SUPREME COURT HOLDS THAT PARTIES MAY NOT BE COMPELLED TO ARBITRATE ON A CLASS-WIDE BASIS ABSENT AN EXPRESS AGREEMENT TO DO SO

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In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 2010 WL 1655826 (Apr. 27, 2010), the Supreme Court clarified the impact of its decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which prompted the American Arbitration Association to develop class arbitration rules and spawned a wave of class arbitrations. Although *Bazzle* has been interpreted by many courts as permitting arbitrators to decide whether a particular matter could proceed as a class-wide arbitration, *Stolt-Nielsen* holds that *Bazzle*, which was a plurality decision, "did not establish the rule to be applied in deciding whether class arbitration is permitted."

In *Stolt-Nielsen*, the parties had stipulated that the arbitration agreement at issue was silent with respect to class arbitration, and the Court found that the courts below had effectively imposed their own view of the appropriate public policy upon the parties without seeking to identify and apply legal principles from potentially applicable law (which in this instance included the Federal Arbitration Act, maritime law and New York law). The Court found that the arbitration 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." The Court characterized the resulting decision as being "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." Finding that the arbitrators had exceeded their powers, the Supreme Court reversed and remanded for further proceedings, holding that the arbitral award should be vacated pursuant to section 10(b) of the FAA.

Addressing for the first time the circumstances in which class arbitration is permissible, the Supreme Court 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." [Emphasis in the original.] Because the parties had stipulated that the arbitration provision was silent, and they had reached "no agreement" on that issue, the Court concluded that "it follows that the parties cannot be compelled to submit their dispute to class arbitration."

The Supreme Court's decision is based upon what it termed "certain rules of fundamental importance," including: (1) arbitration is a matter of consent, not coercion; (2) private agreements to arbitrate are enforced according to their terms; and (3) arbitrators draw their powers from the parties' agreement and must give effect to the contractual rights and expectations of the parties. In particular, the Court explained that parties "may specify *with whom* they choose to arbitrate their disputes." [Emphasis in original.] The Court specifically

rejected the contention that arbitrators may presume from the mere silence of the parties that they consent to resolve disputes in class arbitration proceedings.

This decision is clear. Class arbitration may not occur unless all of the parties have expressly consented to the use of class arbitration to resolve disputes.

This opinion mentions, but does not even discuss, much less resolve, another interesting arbitration issue: whether manifest disregard of law as a basis for vacating an arbitral award survived the Supreme Court's decision of *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). A split of the Courts of Appeal has developed on that question. *Stolt-Nielsen* was commenced by the filing of a Petition to Vacate an arbitration award, and the district court granted the Petition on the basis that the arbitrators had acted in manifest disregard of law. The Court of Appeals reversed, finding that the arbitrators had not acted in manifest disregarded of law. The Supreme Court declined to decide the case on that basis, however, stating that "[w]e do not decide whether 'manifest disregard' survives our decision in *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 enumerated grounds for vacature set forth at 9 U.S.C. §10." The Court left that issue for another day, and to further development of that issue in the Courts of Appeal. Three days after the issuance of the Supreme Court's *Stolt-Nielsen* opinion, such further development occurred, with the Eleventh Circuit taking a side on that issue for the first time by holding in *Frazier v. Citifinancial Corp. LLC*, 2010 WL 1727446 (Apr. 30, 2010) that *Hall Street* "compels" the conclusion that judicially-created bases for vacature, including manifest disregard, are no longer valid.

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