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On April 27, 2010, the U.S. Supreme Court handed down its long-awaited ruling in *Stolt-Nielsen S. A. v. Animalfeeds International Corp.* The Court held that an arbitration agreement that is completely silent on class arbitrations may not be construed to permit them.

Supreme Court Rules Class Action Arbitrations Impermissible Absent Express Agreement

By Henry D. Lederman

The U.S. Supreme Court recently handed down its long-awaited ruling in *Stolt-Nielsen S. A. v. Animalfeeds International Corp*., No. 08-1198 (Apr. 27, 2010). The issue before the Court was, can an arbitration agreement that is silent on the issue be construed to permit a case to proceed in arbitration as a class action?

In what could be a decision having far-reaching impact, the Court held that a class arbitration may be ordered only if "there is a contractual basis for concluding that the part[ies] *agreed*. . . to submit to class arbitration." The case arose in connection with a dispute between a shipping company and a customer regarding whether an agreement that was *completely silent* on the question of class arbitrations could be construed to permit them. The Supreme Court held that silence was not enough. It held instead that the agreement must affirmatively permit class actions in order for an arbitrator to preside over the case as a class action, as opposed to an individual dispute between the two parties to the agreement.

Implicit and explicit in the Court's ruling were two foundational premises of the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq*.), that arbitration agreements are to be enforced as they are written and that parties cannot be compelled to arbitrate disputes that they have not agreed to submit to arbitration.

The Court based its ruling on a number of premises:

- Arbitrations normally are between two parties and therefore it cannot be presumed that the parties consented to a class arbitration simply by agreeing to arbitrate.
- In "bilateral arbitration" (arbitration between only two parties) the parties forgo procedural rigor and appellate review to realize the benefits of lower costs, greater efficiency, speed and the ability to choose experts to resolve their dispute.
- In class arbitration, the arbitrator no longer resolves a single dispute between the parties to a single agreement, but resolves many disputes between hundreds or even thousands of individuals.

- The commercial consequences of a class arbitration (potentially involving enormous sums of money) are substantial even though the scope of judicial review of an arbitrator's award is limited.
- Because of the significant differences between bilateral (between two parties only) and class arbitrations, arbitrators may not presume the power to preside over a class arbitration unless the parties agreed to do so.

The decision in *Stolt-Nielsen* prohibits class arbitrations unless there is contractual language permitting the class claims to go forward with a class action in the arbitral forum. Thus, the focus is on the language of the arbitration agreement and enforcement of the parties expectations as expressed in that language. The Supreme Court ruling, therefore, may have significant national impact. More specifically, in cases involving arbitration agreements with express class action waivers (that is, arbitration agreements that expressly forbid class actions), it would appear that the decision in *Stolt-Nielsen* mandates that the agreements be enforced as written. Under principles of federal supremacy, it is expected that employers will argue based on this case that the Federal Arbitration Act preempts any state rules that would permit class arbitrations notwithstanding contractual language forbidding them or agreement's silence on the issue. This issue likely will be addressed in the near future as motions are filed in pending class actions.

The decision does not directly address collective actions such as those commonly filed under the Fair Labor Standards Act. In class actions, parties must opt out of the class of which they are members or else they will be bound by the outcome of the case. In collective actions, parties must opt into a class affirmatively in order to join the case. It would appear, however, that *Stolt-Nielsen's* language and holding arguably can be applied to collective actions because unless the parties agreed specifically to allow essentially "strangers" to the case to affirmatively join it, such individuals should not be permitted to do so. How the courts will decide this issue, of course, remains to be seen.

It also is anticipated that the opinion may be used to invalidate state court decisions holding that express class waivers are unenforceable or "unconscionable." If, as *Stolt-Nielsen* may be read, class actions in any event are forbidden in arbitration unless the parties affirmatively agreed to allow them, then an express class waiver does not, in that sense, assist the inquiry. Even absent an express class waiver, and where agreements are merely "silent" on the class arbitration issue, the Supreme Court's opinion forbids arbitration of class claims. If *Stolt-Nielsen* means that an arbitration agreement that does not expressly permit class arbitration may not be used to secure one, then an express class waiver is doing no more that confirming the absence of the class remedy under the parties' agreement to arbitrate.

Notwithstanding *Stolt-Nielsen*, if employers want agreements to prohibit class arbitration, they should not rely on what they perceive as the agreement's "silence" to carry them through. A court or arbitrator may conclude that an agreement is not "silent" but, instead, "ambiguous" on the issue, meaning the agreement is capable of being read to permit class arbitrations or not to permit them. It would then be up to the decision maker to decide what the contract means. If employers want to preclude class arbitrations, they should say so clearly in their agreements to arbitrate. On the other hand, if employers want agreements to permit class arbitrations, they likewise are well-advised to say so in clear language in the agreement to arbitrate. Bottom line: whichever way an employer wants to go on the issue, the employer should draft its agreements to clearly state its intentions.

Substantial litigation is expected to grow out of the *Stolt-Nielsen* case, and employers should review their arbitration agreements with their counsel to determine whether any modifications need to be made.

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