The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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Reed v. Florida Metropolitan University, Incorporated (5th Cir. May 18, 2012)

A Fifth Circuit Court of Appeals panel, with Judge Carolyn King writing the panel's opinion has reversed the U.S. District Court for the Western District of Texas's confirmation of an American Arbitration Association ("AAA") arbitrator's Clause Construction Award requiring class arbitration of the putative claims brought by a graduate of an online career college.

The district court had earlier compelled the parties to arbitration under AAA's Supplementary Rules for Class Arbitration on whether the parties' arbitration agreement called for class arbitration. The AAA arbitrator decided that the parties had agreed to class arbitration although the parties' arbitration agreement was silent on class arbitration. The career college moved to vacate the Clause Construction Award that the district court denied while granting the class representative's motion to confirm the award. The career college appealed the district court's confirmation of the Clause Construction Award.

The Fifth Circuit based on *Stolt-Nielsen* and *Concepcion* found the arbitrator, not the district court, was the appropriate person to decide the arbitration agreement construction issue but also held that the arbitrator exceeded his powers in finding that the parties had agreed to class arbitration. (Slip 26)

The court based its approval of the referral of the clause construction to the arbitrator rather than the court on Rule 3 of AAA's Supplementary Rules for Class Arbitration. The court found that the parties had adopted the Supplementary Rules for Class Arbitration by their selection of AAA's Commercial Arbitration Rules in the arbitration clause in question. (Slip 6—8; see Suppl. R1(a) cited at 7).

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

The Fifth Circuit based its finding that the AAA arbitrator had exceeded his power[2] on the arbitrator's failure, in the court's view, to elucidate a "default rule"[3] of contract construction or other applicable law for the arbitrator's finding that the parties had impliedly agreed to class arbitration even though the parties' arbitration agreement was silent on class arbitration and the AAA Supplementary Rules of Class Arbitration.[4] The court acknowledged the U.S. Supreme Court's "exceptionally deferential standard of review" of an arbitrator's award and then proceeded to work hard at limiting its holding to no contractual basis for the arbitrator's award.[5]

The court included in its opinion an extended commentary on *Stolt-Nielsen* and expressly disagreed with the Second Circuit's application of *Stolt-Nielsen* in *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2nd Cir.2011), *cert. denied* March 19, 2012.[6]

OBSERVATIONS

1. Arbitration agreements should expressly address class arbitrations – either waive or include in any thoughtful arbitration agreement.
2. Fifth Circuit is now in disagreement with the Second and Third Circuits about how to apply *Stolt-Nielsen* to class arbitrations where the parties' arbitration agreements are silent regarding class arbitration and class claims.
3. *Reed* is an adhesion contract case whereas *Stolt-Nielsen* was a sophisticated parties contract dispute. The mix of policies supporting arbitrability in adhesion versus arms-length contracts raises significant analogy and applicability questions.
4. Be careful what arbitration rules your arbitration agreement adopts or doesn't adopt. In this case, the parties' adopted AAA's Commercial Rules which has now been interpreted by both courts and the AAA to include adoption by implication of AAA's Supplementary Rules of Class Arbitration. (Slip 7)

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[2] 9 USC 10(a)(4).

[3] Slip 19.

[4] The Fifth Circuit agreed with the career college that the arbitrator's award did not provide "a sufficient contractual basis" for the arbitrator's order of class arbitration. Slip 9.

[5] The Fifth Circuit reads *Stolt-Nielsen* to require courts considering motions to confirm or deny an arbitration award "to ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review." Slip 25 and 26, citing *Stolt-Nielsen*, 130 S.Ct. at 1775.

[6] Slip 22-23; "To the extent that the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning [arguing no prohibition of class arbitration for gender claims based on silence regarding class arbitration in the parties' arbitration agreement], we must part ways." *See also* similar result in *Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215 (3rd Cir.2012). Slip 22 fn13.