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Dispensing Injustice: Stolt-Nielsen and Its Implications - Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.

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NOTES

Dispensing Injustice: Stolt-Nielsen and Its Implications

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.

I. INTRODUCTION

Although it failed to garner the publicity that a decision of its magnitude deserves, the Court's holding in *Stolt-Nielsen* has profound implications for nearly every potential reader of this case note. More than merely upsetting professional arbitrators, the decision threatens to disturb much of the legal profession, and its consequences could harm the interests of all consumers who enter into contractual relationships with corporations subject to jurisdiction in the United States. The Court managed all of this through its application of the standard of review articulated in the decision, which authorizes a judge to vacate an arbitral award if she thinks that an arbitral panel has "dispensed its own brand of industrial justice."[1] This expansive standard permits unwarranted judicial encroachment over the legitimate province of arbitral panels. Undermining the legitimacy and authority of arbitral panels to such an extent potentially imperils the future of arbitration as a viable forum for resolving disputes. Diminishing the legitimacy of arbitration in this way will likely significantly increase the caseload of congested trial courts, as well as increase costs associated with settling disputes.

The immediate effect of the holding was to allow a group of corporate defendants to use their superior bargaining position in the contracting process to effectively shield themselves from liability.[2] Although *Stolt-Nielsen* involved business entities, the case also has implications in the consumer context. If the Court were to extend the reasoning of the case to disputes involving adhesion contracts, corporations would enjoy this immunity in the context of consumer disputes. Far from a hypothetical exercise in the reaches of Supreme Court jurisprudence, the Court is expected to decide this very issue during the 2010 term.[3] In light of these concerns, Congress should enact the Arbitration Fairness Act in order to prevent further injustice.

II. FACTS AND HOLDING

Defendant Stolt-Nielsen is an ocean carrier that charters compartments aboard shipping vessels to companies such as Plaintiff AnimalFeeds for the purpose of

1. 130 S. Ct. 1758, 1762 (2010).
2. *Id.* at 1783 (Ginsburg, J., dissenting).
3. *See generally* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 45 (U.S. 2010) (the Court is scheduled to rule on whether provisions of the FAA preempt state law protections that prohibit corporations from contracting out of class action arbitration in consumer contracts).

transporting products around the world.[4] Plaintiff AnimalFeeds brought a claim against Defendant Stolt-Nielsen and other companies alleging price fixing.[5] The Department of Justice conclusively proved that the defendants engaged in price fixing.[6] AnimalFeeds suit was consolidated with actions brought by similar chartering companies also alleging price fixing.[7]

As a result of a Second Circuit ruling that the dispute between Defendant Stolt-Nielsen and one of the plaintiff companies was subject to arbitration, the parties to the proposed antitrust class action all agreed to settle the dispute in arbitration.[8] The parties further decided to submit to an arbitration panel the question of whether the contracts the parties signed allowed for class arbitration.[9] In presenting this question to the arbitration panel, the parties stipulated that the arbitration clauses were silent on the issue of whether the relevant contracts permitted class arbitration.[10] The arbitration panel settled this issue by holding that the respective contracts allowed for class arbitration.[11]

However, the district court subsequently vacated the judgment of the panel, holding that the arbitral panel had ruled in "manifest disregard of the law."[12] The court based its holding on the panel's failure to consider relevant law in issuing the award.[13] New York state and federal maritime law, which provided the relevant legal context, required judicial bodies to interpret contracts in light of custom and usage, neither of which ever recognized the validity of class action arbitration.[14]

The Second Circuit reversed the district court, reasoning that the panel had not manifestly disregarded the law because the defendants had not cited any example of an authority applying maritime law to prohibit class action arbitration.[15] The U.S. Supreme Court granted certiorari to determine whether an arbitral panel violates provisions of the Federal Arbitration Act (FAA) when it permits class action arbitration in the context of a dispute governed by an arbitration clause that is silent on the issue.[16]

The Court reversed the ruling of the Second Circuit, holding that "imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA."[17] In reaching this conclusion, the Court asserted that

4. 130 S. Ct. at 1764.
5. *Id.* at 1764-65.
6. *Id.* at 1765 (mentioning anti-competitive business practices is relevant because such coercive tactics undermine the Supreme Court and the FAA's overriding concern with mutual consent while negotiating an arbitration agreement. Establishing that the defendants engaged in price fixing is an example of collusive market manipulation during the negotiation process in question, which arguably challenges the Court's insistence that the failure to include a class action stipulation in the contract clearly indicates that the parties involved assented to only bilateral arbitration).
7. *Id.*
8. *Id.*
9. *Id.* at 1765.
10. *Stolt-Nielsen*, 130 S. Ct. at 1760.
11. *Id.*
12. *Id.*
13. *Id.* at 1766.
14. *Id.*
15. *Id.* at 1766-67.
16. *Stolt-Nielsen*, 130 S. Ct. at 1764.
17. *Id.* at 1765.

the panel had "dispensed its own brand of industrial justice" by basing its decision on the public policy arguments advanced by AnimalFeeds.[18]

III. LEGAL HISTORY

A. Standard of Review

In 1925, Congress enacted the Federal Arbitration Act (FAA) in an attempt to further the three primary goals of arbitration: namely, efficiency, cost-effectiveness, and finality.[19] Regarding the goal of finality, the act specified only four circumstances in which a district court could vacate an award.[20] These four situations, which are outlined in Section 10 of the FAA, are as follows:

> (1) where the award was cured by option, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that mutual, final, and definite award upon the subject matter submitted was not made.[21]

In 1953, the Supreme Court provided for additional grounds by which a judge could vacate an arbitral award. In *Wilko v. Swan*, the Court established that judges have the authority to overturn an arbitral decision made in "manifest disregard of the law."[22] Following this decision, nearly every U.S. federal circuit adopted some form of this seemingly judicially created standard for reviewing arbitral awards.[23] Although the precise wording of the doctrine varies among

18. *Id.* at 1775.

19. Linden Fry, *Letting the Fox Guard the Henhouse: Why the Fifth Circuit's Ruling in Positive Software Solutions Sacrifices Procedural Fairness for Speed and Convenience*, 58 CATH. U. L. REV. 599, 601 (2009).

20. Federal Arbitration Act (FAA), 9 U.S.C. § 10 (1925) (current version of FAA at 9 U.S.C. §§ 1-16 (2006)).

21. *Id.*

22. 346 U.S. 427 (1953).

23. Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008); Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007); Three S Del. Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007); McCarthy v. Citigroup Global Mkts., Inc., 463 F.3d 87, 91 (1st Cir. 2006); Dominion Video Satellite, Inc. v. Echostar Satellite LLC, 430 F.3d 1269, 1275 (10th Cir. 2005); Manion v. Nagin, 392 F.3d 294, 298 (8th Cir. 2004); Dluhos v. Strasberg, 321 F.3d 365, 370 (3rd Cir. 2003); Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2nd Cir. 2003); Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995).

jurisdictions, the basic test involves a determination of whether an arbitrator was aware of the governing law but decided not to apply it.[24]

Throughout the second half of the 20th century, courts continued to build upon the foundation created by *Wilko*. This evolution included the development of standards granting considerable discretion to contracting parties to establish the grounds upon which a court could vacate an arbitral award.[25] In *Hall Street Associates, LLC. v. Mattel, Inc.*, however, the U.S. Supreme Court seemed to halt this expansion of the grounds for such review.[26]

In *Hall Street*, the Court held that parties are not permitted to expand the standard for vacating an arbitral award through express contractual provisions.[27] In doing so, the Court rejected Hall Street's argument that *Wilko* had provided for considerable expansion of these grounds beyond the confines of Section 10 of the FAA.[28] Specifically, the Court reasoned that the dicta of *Wilko* introducing the manifest disregard of the law standard might have "merely referred to [Section 10] grounds collectively rather than adding to them."[29] Under this interpretation, manifest disregard of the law is nothing more than shorthand for Section 10(a)(4).[30] Regardless of whether manifest disregard simply restates Section 10, *Hall Street* appeared to curtail the expansion of the standard for vacating arbitral awards.[31]

The rejection of Hall Street's argument created considerable confusion as to whether manifest disregard of the law continued to provide a legitimate basis for vacating arbitral awards.[32] As a result of this ambiguity, lower courts developed their own interpretations of *Hall Street's* implications for the manifest disregard of the law standard.[33] In *Citigroup Global Markets, Inc. v. Bacon*, the Fifth Circuit held that *Hall Street* had invalidated manifest disregard of the law as an independent basis for review.[34] Rather, a narrow reading of Section 10 of the FAA provided the only grounds on which a court could vacate an award.[35] The Ninth Circuit, however, held that manifest disregard, as shorthand for Section 10(a)(4) of the FAA, remained a viable standard for vacating arbitral awards.[36] Similarly, the Second Circuit in *Stolt-Nielsen* ruled that the manifest disregard of the law survived *Hall Street*, though it recognized the debate over whether the standard merely restates Section 10 or is a judicially created independent ground.[37]

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24. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 235 (2007) (citing Cytcy Corp. v. Deka Prods. Ltd., 439 F.3d 27, 35 (1st Cir. 2006)).

25. Maureen A. Weston, *The Other Avenues of* Hall Street *and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010).

26. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 581 (2008).

27. *Id.* at 592-93.

28. *Id.* at 584-85.

29. *Id* at 585.

30. *Id.*

31. Weston, *supra* note 25, at 936.

32. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2nd Cir. 2008) *vacating*, Stolt-Nielsen S.A. v.AnimalFeeds Int'l Corp 130 S. Ct. 1758 (2010).

33. *See, e.g.*, Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009).

34. *Id.* at 358.

35. *Id.*

36. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009).

37. *Stolt-Nielsen*, 548 F.3d at 94 *vacated*, *Stolt-Nielsen*, 130 S. Ct. 1758.

B. Class Certification Absent Express Provision

The Court found certain guidelines established by the FAA dispositive to the issue in *Stolt-Nielsen*.[38] One such controlling provision requires obtaining the consent of the parties involved in the dispute to be bound by the arbitral proceedings.[39] A court is to glean this mutual assent from established industry norms, relevant legal precedent, and from the language of the controlling contract.[40]

New York state law and the industrial norms of maritime law provided the relevant context in *Stolt-Nielsen*.[41] Counsel for Stolt-Nielsen submitted evidence during the arbitral hearing that relevant maritime customs at the time the parties contracted did not recognize the practice of arbitrating claims on a class basis. In support of this, an expert witness testifying on behalf of Stolt-Nielsen asserted that he had "never encountered an arbitration clause in a charter party that could be construed as allowing class action arbitration" over the course of his 30-year career in the maritime industry.[42]

Regarding case law that provides relevant context for class action arbitration issues, *Green Tree Financial Corp. v. Bazzle*[43] was the first case to reach the U.S. Supreme Court involving the appropriateness of class-action arbitration when the relevant contract is silent on the matter.[44] Prior to *Bazzle,* it appears that most states prohibited class certification in arbitration when the contract was silent on the matter.[45] The Court in *Bazzle* remanded a decision of the South Carolina Supreme Court back to an arbitral panel in order to decide whether the contract in question explicitly prohibited class certification or whether the contract was silent on the issue.[46] If the contract were silent on the matter, the ruling allowing class certification would prevail.[47] Following *Bazzle,* a consensus emerged favoring class action arbitration.[48] As a result of *Bazzle,* one could infer, as did counsel for AnimalFeeds, that the Court might approve of allowing class-action arbitration when the contract is silent on the matter.[49]

The Court's apparent willingness to allow for class certification in the context of arbitration seemingly caused some confusion.[50] However, as the Court clarified in *Stolt-Nielsen, Bazzle* does not stand for the proposition that arbitral panels are free to interpret contracts that are silent on the issue of class-action arbitration as

38. *Stolt-Nielsen*, 130 S. Ct. at 1773.
39. *Id.* at 1773-74.
40. *Id.* at 1769 n.6.
41. *Id.* at 1768.
42. *Id.* at 1769 n.6.
43. 539 U.S. 444 (2003).
44. Meredith W. Nissen, *Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept*, 11 DISP. RESOL. MAG. 19, 19 (2005).
45. *See, e.g.*, Glencore, Ltd. v. Schnitzer Steel Prods., 189 F.3d 264, 265 (2d Cir. 1999); Champ v. Siegel Trading Co., 55 F.3d 269, 271 (7th Cir. 1995); U.K. v. Boeing Co., 998 F.2d 68, 69 (2d Cir. 1993); *see also* William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 335, 348 (citing an arbitration case in which "the silent clause under consideration did not permit a class action arbitration").§
46. *Green Tree Fin. Corp.*, 539 U.S. at 447.
47. *Id.*
48. *Stolt-Nielsen*, 130 S. Ct. at 1767.
49. *Id.* at 1765-66.
50. *Id.* at 1772.

allowing for such a proceeding.[51] Rather, the majority in *Bazzle* did not garner enough support to establish this precedent.[52] Although he concurred with the majority's ruling in the particular case, Justice Stevens, the swing vote in the decision, refrained from deciding the issue of who should determine whether to certify a class when the controlling contract is silent on the issue.[53] As *Bazzle* did not establish any precedent on this matter, the Court held that the FAA's emphasis on mutual consent as evidenced by the industrial norm not recognizing class action arbitration provided the relevant context.[54] In doing so, the Court emphasized that "the basic precept of arbitration is a matter of consent, not coercion."[55]

IV. INSTANT DECISION

In reviewing the award, the Court chose to avoid the issue of whether the "manifest disregard of the law" standard of review is statutorily derived or whether it is a judicial construction.[56] Rather, it just assumed "arguendo that such a standard applies."[57] Building off this assumption, the Court borrowed from labor case law in holding that a judge may vacate an award "when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice."[58] This holding marked the first time a court had used such language in the context of a dispute governed by the FAA.[59]

The Court ruled that the arbitral panel "dispense[d] [its] own brand of industrial justice" by deciding the dispute in accordance with policy considerations rather than relying on established law.[60] In making this assertion, the Court argued that the panel based its decision on only one of three arguments advanced by AnimalFeeds, namely that "the clause should be construed to permit class arbitration as a matter of public policy."[61] Furthermore, the majority wrote that the panel justified its policy-based reasoning by referencing post-*Bazzle* norms favoring class arbitration, which the parties could not have contemplated since they contracted prior to the *Bazzle* decision.[62] Additionally, the majority asserted that the panel completely ignored relevant maritime law, which provided necessary context for the dispute.[63] As such, the Court held that the panel exceeded its power by ruling according to policy-based considerations in manifest disregard of existing law, thus dispensing its own brand of industrial justice.[64]

In rendering its decision, the Court criticized the allegedly policy-based reasoning of the Second Circuit that agreeing to arbitrate implies consent to engage

51. *Id.* at 1766.
52. *Id.* at 1769.
53. *Id.* at 1772.
54. *Stolt-Nielsen*, 120 S. Ct. at 1775.
55. *Id.* at 1773 (internal quotations omitted).
56. *Id.* at 1766.
57. *Id.* at 1768 n.3.
58. *Id.* at 1767 (internal quotation marks and brackets omitted).
59. Philip J. Loree, Jr., Stolt-Nielsen *Delivers a New FAA Rule—and then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LITIG. 121, 125 (2010).
60. *Stolt-Nielsen*, 130 S. Ct. 1767-70.
61. *Id.* at 1768 (internal emphases omitted).
62. *Stolt-Nielsen*, 130 S. Ct. at 1772 n.8.
63. *Id.* at 1768.
64. *Id.* at 1767.

in class-action arbitration.[65] Although legitimate public policy arguments in favor of imposing class certification may exist in certain circumstances, the Court found that the FAA's emphasis on mutual consent overrides any such concerns.[66]

After invalidating the arbitral panel's award and reversing the Second Circuit holding that the panel had dispensed it own brand of justice, the Court considered it unnecessary to remand the case to the arbitrators because there was only one correct holding; imposing class arbitration was unwarranted because the contract was silent on the issue.[67]

V. COMMENT

The Court in *Stolt-Nielsen* held that an arbitral panel is prohibited from granting class certification when the governing contract is silent on the issue, even when the parties have provided the panel with the authority to decide the matter.[68] It also provided firm ground for upholding the "manifest disregard of the law" standard in articulating an expansive standard of review previously only used in labor law disputes.[69] In invoking an overly broad standard of review never before used in the context of a dispute governed by the FAA, the Court's decision undermines the legitimacy and finality of arbitration proceedings. Furthermore, the Court's decision to restrict the authority of arbitral panels to decide mere procedural issues may make it more burdensome for aggrieved parties to bring claims resulting from a transaction governed by a contract containing an arbitration clause that omits reference to class arbitration.[70] Although *Stolt-Nielsen* involved commercial entities, the courts might extend some of the decision's reasoning to consumer disputes, which would severely disadvantage plaintiffs.[71] Such concerns call for Congressional legislation to prevent further injustice.

A. The Decision Diminishes Arbitral Authority and Legitimacy

The Ginsburg dissent in *Stolt-Nielsen* provides a persuasive critique of the majority opinion and a good starting point for analyzing the defects and consequences of the holding. After asserting that the award was not yet ripe for judicial review, Ginsburg argued that even if it were ripe, the Court should have held that the "parties' supplemental agreement referring the class-arbitration issue to an arbitration panel undoubtedly empowered the arbitrators to render their . . . decision."[72] As the law clearly establishes that an arbitral panel has the power to decide procedural issues the parties involved in the dispute have explicitly allocated it authority to resolve, the Court should have simply deferred to the arbitral pan-

65. *Id.* at 1777.
66. *Id.* at 1775.
67. *Id.* at 1770.
68. *Stolt-Nielsen*, 130 S. Ct. at 1779-80 (Ginsburg, J., dissenting).
69. Lorec, *supra* note 59, at 129.
70. *Stolt-Nielsen*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting).
71. David Lazarus, *Our Right to File Class Actions is in Jeopardy*, L.A. TIMES, Nov. 5, 2010, at B1.
72. *Stolt-Nielsen*, 130 S. Ct. at 1780.

el's decision.[73] Ginsburg argued that this granting of authority so conclusively settled the matter that this "scarcely debatable point should resolve this case."[74]

Additionally, though the Court did not settle the issue of whether the "manifest disregard of the law" standard is derived from section 10 of the FAA or is a judicially created construction, it nevertheless made the assumption that the standard still applies.[75] In articulating the exact standard used to review the case, the Court borrowed from the *Steelworkers trilogy* line of labor arbitration cases in declaring that a court may overturn an award "when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice."[76] Although the Court never explicitly affirmed the "manifest disregard of the law" standard, the excessively broad standard that it employed seems to encompass "manifest disregard of the law."[77]

More than merely adversely affecting the interests of the plaintiffs in *Stolt-Nielsen,* this expansive standard for reviewing arbitral awards seems to undermine arbitration proceedings as a whole. In declaring that a court may review an award when an arbitrator "dispense[s] his own brand of industrial justice," the Court dealt a major blow to the finality of arbitral awards. Although this standard may not seem imprudently broad on its face, when employed in a manner consistent with the way in which it was applied in *Stolt-Nielsen,* such a standard significantly diminishes the finality of arbitral awards.

Prohibiting an arbitral panel from invoking public policy when deciding a merely procedural matter undermines its authority when the parties involved implicitly understand that the panel might use its broad mandate to justify the award on such grounds.[78] Limiting discretion in this manner inappropriately encroaches on the province of the arbitral panel, which in turn diminishes the authority and legitimacy of arbitration proceedings by undermining the finality of the decision. Allowing for such broad-based review could make arbitration more of "a prelude to a more cumbersome and time-consuming judicial review process."[79] Although the full intentions of the drafters of the FAA remain largely unclear, it is certain that a primary purpose of passing the legislation was to avoid such a situation by promoting the finality of arbitral awards.[80] Thus, the standard of review articulated by the Court in *Stolt-Nielsen* not only undermines the authority and legitima-

73. Albert G. Besser, *The Arbitrator Blew It! Now What?*, 29 VT. B.J. 39, 45 (2003).

74. *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3.

75. *Stolt-Nielsen*, 130 S. Ct. at 1768.

76. *Id.* at 1767 (citing Major League Baseball Players' Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam) (quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

77. Lorec, *supra* note 59, at 129.

78. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364, 385 (N.J. 1992) (Wilentz., C.J., concurring).

> People generally choose arbitration for many reasons: speed, economy, and finality. They trust the process and they trust the arbitrators. Whatever the combination of reasons, the bottom-line is the same: they choose arbitration because they do not want litigation. They simply do not want the courts to have anything to do with it. When parties choose arbitration, the role that the judiciary should aim at is to have no role at all.

Id.

79. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2009)).

80. Bradley T. King, *"Through Fault of Their Own"--Applying Bonner Mall's Extraordinary Circumstances Test to Heightened Standard of Review Clauses, 45 B.C. L. REV. 943, 955-56 (2004).*

cy of arbitral proceedings but also the expressed reasoning behind the enactment the FAA,[81] the provisions of which the Court claims were dispositive in deciding the case.

Furthermore, parties voluntarily engage in arbitration at the risk that the arbitrator will decide the case differently than a court of law.[82] Thus, allowing courts to review an award merely because a judge believes that the panel dispensed its own industrial brand of justice ignores this implicit understanding of the parties involved in the dispute. Rather than wasting additional time and resources, courts should respect the decisions of arbitral panels that are within their authority to decide. Doing otherwise improperly interferes with the intent of the parties involved, which the Court, again, claimed was the overriding factor in deciding the case.[83]

In summary, subjecting awards to judicial review under the 'dispensing justice' standard of review seems to undermine the legitimacy of arbitration as a forum for adjudicating disputes. Although *Stolt-Nielsen* has not yet completely opened the floodgates of judicial review, the new standard will almost certainly increase review of arbitral awards.[84] In light of this, rather than serving as the final decision of a competent adjudicative entity, the new standard threatens to effectively make arbitral panels minor league institutions that feed disputes to major league courts of law. More than just disturbing the work of highly qualified arbitrators, the holding could further burden already congested courts.

Increased reliance on courts to resolve disputes, whether through judicial oversight of arbitral awards or by parties choosing to abandon arbitration as a result of the potential additional hassle of this supervision, will logically serve to increase transaction costs resulting from added expenses incurred during litigation. As such, the Court's holding *Stolt-Nielsen* may have the effect of diminishing the authority and legitimacy of arbitral panels, which would in turn harm the interests of market participants.

B. Public Policy Considerations: Weighing the Burdens on the Parties

In her dissent, Ginsburg further elaborated on her contention that the Court should have upheld the award by emphasizing that the plaintiffs, not the defendants, will endure an undue burden if they are not allowed to proceed as a class in arbitration.[85] The majority based its assertion on the claim that bilateral arbitration differs from class action arbitration to such an extent that it would be unfair to impose such proceedings absent explicit consent. Ginsburg persuasively refuted this contention by pointing out that granting class certification merely stipulates with whom one must arbitrate claims if the parties involved have expressly agreed

81. *Id.*

82. *Perini*, 610 A.2d at 385; *see also supra* note 78 (detailing reasoning).

83. *Stolt-Nielsen*, 130 S. Ct. at 1774.

84. Loree, *supra* note 59, at 129.

85. *Stolt-Nielsen*, 130 S. Ct. at 1783 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

to arbitrate.[86] Moreover, the dissent argued that if a court of law may order class certification in the absence of expressed contractual consent, an arbitral panel should also have such authority.[87]

Rather than overruling the arbitral award on the grounds that the arbitrators considered policy-based arguments in determining a mere procedural matter, the Court should have deferred to the panel's well-grounded determination that granting class certification served the interests of justice in this particular case. Although perhaps not sufficiently articulated by the Court, the power dynamics likely at play during the contractual negotiations underlying the dispute provide further justification for the arbitral panel's decision to invoke public policy considerations. In circumstances where a corporation is able to collude with other similarly situated corporations in drafting industry-wide contracts that shift risks and burdens to the corporations with which they contract, which appears to be the case in *Stolt-Nielsen,*[88] the balance of power in the bargaining process advantages the corporations that engage in collusive behavior to such an extent that one could argue that the weaker party never truly consented to all contractual provisions. If a corporation exploits this superior bargaining position in the negotiation process by drafting a contract that precludes class-action arbitration, a plaintiff would likely find it infeasible to bring a claim against the corporation that does not justify the legal expenditures required to arbitrate a dispute.[89] As such, the holding allows many corporations to effectively shield themselves from liability by virtue of their superior bargaining position, which may be the result of improper manipulation of the dynamics of the negotiation process.[90] Thus, prohibiting class action certification as a matter of law when the governing contract is silent on the issue would more likely unfairly burden the party attempting to bring the claim. Rather than prohibiting arbitral panels from entertaining public policy considerations when determining merely procedural matters, the Court should have instead allowed them to decide such issues on a case-by-case basis.

Contrary to the public policy considerations advanced by the majority in ruling that granting class action certification in *Stolt-Nielsen* would unfairly burden corporate defendants, prohibiting class certification in such a situation would unjustifiably disadvantage plaintiffs. As such, the Court should have deferred to the decision of the arbitral panel in *Stolt-Nielsen*, thus providing arbitral boards with the authority to consider broader equitable concerns when determining procedural issues.

C. Stolt-Nielsen in the Consumer Context

Although the immediate decision involved business entities, the case may have profound implications for consumers.[91] If a case involving class certification in a consumer dispute were to arise, courts might apply the holding in *Stolt-Nielsen* that arbitral panels may not grant class certification when the underlying

86. *Id.*
87. *Id.*
88. *Stolt-Nielsen*, 130 S. Ct. at 1764.
89. *See supra* note 85.
90. *Stolt-Nielsen*, 130 S. Ct. at 1764, 1783.
91. Lazarus, *supra* note 71 at B1.

arbitration clause is silent on the matter. Considering the lack of any meaningful bargaining process in consumer contracts, applying this aspect of the holding in the consumer context would be manifestly unjust.

Even more of a pressing concern is that the decision indicates the Court's willingness to affirm arbitration clauses in adhesive consumer contracts that expressly prohibit class action arbitration. Courts in many states routinely refuse to recognize such provisions on the grounds that they are unconscionable.[92] However, the Court may hold that the FAA, ironically the provisions of the statute that require mutual assent, may override state laws that protect consumers from class action arbitration waivers imposed on them without their knowledge.[93] If the Court upholds the validity of such provisions, a corporation could effectively shield itself from liability in consumer contracts by merely altering the language of an arbitration clause in an adhesion contract, which plainly contradicts the original intent of the FAA.[94] Far from a hypothetical exercise in the potential reaches of Supreme Court jurisprudence, the Court is scheduled to decide this very issue during the 2010 term in *AT&T Mobility vs. Concepcion*.[95] If *Stolt-Nielsen* is any guide, the Court will likely hold that the FAA overrides state law protections against these unconscionable contractual provisions. In light of this, Congress should enact legislation to prevent further injustice.

One potential piece of legislation that could accomplish this goal is the Arbitration Fairness Act (AFA).[96] The AFA would reinstate the FAA's original intent by requiring that agreements to arbitrate employment, consumer, franchise, or civil rights disputes be made after the dispute has arisen.[97] If passed, the bill would not only prohibit corporations from effectively shielding themselves from liability for consumer claims but would also eliminate adhesion contracts in general.[98] As such, enacting the bill would prevent further injustice resulting from the Court's misguided hostility towards class action arbitration.

VII. CONCLUSION

In addition to harming the future of arbitration as a viable forum for resolving disputes, the implications of the Court's reasoning in *Stolt-Nielsen* threaten the interests of all consumers who engage in transactions with corporations subject to jurisdiction in the United States. In establishing such precedent, the Court invoked an expansive standard for vacating arbitral awards that undermines the

92. Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 380-83 (2010).

93. Lazarus, *supra* note 71.

94. Kathleen M. McKenna, *Litigation Strategy: Arbitration, Mediation & Settlement*, 833 PLI/LIT 733, 750 (2010).

95. *Id.*

96. *Id.* at 751.

97. H.R. 1020, 111th Cong. (2009), 2009 CONG US HR 1020 (Westlaw 2009). Though this bill was never passed and its sponsor, Senator Russ Feingold voted out of office, in April of 2011 Senators Franken, Blumenthal and Rep. Hank Johnson announced their intention to file an Arbitration Fairness Act. Press Release, Senator Franken, Sens. Franken, Blumenthal and Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corporations (April 27, 2011) *available at* http://franken.senate.gov/?p=press_release&id=1466.

98. McKenna, *supra* note 94, at 751.

authority and legitimacy of arbitral panels. More than just disturbing the work of competent arbitrators, the holding threatens to flood already swamped courts with a deluge of additional cases. The spill-over resulting from this rising tide of litigation will increase transaction costs associated with operating in the contemporary marketplace.

Despite emphasizing that arbitration is based on the principle of "consent not coercion," the Court may soon extend the holding in *Stolt-Nielsen* to consumer contracts, which would allow corporations to impose class action waivers on consumers who do not manifest even a semblance of genuine assent. This would clearly contradict the original intent of the FAA, the provisions of which the Court ironically found dispositive in deciding the case. As such, it is imperative that Congress immediately enacts the AFA in order to prevent the Court from dispensing further injustice.

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