The Impact of Stolt-Nielsen on Drafting Arbitration Clauses

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The United States' Supreme Court opinion in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* has already been the focus of much discussion in both U.S. and international arbitration circles. One area of interest for arbitration practitioners is the impact which the decision may or should have on how drafters of arbitration clauses should address the issue of class action arbitrations.

Stolt-Nielsen involved an arbitration brought in New York by AnimalFeeds against Stolt-Nielsen, a commercial shipping company, after Stolt-Nielsen had been subject to a U.S. Department of Justice criminal investigation involving charges of illegal price-fixing. The arbitration was brought pursuant to a broad arbitration clause ("[a]ny dispute arising from the making, performance or termination . . . .") in a standardized shipping contract that did not mention class arbitration. AnimalFeeds demanded a class arbitration on behalf of itself and similarly situated shipping customers. The parties entered a supplemental agreement which, consistent with the AAA Supplementary Rules on Class Arbitration, submitted to the arbitrators the question whether the clause authorized class arbitration. During the course of the arbitration, the parties stipulated that the arbitration clause was "silent" on the question of class arbitration

The arbitral tribunal issued a partial award stating that the arbitration clause permitted class arbitrations, citing a consensus of arbitral awards interpreting "a wide variety of clauses in a wide variety of settings." Stolt-Nielsen challenged the

award in the federal courts. The Supreme Court found that the arbitrators had exceeded their authority by basing their decision on policy grounds rather than on the applicable law. The Supreme Court found that the FAA barred class arbitrations where the arbitration clause was "silent." Justice Alito's majority opinion based this holding on the premise that arbitration is a creature of consent, and that class arbitration cannot be forced on parties who have not consented to it.

As Justice Ginsburg's dissenting opinion points out, "the Court does not insist on express consent to class arbitration," and Justice Alito's majority opinion specifically noted that the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." This leaves little guidance to tribunals and courts interpreting arbitration clauses as to what contractual or factual basis can support a finding that the parties agreed to authorize class arbitration. While the *Stolt-Nielsen* opinion implies a restrictive interpretation of broad arbitration clauses on the issue of class arbitration, given the uncertainty noted by the dissent, and the singular fact that in *Stolt-Nielsen* the parties had stipulated that the arbitration clause was silent on the issue of class arbitration, the impact of *Stolt-Nielsen* on clause drafting in different contexts is uncertain.

The best option for drafters of arbitration clauses who want to provide for class arbitration is to make consent express in the clause, for example by including language such as "the parties agree that class action arbitration shall be available under this clause." Drafters intent on including class arbitration should also consult the AAA's Supplementary Rules for Class Arbitration, which provide a mechanism for the administration of class arbitration, and may wish to incorporate those Rules into their arbitration clause. It is to be noted, however, the AAA's Supplementary Rules for Class Arbitration are likely subject to amendment in the wake of the *Stolt-Nielsen* decision. Drafters who want to exclude class arbitration should do so expressly by stating in their clause that "there shall be no class action arbitration."

White & Case represented Stolt-Nielsen in the dispute. The writers of this post were not part of the team representing Stolt-Nielsen and this post is based exclusively on information available to the public.

By Paul Friedland and Michael Ottolenghi