Kluwer Arbitration Blog

Stolt-Nielsen: Postscript on Class Arbitration?

Christopher M. Curran (White & Case LLP) · Wednesday, May 26th, 2010 · White & Case

On April 27, 2010, the Supreme Court of the United States issued its decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, No. 08-1198, 559 U.S. ___ (2010). The Court reversed a Second Circuit ruling permitting arbitrators to impose class arbitration upon four shipping companies—including White & Case client Stolt-Nielsen S.A.—under those shipping companies' shipping contracts with their customers, holding that arbitrators exceed their authority under the Federal Arbitration Act (FAA) if the arbitrators impose class-action arbitration on parties whose arbitration agreement undisputedly is silent on the question of class arbitration.

The FAA expressly governed the parties' arbitration agreements, and the Supreme Court, reaffirming the foundational importance of consent under the FAA, held that "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue . . . . The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."

The parties had agreed before the arbitration panel that there was no agreement on whether the clause allowed or precluded class action arbitration leaving in the Court's estimation "no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." In this context, the Court expressly declined to decide what evidence of an agreement to arbitrate on a class basis is sufficient to support a ruling that class arbitration is available, noting that "[h]ere . . . the parties stipulated that there was 'no agreement' on the issue of class action arbitration."

Additionally, the Court described the fundamental differences between class arbitration and standard, bilateral arbitration, including, among other things: the addition of numerous claims from "hundreds or perhaps even thousands of parties"; loss of confidentiality; the far-reaching effect of an award; and significantly increased financial stakes. These differences caused the Court to conclude "that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."

Stolt-Nielsen also referenced two other recent Court decisions that potentially bore on its ruling, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) and *Hall Street Assocs. L.L.C. v. Mattel,*

Inc., 552 U.S. 576 (2008). The Court discussed at length its earlier decision in *Bazzle*, following which arbitrators in increasing frequency began to construe arbitration agreements to permit class arbitrations. The *Stolt-Nielsen* Court explained that in *Bazzle*, "no single rationale commanded a majority" and that the Court's plurality opinion in *Bazzle* had decided only that arbitrator should make the initial determination as to whether an arbitration agreement is silent as to class arbitration. Regarding *Hall Street*, however, the Court was less expansive, expressly declining to decide whether the "manifest disregard of law" standard in fact survived the *Hall Street* decision. Instead, the Court held that the arbitrators' focus on policy rather than the default rule that applies when an arbitration agreement is silent concerning class arbitration would have satisfied the manifest disregard standard.

Following *Stolt-Nielsen*, there is likely to be some significant wrangling between arbitrating parties over at least the following hot-button issues:

Is the agreement really silent? As the *Stolt-Nielsen* Court noted on several occasions, the parties agreed that their arbitration agreements were silent as to class arbitration. Parties seeking to pursue class arbitration likely will not stipulate that their agreements are silent anymore. Instead, both sides will highlight the "textual clues" that speak to whether a particular agreement authorizes class arbitration, as Justice Rehnquist emphasized in his dissenting opinion in *Bazzle*. But, *Stolt-Nielsen* may stand for the proposition that the "any disputes" language at issue in this case and found in many arbitration agreements, *without more*, is "silent" and therefore does not permit class arbitration.

What standard applies to vacatur of an arbitral award? Having expressly declined to determine the fate of the "manifest disregard of law standard," the standard that the district court applied to vacate the arbitral awards, parties (and lower courts) will continue to dispute the availability of "manifest disregard." Indeed, *Stolt-Nielsen* may have made it easier to overturn an unfavorable award. It appears that an arbitrator's reliance on policy over settled law, i.e., his manifest disregard of the law, is now a ground for vacatur. Perhaps the arbitrator has merely "exceeded his powers," as Section 10(b)(4) of the FAA provides, but this is sure to be a point of contention in the lower courts. Similarly, the Court's determination that a clause construction award is ripe for review—to the chagrin of the dissenters, who questioned the Court's reaching the merits "so early in the game"—gives parties renewed hope for immediate review of the *ultra vires* acts of arbitrators. Finally, the Court's clarification that *Bazzle* did not produce a majority opinion on any issue also raises the possibility for disputes over who—the court or the arbitrator—should decide whether a particular arbitration agreement authorizes class arbitration.

What is the effect on consumer arbitrations? *Stolt-Nielsen* involves sophisticated, multi-national parties on both sides and, as the majority opinion notes, an arbitration clause that the customer (AnimalFeeds) selected. But what of consumer disputes? *Stolt-Nielsen* itself does not distinguish between consumer and business-to-business arbitrations, but many believe that courts will be more receptive to invalidating arbitration agreements that waive or preclude class arbitration as unconscionable. For its part, the Court, in light of *Stolt-Nielsen*, recently vacated and remanded a Second Circuit decision that struck a class arbitration waiver provision as unconscionable. Like *Stolt-Nielsen*, however, the Second Circuit case, *In re American Express Merchants' Litigation*, 554 F.3d 300 (2009), involved businesses on both sides. The Supreme Court's recent resolution of the case—granting certiorari, and vacating and remanding the case in light of *Stolt-Nielsen*—could mean that invalidation of the entire arbitration clause as unconscionable, and not merely the class arbitration waiver provision, may be required to avoid bilateral arbitral resolution of a dispute, a

much tougher task sure to spawn significant litigation in the future. *See Am. Express Co., et al. v. Italian Colors*, 2010 WL 1740528 (U.S.).

Stay tuned.

By Christopher M. Curran and Charles C. Moore

This entry was posted on Wednesday, May 26th, 2010 at 3:02 pm and is filed under Arbitration Agreements, Arbitration Proceedings, Domestic Courts, Federal Arbitration Act (FAA), Manifest disregard of the law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.