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## Introduction

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## INTRODUCTION

Thomas E. Carbonneau\*

Penn State Law was privileged to receive as invited guests the scholars and lawyers who contributed so effectively to the symposium on *AT&T Mobility*.<sup>1</sup> The presentations and accompanying discussions provided greater lucidity and understanding of another significant yet controversial U.S. Supreme Court ruling on the topic of arbitration. From Feerick to Moritz, we benefited from thorough and rigorous assessments, broadcast simultaneously from Penn State Law's two campuses through the marvels of modern AV technology. The student editors did an outstanding job organizing the proceedings and crafting the *Yearbook* volume that memorializes them. The volume also includes additional professional pieces on arbitration.

The evaluation of *AT&T Mobility v. Concepcion* was a judicious choice of symposium topic. When *Stolt-Nielsen v. AnimalFeeds Int'l*<sup>2</sup> was rendered, it seemed that the reign of arbitral autonomy had come to a sudden and brutal end through the implementation of a judicial merits review standard for awards—an approach that undermined the arbitrators' autonomous interpretation of the arbitral agreement. *AT&T Mobility* confirmed the continuing vitality of judicial support for arbitration by proclaiming that legal restrictions reflecting valid state public policy objectives could not be applied disproportionately to arbitration agreements. When the content of state contract laws disabled arbitration agreements in particular, they conflicted with the enforcement directive of FAA § 2 and were preempted by federal law. As a result, class action waivers became a lawful part of the bargain for arbitration. Moreover, adhesive contracts for arbitration were not presumed to be defective instruments by which to agree to arbitration. An opposite perspective, in fact, appeared to govern. The majority opinion indicated that such arrangements had been, and continued to be, the standard means by which to transact business in the consumer sector. Disparity of position and unilaterality, therefore, were not—*per se*—suspect means for establishing a binding contract. Despite the errant doctrinal statement in *Stolt-Nielsen*, the Court's compass had returned to pointing due north; the only true course by which to proceed in U.S. arbitration law was to continue building a sanctuary for efficient and effective private civil adjudication.

The would-be public policy debate aspect of the case made for a close ruling (4-1-4), but the plurality opinion spoke forcefully to the well-established content of U.S. arbitration law and the strength of the federal policy in favor of arbitration. Justice Scalia appears to have become the Court's "point-man" on divisive arbitration opinions, attesting to his evolution on the topic of arbitration. Justice Scalia, in fact, spoke for a firmer majority in the Court's latest pronouncement on arbitration. In *CompuCredit Corp. v. Greenwood*,<sup>3</sup> the Court again concluded that the enforcement imperative in regard to arbitration withstood the restrictive language of a consumer protection statute, but this time the majority was six in number, the two concurring opinions reflected substantial genuine agreement with the majority, and there was only a single dissent. In

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<sup>1</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>2</sup> *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>3</sup> 132 S. Ct. 665 (2012).

two *per curiam* opinions—*KMPG LLP v. Cocchi*<sup>4</sup> and *Marmet Health Care Center, Inc. v. Brown*<sup>5</sup>—the Court emphasized the rule that arbitration agreements must be enforced regardless of state law provisions to the contrary.

The spectrum of opinion on the assessment of these developments is vast among commentators. While it appears reasonably clear that any litigious challenge to arbitration is likely to fail, it is difficult to apprehend how judges (especially the Justices) are defining and responding to the issues of arbitration law raised by litigation. Outcomes are often difficult to predict and the reasoning that brings about the result is opaque. Consensus-building to create a majority contributes to the fog that envelops majority propositions on arbitration, but what exactly the Court decided and why are, at times, difficult to ascertain. It often seems that the law of arbitration is more a product of policy than the result of analytical reasoning or the confrontation of jural dilemmas. To commentators who seek to systematize the decisional rulings into a coherent body of legal rules for purposes of effective and transparent social governance, the Court’s approach to, and definition of, legal propositions in arbitration is perplexing and sometimes resists comprehension. The rulings in *Commonwealth Coatings Corp.*,<sup>6</sup> *Volt Information Sciences, Inc.*,<sup>7</sup> and (especially) *Stolt-Nielsen* effectively illustrate the point. Without a common point of reference, like legal analysis, the rhetoric of opinion-writing and the public portrayal of conclusions make an accurate assessment unattainable. The reasoning in precedents not only engenders analytical confusion, but uncertainty as well in representational circumstances.

For example: *Marmet* seems to leave the door open to possible contract validation in other circumstances despite the untenable conclusions reached by one of the West Virginia courts. Does that mean that arbitration contracts are indeed subject to the strictures of contract formation under state law? If so, when and to what extent? Does the federal policy on arbitration remain a trump card in this configuration? Relatedly, what is the contemporary status of the holding in *Volt Information Sciences*? While courts must (sometimes) enforce arbitral clauses as written, can state law supplant the dictates of federal law as a means of regulating arbitration? What standard applies to the impartiality and neutrality of arbitrators in light of the dated ruling in *Commonwealth Coatings*? Did *Hall Street Associates*<sup>8</sup> irretrievably compromise the principle of contract freedom in arbitration? Are there indeed two separability doctrines in U.S. arbitration law after *Rent-A-Center v. Jackson*?<sup>9</sup> Are there two regimes for *kompetenz-kompetenz*—one by contract and the other through the application of common law? How do the cases—*Kaplan*,<sup>10</sup> *Howsam*,<sup>11</sup> *Bazzle*,<sup>12</sup> and *Stolt-Nielsen*—sort themselves out? Is there now an over-arching judicial surveillance of arbitrator determinations on jurisdiction? How will the Court pursue its concern about manifest disregard and excessive litigation about arbitration in the future? Is adhesion now a dead letter under the “savings clause” of FAA § 2?

An enormous gulf separates the bench, bar, and commentators on the specifics of the U.S. law of arbitration. The interested parties appear to assess arbitration and the adjustments of

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<sup>4</sup> 132 S. Ct. 23 (2011).

<sup>5</sup> 132 S. Ct. 1201 (2012).

<sup>6</sup> *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

<sup>7</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

<sup>8</sup> *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>9</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

<sup>10</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>11</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

<sup>12</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

arbitral adjudication in remarkably different and contradistinctive ways. The Court is the oracle and it alone determines what matters are important enough to consider. It needs to reach a majority among its members and present or sell its determinations to the bar, the lower courts, other government branches, commentators, and the American public. There is an insufficient number of courts and scarce resources for funding adversarial adjudication. The Court's agenda differs from the objectives that might motivate the other implicated parties. What does the modern manifestation of arbitration mean to these parties and their construction of the governing law? An updated legislative protocol would be useful in elucidating the content of the applicable law. Some type of public discussion between the affected constituencies might also prove useful to defining the differences in perspective. Penn State Law and the *Yearbook* intend to continue to provide an effective platform for discussion of the issues of arbitration law.