

COURT CONFIRMS ARBITRATOR'S FINDING: PARTIES' AGREEMENT PERMITS CLASS ARBITRATIONS

There have been a number of decisions as of late about class arbitrations. As a result, virtual discussions about class arbitrations and their viability on the internet have exploded. The United States Supreme Court recently found that the Federal Arbitration Act pre-empts a California State Law that prohibited waivers and permitted class arbitration in consumer disputes. I wondered: will class arbitrations become obsolete? In a 2 to 1 decision, the United States Court of Appeals for the Second Circuit confirmed an arbitrator's finding that the parties' arbitration agreement did not prohibit class claims. *Jock v. Sterling Jewelers Inc.*, No. 10-3247-cv (2d Cir. N.Y. July 1, 2011).

I. Introduction

In May 2005, Laryssa Jock filed suit with the Equal Employment Opportunity Commission ("EEOC") against Sterling Jewelers, Inc. alleging that she and other female workers were paid less because of their gender in violation of Title VII, 42 U.S.C. § 2000e and the Equal Pay Act, 29 U.S.C. § 206 (d). Eighteen other female employees filed EEOC charges. The EEOC concluded that Sterling engaged in an unlawful pattern or practice of gender discrimination in promotions and pay against its female retail employees. In March 2008, Jock and other female employees filed a class action suit in federal court. In September, 2008, the EEOC also filed suit against Sterling.

Plaintiffs also filed class arbitration pursuant to the RESOLVE Program, the alternative dispute resolution procedure in their employment contracts. The RESOLVE Program required employees to grieve disputes in a three-step process and binding arbitration before the American Arbitration Association ("AAA"). Plaintiffs sought to stay their federal court suit in favor of arbitration; Sterling objected. The district court referred to the Arbitrator the issue whether the RESOLVE Agreement permitted class arbitration. The RESOLVE Agreement is silent on this point.

II. The Arbitrator Finds Class Arbitrations Allowed

The scope of the RESOLVE Agreement was broad covering: "any dispute, claim, or controversy...." The arbitrator also had the "power to award any types of legal or equitable relief that would be available in court...." The arbitrator reasoned that Sterling drafted the RESOLVE Agreement without negotiating its terms. Plaintiffs were in an unequal bargaining position and therefore, under Ohio state law, the Agreement was adhesive in nature. Sterling drafted an ambiguity; it failed to prohibit class arbitrations, expressly; therefore, the arbitrator found that Plaintiffs may proceed as a class. Sterling moved to vacate, but that motion was delayed awaiting the U.S. Supreme Court's decision in *Stolt-Nielsen v. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010).

III. *Stolt-Nielsen* and Consent v. Coercion in Arbitration Agreements

Because arbitration agreements are the parties' consensual private dispute resolution process, the Courts consistently hold that the federal act under which these agreements are generally reviewed the Federal Arbitration Act ("Act"), supports a strong presumption favoring enforcement of arbitrator's awards; thus, the court's review of arbitrator's awards are very limited. Under the Act, a court may vacate an award if the arbitrator exceeds contractually conferred authority or power; or exhibits a manifest disregard of law. This ground to vacate an award is considered a "high hurdle." If the award is drawn from the essence of the agreement, or there is a barely colorable justification, even if the reviewing court believes the arbitrator was wrong, the court may not substitute its judgment for that of the arbitrator's. The parties agreed to an arbitrator's binding award, not a reviewing court's decision. An arbitrator may not consider issues that were not submitted, or, are prohibited by law or the parties' agreement.

The *Stolt-Nielsen* case arose out of a Department of Justice investigation that revealed an illegal price-fixing conspiracy. A customer brought a class action alleging antitrust violations against the target, a shipping company. After several cases were consolidated, the parties agreed to arbitrate. The parties stipulated that their arbitration agreement was silent on the issue of class arbitration. The U.S. Supreme Court agreed to hear the case on the issue whether imposing class arbitration on parties whose agreement is silent on the issue of class arbitration is consistent with the Act. The high court stated that the Act imposes certain rules of fundamental importance, including the basic rule that arbitration is a matter of consent not coercion. Although the parties stipulated there was no agreement on class arbitrations, they did not consent to class arbitrations and therefore, the reviewing court under the Act could not coerce the parties to authorize class arbitrations under their arbitration agreement.

IV. The Lower Court Was Reversed Because it Second Guessed the Arbitrator

In the *Jock* case, the appellate court took the lower court to task for substituting its judgment for that of the arbitrator's and not considering the "high hurdle" required to vacate the award. The appellate court reasoned that the lower court should have considered: did the parties submit the class arbitration issue to the arbitrator and did the law or the parties' agreement prohibit the arbitrator from reaching that issue. Plaintiffs' concession that there was no explicit agreement to permit class arbitration is expressly different from the parties' stipulation in the *Stolt-Nielsen* case that the parties' agreement was silent. The parties placed the issue of class arbitrations squarely before the arbitrator who was within her power to find a colorable justification under Ohio law to reach her decision that class arbitrations are permitted. The appellate court reversed. The lower court did not properly defer to the parties' agreed upon arbitrator which found that class arbitration is permitted.

V. The Pen is Mightier...

Plaintiffs may appeal; it is too early to predict. In the *Stolt-Neilson* case, the U.S. Supreme Court found no contractual basis for the arbitrators' finding where in the *Jock* case, because Sterling had written an ambiguity into the agreement without negotiating with Plaintiffs, the arbitrator was permitted to find an implied contract term that did not prohibit class arbitrations, to which the appellate court deferred. Sterling argued *Stolt-Neilson* represented a wholesale prohibition against class arbitrations because the arbitration agreement was silent. The appellate court was not persuaded. Class arbitrations may be possible if an arbitrator finds they are an implied or express contract term. The parties' consent is drawn from the words, actions and circumstances. Arbitration agreements should be drafted carefully, clearly and where possible encompass all foreseeable circumstances. In this case at least, the pen is mightier...