No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE SOCIETY OF MARITIME ARBITRATORS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

RAYMOND A. CONNELL
LAW OFFICE OF RAYMOND A. CONNELL
132 NASSAU STREET, SUITE 900
NEW YORK, NY 10038
(212) 233-0440

Counsel for Amicus Curiae the Society of Maritime Arbitrators, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Does the fact that an arbitration clause in a contract between two parties is silent about class arbitration imply that the parties have agreed to subject themselves to such proceedings?

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INTEREST OF THE *AMICUS CURIAE*

New York City has, since the early parts of the past century, been a central venue for maritime arbitrations and it is still one of the major centers for dispute resolution of maritime contracts.[1]

In order to promote sound and ethical standards for maritime arbitrations, a group of individuals, active as arbitrators, created the Society of Maritime Arbitrators ("SMA") in 1963 and today the majority of shipping-related arbitrations are decided by members of the SMA under the auspices of the SMA Rules. The SMA is a non-profit, professional organization with a membership of approximately 90 experienced shipping professionals from all walks of the industry. It maintains and publishes the SMA Arbitration Rules, the SMA Rules for Shortened Arbitration Procedure, the SMA Rules for Conciliation, Rules for Mediation, Rules for Recreational and Small Commercial Vessel Salvage Arbitration, and the SMA Code of Ethics. A particular feature of SMA arbitration is that unless the parties to the dispute agree not to, the awards rendered pursuant to the SMA Rules are published by the SMA Award Service to subscribers and also made available on Westlaw and Lexis/Nexis on the Internet. To date, more than 4,000 awards have been published. The SMA further

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part, and no person other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. Additionally, the parties have consented to the filing of this brief, and their consent letters are on file with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief.

publishes "The Arbitrator," a newsletter with more than 1,500 readers worldwide. However, perhaps one of the most significant functions of the SMA is to organize workshops and seminars throughout the year in addition to hosting a monthly, open luncheon for members and shipping professionals featuring presentations on relevant topics.

The SMA does not administer or get involved in individual arbitrations conducted by its members or by non-member arbitrators in cases conducted under the SMA Rules. Appointments are personal and the members are free to handle and decide a case without any involvement by the SMA. However, as the leading organization in the United States dealing exclusively with maritime arbitration, the SMA is concerned that arbitration proceedings are conducted in accordance with rules and practices that are understood and recognized in the industry and that are not unduly ambiguous or unclear. The decision by the arbitration panel in the present case introduced a concept of class arbitration which was heretofore unknown in maritime arbitration. The SMA is concerned that the arbitration panel might have been misguided in its understanding of the law and supports Petitioners in their appeal to have this important legal issue clarified.

SUMMARY OF ARGUMENT

The underlying arbitration award in this case is the first where the class arbitration concept has been accepted in maritime arbitration in the United States, and the result was contrary to what has commonly been understood to be the position in the industry. Because of the truly international application of maritime contracts, and because arbitration is the preferred means of dispute resolution, it is of the utmost importance that the parties feel comfortable with the process. The panel's award in this case has created confusion with regard to the position under U.S. law, and the SMA supports

Petitioners' request for clarification as to whether class arbitrations are permitted under arbitration clauses that are silent on the matter.

ARGUMENT

I. Arbitration of Maritime Disputes

Arbitration is a time-honored concept for dispute resolution in maritime disputes and can be traced back to when the Phoenicians carried goods for Greek traders. The international nature of shipping and the particular rules, standards and terminology that have emerged in the business of transporting cargoes across the oceans lend themselves to commercial arbitration where the contractual parties refer their disputes to be decided by a peer. Efficiency, speed and finality in getting resolution to contract differences have always been valued by the shipping community and arbitration is still the preferred means of dispute resolution in maritime contracts.

II. Multi-Party Arbitrations

Maritime contracts are typically limited in time and space by the venture itself (to transport cargo or passengers from one port to another) and at the same time very fact-specific in that each contract is individually negotiated and agreed on the basis of the intended voyage. It is therefore rare that contractual disputes involve more than two parties. However, where a ship for example has been time chartered (sometimes multiple times) and voyage chartered by the (last) time charterer, a dispute may sometimes be germane to the two parties at the beginning and end of the charter party chain and thus have to be passed up or down the contract chain. Conscious of such scenarios and further bearing in mind the decision in *Gov't of U.K.* v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), which concluded that under the Federal

Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, express agreement between parties was required in order to consolidate arbitrations, the SMA specifically changed its Rules in 2003 to address this situation. A new section was added to the Rules to ensure that a right to consolidate arbitrations was preserved insofar as they "involve common questions of fact or law and/or arise in substantial part from the same maritime transactions or series of related transactions . . ." and further on the proviso that "all contracts incorporate SMA Rules."

III. The SMA and Class Arbitration

The question of potential class arbitrations under the SMA Rules has been brought up for discussion periodically, and the SMA Board of Governors has each time noted the total absence of a tradition for class arbitration in maritime disputes and has unanimously concluded that it generally sees no place for class arbitration in maritime disputes, except where the parties to contracts specifically have agreed to include this option and addressed the procedural implications in their arbitration clauses. It was therefore considered sufficiently implied in the SMA Rules that they did not apply to class action arbitrations so that no express statement to this effect was necessary.

Research has only brought up one award published by the SMA Award Service where "class arbitration" was referenced. *The LACERTA*, 2007 WL 5911099 (SMA No. 3983). The facts of the case were that a vessel was time chartered through a string of three separate time charters (from A to B and from B to C and from C to D). However, the charter party form was identical and contained the same arbitration clause calling for proceedings in accordance with the SMA Rules. A dispute arose under the time charter party between A and B, and arbitration proceedings started. The dispute did not continue down the chain of contracts, however. B specifically stated that it had no dispute with C

on the issue and no proceedings were commenced under that charter party or the charter party between C and D. Nevertheless, A (being the claimant in the arbitration) demanded consolidated arbitration with C and D, whom it believed had information essential to its dispute with B. B, C and D objected to any consolidation. In the majority's award, it rejected A's demand and, among the many reasons stated for doing so, the panel reasoned as follows: "Consolidation does not equate to the right of combining parties in subcharters to create the effect of a class action."

The recent Partial Final Clause Construction Award in the arbitration underlying *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), once again has brought the class arbitration issue on the agenda of the SMA Board of Governors. It was noted that the proceedings had been conducted in accordance with a specifically drafted arbitration agreement and also that the three arbitrators did not appear to have a maritime background. It was nevertheless concluded that it would seem prudent for the SMA to remove any doubt or ambiguity as to the role of any potential class arbitration for maritime disputes insofar as the SMA was concerned by adding a specific provision prohibiting such proceedings under the SMA Rules. To this end, Section 2 of the SMA Rules was amended by the following addition to the paragraph addressing consolidation of arbitrations: "However, claims on behalf of or against a class are prohibited from being submitted to arbitration under these Rules."

On this basis, the SMA concludes that it is clear that Respondent would not have been successful in bringing a class arbitration action under the current SMA Rules, but we are equally confident that the result would have been the same before the recent clarification of the SMA Rules.

As far as we are aware, the only actions where the class-action concept is recognized in shipping, is for Court-administered limitation proceedings following a maritime disaster. However, these are proceedings regulated by statutes contained in 46 U.S.C. §§ 30501-12.

CONCLUSION

By holding — contrary to what was widely understood to be acceptable in the maritime industry — that class arbitration proceedings are allowed under standard arbitration clauses widely employed in the maritime industry both in the United States and internationally, the arbitration panel's decision in the present case creates uncertainty and ambiguity, and the SMA as *amicus curiae* supports Petitioners' request for clarification.

Respectfully submitted.

RAYMOND A. CONNELL
LAW OFFICE OF RAYMOND A. CONNELL
132 NASSAU STREET, SUITE 900
NEW YORK, NY 10038
(212) 233-0440

Counsel for Amicus Curiae the Society of Maritime Arbitrators, Inc.

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