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Arbitration - United States Supreme Court Sounds the Death Knell for Class Arbitration - Stolt-Nielsen S.A. V. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010)

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**ARBITRATION—UNITED STATES SUPREME
COURT SOUNDS THE DEATH KNELL FOR CLASS
ARBITRATION—*STOLT-NIELSEN S.A. V.
ANIMALFEEDS INT’L CORP.*, 130 S. CT. 1758 (2010)**

Over the last few decades arbitration has gained increasing popularity because consumer, commercial, and employment contracts regularly incorporate mandatory arbitration clauses.¹ As a result, numerous questions exist regarding the scope and enforceability of arbitration clauses, particularly with respect to the use of class arbitration.² In *Stolt-Nielsen S.A. v. AnimalFeeds International, Corp.*,³ the United States Supreme Court considered whether imposing class arbitration on parties whose arbitration clauses are silent on the use of class arbitration is consistent with the Federal Arbitration Act (“FAA”)—an issue that previously divided federal courts.⁴ Sharply retreating from precedent, the Court held that the FAA prohibits arbitrators from imposing class arbitration on parties who did not previously agree to such a stipulation.⁵

Stolt-Nielsen S.A., joined by other petitioner-companies in the

¹ See Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U.L. REV. 301, 301-03 (2004) (highlighting class arbitration’s growing importance for consumer and employment contracts); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 3 (1997) (“[A]rbitration is suddenly everywhere. A veritable surrogate for the public justice system, it touches the lives of many persons who, because of their status as investors, employees, franchisees, consumers of medical care, homeowners, and signatories to standardized contracts, are bound to private processes traditionally employed by commercial parties.”).

² See Buckner, *supra* note 1, at 303-05 (classifying class arbitration law as new and emerging field with many unsettled procedural issues); James E. McGuire & Bette J. Roth, *Class Action Arbitrations: A First Circuit Update*, 52 B. B.J. 17, 19 (2008) (concluding laws governing prohibitions on class-wide arbitration are unsettled).

³ (*Stolt-Nielsen III*), 130 S. Ct. 1758 (2010).

⁴ See *id.* at 1766-67 (identifying issue on appeal); see also Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006). Compare *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (rejecting class arbitration’s use where arbitration clause is silent on consolidation), with *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins.*, 489 F.3d 580, 590 (3d Cir. 2007) (holding silence does not preclude consolidation), *Rollins, Inc. v. Garrett*, 176 F. App’x 968, 969 (11th Cir. Apr. 19, 2006) (concluding silence does not preclude class arbitration and prohibition of class arbitration is unconscionable).

⁵ *Stolt-Nielsen III*, 130 S. Ct. at 1775 (announcing Court’s holding). But see *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (refusing to interpret arbitration clause because arbitrators are “well situated” to interpret agreement); *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984) (declining to decide whether state law permits class arbitration because Court did not have authority).

case, is a shipping company that charters parcel tankers to customers that ship liquids in small quantities.⁶ AnimalFeeds, the respondent, is a customer that ships its goods pursuant to a charter party contract that contains a mandatory arbitration clause.⁷ In 2003, AnimalFeeds filed an antitrust suit in the United States District Court for the Eastern District of Pennsylvania against the petitioners alleging that the petitioners had engaged in a global conspiracy to restrain competition in the parcel tanker shipping industry through price fixing.⁸ A judicial panel on multi-district legislation transferred the case to the District of Connecticut, where Stolt-Nielsen moved to compel arbitration.⁹ The district court denied the motion, which the United States Court of Appeals for the Second Circuit subsequently reversed, holding that the charter party agreements governed the proceedings and contained legally enforceable agreements to arbitrate.¹⁰

The parties commenced arbitration and entered into an agreement requiring the arbitrators to follow and apply Rule 3 and Rule 7 of the American Arbitration Association's ("AAA") Supplementary Rules for Class Arbitrations.¹¹ The arbitration panel interpreted the arbitration

⁶ *Stolt-Nielsen III*, 130 S. Ct. at 1764 (describing petitioners' businesses). Parcel tankers contain individual compartments that are chartered to customers wishing to ship liquids in small amounts. *Id.*

⁷ *Id.* at 1764-65 (identifying contractual relationship between respondents and petitioners).

⁸ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (Stolt-Nielsen II)*, 548 F.3d 85, 87-88 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009) (noting initial cause of action and case's procedural history). AnimalFeeds alleged that the price fixing scheme violated the federal antitrust laws. 130 S. Ct. at 1761. AnimalFeeds based this allegation on a Department of Justice criminal investigation that revealed the petitioners conspired to illegally fix their prices. *Id.* at 1765.

⁹ *Stolt-Nielsen II*, 548 F.3d at 87-88 (outlining case's procedural history); see also *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F. Supp. 2d 1370, 1371 & n.2 (J.P.M.L. 2003).

¹⁰ *Stolt-Nielsen II*, 548 F.3d at 88; see also *JLM Indus., Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163, 168 (2d Cir. 2004) (summarizing rationale for dismissing claim because price-fixing allegations were beyond scope of arbitration clauses).

¹¹ See *Stolt-Nielsen II*, 548 F.3d at 88 (outlining rules governing arbitration hearings). Rule 3 provides in pertinent part:

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.

Am. Arbitration Ass'n, Supplementary Rules for Class Arbitrations (Nov. 10, 2010), <http://www.adr.org/sp.asp?id=21936> [hereinafter *AAA Supplementary Rules*]. Additionally, Rule 7 provides:

clauses contained in two common charter party agreements, known as the Vegoilvoy charter party and the Asbatankvoy charter party.¹² Both charter parties mandate arbitration, but are silent on the issue of whether class arbitration may be utilized.¹³ In December 2005, the arbitration panel ruled that both agreements permit class arbitration, consistent with other arbitration decisions considering this issue.¹⁴

Stolt-Nielsen petitioned the United States District Court for the Southern District of New York to vacate the arbitration panel's partial award.¹⁵ Granting Stolt-Nielsen's motion, the district court concluded that the award was granted in "manifest disregard of the law."¹⁶ After

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

Id.

¹² *Stolt-Nielsen II*, 548 F.3d at 88-89 (identifying source of conflict within the parties' contract). The parties selected these charter parties for use when they entered into the shipping contracts. *Id.* at 89. The shipping industry uses charter parties, specifically, so that a shipping vessel's owner can charter the vessel, or part of the vessel, to customers for use in the transportation of goods. *Id.* at 89 n.3.

¹³ *Id.* at 89 (elucidating broadly constructed arbitration agreements). The Vegoilvoy agreement, a broadly constructed arbitration clause, governed AnimalFeeds transactions. *Id.* at 88-89. The agreement stated:

Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

Id. at 89. The Asbatankvoy agreement, which governed a number of relevant transactions in this dispute with many of the respondents, also has a broadly worded arbitration clause. *Id.*; see *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (*Stolt-Nielsen I*), 435 F. Supp. 2d 382, 384 n.1 (S.D.N.Y. 2006) (providing Asbatankvoy arbitration clause).

¹⁴ *Stolt-Nielsen II*, 548 F.3d 85, 89-90 (2d Cir. 2008) (explaining arbitration panel's decision). The panel relied on twenty-one decisions that utilized Rule 3 of the Supplementary Rules, each decision held that silent arbitration clauses do not preclude class arbitration. *Id.* at 90; see also sources cited *supra* note 2 and accompanying text (noting emerging case law reflects unsettled questions on class arbitration).

¹⁵ *Stolt-Nielsen II*, 548 F.3d at 90 (detailing petitioner's response to arbitration panel's award); see also *Stolt-Nielsen I*, 435 F. Supp. 2d at 383-84 (outlining case's procedural posture).

¹⁶ *Stolt-Nielsen I*, 435 F. Supp. 2d at 383-84 (stressing that arbitration panels cannot make decisions in "manifest disregard of the law"). The district court outlined the parameters of the

AnimalFeeds appealed, the Second Circuit reversed the district court's decision.¹⁷ The Second Circuit explained that the question presented is for the arbitrators to decide, not the courts.¹⁸ Moreover, the court held that the arbitration panel's construction of the clause was not in "manifest disregard of the law" because no part of the FAA prohibits class arbitration where the relevant arbitration clause is broadly worded in scope, but silent on the issue.¹⁹ Petitioner appealed to the United States Supreme Court and the Court granted certiorari.²⁰

Historically, there has always been a strong policy in favor of resolving disputes through arbitration—one that the Supreme Court emboldened through a series of decisions during the last decade.²¹ In 2002, the Court in *Howsam v. Dean Witter Reynolds, Inc.*²² limited the scope of arbitration issues that a court could address solely to the issue of whether the parties submitted a particular dispute to arbitration.²³ One year later, in *Green Tree Financial Corp. v. Bazzle*,²⁴ the Court had the opportunity to

term:

[T]he doctrine of "manifest disregard" is to be invoked in exceptional circumstances only . . . [T]he Court must find "both that (1) the arbitrators knew of a governing legal principles yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

Id. at 384 (quoting *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). *But see* *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584-85 (2008) (rejecting decision to vacate award based on extra-statutory grounds, including "manifest disregard of the law").

¹⁷ *Stolt-Nielsen II*, 548 F.3d at 102.

¹⁸ *Id.* at 101-02 (highlighting Second Circuit's decision to remand). The Second Circuit reversed and remanded the case to the district court, instructing the district court to vacate the previous decision. *Id.*

¹⁹ *Stolt-Nielsen II*, 548 F.3d at 99-101 (identifying rationale behind the Second Circuit's decision); Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006) (outlining arbitration procedures).

²⁰ *Stolt-Nielsen III*, 130 S. Ct. 1758, 1764 (2010); *Stolt-Nielsen II*, 548 F.3d 85 (2d Cir. 2008).

²¹ See *McGuire & Roth*, *supra* note 2, at 18 (introducing Court's precedent on class arbitration allowing arbitrators to decide certain issues); Kristen M. Blankley, Case Commentary, *Arbitrability After Green Tree v. Bazzle: Is There Anything Left for the Courts?*, 65 OHIO ST. L.J. 697, 697-98 (2004) (articulating prior Supreme Court decisions broadening the arbitrators' power).

²² 537 U.S. 79 (2002).

²³ *Id.* at 83-84 (holding courts have limited ability to hear arbitration issues). The Court in *Howsam* held that courts could hear two types of threshold issues regarding arbitration: (1) whether the parties are bound by the arbitration clause, and; (2) whether the arbitration clause applies to the parties' dispute. *Id.* at 84. On the other hand, procedural issues that affect the final disposition of the case were delegated to arbitrators. *Id.* at 84-85. The Court reasoned that arbitrators had comparatively more knowledge in this area and presumably the parties' agreement reflected that understanding. *Id.* at 83.

²⁴ 539 U.S. 444 (2003).

consider whether class arbitration could be imposed on parties when the agreement was “silent” on the issue.²⁵ However, the Court in *Bazze* did not reach that issue because the Court determined that as a threshold matter the arbitrator, not the court, must decide whether the contract was in fact silent on class arbitration.²⁶ Additionally, in *PacifiCare Health Systems, Inc. v. Book*,²⁷ the Supreme Court held that arbitrators should determine issues pertaining to the enforceability of certain provisions within an arbitration agreement, rather than courts.²⁸

In particular, the *Bazze* holding led many arbitration institutions to create procedures to handle class action arbitrations.²⁹ For instance, the American Arbitration Association promulgated special procedures to facilitate class arbitration, while the International Chamber of Commerce rules remained silent on class arbitration.³⁰ Additionally, federal and state

²⁵ *Bazze*, 539 U.S. at 447 (describing issue before the Court). In *Bazze*, the plaintiffs signed a contract to secure a home loan from the defendant, Green Tree Financial Corporation. *Id.* at 447-48. The contract contained a mandatory arbitration clause, but was apparently silent on whether class arbitration was permissible. *Id.* at 448. The case began in the South Carolina trial court and proceeded to the South Carolina Supreme Court. *Id.* at 449. “The Supreme Court of South Carolina held (1) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitration, and (2) that, in that circumstance, South Carolina law interprets the contracts as permitting class arbitration.” *Id.* at 447. The United States Supreme Court granted certiorari to “determine whether th[e] holding [was] consistent with the Federal Arbitration Act.” *Id.*

²⁶ *Id.* at 450-51 (highlighting preliminary issue considered by Court in *Bazze* regarding contract’s supposed silence). A threshold question for the Court involved whether the contract is silent on class arbitration, or if it actually forbids class arbitration. *Id.* Exercising its discretion, a plurality of the Court remanded the case to the arbitration panel to interpret the contracts governing the dispute. *Id.* at 454; see also Buckner, *supra* note 1, at 302-03 (noting *Bazze* significantly expanded arbitrators’ authority and scope of arbitration).

²⁷ 538 U.S. 401 (2003).

²⁸ *Id.* at 406-07 (holding issues unrelated to arbitrability are limited to arbitrators’ review). In *Book*, a group of doctors brought claims against a number of HMOs under the Racketeer Influenced and Corrupt Organization Act (“RICO”). *Id.* at 402. The HMOs sought to compel arbitration, but the doctors resisted because the arbitration agreement prohibited the recovery of punitive damages. *Id.* at 403. Some circuits, however, allow tremble damages for the RICO claim. *Id.* at 402-05. The Court in *Book* held that because this was not an issue of whether the parties had agreed to arbitration or even whether a particular issue was subject to arbitration, it was for the arbitrator to decide the enforceability of the provision. *Id.* at 406-07.

²⁹ See American Arbitration Association Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=28779> [hereinafter *AAA’s Policy on Class Arbitrations*] (identifying AAA’s response to *Bazze* decision); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 335, 339-43 (2009) (noting arbitration institutions responded to *Bazze* by creating supplementary class arbitration rules). Baker specifically outlines the procedures instituted by the AAA and the Judicial Arbitration and Mediation Services, Inc. (“JAMS”) in response to *Bazze*. *Id.* The AAA and JAMS created procedures to facilitate class arbitration. *Id.*

³⁰ See *AAA Supplementary Rules*, *supra* note 11 and accompanying text (announcing new rules to facilitate class arbitration); *Rules of Arbitration art. 15*, INT’L CHAMBER OF COMMERCE

courts continued to hold differing views on class arbitration particularly in light of the Court's ambiguous ruling in *Bazzle*.³¹ Many courts held that class arbitration was an issue of contract interpretation and that such procedural issues were ultimately for the arbitrator and not the courts to decide.³² On the other hand, at least one circuit has taken the view that class arbitration may not be imposed in the absence of an agreement because it alters the parties negotiated cost-benefit analysis.³³

In reaching its decision, the Court in *Stolt-Nielsen* relied on Section 10(a)(4) of the FAA, which permits a court to vacate an arbitration decision when "the arbitrators exceeded their powers."³⁴ The Court then considered

(1998), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (declining facilitation of class arbitration).

³¹ See *supra* note 4 and accompanying text (identifying circuit split on the enforceability of class arbitration when the contract is silent). See generally Blankley, *supra* note 21, at 706-09 (identifying *Bazzle*'s potential impact on arbitration). Blankley argues that the *Bazzle* decision is problematic because it provides no guidance for lower courts on how to handle class arbitration proceedings. *Id.* Moreover, businesses may be certain to craft contracts explicitly prohibiting class arbitration or working around the *Bazzle* holding. *Id.* at 707-08.

³² See, e.g., *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 590 (3d Cir. 2007) (holding silence does not preclude consolidation and arbitrators have discretion to allow consolidation); *Rollins, Inc. v. Garrett*, 176 F. App'x 968, 969 (11th Cir. Apr. 19, 2006) (holding silence does not preclude class arbitration and prohibition of class arbitration is unconscionable); *Pedcor Mgmt. v. Nations Pers. of Tex.*, 343 F.3d 355, 363 (5th Cir. 2003) (requiring arbitration clauses silent on clause arbitration submission to arbitrator). In *Westchester Fire Ins.*, the Third Circuit determined that imposing class arbitration is a procedural issue and should be resolved by the arbitrator. 489 F.3d at 590. In reaching this decision, the court considered the following factors: prior federal case law (including the *Bazzle* decision), the agreement by both parties to arbitrate disputes, the silence in the contract with respect to class arbitration, and the federal policy strongly in favor of utilizing arbitration. *Id.* at 586-90.

³³ See *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (cautioning court's judgment should not deprive one party of benefit of bargain).

³⁴ Federal Arbitration Act, 9 U.S.C. § 10(a) (2006) (providing grounds for reversing arbitration awards). Section 10(a)(4) provides that an award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.* In *Stolt-Nielsen*, the Court noted that the rationale behind this section was that arbitrators are charged with contract interpretation, and not formulating public policy. *Stolt-Nielsen III*, 130 S. Ct. 1758, 1767 (2010) (quoting 9 U.S.C. § 10(a)(4) (2006)) (identifying Court's authority for vacating arbitrator's decision). However, in her dissent, Justice Ginsburg emphatically stated that the Supreme Court prematurely adjudicated the issue on appeal. *Stolt-Nielsen III*, 130 S. Ct. at 1777 (Ginsburg, J., dissenting). She explained that the arbitration panel's resolution was a partial award and the case was still at a very early stage. *Id.* at 1778-79. As such, the award was an interlocutory decision, and the Court should not have intervened so early in the process, particularly because the panel did not render a final judgment. *Id.*; see generally *Catlin v. United States*, 324 U.S. 229, 233 (1945) (explaining final judgment rule). The final judgment rule essentially states that a decision should not be reviewed until a "final decision" has been rendered. *Id.* The Court in *Catlin* describes a "final decision" as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* The rule is supported by a number of public policy considerations such as preventing piecemeal litigation and avoiding undue delays from appeals of

AnimalFeeds's arguments in support of imposing class arbitration—specifically that public policy favored the imposition of class arbitration.³⁵ The Court criticized this argument and the arbitration panel because the panel was acting as though it had the common law authority of a court to develop laws based on public policy.³⁶ The Court cautioned that the arbitration panel should have focused on a discernible rule of law for guidance, such as the FAA, maritime law, or New York law.³⁷

Next, the Court considered the application of its decision in *Bazzele* to the present case.³⁸ In *Bazzele*, a plurality opinion, the Court concluded that the determination of whether a contract was silent on class arbitration rested with the arbitrator and not the courts.³⁹ Writing for the majority,

interlocutory decisions. *Id.* at 233-34. This rule is one that is firmly embedded in the federal courts. *Id.* at 233.

³⁵ *Stolt-Nielsen III*, 130 S. Ct. at 1768 (outlining arguments justifying class arbitration's use). The Court noted that AnimalFeeds outlined three arguments in support of imposing class arbitration: (1) that class arbitration is permitted under *Bazzele*, absent an express provision to the contrary; (2) the arbitration clause should be construed to allow class arbitration for public policy reasons; and (3) the arbitration clause would be unconscionable and unenforceable otherwise. *Id.* The arbitrators rejected the first argument and did not consider the third, suggesting that public policy considerations had an overwhelming impact on the decision to impose class arbitration. *Id.*

³⁶ *See id.* at 1768-71 (outlining difference between arbitrator and judge).

³⁷ *See id.* (determining arbitrators' decisions should be grounded in law and not public policy). *But see id.* at 1780-81 (Ginsburg, J., dissenting) (defending arbitration panel's decision and consideration of public policy objectives). The dissent displays that the panel's decision was consistent with a prior decision by the New York Court of Appeals and federal maritime law. *Id.* at 1781 & n.9. In addition, the panel considered the arbitration clause's language that "any dispute arising from the making, performance or termination of this Charter Party shall be put to arbitration." *Id.* at 1781 (internal quotation marks omitted). The panel agreed with a number of prior arbitration cases, interpreting similarly worded arbitration clauses, that class arbitration was permissible. *Id.* The dissent proceeded to consider the issues raised by the majority, such as the precept that arbitration "'is a matter of consent, not coercion.'" *Id.* at 1782 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Importantly, Justice Ginsburg noted that parties may continue to determine when they will utilize arbitration and the parties with which they will arbitrate. *Id.* In the present case, AnimalFeeds purported to bring class arbitration on behalf of a class whose claims arose from a charter party agreement that was subject to arbitration. *Id.* As such, companies like Stolt-Nielsen that elect to pursue arbitration with these individuals may only proceed forward on the specific issues outlined in the charter party agreements. *Id.* at 1782-83.

³⁸ *Stolt-Nielsen III*, 130 S. Ct. at 1770 (illustrating problem with respondents' reliance on *Bazzele*). Justice Alito noted that the Court in *Bazzele* confronted three issues: (1) whether the court or the arbitrator should decide whether a contract was silent on class arbitration; (2) what standard should be used to determine whether a contract was in fact silent on class arbitration; and (3) whether class arbitration was properly awarded. *Id.* at 1771. The Court, however, never moved beyond the first question. *Id.* at 1772.

³⁹ *Stolt-Nielsen III*, 130 S. Ct. 1758, 1771 (2010) (identifying and explaining the nuanced holding of the Court in *Bazzele*). Justice Stevens concurred with the *Bazzele* judgment so that there would be a controlling decision; he disagreed with the rationale set forth in the Court's opinion. *Id.* at 1772. Ultimately, his opinion did not address the question of whether the arbitrator or the

Justice Alito insinuated that, because a plurality reached this conclusion, it was not a binding requirement.⁴⁰ The majority also agreed that *Bazzle* did not resolve the issue of what rule to apply when deciding whether class arbitration is permitted.⁴¹ In guiding the Court's ultimate resolution of this issue, the majority relied on the basic precept that arbitration "is a matter of consent, not coercion."⁴² Accordingly, the Court concluded that a party must not be compelled to submit to class arbitration unless there is a contractual basis suggesting that the parties agreed to do so.⁴³

courts were the ultimate decision makers with respect to contract interpretation. *Id.*

⁴⁰ *Id.* at 1771-72 (discussing unanswered question from *Bazzle*). Justice Alito explained that a plurality decided the first issue in *Bazzle*, holding that an arbitrator must decide whether a contract is silent on class arbitration. *Id.* at 1771. Accordingly, the plurality vacated the decision of the Supreme Court of South Carolina and remanded the case for a decision by the arbitrator on whether the contract was in fact silent. *Id.* at 1772. While Justice Stevens concurred with the plurality's decision to vacate and remand the case, he disagreed with their rationale and did not adopt a position with respect to the first issue. *Id.* Thus, there was no majority position with respect to the first issue presented in *Bazzle*. *Id.* But see *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003) (stating arbitrator should interpret relevant questions of contract interpretation). The Court stated:

The parties agreed to submit to the arbitrator "[a]ll disputes . . . relating to this contract" And the dispute about what the arbitration contract in each case means (i.e., whether it forbids the use of class arbitration procedures) is a dispute "relating to this contract" and the resulting "relationships." Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.

Id. (emphasis omitted).

⁴¹ See *Stolt-Nielsen III*, 130 S. Ct. at 1772 (explaining discrepancy between both parties in the interpretation of the *Bazzle* decision). Justice Alito highlighted the arbitration panel's discussion of the appropriate standard:

Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one—arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action.

Id. (quoting App. to Pet. for Cert. 49(a)) (identifying arbitration panel's decision); see also Buckner, *supra* note 1, at 349 (noting the Court in *Bazzle* provided little guidance on how arbitrators should interpret arbitration clauses). Buckner also argues that because *Bazzle* allows arbitrators to interpret arbitration clauses, it is unlikely that courts will vacate an arbitrator's decision unless the decision truly is in "manifest disregard of the law." *Id.* at 350.

⁴² *Stolt-Nielsen III*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (evaluating basic rules guiding arbitration). The Court explained that arbitrators have a duty to "give effect to the contractual rights and expectations of the parties." *Id.* at 1774 (quoting *Volt*, 489 U.S. at 479). This duty derives from the parties' agreement to forgo litigation and rely on the arbitrator's judgment to resolve their dispute. *Id.* The Court's prior jurisprudence fortifies the consensual nature of arbitration in allowing parties to structure and tailor arbitration agreements to meet their individual needs. *Id.*

⁴³ See *id.* at 1775 (announcing Court's holding). In the present case's context, the parties stipulated that they reached no agreement on the issue of class arbitration, but both parties

In *Stolt-Nielsen*, the Supreme Court drastically departed from prior precedent by trumping the arbitration panel's authority to determine an important procedural issue.⁴⁴ The decision contravenes a number of cases holding that arbitrators should decide procedural questions relating to arbitration, and the Court denies the panel the opportunity to clarify the class arbitration's limits by defining the parties and issues within the prospective class.⁴⁵ Additionally, the majority mistakenly emphasizes the coercive effects of class arbitration.⁴⁶ The arbitration panel's class

consented to allowing the arbitration panel to make a determination on class arbitration proceedings. *Id.* Nevertheless, the Court concluded that the parties could not be compelled to submit to class arbitration. *Id.* The majority acknowledged a critical point advanced by the arbitration panel, specifically that the agreement never precluded the use of class arbitration. *Id.* The Court further acknowledged that this analysis was appropriate in certain contexts. *Id.* In *Howsam*, for example, the Court concluded that "procedural" questions that arise out of the dispute and affect the final disposition are for the arbitrator to decide, and not courts. *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). The Court admitted the basis for that decision rests on the principle that when parties to a bargain have not agreed to a particular term, the court or arbitrator may supply a term that is reasonable under the circumstances. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)). The Court, however, cautioned that an implicit agreement to authorize class arbitration could not be inferred simply from the fact that the parties agreed to arbitration in the first place. *Id.* Furthermore, the imposition of class arbitration over bilateral arbitration significantly altered the parties' expectations with respect to procedural safeguards, privacy, etc. *Id.* at 1775-76. *But see id.* at 1783 (Ginsburg, J., dissenting) (extolling the benefits of class arbitration). The dissent observes that when arbitration is costly and the claims are modest, there is little incentive, if any, for potential claimants to seek arbitration. *Id.* Class arbitration, however, provides an avenue for claimants to pursue a course of action rather than feeling compelled to forgo arbitration. *Id.* The dissent observes that the holding may be limited to situations where the parties have relatively equal bargaining power. *Id.* See generally Randall D. Quarles, *Courts Disagree: Is Arbitration a "Class" Act?*, 68 ALA. LAW. 476, 480 (2007) (acknowledging class arbitration's benefits where potential fees for arbitration would prohibit individuals from pursuing arbitration).

⁴⁴ See *Stolt-Nielsen III*, 130 S. Ct. 1758, 1779-80 (2010) (Ginsburg, J., dissenting) (admonishing Court for interpreting issue that parties agreed to submit to arbitration). Justice Ginsburg notes that the parties consented to and submitted the contract-construction issue specifically to the arbitration panel and that the Court's interference allows one party to essentially repudiate an agreement to settle with an arbitration panel. *Id.* at 1779-80. Moreover, the dissent cautions that the Court's deliberation of the case was premature because the arbitration panel only rendered a partial award. *Id.* at 1778. This directly contravenes the well-established final judgment rule that requires appellate courts to review cases after a final judgment is rendered and the full record is available. *Id.*; Blankley, *supra* note 21, at 697 (illustrating movement towards empowering arbitrators).

⁴⁵ See *Stolt-Nielsen III*, 130 S. Ct. at 1782 (Ginsburg, J., dissenting) (scrutinizing decision to usurp power and prevent arbitrators from clarifying limitations on class arbitration); see also *supra* note 11 (explaining that Rule 7 of AAA requires arbitrators to define the class in final arbitration award); *supra* notes 23-28 and accompanying text (awarding arbitrators authority to interpret procedural issues).

⁴⁶ See *Stolt-Nielsen III*, 130 S. Ct. at 1774 (identifying arbitration as a consensual endeavor). The majority noted that class arbitration differs from bilateral arbitration because it changes parties' expectation in numerous ways. *Id.* at 1776. For instance, the presumption of privacy in bilateral arbitration does not apply to class arbitrations. *Id.* Also, the commercial stakes of class

arbitration award is not coercive for three reasons: (1) the parties expressly consented to the authority of the arbitration panel to determine this issue; (2) the parties agreed to resolve their disputes through arbitration; and (3) the parties collectively stipulated the types of disputes that could be resolved through arbitration.⁴⁷ In fact, traditional rules of contract interpretation suggest that even though the contract was silent on the use of class arbitration, it is reasonable to infer such a provision because the parties agreed to the terms above.⁴⁸ The Court's holding essentially permits the objecting party to define the agreement by citing its own general opposition to class arbitration as the basis for finding that the parties did not agree to such arbitration in the agreement.⁴⁹ As such, the decision proves problematic because it vitiates the panel's authority to decide this procedural question and undermines nearly a decade of jurisprudence limiting the judiciary's role in arbitration matters.⁵⁰

Importantly, the *Stolt-Nielsen* decision fails to clarify the holding's scope or the type of language required to demonstrate that the parties consented to class arbitration.⁵¹ First, the dissent recognizes that the holding's scope is too broad and fruitlessly attempts to mitigate its impact by suggesting that the holding does not apply to contracts of adhesion that are offered on a "take-it-or-leave-it" basis.⁵² Unfortunately, this analysis will have little practical effect because the holding does not focus on the parties' relatively equal bargaining power, but instead relies on whether there is a contractual basis for the parties' consent to class arbitration.⁵³ By

arbitration are much higher than bilateral arbitration. *Id.*

⁴⁷ See *id.* at 1775-76 (Ginsburg, J., dissenting) (emphasizing charter party's stipulation to use arbitration along with the issues subject to arbitration).

⁴⁸ See sources cited *supra* note 43 and accompanying text (observing that contract principles allow the arbitration panel to substitute reasonable terms).

⁴⁹ See *Stolt-Nielsen III*, 130 S. Ct. 1758, 1781 (2010) (Ginsburg, J., dissenting) (identifying *Stolt-Nielsen*'s objection to class arbitration). *Stolt-Nielsen* argued that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration." *Id.* (quoting App. To Pet. For Cert. 52(a)). Justice Ginsburg, however, noted that the issue before appeal was not whether the arbitrators decided this case correctly, but whether the decisions exceeded the panel's powers. *Id.*

⁵⁰ See *supra* notes 21-28 and accompanying text (recounting prior Supreme Court decisions that enforced power of arbitrators); see also Blankley, *supra* note 21, at 697 (illustrating movement towards empowering arbitrators).

⁵¹ See *infra* notes 52, 54-55 and text accompanying notes 52-57 (illustrating potential problems with the *Stolt-Nielsen* decision).

⁵² See *Stolt-Nielsen III*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting) (observing that Court spares parties subject to adhesion contracts).

⁵³ See *supra* notes 42-43 and accompanying text (outlining majority's argument that class arbitration is consensual and cannot be imposed without contractual support). The Court's decision was premised on the belief that the parties must consent to class arbitration within the contract governing their relationship. See *supra* notes 42-43 and accompanying text. Often,

failing to define the holding's scope, the Court's decision negatively impacts groups such as employees and consumers who have inferior bargaining power against big corporations that are responsible for drafting contracts and arbitration clauses in the first place.⁵⁴ Furthermore, the Court fails to provide *any guidance* on the type of contractual language required to demonstrate that the parties contemplated or consented to class arbitration.⁵⁵ Specifically, the Court states that silence is not sufficient to demonstrate that the parties consented to class arbitration, but the Court simultaneously refrains from requiring express consent.⁵⁶ This uncertainty not only leaves many claimants in the dark, it causes confusion for courts and arbitrators alike in the future.⁵⁷

Finally, the Court in *Stolt-Nielsen* de-emphasizes class arbitration's benefits, while simultaneously increasing the requirements to certify a prospective class.⁵⁸ Class arbitration provides a mechanism for claimants

however, consumers and employees may concede to the terms of an agreement because they lack a meaningful choice in the matter. See *infra* note 54 and accompanying text (describing how potential plaintiffs are forced to accept terms of contracts despite inferior bargaining power). But see McGuire and Roth, *supra* note 2, at 18 (noting that some courts reject express bans on class arbitration unconscionable).

⁵⁴ See McGuire and Roth, *supra* note 2, at 17-18 (explaining companies included class action waivers in contracts after the *Bazze* decision). In response to *Bazze*, many businesses informed consumers that class action arbitration was banned and that continued use of the business' service was considered acceptance of these terms. *Id.* Similarly, employers revised their employment agreements and informed employees that acceptance of the new agreement was a condition of continued employment. *Id.* Even though these contracts dealt with express bans on class arbitration, the underlying argument against such bans is that they prevent the vindication of claimants' rights. *Id.*; see also Baker, *supra* note 29, at 366 (discussing class-action waivers effect on consumers). Baker's article explores emerging case law in the area of class arbitration and clause construction. *Id.* at 335-36. One emerging issue of importance is the consideration that corporations with superior bargaining power could essentially cheat consumers out of small sums of money by avoiding class arbitration. *Id.* at 366 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

⁵⁵ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (*Stolt-Nielsen III*), 130 S. Ct. 1758, 1776 n.10 (2010) (declining to provide guidance on contractual basis necessary to demonstrate parties agreed to class arbitration). Justice Alito exclaimed that "[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.*; see also *Stolt-Nielsen III*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting) ("[T]he Court does not insist on express consent to class arbitration. Class arbitration may be ordered if 'there is a contractual basis for concluding that the part[ies] agreed' 'to submit to class arbitration.'").

⁵⁶ See cases cited *supra* note 55 and accompanying text (explaining Court's failure to provide guidance on the issue).

⁵⁷ See *supra* note 55 and accompanying text, text accompanying note 56 (discussing Court's vague affirmative authority requirement).

⁵⁸ See *Stolt-Nielsen III*, 130 S. Ct. at 1775 (deciding class arbitration may not be inferred because parties' calculated risks change).

to present disputes that would otherwise be too costly for an individual or where the amount of individual recovery is minimal.⁵⁹ Such arbitration plays an important role in our legal system by providing claimants with the incentive to arbitrate their disputes and seek a legal right to relief.⁶⁰ Importantly, big corporations generally shy away from class arbitration and may take steps to alter their contracts so that they are silent on the class arbitration issue.⁶¹ Unfortunately, the *Stolt-Nielsen* decision implicitly creates a loophole for corporations because if the agreement is silent on the issue of class arbitration, then the presiding arbitration panel will be forced to conclude that class arbitration is not within the scope of the parties' agreement.⁶²

In *Stolt-Nielsen v. AnimalFeeds*, the Supreme Court considered whether class arbitration could be imposed on parties when the arbitration agreement is silent on the issue. The Court held that arbitrators could not impose class arbitration because it exceeded the scope of their powers. In doing so, the Court departed from nearly a decade's jurisprudence favoring the resolution of procedural issues by arbitrators. Arbitrators' decision-making authority is substantially diminished as a result. Moreover, the decision implicitly provides businesses with the upper hand because employers have the power to draft silent agreements, while potential claimants, such as consumers or employees, will be less likely to bring forward legally viable claims.

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⁵⁹ See *supra* note 43 (describing dissent's argument in favor of utilizing class arbitration).

⁶⁰ See generally Quarles, *supra* note 43, at 480 (illustrating legal importance of class actions).

⁶¹ See Quarles, *supra* note 43, at 476 (recognizing class arbitration decisions may be a "poison pill" for businesses). Quarles notes that class arbitration is riskier for businesses because they cannot appeal a class award and the size of the potential award increases in a class proceeding. *Id.*; see also *supra* note 54 and accompanying text (describing trend with businesses to expressly ban class arbitration). McGuire and Roth note that outright bans on class arbitration have been successfully challenged because they are unconscionable and prevent claimants from vindicating their rights. McGuire and Roth, *supra* note 2, at 17-18.

⁶² See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (Stolt-Nielsen III)*, 130 S. Ct. 1758 1775-76 (2010) (holding class arbitration may not be inferred or imposed if agreement is silent); see also *Rollins, Inc. v. Garrett*, 176 F. App'x 968, 969 (11th Cir. Apr. 19, 2006) (holding that silence should not be interpreted as precluding class action because it is unconscionable). The Court of Appeals for the Eleventh Circuit noted that interpreting a silent contract as precluding class action would be unconscionable under state law because doing so "'preclude[s] the possibility that a group of . . . customers might join together to seek relief that would be impractical for any of them to obtain alone.'" *Id.* (quoting *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999)).