Supreme Court Finds Arbitration Agreement Does Not Allow for Class Arbitration

Many companies use pre-dispute arbitration agreements to protect themselves from the public and protracted process of litigation and the risk of runaway juries. Some arbitration agreements go a step farther and include class action waivers. We recently wrote an article on these waivers in the American Bar Association's In-House Litigator publication (http://www.millermartin.com/images/uploads/library/BHarveyLitigatorArticle.pdf). Courts have not uniformly enforced class action waivers and generally have focused on whether waivers in effect act as exculpatory clauses. In other words, if class arbitration is unavailable, will unlawful activity go unchecked because individual claims would not be feasible or effective.

The question of express class action waivers still has not reached the U.S. Supreme Court. On April, 27, 2010, however, the Court, in a 4-3 opinion, ruled that an arbitration agreement did not allow for class arbitration even though the agreement did not include a class action waiver or otherwise address the subject. The case, Stolt-Nielsen S.A. v. AnimalFeeds International Corp., No. 08-1198, 559 U.S. ____ (2010), involved a form arbitration agreement between large maritime companies and their customers. The customers, all of whom were parties to similar agreements, sought to bring anti-trust price-fixing claims on a class basis.

Several aspects of the case underscore its potential impact. First, the parties agreed that the claims were subject to mandatory arbitration. Thus, the class action device now is completely off the table, whether in court or in arbitration. Next, the Court ruled that the arbitration agreement did not allow for class arbitration despite its apparent breadth, covering "[a]ny dispute arising from the making, performance or termination of" the parties' contract. (Op. at 2). Finally, the claimants argued that for the vast majority of potential class members "it would cost … more to litigate the matter on an individual basis than they could recover." (Dissent at 2 n. 3). Thus, the Court could have found that a class waiver in effect would act as an exculpatory clause. Indeed, the U.S. Court of Appeals for the Second Circuit in In re American Express Merchants Litig., 554 F.3d 300 (2d Cir. 2009), ruled that an express class waiver in an arbitration agreement was unenforceable because it was not feasible for the claimants to bring their antitrust claims on an individual basis.

How did the Court arrive at such a favorable ruling for companies seeking to avoid class arbitration? First, the Court stressed that under the Federal Arbitration Act ("FAA") "arbitration 'is a matter of consent, not coercion.'" (Op. at p. 17) (citation omitted). Next, the Court observed that in interpreting arbitration agreements, "as with any other contract, the parties' intentions control." Id. at 18. The Court further held that "parties may specify with whom they choose to arbitrate their disputes." Id. at 19 (emphasis in original). The Court then concluded that "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Id. at 20 (emphasis in original). Critically, "the parties concurred that they had reach 'no agreement'" on the issue of class arbitration. Id.

Without any express agreement, the Court ruled that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume … that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." (Op. at 23). Fundamental changes concomitant with class arbitration include multiplying the number of disputes and parties involved, undoing the presumption of privacy

and confidentiality, and greatly increasing the stakes, despite the limited nature of judicial review of arbitration decisions. Id. at 22-23. The Court ruled that, beyond an explicit agreement, it had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." Id. at 23 n. 10.

Given the broad rulings of Stolt-Nielson, what are its limitations? Hoping to contain the decision's impact, the dissent stressed that "the Court does not insist on express consent to class arbitration." (Dissent at 12-13). The dissent also highlighted the Court's findings that "the parties [here] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party" in the industry. Id. at 13. Thus, the dissent reasoned that "the Court apparently spares from its affirmative-authorization requirements contracts of adhesion presented on a take-it-or-leave it basis." Id. The dissent clearly hopes for more openness to class arbitration in take-it-or-leave-it commercial contracts (e.g., form credit card contracts) or employment contracts. In the employment context, for example, Courts of Appeals from the Fourth, Fifth, and Eleventh Circuits have upheld express class arbitration waivers, while Courts of Appeals from the First and Ninth Circuits have rejected such clauses.

While some battles remain to be fought on another day, Stolt-Neilsen gave companies an important victory. The case could provide an additional reason for companies to consider mandatory arbitration agreements. For those that have arbitration agreements, we still would recommend express class action waivers. Finally, stay tuned as proposed legislation in Congress could prohibit pre-dispute arbitration agreements in the commercial and employment settings.

By Brad Harvey and Jen Klos. For more information on Miller & Martin's Class & Collective Actions Practice Group, please click here to contact Brad Harvey.

ATLANTA

1170 Peachtree Street,
N.E., Suite 800
Atlanta, GA 30309-7706

CHATTANOOGA

832 Georgia Avenue,
Suite 1000,
Volunteer Building
Chattanooga, TN 37402-2289

NASHVILLE

150 Fourth Avenue North,
Suite 1200, One Nashville Place
Nashville, TN 37219