Supreme Court Holds that Courts Must Defer to Arbitrator’s Decision to Authorize Class Arbitration

On June 10, 2013, the United States Supreme Court unanimously held in Oxford Health Plans, LLC v. Sutter that an arbitrator’s decision to authorize class arbitration will not be disturbed under Section 10(a)(4) of the Federal Arbitration Act (FAA) when that decision is grounded in the arbitrator’s interpretation of the agreement. In so holding, the Supreme Court squared the circle between two recent decisions that demonstrated the Court’s predisposition against class arbitration and the Court’s traditional promotion of limited judicial review under the FAA.

There are two lessons for practitioners. First, those who seek to avoid class arbitration can best insulate themselves from that risk by incorporating an express class action waiver in any arbitration clause. A standard arbitration clause that is “silent” on the issue of class arbitration will not provide sufficient protection. Given that many arbitration clauses do not expressly address class arbitration, parties may need to redraft standard clauses to ameliorate this risk. Second, the Court continues to broaden the power of arbitrators to construe contracts, this time in a manner that overcame the antipathy that the Court previously displayed to class action arbitration.

Oxford Health arised from a Primary Care Physician Agreement between Dr. Sutter and Oxford Health. In 2002, Dr. Sutter filed suit in New Jersey Superior Court on behalf of himself and a class of other physicians, alleging that Oxford Health had unlawfully underpaid class members under the Agreement. Oxford Health moved to compel arbitration, based on the Agreement’s arbitration clause:

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.

When the New Jersey court compelled arbitration, the parties submitted the question of whether the Agreement authorized class arbitration to the arbitrator (with Dr. Sutter arguing that it did and Oxford Health arguing it did not). The arbitrator sided with Dr. Sutter. While the text of the clause did not mention class arbitration at all, the arbitrator nonetheless reasoned that the broad clause required all civil actions that could be brought in court to be submitted to arbitration. A class action was one such type of civil action. Therefore, the arbitrator concluded that the agreement authorized class arbitration “on its face.”

Oxford Health appealed the arbitrator’s decision to the courts twice on the grounds that the arbitrator had exceeded his power under Section 10(a)(4) of the FAA. This Supreme Court decision resulted from the second appeal. In the appeal, Oxford Health argued that the arbitrator had exceeded his powers based on the Supreme Court’s intervening decision in Stolt-Nielsen v. AnimalFeeds Int’l Corp., 559 U.S. 662 (2010). In Stolt-Nielsen, which was also based on an arbitration clause that was silent as to class arbitration, the Court had held 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.” 559 U.S. at 684. Prior to taking the appeal, Oxford Health had asked the arbitrator to reverse his decision in light of Stolt-
Nielsen, and he declined, reasoning that he had articulated a basis for determining that class arbitration was permitted.

The Supreme Court (like the Third Circuit before it) declined to reverse the arbitrator’s decision. In so holding, the Court emphasized that its review of the arbitrator’s decision under the FAA was extremely limited: “So the sole question for us is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” Slip Op. at 5. The Court went on to explain that in *Stolt-Nielsen*, the parties had stipulated that they had never reached any agreement regarding class arbitration. Therefore, there was no basis for the *Stolt-Nielsen* arbitration panel to determine the parties’ intent; nor did the *Stolt-Nielsen* panel attempt to ascertain whether the law provided for a “default rule” that applied when the contract was silent. Contrastingly, in *Oxford Health*, the arbitrator attempted to determine the meaning of the (admittedly silent) arbitration clause using traditional principles of contract interpretation:

Here, the arbitrator did construe the contract (focusing, per usual, on its language) and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties’ intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. Slip Op. at 7.

In sum, because the arbitrator’s decision was grounded in the language of the contract, the Court was obligated to defer to that decision. Thus, the Court again confirmed the broad powers given to an arbitrator, and in particular the breadth of that power as to contract construction. Under the FAA, where parties have agreed to have their disputes resolved through arbitration, the construction of their contract will be the sole province of the arbitrator irrespective of the quality of the resulting decision. Assuming the arbitrator makes a good-faith effort at construing the contract, arguments regarding the merits of the arbitrator’s construction are “not properly addressed to a court.” Further, convincing a court that the arbitrator made an error – “even [a] grave error” – will not be sufficient to overturn his or her decision. As Justice Elena Kagan stated simply, “[t]he arbitrator’s construction [of the contract] holds, however good, bad, or ugly.”

The result in *Oxford Health* stands in contrast to the Court’s expressed distaste for class arbitration articulated in its recent decisions in *Stolt-Nielsen* and *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (upholding class-action waiver in consumer contract), both of which found that class arbitration was unavailable and effectively closed the door on the plaintiffs’ ability to obtain class relief. In *Oxford Health*, a concurring opinion by Justice Samuel Alito demonstrates that this disposition still exists, particularly among the Court’s conservative justices. As the concurring opinion states bluntly: “were [we] reviewing the arbitrator’s interpretation of the contract de novo, we would have little trouble concluding that he [erred].” Ultimately, however, even the concurring justices explained that they were constrained by the deference due to the arbitrator under the FAA.

For practitioners, the most important lesson is simple. If you are representing an entity that is using arbitration as its dispute resolution mechanism and wish to avoid the risk of a class-wide dispute, an express class-action waiver should be incorporated into the arbitration clause. Going forward, a clause that is “silent” on class arbitration will not be sufficient, as arbitrator(s) who wish to imply a right to class arbitration will be able to thread the needle between *Stolt-Nielsen* and *Oxford Health* by grounding any decision in the language of the contract. An express class-action waiver will prevent the arbitrator from even reaching the issue.

In addition, the *Oxford Health* Court noted that it “would [have faced] a different issue if Oxford had argued below that the availability of class arbitration [was] a so-called question of arbitrability.” In other words, Oxford might have argued that whether the admittedly binding arbitration clause permitted class arbitration (by binding absent parties) was a gateway issue that required resolution by the court. Had Oxford raised the argument, the Court would have addressed the more difficult question of whether a court or the arbitrator was competent to decide the class arbitration question. Accordingly, parties opposing efforts to impose class arbitration are likely better served by arguing that whether an agreement authorizes class arbitration is a “question of arbitrability” for the courts, rather than submitting the question to the arbitrator from the outset.
The subject of class arbitration continues to be of significant interest to the Court. It has now decided three class arbitration classes since 2010, and will resolve one more (Am. Express Co. v. Italian Colors Rest.) before this term is completed. Further, the Court’s focus on arbitration law will continue into the next term. On June 10, 2013, the Court granted cert in BG Group PLC v. Argentina, which will give the Court an opportunity to determine how much power U.S. courts have over international arbitration proceedings linked to bilateral investment treaties handled by U.S.-based arbitration panels. As we have noted in past alerts, arbitration law will only continue to mature as the Court continues to refine the rules.