US Supreme Court to Decide Fate of Class Arbitration
Where Arbitral Clause is Silent

by Timothy Ho

The US Supreme Court will soon decide whether the Federal Arbitration Act (FAA) bars class arbitration where the arbitration agreement is silent in Stolt-Nielsen, et al. v. AnimalFeeds International Corp., 548 F.3d 85 (2d Cir. 2008), cert. granted 129 S. Ct. 2793 (U.S. 2009). This follows the Supreme Court's decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), which failed to reach this issue under the FAA, not simply because it was a matter of state law, but because an arbitrator should first decide, as a matter of interpretation, whether a contract is indeed silent about class arbitration. This decision could have important implications in the growing internationalization of class arbitrations.

The Stolt-Nielsen case involves contracts for parcel tanker shipping services with Stolt-Nielsen SA. AnimalFeeds alleged that Stolt-Nielsen, along with other firms, conspired to fix the price of international shipments of liquid chemicals in the United States and restrain competition in the world market. On the basis of a standard maritime arbitration clause that was silent as to class arbitration, AnimalFeeds initiated class arbitration proceedings on behalf of a class of "all direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids and other specialty liquids from [Stolt-Nielsen]… at any time during the period from August 1, 1998 to November 30, 2002." The contracts at issue contained two standard maritime arbitration clauses providing for arbitration in New York, but were silent as to whether class arbitration was permitted. The arbitrators permitted the class arbitration. Significantly, this was an international arbitration as Stolt-Nielsen is a non-US company.

Stolt-Nielsen moved to vacate the arbitral award allowing for class arbitration before the United States District Court for the Southern District of New York (the SDNY), arguing that the arbitral tribunal acted in manifest disregard of the law in reaching its decision. The District Court agreed with Stolt-Nielsen, finding that "if, instead, the Panel had made the choice-of-law analysis that it was mandated to make but chose to ignore, it would have had to recognize that what Stolt presented was tantamount to an established rule of maritime law." The SDNY also attached weight to the silence of the arbitration clause with regard to class arbitration and "New York's historically narrow view of what can be read into a contract by implication." Because the panel's decision would "impermissibly fashion a new contract under the guise of contract interpretation," the court vacated the arbitral decision. AnimalFeeds appealed.

The Court of Appeals for the Second Circuit (the Second Circuit) undertook a de novo review of the vacatur decision under the manifest disregard standard. The Second Circuit's analysis traced the evolution of manifest disregard, the limited nature of the doctrine, and its relationship to Sections 9 through 11 of the FAA. The court stressed that an arbitral tribunal's decision is to be accorded great deference. The court also invoked a recent Seventh Circuit decision describing parties that have agreed to arbitration as having opted out of the court system in order to pursue contractual remedies and suggesting, moreover, that the court cannot disturb an award on the basis of a misinterpretation of the law but can only do so when the arbitrators did not execute their contractual role by failing to interpret the contract at all.

Concluding that the arbitral panel's granting of class arbitration was "colorable" given the contract's silence on the issue, the Second Circuit concluded that the arbitral award was not in manifest disregard of the law. Moreover,

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following Bazzle, the Second Circuit held that when parties agree to arbitrate, the question of whether the agreement permits class arbitration is generally one of contract interpretation to be determined by the arbitrators, not a court. A lower court’s order of vacatur based on manifest disregard should apply only to severely limited and highly deferential instances of egregious arbitral impropriety.

The question on which certiorari was granted was: “Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.” The petitioners have argued that when arbitrators recognize a class when the contract is silent they have either acted in manifest disregard of the law (the lens through which the district and appellate courts primarily analyzed the issue) or “exceeded their powers” within the meaning of Section 10 of the FAA.

If the Supreme Court concludes that allowing a class where the parties are silent is either manifest disregard of the law or in excess of the tribunal’s powers, then it is possible that the many clauses that do not mention class actions will be a sufficient basis on which to avoid class action arbitrations. However, if the court reaches the opposite conclusion, parties arbitrating in the US, or under US law, who wish to avoid class arbitration will have to record their agreement explicitly not consenting to class arbitration or accept the risk that tribunals will permit them. Indeed, parties may still want to provide for an explicit anti-class action provision even if the Court finds “silence” an insufficient basis on which to permit class arbitrations. This will ensure that an opportunistic litigant does not attempt to infer consent through some other provision.

In any case, arbitration users with commercial contracts used with counter-parties that could be assembled as a class would be wise to monitor developments in this field.

Endnotes
2 Id. at 385 (emphasis added).
3 Id. at 387.
4 Id., internal quotations omitted.
6 See Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006) (“It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perceives does not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration … the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract’s arbitration clause.”).
7 548 F.3d 85, 100 (2d Cir. 2008).
8 Id. at 91.

Practice Group Updates

• On January 27, 2010, the London office of Latham & Watkins will host a client seminar on the Energy Charter Treaty. Follow-on events will be held subsequently in Latham’s Paris and Hamburg offices.
• In January 2010, Latham attorneys Mark Beckett and Daniel Tan will teach a class on International Commercial Arbitration at Harvard Law School.
• In January 2010, Latham attorney Robert Volterra will be speaking in Singapore at the International Investment Arbitration Conference organized by the National University of Singapore.
• On November 18, 2009, the Hamburg office of Latham & Watkins hosted a seminar on ad-hoc arbitration together with the German DIS 40.
• On November 14, 2009, Latham attorney Sebastian Seelmann-Eggebert spoke at a conference in Moscow on the Settlement of Investment Disputes with Countries in Transition.
• On October 30, 2009, Latham attorney Dave McLean spoke at the annual meeting of the American College of Commercial Arbitrators in Washington, D.C. on the role of an effective advocate in commercial arbitration.
• On October 26, 2009, Latham & Watkins hosted the USCIB Corporate Counsel Luncheon in New York. Stephen E. Smith, the vice president and general counsel of Lockheed Martin Space Systems Company spoke on “Reflections of a Corporate Counsel on International Arbitration.”
• On October 22, 2009, Latham attorney Sebastian Seelmann-Eggebert spoke at a conference in Frankfurt on Entering the Field of Investment Arbitration as a Young Lawyer.
• On September 21, 2009, Latham attorneys Dave McLean, Mark Beckett and Rachel Thorn gave a teleconference seminar on the differences between domestic and international arbitration.
• On September 14, 2009, Latham attorney Mark Beckett was a panelist discussing the “Scrutiny of the Award by the International Court of Arbitration,” at the ICC’s Fourth Annual New York Conference.
• On July 1, 2009, Latham attorney Mark Beckett was appointed as the United States Alternative Member of the ICC Court of Arbitration.
Threshold for Annulment of ICSID Awards Remains High

by Lucas Bastin

In September-October 2009, three annulment committees of the International Centre for Settlement of Investment Disputes (ICSID) published decisions relating to the annulment of ICSID tribunal awards. These decisions confirm that annulment committees will afford parties full opportunity to apply for annulment, but will continue to set a high threshold for the success of such an application.

The circumstances in which an ICSID award can be annulled are limited under the ICSID Convention. According to Article 52 of the ICSID Convention, an applicant must show that the tribunal “manifestly exceeded its powers” or failed to observe certain standards of due process. A party must apply for annulment within 120 days of the award. Three recent ICSID annulment committees recently reiterated the high threshold needed for annulment of an ICSID award.

The first decision was Azurix Corp. v. The Argentine Republic. The tribunal held that Argentina had failed to accord Azurix’s investment protection to which it was entitled under the US-Argentina Bilateral Investment Treaty (BIT). Argentina applied for annulment of the award. The annulment committee rejected Argentina’s application. In response to Argentina’s arguments, the committee made five key findings. First, the tribunal did not manifestly exceed its powers by allowing Azurix, instead of its related entity with whom Argentina contracted, to bring the claim because nothing in the wording of the BIT or the ICSID Convention limited Azurix’s capacity as a shareholder to sue Argentina. Second, the tribunal did not manifestly exceed its powers or fail to state reasons for its decision when it selected international law rather than Argentine law as the applicable law, and, moreover, any error in the application of the selected law cannot be an annulable error. Third, the tribunal did not seriously depart from a fundamental rule of tribunal procedure or fail to state reasons for its decision when it refused to order the production of documents by Azurix because a respondent State does not have a right to production, and the tribunal’s discretion to refuse production is not reviewable by an annulment committee. Fourth, the tribunal’s appointment of its president, and its review of that appointment, did not seriously depart from a fundamental rule of tribunal procedure despite the president’s previous relationship with Azurix. Fifth, the tribunal did not manifestly exceed its powers when selecting the applicable law for the awarding of damages and stated sufficient reasons for its conclusion that Azurix should receive damages. Accordingly, at no point did Argentina’s challenge to the tribunal’s award surpass the high threshold required to obtain annulment before the committee.

The second decision was M.C.I. Power Group L.C. v. Republic of Ecuador. M.C.I. originally claimed that its investment in Ecuador, which was protected by the US-Ecuador BIT, was expropriated by Ecuador before and after the BIT’s entry into force. The tribunal held that it did not have jurisdiction over acts consummated before the BIT’s entry into force. This lack of jurisdiction included Ecuador’s failure to pay accounts which fell due before, but remained unpaid after, the BIT’s entry into force. The tribunal treated Ecuador’s failure to pay those accounts as acts occurring before the BIT’s entry into force, over which it did not have jurisdiction. M.C.I. applied for annulment of the adverse portion of the award. The annulment committee rejected the application. It held that the tribunal’s reasoning was not “egregiously wrong” to the extent that the tribunal manifestly acted beyond its powers. It also held that the tribunal had sufficiently justified its conclusions. The committee emphasised that it was not a court of appeal and its mandate was only to “assess the legitimacy of the award and not its correctness.” Whether the BIT applied to non-payment of the accounts was open to interpretation. The tribunal chose its interpretation and it was not within the committee’s power to substitute its own interpretation for that of the tribunal.

The final decision was Continental Casualty Company v. The Argentine Republic. A tribunal rendered an award partly adverse to each party. Both parties applied for rectification of errors in the award. The tribunal decided the rectification points. Argentina applied for annulment of the award 270 days after the award but only 102 days after the rectification decision. Continental filed a preliminary objection to Argentina’s application. Continental argued that Argentina’s application was made more than 120 days after the award and therefore was outside the jurisdiction of the annulment committee. Argentina argued that, following a rectification decision subsequent to an award, the limit of 120 days should be calculated from the date of that decision. The committee agreed with Argentina. Relying on the plain meaning of Article 49 of the ICSID Convention, it held that the limit of 120 days runs from the date of the rectification decision, rather than the date of the award. Argentina’s application fell within the time limit and within the committee’s jurisdiction.

The threshold for annulment of an ICSID award remains high. Azurix and M.C.I. emphasize that an annulment committee is not a court of appeal and that annulment will only occur when the circumstances outlined in Article 52 of the ICSID Convention are present. On the other hand, Continental Casualty demonstrates that the committee will not readily abbreviate the procedural right of a party to lodge, and be heard in respect of, an application for annulment.

Endnotes

1 Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) (Decision on the Application for Annulment of the Argentine Republic) (September 1, 2009).
3 Continental Casualty Company v. The Argentine Republic (ICSID Case No. ARB/03/9) (Decision on the Claimant’s Preliminary Objection to Argentina’s Application for Annulment) (October 23, 2009).
Cour de Cassation issues Landmark Ruling on Anti-Suit Injunctions

by Yousuf Aftab


An anti-suit injunction restrains a party from continuing legal proceedings brought in breach of a dispute resolution agreement. While the injunction is directed at the party bringing proceedings in breach of the agreement, it inevitably affects the proceedings before the court seized of the matter. The anti-suit injunction has thus been criticized, and resisted by many courts, for infringing on the seized court’s competence to determine its own jurisdiction.

Background

The dispute before the Cour de cassation concerned a contract between In Zone Brands Inc., a children’s beverage company, and In Beverage, a French company that distributed the drinks in Europe. The contract was subject to the laws of the State of Georgia in the United States, and contained a forum selection clause providing for the exclusive jurisdiction of Georgia courts. After In Zone Brands Inc. terminated the contract, In Beverage and its director responded by bringing an action before the Tribunal de commerce in Nanterre, France. In Zone Brands Inc. challenged the French court’s jurisdiction and initiated proceedings before the Superior Court of Cobb County, Georgia.

The Georgia court issued a default judgment on the merits in favor of the American plaintiffs and issued an anti-suit injunction enjoining the French parties to dismiss the proceedings before the French court. The Versailles Court of Appeal held that the anti-suit injunction was enforceable in France, and the French parties appealed to the Cour de cassation.

The Cour de Cassation’s decision

The Cour de cassation confirmed that the anti-suit injunction was enforceable for the following reasons:

1. The decision to sue before the American courts was not animated by fraud or strategic behavior because the parties had agreed to the jurisdiction of the American court;
2. The French parties were not being denied access to court because the American court was ruling on its own jurisdiction and enforcing the parties’ own agreement on forum; and
3. Anti-suit injunctions are not contrary to French international public order when they are outside the field of European community laws or treaties, and the object is only to sanction a violation of a contractual obligation previously undertaken by the parties.

Impact of the Cour de Cassation’s decision

The Cour de cassation’s decision is surprising because the Court had previously suggested in obiter dictum that anti-suit injunctions were not enforceable in France because they infringe on the jurisdiction of French courts.1

The decision is also interesting because it comes in the wake of the European Court of Justice’s (ECJ) recent decision in West Tankers,2 which held that courts of European Member States may not issue anti-suit injunctions in the context of an arbitral proceeding, in relation to judicial proceedings in other European Member States. In so doing, the ECJ’s decision embraced the principle that each court is competent to determine its jurisdiction. Rather than broadening the application of this principle, the Cour de cassation instead took pains to limit the effect of its ruling to anti-suit injunctions emanating from non-EU jurisdictions. Notably, the opinion of the avocat général, which was submitted to the Court before its ruling, clearly distinguishes between the recognition and enforcement of anti-suit injunctions issued by courts in non-EU jurisdictions and anti-suit injunctions issued by courts in EU jurisdictions, the latter of which must be rejected by French courts as a matter of principle.

This decision suggests that French courts will recognize forum selection clauses involving a French party providing for dispute resolution by US courts and actions taken by US courts to enforce those clauses, in normal circumstances. But whether this decision may signal a trend of greater willingness in Europe’s national courts to enforce anti-suit injunctions is difficult to determine.

For now, the Cour de cassation’s decision should be considered when parties consider forum selection clauses and craft their litigation strategies.

Endnotes

1 Stolzenberg v. Daimler Chrysler Canada, Cass. 1e civ., June 30, 2004. In that case, the court enforced a Mareva injunction (a freezing order), observing that this remedy, “unlike the so-called ‘anti-suit’ injunctions, does not affect the jurisdiction of the State in which enforcement is sought.”

2 See The Latham & Watkins International Dispute Resolution Newsletter of July 2009, which discussed an important European Court of Justice (ECJ) decision concerning anti-suit injunctions, Allianz SpA (formerly Ruinone Adriatica di Sicurta SpA) and Generali Assicurazioni Generali SpA v. West Tankers Inc. (West Tankers), European Court of Justice, Feb. 10, 2009.
Earlier this year, US lawmakers proposed legislation to protect employment, consumer, franchise and civil rights litigants from binding pre-dispute arbitration agreements and to vest courts, not arbitrators, with the sole jurisdiction to decide questions concerning the validity and enforceability of arbitration agreements in those contexts. The reaction to the proposed legislation has been mixed, as consumer protection advocates extol the legislation’s virtues while commercial arbitration practitioners worry it may have widespread unintended consequences on the practice of arbitration in the United States.

On February 12, 2009, the Arbitration Fairness Act of 2009 (H. R. 1020) (the House Bill) was introduced in the House of Representatives. As drafted, the House Bill would significantly alter the validity and enforceability of certain pre-dispute arbitration clauses and the allocation of decision-making authority between courts and arbitrators. The House Bill made extensive amendments to Chapter 1 of the Federal Arbitration Act (the FAA), which enshrines the long-standing federal policy favoring the enforcement of all arbitration agreements. The House Bill would invalidate binding pre-arbitration agreements in an “employment, consumer, or franchise dispute; or . . . a dispute . . . to protect civil rights,” and would provide that questions concerning “the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator.”

The House Bill demonstrates that lawmakers intended to target arbitration agreements that are unilaterally and systematically imposed “between parties of greatly disparate economic power, such as consumer disputes and employment disputes.” Lawmakers were not interested in affecting disputes between “commercial entities of generally similar sophistication and bargaining power.” According to the drafters of the House Bill, the FAA “was intended to apply” to entities of equal bargaining power but not scenarios where one party has a significant bargaining advantage and can impose its desire for arbitration on its contracting party.

The legislative intent behind the proposed House Bill may have been to focus on the context of arbitration in situations of unequal bargaining power (e.g., consumer, employment, civil rights, franchise). It is based on the premise that arbitration is inherently unfair or at least suspect in these contexts. However the, “unequal bargaining power” criterion is fact intensive, and could conceivably apply in the commercial context as well. The bill would also appear to reverse the strong federal policy in favor of arbitration developed by the US Supreme Court starting with Prima Paint in 1967. While noting that it is not the focus of the legislation, some critics have argued that the proposed statutory text could undermine some of the key pillars of commercial arbitration:

• First, by seeking to amend Chapter 1 of the FAA, the House Bill would apply to all arbitration, not just the narrow enumerated categories of disputes and would erode long-standing and fundamental principles of federal arbitration law. Most notably, the House Bill would strip arbitrators of their authority to rule on the validity and enforceability of an arbitration agreement, arguably reversing long-standing Supreme Court decisions in Prima Paint and First Options (the widely accepted separability and kompetenz-kompetenz principles).

• Second, the House Bill would apply retroactively by invalidating existing pre-dispute arbitration clauses “with respect to any dispute or claim that arises on or after” the date the House Bill is passed.

• Third, while the House Bill is centered on American consumers, it contains no safeguards to limit its application in the international arena, notwithstanding the US’ obligations under the New York Convention, an international treaty on the recognition and enforcement of foreign arbitral awards and agreements. The House Bill could have profound effects on international arbitration, particularly with respect to franchise disputes and the allocation of decision-making authority between courts and arbitrators.

Lawmakers have responded favorably to the criticism that the text of their proposed Bill was overbroad and potentially detrimental to commercial arbitration. On April 29, 2009, Senator Russ Feingold D-WI introduced a revised Arbitration Fairness Act in the Senate (S.931) (the Senate Bill). Most importantly, the Senate Bill makes clear that these new rules (including the delegation of jurisdiction to courts) apply only to the protected classes of arbitrations and not to commercial arbitration, by implementing a new, free-standing Chapter 4 to the FAA. However, the Senate Bill fails to address concerns about its impact on international arbitration and its retroactive applicability. Moreover, the House Bill has remained unchanged.

Both the House Bill and the Senate Bill are currently pending in Washington, D.C. Neither version of the Arbitration Fairness Act is currently scheduled for a vote. However, it is likely that the text of the proposed legislation will continue to change as the House and Senate Bills make their way through committee. The Arbitration Fairness Act, if enacted into law, could have a profound impact not only on the world of consumer arbitration, but also on commercial and international arbitration, depending on the final legislative text.

Endnotes
2 Id. §2, ¶1.
3 Id. §2, ¶3.
4 Id.
**Arbitral tribunal permits Yukos to go forward in Energy Charter Treaty arbitrations against Russia.** On November 30, 2009, an arbitral tribunal ruled that the former Yukos oil company, disbanded by the Russian government in 2007, may seek an estimated US$100 billion in damages against the Russian government. The dispute will proceed to examine whether the Russian government improperly expropriated Yukos assets under the guise of collecting back taxes. The decision is expected to impact other energy disputes with the Russian state.

**Chevron files new BIT claim against Ecuador in long-running environmental dispute.** In late September 2009, Chevron filed an arbitration against Ecuador before the Permanent Court of Arbitration at the Hague alleging breaches of the US-Ecuador bilateral investment treaty (BIT). Chevron argues that Ecuador should be forced to pay the potential US$27 billion liability for environmental damages. The claim manifests a new role for BIT claims, using an investment treaty to indemnify a foreign investor prospectively from future liability in the host state.

**Recent U.S. district court opinion adds more uncertainty to disclosure under 28 U.S.C. § 1782.** The US District Court for the Northern District of Illinois recently ruled that disclosure under § 1782 was unavailable to aid a “private” ICC tribunal. In *Norfolk Southern Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009), the court denied the motion for a court order to depose a party’s former counsel in aid of an ICC arbitration. Relying on the US Supreme Court’s decision in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004), the court strictly interpreted § 1782 to apply only to “state-sponsored arbitral bodies,” thereby excluding “purely private arbitrations.”

**The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) will enter into force on January 1, 2010.** The agreement was signed by representatives of ASEAN, New Zealand and Australia on February 27, 2009 and envisions a regional common market by 2015. The new agreement spans 12 economies, nearly 600 million people and a combined GDP of US$3.1 trillion. AANZFTA constitutes Australia’s first plurilateral FTA and the first time Australia and New Zealand have jointly negotiated and FTA with third countries.