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Supreme Court Rules No Class Arbitration Absent Contractual Basis

In a landmark decision published earlier this week, the United States Supreme Court held that class-wide arbitration cannot be compelled on the basis of an arbitration agreement that is “silent” regarding class treatment. *See Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, No. 08-1198, 559 U.S. — (Apr. 27, 2010). The majority of the Court rejected the notion that consent to class arbitration can be inferred from the mere fact that the parties agreed to arbitration, finding instead that a party may not be compelled under the Federal Arbitration Act (FAA) to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The parties in *Stolt-Nielsen* stipulated that “when a contract is silent on an issue there’s been no agreement that has been reached on that issue.” Thus, the Court concluded that there was no contractual basis for concluding that the parties agreed to allow class arbitration. Justice Alito authored the Court’s opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg dissented, joined by Justices Stevens and Breyer. Justice Sotomayor did not participate.

The case arose when AnimalFeeds filed a class action lawsuit against four major shipping companies, including Stolt-Nielsen, alleging antitrust violations. Each of the parties had entered into a form maritime shipping contract that contained an arbitration agreement, under which the case was referred to an arbitration panel. That agreement did not state whether class arbitrations were permissible. The arbitration panel decided that the agreement permitted class arbitration, even though it did not mention class treatment. Stolt-Nielsen appealed to the District Court for the Southern District of New York, which vacated the panel’s decision. The Second Circuit then reversed the District Court, relying on *Green Tree*

Financial Corp. v. Bazzle, 539 U. S. 444 (2003), for the proposition that the arbitration panel acted within the scope of its authority in construing the agreement to permit class arbitration.

Prior to *Stolt-Nielsen*, the most influential case on consent to class arbitration was *Bazzle*. In *Bazzle*, the Supreme Court granted certiorari on the issue of whether the FAA permits the imposition of class arbitration when the parties’ agreement is silent on this point. Although the Court was unable to reach that question because of a threshold issue, many courts, arbitrators, and commentators relied upon statements in the *Bazzle* plurality opinions to support the position that class arbitration is permitted even if an arbitration agreement does not expressly address class treatment. (*See, e.g.*, Slip Op. at 15-16). In *Stolt-Nielsen*, a majority of the Court for the first time decided “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the [FAA].” (Slip. Op. at 1).

In answering that question, the Court found that the key consideration is “whether the parties *agreed to authorize* class arbitration” (Slip Op. at 23 (emphasis in original)). The Court noted that the arbitration panel had ordered class arbitration because the petitioners did not establish that the parties to the agreements intended to preclude class arbitration. However, the Court held that imposing class arbitration in such a situation is not consistent with the FAA’s letter or spirit, focusing on the requirement of consent to arbitration and on the FAA’s overarching purpose of ensuring that arbitration agreements are enforced according to their terms. (Slip Op. at 17-20). Accordingly the Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a con-

tractual basis for concluding that the party *agreed* to do so.” (Slip. Op. at 20 (emphasis in original)). Put otherwise, an “implicit agreement to authorize class action arbitration” was “not a term that [an] arbitrator may infer.” (Slip. Op. at 19). Applying that holding to the facts, namely the parties’ stipulation that there was “no agreement” on class arbitration, the Court found that there was no contractual basis for concluding that the parties agreed to allow class arbitration, and the parties could not be compelled to submit their dispute to class arbitration. (Slip. Op. at 23).

There are some important takeaways from the *Stolt-Nielsen* decision. First and foremost, the Court’s opinion stops short of requiring an arbitration agreement to explicitly provide for class arbitration. As Justice Ginsburg notes in her dissent, “the Court does not insist on express consent to class arbitration.” (Dissent Slip Op. at 12-13 (Ginsburg, J., dissenting)). Rather, *Stolt-Nielsen* requires some “contractual basis for concluding that the party agreed” to allow class arbitration. (Slip Op. at 20 (emphasis omitted)). Thus, even if an arbitration agreement does not expressly address class arbitration, it is possible that a party may argue that the agreement otherwise provides a basis for concluding that the parties agreed to allow class arbitration. This point is important to remember in drafting arbitration agreements, in drafting related documents which will be construed as part of the arbitration agreement, and in reviewing existing arbitration agreements to determine whether class arbitration may be permitted.

Second, it remains an open question whether the issue of class treatment must be decided by the arbitrator or may instead be decided by the trial court. In

Stolt-Nielsen, the Court noted that *Bazzle* does not require the class treatment issue to be submitted to the arbitrator. (Slip Op. at 15-16). Although the *Bazzle* plurality decided that the issue should be submitted to the arbitrator, that requirement was not made part of the Court’s judgment. (*Id.* at 16). The Court declined to revisit the question in *Stolt-Nielsen*, so the question of who decides the propriety of class treatment remains open. (*Id.*). Parties should be aware that this issue may be waived; the reason that the Court declined to revisit the question in *Stolt-Nielsen* is that the parties had expressly assigned the class treatment issue to the arbitration panel, and no party argued that the assignment was impermissible. (*Id.*).

Another open question – which impacts both class and *individual* arbitrations – is whether “manifest disregard” survives *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U. S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the grounds for vacatur enumerated in the FAA. (Slip Op. at 7 n.3). The district court vacated the arbitrators’ decision prior to *Hall Street*, characterizing the arbitrators’ failure to conduct a choice-of-law analysis as “manifest disregard” justifying vacatur. (*Id.* at 5). Arguments about manifest disregard were also made to the Court, which expressly declined to decide whether “manifest disregard” (or some iteration thereof) survived *Hall Street* to provide a basis for vacatur. (*Id.* at 7 n.3).

Finally, the Court provided guidance on important differences between class-action arbitration and individual arbitration that may be useful to litigants in other situations. In answering the main question presented, the Court relied in part on the concept that “class-action arbitration

changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” (Slip. Op. at 21). Specifically, the Court found that class arbitration differs from individual arbitration in the following material ways:

- In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration.
- An arbitrator chosen according to an agreed upon procedure, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties.
- Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties’ assumptions when they agreed to arbitrate.
- The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.
- The commercial stakes of class-action arbitration are comparable to those of class action litigation, even though the scope of judicial review is much more limited.

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(Slip. Op. at 21-23) (internal citations and record references omitted).

The answer provided by *Stolt-Nielsen* leads to the next question, which surely will be hotly debated by the lower courts: whether class arbitrations that were initiated prior to *Stolt-Nielsen*, but in which there was no contractual basis for compelling class arbitration, can now be challenged. We will continue to track that issue and look forward to further developments in this area.

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Thomas Cunningham is a partner in the firm's Business Litigation Group and the leader of the firm's Class Action Practice Group. He focuses his practice on the representation of banks and financial institutions in both state and federal courts. Mr. Cunningham frequently engages in consumer protection litigation and litigation involving fraud, fraudulent transfers, and bankruptcy litigation.

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