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## Supreme Court Torpedoes Class Arbitration Under Silent Clause

BY FARROKH JHABVALA

In a 5-3 decision, the U.S. Supreme Court struck a major blow against class action arbitrations where the arbitration clause is “silent” as to whether the parties intended to allow class arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court reversed the Second Circuit Court of Appeals and held that “a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” [Emphasis in the original.] Because the parties in the case stipulated that the arbitration provision was silent, and they had reached “no agreement” on that issue, the Court concluded, “it follows that the parties cannot be compelled to submit their dispute to class arbitration.” The decision does not firmly shut the door on all class arbitrations under “silent” clauses, but it sets a very high bar for parties seeking class arbitrations under such clauses.



*Arbitration matter of consent, not silence*

The decision is based on the long-standing FAA law that “arbitration is a matter of consent, not coercion,” that “private agreements to arbitrate are enforced according to their terms,” and that arbitrators draw their powers from the parties’ agreement and must “give effect to the contractual rights and expectations of the parties.” In particular, the Court explained that parties “may specify *with whom* they choose to arbitrate their disputes.” [Emphasis in original.] The Court concluded from these fundamental principles that the arbitration panel failed to follow the relevant law, “imposed its own policy choice” upon the parties, and “imposed class arbitration even though the parties concurred that they had reached ‘no agreement’ on the issue.” Thus, the “panel’s conclusion [was] fundamentally at war with the foundational FAA principle that arbitration is a matter of consent”, and the panel “exceeded its powers.” In support of its decision, the Court analyzed the benefits of bilateral arbitration – lower costs, greater efficiency and speed, the ability to choose expert arbitrators, and confidentiality – which would be lost in a class arbitration, and concluded that class arbitration “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”

The decision also states that *Green Tree Financial Corp. v. Bazzle*, which has been used to justify class arbitrations under silent clauses, “did not establish the rule to be applied in deciding whether class arbitration is permitted.” Plainly, that rule has now been established by *Stolt-Nielsen*.