Developments in Arbitration: Arbitration at the United States Supreme Court—October Term 2009

By Sherman Kahn

During its 2009 term (commencing in October 2009 and extending until June 2010), the United States Supreme Court decided four cases focusing on arbitration, suggesting that the Court continues to exhibit a strong interest in developing arbitration jurisprudence. The theme of the year's decisions, if there is one, can be reasonably said to be allocation of responsibility for determining arbitrability. The Supreme Court's decisions this year are discussed in more detail below in chronological order.

A. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers, 130 S. Ct. 584 (2009) concerns arbitration procedures designed to resolve employment grievances in the railroad industry. The Railway Labor Act ("RLA")[1] was enacted to promote peaceful and efficient resolution of labor disputes; it mandates arbitration of "minor disputes" before arbitration panels composed of two labor representatives, two industry representatives and a neutral tiebreaker.[2] To supply the representative arbitrators, Congress established the National Railroad Adjustment Board ("NRAB") and the representative arbitrators were to appoint the neutral arbitrator.[3] The RLA includes a requirement that before resorting to arbitration, employees and carriers must exhaust grievance procedures in their collective bargaining agreement and attempt settlement "in conference" between representatives of the carrier and the employee.[4]

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In *Union Pacific* the union initiated grievance procedures on behalf of five employees and, dissatisfied with the outcome of those procedures, initiated arbitration against Union Pacific.[5] Just prior to the hearing, one of the industry representatives on the panel objected *sua sponte* that the pre-arbitral record submitted by the union contained no proof of conferencing.[6] The carrier, which had not previously raised that objection, embraced it and, although the union submitted evidence that conferences had been held and argued that the carrier had waived the objection by failing to timely raise it, the panel dismissed all five arbitrations on the ground that without evidence of a conference the panels lacked jurisdiction and the record must be deemed closed upon submission of a Notice of Intent to arbitrate.[7]

The union filed a petition for review with the Northern District of Illinois, which affirmed the tribunal's order. On appeal, the Seventh Circuit recognized that the union had presented its case on both statutory and constitutional grounds.[8] The Seventh Circuit observed that the single question at issue was whether written documentation of the conference was a necessary prerequisite to arbitration.[9] It determined that there was no such prerequisite and reversed on the ground that the proceedings were incompatible with due process.[10]

The Supreme Court granted certiorari to address whether a reviewing court may set aside NRAB orders for failure to comply with due process but did not decide this constitutional question, holding that the Seventh Circuit reached the right result but should have decided the issue on statutory, not constitutional, grounds.[11] The Supreme Court held that nothing in the RLA elevates the "conference" requirement to a jurisdictional prerequisite and thus the union was entitled to have the NRAB orders vacated.[12] The Supreme Court went on to say that, given the statutory ground for relief, there was no due process issue to be decided.[13]

Notwithstanding its exercise of judicial restraint on the due process issue actually decided by the Seventh Circuit, the Supreme Court went beyond its narrow statutory ruling to reduce confusion over what constitutes a jurisdictional matter.[14] The Court commented that the term "jurisdiction" had been used to convey too many meanings.[15] The Court defined subject matter jurisdiction as the tribunal's power to hear a case and compared jurisdictional rules to "claim-processing rules" which can be forfeited if a party asserting the rules waits too long to challenge them.[16] The Court applied these general principles to the conferencing requirement under the RLA and concluded that conferencing is a claim-processing rule, the failure to comply with which does not divest an NRAB arbitration panel of jurisdiction to hear a dispute.[17] Moreover, the Court concluded "when the fact of conferencing is genuinely contested, we see no reason why the panel could not adjourn the proceeding pending cure of any lapse."[18]

Union Pacific is ostensibly limited to a very narrow category of statutory labor arbitrations. However, the discussion of jurisdictional issues in the latter portion of the opinion appears to have some broader applicability. It should at least be instructive to arbitration panels in commercial arbitrations facing jurisdictional challenges alleging failure to adhere to arbitration prerequisites set forth in step-clause-type arbitration provisions. Such provisions, which typically set forth negotiation and mediation

prerequisites to arbitration, are very common in commercial agreements that provide for arbitration. Such provisions can sometimes lead to considerable litigation and, if drafted poorly, can even be "pathological"—threatening the parties' agreement to arbitrate. *Union Pacific* can reasonably be read to suggest that the failure to strictly adhere to such provisions should not be a jurisdictional bar to arbitration in most cases.[19]

B. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010) held that an admiralty contract which was silent as to the availability of class arbitration could not be construed to allow class arbitration.[20]

The underlying dispute in *Stolt-Nielsen* concerned a contract for the shipping of goods in a type of ship called a parcel tanker—a tanker having compartments to allow the shipment of smaller amounts of liquid cargo.[21] The transport of such shipments is governed by standard contracts called "charter parties."[22] There are various forms of charter parties—and the one at issue in *Stolt-Nielsen* was known as the Vegoilvoy charter party.[23] The Vegoilvoy charter party, which was adopted in 1950, contains an arbitration clause providing for arbitration in New York governed by the FAA but which, not surprisingly given the date of its adoption, is silent as to the availability of class arbitration.[24]

The litigation began with a series of suits brought in various courts after the shippers were found by a Department of Justice investigation to have been engaging in an illegal price fixing conspiracy.[25] The suits were consolidated by the Judicial Panel on Multi-District Litigation in the District of Connecticut, where prior to consolidation the Second Circuit had held in one of the cases that the charterer's antitrust claims were subject to arbitration under the charter party's arbitration clause.[26]

AnimalFeeds then served a demand for class arbitration on the shippers, seeking to represent a class of direct purchasers of parcel tanker transportation services for bulk liquid chemicals from August 1998 to November 2002.[27] The parties to that arbitration entered a supplemental agreement providing for the question of class arbitration to be submitted to a panel of arbitrators under the AAA Supplementary Rules for Class Arbitration.[28] In a stipulation that the majority opinion of the Supreme Court found significant, the parties agreed that the charter party arbitration clause was silent with respect to class arbitration and that the silence meant that "there's been no agreement reached on that issue."[29]

The arbitration panel concluded that the arbitration clause allowed for class arbitration and stayed the action to allow the parties to seek judicial review.[30] The district court vacated the arbitrators' award concluding that it was made in manifest disregard of the law insofar as the arbitrators failed to conduct a choice-of-law analysis.[31] The Second Circuit reversed, holding that the doctrine of manifest disregard of the law survived the Supreme Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), but that the arbitrators' decision was not in manifest disregard of the law.[32] The Supreme Court granted certiorari to determine whether class arbitration is consistent with the FAA where the arbitration clause is silent on the issue.[33]

The Supreme Court decided that the arbitration panel's decision to allow class arbitration should be overturned because the arbitrators exceeded their powers by imposing their own "conception of sound policy" regarding class arbitration instead of analyzing whether there was in fact an agreement to allow class arbitration.[34] The Supreme Court reached this conclusion on the ground that the arbitrators had focused on consensus among arbitrators subsequent to the Supreme Court's decision in *Greentree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) rather than analyzing whether the New York law, maritime law or the FAA sets out a default rule in favor of class arbitration.[35] Thus, according to the Supreme Court, the arbitrators, failing to find a reason to depart from the post-*Bazzle* consensus in favor of permitting class arbitration, substituted their own public policy views for legal analysis.[36]

The Supreme Court then proceeded to decide the issue of the availability of class arbitration rather than remand the issue to the arbitrators because "there can only be one possible outcome on the facts before us."[37] In reaching that conclusion, the Supreme Court first opined that *Bazzle* did not establish a rule of decision.[38] It then focused on the FAA—stating that the FAA's purpose is to ensure that arbitration is a matter of consent, not coercion, and that private agreements are enforced according to their terms to give effect to the contractual rights and expectations of the parties.[39] From this background, the Court concluded that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding it agreed to do so but that the parties in *Stolt-Nielsen* had stipulated that no such agreement existed.[40]

The Supreme Court pointed out that the parties were sophisticated business entities and that the charterer is customarily the party that chooses which form of charter party to use—that is, that the contract was not a contract of adhesion.[41] The Court opined that an implicit agreement to class arbitration is not a term that an arbitrator may infer solely from the fact of the parties' agreement to arbitrate.[42] However, the Court also stated that in light of the parties' stipulation "[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[43]

Justice Ginsburg's dissent (joined by Justices Stevens and Breyer)[44] argued that the issue of class arbitration

was not ripe for judicial review and that the petition for certiorari should have been dismissed as improvidently granted.[45] The dissent went on to say that, should the Court reach the merits, the judgment of the Second Circuit should have been affirmed due to the limitations on judicial review set forth in the FAA.[46]

On the merits, the dissent argued that the parties' agreement to submit the class arbitration issue to the arbitrators should resolve the case as the arbitrators could not have exceeded their authority when the parties explicitly provided it.[47] The dissenters also argue that the majority opinion usurps the authority granted to the arbitrators by deciding again *de novo* the issue the arbitrators had been asked to decide.[48]

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Perhaps most importantly, the dissent notes what Justice Ginsburg describes as "some stopping points" in the Court's decision.[49] The dissent points out that the Court does not require express consent to class arbitration, but rather "a contractual basis for concluding that the parties agreed" to submit to class arbitration.[50] Second, Justice Ginsburg states that by observing that the parties are sophisticated business entities and the shipper chooses the form of charter party, the Court "apparently spares" from the affirmative-authorization requirement contracts of adhesion.[51] It thus remains to be seen whether consumer arbitration provisions can be held to allow class arbitration under the FAA.

The wait for further clarity on this issue may be short. The Supreme Court has granted certiorari in *AT&T Mobility, LLC v. Concepcion*, 176 L. Ed. 2d 1218 (2010), to answer the question "[w]hether the Federal Arbitration Act preempts States from conditioning enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." The underlying decision in *AT&T* held that class action waiver provision in a consumer adhesion contract was unconscionable under California law.[52]

In addition, shortly after deciding *Stolt-Nielsen*, the Supreme court granted certiorari and vacated the Second Circuit's decision in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) for further consideration in light of *Stolt-Nielsen*.[53] In *American Express*, the Second Circuit had decided that whether a class action waiver is enforceable under the FAA is for the court to decide and that the class action waiver in the contract at issue (an adhesion contract between American Express and its merchants) was inconsistent with the FAA because it left the merchants with no reasonable remedy for Sherman Act violations.[54] The Second Circuit's further consideration of this issue in light of *Stolt-Nielsen* and any subsequent review by the Supreme Court may be instructive regarding the application of *Stolt-Nielsen* to adhesion contracts.[55]

C. *Rent-a-Center, West, Inc. v. Jackson*

Rent-a-Center, West, Inc. v. Jackson, No. 09-497, 2010 U.S. LEXIS 4981 (2010) held that in an arbitration agreement providing that arbitrability is to be resolved by the arbitrators, an unconsionability argument against the arbitration agreement must be decided by the arbitrators unless the challenge is to the clause specifically delegating arbitrability to the arbitrators.[56]

Rent-a-Center arose from an employment discrimination suit brought in the District of Nevada by an employee, Jackson, against his former employer.[57] The employer, Rent-a-Center moved to dismiss the proceedings under FAA § 3 and to compel arbitration pursuant to FAA § 4 based upon a "Mutual Agreement to Arbitrate Claims" ("arbitration agreement") that the employee had signed as a condition of his employment.[58] The arbitration agreement accompanied a separate employment agreement but it was solely an arbitration agreement and did not contain other terms unrelated to arbitration.[59] The arbitration agreement provided broadly for arbitration of all claims related to Jackson's employment, including discrimination, claims and provided that the arbitrator would have exclusive jurisdiction to resolve any dispute related to "applicability, enforceability or formation" of the agreement.[60]

Jackson opposed Rent-a-Center's motion on the ground that the arbitration agreement was unconscionable.[61] The district court granted Rent-a-Center's motion to dismiss the suit on the ground that the arbitration agreement gave exclusive authority to decide whether the agreement is enforceable to the arbitrator.[62] The Ninth Circuit reversed on the question of the delegation of the enforceability decision to the arbitrator and remanded to the district court for determination of those of Jackson's unconscionability arguments that had not been addressed by the district court.

The Supreme Court reversed the Ninth Circuit on arbitrability, relying on the *Prima Paint* line of cases holding that a challenge to the specific validity of the agreement to arbitrate is for the court to decide but that a challenge to the general validity of an agreement including an arbitration clause can be delegated to the arbitrators.[63] The Supreme Court's decision in *Rent-a-Center* arguably expands the *Prima Paint* rule by applying it to differentiate among clauses in an agreement that itself addressed only arbitration. The Supreme Court held that, under the reasoning of *Prima Paint*, Jackson's challenge to the arbitration agreement should go to the arbitrators unless the challenge

was specifically directed to the delegation clause which provided that the arbitrators would assess enforceability of the arbitration agreement.[64]

Justice Stevens dissented, joined by Justices Ginsburg, Breyer and Sotomayor. Justice Stevens argued in his dissent that the issue raised by Jackson was whether there was a valid arbitration agreement, an issue that should be decided by the courts.[65] Justice Stevens also argued that under *First Options of Chicago v. Kaplan*, 514 U.S. 939 (1995) the court should determine arbitrability unless the parties clearly and unmistakably intended to submit arbitrability to the arbitrator.[66] Under this line of authority, according to Justice Stevens, where a party raises a good faith challenge to the arbitration agreement, it is difficult to say that the parties clearly and unmistakably agreed to submit the arbitrability question to the arbitrators.[67] The dissent's view is that the unconscionability claim undermines any suggestion that Jackson "clearly and unmistakably" delegated the arbitrability question.[68] Justice Stevens also, while criticizing *Prima Paint*, argues that, under *Prima Paint*, a validity challenge to a standalone arbitration agreement should always be decided by the court.[69]

D. *Granite Rock Co. v. International Brotherhood of Teamsters*

Granite Rock Co. v. International Brotherhood of Teamsters, No. 08-1214, 2010 U.S. LEXIS 5255 (2010) addresses the arbitrability of certain claims brought against a local union and its international parent organization for damages arising out of a strike.[70] In particular, the decision concerns the arbitrability of a dispute over the ratification date of the collective bargaining agreement containing the arbitration clause.[71]

Granite Rock is a concrete and building materials company that employs approximately 800 employees under a variety of union labor contracts.[72] One of those unions is the International Brotherhood of Teamsters, Local 287.[73] Granite Rock and the Teamsters local had been party to a collective bargaining agreement that expired in April 2004 and, after negotiations for a new agreement failed, the union called a strike.[74] The strike continued until July 2, 2004 when the parties reached agreement on a new collective bargaining agreement containing a no-strike clause.[75] At the time the parties reached agreement on the new collective bargaining agreement, they had not agreed on a back-to-work or hold-harmless agreement for the strike prior to the new agreement, and the parent union, The International Brotherhood of Teamsters, instructed the local workers not to return to work until a hold-harmless agreement was in place.[76] Granite Rock took the position that this continued strike was a violation of the no-strike clause in the new collective bargaining agreement and sued the local and international unions in district court for damages and an injunction against the strike.[77] On August 22, the local union ratified the new collective bargaining agreement and the local union members returned to work before the injunction motion could be heard.[78] Nonetheless, Granite Rock pressed its claim for damages.[79]

Granite Rock argued that the strike regarding the hold-harmless issue violated the July 2 collective bargaining agreement's no-strike clause and that the hold-harmless dispute was an arbitrable issue.[80] The unions opposed the complaint on the ground that the new collective bargaining agreement was not properly ratified on July 2 and thus the no-strike clause was ineffective.[81] The district court held that the issue of the ratification date was for the court, not an arbitrator, to decide and submitted the question to a jury, which in turn found that the collective bargaining agreement had been ratified on July 2.[82] The Ninth Circuit reversed the jury's verdict on the ground that the ratification date was not a proper subject for judicial resolution because the arbitration clause covered the related strike claims and because national policy favoring arbitration supported a resolution in favor of arbitrability.[83]

The Supreme Court held that the resolution of the ratification date issue should have been for the court.[84] The Court pointed out that the issue in dispute was not whether, but *when* an agreement to arbitrate had been entered.[85] The Court also noted that the parties had agreed that it was appropriate for the district court to decide whether the ratification dispute is arbitrable.[86] The Supreme Court stated the following principle:

> [C]ourts should order arbitration of a dispute only where the Court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement.[87]

Based upon this principle, the Supreme Court rejected the general presumption in favor of arbitration unless the court is already persuaded that the parties' arbitration agreement was validly formed and covered the dispute at issue.[88] Thus, according to the majority opinion, in both FAA and labor cases, the presumption of arbitrability should only be applied where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand and where the presumption is not rebutted.[89]

The Supreme Court, addressing the merits, concluded that the ratification question was for the court because it related to the arbitration demand in such a way that the district court was required to decide the ratification date in order to determine arbitrability.[90] The Court pointed out that the collective bargaining agreement's arbitration clause extended only to disputes "arising under" the

agreement and did not explicitly extend to disputes regarding the agreement's formation.[91] The Supreme Court held that the "arise under" language was, in fact, not sufficiently broad to include the ratification date dispute and also held that the collective bargaining agreement's prerequisites to arbitration, which include mandatory mediation, foreclose a reading of the arbitration requirement as applicable to the dispute.[92]

Justice Sotomayor, joined by Justice Stevens, dissented regarding the arbitrability of the ratification date issue.[93] According to the dissent, the ratification date dispute was a dispute "arising under" the collective bargaining agreement and that, because the new collective bargaining agreement provided that it was retroactive to May 1, 2004, the date on which the agreement was ratified does not determine the arbitrability of the dispute.[94]

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The coming term may bring more interesting arbitration related decisions. *AT&T v. Concepcion*, on which the Supreme Court has accepted certiorari, will likely add further to the Supreme Court's developing law regarding class-action in arbitration.[95] In addition, the Supreme Court has requested the views of the Solicitor General regarding whether it should grant certiorari in *Louisiana Safety Ass'n of Timbermen-Self Insurer's Fund v. Certain Underwriters at Lloyds, London*, 2010 U.S. LEXIS 3980 which addresses whether Chapter 2 of the FAA is subject to the anti-preemption provisions of the McCarran-Ferguson Act, a law designed to leave the regulation of the insurance business to the states.[96]

Endnotes

1. 45 U.S.C. §§ 151 *et seq.*
2. 130 S. Ct. at 591.
3. *Id.*
4. 130 S. Ct. at 591-92.
5. 130 S. Ct. at 593.
6. *Id.*
7. 130 S. Ct. at 594.
8. 130 S. Ct. at 595, *citing, Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment v. Union Pacific Railroad Co.*, 522 F.3d 746, 750.
9. *Id.*
10. *Id.*
11. *Id.* Justice Ginsburg delivered the Supreme Court's opinion for a unanimous Court.
12. 130 S. Ct. at 595-96.
13. 130 S. Ct. at 596.
14. *Id.*
15. *Id.*
16. *Id.*
17. 130 S. Ct. at 596-98.
18. 130 S. Ct. at 598.
19. *See* Barbara Mentz's comprehensive article regarding this issue, *Applicability of the Supreme Court's Decision in Union Pacific Railroad v. Brotherhood of Locomotive Engineers and Trainmen to Step Clauses*, Volume 3, No. 1 of New York Dispute Resolution Lawyer (2010). In contrast, as discussed below, the Supreme Court's decision in *Granite Rock* suggests that in at least some cases the existence of a step cause might be taken as a limitation on the arbitrators' authority. *See* note 92 *infra* and accompanying discussion.
20. Justice Alito delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Justice Ginsburg filed a dissenting opinion which was joined by Stevens and Breyer. Justice Sotomayor took no part in the decision.
21. 130 S. Ct. at 1764.
22. *Id.*
23. 130 S. Ct. at 1764-65.
24. 130 S. Ct. at 1765.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 130 S. Ct. at 1766.
30. *Id.*
31. *Id.*
32. *Id.*
33. 129 S. Ct. 2793 (2009).
34. 130 S. Ct. at 1767-68. Notably, the Supreme Court declined to reach the question of whether the manifest disregard doctrine survives *Hall Street* or, if so, in what form. 130 S. Ct. at 1768 n. 3. This is a question that has divided the circuits. *Cf., Stolt-Neilsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2nd Cir. 2008) (*Hall Street* "did not, we think, abrogate the 'manifest disregard' doctrine altogether"), *reversed and remanded without reaching manifest disregard issue*, 130 S. Ct. 1758 (2010); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1290 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009) (finding a continued role for manifest disregard); *Coffee Beanery, Ltd. v. W.W. LLC*, 300 Fed. Appx. 415, 419 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009) (same); *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) (manifest disregard no longer viable). *See also, Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120 (1st Cir. 2008) (dicta suggesting manifest disregard may no longer be viable).
35. 130 S. Ct. at 1768-69. *Bazzle* concerned contracts between a lender and its customers which contained an arbitration clause silent as to the availability of class arbitration. A plurality opinion decided that the arbitrator should determine whether the contract permits class arbitration. 539 U.S. at 452. In *Stolt-Nielsen* the Supreme Court pointed out that there was no majority decision on that issue in *Bazzle*. 130 S. Ct. at 1772.
36. 130 S. Ct. at 1769. In making its decision, the Supreme Court was strongly influenced by the parties' stipulation that the charter party was silent on the issue of class arbitration but not sufficiently ambiguous to allow the introduction of parol evidence, which the Supreme Court determined allowed no room for a determination of the parties' intent. 130 S. Ct. at 1770.
37. 130 S. Ct. at 1770.
38. 130 S. Ct. 1772.
39. 130 S. Ct. at 1773-74.
40. 130 S. Ct. at 1775.
41. *Id.*
42. *Id.*
43. 130 S. Ct. at 1776 n. 10.

44. Justice Sotomayor did not participate in the decision.
45. 130 S. Ct. 1777.
46. *Id.*
47. 130 S. Ct. at 1780.
48. 130 S. Ct. 1781-82.
49. 130 S. Ct. 1783.
50. *Id.*
51. *Id.*
52. *Laster v. AT&T Mobility, LLC*, 584 F.3d 849 (9th Cir.) 2009.
53. *American Express Co. v. Italian Colors Restaurant*, 2010 S. Ct. 2401 (2010).
54. 554 F.3d. at 319-320.
55. In fact the Second Circuit has already weighed in post-*Stolt-Nielsen* on the issue of class arbitration and adhesion contracts. In *Fensterstock v. Education Finance Partners*, 2010 U.S. App LEXIS (2d Cir. 2010), the Second Circuit held a class arbitration waiver in a student loan contract void as unconscionable under California law. 2010 U.S. App. LEXIS at *37. The Second Circuit also held that California law holding class action waivers unconscionable was law of general applicability not preempted by the FAA. 2010 U.S. App. LEXIS at *21. Finally, applying the Supreme Court's reasoning in *Stolt-Nielsen*, the Second Circuit held that the contract at issue could not reasonably be reformed to allow class arbitration once the class arbitration waiver was excised because the arbitration clause itself showed a clear intent by the parties that classwide claims should not be arbitrated. 2010 U.S. App. LEXIS at *21. Because this decision was just released, we do not yet know whether it will reach the Supreme Court.
56. Justice Scalia delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer and Sotomayor. *Rent-a-Center* was decided after *Stolt Nielsen*. It is not at all clear that the Supreme Court's decision of the class arbitration issue in *Stolt-Nielsen* overruling an arbitrability decision specifically delegated by the parties to an arbitration panel is consistent with its subsequent holding in *Rent-a-Center*.
57. 2010 U.S. LEXIS 4981 at *4.
58. 2010 U.S. LEXIS 4981 at *4-5.
59. 2010 U.S. LEXIS 4981 at *15-16.
60. 2010 U.S. LEXIS 4981 at *5-6.
61. *Id.*
62. *Id.*
63. 2010 U.S. LEXIS 4981 at *12-13, *citing, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).
64. 2010 U.S. LEXIS 4981 at *15-17. The Court went on to state that had Jackson pleaded his argument as an unconscionability challenge to the delegation clause specifically, he might have had the right to a court determination of arbitrability. 2010 U.S. LEXIS 4981 at *19.
65. 2010 U.S. LEXIS 4981 at *26.
66. 2010 U.S. LEXIS 4981 at *33-34.
67. *Id* The majority opinion treats *First Options* in a footnote, which suggests that because the written agreement clearly submits the issue of arbitrability to arbitration, there is no necessity to determine whether both parties *actually agreed* to submit the issue to arbitration.
68. 2010 U.S. LEXIS 4981 at *31-34.
69. 2010 U.S. LEXIS 4981 at *38-39.
70. 2010 U.S. LEXIS 5255 at *11. Justice Thomas delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer and Alito. Justice Sotomayor concurred in part and dissented in part, joined by Justice Stevens
71. *Id. Granite Rock* also addressed the separate question of whether Section 301(a) of the Labor Management Relations Act, 1947 ("LMRA") authorizes a federal tort claim for alleged interference with a collective bargaining agreement. 2010 U.S. LEXIS 5255 at *42. The Supreme Court affirmed the Ninth Circuit's holding that Granite Rock had not properly alleged such a claim. 2010 U.S. LEXIS 5255 at *45-50. While the Supreme Court was not convinced that Granite Rock has sufficiently alleged the absence of alternative remedies to justify the expansion of federal common law to create such a tort claim, the majority opinion appears to leave the door open for such claims if a proper record were established. *Id.*
72. 2010 U.S. LEXIS 5255 at *12.
73. *Id.*
74. *Id.*
75. 2010 U.S. LEXIS 5255 at *12-13.
76. *Id.*
77. 2010 U.S. LEXIS 5255 at *14-15.
78. 2010 U.S. LEXIS 5255 at *16.
79. *Id.*
80. 2010 U.S. LEXIS 5255 at *15.
81. *Id.*
82. 2010 U.S. LEXIS 5255 at *17.
83. 2010 U.S. LEXIS 5255 at *17-18.
84. 2010 U.S. LEXIS 5255 at *41-42.
85. 2010 U.S. LEXIS 5255 at *19-20.
86. 2010 U.S. LEXIS 5255 at *21.
87. 2010 U.S. LEXIS 5255 at *24. (emphasis in the original; citations omitted).
88. 2010 U.S. LEXIS 5255 at *25.
89. 2010 U.S. LEXIS 5255 at *27.
90. 2010 U.S. LEXIS 5255 at *32-33.
91. *Id.*
92. 2010 U.S. LEXIS 5255 at *39. This holding may present a new ground of attack against arbitrability of numerous issues arising in commercial arbitration agreements having "step-clauses" that impose procedural prerequisites before an arbitration can be commenced.
93. 2010 U.S. LEXIS 5255 at *51-58.
94. 2010 U.S. LEXIS 5255 at *54-55. The Court's opinion dismisses the retroactivity argument as untimely raised. 2010 U.S. LEXIS 5255 at *36-37.
95. 176 L. Ed. 2d 1218 (2010).
96. For a more complete discussion of this case, see William J. T. Brown, *Clash of the New York Convention with the McCarran-Ferguson Act: Can State Insurance Law Ban Arbitration of International Insurance Disputes?*, New York Dispute Resolution Lawyer Vol. 3, No. 1 (2010).

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