mediator’s to propose as his or her own.

**A MEDIATOR’S PROPOSAL?**

What happens when your brilliant idea is not so brilliant after all and fails to close the gap?

While your efforts have had some success, you still find yourself $100,000 apart and out of ideas. And patience. It is late in the evening, the food long gone, the coffee stale, and the result is you have a brilliant idea for settling the case, one that satisfies both your client’s key goals, and appears to address the opposing party’s needs. Even the lawyers will like it.

The only problem is, if you propose it the other side will (a) reject it out of hand because you proposed it (they are a skeptical and suspicious lot in the other room); or (b) use it as a ceiling (or floor) and seek to negotiate a better deal based on that.

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Can the mediator do this? Well, why not? He or she has adopted your idea; it’s now the mediator’s to propose as his or her own.

The mediator provides each side with a proposal for how he or she thinks the dispute should be resolved. This is generally not a resolution that is based on the dispute’s “value,” nor is it a prediction of what a judge or jury would do with the case. It is not even premised on being “fair.”

Rather, the mediator’s proposal is a suggested solution that the mediator believes each party will prefer to the alternative of further litigation.

Sometimes the proposal is a settlement number that splits the difference between the parties’ last offer and demand; sometimes it is something else altogether.

But the point is that if the neutral has been paying attention to what was going on in each room, he or she should be in a position to fashion a proposal that won’t necessarily please, but will seriously tempt each party.

The mediator generally presents it in a double blind “take it or leave it” approach, meaning if a party declines, the mediation is over and the party won’t know whether its adversary was or was not willing to accept to deal.

**WHEN DO YOU DO IT?**

Do you as the advocate have a role to play in the presentation of a mediator’s proposal? It’s possible.

For instance, if the time seems right for a mediator’s proposal, but one is not forthcoming, you could urge your mediator to consider making one.

When is the right time for such a beast? Generally, when all else has failed; when there is no more movement, the parties are at an impasse, the mediator is stymied, the coffee is cold, the cookies are gone, and people are ready to head out the door, grumpy and frustrated. Additionally, the final negotiating positions of the parties cannot be too far apart, in a relative sense.

In other words, the parties must have made substantial progress toward that magical point of overlap so that they can now see each other warring across that final gap between their last positions. They should both want to bridge the gap, but not know how to do it.

Finally, it helps if the negotiations have been reduced to an exchange of numbers—that is, the trading of offers and demands are no longer tied to “value,” or “the facts,” or “the law,” or “what is fair,” but instead are based on a cost benefit or “BATNA” (the best alternative to a negotiated agreement) analysis by each party.

The analysis will be along the lines of whether I would rather take/pay this amount of money and end the thing now, or would I rather spend my money by rolling the dice with additional litigation?

If the parties are still far apart, or in need of information to better evaluate their own or their counterpart’s case, or fighting over principle, then maybe a mediator’s proposal is not a tool that can help bring closure. Yet.

**WAITING FOR THE MAGIC?**

So do you simply ask the mediator to provide each party with the proposed resolution, send the neutral out of the room, and then wait for the magic?

You could, and probably most of the time this is the right thing to do. But you are an advocate, remember.

You are trying to get the best deal that you can for your client. Can you, then, either subtly or otherwise, influence the mediator’s proposal to better benefit your client’s ultimate goals?

Possibly. If there is a range of numbers that will settle the case—for instance something between $695,000 and $705,000 in the example discussed at the outset—you (as plaintiff or as plaintiff’s advocate) will want the mediator to propose a settlement at the high end of the range. How do you get him there?

You could start by discussing the matter with the mediator. Brainstorm with the mediator and consider the consequences of a proposal at different figures. If there is a legitimate reason your client cannot come down (or go up) to a certain number, make sure the mediator understands this.

How about “gaming” the mediator by suggesting or implying, as you might when negotiating with a counterpart, that your client can never accept less than $X (when, of course, he would be happy with something less than $X)? Why not? Why not do all the things you normally would do when trying to influence a negotiation partner—only in this case, your counterpart is the mediator who will be proposing a final settlement?

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Well, because there is a larger than normal risk when you negotiate too sharply with your mediator. What if you are so successful that you convince the mediator to propose $725,000 as the settlement—and the defendant rejects it as too rich? The defendant would have paid $700,000, which your client would have gladly accepted, but your power of persuasion so convinced the mediator that the proposal came in too high, and now the deal is lost.

The point is that you need to be careful when trying to “game” the mediator. You don’t want to outsmart yourself and go home without a deal that your client wanted and was well within everyone’s grasp. Remember, it is the person who has been spending time in both rooms—your erstwhile mediator—who is really in the best position to find that elusive settlement overlap.

Of course, if you do outsmart yourself in this way, have you really lost the deal? After all, the mediator’s proposal is a take-it-or-leave-it proposition, those were the rules, and your opposing party chose to leave it.

Nah. Change the rules. Go back to the mediator and say your client might be willing to accept a little less money if it will get the deal done—essentially asking the mediator to restart the bidding, but this time with the parties much closer together. Why give up when you are this close, and you are still within your client’s authority and desire?

HELP, DON’T HIJACK

The objective here isn’t to encourage the reader, acting as an advocate, to hijack the mediation.

Indeed, if that’s what you got from this article, then this keyboard needs to be retired.

Hijacking the mediation is exactly the opposite of what you should do. Rather, the point is that when you are involved in a mediation that appears to be going south, ask yourself a question: “Is there anything I can do now to change the dynamics of this situation so that a constructive settlement dialogue can be had?”

If you have an effective mediator, be guided by the mediator’s input. If the problem is an ineffectual mediator, however, look to how you can resurrect the process. Mediation is, after all, one of the most powerful processes available for parties to resolve their own disputes in ways that best satisfy their needs.

Don’t you owe it to your client to get the most out of the process possible?

(For bulk reprints of this article, please call (201) 748-8789.)

ADR Contracts

Your New Guide to Arbitration Clauses, Part I

BY M. SCOTT DONAHEY

Arbitration agreements are generally considered, if at all, as the last clause to be negotiated following protracted negotiations that have finally resulted in a commercial contract that both parties envision to be profitable. Neither side wants to spend a significant amount of time drafting and discussing a provision that may only serve to jeopardize the hard-won deal. Moreover, in these difficult economic times, in-house lawyers often are overworked and have neither the time nor the inclination to be creative.

Is it any wonder that the standard arbitration provision provided by one or another of the leading arbitral institutions finds its way into most commercial contracts? The standard clause, calling for the application of the institution’s arbitration rules and not much more, is readily available and non-controversial. Usually, the only negotiation involved generally turns on which institution to use, how many arbitrators to have, and where to hold the hearing.

It is only much later, after some time has been spent in performance of the agreement and after irrecusable disputes have soured the commercial venture, that the parties employ the dispute resolution mechanism to which they have agreed. All too often they find that one size does not fit all. They find that the arbitration procedures that they have chosen either are taking far too long and costing far too much given the nature of the disputes which have arisen. Or they find that the procedures are altogether inadequate to deal with a dispute that is complex, technical, and whose resolution will have a major impact on each business’s balance sheet.

In-house lawyers and outside counsel negotiating a commercial dispute need a readily available menu of alternative arbitration provisions to fit the various types of ventures. The alternatives need to be appropriate to the par-

AUTHOR’S CREDITS AND ACKNOWLEDGEMENTS

Author M. Scott Donahey, of Palo Alto, Calif., is a neutral focusing exclusively on domestic and international arbitration, mediation, and domain names under the Uniform Domain Name Dispute Resolution Act. He has more than 25 years experience in arbitrating complex commercial, intellectual property, and international commercial disputes; and has decided more than 150 commercial arbitration cases and more than 300 disputes under the UDRP. For more information, see www.scottdonahey.com.

Donahey acknowledges substantial help from both inside and outside counsel in various industries. In the areas of technology and intellectual property, where he focuses his arbitration practice, many of the provisions in these articles are borrowed from and often modified clauses that he says he has seen in contracts put before him in his arbitrations. These clauses most likely were drafted by in-house counsel for one or both of the parties, and as a result the drafters’ names are unknown to the arbitrator selected to follow the provisions. Donahey expresses his thanks to these “thoughtful and creative attorneys who practice in emerging and established pharmaceutical, biotechnology, Internet, and computer technology companies.”

In other industries, the author notes that the clauses have been suggested by experienced arbitrators who have encountered them in their practice. Donahey acknowledges the suggestions of James P. Groton, Susan Levy, Gerald Phillips, Tony Smith, D. C. Toedt III and Mareetta Toedt. Special recognition must go to Charles Sink, adds Donahey, who supplied the basis for all of the clauses in the construction section, which will appear in a future issue.
ticular disputes which are most likely to arise under the particular business arrangement that counsel are negotiating.

These articles will undertake to create and collect arbitration agreements and provisions that are tailored to disputes that are likely to arise under particular business relationships.

These clauses are not intended to be used in consumer or employment contracts and are intended for sophisticated entities of roughly equal bargaining power. This author uses the CPR Institute as the provider institution throughout these examples, since it can provide the assistance the parties request under the clauses. Other institutions also may be able to provide such services, but parties should make certain that their chosen institution is able and willing to provide the requested services. Adjustments likely would be needed in the clauses for different providers. [The CPR Institute is publisher, with John Wiley & Sons’ Jossey-Bass unit, of Alternatives.]

**ON THE ARBITRATOR SELECTION PROCESS**

One aspect of the arbitration that is perhaps the most important, but which is frequently given short shrift in institutional rules, is the selection of arbitrators. Nothing may be as important to the acceptance of an arbitral award as confidence in the arbitrators selected.

While there obviously is a potentially infinite number of ways in which a sole arbitrator or a three-person tribunal can be selected, this article presents six alternatives spread over three selection scenarios: (1) mutual interviews of the candidates for arbitrator, one in-person and one by telephone; (2) the traditional party-selection method, one for a three-person panel and one for the selection of a sole arbitrator; and, (3) a hybrid of party selection and institutional expertise in the selection of the arbitrators.

Options 1 and 2 are intended for cases in which a substantial amount of money is likely to be at stake and probably arises under a contract, or in which the case requires familiarity with a particular technology, experience with similar cases, knowledge of a particular area of law, or all three. In such a case, it is extremely important that the parties be as comfortable as possible with the qualifications, judgment, and personality of the arbitrator selected.

Optimally, the parties will interview the final candidates personally in a joint session as set out in Option 1. Where time, expense or other factors militate against a personal joint interview, a joint telephonic interview is the next best thing. This alternative is set out in Option 2. In either case, the parties may wish to provide the candidates with written questions in advance, the answers to which will be furnished to and reviewed by the parties before the interview.

Option 1—
Due Diligence Process

*In-Person Joint Candidate Interviews*

1. Within 30 days of the filing of the request for arbitration, the CPR Institute [see above about the use of CPR as an example in these clauses] shall furnish to each of the parties a list of 25 candidates from the CPR arbitrator panels who CPR has determined are experienced in the area of law and/or the technology involved in the case.

2. Within 20 days of the receipt of the list, each party may strike up to 10 names and submit to CPR a list of the remaining candidates ranked in order of preference. The submitting party shall not serve the other party with its list of ranked candidates.

3. Within two days of receipt of the lists, CPR shall determine the five highest mutually ranked candidates, and provide the list of such candidates to the parties.

4. The parties shall have 45 days in which to conduct joint interviews of the five highest mutually ranked candidates. Participants on the interviewing teams may include in-house counsel, outside counsel, and executive management from each party. Each interview shall last no more than one hour and shall take place at a location mutually agreeable to the parties. Each candidate may receive his or her costs of travel, but will not be compensated for his or her time. The parties shall share all costs of travel equally.

5. Within 10 days of the completion of the interviews, each party may strike one candidate and shall notify the other party of the candidate stricken. Each party shall list the remaining candidates in order of preference and submit the list to CPR. CPR shall determine the three highest mutually ranked candidates. In the case of a tie, CPR, in its sole discretion, shall determine which of the candidates is to be selected. The three candidates so selected shall constitute the Arbitral Tribunal for the case.

Clause Challenge

**The issue:** Your arbitration provisions need improvement and updating.

**Problem solved:** A veteran neutral sifts through several industries’ worth of clauses to come up with new standards for current ADR practice.

**What’s covered?** Here, a half-dozen variations on arbitrator selection. Next month, three baseball arbitration contract clause options. And still to come: Software development/installation; international patent/expedited, and construction.

Options 3 and 4 embody the traditional party selection process where the parties either (1) each select one of the three arbitrators that are to hear their case, and the two so selected agree upon a chair (Option 3), or (2) jointly select the sole arbitrator (Option 4). In the event that the parties cannot agree within the specified time frame, the institution will step in to select.

Options 5 and 6 are hybrids. They are designed for situations in which the parties want to exercise some say in who is to be selected as arbitrator, but ultimately wish to take advantage of the institution’s expertise in the selection of arbitrators best suited to the particular dispute.

Of course, another alternative not covered here is the traditional list method, followed by many arbitral institutions. In this process, the institution provides the parties with a list of names, usually 10, and the parties are asked to strike a given number of candidates, usually five, and to rank the remainder. Under that approach, the highest mutually ranked candidate will be the sole arbitrator.
5. Within 10 days of the completion of the request for arbitration, each party shall submit to CPR a list of three candidates, listed alphabetically by last name.

2. Upon receipt of the lists of the three candidates, CPR, in its sole discretion, shall select one of the three candidates from each party’s list to act as one of the arbitrators.

3. CPR, having regard to the nature of the dispute, the legal issues and technology involved, and experience in having acted as chair, shall appoint the Chair of the Arbitral Tribunal. If none of the remaining candidates listed by the parties is common to both parties’ lists, or if CPR is not satisfied with the conflicts check or that the common candidate has sufficient experience acting as chair, then the Chair of the Panel shall be appointed by CPR from candidates not listed by either party.

Option 6—Appointment Process with Party Input

One Arbitrator
1. Within 30 days of the filing of the request for arbitration, the parties shall agree on three candidates for the position of sole arbitrator and shall jointly submit the list of the three candidates, listed alphabetically by last name, to CPR.

2. Upon receipt of the list of the three candidates, CPR, in its sole discretion, shall select one of the three candidates for sole arbitrator.

3. If after 45 days from the filing of the request for arbitration, the parties have not been able to agree on three candidates to act as sole arbitrator, the sole arbitrator shall be appointed by CPR.

Option 5—Appointment Process with Party Input

Three Arbitrators
1. Within 30 days of the filing of the request for arbitration, the parties shall agree on three candidates to act as one of the arbitrators.

Option 4—Traditional Party Appointment Process

One Arbitrator
1. Within 30 days of the filing of the demand for arbitration, the parties shall agree on a sole arbitrator.

2. If after 30 days, the parties have not been able to agree on the sole arbitrator, upon written request, the sole arbitrator shall be appointed by CPR.

Option 3—Traditional Party Appointment Process

Three Arbitrators
1. The Claimant shall designate the arbitrator whom it has selected in its demand for arbitration.

2. Within 30 days of receipt of Claimant’s request for arbitration and designation of arbitrator, Respondent shall designate the arbitrator whom it has selected.

3. If either party fails to designate its arbitrator within the required period, CPR, pursuant to a written request, shall designate the arbitrator for the failing party.

4. The two arbitrators appointed by the parties shall have 30 days to agree upon the chair of the Arbitral Tribunal. If after 30 days, the two arbitrators appointed by the parties have not been able to agree on the Chair, the Chair of the Arbitral Tribunal shall be appointed by CPR.

Option 2—Due Diligence Process

Telephonic Joint Candidate Interviews
1. Within 30 days of the filing of the request for arbitration, CPR shall furnish to each of the parties a list of 25 candidates from the CPR arbitrator panels who CPR has determined are experienced in the area of law and/or the technology involved in the case.

2. Within 20 days of the receipt of the list, each party may strike up to 10 names and submit to CPR a list of the remaining candidates ranked in order of preference. The submitting party shall not serve the other party with its list of ranked candidates.

3. Within two days of receipt of the lists, CPR shall determine the five highest mutually ranked candidates, and provide the list of such candidates to the parties.

4. The parties shall have 10 days in which to conduct joint interviews by telephone of the five highest mutually ranked candidates. Participants on the interviewing teams may include in-house counsel, outside counsel, and executive management from each party. Each interview shall last no more than one-half hour. Candidates interviewed will not be compensated for the time required to participate in the telephonic interview. The parties shall share all costs of the telephonic conferences equally.

5. Within 10 days of the completion of the interviews, each party may strike one candidate and shall notify the other party of the candidate stricken. Each party shall list the remaining candidates in order of preference and submit the list to CPR. CPR shall determine the three highest mutually ranked candidates. In the case of a tie, CPR, in its sole discretion, shall determine which of the candidates is to be selected. The three candidates so selected shall constitute the Arbitral Tribunal for the case, and the three arbitrators shall select the Chair of the Arbitral Tribunal.

...
Update: Nations Are Sharing Their Progress on Installing the Cross-Border Mediation Directive

BY GIUSEPPE DE PALO

S

even months after the deadline for European Union member states to implement Directive 2008/52/EC, institutions are continually working to support mediation in civil and commercial matters and to promote the amicable settlement of disputes.


As reflected in the resolution, mediation, when widely used, offers benefits to both the state itself, via the reduced burden on the court system, and to European citizens, owing to rationalization of the justice system which allows parties the possibility of obtaining an amicable, faster, and less expensive solution to their dispute.

Now armed with clear evidence of the advantages offered by mediation, the resolution sends a strong political message to member states pushing them to do more and better.

In this resolution, the European Parliament reveals its observations and comments following a formal check of the directive’s implementation status.

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The European Parliament reported that most of the member states are fully compliant with the directive’s requirements. As of September, 22 of 26 member states subject to the directive have these rules in place.

Nine countries had not informed the European Commission that they fully implemented the provisions by the May 21, 2011, deadline. In July, the European Commission began an infringement procedure against them. See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/919&format=HTML&aged=0&language=EN&guiLanguage=en. According to a report late last month, the Commission “will send reasoned opinions to Cyprus, the Czech Republic, Spain, France, Luxembourg and the Netherlands for failing to meet this deadline.” New Europe Online (Nov. 24)

Turning to the resolution’s main points, the Parliament analyzes the implementation of what it refers to as the Directive 2008/52/EC “core requirements.” The resolution states that confidentiality should be treated more consistently across Europe. Some countries have adopted a rigorous regulatory approach to confidentiality—i.e., Bulgaria, France, Poland and Italy—while others, such as Sweden, hold that confidentiality simply needs to be agreed between the parties.

Next, while there is considerable variety in the mode of implementation, most member states have provided a mechanism assuring enforcement of mediated settlement agreements. The resolution calls on the European Commission to ensure that noncompliant states enact these measures immediately.

Finally, member states have succeeded in

(continued on next page)

Parliament Speaks Again

A new European Parliament resolution on ADR—“... ( ) alternative dispute resolution in civil, commercial and family matters, 2011/2117(INI)” (available at www.europarl.europa.eu/oel/FindByProcnum.do?lang=en&procnum=INU/2011/2117)—came out on Oct. 25. The resolution acknowledges the September European Parliament cross-border mediation resolution discussed in the accompanying article. But the new resolution refers to all ADR techniques—not only mediation—and includes matters that fall outside the commercial focus of the European Commission Directive, such as family mediation.

The October resolution states that although there has been a recent discussion focused on consumer matters, the Parliament recognizes a larger need for a more coherent regulatory scheme for all ADR mechanisms, similar to the mediation directive. In this context, the newer resolution acknowledges the benefit of some of the directive provisions such as the treatment of confidentiality, and tolling the statute of limitations. It suggests that similar features be enacted in other forms of ADR procedures.

In focusing on the need for pan-European common ADR standards, the Parliament clarifies that while it does not condone a wholesale imposition of mandatory ADR at the EU level, it does suggest that a mandatory system of referral for parties to consider forms of ADR could be examined.
ensuring that mediation suspends statutory limitation periods, guaranteeing that parties whose dispute is not settled through mediation do not miss their chance to file in court.

BEYOND THE CORE

The resolution next highlights the states that chose to go beyond the directive’s core requirements. It emphasizes mediation incentives that have made dispute resolution more effective, and reduced the court workload in certain jurisdictions. These incentives include mandatory mediation requirements in Italy, and the economic incentives provided by Bulgaria, Romania, and Hungary.

It is important to mention here that this is not the first time the European Parliament has specifically focused on the effect of mediation incentives. Most notably, recently, incentives to mediate were also a central issue at a May 2011, Parliamentary legal committee meeting in Brussels.

The meeting reviewed the results of a European study aimed to provide empirical evidence to assist lawmakers in deciding whether to implement newer, and more audacious, mediation policies. This study was prepared in the context of an EU-funded project implemented by an international consortium; it gathered data on mediation collected from more than 40 experts representing all EU countries.

Comparing the time and costs of litigation to mediation in the member states, the study concluded unequivocally that mediation saves litigants both. It further followed that the greater the savings, the stronger the policies incentivizing mediation should be. Ultimately mediation—like many other positive changes—should be encouraged and, when this is insufficient, forced.

This study and its conclusions, in focus at the Brussels meeting, have now also played an important role in assisting the Parliament in drafting the Sept. 13 resolution. We therefore turn to a discussion of its findings.

In order to compare the member state jurisdictions, the study used the data gathered by the World Bank’s “Doing Business” report as a starting point. See www.doingbusiness.org. It focuses on the “Enforcing Contracts” index which measures the efficiency of a country’s judicial system in resolving a specific type of commercial dispute.

This data shows, for example, that the author’s home nation of Italy is next-to-last in Europe, requiring an average of 1,210 days and €15,370 to resolve the sample dispute. See Tables 1 and 2. [The 200% GNI figure in Table 1 is the standard indicator used by the World Bank Doing Business Report to enable the comparison of the costs for certain procedures in different countries. “GNI” means Gross National Income. The World Bank uses 200% of GNI as an indicator instead of a dollar amount to account for differences across rich and poor countries. The study represents the cost of a litigated case as a percentage of this standardized indicator.]

The sample dispute for each calculation is based on the following litigation case: the seller sells goods to the buyer. The buyer alleges that the goods are of inadequate quality and refuses to pay. The seller files suit against the buyer in the court of the capital city to recover the amount under the contract for the sale. Opinions are given on the quality of the goods by witnesses or independent experts. The judgment is 100% in favor of the seller. The buyer does not appeal the judgment, which becomes final. The seller takes all required steps for prompt enforcement of the judgment. The money is collected successfully through a public sale of the buyer’s moveable assets.

As a comparison, the same dispute litigated in Belgium requires 505 days and €16,000. See Table 3.

Table 4 reveals the mediation improvements. The study data shows that using mediation to resolve the sample dispute in Italy would take 47 days and cost €4,369; in Belgium it would take 45 days and €7,000, and in the European Union on average, it would take 88 days and cost €2,497. Clearly, the raw numbers speak for themselves: mediation has a massive savings potential for not only Italy, but for all member states.

MEDIATION’S BREAK-EVEN

But as we know, Directive 2008/52/EC favors a multistep approach—mediation then court or arbitration. The inevitable truth is that to accurately portray the value of mediation as compared to litigation, the data must take into account the possibility that mediation fails to resolve the dispute.

Accordingly, the study calculated mediation’s impact on the time and cost of the resolution of a dispute in correlation with the estimated mediation success rate. Naturally, the higher the success rate of mediation, the shorter the duration of dispute resolution proceedings and the greater the time saved.

While the time and cost figures correlating with a high mediation success rate are quite impressive (e.g., a 75% mediation success rate in Belgium can save about 330 days and €5,000 per dispute, while in Italy it can save 860 days, or more than two years, and more than €7,000 per dispute), questions about the viability of reaching this implementation level still remain.

Since a 75% mediation success rate is an ambitious projection, the study considered the time and cost savings for mediation in Italy and Belgium with a 50% success rate. In Italy, success in 50% of the mediated cases would save 558 days and €3,315 per dispute.

At the same success rate, a case in Belgium would save 207 days and €1,000. Clearly, in both Italy and Belgium, success in only half of the mediated cases still provides significant savings for disputants.

After showing data at both the 75% and 50% success rate marks, the study went on to identify, in each of the EU countries, the minimum success rate that would still make mediation viable in terms of generating both

Gathering Data

**The implementation:** European Union member states install cross-border mediation procedures for use in international disputes.

**The numbers:** Not surprisingly, the worse the litigation setting, the better the prospects are for ADR cost savings.

**The current status:** The European Parliament checked in with two fall 2011 supporting resolutions in September and October. It wants more mediation and ADR, and non-litigation relief for consumers, too.
time and cost savings—a “mediation effectiveness break-even point.”

Using progressively lower mediation success rates in order to find this point, it turned out that the break-even point for Italy is 4% for time and 28% for costs, while Belgium requires at least 9% success in mediation to save time and 44% success for costs.

Using a macro-level perspective, the study considered the break-even point for the entire European Union. Europe requires success in only 19% of cases to save time and 24% to save costs. To put this into perspective, it is important to note that the study found that the average cost to litigate in the European Union is €10,449, while the average cost to mediate is €2,497. Therefore, in every instance where mediation is successful, European citizens save more than €7,500 per dispute.

RISING TO THE TOP

In light of the study’s conclusions, the September European 2011 Parliament meeting in Strasbourg, France, compared the past and present statistics on mediation filings in the member states, and focused on Italy in particular.

The Italian data rose to the top of the discussion because it was by far the most significant example of the positive effects of mediation incentives implemented following Directive 2008/52/EC—especially so considering the need for change in Italy due to its incredible backlog of pending civil cases. The other incentives that have been noted as effective are economic, as experienced in Romania and Bulgaria. The increasing rate of mediation filings in Italy, however, is a direct result of the pre-trial mandatory mediation procedures introduced by law as a political incentive to mediate.

Returning to the resolution, the Parliament draws a clear line between Directive 2008/52/EC, Article 5, paragraph 2, which allows member states to make the use of mediation compulsory, and countries where courts are notoriously overburdened—that is, countries in which a mandatory mediation incentive is particularly appropriate, such as Italy.

Point 7 of the September resolution, among other things, dispels the idea that mandatory mediation is contrary to European legal principles. Further, points 8, 9 and 10 specifically name the Italian Mediation Law (Legislative Decree 28/2010) and the “important results achieved by Italy” because of these incentives.

While it is true that in point 10 the Parliament observes that mediation should be pro-
promoted as a “low cost and quicker” form of alternative justice rather than a “compulsory aspect of the judicial procedure,” the Parliament specifies that it is the “promotion,” or publication, of mediation that should focus on the added value of the procedure, including costs and time efficiency, rather than on its mandatory nature.

This reading is confirmed by resolution point 19, where national authorities are encouraged to develop programs in order to promote sufficient knowledge of ADR benefits. When received before mediation, this information serves to entice litigants to participate actively in mediation as well as to allow them to receive maximum benefit from mediation procedures rather than to suffer from them.

Accordingly, Italy’s mandatory mediation should be read as a means and not an end, as it is a way to inject understanding of mediation procedures and habitual selection of mediation into the mainstream legal culture. This is succeeding: according to the most recent Italian data, the acceptance rate of parties invited to participate in mediation is steadily increasing.

ITALY SPREADS

If it seems to be an overstatement to infer that the resolution is suggesting that Europeans learn from the Italian mediation model, it has, in fact, become a reality.

In addition, a delegation of Dutch policymakers asked Italian mediation experts, including this author, to hold a meeting so that they may discuss the merits of a draft law put forth by the current government majority in the Netherlands.

This draft law is of particular interest because it includes, among other mediation incentives, a list of subject matters for which mediation could become mandatory. The Dutch law was modeled after Italian Decree 28/2010, Article 5, identifying which Italian disputes are subject to mandatory mediation.

There has been a similar interest formally expressed by Poland, which currently is considering a modification to legislation that may include mandatory procedures. Given both the interest in the Italian model and the interest in exchanging information on best practices in mediation among the member states, the meeting with the Dutch delegation expanded into a roundtable of European mediation experts that included representatives from Belgium, Bulgaria, the Czech Republic, Germany, Greece, Poland, Romania, Spain, Slovenia and the United Kingdom.

This meeting, organized by the author’s firm, took place in Milan on Nov. 7 as this issue of Alternatives was being readied for publication. The goal was to share points of view regarding the way in which mediation is now regulated in various EU states following the directive’s implementation, and to identify the effect of mediation
incentives on the domestic legal culture.

The meeting resulted in several positive steps. A continuing working group has been formed. The 19 mediation experts created a plan of action that will continue to analyze best practices for mediation, and mediation education at the EU-level.

The group decided that it would next explore the inclusion of specific features of each country's mediation legislation, or draft legislation, in a grid. It is expected that the experts will choose to focus on certain topics, including:

- Regulatory features of mediator accreditation requirements, including provisions allowing a mediator's certification to be recognized in a different EU Member State;
- Regulatory features which control mediation incentives, and,
- The organization of a mediation workshop to coincide with the next meeting of the group, in which experts may participate in mediation simulations and experience cross-border techniques. This topic also will explore the possibility of one expert traveling to shadow another expert in an actual mediation in situations where language is not an issue.

Meanwhile, group members have agreed to continue to communicate via an E-mail list, and participants from countries not already represented will be proposed. The group decided that it will seek to reconvene in the Netherlands soon, and to follow and share mediation updates for this project.

In addition to mediation, other forms of Italian ADR are being considered at the EU level. For example, even though the focus of the new Oct. 25 European Parliament resolution is broader than simply mediation, it singles out the Italian joint conciliation processes as "a possible best practices model" for pre-dispute consumer-related ADR (see the "Parliament Speaks Again" box on page 201).

During this period of change, European institutions have consistently exhibited confidence that promoting access to and the use of extrajudicial mechanisms to solve conflicts contributes to improving, simplifying and increasing access to justice. This is an important challenge for the European Union and for the assurance of freedom, security and justice in the territory, as well as for the concept of the rule of law within the member states.

* * *

Next month: Slovenia.

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### CPR News

(continued from page 194)

Also new on demand is an April panel discussion on applying the principles in CPR's new Master Guide to Mass Claims Resolution Facilities, which addresses issues of mass claims post-settlement, covering all areas of claims resolution facilities. The session was hosted by the law firm of Dickstein Shapiro in Washington. It features a conversation with members of the CPR Institute Commission on Facilities for the Resolution of Mass Claims, including commission co-chairs Kenneth R. Feinberg, who is founder and managing partner of Washington's Feinberg Rozen, and Dickstein Shapiro partner Deborah E. Greenspan, who is the firm's complex dispute resolution practice leader, and who serves as session moderator.

The latest addition just posted by WestLegalEd center is another Y-ADR session, held in Boston in October, “Successful ADR Strategies for Life Sciences Companies: What Young Lawyers Should Know.” The program, hosted by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, features another panel of in-house experts providing both general ADR and career advice, along with specific health-care ADR instruction.

All sessions are available via WestLegalEdcenter.com and under "Events" at www.cpradr.org.

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Commentary

(continued from front page)
that “a party may not be compelled under the
FAA to submit to class arbitration unless there
is a contractual basis for concluding that the
party agreed to do so.” Id. at 1775 (emphasis in
the original).

But the Court left unclear what that con-
tractual basis may be. It noted only that ex-
press language referring to class arbitration
was not always required but that “[a]n implicit
agreement to authorize class-action arbitra-
... is not a term that the arbitrator may
infer solely from the fact of the parties’ agree-
ment to arbitrate.” Id.

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

WHO IS THE DECIDER?
The Bazzle plurality remains persuasive after
Stolt-Nielsen.

ca3.uscourts.gov/opinar/h102888np.pdf), the
court held that the district court erred in
granting summary judgment to a defendant,
having determined that because the plaintiffs
had received adequate notice of a waiver of
class arbitration, the waiver was binding on
them. The court held that the district court
should not have decided the class arbitration
issue. It ordered the case to arbitration on the
question of whether the agreement permitted
class arbitration.

Similarly, in Guida v. Home Savings of
America Inc., 2011 WL 2550467 (E.D.N.Y.
cases/federal/district-courts/new-york/nyedc/
/2011cv00009/312979/14), the court noted
that: “[W]here, as here, there is disagreement
over whether the agreement to arbitrate per-
mits class arbitration and the agreement does
not explicitly address this issue, the ability to
proceed on a class basis is a procedural ques-
tion involving contract interpretation and is
therefore for the arbitrator to decide in the
first instance.” Id. at ’2.

The court rejected the argument that

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

The court noted that Stolt-Nielsen clari-
fied Bazzle’s plurality holding—that class
arbitration was a question for the arbitra-
tor to decide—and “did not indicate that . . .
Bazzle was incorrect. . . .” Id. See also
Vazquez v. Servicemaster Global Holding,
No. 09-cv-05148-SI, 2011 WI 2565574 (N.D.
Cal. June 29, 2011)(noting that Stolt-Nielsen
“clarified that the question remains open,”
and referring class arbitration question to
arbitrator for resolution); Opalinski v. Rob-
ert Half Int’l Inc., 2011WL 4729009 (D.N.J.
com/cases/federal/district-courts/new-jersey/
njdce/2/2010cv02069/24085867/)(“where
contractual silence is implicated the arbitra-
tor and not a court should decide whether a
contract was indeed silent on the issue of class
arbitration”).

A DIFFERENT CLASS VIEW
By contrast, however, New York Southern Dis-

Silencing
The Class

The issue: Potential litigation over
who decides whether there can be
class arbitration. Still.

The problem: A 2011 New York federal
court decision again calls into question
the scope of the arbitrator’s authority in
a class case.

The advice: To prevent court
involvement in arbitration where
there are class claims—even after
Stolt-Nielsen—specifically require
individual actions in contracts. Form
clause provided.

tract Magistrate Judge James C. Francis IV has
decided that, in some circumstances, the class
question is appropriate for judicial resolution
where the purported class arbitration has statu-
tory implications.

Chen-Oster v. Goldman Sachs & Co., 785 F.
Supp. 2d 394 (S.D.N.Y. April 28, 2011), recon-
sideration denied (July 7, 2011)(available at
www.publicjustice.net/repository/files/Chen-
OstervGoldmanSachs-orderDenyingDefen-
dantsMotion-070711.pdf), was a putative class
action Title VII claim where the plaintiffs
alleged that their former employer engaged in
a “pattern or practice” of gender discrimina-
tion. The court acknowledged that generally
the question of class arbitration “is an issue
of contract interpretation properly left to the
arbitrator.” The court nevertheless held that,
because both parties agreed that the court
was the appropriate forum for resolution of
the dispute and the questions "raised by the
parties require determination of the scope and
enforceability of the arbitration clause," the
court was the appropriate decision-maker.

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

Ultimately, Magistrate Judge Francis de-
nied the employer’s motion to stay the litiga-
tion and compel arbitration because enforcing
the arbitration agreement would prevent one
plaintiff from vindicating her statutory rights,
since Title VII “pattern or practice” claims can
only be brought on a class basis. Id.

This ruling may inform a Supreme Court
decision to take up the interpretive question
itself. See also Vazquez, 2011 WL 2565574
at ’3 (”[I]f . . . the question of class arbitra-
tion needed to be answered in order for the
Court to determine whether a party waived
its right to arbitrate, it would be a question
for the Court. Here, however, the arbitration
clause is enforceable regardless of whether
it permits or precludes class certification.”)
(emphasis added).

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

These courts have held that the interpretation will stand, so long as the issue was properly before the arbitrator and the arbitrator’s interpretation (1) focused on the intent of the parties, (2) addressed Stolt-Nielsen itself, and (3) did not rely on considerations of public policy. See, e.g., Jack v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. July 1, 2011)(reversing vacatur of an arbitral award that interpreted the parties’ agreements to permit class arbitration); Spradlin v. Trump Ruffin Tower I, LLC, 2011 WL 2295067, at *2 (D. Nev. June 6, 2011)(available at http://law.justia.com/cases/federal/district-courts/nevada/nvdc2/2008cv01428/62433/29) (refusing to vacate an arbitral award holding that the parties’ agreement did not permit class arbitration; vacatur is appropriate only when the “mode of the arbitrator’s decision was one of policy-making”); Sutter v. Oxford Health Plans LLC, 2011 WL 734933 (D.N.J. Feb. 22, 2011)(refusing to vacate an arbitral award; the arbitrator “performed the appropriate function of an arbitrator under the FAA after Stolt-Nielsen; [he] examined the parties’ intent, and gave effect to the arbitration agreement.”).

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

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

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

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

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

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

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

Thus, the post–Stolt-Nielsen discussion on questions of the scope of arbitrators’ interpretive authority looks remarkably similar to the pre–Stolt-Nielsen answer. The parties’ intent controls, but the arbitrator decides what that intent was; once the arbitrator has done so, courts will defer in all but the most egregious cases of error.

**WHAT THIS MEANS FOR BUSINESSES**

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

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

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

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

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

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

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

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