NOTE

STANDARDIZING GAP-FILLING ARBITRATION CASES: UNTANGLING THE SUPREME COURT OPINIONS IN *STOLT-NIELSEN V. ANIMALFEEDS*

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INTRODUCTION

Stolt-Nielsen owns several shipping companies that provide a significant portion of parcel tankers for the global economy.[1] AnimalFeeds contracted with Stolt-Nielsen to ship its products using Stolt-Nielsen's parcel tankers and used a standard contract in maritime trade, a charter party, to charter those vessels.[2] AnimalFeeds along with other charterers, however, ultimately brought a class-action lawsuit against Stolt-Nielsen, alleging the company was engaging in price-fixing.[3] Since the charter party contained an arbitration clause, the parties agreed to arbitrate the price-fixing dispute.[4]

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[1] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010).

[2] *Id.* at 666-67 (describing the underlying Vegoilvoy charter party, adopted in 1950, that AnimalFeeds uses).

[3] *Id*. at 667-68. In the past, antitrust disputes were disallowed in arbitration proceedings for public policy reasons, because antitrust disputes were deemed too important to be

What happened next is extremely important to this Note's analysis: the parties agreed to submit the question of "whether their arbitration agreement allowed for class arbitration" to a panel of arbitrators bound by arbitration rules developed by the American Arbitration Association ("AAA").[5] Accordingly, "[t]he parties selected a panel of arbitrators and stipulated that the arbitration clause was 'silent' with respect to class arbitration."[6]

Pursuant to AAA rules, the arbitrator must decide the question of class arbitration.[7] After consideration, the AAA panel of arbitrators "concluded that the arbitration clause allowed for class arbitration."[8] Stolt-Nielsen then moved to vacate the award.[9] The District Court vacated the award, the Second Circuit reversed, and the Supreme Court ultimately agreed with the District Court and reversed the Second Circuit ruling.[10]

What happened to giving deference to arbitrators, as all arbitral case law suggests, particularly in a case where the parties expressly submitted the question at issue to the arbitration panel?[11] A problem throughout arbitral case law generally (and the opinions in *Stolt-Nielsen v. AnimalFeeds* specifically) is that when silence in a contract is put at issue, the application of the law is not varied based on the *kinds* of silences (or gaps) at issue, or the different ways in which an arbitrator might have filled those gaps. This Note suggests that the law should turn on the interpretation of the *particular* gap in the contract, and on how and why an arbitrator, or in this case a panel of arbitrators, decides to fill that gap.

It should be noted that a later decision by a unanimous Supreme Court in *Oxford Health Plans v. Sutter*,[12] appears to limit the application of the *Stolt-Nielsen* decision. Indeed, the holding in *Oxford Health* seems to directly

resolved outside a U.S. court. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 620-21 (1985) (discussing Courts of Appeals precedent that antitrust disputes should not be resolved via arbitration). However, this is no longer the case in American jurisprudence. *See generally id.* (holding that antitrust claims can be arbitrated in an international business context).

[4] *Stolt-Nielsen*, 559 U.S. at 668.

[5] *Id.*

[6] *Id.*

[7] *Id.* (explaining that the AAA "requires an arbitrator, as a threshold matter, to determine 'whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.'" (quoting SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (Am. Arbitration Ass'n 2003), http://perma.cc/FW3V-SP2J)).

[8] *Id.* at 669.

[9] *Id.*

[10] *Id.* at 669-70, 687.

[11] *See supra* Part II.

[12] 133 S. Ct. 2064 (2013) (upholding an arbitrator's decision to enforce class arbitration even absent an explicit class arbitration clause in the contract because the arbitrator properly construed the contract, and did not stray from an interpretive role as the Court found the case to be in *Stolt-Nielsen*).

contradict the holding in *Stolt-Nielsen*.[13] The *Oxford Health* decision is likewise discussed in the analysis below, and just as with the *Stolt-Nielsen* decision, it would have benefitted from a delineation of gap-filling based upon the type of gap being filled.

Stolt-Nielsen is a complicated and controversial 5-3 Supreme Court opinion in arbitral legal doctrine.[14] This Note will not opine about the motivations of either the majority or dissenting opinions. Rather, this Note provides a suggested framework, a tool, for untangling the murky and inconsistent reasoning found in the *Stolt-Nielsen* opinions. Part I describes the context in which gap-filling relates to the enforceability of international arbitral awards in the United States. Part II explores the cases that have informed arbitral doctrine as it relates to international commercial disputes. This Note then proceeds to detail four gap-filling methods proposed as part of the suggested framework of gap-filling analysis, using the facts of *Stolt-Nielsen* to flesh out the difference in analyses. Part III evaluates gap-filling when a contract lacks an essential term. Part IV then analyzes gap-filling when a contract lacks a non-essential (or desirable) term. Part V proceeds to show how the rewriting of a contract by an arbitrator can be seen as gap-filling, and finally Part VI distinguishes situations in which gap-filling results in arbitrators constructing contracts. The goal of this Note is to provide professionals in the field of international commercial disputes with a categorization tool that promotes clearer and more predictable international arbitral contracts.

I. ENFORCEABILITY OF AN INTERNATIONAL ARBITRAL AWARD IN THE UNITED STATES

This Note specifically focuses on the question of the enforceability of an international arbitral award under the Federal Arbitration Act, specifically 9 U.S.C. § 10(a)(4), where an arbitral tribunal has engaged in gap-filling.[15] The Federal Arbitration Act ("FAA") sets out the standard of judicial review for international arbitral disputes.[16] The FAA is divided into three chapters.[17]

[13] *Compare id.* at 2071 ("Oxford chose arbitration, and it must now live with that choice."), *with Stolt-Nielsen*, 559 U.S. at 684 ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a [pre-established, explicit] contractual basis for concluding that the party agreed to [class arbitration].").

[14] *Stolt-Nielsen*, 559 U.S. at 665-66.

[15] A U.S. court may vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4) (2012).

[16] William W. Park, Symposium, *International Commercial Arbitration: The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1245 (2003) ("The Federal Arbitration Act subjects most arbitration in the United States to a single standard for judicial review, regardless of whether the dispute is big or small, domestic or international, and notwithstanding state attempts to create a more nuanced framework for arbitration.").

Chapter One applies to domestic arbitrations, but its provisions also apply to awards enforced under Chapters Two and Three for issues not covered in those two chapters.[18] Chapter Two of the FAA incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the New York Convention), an international agreement on the recognition and enforcement of foreign arbitral awards.[19] Chapter Three incorporates a related treaty that is not the focus of this Note.[20]

The policy of the United States is to be deferential to foreign arbitral awards.[21] As stated in the FAA, a court "shall confirm the [foreign] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[22] Articles III and V of the New York Convention (incorporated into law by Chapter Two of the FAA) are most relevant to American interpretation of foreign arbitral awards. Article V explains when the recognition and enforcement of an award may be refused,[23] while Article III provides:

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[17] Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208, 301-307 (2012).

[18] *See* 9 U.S.C. §§ 1-16 (presenting general provisions of the Federal Arbitration Act); S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources,* 20 AM. REV. INT'L ARB. 119, 134-35 n.54 (2009) ("The first chapter . . . covers domestic U.S. arbitration . . . Chapter one of the FAA only applies to matters brought under chapters two and three of the FAA to the extent that it is not inconsistent with the later provisions."); AM. SOC'Y INT'L L., BENCHBOOK ON INTERNATIONAL LAW § III.A (Diane Marie Amann ed., 2014), *available at* http://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf [http://perma.cc/M2T6-423L] (providing an overview of certain "instances in which U.S. courts may be asked to intervene in an international arbitration").

[19] 9 U.S.C. §§ 201-208 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 [(the "New York Convention")], shall be enforced in United States courts in accordance with this chapter."); Strong, *supra* note 18, at 134-35 n.54 (2009) ("International arbitrations governed by the New York Convention are covered in chapter two of the FAA.").

[20] 9 U.S.C. §§ 301-307. Chapter Three incorporates the Inter-American Convention on International Arbitration, otherwise known as the Panama Convention. *See* John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 1-2 (2000).

[21] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) ("The goal of the [New York] Convention . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.").

[22] 9 U.S.C. § 207 (2012). Note that a party seeking to enforce an award has three years to "apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration," so non-recognition of an award is a defense rather than a cause of action. *Id.*

[23] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[24]

Thus, when interpreting how to apply Article V, U.S. courts look to domestic law on non-recognition of arbitral awards, namely 9 U.S.C. § 10.[25]

Gap-filling does not have a single, precise definition, though the term generally refers to decisionmakers—in this context, arbitrators—resolving a matter that is not specified in a contract.[26] In other words, the question becomes: when the matter in dispute is not specified in the contract, does an arbitrator have the jurisdiction (or broadly, the authority) to fill the gap in the contract, or must the gap be filled by a court?[27] The short answer is that it depends. It depends on the type of gap-filling that the arbitrator is engaging in. Yet U.S. courts, including the Supreme Court, have failed to distinguish between different types of gap-filling when deciding on the enforcement of arbitral awards.[28]

This Note distinguishes four types of gap-filling: (1) gap-filling when the contract is lacking an essential term; (2) gap-filling of a non-essential (desirable) term; (3) rewriting the contract; and (4) contract construction. First, essential-term gap-filling happens when the contract at issue is incomplete because of a missing term. There is a question about whether a contract has been formed, and whether an arbitrator has the authority to give the contract legal effect by filling in the gap. Second, desirable-term gap-filling occurs when the contract clearly exists, but there is a dispute of an extra, non-essential term in the contract. In this case, the arbitrator most likely has clear authority to fill in the gap. Third, rewriting-term gap-filling happens when an arbitrator expressly changes the terms of a contract. The issue in this situation is whether the arbitrator has the authority to change the original terms of the disputed contract. The fourth type of gap-filling, contract construction, occurs when an

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[24] New York Convention, *supra* note 23, at art. III.

[25] Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L LAW. 487, 496 (1990) ("The New York Convention thus remits the parties to domestic laws already in place with respect to enforcing awards.").

[26] *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1107 (2011) ("As with any agreement, procedural contracts raise important questions, both positive and normative . . . . When a procedural contract is silent as to a particular matter, how do decision makers (such as arbitrators) fill the gap?").

[27] *Id.*

[28] *See generally, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

arbitrator adds a new term to the disputed contract. This Note proposes the adoption of these gap-filling categories for international commercial arbitral contracts.[29]

Introducing categories into this area of law will promote efficiency, clarity, and predictability. Using *Stolt-Nielsen*, as a lens, this Note will show how judicial determination of the type of gap-filling in which an arbitrator engaged will result in more consistent jurisprudence as a whole.[30] It is necessary first to understand and define what kind of gap-filling an arbitral tribunal engaged in before ruling on whether to vacate that award per 9 U.S.C. § 10(a)(3) or 9 U.S.C. § 10(a)(4). Put another way, this Note seeks to clarify the standard for arbitral gap-filling by exploring how different types of gap-filling may call for different analyses of non-recognition of an arbitral award. Clarity will lead to more efficient agreements and decisions in international commercial contracts.

II. PRECEDENTIAL CASES INFORMING *STOLT-NIELSEN*

Stolt-Nielsen has created turmoil in arbitration-related case law and has been characterized as the Supreme Court case that "could undermine the legal foundation of U.S. arbitration."[31] Before delving into the decision, we must consider the case law that the Supreme Court had to cite and distinguish in order to render both the majority and dissenting opinions in *Stolt-Nielsen*. All of the following cases created a narrow scope for judicial review of arbitral decisions in proceedings, limiting court review to situations where arbitrators would be deciding on their own jurisdiction—in other words, where arbitrators would be arbitrating arbitrability.[32] *Stolt-Nielsen*, without explicitly overruling any precedential cases, seems to have overturned all established precedent that gave U.S. courts such narrow judicial review of arbitral awards.[33] *First Options of Chicago, Inc. v. Kaplan*,[34] *Howsam v. Dean Witter Reynolds, Inc.*,[35]

[29] *See generally* Drahozal & Rutledge, *supra* note 26 (providing an in-depth analysis of how to approach "procedural contracts"—contracts that regulate both commercial relations and how disputes over those relations will be resolved).

[30] *See generally Stolt-Nielsen*, 559 U.S. 662.

[31] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 519 (4th ed. 2012) ("*Stolt* introduced the possibility that courts could second-guess and reverse arbitrator determinations on the basis of clear error.").

[32] *See generally* Alan Scott Rau, *Arbitrating 'Arbitrability'*, 7 WORLD ARB. & MEDIATION REP. REV. 487 (2013) (providing an overview and international comparison of how courts deal with the issue of allowing or disallowing arbitrators to determine arbitrability).

[33] *See Stolt-Nielsen*, 559 U.S. at 688 (2010) (Ginsburg, J., dissenting) (accusing the majority of "indulging in de novo review, [and] overturn[ing] the ruling of experienced arbitrators" rather than "adher[ing] to the strict limitations the Federal Arbitration Act . . . places on judicial review of arbitral awards").

[34] 514 U.S. 938, 944, 949 (1995) (vacating an arbitrator's decision that a contract dispute was arbitrable because there was no clear arbitration agreement, but affirming that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to

and *Green Tree Fin. Corp. v. Bazzle*[36] are particularly relevant to the analysis of deference to arbitral awards related to gap-filling.[37] *Kaplan* clarified how and when courts can assess arbitrability—namely, whether a court or an arbitrator should be the one to determine whether the parties agreed to arbitrate.[38] In a unanimous decision, the Supreme Court held that the answer depends on what the parties specified in their contract.[39] If there is clear and unmistakable evidence, per the contract, that the parties agreed to submit to arbitration, then courts should defer to the arbitrator's decision on the arbitrability of the dispute.[40] If, however, the standard of clear and unmistakable evidence is not met, the court shall review the question of arbitrability independently.[41] *Kaplan* clarified that the court will review the

arbitration").

[35] 537 U.S. 79, 81 (2002) (holding that an arbitration rule of the National Association of Securities Dealers regarding a statute of limitations should be decided by an arbitrator rather than a court).

[36] 539 U.S. 444, 453 (2003) ("Given . . . the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation [regarding class arbitration] should be for the arbitrator, not the courts, to decide.").

[37] *See* CARBONNEAU, *supra* note 31, at 520 (asserting that *Stolt-Nielsen* contradicts precedent that arbitrators are the "dominant player at the head of the arbitral process"). Although there are other cases tangential to this issue that involve considerations of the class-litigation policy issue, a discussion of them would not provide substantial benefit to this particular analysis. *Id.* ("[I]n contrast to *Bazzle,* the *Stolt-Nielsen* Court, in fact, gave its assessment of the utility, desirability, and foundation of class litigation. It proclaimed the new principle that bilateral arbitration was drastically different from multiparty litigation. Therefore, the absence of any reference to class litigation in the arbitral clause could not ever justify an arbitral order for this type of class procedure. It appeared the Court's distaste for class litigation and its disruptive impact upon business enterprises trumped its support for arbitration—at least, on this occasion.").

[38] *Kaplan*, 514 U.S. at 942-43 ("[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then . . . the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." (citations omitted)).

[39] *Id.* at 943 ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

[40] *Id.* (holding that if the parties agreed to arbitration, the arbitrators should decide any questions of arbitrability regarding specific conflicts that arise).

[41] *Id.* at 943 ("If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely,

question of arbitrability *de novo*, the ordinary standard of review.[42] In *Howsam*, the Court held that questions of arbitrability have a very narrow scope:

> The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[43]

Addressing the policy of narrowly limiting questions of arbitrability, the *Howsam* Court discussed how the timeliness of the arbitration in this case was a procedural condition precedent to the arbitration and not a gateway question of arbitrability for the court to decide.[44] Arbitrators, compared with courts, are more knowledgeable and have more expertise about the meaning of procedural arbitration rules, and thus should have jurisdiction over these types of questions.[45] The Court called it "a goal of arbitration systems and judicial systems alike . . . to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise [to] help . . . secure a fair and expeditious resolution of the underlying controversy."[46]

In *Stolt-Nielsen*, the Supreme Court frequently cited and discussed its decision in *Bazzle*, as both cases involved a question of arbitrability relating to class arbitration.[47] The majority opinion attempts to distinguish *Bazzle*, since it directly contradicts the *Stolt-Nielsen* majority opinion—a fact not lost on the dissenters.[48] *Bazzle* was a plurality opinion that held that the arbitrator, rather

independently.").

[42] *Id.* at 948.

[43] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002) (citation omitted).

[44] *Id.* at 85 (distinguishing questions of substantive arbitrability from questions of procedural arbitrability, and asserting that arbitrators should decide the latter).

[45] *Id.* ("[T]he [National Association of Securities Dealers] arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.").

[46] *Id.*

[47] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 677-79 (2010) (discussing the opinions in *Bazzle* where the plurality held that "the arbitrator and not a court should decide whether the contracts were indeed 'silent' on the issue of class arbitration").

[48] *See* CARBONNEAU, *supra* note 31, at 520 ("As the dissent rightly emphasizes, the Court's ruling contradicts the plurality holding in *Bazzle* which appeared to make the arbitrator the dominant player at the head of the arbitral process once a court ascertained the existence of an arbitral clause.").

than a state supreme court, should have interpreted the arbitration agreement in question when the contract was silent regarding class arbitration. The Court reasoned that this was a procedural issue related to arbitration rather than a question of arbitrability.[49] The *Bazzle* Court held that, unlike in *Kaplan*, "the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to."[50] Simply put, "the Court's ruling [in *Stolt-Nielsen*] contradicts the plurality holding in *Bazzle* which appeared to make the arbitrator the dominant player at the head of the arbitral process once a court ascertained the existence of an arbitral clause."[51]

III. GAP-FILLING WHEN THE CONTRACT LACKS AN ESSENTIAL TERM

A. *Background on International Disputes and Essential-Term Gap-Filling*

The first type of gap-filling, as defined by this Note, occurs when the contract at issue lacks an essential term, and thus a question arises as to whether a contract has been formed. In essential-term gap-filling, an essential term is missing, which means that the contract is incomplete unless an arbitrator or court steps in to fill the gap.[52] In the United States, supplying essential terms that are missing in a commercial contract is generally a matter of effectuating the intent of the parties.[53] That is, if the parties intended for there to be a contract, a court will fill in the gaps of the essential terms to effectuate the intent of the parties.[54] In a non-arbitral dispute, United States courts operate within the framework of the Uniform Commercial Code ("UCC"), and the UCC focuses on a question of intent when determining whether or not the term left open in the contract was essential.[55] There is

[49] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003).

[50] *Id.* at 452 (citation omitted).

[51] *See* CARBONNEAU, *supra* note 31, at 520 ("*Bazzle* established a common law regime that governed in the event of a party failure to include a *Kaplan* jurisdictional delegation in the arbitration agreement.").

[52] For a canonical contract law case where the court debated whether a contract had been formed given the terms left open in the contract, see, for example, Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581, 592 (Pa. 1985) ("In sum, a review of the record indicates that there is more than ample evidence to support the trial court's findings that there was no contractual intent and that the open terms could not be filled by the court.").

[53] *See id.* at 589-90 ("[T]he existence of open terms in a writing will not necessarily defeat the enforceability of a contract so long as there is a contractual intent.").

[54] *See id.* at 589-90, 592 (holding that a court may look at the conduct of the parties, the number of open terms, and the writing itself to find contractual intent from which to fill the open terms of the contract).

[55] *See* U.C.C. § 2-204(3) (2014) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); U.C.C. § 2-305(4) (2014) ("Where, however, the parties intend not to be bound unless the price be

extensive jurisprudence on which American judges rely in determining the intent of the parties.[56]

In international arbitration disputes, by contrast, arbitrators cannot engage in this analysis of the parties' intent to fill in a missing essential term.[57] Rather, international arbitration disputes rely upon the premise that the very nature of such disputes is incompatible with this precedential intent-determining approach: arbitrators must focus not on case law or precedent, but rather on the parties' interpretation of the legal theories that apply in their disputes.[58] The principle of *jura novit curia*—that the judge knows the law—does not exist in the same way for international arbitrators, in terms of the law upon which they may draw in rendering a decision, as it does for judges: "As creatures of consent, arbitrators are law-appliers rather than law-makers, and must show special fidelity to the litigants' shared *ex ante* expectations as expressed in a contract or treaty."[59] Thus, arbitrators have a special need to consider only what the parties have put before them in "filling in the gap" of an essential term.[60] An example of this principle is seen in *Caribbean Niquel v. Overseas*

fixed or agreed and it is not fixed or agreed there is no contract.").

[56] There are two main schools of thought on effectuating the intent of parties regarding the existence and interpretation of a commercial contract. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 131-36 (5th ed. 2003). The different methods of finding intent center around the question of what constitutes a final (in other words, integrated) contract. *See id.* at 131 (exploring the relationship between determining "[w]hether the integration is total or partial" and the intent of the contracting parties). The Williston school of thought looks mainly to the "four corners" of the contract to effectuate intent, basically staying within the bounds of the written contract. *See id.* at 132-34 ("[I]f the instrument appears complete on its face—a determination to be made by the trial judge by looking solely at the writing—the instrument is conclusively presumed to be a total integration."). The Corbin school of thought favors looking to circumstances outside just the text of the contract itself. *See id.* at 132, 135-36 ("[T]he existence of a total integration d[oes] not prevent "collateral agreements"—those that are independent from the writing—from being introduced so long as the main agreement [i]s not contradicted."). These are, however, oversimplifications of the theories.

[57] *See* William W. Park, *Arbitrators and Accuracy*, *in* ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 84 (2d ed. 2012).

[58] Reasons for this include: (1) arbitral awards are not usually subject to review for legal error, and thus there is a heavy burden to get the law right; (2) determining the applicable law may be a problem for arbitrators because the nature of arbitration stems "from the parties' decision that a dispute *not* be decided by national courts"; (3) if tribunals include members not trained in the contractually designed law, the arbitrator especially needs to rely on the legal expertise presented by the parties. *See id.* at 83-85 (2d ed. 2012) (exploring the "arbitrator's truth-seeking function with respect to legal norms").

[59] *Id.* at 84-85.

[60] *See id.* ("Although sensitive to public values, rejecting complicity with illicit schemes and abusive procedures, arbitrators fix their eyes on existing legal norms in determining what the parties had a right to expect.").

Mining,[61] a French case[62] decided by the Paris *Cour d'appel* and affirmed by *Cour de cassation*, the French supreme court in judicial matters.[63] The case involved a dispute about a Cuban mining joint venture.[64] The parties argued about a theory of lost profits, and the arbitrators felt that a theory of lost chance more readily applied to the situation.[65] The decision was vacated by the French court because "[a]lthough not questioning the assumption that arbitrators know the law, often expressed as *jura novit curia*, the Court found it unacceptable that an award should rest on a method of damages calculation which the Court assumed, rightly or wrongly, had not been addressed by counsel."[66]

B. *Applying the Essential-Term Method to* Stolt-Nielsen

Justice Alito's majority opinion in *Stolt-Nielsen* is reasonable in the context of essential-term gap-filling. Although Justice Alito's majority opinion (and Justice Ginsburg's dissent, for that matter) ultimately does not put at issue the existence of the contract, it is helpful for our purposes to analyze the majority opinion as if Justice Alito's opinion *had* taken issue with the existence of the contract.[67] Before analyzing how the arbitrators should have filled the "essential gap," (which for this part of the analysis is assumed to be an agreement to class-action arbitration) we must explore whether the arbitrators had the authority to decide on the existence of the contract, considering the principle that arbitrators should not be arbitrating their own jurisdiction.[68]

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[61] Cour d'appel [CA] [regional court of appeal] Paris, civ., Mar. 25, 2010, 08/23901 *confimed by* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2011, Bull. Civ. I, No. 10-23.321.

[62] French decisions are usually extremely deferential to arbitral awards. *See* Lawrence W. Newman & Michael Burrows, *"Manifest Disregard" and International Awards*, *in* THE PRACTICE OF INTERNATIONAL LITIGATION V-331 (2d ed. 2014) ("France, like Switzerland, has a reputation of giving great deference to arbitration awards.").

[63] *See* William W. Park, *The Maturing of Arbitration: Continuity and Change*, *in* ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 3, 8-10 (2d ed. 2012) ("Emphasizing procedural fairness over efficiency, the Paris *Cour d'appel* affirmed the parties' right to comment on new legal theories even at the addition of cost and delay.").

[64] Park, *supra* note 63, at 8.

[65] *See id.* (differentiating between the parties' proposed "theory of lost profits (*gain manqué*)" and the theory "of 'lost chance' (*perte de chance de poursuivre le projet*)," which was ultimately accepted by the arbitrators).

[66] *Id.* at 9.

[67] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 676 (2010).

[68] *See supra* note 29 and accompanying text; Drahozal & Rutledge, *supra* note 26, at 1107 ("Assuming that limits should exist, what blend of oversight achieves the optimal degree of regulation? What are the limits on arbitrators' authority to fill the gaps in procedural contracts? What is the proper role of courts in policing arbitrators' gap-filling authority?").

In U.S. case law, one can separate the question of whether parties agreed to arbitrate from the question of whether the contract itself exists.[69] This is known as the doctrine of separability.[70] If the question is about whether the parties agreed to arbitrate, then it is for courts to decide. If the question is about whether the contract exists, it is for arbitrators to decide.[71] Following the doctrine of separability, if a stipulation of non-agreement on class-action arbitration is assumed to be an essential term of the contract (i.e., calling into question the existence of the contract), then it should be for the arbitrators to decide.

Justice Alito's majority opinion could be interpreted as follows: class arbitration was an essential part of the contract, but the arbitration panel exceeded its authority by going beyond what was available to the panel in deciding the question.[72] The majority opinion held:

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in absence of express consent, the panel proceeded *as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation*. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case.[73]

In other words, if we interpret the class-arbitration provision as an essential term on which the contract was silent, the correct procedure for the arbitrators would presumably have been to go through the FAA, maritime law, and New York law to "fill the gap" of the class-arbitration issue.[74] Justice Alito states (and effectively *assumes*) that the arbitrators, after going through that process, would not have been able to find a basis to fill the "essential gap" of class

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[69] For a detailed discussion on the principle of separability, see generally Alan Scott Rau, *Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003). *See also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) ("Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

[70] *See generally* Rau, *supra* note 69.

[71] *See id.* at 17.

[72] *See Stolt-Nielsen*, 559 U.S. at 673-74 ("Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation.").

[73] *Id.* (emphasis added).

[74] *See id.* at 662.

arbitration.[75] Thus, following Justice Alito's assumption, the arbitrators should have concluded, after finding no authority on class arbitration (combined with the parties' stipulation that there was no agreement on class arbitration), that there was no contract regarding class arbitration such that any class lawsuit would have to go through a court.[76]

The expectation under essential-term gap-filling would be for the Supreme Court to submit the dispute back to the arbitrators to go through the correct procedure; and in this way, the Court would have deferred to the arbitrators on the existence of a contract.[77] Justice Alito's opinion did not defer to the arbitrators, and although his analysis can be framed as an example of essential-term gap-filling, it does not comport with the outcome of the case.[78] Justice Alito's reasoning for not directing a rehearing on the case by arbitrators is that "there can be only one possible outcome on the facts before [the Court]."[79] The opinion cites 9 U.S.C. §10(b), which states that "[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."[80] The Court should have used its discretion, through essential-term gap-filling interpretation, to direct a rehearing by arbitrators to decide whether a contract exists, even if the Court thought there could be only one result.[81] Although the majority opinion discusses the issue of class arbitration under the FAA, the Court neither gives any evidence nor provides a detailed analysis of maritime law or New York law to support its conclusion that there can be only one result under this set of facts.[82] Even if the opinion did analyze New York law and maritime law in detail, it still would not have been within the Court's jurisdiction to decide whether a contract exists, and thus the Court should have remanded the case to the arbitration panel for rehearing pursuant to proper procedures.[83]

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[75] *See id.* at 677.

[76] *See id.* at 673-74 ("Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.").

[77] *See id.* at 677 ("[U]nder § 10(b) of the FAA, [the Court] must either 'direct a rehearing by the arbitrators' or decide the question that was originally referred to the panel.").

[78] *See id.* ("Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.").

[79] *Id.*

[80] 9 U.S.C. § 10(b) (2012).

[81] *See Stolt-Nielsen*, 559 U.S. at 677.

[82] *See id.* at 680-87 (applying the principle that a party will not be required "to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so").

[83] *See id.* (using the principles of the FAA to find that an arbitrator could not presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to

As discussed above, essential-term gap-filling likely is not the best lens through which to view the majority opinion, since nowhere in the opinion is there an issue or question raised as to the actual existence of the contract. The Court, however, certainly could have analyzed the fact pattern of *Stolt-Nielsen* in this manner had it decided to delineate methods of gap-filling and found that in this case the arbitrators were filling in an essential term of the contract.[84]

IV. GAP-FILLING OF A NON-ESSENTIAL (OR DESIRABLE) TERM

Desirable-term gap-filling happens when a disputed contract clearly exists, but there is a dispute regarding an extra, non-essential term in the contract. This is the method that aligns best with the facts of *Stolt-Nielsen*. In fact, Justice Ginsburg's dissent in *Stolt-Nielsen* evokes this type of interpretive method. To evaluate the application of desirable-term gap-filling to the facts of *Stolt-Nielsen*, I will trace Justice Ginsburg's dissent.[85]

First, although Stolt-Nielsen contested that AnimalFeeds had a right to proceed on behalf of a class, it "agreed to submission of that threshold dispute to a panel of arbitrators."[86] Thus, after the parties agreed that the issue of class arbitration was not part of their original agreement, they asked the arbitration panel to decide on that missing non-essential term.[87] This interpretation does not involve a dispute as to whether the contract existed or whether it was valid initially. In other words, the parties were not disputing the contract's existence. Rather, the parties asked the arbitration panel to rule on whether AnimalFeeds could proceed with a class arbitration pursuant to Rule Three of the AAA's Supplementary Rules for Class Arbitrations.[88] Thus, the class arbitration agreement is best seen as an extra or desirable term.

Justice Ginsburg comments that this was a "preliminary ruling rendered by arbitrators" and that "[n]o decision of this Court . . . has ever approved immediate judicial review of an arbitrator's decision as preliminary as the 'partial award' made in this case."[89] She therefore argued that the case was not yet ripe for judicial review.[90] Procedurally, gap-filling methods do not aid

resolve their disputes in class proceedings").

[84] *See id.* at 662.

[85] *See id.* at 688-99 (Ginsburg, J., dissenting) (explaining that the Majority "errs in addressing an issue not ripe for judicial review" and that "the Court substitutes its judgment for that of the decisionmakers chosen by the parties").

[86] *Id.* at 689.

[87] *See id.*

[88] *See id.* (describing that pursuant to Rule Three of the AAA's Supplementary Rules for Class Arbitration, the panel was to "determine . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class" (quoting SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (Am. Arbitration Ass'n 2003), http://perma.cc/FW3V-SP2J)).

[89] *Id.* at 692.

[90] *See id.* at 690-92 ("The Court does not persuasively justify judicial intervention so early in the game or convincingly reconcile its adjudication with the firm final-judgment

much in this part of the analysis. It is worth noting that because the parties themselves labeled the class-action provision in *Stolt-Nielsen* as a "threshold" matter (that is, a procedural rather than substantive matter), it strengthens the conclusion that the missing class-action provision was a desirable term rather than a term essential to the contract.[91] As a procedural "threshold" matter, based on precedent, the determination of jurisdiction for the question of class arbitration should fall within the jurisdiction of arbitrators, rather than courts.[92]

Moving on from procedural questions, Justice Ginsburg then rejects Stolt-Nielsen's arguments on the merits.[93] Justice Ginsburg argues that the majority should not have granted Stolt-Nielsen *de novo* consideration after it had consented to arbitrate whether a "broad arbitration clause" included class arbitration.[94] A court may vacate an arbitral award "only in very unusual circumstances" pursuant to 9 U.S.C. § 10(a).[95] The only portion of 9 U.S.C. § 10(a) that Stolt-Nielsen relied on in arguing to vacate the arbitration panel's decision is that the arbitrators "exceeded their powers."[96] The question that must be asked as to whether the arbitrators exceeded their power is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue."[97]

The supplemental agreement of the parties to submit the question to the arbitration panel clearly fulfilled this requirement, and thus the arbitrators did not exceed their powers.[98] As such, adding a desirable-term gap-filling analysis would strengthen this argument on the merits. Under the theory that the class

rule prevailing in the federal court system." (citation omitted)).

[91] *See id.* at 689-90 ("The arbitrators decided the issue, in accord with the parties' supplemental agreement, 'as a threshold matter.'").

[92] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003).

[93] *See Stolt-Nielsen*, 559 U.S. at 693 (Ginsburg, J., dissenting).

[94] *See id.* ("The Court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's *de novo* determination.").

[95] *Id.* (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995)); *see* 9 U.S.C. § 10(a) (2012) (permitting a court to vacate an arbitration award when there was 1) "corruption, fraud, or undue means," 2) "evident partiality or corruption," 3) misconduct by the arbitrators, or 4) an arbitrator who "exceeded their powers" so that there was no "mutual, final, and definite award upon the subject matter").

[96] 9 U.S.C. § 10(a)(4) (2012); *Stolt-Nielsen*, 559 U.S. at 694 (Ginsburg, J., dissenting) (explaining that Stolt-Nielsen only invoked § 10(a)(4) which requires the reviewing court to ask if the arbitrator had the power to address an issue based upon the agreement not whether the issue was correctly decided).

[97] *Stolt-Nielsen*, 559 U.S at 694 (Ginsburg, J., dissenting) (citing Disrussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 824 (2d Cir. 1997)).

[98] *See id.* ("The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.").

arbitration agreement was a desirable term, there should be no question that the Court should have deferred to the arbitration panel. When the missing term is desirable, there is no defect with the agreement to arbitrate.[99] A desirable term is nothing more than an *extra* term, meaning it clearly falls to the arbitration panel to analyze.[100]

Perhaps there is some ambiguity about whether a desirable term can be purely about arbitrability, thus remaining a question for the courts. It seems more likely that any desirable term relating to arbitrability would be a procedural (or threshold) matter regarding the agreement to arbitrate. Yet, must an arbitration provision itself be an essential term of the contract? In other words, can a contract exist if the arbitration provision is missing? To answer this question, we might think of the contract in separate venues: in court and in the arbitration venue. The contract could still exist in the "normal" court world without an arbitration provision because all disputed contracts are by default reviewable by a court if one of the parties files a lawsuit.[101] Thus, if we are in the world of courts, desirable terms in arbitration contracts about arbitrability are *not* essential to the contract.

Compare this analysis with the supposition in Section III.B that the class-arbitration provision could be an essential term of the contract.[102] That is, without an arbitration provision, such a contract could not exist in the world of arbitration; thus becoming perhaps the most essential term. In Section III.B, the analysis focused on what the arbitration panel should be doing.[103] The analysis is logically consistent: if class arbitration was an essential term and the arbitration panel could not find a basis for allowing class arbitration in New York or maritime law, the contract could no longer exist in the world of arbitration, and the question would rest with the courts. Equipped with the determination that a term is essential for arbitration proceedings, a court could then settle such a dispute.

However, if both parties agree during the arbitration proceedings that a term is non-essential, as in *Stolt-Nielsen*, a court has no business reviewing that term. In *Stolt-Nielsen*, both parties agreed to submit the question of class arbitration to the arbitration panel, so this additional, desirable term falls

[99] *See id.*

[100] *See id.*

[101] *Breach of Contract: Legal Remedies That Can Be Pursued*, ROSENTHAL LAW GROUP, http://www.hg.org/article.asp?id=22797 [http://perma.cc/9M2M-UR2X].

[102] *See supra* Section III.B ("Justice Alito's majority opinion could be interpreted in the following view: class arbitration was an essential part of the contract, and the arbitration panel exceeded its authority by going beyond what was available to the panel in deciding the question.").

[103] *See supra* notes 73-74 and accompanying text ("[I]f we interpret the class-arbitration provision as an essential term on which the contract was silent, the correct procedure for the arbitrators would presumably have been to go through the FAA, maritime law, and New York law to 'fill the gap' of the class-arbitration issue.").

squarely within the jurisdiction of the arbitration panel.[104] Furthermore, the parties did not dispute the existence of the contract.[105] By submitting the question of a desirable-term gap to the arbitration panel, the parties preempted any question involving the doctrine of separability.[106] Given the situation, there is no question as to whether the contract was completed, particularly because neither party disputed the original arbitration provision.[107] Such a holding by the Supreme Court in *Stolt-Nielsen* would not have established precedent for further cases on class arbitration, however, because this analysis is case specific. In *Stolt-Nielsen*, the parties agreed to submit the question of class arbitration to the arbitration panel, indicating that it was a desirable or extra term they wanted decided.[108]

V. ARBITRATORS REWRITING CONTRACTS

The third kind of gap-filling occurs when an arbitrator rewrites terms of a contract at issue. Rewriting contract terms is different from essential-term gap-filling. As previously noted, in essential-term gap-filling, an essential term is missing, meaning that the contract is incomplete unless an arbitrator or court steps in to fill the gap.[109] When rewriting a contract, by contrast, the arbitrator takes a complete contract and changes its original terms. In this situation, an arbitrator can rewrite essential as well as desirable terms. The analysis in rewriting-term gap-filling hinges on the source of the arbitrator's authority to rewrite terms: did the parties authorize it after the fact, or does the arbitrator's authority stem from the contract itself?

Rewriting-term gap-filling usually arises as an "equitable correction of a contractual term that is misstated," where the parties agree that the term should be corrected.[110] Some jurisdictions have a presumption of arbitral authority to correct or rectify a contract.[111] In England, for example, the English

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[104] *See Stolt-Nielsen*, 559 U.S at 673.

[105] *See id.* at 669.

[106] *See supra* Part I (explaining that when "there is a dispute of an extra, non-important term in the contract . . . the arbitrator most likely has clear authority to fill in the gap").

[107] *See Stolt-Nielsen*, 559 U.S at 693 (Ginsburg, J., dissenting) (suggesting the Court was "act[ing] without warrant" because the majority decision allowed Stolt-Nielsen to "repudiate its submission of the contract-construction issue to the arbitration panel"). The parties only disputed the class-arbitration agreement and did not dispute the original arbitration provision. *Id.*

[108] *Id.* at 689.

[109] *See supra* Section III.A.

[110] Jonathan Sutcliffe, *§ I-7.02 Formal Requirements and Components of an Award*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 240 (Daniel M. Kolkey et al. eds., 3d ed. 2012) (explaining that if the "panel does not have the express power to order rectification," the panel must analyze the arbitration agreement itself to determine if it may rewrite the contract).

[111] *Id.*

Arbitration Act of 1996 gives an arbitration panel power to order "the rectification, setting aside or cancellation of a deed or other document," unless otherwise agreed by the parties.[112] The United States, however, does not have this presumption. Instead, under 9 U.S.C. § 10(a)(4), a party may seek reversal of an award by accusing an arbitrator of rewriting a contract. As previously noted, a court may vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[113] Indeed, this Note's categorical analysis on gap-filling through the frame of *Stolt-Nielson* is geared toward setting standards for determining when an arbitration panel exceeds its authority. Rewriting-term gap-filling gives the strongest justification for vacating an award under the "exceeding powers" standard, and it is the strongest justification for Justice Alito's majority opinion, as will be detailed below.[114] In effectuating the intent of the parties, it is much easier to justify supplying a missing term than it is to change a contract outright.[115] In practice, "it is thus a smaller step for an arbitral tribunal to imply a power to fill a gap in the agreement than to imply a power to change it . . . . Most tribunals shrink from changing the terms of a contract unless the arbitration agreement contained an express power."[116]

A. *Analyzing the Majority Opinion in* Stolt-Nielsen *as Rewriting-Term Gap-Filling*

The parties in *Stolt-Nielsen* agreed that their contract was silent as to class arbitration.[117] Justice Alito opines that since there was an agreement that the contract did not have a class arbitration provision, the arbitration panel took it upon itself to allow class arbitration without considering the FAA, federal maritime law, and New York law, which the parties claimed governed this case.[118] The arbitrators exceeded their authority under 9 U.S.C. § 10(a)(4) because "the task of an arbitrator is to interpret and enforce a contract, not to make public policy. . . . In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration."[119]

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[112] English Arbitration Act 1996, 1996, c. 23, § 48 (5)(c) (Eng.). *See also* Sutcliffe, *supra* note 110 at 99 n.61.

[113] 9 U.S.C. § 10(a)(4) (2012).

[114] *See supra* Part I (explaining that the role of an arbitrator is to interpret existing contracts).

[115] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 362-63 (4th ed. 2004) (describing gap-filling as "a less speculative undertaking" than rewriting a contract).

[116] *Id.* at 363 (emphasis omitted).

[117] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 673 (2010).

[118] *Id.* at 673-74.

[119] *Id.* at 672.

Rewording this in the context of rewriting-term gap-filling would strengthen the majority opinion's analysis. Justice Alito could have said that the presence of an arbitration provision in the original contract, allowing class arbitration in this dispute, effectively rewrote the agreed-upon arbitration provision by changing the scope of available arbitration. Therefore, the arbitrators necessarily did not find authority within the four corners of the contract to rewrite the arbitration provision to allow for class arbitration.[120] Finding no authority within the contract, the arbitration panel had to find authority under the FAA or under the laws that the parties claimed governed the charter party—namely, federal maritime law and New York law. The arbitration panel did not cite to any such authority:

> But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post-*Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration." The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law.[121]

Justice Alito further notes that the panel's decision relied on post-*Bazzle* arbitral decisions, and consequently was "made under the AAA's Class Rules, which were adopted in 2003, and thus none was available when the parties here entered into the Vegoilvoy charter party during the class period ranging from 1998 to 2002."[122] AnimalFeeds conceded that class arbitrations became common only after the *Bazzle* case.[123] The arbitration panel also acknowledged that "none of the cited arbitration awards involved a contract between sophisticated business entities."[124] Thus, the arbitration panel had no authority to rewrite the arbitration provision in this case. Justice Alito relegated this analysis to a footnote, though under rewriting-term gap-filling analysis, the point would be featured in the main argument as an important justification for how the arbitration panel rewrote the arbitration provision to include class arbitration.

Of course, under a rewriting-term gap-filling analysis, Justice Alito would also need to explain why the fact that the parties submitted the question of class arbitration to the arbitration panel was not a sufficient grant of express authority to rewrite the contract. Justice Alito does not address this issue in the majority opinion. The only plausible response to the contention that the

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[120] *See* PERILLO, *supra* note 56 at 131-36 (explaining that under the "Four Corners" rule, if a contract appears complete on its face, it may not be supplemented).

[121] *Stolt-Nielsen*, 559 U.S. at 673 (citations omitted).

[122] *Id.* at 673 n.4 ("The panel's reliance on arbitral awards confirms that the panel's decision was not based on a determination regarding the parties' intent.").

[123] *Id.*

[124] *Id.*

arbitration panel had express authority to rewrite a term of the contract is that the panel went too far in its actions. Justice Alito while arguing that the arbitration panel dispensed its "own brand of industrial justice,"[125] cited *Major League Baseball Players Association v. Garvey*,[126] which in turn quoted *United Steelworkers of America v. Enterprise Wheel & Car Corp*.[127] According to the majority, the arbitration panel exceeded its authority under 9 U.S.C. § 10(a)(4) because it relied on policy considerations rather than on facts and law.[128]

This is a weak argument, however, which may explain why Justice Alito ignores the problem. To understand why this is a weak argument, we must consider the context in which the "brand of industrial justice" language appears in *United Steelworkers*.[129] *United Steelworkers* was about a collective-bargaining agreement and involved arbitration of a labor dispute.[130] When the Court expressed the need for arbitrators not to dispense their "own brand of industrial justice" in *United Steelworkers*, the statement was targeted toward collective-bargaining agreements, not a contract between sophisticated business entities.[131] *Garvey* only further limited the language of *United Steelworkers* to collective-bargaining agreements.[132] The Court in *Garvey* likewise did not find that the arbitrators had dispensed their "own brand of industrial justice," instead, the Court gave deference to the arbitrators' decision.[133] In this context, it seems a rather big leap for Justice Alito to apply this very narrow exception to arbitral-award deference—rogue policy-making in collective-bargaining agreements—as a way in which the international arbitration panel in *Stolt-Nielsen* exceeded its authority under the FAA. Even if this standard did somehow apply to the FAA, Justice Alito conveniently does not cite the sentence immediately following the "industrial justice" language in *United Steelworkers*. The full excerpt from *United Steelworkers* reads as follows:

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[125] *Id.* at 671-72 (citing Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)).

[126] 532 U.S. 504 (2001).

[127] 363 U.S. 593 (1960).

[128] *Stolt-Nielsen*, 559 U.S. at 672 ("[T]he task of an arbitrator is to interpret and enforce a contract, not to make public policy.").

[129] *United Steelworkers*, 363 U.S. at 597 (1960) (explaining the role of an arbitrator).

[130] *See id.* at 595 (discussing the discharge of employees that led to the underlying arbitration).

[131] *Id.* at 597.

[132] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 505 (2001) (discussing the underlying collective bargaining dispute between the Major League Baseball Players Association and the Major League Baseball Clubs involving the Clubs' alleged collusion).

[133] *Id.* at 509 (describing the limited role of the Court in reviewing arbitration agreements).

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course *look for guidance from many sources*, yet his award is legitimate only *so long as it draws its essence* from the collective bargaining agreement.[134]

Applying this expanded standard to the facts in *Stolt-Nielsen*, it is difficult to justify Justice Alito's contention that the arbitration panel exceeded its authority under 9 U.S.C. § 10(a)(4). Whether the arbitration panel did so correctly or incorrectly is irrelevant. As long as the arbitration panel did not pull a remedy out of thin air, the Court should not assess how well the arbitration panel did its job.[135]

The second problem with Justice Alito's arbitrator-as-rogue-policymaker argument is that it has already been established under different jurisprudence. Manifest disregard of the law was established as a non-statutory ground for vacatur of an arbitration award in *Wilko v. Swan*.[136] The Court revisited this standard in *Hall Street Associates v. Mattel, Inc.*[137] "to consider again whether the manifest disregard standard was viable only as another way of expressing grounds for vacatur under § 10" or whether it could be an independent ground for vacatur.[138] In *Hall Street*, the Court did not give a clear answer, stating only that there was no statutory ground to expand the FAA.[139] The Court did not repudiate the "manifest disregard" standard, instead reasoning that "nonstatutory grounds for vacatur were hardly necessary when § 10 grounds could be read to encompass many of the same arguments."[140]

The District Court in *Stolt-Nielsen* applied the "manifest disregard" standard and vacated the arbitral award.[141] The Court of Appeals then held that the

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[134] *United Steelworkers*, 363 U.S. at 597 (emphasis added).

[135] *See supra* Part II (discussing case law prior to *Stolt-Nielson* that gave deference to arbitrators).

[136] 346 U.S. 427 (1953). *See also* Kermit L. Kendrick & Julie W. Pittman, *Dreaming the Nearly Impossible Dream: Vacatur of Arbitration Awards in Commercial Arbitration*, 2014 A.B.A. SEC. TORT TRIAL & INS. PRACTICE 35, 40 ("[I]interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretations.") .

[137] 552 U.S. 576 (2008).

[138] Kendrick & Pittman, *supra* note 136 at 40 (discussing *Hall Street Assocs. v. Mattel, Inc.*, where the Court found no support for the "manifest disregard" standard in the language of § 10 but suggested § 10 "could be read to encompass many of the same arguments") (quoting Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008)).

[139] *Hall Street Assocs.*, 552 U.S. at 589 ("[T]he statutory text gives us no business to expand the statutory grounds [of judicial review under the FAA].").

[140] Kendrick & Pittman, *supra* note 136 at 40.

[141] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 669-70 (2010) (quoting the District Court) ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

"manifest disregard" standard survived the Supreme Court's decision in *Hall Street* as a "'judicial gloss' on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10."[142] The Court of Appeals further found that the arbitrators' decision in *Stolt-Nielsen* was not in manifest disregard of the law, "because petitioners had cited no authority applying a federal maritime rule of custom and usage against class arbitration . . . . Nor had the arbitrators manifestly disregarded New York law . . . since nothing in New York case law established a rule against class arbitration."[143] In a footnote, Justice Alito explained that the Court in *Stolt-Nielsen* does not decide the question of the "manifest disregard" standard.[144] The footnote does state, however, that had the "manifest disregard" standard been as AnimalFeeds characterized it in its brief—that arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it"—the majority would have held that the standard was satisfied.[145] Thus, the "own brand of industrial justice" language from arbitration cases related to collective-bargaining agreements that Justice Alito brings into *Stolt-Nielsen* seems to be a way to avoid deciding whether the "manifest disregard" judicial gloss that the Court of Appeals enumerated is a valid standard.

In sum, although the method of rewriting-term gap-filling fits best with Justice Alito's majority opinion in *Stolt-Nielsen*, the opinion still does not survive scrutiny. The only way the opinion could be correct under this analysis is if the parties in *Stolt-Nielsen* agreed that their contract was silent on the issue of class arbitration, but then also disputed whether the arbitration panel had a right to decide that issue. Since both parties did not dispute the arbitration panel's authority over this issue, evidenced by having submitted this question to the arbitration panel, and since the panel did not violate any established ground for vacatur of an award under § 10, the Supreme Court should have deferred to the authority of the arbitration panel.

B. *Distinguishing* Oxford Health Plans

As mentioned at the beginning of this Note, *Oxford Health Plans* is a case in which the Supreme Court seems to backtrack on its opinion in *Stolt-Nielsen*.[146] The posture of *Oxford Health Plans* was very similar to that of *Stolt-Nielsen*, in that the Supreme Court reviewed whether or not an arbitrator who found the parties' contract provided for class arbitration had exceeded his authority under

[142] *Id.* at 670 (quoting the Court of Appeals for the "judicial gloss" language).

[143] *Id.*

[144] *Id.* at 672 n.3 ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates*, as an independent ground for review." (internal citation omitted)).

[145] *Id.* (internal quotation marks omitted) (quoting Brief for the Respondent at 25, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (No. 08-1198)).

[146] Oxford Health Plans, L.L.C., v. Sutter, 133 S. Ct. 2064, 2066 (2013) (holding the arbitrator's decision "survive[d] the limited judicial review § 10(a)(4) allows").

9 U.S.C. § 10(a)(4).[147] A unanimous Court held that the arbitrator had not exceeded his authority.[148] The Court distinguished the case from *Stolt-Nielsen* in the following way:

> In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. 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. *Stolt-Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.[149]

Such a distinction falls in line with rewriting-term gap-filling. Stated in the language of gap-filling analysis, the arbitration panel in *Stolt-Nielsen* had no authority (setting aside the problem of the parties submitting the class-arbitration question to the arbitration panel) to rewrite a term of the charter party in dispute. Further, in *Stolt-Nielsen*, the parties agreed that the charter party was silent as to class arbitration.[150] Accordingly, the arbitration panel had to apply the laws related to the case—the FAA, federal maritime law, and New York law—to be able to rewrite the arbitration provision so that it allowed for class arbitration. Since the arbitration panel cited no such authority in allowing class arbitration, it exceeded its powers under § 10(a)(4).[151] In *Oxford Health Plans*, by contrast, the parties did not stipulate that their contract was silent on the issue of class arbitration. Rather, using the original contract to effectuate the intent of the parties, the arbitrator determined that the contract in dispute allowed for class arbitration.[152]

VI. ARBITRATORS CONSTRUCTING CONTRACTS

The final method of gap-filling occurs when arbitrators construct contracts or add terms to contracts because the parties in their original contract intended

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[147] *Id.* at 2066.

[148] *Id.* at 2068 (affirming the decision of the Court of Appeals upholding the arbitrator's award).

[149] *Id.* at 2070 (emphasis added).

[150] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 668 (2010).

[151] *See supra* Section V.A.

[152] *Oxford Health Plans*, 133 S. Ct. at 2067 ("[O]n its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained." (quoting the arbitrator)).

an arbitrator have such authority should the need arise.[153] Unlike in essential-term gap-filling, in contract construction there is no question that a contract has been formed and anything that the arbitrator adds to the contract does not go to the question of whether the contract exists. Further, in contract construction, the arbitrator is adding terms rather than rewriting existing terms or supplying missing terms. Contract construction likewise differs from desirable-term gap-filling because contract construction occurs only where the parties originally intended for the arbitrator to fill gaps that may arise. It is worth noting that some scholars argue that an explicit power to adjust a contract is different from gap-filling.[154] However, this Note argues that contract construction is in fact a type of gap-filling by which the contract expressly confers authority for an arbitrator to fill a gap should one arise.

An example of contract-construction gap-filling can be seen in *Gas Natural Aprovisionamientos v. Atlantic LNG Co*.[155] Gas Natural and Atlantic LNG entered into a contract wherein Atlantic LNG would sell gas to Gas Natural, and Gas Natural could then transport the gas it bought to either Spain or New England.[156] The original contract also stipulated that the pricing formula for the gas was tied to the European energy market, but it included a "price reopener" provision "whereby either party may request a revision of the pricing formula if it establishes that certain preconditions have been met."[157] In the event that the parties could not agree on a revised price formula within six months, either party could submit the question of the price formula to arbitration.[158] As selling gas became more attractive in New England relative to Spain because of Spanish liberalization of the market for natural gas, Gas Natural sought to revise the contract's price formula.[159] The parties could not agree to a new formula and thereby submitted the dispute to an arbitration panel to determine a revised formula, resulting in a calculation that favored Gas Natural.[160] The matter ultimately landed in federal district court.[161]

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[153] William W. Park, *Gaps and Changed Circumstances in Energy Contracts: The Devil in the Detail*, 8 J. OF WORLD ENERGY L. & BUS. 89, 98 (2015) (For example, in the revision of gas prices, "[A]rbitrators often engage in price adjustment of energy contracts pursuant to explicit terms in the agreement.").

[154] *Id.* at 91 ("Although gap filling remains distinct from price adjustment, each exercise implicates the addition of some element beyond the mix of rights and duties explicit in the signed document.").

[155] 2008 U.S. Dist. LEXIS 69632, *1 (S.D.N.Y. Sept. 16, 2008); *see also* Park, *supra* note 153, at 92-93 (describing the contract at issue in *Gas Natural Aprovisionamientos*, which expressly permitted the parties to submit a price fixing dispute to an arbitrator if they failed to come to agreement within six months).

[156] *Gas Natural*, 2008 U.S. Dist. LEXIS 69632, at *2.

[157] *Id.* at *2-3.

[158] *Id.* at *4 (stating that the arbitrator's decision needed to be made "in accordance with the criteria set out" in the contract).

[159] *Id.*

[160] *Id.* *5-6.

Atlantic LNG argued that the arbitration panel exceeded its authority under § 10(a)(4) because changing the price formula to a two-part scheme constituted rewriting the contract.[162] The U.S. District Court for the Southern District of New York held:

> It is undisputed that the Tribunal was specifically charged with the duty to revise the pricing scheme once it determined that the contractual preconditions were met. The Tribunal having made that determination, Article 8.5(a) required it to reach "a fair and equitable revision" of the contract price. Neither this standard nor any other contractual provision set a structural limitation on permissible price revisions.[163]

Thus, an arbitration panel constructing part of a contract, drawing its authority from the original contract, does not exceed its authority under § 10(a)(4).[164]

Contract-construction gap-filling certainly does not apply to the facts of *Stolt-Nielsen*, since everyone—the parties, the arbitration panel, and a unanimous Court—agreed that the original charter party was silent as to class arbitration. It is difficult to suppose a contract-construction hypothetical using the facts of *Stolt-Nielsen* related to an arbitration provision, since that is not something that involves giving specific discretion, as opposed to the example above relating to a discrete price formula revision. Contract construction applies only if the parties are quite specific about the authority they give to the arbitrator. Thus, contract-construction gap-filling relates to specific grants of arbitral authority, and the facts of *Stolt-Nielsen* are best analyzed under desirable-term gap-filling, most in line with the dissent.

CONCLUSION

This Note has outlined four distinct methods of gap-filling: (1) gap-filling when the contract is lacking an essential term; (2) gap-filling of a non-essential (desirable) term; (3) rewriting the contract; and (4) contract construction. In the currently evolving field of international commercial arbitration, these categories can assist arbitrators, professors, and courts in determining when an arbitrator should fill in the gaps of a disputed contract and when a court should do so. In the past sixty years, arbitration has proven to be incredibly influential in the diversification and linking of global commercial markets.[165] Arbitration,

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[161] *Id.* at *6-7.

[162] *Id.* at *7 ("Atlantic contends . . . the Tribunal . . . acted in excess of its authority, acted against public policy, and violated Atlantic's due process rights.").

[163] *Id.* at *17.

[164] *Id.* ("[T]he Court does not review arbitration awards for legal or factual errors.").

[165] *See* Lucy V. Katz, *Arbitration as a Bridge to Global Markets in Transitional Economies: The Republic of Cuba*, 13 WILLAMETTE J. INT'L L. & DISPUTE RESOL. 109, 114 (2005) (discussing the growth in arbitration filings that "reflects the inherent needs of global business").

among various benefits, allows businesses of different nationalities to contract with each other and to choose their dispute-resolution rules and venue. Often, the rules and venues chosen by parties are American.

American law provides an image and expectation of predictability and reliability. By contrast, Arbitration law within the United States, is still a new area of law that does not have concrete jurisdictional principles and contours. Likewise, there is an ongoing global debate between nation-states and within nation-states about the principles of arbitral disputes.[166] Arbitration is on the frontier of legal scholarship, and as a global leader in financial markets, it would behoove the United States to clarify the import of international arbitral principles within the United States. Clarity leads to predictability, which leads to reliability, which in turn leads to market growth. Establishing and adopting delineated gap-filling methods in international commercial arbitral contracts will have a significantly positive (and necessary) impact on both legal theory and global financial markets.

[166] *See generally id.*