by Ilana Haramati

The Future of Class Arbitration: Lessons from *Oxford Health Plans LLC v. Sutter*

Earlier this year, the U.S. Supreme Court decided *Oxford Health Plans LLC v. Sutter* (*Oxford Health*), permitting an arbitration dispute between John Sutter, and Oxford Health Plans LLC (Oxford) to proceed on a class-wide basis.[1]

The question before the Court in *Oxford Health* was whether the arbitrator, in deciding that the parties' contract permitted class-wide arbitration, "exceeded [his] powers" under the Federal Arbitration Act (FAA) § 10(a)(4), permitting the Court to vacate the arbitrator's decision.[2] Implicitly, this question turned on the degree of contractual clarity required to permit class-wide arbitration.[3] This article examines *Oxford Health* and what light, if any, it sheds regarding class-wide arbitration in the future.

Legal Background

In 2010, the Supreme Court decided *Stolt-Nielsen v. AnimalFeeds* (*Stolt-Nielsen*),[4] in which it sought to answer whether "imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act."[5]

The arbitration clause in *Stolt-Nielsen* was ambiguous on the issue of class arbitration; it neither permitted nor prohibited it. The clause did not even mention class arbitration.[6]

When the *Stolt-Nielsen* plaintiff AnimalFeeds served the defendant Stolt-Nielsen with a petition for class arbitration, the parties entered into a supplemental agreement that they would submit the class arbitration question "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 (as effective Oct. 8, 2003).'"[7] The parties also stipulated that the agreement was "silent" on the question. This so-called "Silence Stipulation" meant that the parties had not reached an agreement regarding class arbitration.

The arbitrators, taking guidance from similar arbitration cases, permitted class arbitration, but stayed the arbitration so that Stolt-Nielsen could seek judicial review.[8]

Focusing on the Silence Stipulation, the majority in *Stolt-Nielsen* vacated the arbitrator's decision allowing class arbitration. Because "arbitration is a matter of consent," and because according to the Court's interpretation the Silence Stipulation meant that the parties had not reached an agreement regarding class arbitration, the Court held that class arbitration was precluded in that case.[9]

After *Stolt-Nielsen*, it seemed that a clear statement was necessary for class arbitration. Many courts and commentators interpreted *Stolt-Nielsen* "as all but sounding the death knell for class-wide … arbitration."[10]

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The Court's recent decision in *Oxford Health*, refusing to vacate an arbitrator's decision to permit class arbitration based on a similarly inexplicit clause, appears to point in a different direction. Did *Oxford Health* effectively revive class-wide arbitration by clarifying the standard under the FAA's § 10(a)(4) for vacating arbitrators' decisions to permit class-wide arbitration?

In *Oxford Health*, plaintiff Sutter filed suit against Oxford in New Jersey state court on behalf of a putative class for breach of contract and violation of numerous state laws. Based on their contract's arbitration clause, Oxford successfully moved to compel arbitration.[11]

Once in the arbitral forum, the parties agreed to submit to the arbitrator the question of whether their contract permitted class arbitration. The arbitrator ruled, looking at the contract's broad and inconclusive language, that the contract did permit class arbitration.[12]

The contract's arbitration clause read as follows:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.[13]

Ilana Haramati is an attorney licensed in New York, currently practicing in Greenberg Traurig's Amsterdam office.

This clause, as the arbitrator interpreted it, required arbitration in "the same universal class of disputes" as would ordinarily be brought as "civil actions" in court. In other words, the "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." Thus, because class action would plainly be one of the possible forms of civil action that could be brought in a court," the arbitrator found that "on its face, the arbitration clause…expresses the parties' intent that class arbitration can be maintained."[14]

Seeking to escape the arbitrator's ruling,[15] Oxford filed a motion in federal district court arguing that the arbitrator had exceeded his powers under § 10(a)(4) of the FAA.[16] The district court denied the motion, and the Third Circuit affirmed.[17]

While the arbitration proceeded, the Supreme Court decided *Stolt-Nielsen v. AnimalFeeds*.[18] In the wake of *Stolt-Nielsen*, Oxford requested that the arbitrator reconsider his class arbitration decision. Upon reconsideration, however, the arbitrator found that *Stolt-Nielsen* did not affect his ruling.[19]

Oxford again returned to federal court in an attempt to vacate the arbitrator's decision. The district court denied Oxford's motion, and the Third Circuit affirmed, holding that "the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur…."[20] Thus, because the "the arbitrator endeavored to interpret the parties' agreement within the bounds of the law,"[21] the Third Circuit found that the arbitrator had not run afoul of the FAA and declined to unseat the arbitrator's decision. The Supreme Court granted certiorari.

A unanimous Supreme Court refused to vacate the arbitrator's decision to permit class arbitration. In its opinion, the Court took care to distinguish the case from *Stolt-Nielsen*, characterizing its *Stolt-Nielsen* decision as holding,

> 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. The parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement on class arbitration. Relying on §10(a)(4), we vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had simply imposed their own view of sound policy.[22]

The Court emphasized the *Oxford Health* parties' agreement to submit the question of class arbitration to the arbitrator, and the arbitrator's interpretation of the contract in making the decision.

Distinguishing *Oxford Health* from *Stolt-Nielsen*

The contrast between *Stolt-Nielsen*, and *Oxford Health*, explained the Court, "is stark."[23] In *Stolt-Nielsen,* the arbitrator did not—and could not—construe the parties' agreement, because the Silence Stipulation stated that they had reached none. But in *Oxford Health*, the arbitrator's decision to permit class arbitration was based on an exegesis of the parties' contract.

Thus, elaborated the Court, in *Stolt-Nielsen* the arbitral panel exceeded its powers by imposing class arbitration on the parties without regard to the parties' agreement, and the Court could vacate the arbitral decision pursuant to § 10(a)(4). However, because in *Oxford Health* the arbitrator based his decision on the parties' agreement, the Court could not vacate the decision under § 10(a)(4).[24] A stark contrast indeed. Or is it?

Although in *Oxford Health*, the Court characterized the differences between the two cases as dramatic, the difference in their material facts is slight, and focusing on those differences could even be called formalistic.

Both *Stolt-Nielsen*, and *Oxford Health* considered whether arbitrators had exceeded their authority within the meaning of § 10(a)(4) of the FAA—a narrow review—in permitting class-wide arbitration. Both concerned arbitration clauses that did not directly address the question of class arbitration. And, in both cases, the parties stipulated that the arbitral body would determine whether the arbitration clause permitted class arbitration.[25]

The principal distinction between the two cases is that in *Stolt-Nielsen* the parties' supplemental agreement included a stipulation that the arbitrators should decide the question of class arbitration and the additional Silence Stipulation.[26]At first blush, this distinction seems quite significant. After all, the Court in *Stolt-Nielsen* used the Silence Stipulation as a primary basis for deciding that the arbitrators exceeded their authority in permitting class arbitration. Reasoning that because the parties agreed that the contract was "silent" on the class arbitration question, and because the arbitrators' authority was confined to the parties' agreement, they did not have authority to decide the class arbitration question.[27]

However, the Silence Stipulation's significance in distinguishing the two cases may not pass muster upon closer inspection—for at least two reasons. First, according to the Supreme Court, the Silence Stipulation makes the supplemental agreement in *Stolt-Nielsen* internally contradictory. In agreeing to submit the class arbitration question to the arbitral panel, the parties affirmatively granted the arbitrators authority to decide the class question. But stipulating that the clause was "silent" on the class question, the parties in their supplemental agreement removed the question of class arbitration from the arbitrators' purview. Thus, based on the Court's reading of the Silence Stipulation, the *Stolt-Nielsen* parties' supplemental agreement gave the arbitral panel authority to decide the class arbitration question, while simultaneously revoking that authority.

Second, the *Stolt-Nielsen* opinion itself belies the Silence Stipulation's significance in differentiating the two cases. The Court in *Stolt-Nielsen* found that the Silence Stipulation placed the question of class arbitration outside the scope of the arbitrators' authority, which extended only as far as the parties' agreement. Nonetheless, the Court additionally examined the arbitrators' reasoning to find that the panel exceeded its authority.[28] One might wonder—if the arbitrators did not have authority to decide the question, why would their reasoning matter?[29]

If the difference between the two cases—*Stolt-Nielsen's* Silence Stipulation—is relatively slight, and nonetheless their results diverge, then *Oxford Health* may have done little to clarify class arbitration's contours. The contractual prerequisite for class arbitration remains unclear, and the outcome of judicial challenges to class arbitration under § 10(a)(4) of the FAA remains unpredictable, even in factually similar cases.

Class-Wide Arbitration After *Oxford Health*

As previously discussed, the Silence Stipulation's importance in controlling the divergent outcomes in *Stolt-Nielsen* and *Oxford*

Health is questionable. We are therefore left with the reality that these two cases were substantially similar. And, nonetheless, in one the arbitrators were adjudged to have "abandoned their interpretive role,"[30] whereas in the other the Court found that the arbitrator's decision was firmly rooted in the contract.[31]

So what, then, does *Oxford Health* clarify? Unfortunately, perhaps not much. The Court in *Oxford Health* did stress that the arbitrator's opinion did not "exceed[] [his] authority" under the deferential FAA standard because he based his decision in the parties' agreement. So arbitrators can take home the message that they should explicitly base their class arbitration decisions in the contract under scrutiny.

However, *Oxford Health* leaves us no closer to understanding the contours of applying § 10(a)(4) of the FAA to class arbitration questions. How explicit the contract must be to support class arbitration remains unclear.[32] Practically, because the law is unclear, parties wishing to ensure that class arbitration will be available in the event of a dispute should include an explicit class arbitration provision in their contract. ⊙

Endnotes

[1]*Oxford Health Plans LLC v. Sutter*. No. 12-135, 569 U.S. ___ , 2013 U.S. LEXIS 4358 (June 10, 2013), *available at* www.supremecourt.gov/opinions/12pdf/12-135_e1p3.pdf (last visited Oct. 24, 2013).

[2]9 U.S.C. § 10(a)(4) ("(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration…(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.").

[3]If the arbitrator's decision to permit class arbitration is based in the contract, then the "a court's authority under § 10(a)(4) of the FAA to vacate an arbitrator's decision is very narrow—it may do so "only in very unusual circumstances" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). How explicit a contract must be to permit class-wide arbitration is thus a very important threshold question.

[4]559 U.S. 662, 130 S. Ct. 1758 (2010).

[5]*Stolt-Nielsen*, 130 S. Ct. at 1764.

[6]*Id*. at 1765 (quoting the parties' arbitration clause, which states "Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator." (alterations in original)).

[7]*Id*. (quoting parties' supplemental agreement).

[8]*Id*.

[9]*Id*. at 1775.

[10]Steve Vladeck, "Opinion analysis: Tentatively reopening the (back) door to class arbitration," *available at* www.scotusblog.com/2013/06/opinion-analysis-tentatively-reopening-the-back-door-to-class-arbitration/ (last visited June 20, 2013).

[11]*Oxford Health*, 2013 U.S. LEXIS 4358, at *4-5.

[12]*Id*. at *5.

[13]*Id*. at *15.

[14]*Id*. at *5 (quoting the arbitrator's opinion on the arbitrability of a class action).

[15]*Id*. at *5-6. It is important to note that the arbitrator's ruling encompassed only that the arbitration clause permitted class arbitration in the abstract. He did not reach the question of class

certification, and he did not decide whether Sutter could actually represent a class in the instant action.

[16]*See* 05–CV–2198, 2005 WL 6795061 (D. NJ. Oct. 31, 2005); 9 U.S.C. § 10(a)(4).

[17]227 F. App'x 135 (3d Cir. 2007).

[18]*See Stolt-Nielsen*, 130 S. Ct. at 1775-76.

[19]*Oxford Health*, 2013 U.S. LEXIS 4358, at *6-7.

[20]*Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 220 (3d Cir. 2012).

[21]*Id*. at 224.

[22]*Oxford Health*, 2013 U.S. LEXIS 4358, at *6 (internal quotation marks, citations, and modifications omitted).

[23]*Id*. at *13.

[24]*Id*. at *13-14.

[25]*Compare Stolt-Nielsen*, 130 S. Ct. at 1765 *with Oxford Health*, 2013 U.S. LEXIS 4358, at *5.

[26]Stolt-Nielsen, 130 S. Ct. at 1766.

[27]Stolt-Nielsen, 130 S. Ct. at 1775.

[28]*Id*.

[29]Moreover, as Justice Ginsburg pointed out in her *Stolt-Nielsen* dissent, the *Stolt-Nielsen* majority's analysis of the arbitrators' opinion is less than airtight.

> The Court's characterization of the arbitration panel's decision as resting on "policy," not law, is hardly fair comment, for "policy" is not so much as mentioned in the arbitrators' award. Instead, the panel tied its conclusion that the arbitration clause permitted class arbitration to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations.

Furthermore, the arbitrators "construed the broad arbitration clause … and ruled, expressly and only, that the clause permitted class arbitration. The Court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's *de novo* determination." *Id*. at 1780-81 (Ginsburg, J., dissenting).

[30]*Oxford Health*, 2013 U.S. LEXIS 4358, at *13-14 (describing the basis for the *Stolt-Nielsen* decision).

[31]*Id*. at *15-16.

[32]To make matters worse, the Court further complicated this issue by explicitly reserving whether and to what extent class arbitration questions are questions of "arbitrability," which "are presumptively for courts to decide," and which "[a] court may therefore review … *de novo* absent clear and unmistakable evidence that the parties wanted an arbitrator to resolve the dispute." In leaving open the arbitrability issue, the Court intimated that explicit contractual language may be necessary to permit an arbitrator to decide whether class-wide arbitration is contractually permitted. A clear statement is a far cry from the broad language deemed sufficient in *Oxford Health. Id*. at *9-10 n.2 (quoting *Green Tree*, 539 U.S. at 452, and *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649 (1986) (internal quotation marks, citations, and modifications omitted).

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[4]*See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975) (considering whether the requested fee award fell within any of the exceptions to the general rule that "the prevailing party may not recover attorneys' fees as costs or otherwise").

[5]*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[6]*Carter v. Sedgwick Cnty., Kan.*, 36 F.3d 952, 956 (10th Cir. 1994).

[7]559 U.S. 542 (2010).

[8]*Johnson*, 488 F.2d at 717-19.

[9]*Perdue*, 559 U.S. 542, 130 S. Ct. 1662, 1672 (2010) (quoting *Pennsylvania. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986)).

[10]*Hensley*, 461 U.S. at 440.

[11]*Lindy Bros. Builders, Inc.*, 487 F.2d at 166.

[12]*Perdue*, 559 U.S. 542, 130 S. Ct. at 1672.

[13]*Hensley*, 461 U.S. at 436.

[14]*Perdue*, 559 U.S. 542, 130 S. Ct. at 1673.

[15]*McAfee v. Boczar*, 906 F. Supp. 2d 484, 492 (E.D. Va. 2012).

[16]*Id.*

[17]*Id.* at 504-05.

[18]*Nat'l Wildlife Fed'n. v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988).

[19]*Id.*

[20]*SunTrust Mortgage, Inc. v. AIG United Guar. Corp.*, 3:09CV529, 2013 WL 870093, at *6 (E.D. Va. Mar. 7, 2013). *See also Kim v. U.S. Bank, N.A.*, 2013 WL 3973419 (E.D. Va. Jul. 29, 2013).

[21]*In re Abrams & Abrams, P.A.*, 605 F.3d 238, 244 (4th Cir. 2010).

[22]*SunTrust*, 3:09CV529, 2013 WL 870093, at *10.

[23]*Id.*

[24]*Hensley*, 461 U.S. at 433.

[25]*Guidry v. Clare*, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006) (quoting *E.E.O.C. v. Nutri/Sys., Inc.*, 685 F. Supp. 568., 573 (E.D. Va. 1988)).

[26]*Id.*

[27]*Id.*

[28]*SunTrust*, 3:09CV529, 2013 WL 870093, at *13. *See also Project Vote/Voting for America, Inc. v. Long*, 887 F. Supp. 2d 704 (E.D. Va. 2012).

[29]*Id.* at *14.

[30]*Perdue*, 559 U.S. 542, 130 S. Ct. at 1667.

[31]*Id.* at 1673.

[32]*Id.*

[33]*Id.*

[34]*Id.* at 1674.

[35]*Id.* at 1673.

[36]*Id.* at 1668.

[37]*Id.* at 1675.