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Stolt-Nielsen SA v AnimalFeeds Int'l Corp,[1] which overturned the decision of experienced arbitrators authorising class-wide arbitration of alleged price fixing by international shippers, signals the US Supreme Court's intention to limit the power of arbitrators to decide their own jurisdiction ("competence-competence") and the scope (or "application") of disputes subject to arbitration.

1. SOMETHING FISHY ABOUT PARCEL TANKER PRICES

In 2003, the US Department of Justice (DOJ) disclosed a criminal investigation into price fixing by parcel tankers, the shipping companies that charter separate compartments of vessels to customers for the transport of liquids. AnimalFeeds International Corp ("AnimalFeeds"), a parcel tanker customer, ships raw ingredients such as fish oil to animal-feed producers worldwide. AnimalFeeds ships all of its goods pursuant to a standard charterparty contract with an arbitration clause that is silent as to the issue of classwide arbitration.[2] In response to the DOJ's announcement, AnimalFeeds launched a putative class action lawsuit in federal court in Pennsylvania alleging antitrust claims against ocean carriers, including Stolt-Nielsen SA.

Subsequently, other charterers—who also used charterparty contracts with arbitration clauses—filed similar lawsuits in other US jurisdictions. In a case pending in Connecticut, the federal trial court ruled that that the claims were not subject to arbitration under the applicable arbitration clause, but the federal court of appeals for the Second Circuit reversed this ruling.[3] While the appeal was pending, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits, including AnimalFeeds' action, for adjudication in the District of Connecticut.[4]

2. NEW YORK ARBITRATION PANEL'S ANALYSIS OF THE SOUNDS OF SILENCE

In 2005, consistent with the decision of the Second Circuit, AnimalFeeds commenced American Arbitration Association (AAA) class-action arbitration in New York. The parties entered into a supplemental agreement providing for the question of classwide arbitration to be submitted to a panel of three arbitrators who were directed to follow special class action arbitration rules developed by the AAA shortly after the Supreme Court issued its ruling on *Green Tree Financial*, in which a plurality of the court ruled that the arbitrator should decide whether a contract that was otherwise silent permits classwide arbitration.[5]

[1] *Stolt-Nielsen SA v AnimalFeeds Int'l Corp*, 559 U.S., 2010 WL 1655826 (April 27, 2010).

[2] The arbitration clause provides in relevant part that: "Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York." The provision allows the owner and charterer to appoint a panel of arbitrators experienced in the shipping business and provides that arbitration will be conducted in conformity with the provisions and procedures of the US Federal Arbitration Act 9 USC ss.1 et seq. (FAA).

[3] *JLM Indus. Inc v Stolt-Nielsen SA*, 387 F.3d 163, 183 (2004).

[4] *Parcel Tanker Shipping Servs. Antitrust Litig., Re*, 296 F. Supp.2d 1370 at 1371 and fn.1 (JPML 2003).

[5] *Green Tree Fin. Corp v Bazzle*, 539 U.S. 444 (2003). As the arbitrator had already completed classwide arbitration and awarded substantial damages, and the South Carolina Supreme Court had ruled on appeal that state law authorised class arbitration, the arbitrator's ruling on this topic was never in serious doubt. Stevens J., who filed a concurrence

After hearing argument and evidence, including expert testimony, the AnimalFeeds arbitration panel issued a partial award ruling that the arbitration clause authorised class action arbitration. As the arbitration provision was silent on the subject of classwide arbitration, and maritime law offered almost no guidance, the panel relied on post-*Green Tree* decisions that allowed for class action arbitration in a "wide variety of settings".

A federal trial court annulled the panel's partial award for failing to apply the customs and usage of maritime law.[6] But the Second Circuit reversed this decision, holding that there was insufficient basis to annul the partial award under the FAA because the arbitration panel had not acted in "manifest disregard" of federal maritime law or New York law.[7] In 2009, after six years of legal proceedings, the US Supreme Court granted certiorari to resolve the threshold question of whether the charterparty arbitration provision authorised classwide arbitration.

3. MAJORITY DECISION: *ANIMALFEEDS* LOST ITS WAY IN *GREEN TREE*

The majority opinion delivered by Alito J. quickly concluded that the arbitration panel failed to determine whether the FAA, maritime law or New York law provided the rule of decision for construing the "silent" arbitration provision and instead, acting like a "common-law court", tried to impose its own "conception of sound [public] policy".

Next, the court announced that the opinions in *Green Tree* appeared to have "baffled the parties" in two respects. First, the court raised doubt as to the widely held understanding—as reflected in the rules promulgated by the AAA following the ruling in *Green Tree*—that *Green Tree* directs an arbitrator (not a court) to decide whether a contract permits classwide arbitration. The majority pointedly observed that "only the plurality decided that question" before declining to revisit the question because the "parties' supplemental agreement expressly assigned this issue to the arbitration panel". But although the Supreme Court may have shown the glint of the axe, for the moment this element of *Green Tree* stands; the arbitrator not the court still decides if the arbitration clause permits classwide arbitration.

Secondly, declaring that the parties "misunderstood" *Green Tree* in another respect, the court quashed any suggestion that the *Green Tree* decision mandated that the arbitration clause contained "clear language that forbids class action arbitration in order to bar a class action". Instead, the majority explained, the earlier decision "left that question open, and we turn to it now".

Underscoring the "consensual nature of private dispute resolution", the majority stated that a party may not be compelled under the FAA to submit to classwide arbitration unless there is a contractual basis for concluding that the party agreed to do so. The AnimalFeeds panel's reliance on a broad arbitration provision that did not exclude class arbitration was "fundamentally at war" with the "foundational FAA principle that arbitration is a matter of consent". Further, although a class action may merely supply a procedural mechanism, applied to arbitration it imposes such "fundamental changes" to the judicial process that it can no longer be presumed that silence constitutes agreement.

to the plurality opinion in *Green Tree*, recommended under the circumstances that the US Supreme Court simply affirm the decision of the South Carolina Supreme Court rather than remand for the arbitrator's almost foregone determination.

[6] *Stolt-Nielsen SA v Animalfeeds Int'l Corp* 435 F. Supp.2d 382 at 384–385 (S.D.N.Y. 2006).

[7] *Stolt-Nielsen SA v Animalfeeds Int'l Corp* 548 F.3d 85 at 97–99 (2d Cir. 2008).

4. DISSENT: TOO EARLY FOR FRUITION; *GREEN TREE* ARBITRABILITY ISSUES UNRIPE FOR REVIEW

The three dissenting justices (Sotomayor J. took no part in the decision) sought to preserve what remained of *Green Tree*.

First, as a procedural matter, they argued that appellate review of the arbitration panel's interlocutory ruling violated the final-judgment rule.

Secondly, the FAA s.10(a)[8] severely limited the scope of judicial review even when the petitioner established "serious error". Here, according to the dissent, the FAA precluded review because the AnimalFeeds panel explicitly determined that classwide arbitration was consistent with New York law and federal maritime law. The arbitration panel had also considered the broad language of the arbitration provision ("any dispute"). The dissent cited another recent decision stating that class action rules "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed".[9] Encapsulating the majority, the dissent concluded:

> "[T]he Court apparently demands contractual language one can read as affirmatively authorising class arbitration. … The breadth of the arbitration clause, and the absence of any provision waiving or banning class action proceedings, will not do."

The dissent sharply criticised this more stringent requirement because requiring affirmative language authorising classwide arbitration would drastically reduce the use of arbitration to vindicate claims for small sums. In an effort to limit the majority's holding, the dissent identified two "stopping points" to the majority opinion. First, the dissent argued that even under the majority's view, a "contractual basis" for compelling classwide arbitration may involve something less than "express consent". Secondly, the dissent seized on language from the majority opinion to suggest that the holding only applied to contracts between sophisticated entities and not to consumer adhesion contracts.[10]

5 *ANIMALFEEDS* REAFFIRMS COURTS ARE KING OF THE JUNGLE

In *Green Tree* a plurality of the US Supreme Court opened the door for a small expansion of the competence-competence principle and dramatically expanded the scope of disputes subject to arbitration by implying a default rule that silence constituted agreement to classwide arbitration. *AnimalFeeds* reverted to the traditional view in the United States on competence-competence and emphasised the role of the courts to ensure that no party "be required to submit to arbitration any dispute which he has not agreed so to submit".[11]

[8] FAA 9 USC s10(a).

[9] *Shady Grove Orthopedic Assocs P.A. v Allstate Ins. Co* 559 U.S., 130 S.Ct 1431, 1443 (2010) (plurality opinion).

[10] The South Carolina Supreme Court once observed: "If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement": *Bazzle v Green Tree Fin. Corp*, 351 S.C. 244, 266, 569 S.E.2d 349 at 366 (2002).

[11] *Steelworkers v Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).