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 Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF 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., TEEKAY CORPORATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Association of Ship Brokers & Agents

The Association of Ship Brokers & Agents (U.S.A.), ("A.S.B.A.") is a membership trade organization founded in 1934. Its members consist of the leading shipbrokers and agents in the United States and Canada. A.S.B.A. promotes the interests of its members in particular, and the ocean shipping industry in general, in various ways. It has set high professional, ethical and fiduciary standards for its members through its Agency Certification program. It conducts educational seminars, home study and online courses about the shipping business and publishes a newsletter.

Of particular relevance, A.S.B.A. maintains and causes to be published various standard form charter parties in common usage in the shipping business. One of these forms is a tanker voyage charter used throughout the tanker shipping industry, which includes the parcel trades, and is known by its code name ASBATANKVOY.

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* represented in this brief or their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest associations of shipowners, ship managers, shipbrokers, agents, operators, associations, and other entities connected with the international shipping industry. BIMCO's membership includes almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies. Shipowner members represent more than 65% of the world's available cargo carrying-capacity.

BIMCO strives to raise the standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, environmental protection, the fair treatment of seafarers, free trade, and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs *amicus curiae* with this Court.

BIMCO is also the acknowledged leader in the production of standard documents and clauses for the maritime industry. BIMCO has, for instance, developed a standard dispute resolution clause which is widely used in the industry. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry.

Bergen Shipowners Association

The Bergen Shipowners Association ("BSA") is the oldest shipowners association in Norway, founded in 1889. Bergen is one of the largest and most active maritime cities in the world. In 2006, 525 vessels were recorded carrying 5.3 million gross dead weight tons via the Bergen port. The BSA has over 240 members, including approximately 40 shipping related companies and organizations. The BSA supports Norway's domestic maritime industry and promotes global maritime trade. It facilitates discussions and negotiations between members of Norway's shipping industry and works to develop solutions to the challenges facing the international maritime industry.

Chamber of Shipping of America

The Chamber of Shipping of America's ("CSA") membership includes 35 U.S.-based companies that either own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable domestic maritime industry and promotes open

international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

International Association of Independent Tanker Owners

The International Association of Independent Tanker Owners ("INTERTANKO") is an unincorporated, not-for-profit association of independent tanker owners and operators. As used in this context, "independent" reflects INTERTANKO membership criteria that member companies be tanker owners neither owned nor controlled by cargo owners (*e.g.*, oil companies) whose cargo is carried aboard INTERTANKO vessels. INTERTANKO, however, works closely with all sectors of the international marine tanker market, and oil company-owned tanker companies participate in INTERTANKO activities as associate members.

INTERTANKO has a membership of 270 independent tanker owners and over 330 associate members. INTERTANKO's full members own, operate and manage more than 3,100 tankers in all major maritime trades of the world, including all major liquid bulk ports in the United States. These

members operate tankers totaling approximately 250 million tons (deadweight), or 80% of the world's independent tanker fleet. INTERTANKO has non-governmental organization status at the International Maritime Organization ("IMO") and consultative status at the UN Conference on Trade and Development.

Japan Shipping Exchange, Inc.

The Japan Shipping Exchange, Inc. ("JSE"), founded in 1921, is a non-profit and non-governmental organization which facilitates world maritime-related business transactions and assists maritime companies and organizations. Its members include more than 390 companies and organizations, including shipping companies, traders, steel-mills, shipbuilders, marine underwriters, protection and indemnity ("P&I") clubs, shipbrokers, agents, warehousing companies, banks, and law firms.

JSE serves the shipping industry by administering maritime arbitrations, drafting and promulgating maritime contract forms, publishing in-depth analysis on shipping and logistics in the form of the monthly magazine "KAIUN" and other periodicals including "Maritime Law Review" and "Mariners Digest" and providing electronic shipping databases. JSE also responds to inquiries, consults and advises its members on the interpretation of shipping contract clauses, the maritime economy and Japanese shipping policies. JSE drafts and promulgates standard contract

forms such as Nanyozai Charter Party ("NANYOZAI 1967"), Iron Ore Charter Party ("NIPPONORE"), Voyage Charter Party ("NIPPONVOY"), and the Coal Charter Party ("NIPPONCOAL") and Nippon Grain Charter Party ("NIPPONGRAIN").

Norwegian Shipowners' Association

The Norwegian Shipowners' Association ("NSA") founded in 1909 is a trade organization representing Norwegian companies engaged in shipping and offshore industries. Norway is one of the five largest shipping nations in the world with its fleet representing approximately 5% of the world's total merchant fleet. Norwegian member companies own and/or operate approximately 1,400 vessels representing 48 million deadweight tons with 50% of these vessels flying the Norwegian flag. More than 90% of the Norwegian fleet is engaged in trading outside of Norwegian waters.

In some areas Norway's relative position in the shipping industry is even larger than what gross average figures indicate. For example, Norwegian companies control approximately 20% of the world's gas carriers (LPG) and 20% of the world's chemical tankers. The vast majority of this trading is carried out via charter parties.

Society of Maritime Arbitrators, Inc.

In order to promote sound and ethical standards for maritime arbitrations, a group of individuals,

active as arbitrators, created the Society of Maritime Arbitrators, Inc. ("SMA") in 1963. Today the majority of shipping-related arbitrations in the United States 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 75 experienced shipping professionals from all walks of the industry. The SMA 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.

The SMA also publishes "The Arbitrator," a newsletter with more than 1,500 readers worldwide. 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. 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, unclear, or inconsistently applied.

Teekay Corporation

Teekay Corporation ("Teekay") operates more than 175 vessels, including time-chartered and commercially managed vessels, and is an essential

marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with downstream refining and distribution. In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG") – representing approximately 10 percent of the world's seaborne oil movements and about 2.4 percent of the world's LNG transport. In 2006, the Teekay fleet completed 3,307 voyages. Teekay has offices in 16 countries around the world and provides a comprehensive set of marine services to the world's leading oil and gas companies.

INTRODUCTION

Global trade relies almost entirely on the shipping industry for its transportation needs. Fully ninety percent of international trade moves by ships and other forms of marine transport. Shipping Facts, Shipping and World Trade, http://www.marisec.org/shippingfacts/worldtrade/index.php.

Meeting this staggering requirement are fifty thousand merchant ships registered in over one hundred and fifty nations. *Id.* It is difficult to think of an industry more international in scope than the shipping industry.

A key part of the international shipping industry is the parcel tanker trade. A parcel tanker is a vessel designed to carry simultaneously an assortment of bulk chemicals, vegetable oils and other liquids.

Utilizing sophisticated pumps and dedicated lines, bulk liquid cargoes (or "parcels") can be loaded, carried and discharged without contamination or loss.

Shippers in this trade normally engage the services of parcel tankers by entering into bilateral ship charters incorporating charter forms known in the industry by source (*e.g.*, ASBATANKVOY) or by trade (*e.g.*, VEGOILVOY). Sometimes, the parcel tanker charter can be for the entire vessel but, much more often, the charter covers only a "part cargo." It is normal for a loaded parcel tanker to have a large number of different cargoes owned by many different shippers, several of which compete with one another. As the information regarding customers, pricing, commodities, quantities and trade routes is extremely sensitive, the shipowner and its charterer normally agree to keep the chartering details private and confidential ("p and c" in shipping parlance).

SUMMARY OF ARGUMENT

Charter party forms, such as ASBATANKVOY and VEGOILVOY, are universally employed to provide known, understood and accepted contractual frameworks for the chartering of vessels. A dispute arising out of a charter party traditionally is resolved in arbitration by a panel of experienced maritime arbitrators applying maritime law. Maritime arbitrations are bilateral, private proceedings in which the parties expect to receive a quick commercial

decision. Class actions, which are not private, not informal and not quickly resolved, are alien to the customs and practices of maritime arbitral practice. It is, therefore, unreasonable to interpret silence in an arbitration provision as meaning that the parties intended to consent to class arbitration. To impose class arbitrations based on such silent provisions would be unprecedented and would compel the parties to go beyond that which they consented to arbitrate, thereby leading to unwelcome surprise and deep dissatisfaction. Furthermore, imputing consent to class arbitration, in the absence of express consensual language, would deter maritime contract parties from agreeing to arbitration in the United States.

ARGUMENT

I. Charter Party Dispute Resolution Historically Has Relied on Bilateral Arbitration Accomplished Quickly and Privately Before Arbitrators of the Parties' Choosing

A "charter party" (sometimes shortened to "charter") is a contractual arrangement, usually in writing, by which the shipowner or vessel operator contracts with another, termed the "charterer," to use the vessel. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 4-1, at 193 (2d ed. 1975). The first known usage of the term "charter party" dates back to 1539. Stewart C. Boyd et al., *Scrutton on*

Charterparties and Bills of Lading 3 n.19 (20th ed. 1996). Professor Schoenbaum in his treatise, *Admiralty and Maritime Law*, describes the origin of this term:

> The term "charter party" derives from the Latin, *charta partita* (a divided document), which shows the ancient origin of this arrangement. In the middle ages a contract technique was as follows: An agreement was written out twice on the same piece of parchment, then cut in half on a jagged line. . . . Each party would retain a half, and comparing the two halves would prove the agreement's authenticity.

Thomas J. Schoenbaum, 2 *Admiralty and Maritime Law* § 11-1, at 2 n.1 (4th ed. 2004).

There are different kinds of charter parties. The principal delineating factor is whether the charter party amounts to a lease of the vessel. Boyd et al., *supra*, at 59. If the shipowner has "parted with the whole possession and control of the ship," the charter is considered a lease of the vessel and is referred to in the trade as a "demise" or "bareboat" charter. *Id.* (quoting *Baumwoll v. Gilchrest*, [1892] 1 Q.B. 253, 259). As to charter parties that do not amount to demise charters, there are principally two kinds of charter parties. One is a contract under which the shipowner agrees with the charterer to carry one or more cargoes from one port to another on a single voyage (a "voyage charter"). *Id.* at 63-64. The other is a contract under which a shipowner agrees to carry

cargoes for a stated period of time normally covering more than one voyage (a "time charter"). *Id.* at 63. Regardless of the kind of charter party, all are considered maritime contracts. Gilmore & Black, *supra*, at 193; 1 *Benedict on Admiralty* § 183, at 12-7 (Steven F. Friedell ed., 7th ed. 2008); *Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 259 (1926); *Morewood v. Enequist*, 64 U.S. 491, 493-94 (1859).

A. Arbitration Practices in Charter Parties

Almost all charters contain dispute resolution provisions providing for arbitration. Schoenbaum, *supra*, § 11-19, at 47 ("[a]ll forms of charter parties routinely provide for dispute settlement by arbitration"). One commentator describes the traditional use of arbitration in charter party disputes thus:

> 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. These have, from early time, provided for recourse to arbitration as a preferred method for the resolution and settlement of disputes.

Richard A. Lord, 21 *Williston on Contracts* § 57:147, at 686-87 (4th ed. 2001). Professor Lord explains why arbitration provisions have long been so prevalent:

> The international nature of the maritime business makes arbitration more practicable

> – and its awards more portable – 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.

Id. at 687.

The United States Congress expressly endorsed the arbitration of maritime disputes when it enacted the Federal Arbitration Act in 1925 (9 U.S.C. §§ 1-16 (2006)) ("FAA"). Section 2 states that an arbitration provision "in any maritime transaction" is considered "valid, irrevocable, and enforceable." *Id.* § 2. Similarly, in the legislation implementing the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (9 U.S.C. §§ 201-208 (2006) (the "New York Convention"),[2] the U.S. Congress stated that any transaction included in "section 2 of this title [*i.e.*, 'any maritime transaction'] falls under the Convention." *Id.* § 202. *See also Atlas Chartering Servs. Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978).

The pervasive use of arbitration in the maritime industry is due to its several advantageous practices. One such practice is the bilateral nature of arbitration. The Chairman of the Arbitration Committee of the Chamber of Commerce of the State of New

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[2] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 6A *Benedict on Admiralty* Doc. 7-1 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 2007).

York, Charles Bernheimer, was a prominent witness in the hearings that preceded the enactment of the FAA. Mr. Bernheimer testified as to the efficacy of the "face to face" nature of bilateral arbitration:

> When the two parties to a dispute . . . are face to face they see, in the presence of a third man, their respective viewpoints better than they did before. . . . They are on speaking terms again and on terms of willingness to listen to reason, which they were not before, when they were separated and did not see each other face to face.

David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 60 (2007) (quoting *Hearing On S.4213 and S.4214 Before the Subcomm. of the S. Comm on the Judiciary*, 67th Cong. 5 1923) (statement of Charles L. Bernheimer).

Another important practice is that an arbitration proceeding, unless agreed otherwise, is private. Mr. Bruce Harris, an experienced maritime arbitrator, in his declaration which was submitted in evidence in this matter, emphasized the attraction of resolving maritime disputes in a private proceeding:

> Parties also choose to arbitrate their maritime disputes because arbitration is a private and confidential process. Arbitration allows the parties to a specific dispute to have that dispute considered and resolved behind closed doors, entirely between

> themselves, without the risk of the terms of their commercial relationship being disclosed to third parties.

Expert Declaration of Bruce Harris, dated Oct. 18, 2005, JA 128a, at JA 131a, ¶8 [hereinafter Harris Decl.].

One other highly valued practice is that the parties can select those who will decide the dispute. Most charter arbitration provisions provide that three arbitrators are to decide the disputes with each side appointing one arbitrator and the two arbitrators selecting the third arbitrator who acts as Chair.[3] Society of Maritime Arbitrators, Inc., *Maritime Arbitration in New York* 4 (4th ed. 2003) [hereinafter *SMA Guidebook*]. Traditionally, the parties choose commercial persons (*i.e.*, non-lawyers) with maritime experience to serve as arbitrators.[4] *Id.* at 7. Each party then would select someone who has the requisite commercial knowledge and experience to decide the dispute. John Kimball, a noted and experienced New York maritime lawyer who submitted a declaration in this matter, stated:

> In my experience, the parties I represent regard these appointment rights as an

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[3] In some arbitration provisions, the two party arbitrators do not choose a third arbitrator until the arbitration has been completed and then only if the two arbitrators cannot agree as to the result. *See, e.g.*, VEGOILVOY form, JA 9a, at JA 30a.

[4] In some arbitration provisions, having arbitrators with maritime industry experience is thought to be so important, it is mandated. *See, e.g.*, *id.*

> indispensable feature of their arbitration agreements and exercise them with the utmost care and seriousness.

Expert Declaration of John Kimball, dated Oct. 18, 2005, JA 119a, at JA 122a, ¶10 [hereinafter Kimball Decl.].

Mr. Harris agreed as to the importance of the parties selecting the arbitrators:

> The parties also guarantee that they will have a voice in the selection of their decision makers (usually each is entitled to appoint an arbitrator of its choosing), and therefore that those decision-makers will have what the parties judge to be the requisite experience and qualifications to decide the dispute.

Harris Decl., at JA 130a, ¶6.

In its Guidebook, the Society of Maritime Arbitrators ("SMA") describes the advantages to the parties of selecting the arbitrators: "[they] normally are comprised of one's peers in the industry – commercial people who apply their knowledge and understanding in what are often specialized areas." *SMA Guidebook* at 7. Courts also acknowledge the importance of peer review. For example, the Seventh Circuit recently stated:

> [T]hey have bargained for *the arbitrator's* interpretation of their contract – not ours. "Putting . . . matters in the hands of specialists rather than judges or jurors is one

> attraction of arbitration." If we were to weigh in on the merits of their case, we would be denying them the benefit of that bargain.

United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Trimas Corp., 531 F.3d 531, 536 (7th Cir. 2008) (citation omitted).

Still another practice is the expectation that the proceeding will conclude and an award will be rendered more quickly than in a court proceeding. As stated by Mr. Kimball:

> Arbitration also offers greater procedural flexibility than litigation, and is intended to result in a faster and less expensive proceeding. These features are particularly important to parties in maritime disputes, where exigent circumstances often require a quick resolution of a dispute. . . .

Kimball Decl., at JA 122a, ¶11.

In its Guidebook, the SMA states:

> Justice in New York arbitration is swift and final. Such speed and finality can effectively reduce costs, particularly when compared to court proceedings. . . .

SMA Guidebook at 9.

Those practices (a bilateral proceeding accomplished quickly and privately before an experienced and knowledgeable panel of arbitrators of the parties' choosing) are the advantages that parties

seek in arbitrating charter party disputes. Those advantageous practices are an important, accepted and acknowledged part of the maritime industry. Senior Judge Haight expressed his understanding of the role of maritime practices thus:

> In determining whether the parties' minds met with respect to an arbitration clause, a court applies the ordinary principles of contract construction. However, where as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to.

Samsun Corp. v. Khozestan Mach. Kar Co., 926 F. Supp. 436, 439 (S.D.N.Y. 1996) (citation omitted); *see also Orvig's Dampskibselskab A/S v. Munson Line S.S. Line*, 16 F.2d 957, 958 (2d Cir. 1927); *Schoonmaker-Conners Co. v. Lambert Transp. Co.*, 269 F. 583, 585 (2d Cir. 1920).

The maritime practices described above should guide the Court in deciding that a silent charter party arbitration provision cannot support a class action.

B. The Arbitration Provisions in the VEGOILVOY and ASBATANKVOY Confirm that the Parties Intended to Enjoy the Advantages of Maritime Arbitration

In negotiating a charter party, the parties attempt to agree to several variable terms including

the freight rate or hire amount, the quantity of and cargo type to be carried, the load and discharge ports (in the case of a voyage charter) or the duration of the charter (in the case of a time charter). Schoenbaum, *supra,* § 11-2, at 5. Another variable is the printed charter form which contains necessary terms which complement the variable terms and which experienced parties know and understand. Often, if the form is for a voyage charter, the suffix "voy" is added in naming the form or, if the form is for a time charter, the suffix "time" is added.

Charter party forms are drafted and issued by a number of maritime associations and companies. Some like *amici* BIMCO and INTERTANKO seek to produce forms and clauses that are designed to obtain broad industry acceptance. BIMCO, *Forms of Approved Documents* 2-3 (Rev'd Apr. 2009). Others, like major oil companies or commodity traders, issue forms or sets of clauses designed to fulfill their own requirements (usually as vessel charterers) and to take advantage of their superior bargaining power. Lars Gordon et al., *Shipbroking and Chartering Practices* 108 (6th ed. 2004). Included in these forms are a wide range of subjects that need to be covered if the contractual relationship is to proceed smoothly. Some of the common subjects concern arrival, delay, cleanliness, cancellation, liens and, of course, arbitration. These forms and the terms within, over time and through usage, become well-known in the maritime community. Kimball Decl., at JA 124a, ¶15. Also, as the charter terms are construed by the trade

and, sometimes, by arbitrators, those constructions assume the force of law. Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. 1421, 1481 (2001). The use of the charter forms speeds negotiations and minimizes disputes. If disputes do arise, the arbitration provisions allow for the resolution of the disputes privately and speedily. While using a form is not necessary, it is almost always part of an international charter party. *See* Schoenbaum, *supra*, § 11-2, at 4-5.

The ASBATANKVOY form (JA 32a) was first published in 1977 by the Association of Ship Brokers and Agents (U.S.A.) Inc. ("A.S.B.A.").[5] Julian Cooke et al., *Voyage Charters* 757 (3d ed. 2007). Its creator was Exxon Inc. (now ExxonMobil Inc.) and its original name was EXXONVOY. *Id.* When Exxon abandoned the EXXONVOY form to prepare a new iteration, it permitted A.S.B.A. to issue it under the ASBATANKVOY name. *Id.* In developing the EXXONVOY form, Exxon based it on the WARSHIPOILVOY form which had been issued by the U.S. government during World War II. D. Thomas McCune, *The ASBATANKVOY Charter* 1 (Lloyd's of London Press 1984).

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[5] As noted by Petitioners, the ASBATANKVOY charter form was used by some claimants which are no longer in the case. Petr.'s Br. 4 n.3. If this case proceeds with a class being established, some claimants, having used the ASBATANKVOY form, would be expected to be included.

The VEGOILVOY form was created in 1950 (JA 9a) and is very similar to both the EXXONVOY and ASBATANKVOY forms. That similarity results from their common sources. The VEGOILVOY form also was based on the WARSHIPOILVOY form.[6] *See* Charles L. Trowbridge, *The History, Development, and Characteristics of the Charter Concept,* 49 Tul. L. Rev. 743, 759 (1975). Both the VEGOILVOY and the ASBATANKVOY forms are used in a number of trades. In the parcel tanker trade they are used for the carriage of chemicals, vegetable oils and other liquid cargoes. Both forms contain arbitration provisions.

VEGOILVOY's arbitration provision, Clause 31, states in relevant part:

> 31. Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and

[6] WARSHIPOILVOY was the progenitor of a number of charter party forms including INTERTANKVOY, VEGOILVOY and EXXONVOY.

> procedure of the United States Arbitration Act,. . . .

VEGOILVOY form, JA 9a, at JA 30a.

ASBATANKVOY's arbitration provision, Clause 24, uses different words but it has the same import. In relevant part, it states:

> 24. Arbitration. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this Charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.

ASBATANKVOY form, JA 32a, at JA 50a-51a.

It is common ground that the parties did not amend Clause 31 of VEGOILVOY or Clause 24 of ASBATANKVOY expressly to allow class actions and that Clause 31 and Clause 24 are silent on the subject. Indeed, the text of each arbitration clause gives no indication that the parties intended to subject themselves to class arbitration. Clause 31 of the VEGOILVOY form requires the Owner and Charterer to arbitrate. JA at 30a. The terms, "Owner" and "Charterer" are identified and defined. *Id.* at 9a. They are the only parties to the charter party. Clause 31 is clear as to what disputes can be heard: only those "arising from the making, performance or

termination of this Charter Party." *Id.* at 30a. Clause 24 of the ASBATANKVOY form follows the same pattern.[7] Three justices of this Court found the similar results of a parsing of the arbitration provision dispositive in prohibiting class arbitrations in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting). The plurality found the analysis less "clear" as to whether the language prohibited class arbitration, but did not hold that the language indicated that the parties intended to subject themselves to class arbitration. *Id.* at 451. What can be agreed is that, while Clause 31 is silent on the subject of class actions, there is nothing in Clause 31 (or in the rest of the VEGOILVOY form) that would lead one to believe that, at the time of the making of the charter party, the parties intended, expected or desired that a class action could be imposed upon them. The issue then is whether, notwithstanding such silence, a class arbitration can be imposed.

II. Class Actions Are Alien To Maritime Arbitration

The nature of class actions and the lack of their acceptance internationally or within the maritime community strongly militate against the imputation

[7] The "Owner" and "Charterer" are defined; only disputes " . . . arising out of this Charter . . . " are to be heard. JA 32a, 50a-51a.

of an intent by the parties to include such actions in a maritime arbitration.

A. Class Actions Are Designed for Negative Value Cases Involving Consumers, Not Disputes Between Industrial Companies

The notion that the parties here intended to subject themselves to class arbitration by signing the general bilateral arbitration provision at issue, which makes no mention of class arbitration, is particularly unfounded given that this dispute lies far afield from the purpose of the class action device:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

The type of controversy that corresponds to this core policy of the class action mechanism is a negative value case, that is, "one in which the stakes to each member are too slight to repay the cost of the suit." William B. Rubenstein et al., 2 *Newberg on*

Class Actions § 4:33 (4th ed. 2009). Courts have recognized that the existence of a negative value suit is the most compelling reason to find a class action superior to other types of litigation, a finding required for a party to obtain class certification under Federal Rule of Civil Procedure 23(b)(3). *See*, *e.g.*, *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000); *Castano v. Amer. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).[8] Not surprisingly, then, the cases on which the Respondent relied before the arbitral panel, as examples of arbitrators interpreting silent arbitration clauses to permit class actions, were generally "consumer type . . . negative value cases." Tr. of Clause Construction Hearing, JA 77a, at 81a (statement by Arbitrator Jentes during argument); *see also* App. Pet. Cert. 50a (arbitral panel's noting Petitioner's argument to this effect and acknowledging that "none of the other [arbitral decisions allowing class arbitration] is exactly comparable"). In contrast to such consumer protection, negative value cases, Respondent admitted to the arbitrators that it would proceed individually with its claim for damages if a class is not certified. *See* Petr.'s Br. 14.

More generally, maritime arbitration – which is normally between two companies, not an individual consumer and a company – is well suited to resolve

[8] In addition to satisfying the prerequisites of Rule 23(a), parties seeking class certification must satisfy either Rule 23(b)(1), (2), or (3). *See Amchem Products, Inc.*, 521 U.S. at 614.

disputes concerning small amounts of money. The SMA has a special set of procedures that permit efficient, low-cost arbitration of such disputes. *See* Society of Maritime Arbitrators, Inc., *Rules for Shortened Arbitration Procedure* (effective May 1, 2007), *available at* http://www.smany.org/sma/about6-2.html. Therefore, some disputes that would be negative value cases if brought in state or federal court would not be negative value cases in maritime arbitration.

In summary, this case is not a negative value dispute, and, indeed, disputes resolved through maritime arbitration are less likely to be negative value cases than those litigated in state or federal court. There is no basis in either the record or in logic to assume that the parties, by signing a bilateral arbitration agreement making no mention of class arbitration, consented to subject themselves to class arbitration of a dispute that is far removed from the type of controversy underlying the class action mechanism.

B. Class Actions Are Not Internationally Accepted

A defining feature of maritime commerce is that the parties are normally from different countries and their contracts normally involve international commerce. As an example, in the last one hundred arbitration awards published by the SMA, sixty-eight arbitrations involved at least one party domiciled

outside the United States.[9] For this reason, many maritime charters, including the ASBATANKVOY and VEGOILVOY forms, provide for a neutral system of dispute resolution that is not based on the unique laws or customs of any one nation.

This transnational character of the ASBATANKVOY and VEGOILVOY charters is compelling evidence that parties do not intend to subject themselves to class arbitration by agreeing to the silent arbitration clauses in those charters. Most nations do not permit litigation or arbitration comparable to American-style class actions. One scholar, writing in 2002, went so far as to conclude: "The class action is a uniquely American procedural device." Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions,* 52 DePaul L. Rev. 401, 401 (2002). Professor Sherman further explained:

> Many countries have procedures that permit, in certain circumstances, standing to sue in the place of others, aggregation of similar claims, or suits filed in some kind of representative capacity. However, such procedures fall short of the broad sweep of the contemporary American class action with its

[9] Society of Maritime Arbitrators, Inc., *SMA Award Service*, Award Nos. 3943-039 dated October 11, 2006 – July 9, 2009 (there is an award number 3947A, and there are three awards designated "4001"), *available at* http://www.westlaw.com or http://www.lexis.com.

> incentives to litigate on behalf of a class. "Representative proceedings" have been available under English court rules for over two hundred years, but have been used infrequently as a result of early narrow interpretation by the courts and limitations on group-wide determination of damages.

Id. at 402 (footnote omitted).

And although group actions have gained some traction in other common law countries, they "are still relatively rare and unknown in civil law countries." Bernard Hanatiou, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* 257-58 (2005); *see also* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 Nw. J. Int'l L. Bus. 301, 308 (2007) ("Although there have increasingly been suggestions to introduce class actions – at least in limited circumstances – in many other countries, few of those countries have yet acted on them. Among those that have, most are squarely in the common law tradition . . . .") (footnote omitted); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 405, 413 (2001) ("[I]n many civil law systems, there is still widespread and strong resistance toward the acceptance of any full-fledged form of group or class litigation."). As even a proponent of class arbitration has acknowledged:

> [M]any states – particularly civil law systems – have deep-seated concerns about the U.S. model due to fundamental conceptual differences about how individual procedural rights

> operate. . . . Because the right to an individual cause of action is inviolate and cannot be overcome by arguments of social or judicial efficiency, civil law nations resist a wide rule allowing representative actions.

S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 22-23 (2008).

As these authorities demonstrate, class actions are not internationally accepted. *See also* Eric Tuchmann, *The Administration of Class Action Arbitrations, in Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement* 325, 334 (Belinda Macmahon ed., 2009). It would therefore thwart the purpose of the arbitration clauses in the ASBATANKVOY and VEGOILVOY charters – which, as noted, is to create neutral systems of dispute resolution that do not depend on country-specific litigation models – to require class arbitration under those clauses. Parties, like the Petitioners, who signed the ASBATANKVOY and VEGOILVOY charters in the period 1998-2002 had no reason to expect that, by signing a silent arbitration clause, they were subjecting themselves to a type of litigation that may well be unknown to their nation's legal system, or even contrary to their nation's deep-seated legal norms. As explained by the American expert in a declaration presented to the arbitrators in this case:

> There is no doubt whatsoever that these [charter] forms would not have been acceptable to the vast majority of owners and

> charterers if these forms had authorized the use of particular national court litigation procedures, such as class actions, for the resolution of disputes under the charter parties. . . . Non-U.S. parties typically have no experience with class actions and would be horrified to learn they could find themselves caught up in a class action case by agreeing to arbitrate in New York, as compared with other leading maritime arbitration centers whose legal systems do not recognize these types of cases . . . .

Kimball Decl., at JA 124a, ¶15-16.

C. Class Actions Are Not Accepted in the International Maritime Arbitral Community

There has never been a class action resolved by international maritime arbitration. Harris Decl., at JA 139a, ¶24; Kimball Decl., at JA 126a, ¶21. As described, *supra*, the participants in a maritime arbitration expect the arbitration to be a bilateral proceeding which will be accomplished quickly and privately. If class actions were to be permitted, the participants doubtless would be greatly surprised and sorely disappointed.

1. The maritime arbitration would not be bilateral.

Class actions are not bilateral. In fact, one of the requirements of a class action is numerosity. *See*

Fed. R. Civ. P. 23(a) ("that the class is so numerous that joinder of all class members is impracticable"); American Arbitration Association, *Supplementary Rules for Class Arbitrations* 4(a)(1) (effective Oct. 8, 2003), at JA 57a. Class actions can involve hundreds, thousands, or even over a million parties. *See, e.g.*, *Grueschow v. Harris*, 492 F. Supp. 419, 422 n.1 (D.S.D. 1980), *aff'd*, 633 F.2d 1264 (8th Cir. 1980) (government benefits) (5,000 class members); *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974) (government regulation) (multi-million member plaintiff class). Therefore, a class arbitration lacks " 'the face to face' quality of the very different kind of proceeding described to Congress prior to the FAA's enactment." Clancy & Stein, *supra*, at 64.

2. The maritime arbitration would not be resolved quickly.

Class action "is not prompt, inexpensive, and streamlined," rather it "resolves the claims of many individuals, and, as such, [it] inherently require[s] the staged and deliberate resolution and administration of complex issues." Clancy & Stein, *supra,* at 62.

3. The maritime arbitration would not be private.

Due 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. As explained by Bruce Harris:

> The reason parties agree to arbitrate international maritime disputes in the first place is to accomplish neutral, private commercial dispute resolution without the delay, uncertainty, and complexity of court proceedings. These objectives would be wholly undermined if one party could impose on another a U.S. style class action litigation. Such a proceeding would destroy the privacy and confidentiality of the arbitral process, would eliminate the ability of each party involved to influence the selection of the tribunal, and would subject the parties to a complex national court litigation process which is both unfamiliar and unsuited to maritime disputes.

Harris Decl., at JA 138a, ¶21.

In light of the foregoing, class arbitrations have not been and would not be accepted by the maritime arbitral community. The two maritime arbitration experts, discussed above, one from New York and one from London (the other principal site of international maritime arbitrations), presented undisputed evidence below that class arbitrations are wholly foreign to maritime practice. In the words of John Kimball, the New York expert: "Allowing class action arbitration under one of the[ ] charter parties [at issue in this case] would be more than unprecedented. It would be entirely inconsistent with the expectations of the thousands of parties who have

chosen New York as the situs for international maritime arbitrations[.]" Kimball Decl., at JA 126a, ¶21. Similarly, Bruce Harris, who has been appointed as an arbitrator in over eight thousand maritime arbitrations over the past twenty-five years in London affirmed:

> Whatever the status of class action arbitrations in other fields in the U.S., there is no precedent of which I am aware for a class action maritime arbitration in the U.S. or elsewhere. . . . None of the arbitrator colleagues . . . to whom I have spoken have ever heard of the idea. Nor would they be prepared to entertain it any more than I would.

Harris Decl., at JA 139a, ¶24.

These uncontroverted expert declarations are fully supported by the experience of the SMA. As explained in a forthcoming article jointly written by a past president and the current vice-president of the SMA:

> The question of potential class arbitrations under the SMA Rules has been brought up for discussion periodically, and the SMA has each time noted the total absence of a tradition for class arbitration in maritime disputes (a view also shared by our colleagues in London) and has unanimously concluded that it generally sees no place for class arbitration in maritime disputes.

Manfred W. Arnold & Bengt E. Nergaard, *Does an Arbitration Clause Providing for Arbitration in New York Imply that the Parties Agree to Class Arbitration Proceedings?* (Int'l Conference of Mar. Arbitrators, forthcoming Oct. 2009) (manuscript at 5).

The SMA Rules do have a provision for consolidated arbitration, which means that, if parties incorporate the SMA Rules into their arbitration agreement, they consent to consolidated arbitration.[10] However, because there is no precedent for class arbitration in maritime disputes, "[i]t was, therefore, considered sufficiently implied in the SMA Rules that they did not apply to class action arbitrations so that an express statement to this effect was not necessary." *Id*.

In the wake of the decision in this case by the Second Circuit, however, the SMA decided that "even if restating the obvious, it was appropriate to amend its Rules by including a specific reference to class actions." *Id*. (manuscript at 10). As a result, the SMA added the following sentence to its consolidation provision: "However, claims on behalf of or against a class are prohibited from being submitted to arbitration under these Rules." Society of Maritime Arbitrators, Inc., *Maritime Arbitration Rules* § 2

[10] The charters in this case do not incorporate the SMA Rules into their arbitration clauses. *See* JA at 30a, 50a-52a. Amici nonetheless discuss the SMA Rules because they are illustrative of the settled understanding in international maritime law rejecting class arbitration.

(effective Mar. 19, 2009), *available at* http://www.smany.org/sma/about6-1.html. As discussed, there was nothing innovative about this amendment: it simply reflects the well-settled transnational understanding that, absent an explicit agreement to the contrary, parties to maritime charters do not intend to subject themselves to class arbitration.

D. Because Class Actions Are Alien to Maritime Arbitration, It Is Unreasonable to Interpret Silence in the Arbitration Clauses at Issue Here to Mean That the Parties Consented to Class Arbitration

The Federal Arbitration Act "declares a national policy favoring arbitration," to the extent that, and only to the extent that, the parties have contracted to settle their disputes through arbitration. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). As this Court explained in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985), "[t]he Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." Therefore, it is axiomatic that the scope of an arbitration cannot go beyond that which the parties have contractually consented to arbitrate. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*

Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989); *see also United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

This means that a court cannot compel multi-party arbitration absent prior consent by all of the affected parties. For example, in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983), the Court recognized that two related disputes involving three separate parties would have to be resolved in two different forums: two of the three parties had agreed to resolve their disputes by arbitration and were required to do so, but the third had not entered into an arbitration agreement and "cannot be sent to arbitration without [its] consent."

Similarly, where an arbitration agreement between two parties is silent as to class arbitration, those parties have not consented to class arbitration and cannot be required to subject themselves to it. As the Seventh Circuit has explained:

> The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration."

Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (quoting *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Seyla, J., dissenting) (alterations omitted)).[11]

These principles apply with special force in the maritime context. As discussed, maritime arbitration is unique in a number of important respects: (i) maritime arbitrations rarely involve the consumer protection, negative value cases that are the primary objective of class actions, (ii) the international character of maritime commerce means that maritime arbitration agreements must be interpreted consistently with the expectations of parties from around the world – many of which are from legal systems that reject class actions, (iii) maritime arbitration clauses generally envision that non-lawyer shipping persons, who lack training or

[11] In *Champ*, the Seventh Circuit relied heavily on decisions by six other circuits holding that courts could not require consolidated arbitration where the parties' arbitration agreement was silent on the point. *See* 55 F.3d at 274-75. As explained by one those decisions, "[i]t is clear the parties here did not consent to joint arbitration" because there was no provision for consolidated arbitration in their contracts; therefore, the parties could not be required to proceed with consolidated arbitration. *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *see also*, *e.g.*, *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) ("Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in.").

experience with the procedural complexities of class arbitrations, serve as arbitrators, and (iv) maritime arbitrations are bilateral, private and speedily determined. Under these circumstances, it would be nothing more than a legal fiction to presume that parties intended to subject themselves to class arbitrations by signing bilateral arbitration clauses in transnational maritime charters. This Court's precedent, which holds that parties "cannot be sent to arbitration without [their] consent," *Moses H.*, 460 U.S. at 19-20, leaves no room for such fiction.

III. Imputing Consent to Class Arbitrations Based on Silent Agreements Will Be Disruptive to the Maritime Industry and Discourage Parties From Consenting to Arbitration in the United States

Businessmen bear risks for which they are rewarded if they have calculated correctly and punished if they have not. It is essential, in calculating those risks, that they be confident that the terms of the agreement embodying those risks are uniformly interpreted and consistently applied. As stated by this Court "orderliness" and "predictability" are "essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Permitting arbitrators to impose class actions in silent arbitration provisions would undermine that confidence and lead to disruption and frustration.

A. Permitting Class Actions in Maritime Arbitrations Would Expose the Awards to Challenge Under Article V of the New York Convention

Because of the limited right of appeal, the most vigorous challenge to an international class arbitration will arise in the enforcement stage under the New York Convention. *See* S.I. Strong, *Legal Research Paper Series Research Paper No. 2009-04: The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity*, at 4, 77 (2009), *available at:* http://ssrn.com/abstract=1359353. In particular, the successful class action party seeking to enforce the award will be faced with challenges under Article V(1)(c), (1)(d) and V(2)(b) of the New York Convention. Those sections provide for the court in the foreign country to refuse to recognize and enforce the award if:

> 1(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration,. . . .
>
> [or]
>
> 1(d) [t]he arbitral procedure was not in accordance with the agreement of the parties,. . . .
>
> [or]

> 2(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra*, n.2; 9 U.S.C. § 201.

To date, there have been no known actions outside the United States to enforce a class action award arising out of a U.S.-based class arbitration. Strong, *The Sounds of Silence, supra,* at 21. If a foreign court were to consider class actions unsupportable under its own laws, it could deny recognition or enforcement of the class action award under paragraphs (c) or (d) of Article V(1) or paragraph (b) of Article V(2).

B. Inserting a Contractual Provision Barring Class Actions Is No Answer

Charter parties are negotiated and agreed by commercial men employed usually in the chartering departments of their employers. Their training usually includes an apprenticeship at a charter brokerage company. Many have sea experience. Hardly any have legal experience. Lawyers play no role in negotiating charter parties. Indeed, all but the largest shipping companies do not have in-house counsel. Lawyers get involved only when a dispute arises that cannot be resolved commercially. Asking commercial persons to protect themselves from risks of which they are unaware is unrealistic. At best, the education of shipping persons to this risk would take

considerable time with the results uneven and difficult to gauge. The consequence would more likely be a rejection of the place where the risk exists rather than the crafting of a contractual provision to avoid the risk. In the meantime, there would be innumerable charters that predate the cure, likely thousands which are long-term contracts and all of which include unprotected arbitration provisions that would lie in wait for the unfortunate who would be affected.

C. Imposing Class Actions in Maritime Arbitration Will Further Deter Maritime Companies From Choosing to Arbitrate in the United States

All modern charter party forms contain a dispute resolution form that includes the place where the dispute will be resolved. Schoenbaum, *supra*, § 11-19, at 47. Many forms include a choice in which the parties select New York or London (the two principal maritime centers) or a mutually agreed place. This Court has acknowledged the importance of selecting, in advance, a dispute resolution forum:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516.

Not only is the incorporation of a forum selection clause "indispensable," the actual place that is to be selected in international maritime contracts is of consequential importance:

> [I]t would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with consequences of the forum clause figured prominently in their calculations.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 14 (1972).

Imposing class actions in an international maritime arbitration, notwithstanding that the dispute resolution provision is silent, would deter parties from selecting the United States as the dispute resolution situs. The English maritime arbitration expert, Bruce Harris, stated that shipowners and charterers, who become aware that a silent maritime arbitration would expose them to class actions, "would almost always prefer another arbitral situs." Harris Decl., at JA 142a, ¶20. Similarly, John Kimball declared that foreign shipowners and charterers would "veto" New York as the arbitral situs if they became aware that silent arbitration provisions could lead to class actions against them. Kimball Decl., at JA 124a-125a, ¶16. He added that it would be "hard to imagine" major oil company charterers would subject themselves to class actions by agreeing to arbitrate in New York. *Id.* A.S.B.A., the group representing the American shipbrokers and ship agents (and one of the *amici*), cautions that

if silent arbitration clauses were construed as suggested by the Respondent, foreign companies would look elsewhere for trading partners. A.S.B.A. Cert. Br. 7.

Imposing class arbitration involuntarily on the international maritime community would place New York (and the United States) in a significantly disadvantageous position when parties decide the arbitral forum in which to have their potential disputes resolved.

CONCLUSION

The judgment should be reversed.

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September 4, 2009

Respectfully submitted,

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