

THE END OF CONSUMER CLASS ACTION ARBITRATIONS

PERSPECTIVE

By Richard L. Kellner and Alfredo Torrijos

In the last 10 years, corporations were mildly successful in shifting a number of consumer class actions to arbitration forums. In fact, the American Arbitration Association claims to have adjudicated nearly 300 arbitrations during the past six years. This trend will, inevitably, come to an end in the wake of the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.*, 2010 DAR 6107. In that case, the Supreme Court ruled that the Federal Arbitration Act prohibits arbitrators from imposing class arbitration on parties who have not agreed to authorize class arbitration.

The issue presented in *Stolt-Nielsen* was whether an arbitrator has the authority to determine if a class arbitration can proceed even if an arbitration agreement does not expressly contain an acknowledgment that the adjudication can be by class arbitration. The arbitration provision in that case involved a shipping agreement between AnimalFeeds, an industrial feed manufacturer, and Stolt-Nielsen, a commercial shipper. The arbitration provision was straightforward, providing simply that "any dispute arising from the making, performance or termination" of the agreement shall be submitted to arbitration conducted "in conformity with the provisions and procedures" of the Federal Arbitration Act.

Upon the conclusion of a criminal investigation against Stolt-Nielsen for illegal price-fixing, AnimalFeeds served Stolt-Nielsen with a demand for the arbitration of its own antitrust claims and for those of putative class members. Stolt-Nielsen objected arguing that it had never agreed to the arbitration of class claims.

Because the arbitration clause did not mention class arbitration, the parties ultimately stipulated that the shipping agreement was silent on the issue and asked a panel of arbitrators to rule on whether class arbitration was available. The panel held that it was an option because Stolt-Nielsen had not established that the parties "intended to preclude class arbitration." A federal district court vacated the award, and the 2nd Circuit reversed, holding that the arbitrators' determination was not contrary to law because Stolt-Nielsen had cited no applicable law against class arbitration.

In reversing the 2nd Circuit's decision, the Supreme Court acknowledged that any challenge to the arbitration panel's decision to impose class arbitration had to overcome a "high hurdle." Under the Federal Arbitration Act, challenging the panel's decision not only required a showing that the panel's decision was erroneous, but also required a showing that the panel had "exceeded its powers." The majority found that this hurdle was met in this case because the panel's ruling did not rest on either New York or maritime contract law - the two bodies of law that could have applied to this dispute - but instead rested on the panel's policy conclusion regarding the merits of class arbitrations. Accordingly, the court held that the arbitrators exceeded their powers by ordering class arbitration.

Justice Samuel A. Alito Jr., writing for the majority, held that because the parties had stipulated that the arbitration clause was silent as to the class mechanism, there was no need to ascertain party intent given the parties' "complete agreement" that they did not desire it. The majority began its analysis with the fundamental principle that arbitral power is based on "the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." Consistent with this basic rule, the court held that imposing class arbitration where the parties stipulated they "had reached 'no agreement' on that issue" was "fundamentally at war with the foundational Federal Arbitration Act principle that arbitration is a matter of consent." Therefore, "a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Because, no such agreement existed between the parties in *Stolt-Nielsen*, the majority concluded that the arbitration panel incorrectly interpreted the parties' silence as allowing class arbitration, rather than precluding it.

The effect of the court's decision on the arbitration of class claims is unmistakable: there will be less - significantly less - class arbitrations. However, the potential ramifications of *Stolt-Nielsen*, however, will not end with the curtailment of class action arbitrations. In all likelihood, the court's decision will ensure that consumer claims that would normally be heard in an arbitration forum, will ultimately be adjudicated as class actions in state and federal courts.

Corporate defendants will inevitably argue that *Stolt-Nielsen* will require the arbitration of individual claims, while precluding the class arbitration of those claims. In other words, corporate defendants will argue that *Stolt-Nielsen* effectively serves as a class arbitration waiver. However, this extension of *Stolt-Nielsen* is highly unlikely. In the federal courts, there is a large body of law that has rejected class arbitration waivers in adhesion contracts, on the ground that they are unconscionable as a matter of state contract law or federal statutory rights. See, e.g., *Shroyer v. New Cingular Wireless Servs. Inc.*, 498 F.3d 976, 978 (9th Cir. 2007), which after finding the waiver unconscionable, the court ruled that the entire arbitration clause was therefore void, and held that arbitration could not be compelled. Also see, *In re Am. Express Merchants Litig.*, 554 F.3d 300, 304 (2d Cir. 2009). The reason such waivers are unconscionable is that for a consumer with a claim against a corporation of \$10,000 or less, the costs of bringing an action are entirely unfeasible. Quite clearly, the smaller the claim, the less incentive a consumer would have to bring an action on his or her own. Indeed, that is the very reason why courts generally support the class action process to effectively and efficiently adjudicate consumer claims.

To avoid the unconscionability argument in the past, corporate defendants have argued that arbitrations provide a viable forum. Now, with that door effectively closed by the *Stolt-Nielsen* eradication of class action arbitrations, the only viable forum in which small consumer cases can be held will be in state and federal courts.

California similarly will not enforce class action arbitration in consumer adhesion contracts. In *Gentry v. Superior Court*, 42 Cal.4th 443 (2009), the California Supreme Court held that any arbitration agreement that precludes class certification is an unenforceable "exculpatory clause." Importantly, *Gentry* explained that its decision creates no conflict with the Federal Arbitration Act because it applies generally to all class-waiver "exculpatory clauses" regardless of whether they happen to appear in arbitration agreements.

There is no question that Stolt-Nielsen has effectively shut the door on consumer class actions before arbitration associations. However, it appears just as likely that Stolt-Nielsen will effectively open the door wider to consumer class actions in federal and state courts.

Richard L. Kellner is a partner at Kabateck Brown Kellner, heading the firm's class action and mass tort practice. Alfredo Torrijos is a senior associate at Kabateck Brown Kellner.