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Litigating Arbitration Agreements: Recent United States Supreme Court Decisions Provide Guidance to Employers Looking to Avoid Court

Despite entering into arbitration agreements with their employees, employers all too often find themselves in court adverse to the very employees who have signed an arbitration agreement. The U.S. Supreme Court recently issued three arbitration decisions that have important implications for employers seeking to avoid the inside of a courtroom. First, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court issued an employer-friendly decision that prohibits class action arbitration, unless the parties specifically provide for and consent to class action proceedings in their arbitration agreement. This decision could potentially halt employees, who are subject to an arbitration agreement, from bringing or joining class actions in court.

The other two cases, *Rent-A-Center West v. Jackson* and *Granite Rock Co. v. International Brotherhood of Teamsters*, addressed whether it is the court or an arbitrator's role to decide enforceability challenges to an arbitration agreement. *Rent-A-Center* held that arbitrators are the proper decision-makers of unconscionability challenges, unless the party asserting unconscionability specifically challenges the "delegation provision" granting the arbitrator authority to hear the case. By contrast, in *Granite Rock Co.,* the Supreme Court concluded that courts, rather than arbitrators, are the proper decision makers when a party challenges the formation of the contract containing the agreement to arbitrate.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

News flash for employers: *silence may be golden* when it comes to arbitration agreements that fail to mention class action arbitration. This past April, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the United States Supreme Court issued a business-friendly opinion barring class action arbitration for agreements silent on the issue of class arbitration and further cautioned arbitrators that class arbitration is not available without the parties' express consent.

Stolt-Nielsen—a global shipping conglomerate—is comprised of companies that charter space in its vessels to customers such as AnimalFeeds, which entered into a contract with Stolt-Nielsen for the shipment of its goods. The standard form contract that Stolt-Nielsen and AnimalFeeds (the "Parties") executed contained an arbitration clause silent on the issue of class actions.

AnimalFeeds brought a class action antitrust suit on behalf of purchasers of parcel tanker transportation purchasers against Stolt-Nielsen and alleged price-fixing. Under the terms of their contract, the Parties agreed to arbitrate the dispute; however, they did not agree on whether their arbitration agreement allowed for class arbitration. Thus, the Parties submitted the question of whether their contract allowed for class arbitration to a panel of arbitrators. The arbitration panel concluded that class arbitration was permitted, but the District Court vacated the award. On appeal, the Second Circuit reversed the District Court's decision, and the U.S. Supreme Court agreed to hear the case.

The High Court determined that the arbitrators' decision to permit class arbitration constituted a "manifest disregard" of law because the Parties' arbitration agreement was silent on the issue of class actions. In the Court's view, imposing class arbitration on parties who have not contracted for, or otherwise agreed to, arbitration violates the Federal Arbitration Act's (the "FAA") primary purpose of ensuring that "private agreements to arbitrate are enforced according to their terms."

The Court also chipped away at the broad authority typically granted to arbitrators. The Court made clear that arbitrators do not have the common law court's authority to rely on public policy and develop the best rule for each situation. Rather, the task of arbitrators is to "identify the rule of law that governs" in order to interpret the Parties' agreement. Applying this rule, the Court reasoned that the arbitrators' role was to identify and apply the applicable rule from the FAA, maritime, and state law; the arbitrators could not use public policy justifications to force class arbitration on Stolt-Nielsen.

The Supreme Court's decision is favorable for employers seeking to steer clear of class actions and could potentially halt class actions against employers on two fronts: (1) preventing employees with mandatory arbitration clauses from bringing or joining class actions against employers in court; and (2) preventing employees with mandatory arbitration clauses—that also withhold the employer's consent to class arbitration—from bringing class actions against employers in arbitration. Therefore, employers hoping to avoid class actions should review their arbitration agreements to ensure that they are silent on, or expressly withhold consent to, class arbitration and are also broad enough to cover any disputes that might arise out of their relationship with their employees.

Nevertheless, the full ramifications of *Stolt-Nielsen* are yet to be known, and complete employer immunity from class actions is not guaranteed. The dissent in *Stolt-Nielsen* attempted to limit the majority's holding to sophisticated "repeat parties" rather than employment and consumer contracts. Thus, courts looking to give employees an avenue to pursue class actions will likely rely on the dissent's limitation or, alternatively, will find that limiting class arbitration necessarily opens up the possibility of class actions in the courts.

Rent-A-Center West v. Jackson

In late June 2010, the Supreme Court issued another employer-friendly arbitration decision in *Rent-A-Center West v. Jackson*. Jackson filed an employment discrimination suit against his former employer, Rent-A-Center, in federal district court. Rent-A-Center filed a motion to dismiss or stay court proceedings and compel arbitration based on the arbitration agreement Jackson had signed as a condition of his employment. That agreement required Jackson and Rent-A-Center to arbitrate all future disputes and also contained a "delegation provision" which provided:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

Jackson opposed Rent-A-Center's motion and argued that the arbitration agreement was unconscionable and that the issue of unconscionability must be decided by a court rather than an arbitrator. The district court granted Rent-A-Center's motion, but the Ninth Circuit reversed; the Supreme Court then decided to hear the case.

The Supreme Court held (5-4) that, under the Federal Arbitration Act, *arbitrators* decide challenges to the enforceability of an arbitration agreement—as a whole—that are based on unconscionability. The Court, however, articulated one exception to this rule. Courts, rather than arbitrators, decide specific challenges to the unconscionably of an arbitration agreement's "delegation provision" (giving the arbitrator authority to determine the enforceability of the agreement).

The High Court reasoned that Jackson did not specifically challenge the delegation provision and, thus, treated Jackson's challenge to the unconscionablity of the arbitration agreement as a challenge to the whole contract. Accordingly, the Court determined that the arbitrator, rather than the courts, should decide the unconscionablity of the arbitration agreement.

The take away from *Rent-A-Center* is that employers should review and revise their arbitration agreements to ensure that they contain a "delegation provision" specifying that the arbitrator decides enforceability questions. While employees can specifically challenge a "delegation provision" as unconscionable, employees will have an uphill battle demonstrating that delegating decision-making powers to arbitrators—who are usually viewed as unbiased and professional—is unconscionable.

Granite Rock Company v. International Brotherhood of Teamsters

In another recent Supreme Court opinion, Granite Rock, the employer, sued its local union and the parent international union in federal district court, seeking strike-related damages for the union's alleged breach of contract and asking for an injunction against the ongoing strike because it was an arbitratible grievance under the Parties' new collective bargaining agreement (CBA).

Whether the Parties had actually entered into the new CBA was hotly contested. After the old CBA expired, but before a new CBA—which the Parties had been negotiating—was entered into, the local union went on strike. After the strike, Granite Rock argued that the Parties had entered into a new CBA, which contained a no-strike clause. While the union denied that the new CBA had actually been entered into, it asked the court to send the entire dispute to arbitration based on the arbitration provision in the new CBA.

The U.S. Court of Appeals for the Ninth Circuit ruled that the local union had the right to compel arbitration even though it denied that the Parties entered into the new CBA. Among other things, the Ninth Circuit explained that it would be unfair for Granite Rock to seek to enforce the new CBA and, at the same time, ignore its arbitration provision.

In a decision that broke the Supreme Court's recent pro-arbitration trend, the *Granite Rock* Court reversed the Ninth Circuit and sided with Granite Rock—it was the court's job, rather than the arbitrator's, to decide whether the Parties had entered into the new CBA (and thus agreed to arbitrate). Despite recognizing that federal policy favors arbitration, the Supreme Court emphasized that arbitration is a matter of consent—"a court may submit to arbitration only those disputes. . .that the [P]arties have agreed to submit."

After *Granite Rock Co.*, employers must be prepared to go to court when contract-formation (and whether a contract actually exists) is at issue. While this principle benefitted the employer in this case, the more likely scenario is that employees will use this case to challenge the existence of an underlying contract in court.

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