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SPECIAL FEATURE

Class-action arbitration requires express consent

By William E. Hannum III

The U.S. Supreme Court recently ruled that the arbitration of class claims requires the express consent of the parties to the arbitration agreement. This decision has significant implications for employers, employees, and unions whose employment-related claims are covered by collective-bargaining agreements or other contracts providing for mandatory arbitration.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the court ruled that an arbitrator does not have the authority to require that a dispute be arbitrated on a class-action basis, unless the parties have affirmatively agreed that class-action disputes can be arbitrated.

The Supreme Court has thus resolved a split among federal and state appellate courts, some of which had held that an arbitrator could find that an agreement's silence on the possibility of class arbitration could constitute implicit consent to the resolution of a dispute on a class basis. As a result, parties to arbitration agreements that are silent on the issue of class arbitration should now be able to avoid arbitration of class claims.

It should be noted, however, that the court did not address how this analysis might be affected by evidence, such as course of performance, showing that the parties intended to arbitrate class claims, even where the contract is silent. Further, parties drafting (or negotiating) arbitration agreements should bear in mind that, in order to arbitrate a dispute on a class basis, express language should be included in the agreement.

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Factual background

The *Stolt-Nielsen* decision arose from a standard maritime contract. AnimalFeeds International Corporation, a supplier of raw ingredients to feed producers, filed a putative class-action lawsuit against Stolt-Nielsen, S.A. and other shipping companies, alleging unlawful price-fixing.

After some litigation, the parties agreed that these antitrust claims were subject to mandatory arbitration under the standard maritime contract.

Subsequently, AnimalFeeds served Stolt-Nielsen and the other shippers with a demand for arbitration on a class basis, purporting to represent a class of all parties for which the shippers had transported certain products over a specified period of time. The parties selected an arbitration panel and then, significantly, the parties stipulated to the panel that their contract was silent as to whether arbitration on a class basis was authorized.

The panel ultimately determined that the contract allowed for class arbitration, noting that it did not expressly exclude class-action proceedings. In so doing, the panel noted that, in a number of other cases arising in comparable settings, arbitrators had recently interpreted arbitration clauses as permitting such class-based proceedings. The arbitrators then stayed the proceeding to permit the parties to seek judicial review.

After a federal district court in New York vacated the arbitrators' award, the 2nd Circuit subsequently reversed this decision. Thereafter, the Supreme Court granted certiorari to resolve the issue.

Supreme Court's decision

In a 5-3 ruling, with Justice Sotomayor not participating, the Supreme Court reversed the 2nd Circuit's decision and held that the arbitration panel had exceeded its authority in deciding that the proceeding could be conducted on a class basis.

Writing for the majority, Justice Alito emphasized that arbitration is purely a product of contract and that arbitrators and courts therefore should strive, to the greatest extent possible, to give effect to the parties' actual intent.

Thus, in the absence of any evidence that the parties to an arbitration agreement affirmatively intended to permit arbitration on a class basis, an arbitrator is not permitted to impose such a procedure upon an unwilling respondent and a federal court may vacate an arbitration award that purports to do so.

In the court's decision, Justice Alito

conceded that it is sometimes appropriate to presume that, by entering into an arbitration agreement, the parties are implicitly authorizing the arbitrator to determine procedural matters necessary to give effect to their agreement.

For example, in the absence of any explicit agreement to the contrary between the parties, it is generally an arbitrator's prerogative to decide certain procedural issues (e.g., the order in which testimony will be presented, whether telephonic or affidavit testimony will be admitted, and similar procedural matters).

Justice Alito, however, went on to note 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."

In particular, an arbitrator hearing a class-action proceeding is no longer resolving one dispute between parties to a single agreement, but instead is simultaneously adjudicating the rights of many different parties, not all of whom may have any direct involvement in the actual arbitration proceeding.

Further, Justice Alito expressed concern that "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."

Writing for the three dissenting justices, Justice Ginsburg contended that the issue of whether an agreement authorizes class arbitration should be viewed as a procedural question for an arbitrator to resolve, and that the *Stolt-Nielsen* arbitration panel's decision that class arbitration was permissible thus should not be disturbed.

In addition, Justice Ginsburg indicated that the matter was not yet ripe for judicial review, because the arbitration panel had concluded only as a general matter that the parties' contract permitted class arbitration and had not yet decided which of the actual clams at issue (if any) were suitable for class resolution, which parties should be included in a class arbitration and whether those parties should be required to "opt in" to the proceeding.

Practical implications

As a result of *Stolt-Nielsen*, practitioners and parties to arbitration agreements should keep in mind a number of practical considerations.

If a party receives a demand for arbitration on a class basis, and the arbitration agreement makes no mention of a possible class proceeding, the party should consider asking the arbitrator – early on (e.g., in a pre-hearing motion) – to strike the class-action claims. By doing so, the party can ensure that the arbitrator is aware of the *Stolt-Nielsen* holding and minimize the risk of erroneously proceeding on a class basis.

Along the same lines, if appropriate, a party might file a court action to vacate any class arbitration award rendered against it in the absence of contractual language authorizing the arbitration of class claims.

A party drafting or negotiating an arbitration agreement, if it wants to preserve the possibility of class arbitration, should have explicit language authorizing such a procedure included in the agreement.

It should be noted, however, that the *Stolt-Nielsen* decision did not clearly resolve at least two related issues: (1) whether the class arbitration question should be resolved by an arbitrator or by a court; and (2) what types of contractual language or other evidence may be sufficient to support a finding that the parties agreed to arbitrate class claims. For example, because the parties in *Stolt-Nielsen* stipulated that their contract was silent as to whether arbitration on a class basis was authorized, the court did not address how this analysis might be affected by other evidence that the parties intended to arbitrate class claims.

Thus, while we await clarification through further court decisions, parties may want to consider expressly addressing the issue of class claims in every arbitration agreement, even where the desired outcome is that class claims are not subject to arbitration.

As the court wrote, "the purpose of the exercise [is] to give effect to the intent of the parties." So, out of an abundance of caution, parties should make their intent clear. NEIH