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Class Action Arbitration: A Plaintiff's Perspective*

Sarah Clasby Engel
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Early arbitration agreements arose mainly from disputes between individual parties, where the streamlined process was an effective and less complex alternative to litigation in resolving disputes. With the rise of class action lawsuits, businesses seeking to reduce litigation expenses and damages awards have sought to use arbitration clauses to preclude class actions altogether. Courts have struggled to determine whether such class action waivers are valid and whether, even in the absence of such a waiver, class claims are subject to arbitration. The resultant uncertainty unfortunately often leads to more expensive and time-consuming legal maneuvering. After a brief synopsis of the relevant statutory scheme, this article examines recent developments in class action arbitration and explores the potential advantages and disadvantages of arbitration to class action plaintiffs.

I. THE FEDERAL ARBITRATION ACT

In order to promote the use of arbitration as a more streamlined dispute resolution process, the Federal Arbitration Act (FAA) provides the framework for enforcing arbitration clauses and recognizing domestic and foreign arbitral awards.¹ Under the FAA, courts have the power to require parties to comply with a domestic or international arbitration agreement and to stay pending litigation.² The resulting arbitration decisions are subject to

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¹ 9 U.S.C. §§ 1-16 (2006). In 1970, Chapter 2 of the Act was added to place international arbitration agreements within the FAA, consistent with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which over 140 countries are a party. 9 U.S.C. §§ 201-08 (2006). Chapter 3 of the FAA establishes the recognition of foreign arbitral awards and decisions where there is reciprocity under the Inter-American Convention on International Commercial Arbitration of January 30, 1975. 9 U.S.C. §§ 301-307 (2006).

² See 9 U.S.C. §§ 3, 4 (2006).

judicial review in only a narrow set of circumstances, including fraud or corruption.³ Arbitration clauses are treated as binding contracts and courts can invalidate them “upon such grounds as exist at law or in equity for the revocation of any contract,” such as unconscionability.⁴ The Florida Arbitration Code mirrors the FAA.⁵

II. DEVELOPMENT OF CLASS ACTION ARBITRATION LAW

As arbitration has developed as an alternative to litigation, the law has evolved to meet the challenge of larger and more complex matters. In *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court affirmed the strong presumption in favor of arbitration and enforced an agreement requiring arbitration of antitrust claims arising from an international transaction.⁶ The Court found that arbitrators are well positioned to resolve matters requiring special expertise and that arbitration is appropriate in asserting the statutory claims under the Sherman Antitrust Act.⁷ The Court found that “(h)aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights as issue.”⁸

The limited judicial review under the FAA was affirmed in *Howsam v. Dean Witter Reynolds, Inc.*⁹ The Court held that only “gateway” matters of the validity of the arbitration agreement are subject to judicial review.¹⁰ All other matters, within the arbitration agreement, are for the arbitrators to decide.¹¹

The question of judicial review of class action arbitration agreements has arisen in both state and federal courts and was addressed in the seminal

³ See 9 U.S.C. § 10 (2006). The FAA provides an award is not subject to judicial review except in the following circumstances:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

⁴ 9 U.S.C. § 2 (2006).

⁵ See FLA. STAT. §§ 682.01-682.22 (2009).

⁶ 473 U.S. 614 (1985).

⁷ 15 U.S.C. §§ 1-7 (2006).

⁸ *Mitsubishi Motor Corp.*, 473 U.S. at 628.

⁹ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

¹⁰ *Id.* at 83-86.

¹¹ *Id.* at 85.

case of *Green Tree Financial Corp. v. Bazzle*.¹² The issue before the Court was whether arbitration can proceed as a class action when the agreement to arbitrate is silent on this issue.¹³ In *Bazzle*, the Supreme Court of South Carolina had interpreted the silence of the arbitration contract as permitting class actions.¹⁴ While the U.S. Supreme Court did not directly address the legality of the class action certification in the face of the silence in the agreement, a plurality of the Court found that the validity of the class was a matter for the arbitrator to decide and remanded the issue accordingly.¹⁵ Since there had been no decision by the arbitrator, the Court did not reach the decision of whether a class certification was proper and subject to judicial review.¹⁶

In the wake of *Bazzle*, most state and federal courts have treated that decision as authority to enforce class action arbitration where the agreement is silent.¹⁷ The arbitrators must look to the law of the appropriate jurisdiction in determining whether to certify a class.¹⁸ Immediately following *Bazzle*, the American Arbitration Association (AAA) issued new rules for class action arbitration patterned after Rule 23 of the Federal Rules of Civil Procedure.¹⁹ Rule 3 of the Supplementary Rules for Class Arbitration allows the arbitrator(s) to decide the threshold questions of class certification when an agreement is silent: "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf or against a class (the 'Clause Construction Award')." ²⁰

Rule 3 goes on to state that, upon this determination, the arbitrator will stay the proceedings for "at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award."²¹ The proceedings are then stayed pending the outcome of

¹² *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

¹³ *Id.* at 450 (plurality opinion).

¹⁴ *Id.* (citing *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 351 (S.C. 2002), *vacated*, 539 U.S. 444 (2003)).

¹⁵ *Id.* at 450-54.

¹⁶ *Id.* at 452-54.

¹⁷ *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *In re Wood*, 140 S.W.3d 367 (Tex. 2004).

¹⁸ *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729 (S.D. Fla. 2007); *In re Terazosin Hydrochloride*, 220 F.R.D. 672 (S.D. Fla. 2004).

¹⁹ *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION (2003), <http://www.adr.org/sp.asp?id=21936>.

²⁰ AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION R. 3 (2003), <http://www.adr.org/sp.asp?id=21936>.

²¹ *Id.*

judicial review.²² After a determination that the arbitration agreement permits a class award, Rule 4 of the AAA then allows the arbitrator to determine whether the criteria of class certification (similar to Rule 23 of the Federal Rules) are met.²³ Again, once class certification is made under Rule 4 (the Class Determination Award), the proceedings are stayed for thirty days to allow the parties to seek judicial review.²⁴

The interlocutory judicial review established by the AAA rules may not, however, withstand judicial scrutiny. In *Hall Street Associates, LLC v. Mattel, Inc.*, the Court held that the standard of judicial review cannot be changed by an arbitration agreement.²⁵ The FAA limits its judicial review to those grounds specifically set forth in §§ 10 and 11 of the Act.²⁶ One state court has already held that there is no interlocutory appeal, under Texas law, from a refusal to certify a class by an arbitrator because the AAA rules could not alter the statutory law of Texas.²⁷

The issue of class action arbitration when the agreement is silent may finally be decided on the merits. In *Stolt-Nielson SA v. Animalfeeds International Corp.*, the Second Circuit held that the arbitration panel did not exhibit a “manifest disregard” of the law and did not exceed its authority in finding that class arbitration was permitted under an arbitration agreement that was silent on the issue.²⁸ Oral argument was heard before the Supreme Court on December 9, 2009.²⁹ It is unlikely that a decision will be reached before publication of this article.

In the interim, after *Bazzle*, many contracts with arbitration clauses were drafted to specifically exclude class actions.³⁰ Florida courts have closely examined the legality of the class action arbitration waivers, with mixed results.³¹

²² *Id.*

²³ *Id.* R. 4.

²⁴ *Id.* R. 5(d).

²⁵ *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

²⁶ *Id.* at 586-87 (“[T]he text compels a reading of the §§ 10 and 11 categories as exclusive.”).

²⁷ *O’Quinn, PC v. Wood*, 244 S.W.3d 549 (Tex. App. 2007).

²⁸ *Stolt-Nielson SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3562 (U.S. June 15, 2009) (No. 08-1198).

²⁹ Transcript of Oral Argument, *Stolt-Nielson SA v. Animal Feeds Int’l Corp.*, 129 S. Ct. 2793 (2009) (No. 08-1198), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts.a.spx.

³⁰ See *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361 (S.D. Fla. 2009).

³¹ See *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600 (Fla. 1st Dist. Ct. App. 2007) (class action waiver violated public policy because it did not allow claimants to bring class actions under Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”)); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st Dist. Ct. App. 1999) (arbitration clause that barred class actions, limited claimants to actual damages and barred declaratory relief was procedurally and substantively unconscionable). *But see Sanders v. Comcast*, No. 3:07-cv-918-J-33HTS, 2008 WL 150479 (M.D. Fla. 2008) (class action

In the wake of these somewhat conflicting opinions, the Eleventh Circuit was recently faced with the task of applying Florida law to determine whether an arbitration clause that prohibited class actions for a FDUTPA claim was unconscionable or void as against public policy.³² The Eleventh Circuit noted that Florida law required a “showing of both procedural and substantive unconscionability,” but could not adequately determine whether courts are permitted to “evaluate both prongs simultaneously in a balancing exercise” or whether each prong is independent and must be evaluated separately, and if one prong is absent the inquiry stops.³³ Ultimately, the Eleventh Circuit certified questions to the Florida Supreme Court to clarify the unconscionability test and to determine whether barring class actions violates FDUTPA.³⁴ Until the Florida Supreme Court issues its ruling, the question of whether arbitration clauses prohibiting class actions are valid in Florida remains unsettled and the subject of much litigation.

III. POTENTIAL ADVANTAGES AND DISADVANTAGES TO CLASS ACTION ARBITRATIONS FOR PLAINTIFFS

Plaintiffs bringing consumer class actions routinely attempt to avoid or invalidate mandatory arbitration clauses due to the added expense of arbitration and the potential bias of certain arbitral forums due to their ties to corporate defendants.³⁵ Indeed, pending legislation (The Arbitration Fairness Act of 2009), seeks to amend the FAA to prevent use of pre-dispute mandatory arbitration clauses in consumer, employment and franchise agreements.³⁶

If, however, invalidating the arbitration clause seems unlikely (and litigating the arbitrability question is itself expensive), it may make sense to arbitrate the class action in the first instance. The following are some advantages and potential pitfalls to doing so.

waiver was not unconscionable where the consumers received notice that all claims were subject to arbitration and did not exercise their right to opt out); *Fonte v. AT & T Wireless Servs.*, 903 So. 2d 1019 (Fla. 4th Dist. Ct. App. 2005) (arbitration clause which barred class actions was not unconscionable and did not defeat the remedial purpose of FDUTPA).

³² *Pendegast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010).

³³ *Id.* at 1134.

³⁴ *Id.* at 1143.

³⁵ See Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075 (2009). See generally David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

³⁶ S. 931, 111th Cong. (2009), H.R. 1020, 111th Cong. (2009).

A. Class Certification

Arbitration has traditionally been more beneficial to the corporate defendants, who typically draft the contracts. Many agreements are consumer-adhesion contracts, where the consumer has little or no choice and is often not cognizant of the arbitration clause. For an individual plaintiff those costs can be onerous, particularly when the plaintiff typically is an individual consumer in arbitration against a large corporation. The problems of the substantial arbitrator fees have been ameliorated by the advent of class action arbitration. The costs are less burdensome when spread among a class and the high costs can be outweighed by the reward of a more substantial and more expeditious recovery.³⁷ In fact, the AAA's Amicus Curiae Brief, filed in the *Stolt-Nielsen* case currently before the United States Supreme Court, notes that 94% of the Clause Construction Awards have permitted arbitration to proceed on behalf of the class, either by decision of the arbitrators (70%) or by stipulations among the parties (24%).³⁸ The Amicus Brief further notes that of those cases that have proceeded beyond the Clause Construction award, 50% have resulted in granting class certification, with another 13% agreeing to class certification by stipulation among the parties, and 38% denied certification.³⁹ Without knowing the percentage of class certification in the Federal District Courts, logic tells us that it is likely to be lower.

B. Discovery

Due to the more expeditious nature of arbitration, discovery is more limited than in litigation. It is yet unclear just how much class action arbitration changes the nature of expedited discovery. Rule 21 of the AAA Commercial Arbitration Rules governs the exchange of information between the parties in commercial arbitration under its auspices: at the arbitrator's discretion or at the request of the parties, the arbitrator directs document production and identification of witnesses to be called.⁴⁰ The parties must exchange copies of the exhibits they intend to produce at least 5 days

³⁷ See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 835 (2008) (noting that class action arbitration "provides a possible means by which claimants can vindicate small claims that could not be brought economically on an individual basis in arbitration [or in a court]"). See generally Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001).

³⁸ Brief of Am. Arbitration Ass'n as Amicus Curiae in Support of Neither Party at 22, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 129 S. Ct. 2793 (2009) (No. 08-1198), 2009 WL 2896309.

³⁹ *Id.*

⁴⁰ AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES R. 21 (2009), <http://www.adr.org/sp.asp?id=22440#R21>.

before the hearing.⁴¹ The amount of discovery allowed is left to the discretion of the arbitrator who must be mindful of the expedited nature of arbitration.⁴² Other bodies of arbitration, including various international arbitration bodies, limit discovery but leave such decisions to the arbitrator or arbitral panel.⁴³ It is likely that where there is class arbitration, there will be more discovery than is allowed among individual parties, but still less than in litigation which may tend to lead to a quicker and less costly resolution.⁴⁴

C. Evidence

The admission of evidence is in the discretion of the arbitrator as are questions of relevance and materiality. Written testimony may be taken under both AAA and international arbitration rules.⁴⁵ Again, since arbitrator discretion is generally the standard, it is difficult to assess, as yet, if class arbitration has greatly expanded the evidentiary proceedings. However, due process concerns for the class members make it seem likely that some expansion is inevitable.

D. Settlement

The AAA's brief filed in *Stolt-Nielson* appears to indicate a greater likelihood of class certification in arbitration than in class action litigation.⁴⁶ Once class certification is granted, corporate defendants have a greater incentive to enter into serious settlement negotiations. While class action arbitration may not be the expeditious procedure contemplated when arbitration law was developed, a faster resolution than in litigation may still be likely.⁴⁷ In the AAA's Amicus Brief, the statistics for the median time frame for filing to settlement, withdrawal, or dismissal of the 162 closed class arbitration cases that had come before it was 583 days.⁴⁸ Although that time

⁴¹ *Id.* R. 21(b).

⁴² *See id.* R. 21(a), R. 21(c).

⁴³ *See, e.g.*, ICC INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION, ART. 20, <http://www.iccwbo.org/court/arbitration/>; *see also* LONDON COURT OF INT'L ARBITRATION, ARBITRATION RULE 22, <http://www.lcia-arbitration.com/>.

⁴⁴ *See* Frederick T. Davis et al., *Current Trends in US and International Arbitration*, GAR ARB. REV. AMS. (2008), available at <http://www.globalarbitrationreview.com/reviews/4/sections/7/chapters/51/current-trends-us-international-arbitration/>.

⁴⁵ AM. ARBITRATION ASS'N, OPTIONAL RULE FOR EMERGENCY MEASURES OF PROTECTION O-3 (2009), <http://www.adr.org/sp.asp?id=22440#O3>; AM. ARBITRATION ASS'N INT'L DISPUTE RESOLUTION PROCEDURES Art. 17(1) (2009), <http://www.adr.org/sp.asp?id=33994>.

⁴⁶ *See supra* text accompanying notes 35-36.

⁴⁷ Brief of Am. Arbitration Ass'n as Amicus Curiae in Support of Neither Party, *supra* note 38, at 24.

⁴⁸ *Id.*

frame is not rapid by many standards, it is certainly more expeditious than most complex class action litigation, which takes many years to resolve.

In addition, although the Federal Rules encourage courts to decide the question of certification early in the litigation, there is no way to require a court to rule on the motion for class certification.⁴⁹ In some instances, the motion for class certification remains pending, while the parties are left to litigate the case in its entirety, including complying with pretrial orders and deadlines.⁵⁰ Arbitral forums, such as the AAA, that put the certification question up front and provide the parties with greater control over the timing of the arbitrator's decisions, may facilitate an earlier decision on the class issue, thus making settlement possible before extensive litigation costs are incurred.⁵¹

E. Judicial Review

The FAA's presumption in favor of arbitration and strict standards of review severely limit judicial review of an arbitral decision.⁵² The Florida Arbitration Code follows suit.⁵³ The Supreme Court and the Federal appellate courts have not yet ruled on the validity of the interlocutory appeals from class certification that are set forth in the rules of the AAA. Given the Supreme Court's decision in *Hall*, it is not at all certain whether the AAA's Supplementary Rules for Class Arbitration will withstand judicial scrutiny.⁵⁴ While an unfavorable class certification opinion will be more difficult to appeal, the greater likelihood of granting class certification in arbitration would mitigate in favor of arbitration for plaintiffs.

IV. AVAILABLE INTERNATIONAL ARBITRAL FORUMS

The flexibility of arbitration as opposed to litigation can be well suited to international dispute resolution. Since arbitration is a matter of contract, the parties can determine the place of arbitration, language, procedures, and

⁴⁹ FED. R. CIV. P. 23(c)(1)(A).

⁵⁰ Although Federal Rule of Civil Procedure 23(c)(1)(A) provides that the Court must decide a motion for class certification as early as possible in the litigation, there is no real enforcement mechanism for this mandate. In the meantime, the pretrial deadlines established pursuant to Rule 16(b) still apply, requiring the parties to complete discovery and file dispositive motions. Of course, such pretrial discovery can be burdensome. See *Commonwealth Land Title Ins. Co. v. Higgins*, 975 So. 2d 1169 (Fla. 1st Dist. Ct. App. 2008); *Prado-Steiman ex. rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

⁵¹ See AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION (2003), <http://www.adr.org/sp.asp?id=21936>.

⁵² Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000); see also *supra* text accompanying notes 25-27.

⁵³ FLA. STAT. § 602.01-22 (2009).

⁵⁴ *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

applicable laws. Of importance to the international parties is the ability to choose independent arbitrators as opposed to submitting to the opposing party's jurisdiction.⁵⁵ The parties can also select arbitrators who possess the technical competence to resolve their disputes.⁵⁶

Of the many international arbitration bodies, the International Chamber of Commerce (ICC) is one of the largest and most actively involved in the process.⁵⁷ It consists of two supervisory bodies to administer its rules.⁵⁸ The International Court of Arbitration, made up of representatives of the ICC member countries, enforces the ICC rules and makes decisions of application of laws and forums if not covered by the agreement between the parties.⁵⁹ The tribunals draw up a document called Terms of Reference, which summarizes the rules, parties, place, and may also include the issues prior to the arbitration hearings.⁶⁰ The Secretariat of the ICC consists of teams of counsel from various nations, communicates the awards to the parties, after scrutiny by the International Court of Arbitration, and provides additional supervisory functions pursuant to their rules.⁶¹ This scrutiny, prior to the issuance of the arbitration award, is unusual and provides an additional safeguard for the arbitration awards, which are generally not subject to appeal.⁶²

The AAA's International Center for Dispute Resolution (ICDR) is also a large body administered under its International Arbitration Rules.⁶³ The ICDR does not play as large of a supervisory role as the ICC does, but the administrators will select arbitrators when the parties cannot agree and set the arbitrator's fees.⁶⁴

⁵⁵ See, e.g., ICC INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION, <http://www.iccwbo.org/court/arbitration/>; see also AM. ARBITRATION ASS'N, INT'L DISPUTE RESOLUTION PROCEDURES (2009), <http://www.adr.org/sp.asp?id=33994>.

⁵⁶ See, e.g., ICC INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION, <http://www.iccwbo.org/court/arbitration/>; see also AM. ARBITRATION ASS'N, INT'L DISPUTE RESOLUTION PROCEDURES (2009), <http://www.adr.org/sp.asp?id=33994>.

⁵⁷ See ICC INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION, <http://www.iccwbo.org/court/arbitration/>.

⁵⁸ ICC INTERNATIONAL COURT OF ARBITRATION: INTRODUCTION TO ARBITRATION, <http://www.iccwbo.org/court/arbitration/id4089/index.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ AM. ARBITRATION ASS'N: INT'L CENTER FOR DISPUTE RESOLUTION, <http://www.adr.org/icdr>.

⁶⁴ AM. ARBITRATION ASS'N, INT'L DISPUTE RESOLUTION PROCEDURES (2009), <http://www.adr.org/sp.asp?id=33994>.

V. CONCLUSION

Although class action arbitration may have tipped the balance to increase the success of the plaintiff, the plaintiff's attorney must be mindful that the law is still developing and may change in the near future. In 2010, the Supreme Court will likely decide the merits of the arbitration agreement's silence on class action in *Stolt-Nielsen*.⁶⁵ Given the recent history of the Court, predicting whether such a ruling will be favorable to the class action plaintiff, or even decided on the merits as opposed to procedurally, is difficult at best. Certainly, as the law evolves, bringing class claims in arbitration is an option that merits consideration.

⁶⁵ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3562 (U.S. June 15, 2009) (No. 08-1198).