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Dallas Business Journal Comment

Arbitration agreements: Choose words carefully

Because arbitration is typically less expensive and quicker than traditional litigation, arbitration provisions have become a standard part of most commercial and employment contracts.

Yet many parties do not pay close attention to the wording of the arbitration provisions they use. Arbitration agreements must be drafted with care because, as demonstrated by two recent Supreme Court decisions, the precise wording of the provisions will have a significant impact on the scope of their enforceability. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* and in *Rent-A-Center, West Inc. v. Antonio Jackson*, the Supreme Court's message was clear: Choose your words carefully, because arbitration agreements will be interpreted exactly how they are written.

Stolt-Nielsen is a shipping company that operates vessels with individually chartered compartments. Its customer, *AnimalFeeds*, claimed that *Stolt-Nielsen* had engaged in a price-fixing conspiracy. To obtain more legal clout, *AnimalFeeds* sought to have the case proceed as a class action, which is a significant benefit to any party lacking the means or incentive to bring a lawsuit individually, or seeking to exert more power over its opponent. The parties' arbitration agreement did not address whether a dispute could move forward as a class action in arbitration. *AnimalFeeds*



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contended it would be unconscionable to interpret the "silent" arbitration agreement as a decision to forego class actions.

The Supreme Court disagreed, and ruled in favor of *Stolt-Nielsen*, noting that class claims may not be brought into arbitration unless the contracting parties have specifically agreed to do so. The Supreme Court found no basis to presume that parties agreeing to arbitrate one-on-one have also agreed to arbitrate class disputes.

This is good news for employers because arbitration is binding and the standards to overturn are onerous.

An employment discrimination suit between *Rent-A-Center* and a former employee also reinforces the legal interpretation of arbitration agreements as written. In that case, the employment agreement required arbitration of all disputes, including disagreements relating to the validity of the agreement itself. *Jackson* sought to have a court determine the agreement's enforceability. The Supreme

Court, once again, affirmed that the scope of an arbitration agreement is a matter of precisely what the parties have consented to.

The agreement gave an arbitrator the authority to resolve all disputes, including disputes regarding the validity of the agreement. The Supreme Court upheld it as written, and gave the arbitrator the authority to decide who should hear the underlying dispute. Courts do not assume that parties to an arbitration contract agree that the enforceability of the arbitration agreement will be decided by an arbitrator. To the contrary, enforceability is often viewed as a "gateway" issue which a judge must decide. The agreement in *Rent-A-Center*, however, included a provision specifically giving the arbitrator the authority to decide this gateway issue.

For companies favoring arbitration, *Stolt-Nielsen* and *Rent-A-Center* give valuable insight into the need for clear and precise arbitration provisions. All agreements should be reviewed and carefully revised to ensure that the contracts meet the company's specific objectives. With arbitration agreements, words matter. And in the end, the right words will speak to the outcomes you want to hear.

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