TWO NEW U.S. SUPREME COURT DECISIONS WILL LIKELY IMPACT COMPANIES DRAFTING OF ARBITRATION PROVISIONS

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Two recent United States Supreme Court decisions present significant new developments on the scope and interpretation of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., and will likely influence the manner in which companies draft future arbitration provisions.

- In *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 130 S.Ct. 1758 (2010), the Court held that the FAA prohibited arbitrators from imposing class arbitration in the absence of an agreement between the parties authorizing as such.
- In the more recent decision, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), the Supreme Court held that, where an arbitration agreement expressly delegates the decision of the arbitration agreement's enforceability to an arbitrator, a court may not intercede unless the claim of unconscionability is directed to that particular provision of the arbitration agreement.

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

In *Stolt-Nielsen*, the parties utilized a standard maritime charter party agreement that provided that all disputes would be resolved through arbitration. Following a 2003 U.S. Department of Justice criminal investigation which reveled that the shipper, Stolt-Nielsen and others ("Stolt-Nielsen"), were engaging in an illegal price-fixing conspiracy, AnimalFeeds brought a putative class action in a federal district court asserting antitrust claims. The district court held that AnimalFeeds's claims were not subject to the arbitration agreement. The Second Circuit Court of Appeals disagreed, holding that AnimalFeeds must bring its antitrust claims in arbitration.

AnimalFeeds thereafter served a class arbitration demand, designating New York as the situs for the arbitration. The arbitration agreement, however, was silent as to whether the arbitration could proceed on behalf of or against a class. The parties then entered into a supplemental agreement providing that the question of class arbitration be submitted to a three arbitrator panel, in accordance with Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations. After hearing argument and evidence from the parties, the panel ruled that AnimalFeeds could proceed with a class arbitration as a matter of public policy.

Unsatisfied, Stolt-Nielsen petitioned a federal district court to vacate the panel's award under Section 10(a)(4) of the FAA. The district court vacated the arbitral award, concluding that the panel's decision was in "manifest disregard" of the law. The Second Circuit Court of Appeals once again reversed, and Stolt-Nielsen petitioned the U.S. Supreme Court for certiorari review.

Writing for a majority of the Court, Justice Alito began by noting that under Section 10(a)(4) of the FAA, the Court's task was to decide whether the arbitration panel exceeded its powers by imposing its own public policy considerations regarding class arbitration rather than simply interpreting a contract under the applicable law. Because the arbitration panel's decision was policy driven, the Court concluded that the arbitrators exceeded their powers and, pursuant to Section 10(a)(4) of the FAA, the award should be vacated.

The Court reached this conclusion by first noting that arbitration is a creature of contract. Thus, according to the Court, it is imperative that both courts and arbitrators not lose sight of their principal directive – "to give effect to the intent of the parties." Class arbitration, unlike other "procedural questions, which may grow out of the parties' dispute," may not be inferred solely from the fact that the parties agreed to arbitrate. The Court so found because class arbitration fundamentally changes the nature of the parties' arbitration. Accordingly, the Court held that under the FAA an arbitrator couldn't compel class arbitration in the absence of some contractual basis for concluding that the parties have so consented.

Rent-A-Center West v. Jackson

Rent-A-Center arose from an employment discrimination suit. The employee, Antonio Jackson, had executed a separate agreement with his employer, Rent-A-Center, wherein he agreed to arbitrate any and all claims, (the "Arbitration Agreement"), including any claim that the Arbitration Agreement was void or voidable. Jackson nonetheless filed his employment discrimination suit in a Nevada federal district court. Rent-A-Center responded by filing a motion to compel arbitration pursuant to the FAA. Jackson opposed the motion by claiming that the Arbitration Agreement, as a whole, was unconscionable under Nevada law.

The federal district court granted Rent-A-Center's motion, concluding that the Arbitration Agreement clearly delegated the decision of whether the Arbitration Agreement was enforceable to the arbitrator. The Ninth Circuit Court of Appeals reversed on the ground that the question of who (the arbitrator or the court) had authority to decide Jackson's claim that the Arbitration Agreement was unconscionable was for the court, not the arbitrator.

On Rent-A-Center's petition for writ of certiorari review, the U.S. Supreme Court held that because Jackson challenged the enforceability of the Arbitration Agreement as whole, the arbitrator (and not the court) should have decided Jackson's claims. The doctrine of severability, as announced in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), required that Jackson challenge as unconscionable the specific clause delegating the decision of the Arbitration Agreement's validity to the arbitrator for the court to have decided the issue. Jackson, however, challenged the validity of the Arbitration Agreement as whole. As such, the Court was required to treat the Arbitration Agreement as valid and enforce its terms.

Justice Stevens wrote a spirited dissent that was joined by Justices Ginsburg, Breyer, and Sotomayor. The dissent argued that the majority 's decision was flawed because under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and its progeny, the relevant inquiry was whether the party raised "a good-faith challenge to the arbitration agreement itself." It did not matter that the Arbitration Agreement was a stand-alone agreement, rather than

embedded in the employment contract. Consequently, the dissent concluded that under the majority's holding, a claim to the validity of the entire arbitration agreement would go to the arbitrator, rather than the court, unless the party challenges a particular provision within the arbitration agreement that delegates such a claim to the arbitrator.