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"The shipping and commodity trades of the world are unusual in that they do not regard . . . arbitration with abhorrence. On the contrary, they regard it as a normal incident of commercial life—a civilised way of resolving the many differences of opinion which are bound to arise."

~Lord Donaldson of Lymington[1]

I. INTRODUCTION

On April 27, 2010, the United States Supreme Court decided a case that will have far-reaching implications for virtually all sectors within the arbitration industry, including the subject of this article—maritime arbitration.[2] The question presented in *Stolt-Nielsen v. AnimalFeeds International Corp.* dealt with class arbitration and whether its imposition on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act (FAA).[3]

The Court's primary focus and concern in deciding *Stolt-Nielsen* was with the broader issues of class arbitration, as well as more complicated interpretations of contract law and the FAA.[4] Although the parties to the case were privy to a maritime contract, this fact was more or less incidental to the Court's discussion and focus.[5] Indeed, some claim that even though

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1. Pando Compania Naviera S.A. v. Filmo, S.A.S., [1975] 1 Lloyd's Rep. 560 (Q.B.).
2. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).
3. *Id.* at 1766.
4. *Id.* at 1767-76.
5. *See id.*

the parties to the case were sophisticated maritime entities, "what [was] really at stake [was] the continued viability of class arbitration in consumer disputes."[6]

In contrast to the more generalized approach taken by the Court in deciding *Stolt-Nielsen*, this article will primarily examine the history and viability of class arbitration—and arbitration in general—in the far more narrow context of maritime and the admiralty. *Stolt-Nielsen* provides an excellent backdrop against which to explore the more maritime-specific aspects of the topic, an endeavor not often undertaken by the Court or legal scholars.[7]

Part II will briefly expound on the facts before the Court in *Stolt-Nielsen*. Part III will explore the rich and fabled history of maritime law and dispute resolution, and the benefits derived from submitting maritime disputes to arbitration rather than litigation. Part IV will focus briefly on the history of class arbitration and recent trends in the field. Part V will attempt to synthesize the various arguments made by the parties as to whether class arbitration should apply in maritime disputes regardless of contractual silence or express inclusion. Part VI will conclude the article by expounding on the Court's decision and what *Stolt-Nielsen* could mean for the maritime industry as well as for arbitration in general.

II. BRIEF FACTS

Stolt-Nielsen arose from disputes subject to international maritime arbitration agreements among multinational corporations involved in oceanic shipping.[8] Stolt-Nielsen, a foreign corporation operating parcel tankers carrying bulk chemical and other specialty liquids in individual tanks,[9] entered into bilateral shipping contracts with AnimalFeeds, a multinational

6. Stolt-Nielsen Oral Argument Analysis: Part I, http://loreclawfirm.com/blog/stolt-nielsen-oral-argument-analysis-part-i (Dec. 13, 2009, 08:39 EST). *See also* Posting of Anna Christensen to SCOTUSblog, http://www.scotusblog.com/2009/12/does-the-faa-permit-class-arbitration-when-the-arbitration-agreement-is-silent (Dec. 8, 2009, 15:52 EST) ("Given the ubiquitous use of arbitration agreements across a wide range of industries, the outcome of this case could have far-reaching effects.").

7. *See* William W. Park, *Private Disputes and the Public Good: Explaining Arbitration Law*, 20 AM. U. INT'L L. REV. 903, 906 (2005) ("[M]aritime arbitration . . . [is] . . . a richly variegated field that has been too often neglected in colloquia addressing international arbitration."). *See also* Fabrizio Marrella, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT'L L. REV. 1055, 1058 (2005) ("[D]espite the multi-secular existence of such an institution and its wide distribution in merchant trading, there has been limited scholarly review and investigation of maritime arbitration.").

8. *Stolt-Nielsen*, 130 S. Ct. at 1764-65.

9. *Id.* at 1764.

corporation.[10] The terms of these contracts, known in the maritime community as "charter parties," called for disputes to be committed to arbitration but were silent as to the applicability of class arbitration.[11]

Subsequently, AnimalFeeds accused Stolt-Nielsen of price-fixing and filed an antitrust suit.[12] The District Court held the claims were not arbitrable under the charter party, but the Second Circuit reversed and compelled arbitration.[13] In arbitration, AnimalFeeds filed a putative class action against Stolt-Nielsen, seeking to arbitrate the anti-trust claims "of all direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids" from Stolt-Nielsen.[14] Because the arbitration agreement was silent as to class arbitration, the arbitrators stayed the proceeding to allow the parties to seek judicial review.[15]

III. MARITIME ARBITRATION

A. A Brief History

Maritime commerce and trade is ancient, with some of the earliest records of maritime commerce dating back to 1500 B.C.[16] Maritime law also has a long and rich history,[17] which some characterize as being "as long as mankind"[18] itself. And for hundreds of years, the maritime industry has

10. *Id.*
11. *Id.* at 1764, 1766.
12. *Id.* at 1765.
13. *Id.*
14. *Id.*
15. *Id.* at 1766.
16. An example of such an ancient, rich, and vibrant history was depicted on "an Egyptian relic in the British Museum . . . and depicts a three-masted vessel owned by Queen Hapsheput, who just happens to have been the princess who rescued Moses from the bulrushes." *See* DAVID W. ROBERTSON, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 3 (2008) (citing JAMES WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 875-76 (1928)).
17. *See id.* ("[T]here is evidence for the existence of substantive maritime law at . . . circa 300 B.C.").
18. *See* James Allsop, *International Maritime Arbitration: Legal and Policy Issues* (Paper presented to Australian Maritime and Transport Arbitration Commission, Dec. 4, 2007), *available at* http://www.acica.org.au/downloads/International%20Maritime%20Arbitration%20Malmo%20and%20Sydney.pdf.

also used "alternate dispute resolution in one form or another, most notably arbitration."[19]

Maritime arbitration most commonly arises from disputes involving contracts for the carriage of goods, insurance, or shipping[20]—disputes much like the one that arose between the parties in *Stolt-Nielsen*.[21] According to the International Chamber of Shipping, "[a]round 90% of world trade is carried by the international shipping industry."[22] Moreover, there are nearly 50,000 merchant ships, registered in over 150 nations, "trading internationally, transporting every kind of cargo."[23] Historically, maritime commerce has "not [been] restricted to one country . . . ."[24]

It follows naturally, therefore, that disputes which arise from maritime activities almost always involve international contracts made between

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19. Charles L. Measter & Peter Skoufalos, *The Increasing Role of Mediation in Resolving Shipping Disputes*, 26 TUL. MAR. L.J. 515, 517 (2002). *See also* Expert Declaration of Bruce Harris at ¶ 2 [hereinafter Harris Expert] (on file with author) (Harris, the proposed arbitrator in *Stolt-Nielsen*, explains: "International maritime arbitration has been established for a very long time . . . ."); 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:147 (4th ed. 2001) ("Among long established and time honored uses of arbitration in the various spheres of activity in trade and commerce, few can compare with charter parties."); Marrella, *supra* note 7, at 1057 ("[M]aritime arbitration has ancient origins, and . . . maritime arbitration preceded international commercial arbitration, with its roots dating back to the times of the ancient lex mercatoria."); Buffy D. Lord, *Dispute Resolution on the High Seas: Aspects of Maritime Arbitration*, 8 OCEAN & COASTAL L.J. 71 (2002) ("In the maritime industry, arbitration has served as a common tool for the settlement of disputes for several decades."); Society of Maritime Arbitrators, Inc., Maritime Arbitration in New York, http://www.smany.org/sma/ about2.html ("[T]he origins of maritime arbitration can be traced as far back as the voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders.").

20. *See* Marrella, *supra* note 7, at 1059.

> Typically, issues center around: the investigation of damage to transported goods and ensuing liability attached to the maritime carrier; damages to the ship caused by the nature of the carried goods; issues of lay days and demurrage including damages resulting from late entry to port or late access to the operative quay; damages suffered by the carrier as a result of force majeure; issues relating to non-execution of charter parties (for example, non-payment of the charter fee, late return of the vessel or early collection of the ship); sale, construction and ship repairs; matters relating to salvage at sea; and maritime insurance.

Id.

21. *See* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1764 (2010).

22. International Chamber of Shipping, Shipping Facts, http://www.marisec.org/shippingfacts/worldtrade/ index.php (last visited Mar. 21, 2011).

23. *Id.*

24. Soo Sandra Jin Lee, *Is Sky Reefer in Jeopardy? The MLA's Proposed Changes To Maritime Foreign Arbitration Clauses*, 72 WASH. L. REV. 625, 625 (1997).

parties who are often from different countries.[25] When speaking about dispute resolution, "maritime" is practically synonymous with "international" and it is easy to understand why maritime arbitration is widely characterized as a type of international commercial arbitration.[26]

B. Why Arbitration?

Some argue that this international nature of maritime commerce makes the industry ideal for arbitration,[27] making the general benefits of intra-national arbitration even more important and significant to entities engaged in maritime commerce. According to Bruce Harris, a prominent maritime arbitrator based in London, there are numerous benefits to resolving maritime disputes through arbitration rather than through litigation.[28]

First, arbitration has traditionally been limited to the resolution of a dispute between only two parties, and maritime arbitration, accordingly, has historically been a bilateral affair.[29] Second, arbitration gives the parties to a contract some certainty of a mutually acceptable, neutral forum. Because so much business in the maritime industry is done on an international level,[30]

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25. *See* Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

26. *See* Marrella, *supra* note 7, at 1059 ("[M]aritime arbitration is a species belonging to the 'genus' of international commercial arbitration . . . .").

27. *See generally* Brief of Society of Maritime Arbitrators, Inc. as Amici Curiae Supporting Petitioner at 9, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 1144191, *available at* http://www.scotusblog.com/wp-content/uploads/2009/06/08-1198_cert_amicus_maritime.pdf [hereinafter Amicus Curiae Br. of Society of Maritime Arbitrators] ("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.").

28. *See* Harris Expert, *supra* note 19, ¶ 7.

29. *See generally* S.I. Strong, *Enforcing Class Arbitration In the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 6, 84 (2008) (stating that "[i]nternational commercial arbitration developed primarily as a means of enforcing bilateral contracts, and the vast majority of its policies and procedures reflect that tradition." Many arguments for the benefits of multiparty arbitration "have not been universally adopted as a means of overcoming the traditional view of arbitration as a bilateral, contractual construct."). *See also* Harris Expert, *supra* note 19, ¶ 20.

30. *See generally* J. Michael Taylor, *Evaluating the Continuing Gats Negotiations Concerning International Maritime Transport Services*, 27 TUL. MAR. L.J. 129, 150 (2002) (stating that "[b]ecause of its importance to world trade, maritime transport has historically been the focus of international attention . . . "). The author goes on to state that "maritime transport already is one of the most internationally integrated service sectors in the world," and that "maritime transport is undeniably global in its procedures and reach." *Id.* at 150-51.

contracting entities seeking to resolve disputes through litigation may otherwise be subjected to biased courts or differing laws.[31] In contrast to this potential for bias in litigation, the relative neutrality of an impartial third-party makes arbitration particularly well suited to the settlement of disputes arising in maritime commerce.[32]

Third, the privacy and confidentiality of arbitration makes it a desirable method of resolving international maritime disputes.[33] Maritime commerce usually involves sophisticated commercial entities, such as shipping companies like Stolt-Nielsen, and common carriers—not consumers.[34] Such parties have a heightened interest in preventing the terms of their commercial relationship from being disclosed to third parties.[35]

Fourth, parties in arbitration value the opportunity to select those who will decide the dispute, something which is advantageous to all sectors of arbitration. However, this is of particular significance in complex maritime disputes where most charter provisions provide for discretion of the parties to choose commercial persons with the unique and requisite maritime experience and knowledge to serve as arbitrators.[36] Realizing that this

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31. *See* WILLISTON & LORD, *supra* note 19, § 57:147 ("The international nature of the maritime business makes arbitration more practicable . . . than litigation, which is subject to the vagaries of diverse courts, imposing differing legal standards dependent more on national history than on the realities of seafaring commerce.").

32. *See generally id. See also* Amicus Curiae Br. of Association of Ship Brokers And Agents, BIMCO, Bergen Shipowners Association, Chamber of Shipping of America, International Association of Independent Tanker Owners, Japan Shipping Exchange, Inc., Norwegian Shipowners Association, Society of Maritime Arbitrators, Inc., and the Teekay Corporation in Support of Petitioner at 27, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896310, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_PetitionerAmCu9ShippingOrgs.authcheckdam.pdf [hereinafter Amicus Curiae Br. of Ship Brokers And Agents] ("[M]any maritime charters . . . provide for a neutral system of dispute resolution that is not based on the unique laws or customs of any one nation.").

33. *See* Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 121 (2003) ("[C]onfidentiality is an important aspect of international commercial arbitration . . . ."). *See also* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards when Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1086 (2009) ("[P]roponents of international arbitration have long touted its ability to keep proceedings private and confidential.").

34. *See generally* Graydon S. Staring, *The Admiralty Jurisdiction of Torts and Crimes and the Failed Search For Its Purposes*, 38 J. MAR. L. & COM. 433, 463 (2007) (stating that "maritime commerce is traffic in vessels"). *See also* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note 32, at 25 ("[M]aritime arbitration . . . is normally between two companies, not an individual consumer and a company.").

35. Harris Expert, *supra* note 19, ¶ 8.

36. *See* Marrella, *supra* note 7, at 1085 ("[I]n the maritime world, out of respect for a multisecular tradition, parties select arbitrators from among those who have a specific professional

aspect of arbitration is of such great importance in the context of maritime arbitration, the London Maritime Arbitration Association stated that "arbitrators must be specialists on maritime matters and not specialists of arbitration law . . . ."[37]

Fifth, arbitration is often faster than litigation and can be conducted at a much lower cost. Although this is advantageous in all forms of arbitration, it is of particularly great importance in maritime commerce, where exigent circumstances often require a quick resolution of a dispute.[38] The rapid speed of arbitration, as opposed to untimely and sluggish litigation, makes it readily apparent why alternative dispute resolution is particularly attractive to parties engaged in maritime commerce.

Recognition of these benefits among maritime entities has made arbitration in the maritime industry increasingly desirable and popular over the years[39] and has led the overwhelming majority of maritime disputes to be relegated to arbitration.[40] Indeed, most of the widely-used shipping contracts in existence today provide for arbitration.[41] It is the continued reliance on these traditional and established benefits that has made arbitration of maritime disputes so wildly popular, and some argue that these

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background in the sector where they have accumulated significant practical experience, which is rarely of a legal/judicial type."); WILLISTON & LORD, *supra* note 19, at 88 ("[M]aritime arbitrations have facets not found in many other types of arbitrations due to their highly transient and international nature."); International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 552 ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose.").

37. *See* Marrella, *supra* note 7, at 1086.

38. *See id.* at 1087 (stating that there is a "need for rapid resolution of controversies" in maritime disputes). *See also* Lord, *supra* note 19, at 72 (stating that "maritime arbitration remains a popular way to resolve maritime disputes that arise . . . because of the lower costs involved . . . ").

39. *See* Georgios I. Zekos, *Maritime Arbitration and the Rule of Law*, 39 J. MAR. L. & COM. 523, 524 (2008) ("[M]aritime arbitration has become popular as an alternative to litigation, because of the costs, delay and procedural complications of court proceedings."). Zekos went on to state that "in recent years the private sector has begun to use binding arbitration as the favored method of dispute resolution and the payback appears to be that arbitration is a 'quicker, less expensive and more private alternative to litigation.'" *Id.* at 541. *See also* Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1, 31 n.132 (2006) (highlighting the "noticeable growth of specialized areas of arbitration" and proposing that "the most pronounced of these growth areas in international commercial arbitration relate to maritime law").

40. *See* Measter & Skoufalos, *supra* note 19, at 520 ("[T]he majority of maritime disputes are never litigated as the contracts generally provide for arbitration.").

41. *Id.*

benefits are "an important, accepted[,] and acknowledged part of the maritime industry."[42]

C. *The Globalization of Maritime Arbitration*

The trend away from litigation toward arbitration has generated an enormous demand for the establishment of more regional maritime arbitration organizations. In response to this demand, countries such as China and Singapore, among many others, have established local maritime arbitration organizations.[43] Even though this trend has led major ports in most countries to establish organizations that handle maritime arbitration in some capacity,[44] the two primary locales for international maritime arbitration are, and most likely will continue to be, London and New York.[45]

According to the Society of Maritime Arbitrators of New York, the preeminent maritime arbitration authority in New York, [46] New York has

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42. *See* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note 32, at 18. *See also* Amicus Curiae Br. of Society of Maritime Arbitrators, *supra* note 27, at 9 (stating that "efficiency, speed and finality in getting resolution to contract differences have always been valued by the shipping community").

43. *See* Mark S. Hamilton, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10 ("[B]ecause of China's growing importance within the maritime shipping industry, it follows that CMAC [China's Maritime Arbitration Commission] will assume an increasingly important role in resolving maritime disputes."). *See also* Lawrence G. Cohen, *Maritime Arbitration in Asia*, 29 J. MAR. L. & COM. 117, 117 (1998) ("[M]aritime arbitration is establishing a stronger foothold in Asia."); Measter & Skoufalos, *supra* note 19, at 519 ("[M]aritime arbitrations are also being conducted in Hong Kong, Singapore, Beijing, Paris and other less likely venues.").

44. *See* Robert Force, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 TUL. L. REV. 1461, 1464 (1991) ("Although some arbitrations are held in other port cities, when one speaks about maritime arbitration in the United States, the reference is to New York arbitration."). *See also* International Congress of Maritime Arbitrators, Maritime Arbitration Associations, http://www.icmaweb.com/index.php/national-maritime-arbitration-associations (last visited Mar. 22, 2011) (listing numerous associations around the world that promote arbitration in maritime disputes).

45. Force, *supra* note 44, at 1464 ("Virtually all of the maritime arbitration in the United States occurs in New York."); Donald E. Zubrod, *Arbitration from the Arbitrator's Point of View*, 49 TUL. L. REV. 1054, 1055 ("The vast majority of maritime arbitrations throughout the world are conducted in the United States and Great Britain, almost invariably in New York and London."); Measter & Skoufalos, *supra* note 19, at 519 ("London and New York are the venues for the majority of cases . . . ."); Cohen, *supra* note 43, at 117 ("Most maritime arbitrations are conducted in either London or New York, and will likely continue to be held in these cities for the foreseeable future . . . .").

46. *See* Bruce Harris, Maritime Arbitration in the U.S. and the U.K., Past, Present, and Future: The View from London, Address at William Tetley Maritime Law Lecture 2008 (Mar. 4, 2008), *available at* http://www.mcgill.ca/maritimelaw/maritime-admiralty [hereinafter Harris Speech] ("[T]he only real American competitor to London has been the Big Apple and its excellent Society of Maritime Arbitrators . . . ."). *See also* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note

been a center of international arbitration since the early twentieth century.[47] As one of the primary hubs of international maritime arbitration in the world, proponents of New York maritime arbitration argue that New York arbitration is cheaper,[48] more transparent,[49] and more flexible[50] than London maritime arbitration.

London shares a similarly long history in this regard, with "maritime arbitration in London bec[oming] popular because of the existence of the Baltic Exchange . . . ."[51] Moreover, as one of the busiest financial and business hubs in all of Europe, London's "linguistic and geographical advantages . . . also make it an attractive venue."[52] In London, the preeminent organization dealing with matters of international maritime arbitration is the London Maritime Arbitrators Association (LMAA).

Despite the perceived benefits of New York arbitration, as well as the traditional and continued popularity of the city as one of the primary centers for maritime arbitration in the world, there has actually been a notable shift

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32, at 7 (stating that "the majority of shipping-related arbitrations in the United States are decided by members of the SMA under the auspices of the SMA Rules").

47. *See* Society of Maritime Arbitrators, Inc., Guide to Maritime Arbitration in New York, http://www.smany.org/sma/about2.html (last visited Mar. 22, 2011) ("New York has regularly been chosen as an arbitral site in charter parties and other contracts of affreightment starting with the New York Produce Exchange Time Charter in 1913."). *See also* Amicus Curiae Br. of Society of Maritime Arbitrators, *supra* note 27, at 7 (stating that "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").

48. *See generally* Thomas H. Belknap, Jr., *Notes from the Editor: New York vs. London Arbitration*, MAINBRACE (Blank Rome LLP, Washington D.C.), July 2008, at 2, *available at* http://www.blankrome.com/siteFiles/Publications/0014047F5DE71E841ECA2A40D736E8B7.pdf ("[T]he practice commonly used in London of having barristers represent parties before the arbitrators introduces a double layer of cost (at very high hourly billing rates) that simply does not exist in New York."). The article went on to explain that New York maritime arbitration is also cheaper because "awards issued by New York arbitrators are governed by the New York Convention," which means that "they are easily and quickly enforceable in most jurisdictions around the world." *Id.* at 11.

49. *Id.* at 11 ("[T]he SMA ordinarily publishes its awards."). The article went on to state that such transparency through publication of awards "engenders consistency" and "accountability." *Id.*

50. *Id.* ("If the parties require emergency relief or prompt resolution of an ongoing dispute, New York arbitrators are well equipped to handle these kinds of emergencies.").

51. Harris Speech, *supra* note 46.

52. Jamie Maples, *When Looking for a Seat of Arbitration, Try London!*, THE METROPOLITAN CORPORATE COUNSEL, May 2008, at 31, *available at* http://www.metrocorpcounsel.com/pdf/2008/May/31.pdf.

away from New York in favor of London in recent years.[53] According to Bruce Harris, "New York's maritime arbitration practice has dwindled very substantially, such that there is now no real question that London has at least half and probably three-quarters—or more—of all the maritime arbitration that takes place in the world."[54]

Aside from the significant benefits of arbitration in settling maritime disputes, some commentators argue that arbitration, in general, has actually been losing its appeal, becoming more "costly and prolonged."[55] Regardless of such criticism, however, arbitration continues to be the preferred method of dispute resolution in maritime commerce.[56]

IV. CLASS ARBITRATION AND THE ADMIRALTY

A. Brief Introduction to the Class Action

Although arbitration is a subject too often neglected in law school curricula, everyone who has been through law school has taken first-year civil procedure and has heard of something called the class action. "The class action is a . . . procedural device that allows a small number of individual plaintiffs to represent a larger group of plaintiffs in one [legal] proceeding against a single defendant who caused a similar injury to all of the plaintiffs."[57] The concept of the class action is one that is relatively exclusive to the legal system of the United States and is essentially an American creation.[58]

Other common law countries have been slow to adopt the class action, and the concept is "still relatively rare and unknown in civil law

53. *See* Harris Speech, *supra* note 46 (stating that such a shift has occurred "[i]n the past [ten] years or so . . . "). *See also* London Maritime Arbitrators Association, About Us, http://www.lmaa.org.uk/about-us-Introduction.aspx ("[M]ore maritime disputes are referred to arbitration in London than to any other place where arbitration services are offered."); Belknap, *supra* note 48, at 2 ("[T]he New York [international shipping] arbitration market has not exactly kept pace with London these last several years.").

54. *See* Harris Speech, *supra* note 46.

55. *See* Measter & Skoufalos, *supra* note 19, at 520. *See also* Zekos, *supra* note 39, at 542 (stating that "[i]t is argued that arbitration is no faster than litigation . . . ").

56. *See* WILLISTON & LORD, *supra* note 19, at 72 ("Despite any changes, maritime arbitration remains a popular way to resolve maritime disputes . . . .").

57. Michael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 105 (2007). *See generally* FED. R. CIV. P. 23(a).

58. *See* Daly, *supra* note 57, at 105 (stating that "the class action is a 'uniquely American procedural device' . . . ").

countries."[59] As a general rule, people fear what they do not understand, and the class action is no exception. Indeed, there has been a widespread wariness and distrust of the concept among foreign nations.[60]

B. Class Actions in Arbitration

In recent years, the concept of the class action has seeped into the world of alternative dispute resolution, creating the unique animal[61] before the Court in *Stolt-Nielsen*—the class arbitration. Class arbitration may most easily be described as "the coupling of the class action device with an arbitral proceeding to form a hybrid 'class-wide arbitration.'"[62] Although it has much in common with its counterpart in litigation, class arbitration has a much younger[63] and less certain[64] history than the class action, and has "not been universally or clearly accepted into U.S. jurisprudence."[65] Indeed, the issue of class arbitration remains much-debated and is largely up in the air. Many have criticized the current state of limbo regarding class arbitrations, with one critic stating that "[r]ecent developments in class arbitration law have left 'defendants with the worst of all worlds—the threat of a class action in a forum without the procedural, evidentiary and appellate protections available through the judicial process.'"[66]

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59. BERNARD HANATIOU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 257-58 (2005).

60. *See* Daly, *supra* note 57, at 109 (stating that "[t]he U.S. class-action procedural device is viewed with 'admiration and suspicion' abroad").

61. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (stating that class arbitration is a "different animal [from] individual arbitration").

62. Greg Kilby, *Leaving a Stone Unturned—The Unanswered Question from Green Tree Financial Corp. v. Bazzle: Does the Federal Arbitration Act Permit Classwide Arbitration?*, 59 U. MIAMI L. REV. 413, 420 (2005).

63. *See* Daly, *supra* note 57, at 107 ("[C]lass arbitrations have existed as a procedural device in the United States since the 1980s . . . .").

64. *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1722 (2006) ("[T]he question of whether nonparticipatory class members' rights may be foreclosed in a private class arbitration is not entirely clear.").

65. Daly, *supra* note 57, at 107. *See also* Strong, *supra* note 33, at 1092 ("[C]lass arbitration has developed primarily as a domestic phenomenon, insulated by the policy values and legal principles of the different States in which it has appeared. Only recently have class disputes moved to the international sphere.").

66. P. Christine Deruelle & Robert Clayton Roesch, *Gaming The Rigged Class Arbitration Game: How We Got Here And Where We Go Now—Part 1*, THE METROPOLITAN CORPORATE

One of the last major decisions to address class arbitration was *Green Tree Financial Corp. v. Bazzle*.[67] In *Bazzle*, the issue presented to the Court was whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration.[68] Some felt that the Court, however, failed to adequately address the issue, sidestepping the problem instead by deciding that arbitrators, and not courts, should determine whether class arbitration is permissible under the terms of the contract.[69] In the wake of *Bazzle*, however, there remained a split among circuits on the issue of class arbitration, and many felt that the Court did not adequately address the issue presented to it regarding class arbitration.[70] Indeed, the petitioners in *Stolt-Nielsen* urged the Court to examine and resolve the basic issues underlying the issue presented but not answered in *Bazzle*.[71]

C. *Maritime Class Arbitration*

Despite the decades-long existence of class arbitration and its use in other sectors of the United States arbitration industry, experts have argued that class arbitration is largely alien to maritime dispute resolution.[72] Although AnimalFeeds maintained that mere testimony of the industry's leading experts does not establish an industry custom which opposes class arbitration,[73] such testimony nevertheless sheds light on the fact that class arbitrations have practically never been instituted in the maritime arbitration industry, and that "there is no tradition of class arbitration under maritime law."[74]

COUNSEL, Aug. 1, 2007, at 9, *available at* http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf.

67. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

68. *Id.*

69. *Id.* at 451.

70. *See* Weston, *supra* note 64, at 1718 ("Green Tree Financial Corporation v. Bazzle raised but failed to adequately address [several] concerns about class actions and arbitration.").

71. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010).

72. *See* Harris Expert, *supra* note 19, ¶ 24 ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has ever been raised."). *See also* Expert Declaration of John Kimball at ¶ 21.

73. *See* Resp't's Merits Br. at 42, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 3404244, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1198_Respondentnew.authcheckdam.pdf.

74. *Stolt-Nielsen*, 130 S. Ct. at 1775.

V. SYNTHESIS AND SUMMARY OF THE ARGUMENT

Various vigorous arguments have been made by the parties in *Stolt-Nielsen*, as well as by other commentators, as to the applicability of class arbitration in the maritime industry. At the outset, the Society of Maritime Arbitrators claimed that the use of class arbitration in maritime disputes would be contrary to the aforementioned aims and benefits of arbitration in maritime commerce, which have made arbitration so popular and reliable among maritime shippers.[75] According to Bruce Harris, these established benefits "would be wholly undermined if one party could impose on another a U.S. style class action litigation."[76] Moreover, another expert claimed that "many of [the] traditional advantages may be lost in class, as opposed to individual, arbitration proceedings."[77]

In their reply brief, Petitioners argued that class arbitrations would be at odds with bilaterality, one of the key benefits of maritime arbitration.[78] Class actions, by their very nature, require numerous parties.[79] Petitioners further argued that "[s]uch substantially raised stakes make class proceedings different in kind from bilateral disputes, where each party's exposure is naturally circumscribed."[80] The lack of a bilateral resolution resulting from the introduction of numerous parties would hinder, or perhaps even defeat, another cornerstone benefit of traditional maritime arbitration—speedy resolution.[81]

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75. *See* Amicus Curiae Br. of Society of Maritime Arbitrators, *supra* note 27, at 8 (stating that, by the arbitrators allowing class arbitration in *Stolt-Nielsen*, "the result was contrary to what has commonly been understood to be the position in the industry"). The SMA went on to argue that "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." *Id.*

76. Harris Expert, *supra* note 19, ¶ 21.

77. Deruelle & Roesch, *supra* note 66, at 9. *See also* Amicus Curiae Br. of Society of Maritime Arbitrators, *supra* note 27, at 4 (stating that there is a "total absence of a tradition for class arbitration in maritime disputes" and that the SMA "generally sees no place for class arbitration in maritime disputes").

78. *See* Pet'r's Reply Br., at 17-18, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 4030381, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1198_PetitionerReply.authcheckdam.pdf.

79. *See* FED. R. CIV. P. 23(a) (stating that "the class is so numerous that joinder of all class members is impracticable").

80. *See* Pet'r's Reply Br., *supra* note 78, at 18.

81. *See* Deruelle & Roesch, *supra* note 66, at 9 ("[E]ach of the interim phases related to class—and merits—arbitral awards will carry with them potential burdens relating to discovery,

Respondents, on the other hand, argued that "[t]o the contrary, class arbitration captures efficiencies that often make the difference between fair recovery and none."[82] Although class arbitrations are efficient at consolidating the claims of many against one, the Pacific Legal Foundation claimed that this is exactly the type of efficiency that maritime arbitration, at least historically, has sought to avoid.[83] The Association of Ship Brokers and Agents argued, and rightfully so, that "[d]ue to the nature of class actions, there would be a multitude of parties, lawyers and expert witnesses, the very antithesis of the bilateral informality of maritime arbitrations."[84]

Opponents argue that if a class procedure would be permitted, the maritime arbitration would not be private,[85] while other commentators maintain that such transparency would actually be beneficial.[86] Moreover, some critics believe that class arbitrations would pose a significant impediment to the ability of the parties to select a specialized arbitrator, one of the aforementioned key benefits of maritime arbitration.[87] As one critic explained, "[t]he parties may choose, for example, an arbitrator with a class action background, instead of an arbitrator familiar with the substantive law governing the dispute, in a class arbitration proceeding."[88] And with maritime arbitrations, selection of a specialized maritime arbitrator, as opposed to an arbitrator with class action expertise or even a judge with general legal knowledge, is paramount to the purposes of choosing to arbitrate maritime disputes in the first place.[89]

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briefing, hearings, and time, money and effort spent in obtaining judicial review at each of the various phases, which will not necessarily be present in individual arbitrations.").

82. *See* Resp't's Merits Br., *supra* note 73, at 46.

83. *See generally* Amicus Curiae Br. of the Pacific Legal Foundation in Support of Petitioners at 7, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2875370, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_PetitionerAmCuPLF.authcheckdam.pdf [hereinafter Amicus Curiae Br. of the Pacific Legal Foundation] (stating that "considerations of economic efficiency do not warrant imposing arbitration on parties against their will").

84. *See* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note 32, at 31-32.

85. *See* Deruelle & Roesch, *supra* note 66, at 9 ("[T]he specter of class arbitration disposes of the presumption of privacy and confidentiality in arbitration.").

86. *See* Strong, *supra* note 33, at 1087 ("[Transparency] is particularly important for class arbitration, since public interest exists in both the outcome and the process itself.").

87. Deruelle & Roesch, *supra* note 66, at 9.

88. *Id.*

89. *See supra* notes 36-37 and accompanying text.

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VI. THE *STOLT-NIELSEN* DECISION, ITS POTENTIAL IMPACT, AND THE FUTURE OF MARITIME ARBITRATION

A. The Stolt-Nielsen Decision

Some predicted *Stolt-Nielsen* to be closely decided, dividing the court and creating two main coalitions—those Justices who would oppose a finding of class arbitration in the absence of contractual silence, and those Justices who would find otherwise.[90] In light of what took place at the oral arguments on December 9, 2009, however, other commentators believed that AnimalFeeds had the majority of the Court in its corner.[91] The stances of some of the Justices became apparent from their questioning, but others, such as Justice Scalia, made their position ambiguous.[92]

On April 27, 2010, however, any doubt was dismissed when the Supreme Court released its long-awaited decision in *Stolt-Nielsen*.[93] In delivering the majority opinion, Justice Alito found for Stolt-Nielsen and against AnimalFeeds,[94] broadly holding that imposing class arbitration on parties that have not agreed to authorize class arbitration is inconsistent with the FAA and the foundational principle that arbitration is a matter of consent, not coercion.[95]

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90. *See* Stolt-Nielsen Oral Argument Analysis: Part I, http://loreelawfirm.com/blog/stolt-nielsen-oral-argument-analysis-part-i (Dec. 13, 2009, 08:39 EST) ("[C]ertain members of the Court appear to have joined one of two coalitions."). The article went on to explain that "[o]ne [coalition] consists of Justices John Paul Stevens, Stephen G. Breyer, and Ruth Bader Ginsburg," and the "other apparent coalition consists of Chief Justice John G. Roberts, Jr., Justice Antonin Scalia, and Justice Samuel A. Alito, Jr . . . ." *Id.* Later, in Part V of his analysis, Loree explains that "[t]he Breyer Coalition appears to be leaning toward either taking a pass or affirming the decision of the United States Court of Appeals for the Second Circuit, which upheld the arbitrators' award imposing class arbitration . . . ." Stolt-Nielsen Oral Argument Analysis: Part V, http://loreelawfirm.com/blog/stolt-nielsen-oral-argument-analysis-part-v-should-class-or-consolidated-arbitration-be-imposed-if-the-contract-is-silent (Feb. 16, 2010, 19:59 EST). Loree further explained that "the Roberts Coalition appears to be leaning toward reversal." *Id.*

91. *See* Posting of Vivian Wang to SCOTUSblog, http://www.scotusblog.com/?p= 13795 (Dec. 11, 2009, 13:20 EST) (stating that "[i]f the Justices' questions are taken at face value, respondents have likely garnered the votes of a majority of the Court").

92. *Id.*

93. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

94. *Id.* Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Scalia. Justice Sotomayor took no part in the consideration or decision of this case.

95. *Id.* at 1768.

The Court went on to state that allowing otherwise would be contrary to established precedent, policy,[96] and reaffirmed the truism that "there is no tradition of class arbitration under maritime law."[97] The Court remarked 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,"[98] which clearly reaffirmed the stated positions of opponents of class arbitration in maritime dispute resolution.[99]

Furthermore, the Court expounded the advantages of arbitration,[100] similar to those set forth above,[101] and commented on the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration."[102] The Court emphasized that class arbitration changes the underlying, bargained-for benefits of bilateral dispute resolution,[103] and that the privacy and confidentiality that make bilateral arbitration so enticing in the first place are lost when one moves to a class-wide arbitral process.[104]

The Court noted, however, that its decision did not follow from its recent decision in *Bazzle*.[105] The Court remarked that the parties misunderstood *Bazzle* and that *Bazzle* "did not control resolution of the question" in the instant case.[106] Moreover, Justice Ginsburg, joined by

96. *Id.* at 1774 ("[I]t is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes.").

97. *Id.* at 1775.

98. *Id.*

99. *See supra* notes 75-89 and accompanying text.

100. *Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). "By agreeing to arbitrate . . . [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 1774 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). "Parties generally favor arbitration precisely because of the economics of dispute resolution." *Id.* at 1775 (quoting 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1464 (2009) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001))).

101. *See supra* notes 27-42 and accompanying text.

102. *Stolt-Nielsen*, 130 S. Ct. at 1775-76 ("But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.").

103. *Id.* at 1776 ("An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties."). "The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Id.*

104. *Id.*

105. *Id.* at 1772.

106. *Id.* ("*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted.").

Justices Stevens and Breyer, briefly expressed their belief that AnimalFeeds, not Stolt-Nielsen, should have prevailed.[107]

B. Impact and Quick Thoughts

Freedom to contract, one of the most basic and long-established principles of contract interpretation, dictates that parties that expressly and knowingly agree to arbitration on a class level are free to do so and should be bound to such an agreement.[108] Although a maritime party, at least in the United States, most certainly *can* enter into a contract providing for class arbitration,[109] it is readily apparent that by doing so, he would be defeating the very purposes and benefits of arbitrating maritime disputes in the first place. But this is not the type of party with whom the Court in *Stolt-Nielsen* was concerned.

The problem dealt with in *Stolt-Nielsen*, and in many contracts in general, is when agreements are *silent* on a disputed issue. If class arbitration was imposed on all arbitration clauses that are silent on the issue of class arbitration, maritime entities entering into contracts whose terms call for arbitration would be much more careful in crafting and entering into contracts with such clauses. Furthermore, with much of the maritime arbitration industry being opposed to the concept, if silence in the contract implied acceptance of class arbitration, it is possible that many maritime parties entering into such contracts would require explicit waiver of any class arbitration.

Moreover, although *Stolt-Nielsen* involves a dispute between parties engaged in maritime commerce,[110] the decision in the case is clearly not limited to maritime entities. The arguments made in this article, although of clearly emphasized importance and specificity in the maritime context, are of equal applicability and significance to the general arbitration community.

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107. *Id.* at 1777-83.

108. *See* Mark Pettit, Jr., *Freedom, Freedom of Contract, and The "Rise and Fall"*, 79 B.U. L. REV. 263, 282-83 (1999).

109. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("[P]arties are generally free to structure their arbitration agreements as they see fit.").

110. *See supra* notes 8-10 and accompanying text.

C. *Brief Speculation and the Future of Maritime Arbitration*

1. Brief Speculation

Some industries have rejected the usage of class arbitration,[111] and the Association of Ship Brokers and Agents argued that class arbitrations are "wholly foreign to maritime practice," and that class arbitrations "have not been and would not be accepted by the maritime arbitral community."[112] Considering the established and continuing usage of traditional, bilateral arbitration in settling maritime disputes, it does not seem unrealistic to think that the maritime industry would not embrace class arbitration. If *Stolt-Nielsen* had held otherwise, United States maritime arbitration may have taken a particularly hard hit.

As previously discussed, New York and London are the two principal locations where maritime arbitration occurs.[113] Some believe, and logically so, that "imposing class actions in an international maritime arbitration . . . would deter parties from selecting the United States as the dispute resolution situs."[114] Parties would be likely to choose to arbitrate in a foreign locale, such as London, whose judicial and arbitral systems do not typically recognize class actions, much less class arbitrations in such settings.[115]

Given that there has already been a notable shift away from New York in favor of London in recent years as a preferred situs for maritime arbitration,[116] an adverse decision in *Stolt-Nielsen* could have brought this already significant trend full circle, and could very well have been a catalyst for the continued decline in popularity of selecting the United States as a forum for international maritime arbitration.[117]

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111. *See* Kilby, *supra* note 62, at 422-23 ("[T]he entire securities industry has rejected classwide arbitration as a dispute resolution mechanism.").

112. *See* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note 32, at 32. *See also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)("[T]here is no tradition of class arbitration under maritime law . . . .").

113. *See supra* notes 45-54 and accompanying text.

114. Pet'r's Reply Br., *supra* note 78, at 42. *See also* Harris Expert, *supra* note 19, ¶ 20 ("[I]f reasonable charterers and owners were told that arbitration in New York meant exposure to class actions, they would almost always prefer another arbitral situs."); Kimball Expert, *supra* note 72, ¶ 16.

115. *See supra* notes 58-59 and accompanying text.

116. *See supra* notes 53-54 and accompanying text.

117. *See* Catherine Suh & Andrew Kaplan, *Stolt-Nielsen S.A. v. AnimalFeeds International*, LEGAL INFORMATION INSTITUTE, http://topics.law.cornell.edu/supct/cert/08-1198 ("The Supreme Court's decision will place an economic burden on the losing side and may affect international businesses decisions on whether to select a forum in the United States."). *See also* Amicus Curiae Br. of Ship Brokers And Agents, *supra* note 32, at 11 (stating that "there would be less fixing of

Critics, however, argue that such broad and sweeping negative implications were over-exaggerated.[118] They argue that such criticisms and predictions of the impact of *Stolt-Nielsen* were merely general complaints about the concept of aggregate litigation in general, and were merely policy reasons for not accepting a new concept that many proponents believe to be more beneficial than harmful.[119] Regardless of whether these complaints were "merely general," as proponents maintain, they are still valid and widely-recognized, and even more so in the context of maritime arbitration.

Many feared that, had the Court held otherwise, the arbitration Lord Donaldson spoke of, regarded by the shippers and commodity traders of the world as a "normal incident of commercial life," would become completely the opposite, and may very well have led such maritime entities to regard arbitration, at least American-based international maritime arbitration, with great abhorrence.[120] However, it appears, for the time being at least, that the words of the great Lord Donaldson of Lymington stand true, as *Stolt-Nielsen* represents a crucial step forward in protecting the tradition and sanctity of bilateral United States maritime arbitration that this article and many others have argued so vigorously for. Regardless of such a ruling, however, the fact remains that class arbitration is a procedural and arbitral device in its infant stages, and it is more than certain that its maturity will stir much debate, both legally and scholarly, for some time to come.

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charters in the United States as foreign companies would look elsewhere for their shipping contracts").

118. *See generally* Resp't's Merits Br., *supra* note 73, at 43.

119. *See generally id.*

120. *See supra* note 1 and accompanying text.