

TOO MUCH POWER AND NOT ENOUGH: ARBITRATORS FACE  
THE CLASS DILEMMA

by

Alyssa S. King\*

*After a series of Supreme Court decisions limiting the use of class arbitration and allowing defendants to contractually prohibit it, many expected that the end of this form of arbitration was imminent. Others argued that, given arbitrators' wide discretion and the limited scope for judicial review, class arbitration might continue much as it had before. The empirical data developed in this Article show that neither side is completely correct. Class arbitration with the country's largest provider, the American Arbitration Association (AAA), has not ended, but it has changed significantly. Arbitrators' willingness to find that a contract gives them jurisdiction to allow class arbitration has decreased dramatically.*

*AAA's publicly available awards demonstrate that the class arbitration system was neither dismantled nor unaffected. Instead, the arbitrators' approach to the change wrought by the Supreme Court resembles that of judges. Some businesses have updated their contracts to include class waivers, but many arbitrations have gone forward under contracts that are not so clear. Although they once routinely ruled that class arbitration was permitted in such instances, arbitrators have now split nearly 50-50 on whether ambiguous clauses permit class arbitration. The arbitrators take the law seriously, and its inconsistencies have resulted in the present muddle. Unlike judges, however, arbitrators cannot write their way out of trouble by creating a general default rule. Their authority is simultaneously too broad and not broad enough.*

INTRODUCTION .....	1032
I. HOW CLASS ARBITRATION WORKS .....	1036
A. Arbitrators, Not Judges.....	1037
B. Organizational Rules.....	1039
II. WHAT HAS HAPPENED SINCE <i>Stolt-Nielson</i> ? .....	1041

---

\* Resident Fellow, Yale Law School Information Society Project. PhD Candidate in Law, Yale University. Thanks to Sadie Blanchard, Richard Brooks, Alvin Cheung, Robin Effron, Robert Ellickson, Claudia Haupt, Daniel Hemel, Kate Klonick, Daniel Markovits, David Noll, Tom Tyler, Judith Resnik, Michael Reisman, and John Witt for their helpful comments. I would also like to thank participants in the Graduate Student Conference on Judicial Politics at Yale University, the YLS PhD Seminar, and the ISP Fellows Workshop.

A.	<i>Scope</i> .....	1045
B.	<i>Arbitration Characteristics</i> .....	1048
	1. <i>What is Arbitrated</i> .....	1048
	a. <i>The Claims</i> .....	1048
	b. <i>Applicable State Law and Venue</i> .....	1050
	c. <i>The Contracts</i> .....	1050
	2. <i>Who Arbitrates?</i> .....	1054
C.	<i>Award Characteristics</i> .....	1058
	1. <i>A Judicialized Approach</i> .....	1059
	2. <i>Reasons Arbitrators Found They Did Not Have Authority to Administer a Class Arbitration</i> .....	1063
	3. <i>Reasons Arbitrators Decided They Had Authority to Administer a Class Arbitration</i> .....	1064
	4. <i>What Accounts for the Split Among Arbitrators?</i> .....	1067
III.	DEVELOPING NEW DEFAULTS.....	1070
	A. <i>Courts</i> .....	1073
	B. <i>Legislation or Regulation</i> .....	1075
	C. <i>A Private Solution</i> .....	1076
	CONCLUSION .....	1077

## INTRODUCTION

The Supreme Court's jurisprudence has been nothing if not arbitration friendly, with the exception of class arbitration, a type of arbitration using procedures similar to a federal class action. Justice Alito's majority opinion in *Stolt-Nielsen v. AnimalFeeds*, the first in a series of cases hostile to class arbitration, condemned the American Arbitration Association (AAA) panel that ordered class proceedings for "impos[ing] its own policy preference[s]" when the parties had not agreed to a class proceeding.<sup>1</sup> Justice Alito emphasized the "fundamental changes" brought about by the use of class proceedings; they may "resolve[] many disputes between hundreds or perhaps even thousands of parties," involve public proceedings and, "bind. . . absent parties," so that "the commercial stakes. . . are comparable to those of class-action litigation."<sup>2</sup> He further took arbitrators to task for acting like "common-law court[s]" and referring to their own precedents and to "public policy."<sup>3</sup> A year later, in *AT&T Mobility LLC v. Concepcion*, Justice Scalia was blunt, declaring that "[a]rbitration is poorly suited to the higher stakes of class litigation."<sup>4</sup> "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to general procedural

<sup>1</sup> *Stolt-Nielsen S.A. et al. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676 (2010).

<sup>2</sup> *Id.* at 686.

<sup>3</sup> *Id.* at 673–74.

<sup>4</sup> 563 U.S. 333, 350 (2011).

morass than final judgment.”<sup>5</sup> In light of the Court’s hostility, the end of class arbitration seemed imminent.

This expectation was wrong. The dockets of the nation’s largest arbitration provider, AAA, show a class arbitration system that remained alive, if not exactly well, five years after *Stolt-Nielsen* seemed to signal its demise. Arbitrators continued to order class arbitration. The Court even affirmed their power to do so in *Oxford Health Plans LLC v. Sutter*.<sup>6</sup> Still, a shift is apparent. AAA arbitrators once allowed class arbitration in somewhere between seventy and ninety percent of cases.<sup>7</sup> Post-*Stolt-Nielsen*, they did so in about fifty percent of their decisions on the issue.<sup>8</sup> AAA’s system is judicialized,<sup>9</sup> enough to be seriously affected by changes in the law. Arbitrators pay close attention to *Stolt-Nielsen* and its progeny in explaining their decisions. The Court’s arbitration decisions have left arbitrators in a difficult situation. They retain the power to order class arbitration in ambiguous cases, but do not have enough power to resolve the uncertainties that the Court has introduced or to develop their own default rule.

This Article is the first to examine AAA’s class arbitration system in the post-*Stolt-Nielsen* landscape. To measure the Court’s impact on the arbitrators, I analyze sixty-four “clause construction” awards. Clause construction awards are initial determinations of whether an arbitration clause gives an arbitrator the authority to hear an arbitration on a class basis. The sixty-four awards represent all publicly available clause construction awards from April 2010 (shortly after *Stolt-Nielsen* was issued) to the end of 2015. Such decisions were at issue in several of the major class arbitration cases.<sup>10</sup> Because plaintiff claims may be too low value to

---

<sup>5</sup> *Id.* at 348.

<sup>6</sup> 133 S. Ct. 2064 (2013).

<sup>7</sup> See *infra* notes 83–84 and accompanying text.

<sup>8</sup> See *infra* note 85 and accompanying text.

<sup>9</sup> “Judicialization” or “institutionalization” has been observed in several arbitral fora. Judicialization typically involves the use of a detailed process mandated by the organization. It may also involve a style of decision-writing that resembles the practices of national or international courts. See Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627, 641 (2006) (defining institutionalization as “the process through which arbitral practices are consolidated as stable rules and procedures”); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 46–48 (1999) (describing shift away from “folklore” to judicialized arbitration in a domestic context). This terminology is not fully fixed. See also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 46, 60–62, 111–13 (1996) (describing “routinization” in international arbitration as the development of a system that is more “procedural,” “routine and . . . judicialized” as well as the involvement of experts in the field (both within arbitration organizations and large law firms) whose input renders disputes a matter of routine).

<sup>10</sup> *Oxford Health Plans*, 133 S. Ct. at 2067; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 662 (2010); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011).

pursue individually, a clause construction decision can determine the outcome of the arbitration.

My data covers AAA class arbitrations in which no party successfully convinced the arbitrator to make the record confidential. It leaves out such confidential cases, as well as any administered by JAMS (formerly Judicial Arbitration and Mediation Services and Endispute), which also claims the capacity to administer class arbitrations.<sup>11</sup> Despite these limits, a focus on AAA is warranted due to the organization's size and prominence.<sup>12</sup>

This case study is relevant not only to class arbitration, but also to other situations in which arbitrators encounter changes in law that may impact their powers. AAA has actively sought to maintain and expand its powers, filing briefs in significant cases, and seeking to influence legislation.<sup>13</sup> As arbitrators take on tasks beyond resolving bilateral contract disputes, particularly those of a public, administrative nature, arbitrator approaches to case management and to legal interpretation may also change. As a site of debates that expose contested theories of arbitrator authority, AAA class arbitration provides one example of this phenomenon. Under current law, arbitrators lack contract-based authority to fill a gap in terms with permission to conduct class arbitration. They also lack the public authority of judges in ordering class actions. This state of affairs reflects a central tension in the role of arbitrators.<sup>14</sup>

Arbitration scholars have attacked the Court's treatment of class arbitration as inconsistent with other aspects of U.S. arbitration law.<sup>15</sup>

---

<sup>11</sup> *Arbitration Services*, JAMS, <https://www.jamsadr.com/adr-arbitration/>.

<sup>12</sup> AAA claims that it is the largest dispute resolution provider in the world. AM. ARB. ASS'N., 2016 ANNUAL REPORT AND FINANCIAL STATEMENTS 8 (2017). The Consumer Financial Protection Bureau (CFPB) arbitration study shows that AAA is listed far more frequently than its competitors as the organization to administer an arbitration in the industries the study covered. CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2.5.3 (2015).

<sup>13</sup> See, e.g., Brief of the American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198); SARAH STASZAK, NO DAY IN COURT: THE POLITICS OF JUDICIAL RETRENCHMENT 50–51 (2015) (AAA lobbying).

<sup>14</sup> See generally Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010) (discussing contrasting arbitrators acting as agents authorized to fill gaps in a contract with arbitrators acting as adjudicators authorized to interpret, and not create, contractual provisions).

<sup>15</sup> See, e.g., William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 AM. U. INT'L L. REV. 837, 853 (2012) (arguing that the majority conflated arbitrator jurisdiction, which is subject to judicial review, with the merits of the award, which is subject to review only for manifest disregard of law); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 485 (2011) (asking "if indeed the avoidance of class relief is the engine driving the machine"); S.I. STRONG, CLASS, MASS, AND

Meanwhile, many civil procedure scholars see the Court as denying effective redress to those with smaller claims, connecting the class arbitration decisions to other decisions related to class actions.<sup>16</sup> In the context of mass contracting, some questioned whether it made sense to talk about an individual “choice” to arbitrate.<sup>17</sup> Not only are contracts adhesive, but absent parties will also be bound by the arbitrator’s decision.<sup>18</sup> Moreover, class litigation enables private plaintiffs to do the work of public regulatory authorities, ensuring that statutory commands are enforced.<sup>19</sup> In offering class arbitration, AAA and other organizations may not be subject to the same scrutiny as the public authorities that previously did such work.

Class arbitration little resembles the idealized picture of quick and inexpensive bilateral arbitration drawn by the Court.<sup>20</sup> To begin with, demand for class arbitration is plaintiff driven. Defendants, the contract drafters, did not affirmatively choose a class arbitration in any example. Rather, they faced class arbitration because they wrote contracts without class waivers and did not change the terms before the plaintiffs’ claims accrued.<sup>21</sup> Moreover, all parties in the arbitrations were represented and

---

COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 109 (2013) (criticizing the majority’s “unspoken premise that the nature of arbitration is something that can be both defined and universally agreed upon” for ignoring the diversity of forms of arbitration).

<sup>16</sup> See, e.g., David Horton & Andrea Cann Chandraseker, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 124 (2015) (showing that empirical data compiled from AAA arbitrations confirms that large corporations are using individual arbitration clauses to shield themselves from liability); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808–11 (2015) (arguing that the effect of the Supreme Court’s class arbitration jurisprudence has been to create a system in which consumers do not defend their rights in court or in arbitration and that the courts must recognize a right to “effective vindication” in adjudication); Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 2 (2011) (arguing that “class-wide consumer actions—whether litigation or arbitration—will all but disappear” in the wake of *Concepcion*).

<sup>17</sup> Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 723 (2013).

<sup>18</sup> AAA submitted an amicus curiae brief to the Supreme Court in *Stolt-Nielsen*. There, it noted the differences between other arbitrations it administers and class arbitration, which involves “greater prevalence of arbitration clauses in form contracts with large numbers of counterparties.” Brief, *supra* note 13, at 7.

<sup>19</sup> STRONG, *supra* note 15, at 280 (collective forms of arbitration have “regulatory overtones”); David Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1037–52 (2017).

<sup>20</sup> See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).

<sup>21</sup> Under *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2316–17 (2013), arbitration clauses barring class mechanisms are not unconscionable even if they have the effect of making litigation too expensive for the plaintiff to pursue. As a result, one might expect potential defendants to include a class waiver in any arbitration clause.

arbitrators were often experienced in handling class matters. Finally, AAA arbitrators have a unique opportunity to engage courts and legislatures on this issue because their class arbitration decisions are public.<sup>22</sup> In most instances, lack of publicity means that scholars are confined to studying how courts view arbitrators. The class arbitration dockets allow a rare window into how arbitrators view courts.

The arbitrators approached their decisions the same way judges would, engaging with relevant cases and statutes. However, *Stolt-Nielsen* emphasized how far their authority is from that of judges, taking the arbitral panel to task for relying on previous awards and on public policy in its decision.<sup>23</sup> Without these tools, arbitrators face a dilemma. The data show that *Stolt-Nielsen* and *Concepcion* effectively did away with a previous default that AAA arbitrators had developed in favor of allowing class arbitration in ambiguous cases. Arbitrators are now split on how to approach ambiguous arbitration clauses, creating inconsistency in outcomes in arbitrations involving strikingly similar contract language. Arbitrators cannot reach for tools, such as policy and precedent, which could allow them to resolve the split in interpretations. Such a result may be necessary to prevent arbitrators from becoming a law unto themselves, but it also limits the degree to which adjudication in arbitration can substitute for adjudication in court. Lacking these tools, arbitrators will likely need outside help in the form of legislation or regulation to reestablish a default rule.

This Article has three parts. Part I offers a brief history of class arbitration and a description of AAA's process. Part II presents the AAA data, which shows that the Supreme Court's decisions had a significant impact—the rate at which arbitrators allowed class arbitration at this initial jurisdiction phase dropped from between seventy and ninety percent to forty-five percent of cases. AAA's default rule in favor of class is no more, and arbitrators differ on how to respond. The awards also show the limits of judicialization. Arbitrators can approach their work like judges, but cannot develop the law to resolve splits in how they view similar contracts. Part III argues that the present situation is particularly problematic for plaintiffs, who cannot draft their way out of it, and suggests a default rule allowing class arbitration. If this Article concerned a split in opinion among common law judges, this Part would be addressed to them. However, arbitrators lack the power to develop a common law rule, so legislation and regulation are necessary instead.

## I. HOW CLASS ARBITRATION WORKS

Current case law leaves class arbitration in an uncertain position. Arbitrators may be given authority to decide whether a contract gives them the power to administer an arbitration as a class. However, they

---

<sup>22</sup> Supplementary Rules for Class Arbitrations § 10 (Am. Arbitration Ass'n 2003).

<sup>23</sup> *Stolt-Nielsen*, 559 U.S. at 672–75.

may not reach for rules outside the contract to make this decision. Except for the initial contract interpretation, an AAA class arbitration will go forward in steps resembling a class action in federal court. AAA's process involves public dockets, reasoned decisions, notice to absent parties, and arbitrator approval for class settlements.<sup>24</sup> These elements set the stage for arbitrators to take on a judicial role in their decisions—paying significant attention to the law as the courts have articulated it.

### A. *Arbitrators, Not Judges*

American arbitrators first used class arbitration as early as the 1980s.<sup>25</sup> However, it was not until 2003 that the Supreme Court appeared to approve the proposition that arbitrators could preside over a class arbitration even if the parties did not explicitly agree to one in their contract.<sup>26</sup> Subsequent Supreme Court rulings have taken contradictory positions, leaving lower courts and arbitrators to parse their meaning.

In the 2003 decision *Green Tree Financial v. Bazzle*, the parties' contract neither clearly permitted nor clearly prohibited class arbitration.<sup>27</sup> A state court first granted class certification and then granted a motion to compel arbitration, which went forward on a class basis.<sup>28</sup> After the class arbitration, Green Tree challenged the state court's decision confirming the award. A plurality of the Court determined that, in principle, arbitration could proceed on a class basis without violating the Federal Arbitration Act (FAA). The Court remanded to allow the arbitrators, not the state court, to decide whether the contract allowed class arbitration, as it interpreted the contract as giving jurisdiction over this issue to the arbitrators.<sup>29</sup>

Having seemingly accepted class arbitration, the Supreme Court reversed course in its 2010 *Stolt-Nielsen v. AnimalFeeds* decision.<sup>30</sup> At issue was a decision by a panel of AAA arbitrators that permitted the arbitration to proceed on a class basis.<sup>31</sup> The majority in *Stolt-Nielsen* held that: "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."<sup>32</sup> Writing for the majority, Justice Alito faulted the arbitrators for "impos[ing] class arbitration even though" the parties had reached no agreement to allow class arbitration.<sup>33</sup> He also criticized the arbitrators for relying on public policy arguments and on previous

---

<sup>24</sup> Supplementary Rules for Class Arbitrations, *supra* note 22, at § 3.

<sup>25</sup> Rau, *supra* note 15, at 445–46.

<sup>26</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 449.

<sup>29</sup> *Id.* at 454.

<sup>30</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

<sup>31</sup> *Id.* at 672–73.

<sup>32</sup> *Id.* at 684.

<sup>33</sup> *Id.*

decisions by other AAA arbitrators.<sup>34</sup> Justice Ginsburg dissented along with three others, taking the majority to task for reviewing an interim arbitral decision.<sup>35</sup> Moreover, she saw nothing wrong with arbitrators conducting a putative class action when a court would have authority to do so.<sup>36</sup>

Later decisions have potentially undermined both plaintiff access to class arbitration and state attempts to regulate it. In *AT&T Mobility v. Concepcion*, the Supreme Court determined that states could not treat contractual prohibitions on class arbitration as unconscionable, abrogating California precedent and statutory rules that required access to class arbitration for consumer claims.<sup>37</sup> *Concepcion* was directed to state courts rather than to arbitrators, but also reiterated the view that class arbitration is “fundamental[ly]” different from bilateral arbitration, citing “absent parties,” “higher stakes” and a lack of confidentiality as well as more burdensome procedures.<sup>38</sup> Further, “class arbitration greatly increases risks to defendants” as AAA and other fora typically offer no means of appeal.<sup>39</sup> Justice Breyer’s dissent rejected this view and pointed to the advantages of class proceedings for litigating low-value claims.<sup>40</sup> In *American Express v. Italian Colors*, the Court held that an arbitration clause with a class action waiver was permissible even if individual arbitration was too costly for plaintiffs to use.<sup>41</sup> The Court did not discuss class arbitration at length; its target was a Second Circuit decision on a related issue.<sup>42</sup> However, the decision gave free rein to potential defendants seeking to avoid class arbitration through contract, even in cases that might be impossible to pursue without this form of arbitration.

The circuits split on how to read the Court’s warnings against class arbitration. In *Jock v. Sterling Jewelers*, a 2011 gender discrimination case, the Second Circuit upheld an arbitrator decision that a clause that sent “any dispute” to arbitration could be read to allow arbitrators to conduct a class arbitration.<sup>43</sup> The AAA arbitrator decided to allow class arbitration on the basis that the contract should be construed against its drafter.<sup>44</sup> Although the district court vacated the arbitrator’s decision after *Stolt-Nielsen*, the Circuit reinstated it because the district court had impermissibly “focused . . . on whether the arbitrator had correctly

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 692 (Ginsburg, J., dissenting).

<sup>36</sup> *Id.* at 698–99.

<sup>37</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011).

<sup>38</sup> *Id.* at 348.

<sup>39</sup> *Id.* at 350.

<sup>40</sup> *Id.* at 365 (Breyer, J. dissenting).

<sup>41</sup> *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (holding that individual arbitration may be compelled even if doing so renders the plaintiff unable to afford to continue the case).

<sup>42</sup> *Id.*

<sup>43</sup> *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 124 (2d Cir. 2011).

<sup>44</sup> *Id.* at 117.



interpreted the arbitration agreement itself.”<sup>45</sup> The Fifth Circuit disagreed in *Reed v. Florida Metropolitan University, Inc.*, holding that a similarly ambiguous contract could not be read to authorize class arbitration in a consumer suit against a for-profit college.<sup>46</sup> The court found the arbitrator’s reliance on the “any dispute” clause was not enough to impute an agreement for class arbitration in light of “the significant disadvantages of class arbitration as discussed in both *Stolt-Nielsen* and *Concepcion*.”<sup>47</sup>

In *Oxford Health Plans v. Sutter*, the Supreme Court resolved the circuit split by unanimously reaffirming that arbitrators could decide the meaning of ambiguous language.<sup>48</sup> The question was whether the AAA arbitrator exceeded his powers by ordering class arbitration when the contract between the parties was ambiguous.<sup>49</sup> The arbitrator interpreted a provision requiring arbitration of all “civil actions” to include class actions.<sup>50</sup> Although the Court considered this interpretation mistaken, it declined to overturn the arbitrator’s decision.<sup>51</sup>

The cases make clear that arbitrators have the authority to decide whether an ambiguous contract permits class arbitration or not. However, arbitrators cannot rest this decision on grounds outside the contract. Instead of reaching for the familiar common law tools of precedent and public policy to resolve an ambiguity, they have recourse only to the contract itself. The question then remains whether removing the use of these tools from arbitrators would remove from them the tools they would use to order class arbitration, or if the absence of arbitral precedent would leave them reliant on the *Stolt-Nielsen* and *Concepcion* majorities’ anti-class arbitration dicta.

### B. Organizational Rules

The Supreme Court’s decision in *Bazzle* signaled a potentially lucrative market for class dispute resolution, prompting both AAA and JAMS to develop their own rules for construing arbitration clauses and administering class arbitrations. Neither organization changed its rules after later cases. Both systems are broadly similar,<sup>52</sup> but my analysis focuses on AAA’s.

AAA’s statements suggest that it uses process to make up for any doubts about its authority to administer class arbitration and thus bind

---

<sup>45</sup> *Id.* at 123.

<sup>46</sup> *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 645 (5th Cir. 2012), *abrogated by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

<sup>47</sup> *Id.* at 640–43.

<sup>48</sup> *Oxford Health Plans*, 133 S. Ct. at 2068.

<sup>49</sup> *Id.* at 2067.

<sup>50</sup> *Id.* at 2070.

<sup>51</sup> *Id.*

<sup>52</sup> STRONG, *supra* note 15, at 36.

absent parties.<sup>53</sup> The organization offers an extensive set of mandatory rules in its Supplementary Rules for Class Arbitration.<sup>54</sup> Arbitrators are likely to be familiar with the content of the Rules. AAA has a general policy of including only lawyers with ten years of experience or retired judges on its lists of arbitrators the parties may appoint.<sup>55</sup> Additionally, at least one arbitrator in every putative class arbitration must be from AAA's class arbitration list.<sup>56</sup> Arbitrators take on some of the supervisory role that a judge would in determining who is in the class, how they are notified, and whether a settlement serves their interests.<sup>57</sup> However, access to class arbitration remains bounded by contract. The contract defines the class and gives the arbitrator jurisdiction to conduct the class arbitration to begin with.

The Rules require that class arbitration dockets and decisions be public<sup>58</sup> and set out a series of three decisions that the arbitrator must issue. These decisions are known as awards. The first two are procedural decisions. These awards are known as "partial awards" rather than "full" awards, which would decide the merits. If the arbitrator does not plan to revisit a decision, an award is called a "final award," so a final procedural decision would be a "partial final award." In the first decision, the arbitrator must verify that she has jurisdiction under the arbitration clause to hear the matter as a putative class arbitration through a "clause construction award."<sup>59</sup> This award is "a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."<sup>60</sup> The arbitrator is then to stay proceedings to allow challenge in court.<sup>61</sup>

If the arbitrator reads the contract to allow a potential class arbitration, and a court does not overturn the decision, the parties move on to class certification. AAA class certification requirements track Federal Rule of Civil Procedure 23(b)(3), which governs class actions for damages.<sup>62</sup> Just as a court would in certifying a class in federal court, the arbitrator considers numerosity, commonality, typicality, and

---

<sup>53</sup> Brief, *supra* note 13, at 5–12.

<sup>54</sup> Supplementary Rules for Class Arbitrations, *supra* note 22, at § 1(a).

<sup>55</sup> Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 323 (2012).

<sup>56</sup> Supplementary Rules for Class Arbitrations, *supra* note 22, at § 2(a).

<sup>57</sup> *Id.* at § 4(a).

<sup>58</sup> *Id.* at § 9. However, the parties can request and the arbitrators can grant an exception to this rule. *Id.*

<sup>59</sup> *Id.* at § 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> FED. R. CIV. P. 23 (b)(3); Supplementary Rules for Class Arbitrations, *supra* note 22, at § 4.

representativeness.<sup>63</sup> The arbitrator weighs whether “questions of law or fact common to the members of the class predominate” over individual questions and whether “class arbitration is superior to other available methods” of resolving the claims.<sup>64</sup> To these familiar criteria, AAA adds its own requirements. The plaintiff’s lawyer must “fairly and adequately protect the interests of the class.”<sup>65</sup> Additionally, each putative class member must have entered into an agreement with an arbitration clause “substantially similar” to the named plaintiff’s.<sup>66</sup> Class certification requires another written award and stay to allow a court challenge.<sup>67</sup> Once a class has been certified and notice sent to potential class members, the arbitration can move to the third and final stage, a merits determination.<sup>68</sup> The arbitrator’s decision on the merits is final and not appealable unless the parties have agreed to AAA’s appellate process.<sup>69</sup>

In its amicus brief to the Supreme Court in *Stolt-Nielsen*, AAA maintained that its drafting committee sought to protect the interests of potential class members in creating the Rules.<sup>70</sup> The decision to make awards and some filings public and the requirement of reasoned awards demonstrate concern with the substance of the process and how others perceive it. Additional protections in the form of notice and court scrutiny attach to class actions in court, and so AAA lawyers might believe it prudent or necessary to import some of those protections into their rules. Regardless of their own views, rule-makers might be concerned with perceptions of the process by legal professionals, at minimum by judges reviewing awards. Public awards also signal arbitrators’ views and demonstrate their skill to other arbitrators and to potential clients who might pick an arbitrator from AAA’s lists. Publication also allows later parties and tribunals to refer to the awards.<sup>71</sup> Publication might thus encourage consistency in outcomes.

## II. WHAT HAS HAPPENED SINCE *STOLT-NIELSEN*?

The clause construction awards show arbitrators responding to the change in law in much the way judges would, contrary to predictions that

---

<sup>63</sup> Compare Supplementary Rules for Class Arbitrations, *supra* note 22, at § 4(a)(1)-(4), with FED. R. CIV. P. 23 (a).

<sup>64</sup> Compare Supplementary Rules for Class Arbitrations, *supra* note 22, at § 4(b), with FED. R. CIV. P. 23 (b)(3).

<sup>65</sup> Supplementary Rules for Class Arbitrations, *supra* note 22, at § 4(a)(5).

<sup>66</sup> *Id.* at § 4(a)(6).

<sup>67</sup> *Id.* at § 5.

<sup>68</sup> *Id.* at §§ 5-7.

<sup>69</sup> AM. ARBITRATION ASS’N, OPTIONAL APPELLATE ARBITRATION RULES § A-3 (a) (Nov. 1, 2013).

<sup>70</sup> Brief, *supra* note 13, at 11.

<sup>71</sup> W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1126 (2011) (discussing citation of previous awards in class arbitration).

they would react more strongly, by refusing to allow any class arbitration, or not react at all. Unlike judges, however, arbitrators may have less ability to muddle through as they and the parties respond to change. Some observers predicted that *Stolt-Nielsen* and *Concepcion* would effectively end the use of class arbitration.<sup>72</sup> They had three main reasons for making this prediction. First, they believed that plaintiffs would no longer attempt to bring class arbitrations.<sup>73</sup> Second, they expected that potential defendants would adopt class waivers.<sup>74</sup> A plaintiff's lawyer is unlikely to try to bring a putative class action if a class action waiver is present and likely to be upheld. Together, *Concepcion* and *American Express* suggest that such waivers will be easily upheld, giving businesses every incentive to adopt class waivers widely.<sup>75</sup> However, empirical studies of contracts show that some industries have done so, but some have not.<sup>76</sup>

---

<sup>72</sup> See, e.g., JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 129 (2015) (class arbitration unlikely to be used in light of recent Supreme Court cases); Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 35 (Court "almost entirely undid the results in *Bazzele*"); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1165 (2011) (arguing arbitrators are unlikely to authorize class arbitration after *Stolt-Nielsen* and parties likely to stop asking for it); Miriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (predicting that most consumer companies would include class action bans in their contracts); Rau, *supra* note 15, at 550 (predicting that, after *Stolt-Nielsen* and *Concepcion*, arbitrators will not administer class arbitrations "without some pretty special authorization" in the contract); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and The Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011) ("The Supreme Court's recent decision in *AT&T v. Concepcion* . . . sounds the death knell for the class arbitration process"); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 265 (2012) ("*Stolt-Nielsen* all but assures us that no party to an arbitration agreement can be sued in a class action without its (actual) consent"); Jean R. Sternlight, *Tsunami: AT&T Mobility L.L.C. v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (*Concepcion* "is wiping out . . . consumer and employment class actions"); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 791 (2012) ("*Concepcion* may be the death knell of arbitral class actions.").

<sup>73</sup> Drahozal & Rutledge, *supra* note 72, at 1157 (stating that filings of new class arbitrations had "almost completely dried up").

<sup>74</sup> *Id.* at 1119.

<sup>75</sup> Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 162, 167 (2015).

<sup>76</sup> Peter Rutledge and Christopher Drahozal studied arbitration clauses written by credit card issuers, and found class waiver to be "ubiquitous" in contracts with an arbitration clause. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 57 (2013). However, a settlement agreement temporarily banning major issuers from using arbitration clauses in some contracts depressed the overall number of contracts that had them. *Id.* at 19–20. On the other hand, the same authors did not find such an increase in the use of class waivers in franchise agreements. Peter B. Rutledge & Christopher R. Drahozal, "*Sticky*" Arbitration Clauses? *The Use of Arbitration Clauses after Concepcion and Amex*, 67 VAND. L. REV. 955, 1005 (2014) [Hereinafter Rutledge & Drahozal, "*Sticky*" Clauses]. More recently, Brian

Finally, those who expected class arbitration to end argued that arbitrators would no longer allow class arbitration unless a contract specifically allowed it.<sup>77</sup> They expected arbitrators to be extremely sensitive to the change in law, and to lack the sort of investment in existing institutional practice that might lead them to interpret the Supreme Court's decisions in a more limited way.<sup>78</sup>

Others thought that little would change as a result of the Supreme Court's interventions, a view they saw as vindicated by *Oxford Health Plans*.<sup>79</sup> Arbitral decisions are difficult to challenge in court, so arbitrators have little reason to pay much attention to ambiguous court decisions.<sup>80</sup> The arbitrators' award in *Oxford Health Plans* might itself be taken as a signal that arbitrators were unlikely to change how they decided even after *Stolt-Nielsen*. With the exact contours of the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion* unclear, arbitrators continued to be able to infer consent to class arbitration.<sup>81</sup> Moreover, California state courts continued to view the state's Private Attorneys General Act (PAGA) as requiring access to class proceedings for plaintiffs making

---

Fitzpatrick argued that the end of any form of class action is indeed at hand, but conceded that "the empirical evidence does not yet bear out a flight to class action waivers in the consumer and employment context." Fitzpatrick, *supra* note 75, at 191. The Consumer Financial Protection Bureau (CFPB) studied credit card agreements from a slightly different angle than Rutledge and Drahozal, considering the number of consumers covered by arbitration clauses, as well as the number of companies writing them. CONSUMER FIN. PROTECTION BUREAU, *supra* note 12, § 2.3. The CFPB found increased use of arbitration clauses and class action waivers, with the percentage of consumer accounts covered by such clauses approaching one hundred with respect to cell phones and payday loans. *Id.* at §§ 2.3, 5.5. However, the CFPB reported more mixed numbers in other industries, notably banking. *Id.* at § 2.3.

<sup>77</sup> Rau, *supra* note 15, at 477 (predicting a presumption against class arbitration). See also Drahozal & Rutledge, *supra* note 72, at 1157–58 (empirical support for same, with one year of data). When parties are picking an arbitrator, they may have relatively little information about the quality of an arbitrator's decisions, as non-class arbitrations are confidential. However, a party can determine when a court has overturned an arbitrator's decision as this information typically is public. Thus, arbitrators might be particularly sensitive to being overturned.

<sup>78</sup> Drahozal & Rutledge, *supra* note 72, at 1158.

<sup>79</sup> George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551, 572 (2011) ("none of the decisions . . . [*Stolt-Nielsen*, *Rent-A-Center*, and *Concepcion*] ha[ve] dealt a decisive blow" to class cases). In more recent work, Rau revised his post-*Stolt-Nielsen* assessment that the decision would bar class arbitration. Alan Scott Rau, "Gap Filling" by Arbitrators, ICCA Congress Series No. 18, 935, 996 (2014). Rau examined fourteen clause construction awards issued after *Oxford Health Plans*. In all but one, the arbitrators authorized class arbitration. *Id.*

<sup>80</sup> Rau, *supra* note 79, at 1001 ("the prevailing standard of review will be easy enough for any but the most unwary, clumsy, or naïve of arbitrators to satisfy . . ."). See also *id.* at 27 (discussing the difficulty of challenging an award for manifest disregard of law).

<sup>81</sup> STRONG, *supra* note 15, at 216.

claims as representatives under the act.<sup>82</sup> In this telling, arbitrators are not sensitive to change because they are insulated from judicial review.

AAA's own dockets tell a different and more complex story. I examined sixty-four clause construction awards, which comprise every public decision on authority to conduct class arbitrations that AAA arbitrators issued during a period from April 27, 2010, the date *Stolt-Nielsen* was decided, until the end of 2015. Before *Stolt-Nielsen*, AAA arbitrators were liberal in construing arbitration contracts to allow class arbitration. A pre-*Stolt-Nielsen* study shows arbitrators permitting class arbitration in roughly 90% of cases.<sup>83</sup> AAA's own accounting shows that its arbitrators affirmatively ordered class arbitration in 70% of arbitrations, and denied it only in 5%; the rest involved stipulation by the parties about whether they would proceed with class arbitration.<sup>84</sup> After *Stolt-Nielsen*, the situation changed dramatically. Arbitrators permitted class arbitration in 45% or 29 out of 64 clause construction awards during an almost five-year period from when *Stolt-Nielsen* was decided in April 2010 to the end of 2015.<sup>85</sup> Those who expected a quick end to class arbitration have underestimated the inertia in organizational systems like AAA's and the legal ingenuity of parties and arbitrators. Those who expected no change underestimated how responsive the arbitrators in this system are to changes in law.

Selection effects make it impossible to compare before and after directly, as some plaintiffs who might have sought class arbitration before the Court weighed in might choose not to do so now.<sup>86</sup> Taking selection

---

<sup>82</sup> *Id.*

<sup>83</sup> See Weidemaier, *supra* note 71, at 1127 n.145. Percentage calculated based on totals provided by article.

<sup>84</sup> Brief, *supra* note 13, at 22.

<sup>85</sup> My data involves 64 awards, but 63 cases. One award was reissued after the initial award was struck down in court. *Garcia-Herman v. Greystar*, AAA No. 73-20-1300-0149 at 3, 11 (Feb. 3, 2015) (*Greystar II*). As discussed below, five of the sixty-four awards involved arbitration clauses arbitrators saw as unambiguous on the issue of class arbitration. In one, the arbitrator saw an affirmative authorization for class arbitration. As this choice was a matter of arbitrator interpretation, I did not exclude this award from my analysis. In four, the arbitration clause in question included a class action ban. AAA has issued a policy statement that it will only administer a class arbitration if the arbitration agreement is "silent with respect to class claims, consolidation, or joinder of claims." Drahozal & Rutledge, *supra* note 72, at 1141. Notwithstanding this rule, arbitrators did not dismiss arbitrations under it. In one of the four, a court had previously decided that the waiver was unenforceable, and the arbitrator treated the contract as ambiguous. This approach is an exception to the rule. *Id.* In the other three, the plaintiffs argued that the class action waiver was unconscionable. Although the arbitrators deciding all three matters rejected this analysis, they still issued full awards rather than simply dismissing them out of hand. Thus, I decided to include these awards as well.

<sup>86</sup> See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (explaining why selection effects make before and after comparisons of litigation choices difficult).

effects into account suggests that *Stolt-Nielsen's* impact on clause construction is still more significant than this figure suggests. Yet the frequency with which arbitrators found that they could administer class arbitration is still higher than many expected.<sup>87</sup> Moreover, decisions in favor of class are not confined to 2010 and 2011, the years immediately after the Supreme Court's decision; they continue into 2015.

This ambiguous result reflects a certain amount of systemic inertia—more experienced arbitrators were far more likely to allow class arbitration—as well as the discretion arbitrators retain even after *Stolt-Nielsen*. However, that discretion is not paired with a regime that would allow arbitrators to develop their own consistent rules. The rest of this Part discusses the information available from the dockets and awards. First, I specify the scope and limitations of this research. I will then discuss the characteristics of the arbitrations for which clause construction awards are available—including type of claim and amount at issue, the contracts (choice of law and arbitration clause language), the parties and their counsel, and the background of the arbitrators rendering the decisions. The variation in award outcomes does not seem to track the specifics of the claim or contract. However, the identity of the arbitrator, and to a lesser extent, of the lawyers, had a significant influence on the results. Finally, I discuss the reasons arbitrators gave for their decisions. Arbitrators followed the law, but the Supreme Court's insistence that they ground their decisions in the contracts left them with little to fill gaps if the contract language ran out.

#### A. *Scope*

Clause construction awards are part of the online docket for each putative class arbitration. The dockets typically include a copy of the contract at issue, which must be filed prior to arbitration, the demand for arbitration, and a statement of claim, as well as any decisions the arbitrator has rendered. The dockets also include the names of arbitrators, parties, and counsel. In contrast to bilateral arbitration, all parties were represented in every class arbitration for which an award issued.<sup>88</sup> The clause construction awards are roughly five to thirty pages long, similar in format and style to a procedural decision from a federal district court.<sup>89</sup> Between awards, I compared the date and outcome, the

---

<sup>87</sup> See, e.g., Drahozal & Rutledge, *supra* note 72, at 1165 (arbitrators unlikely to authorize class arbitration after *Stolt-Nielsen* and parties likely to stop asking for it); Rau, *supra* note 15, at 550 (predicting that, after *Stolt-Nielsen* and *Concepcion*, arbitrators will not administer class arbitrations “without some pretty special authorization” in the contract).

<sup>88</sup> See Horton & Chandraseker, *supra* note 16, at 82 (noting that a significant number of bilateral arbitration plaintiffs are pro se).

<sup>89</sup> This format involves a short description of the case, including procedural history, followed by a description and analysis of the legal question at issue, often including key arguments on both sides, and concluding with the adjudicator's

operative contract language (quoted in the award itself, but also available on the docket) and date of the contract, the state law that applies to the contract, and the reasons the arbitrators gave for the decision, including their citation to certain commonly-used precedents. Additionally, I classified awards by the nature of the claim the plaintiff asserted.<sup>90</sup>

My research has two main limitations. First, I can describe only public awards and I do not know what proportion of decisions on contract interpretation and class arbitration they represent.<sup>91</sup> Second, I was not always able to determine what happened after clause construction.<sup>92</sup> With relatively little information, I cannot say whether

---

decision on the matter. Some issue an order in the same document and others issue the document laying out their reasons along with or after a separate order that is the operative decision.

<sup>90</sup> AAA has a system of classifying arbitrations as “international,” “commercial,” “construction,” or “employment.” I reclassified cases for greater clarity according to common matters at issue. Most could be classified as “consumer” or “employment,” categories I expanded somewhat to include awards classified as construction or commercial that nonetheless involved a consumer or employment relationship. I also used the categories of “insurance,” which described several commercial disputes, general “commercial,” and “construction.” Taken together, these latter categories comprise only a small portion of awards included in this study.

<sup>91</sup> Decisions may not be public either because a party successfully argued for an exception to AAA’s rules or because JAMS issued the decision. AAA has stated that very few parties have been concerned about confidentiality. *See* Brief, *supra* note 13, at 20–21 (arbitrator granted request for confidentiality in only one instance). Some awards in the AAA set had JAMS as well as AAA docket numbers listed, suggesting that one arbitrator might have come from JAMS. *Aikin v. U.S. TelePacific Corp.*, AAA No. 01-15-0003-0890, JAMS No. 1210032558 at 1 (Nov. 12, 2015); *Hernandez v. Custom Fiberglass*, AAA No. 01-14 0002-2663, JAMS No. 1200050189 at 1 (Oct. 7, 2015). I made several telephone calls to JAMS headquarters seeking further information, but was informed that JAMS could not tell me whether its arbitrators had conducted any class arbitrations as this information was confidential. I also used Westlaw searches of court proceedings involving class actions and JAMS decisions. I expected that these searches would at least identify JAMS decisions that were challenged in court. Although I found plenty of mentions of JAMS, none of the cases involved a decision analogous to a AAA clause construction award. However, some cases involved the potential for class arbitration and so I cannot rule out that the possibility that JAMS administered such an arbitration. *See, e.g., Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 198 (5th Cir. 2016) (contract assigns JAMS arbitrator the responsibility of determining whether or not contract allows class arbitration); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 934–35 (N.D. Cal. 2015) (class arbitration an issue, but JAMS rejected the case due to an unrelated violation of organizational rules); *Aviles v. Quik Pick Express, LLC*, No. CV-15-5214-MWF (AGR), 2015 WL 9810998, at \*7–8 (C.D. Cal. Dec. 3, 2015) (contract refers to JAMS arbitration, but court determined PAGA waiver so broad as to be unconscionable).

<sup>92</sup> Only one later docket entry exists in an arbitration in which the arbitrator construed the parties’ agreement to require individual arbitration. In that entry, the plaintiff filed a stipulation of dismissal. Stipulation and Order of Dismissal with Prejudice, *Sterman v. Marriott Ownership Resorts, Inc.*, AAA no. 01-14-0001-2668



AAA's system gives plaintiffs access to effective class relief in arbitration once an AAA arbitrator has confirmed that he will administer a class arbitration.

The decisions I discuss are worthy of study even if they are not representative of class arbitration in other contexts. AAA has had extensive interactions with the federal courts: AAA decisions on arbitration clause construction were at issue in *Stolt-Nielsen*, *Oxford Health Plans*, *Jock*, and *Reed*.<sup>93</sup> The organization is willing to take steps such as making its awards publicly available and filing Supreme Court briefs related to its interests, and so is likely to continue to influence law in this area.

---

(July 14, 2015). Of the 29 arbitrations in which arbitrators indicated that class might be allowed, twelve dockets had additional information. In one instance, arbitrators changed their opinion and issued a new award. *Garcia-Herman v. Greystar*, AAA No. 73-20-1300-0149 at 3 (Feb. 3, 2015) (*Greystar II*). In another, the matter was dismissed because the arbitrator was not paid and the defendant refused to appear. Dismissal Order, *Maldonado v. Callahan's Express Delivery*, AAA No. 33-523-00375-13 (Mar. 29, 2017); Order of Suspension, *Maldonado v. Callahan's Express Delivery*, AAA No. 33-523-00375-13 (Dec. 20, 2013). Arbitrators certified classes in three instances and preliminary hearings were held in one more. Order, *Oak Pointe Country Club, Inc. v. Maslo*, No. 08-23627-CZ (Mich. Cir. Ct. Apr. 1, 2009); Partial Final Award on Class Certification, *Cordova v. United Education Institute*, AAA No. 73-516-000065-13 at 5 (Jan. 20, 2015); *Baer v. TruGreen*, AAA No. 14-160-01482-12 (docket entries from 2013). Finally, four arbitrations settled, three in arbitrator-approved class settlements and one in an individual settlement before class certification. Settlement Approval Award, *Grande v. Lawrence Recruiting Services*, AAA No. 57-160-00080-13 (Dec. 19, 2014) (certifying settlement class and approving settlement); Order Approving Settlement, *Price v. NCR Corp.*, AAA No. 51-160-908-12 (Mar. 12, 2015); Award Granting Final Approval of Class Action Settlement, *Her v. Club One Casino, Inc.*, AAA No. 160-01109-12 (Jan. 5, 2015) (final class settlement arbitrator judged to be "fair, reasonable, adequate, and in the best interests of the settlement class"); *Ormiston v. Red Bull*, AAA No. 72-160-01077-12 (Oct. 15, 2013) (final settlement of individual claims). Most dockets did not include any later entries. They may not include later decisions because the parties chose to settle, or because the plaintiffs did not to pursue the case further. However, it is impossible to distinguish these events from a decision to continue arbitrating on a bilateral basis, in which case the matter would no longer be subject to the class arbitration rules and would no longer have to be public. In compliance with California law, AAA makes quarterly consumer arbitration statistics available on its website. *Consumer Arbitration Statistics*, AM. ARB. ASS'N., [https://www.adr.org/sites/default/files/document\\_repository/ConsumerReportQ2\\_2017.xlsx](https://www.adr.org/sites/default/files/document_repository/ConsumerReportQ2_2017.xlsx) (last visited Sept. 2, 2017). However, this information was anonymized, so I was unable to match the cases included in this quarterly data to any former class arbitration. I am not the first to encounter this problem. Horton & Chandraseker, *supra* note 16, at 90.

<sup>93</sup> *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013); *Stolt-Nielsen S.A. et al. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 688 (2010); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 632 (5th Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 116 (2d Cir. 2011).

### *B. Arbitration Characteristics*

Most putative class arbitrations involved consumers and employees with statutory or common law claims. Their arbitration clauses did not specify whether class arbitration was allowed, leaving this matter to the discretion of the arbitrator. The arbitrators were more likely to have other experience with AAA class arbitration than either parties or counsel. Lawyers' prior experience with class arbitration mattered, at least on the defense side. Arbitrators' prior experience had an even stronger effect. Inexperienced arbitrators shied away from class arbitration. Some experienced arbitrators changed their positions in response to the changes in law and some did not, reflecting their wide discretion and lack of an agreed-upon default rule.

#### *1. What is Arbitrated*

##### *a. The Claims*

Most claims made by putative class plaintiffs were consumer or employment claims (made in 83% or 53 of 64 awards). Of these, the most common causes of action were for some form of consumer fraud (17 of 20 consumer cases) or for violations of state and federal wage and hour laws (30 of 33 employment cases).<sup>94</sup> Other claims involved non-insurance business-to-business or contractor matters, insurance matters, and construction.

---

<sup>94</sup> Many employment arbitrations involved claims under the Fair Labor Standards Act (FLSA). An action under the FLSA is not identical to a class action. In an FLSA collective action, each individual must opt in to be counted as a plaintiff. Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 451 (2012). However, a AAA class arbitration mirrors Rule 23(b)(3), which allows an opt-out class. Federal courts have allowed opt-out class actions that include an FLSA component. Some federal courts have similarly allowed opt-out classes under Rule 23 under state law and the court's supplemental jurisdiction along with an opt-in FLSA collective action. *Id.* at 453. Arbitrators can do the same.

WHAT TYPE OF CLAIM?<sup>95</sup>

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Employment	33	51.6	51.6	51.6
Consumer	20	31.3	31.3	82.8
Business	3	4.7	4.7	87.5
Insurance	2	3.1	3.1	90.6
Construction	5	7.8	7.8	98.4
Other	1	1.6	1.6	100.0
Total	64	100.0	100.0	

Although they likely involved higher dollar values than one might expect in a bilateral arbitration, the putative class arbitrations subject to AAA clause construction decisions were not necessarily “bet the company” actions.<sup>96</sup> However, the dockets do not always give a good sense of the defendant’s ultimate exposure to liability. In cases in which plaintiffs name a specific number, interpretation remains difficult.<sup>97</sup> Many litigants might have viewed whatever amount the plaintiff named as a starting place for settlement negotiations. As the putative class arbitrations had not reached the class certification stage, awards did not discuss the size of the potential class.

---

<sup>95</sup> “Valid” in this and subsequent tables refers to the entries for which I had data. In this instance, I had data for 64 of 64 awards. In other instances, some data is missing and is referred to as “missing” on the relevant charts. The “valid percent” gives frequency data for all valid entries, but leaves out any missing entries (as opposed to “percent” which counts valid and missing entries in determining frequency).

<sup>96</sup> See Resnik, *supra* note 16, at 2881, 2891.

<sup>97</sup> Plaintiff demands varied by type of case. Many did not state a specific monetary amount; a few sought primarily injunctive relief. Others sought unspecified damages based on the amount of fees paid or wages lost by the putative class. Arbitrators did not note the amount of money at stake in their clause construction decisions. In some cases, though not all, it was possible to find this number in a demand form submitted to AAA, which allows plaintiffs to write in an amount and also allows plaintiffs to check a box reflecting the following ranges: less than \$100,000, \$100,000-\$250,000, or over \$250,000. For an example demand form see, Demand, Stone v. Universal Prot. Serv., AAA No. 01-15-0002-7497 (filed Mar. 2, 2015) (standard form providing ranges). In some cases, plaintiffs did not file demand forms because the case was ordered to arbitration by a court. For an example of a demand for injunctive relief, see Livingston v. 23andme AAA No. 11-434-001662-13 (Sept. 17, 2014) (plaintiffs sought refund of fee and changes to product labeling). In employment cases, reported demands ranged from a low of \$25,000 to a high of over \$2 million. Listed consumer demands tended to be higher, ranging from \$75,000 or more to over \$60 million. Other types of claims were not numerous enough for a trend to be discernible. Clause construction award data, on file with author.

*b. Applicable State Law and Venue*

State law differences may affect who seeks and who gains access to class arbitration.<sup>98</sup> However, these differences do not explain the split in award outcomes. Overall, twenty states and one territory (Puerto Rico) are represented, but the spread of cases is far from even. California law applied in a plurality of arbitrations (37% or 23 cases).<sup>99</sup> The state likely figured so prominently because the state was hospitable to class arbitration. Before *Concepcion*, California rules requiring class arbitration in consumer and employment cases would apply. California courts had long explicitly condoned class arbitration under the *Discover Bank* rule, which held that arbitration under adhesive consumer contracts was unconscionable unless plaintiffs had the option of class arbitration, and under a corresponding consumer statute.<sup>100</sup> In employment cases, California courts applied the analogous *Gentry* rule, and the PAGA.<sup>101</sup> Yet, even in California arbitrations, arbitrators only allowed a putative class to go forward in 10 of the 24 cases—a record not terribly different from the overall numbers.

*c. The Contracts*

Contract language does not explain the split in outcomes either. Most contracts left the arbitrators with significant discretion. The contracts at issue in the AAA awards were form contracts written by the defendants. In no instance did the arbitrators note that they had heard evidence indicating that the parties had negotiated the terms of the arbitration clause. All but five contracts did not specify class or bilateral (individual) arbitration, leaving the decision up to the arbitrator. Many contracts had not been altered even as it became increasingly clear that class action waivers would be upheld in court.

The contracts subject to class arbitration used broad arbitration clauses. The operative language in an arbitration clause typically instructed that the parties agree to arbitrate “any” dispute, claim, or controversy, or “all” disputes, claims, or controversies. For instance, the contract in *Ormiston v. Red Bull*, an employment arbitration, stated that:

---

<sup>98</sup> I determined which state law applied based on contractual choice of law or the law the arbitrator stated applied in the award. If no choice of law provision was on file or discussed by the arbitrator, I assumed that the seat of the arbitration determined the applicable state law. For instance, an arbitration seated in New York would be conducted under New York law. This assumption was based on the general rule that if the parties do not specify the law that applies to their arbitration, courts apply the law of the seat in determining whether to enforce an award.

<sup>99</sup> Florida (6 contracts), New Jersey (4 contracts), and Texas (4 contracts) followed.

<sup>100</sup> Cal. Civ. Code § 1781 (West 2017); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>101</sup> CAL. LAB. CODE §§ 2698–2699.5 (West 2017); *Gentry v. Super. Ct. of L.A. Cty.*, 165 P.3d 556, 559 (2007).

“any dispute, claim, or controversy of any kind. . . arising from, related to, or in connection with” the plaintiff’s employment was to be arbitrated, without further specification.<sup>102</sup> Others were more specific: “Any claim or controversy between the parties to this Agreement, which arises out of or relates to the Agreement, the business of the Company, Professional’s employment with the Company, or any other relationship between Professional and the Company”;<sup>103</sup> “[T]o the fullest extent allowed by law, any controversy, claim or dispute between me and the Company . . . relating to or arising out of my employment or the cessation of employment will be submitted to final and binding arbitration. . . .”<sup>104</sup>

Consumer clauses were similar. Several of the putative class actions filed during the relevant period involved fraud claims against for-profit colleges. Some college contracts specified multi-step in-house dispute resolution processes before discussing resort to arbitration, but still did not state whether class proceedings are allowed. Instead, they might say: “any dispute arising from my enrollment . . . no matter how described, pleaded or styled, shall be resolved by binding arbitration. . . .”<sup>105</sup> or “[a]ny disputes or controversies between the parties to this Agreement arising out of or relating to the student’s recruitment, enrollment, attendance, education or career service assistance by [the school] or to this Agreement” must be arbitrated.<sup>106</sup> Arbitrators quoted similar language in other contexts, as with a regional bank contract: “Upon request by you or us, any controversy or claim involving more than \$25,000 that arises out of or relates to this agreement shall be settled by arbitration . . . .”<sup>107</sup> Commercial matters also included this sort of broad clause, with the instruction to arbitrate: “all claims, counterclaims, demands, causes of action, disputes, controversies, and other matters in question arising out of or in connection with this Agreement . . . .”<sup>108</sup>

---

<sup>102</sup> Ormiston v. Red Bull, AAA No. 72-160-01077-12 at 2 (April 18, 2013).

<sup>103</sup> Grande v. LRS, AAA No. 57-160-00080-13 at 4 (Dec. 20, 2013).

<sup>104</sup> Stone v. Universal Protection Serv., AAA No. 01-15-0002-7497 at 3 (Nov. 16, 2015).

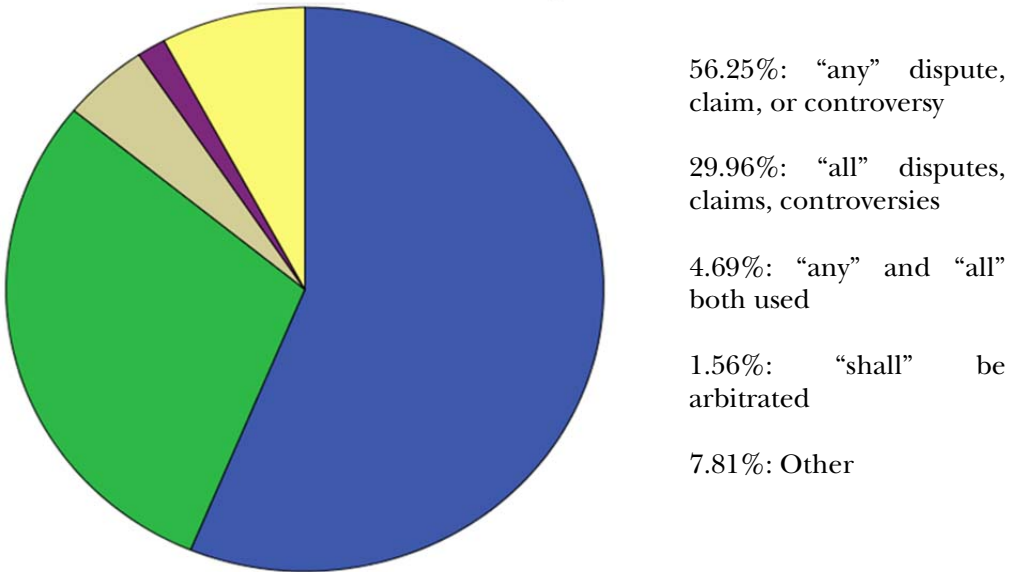
<sup>105</sup> King v. Concorde Career Colleges, AAA No. 72-20-1400-0143 at 3 (Aug. 24, 2015).

<sup>106</sup> Brainard v. Career Educ., AAA No. 33-20-1300-0437 at 2 (Dec. 4, 2014) (emphasis omitted).

<sup>107</sup> Harding v. MidSouth Bank, AAA No. 69-516-y-00219-12 at 21 (Aug. 29, 2013) (emphasis omitted).

<sup>108</sup> Woodcock v. Valerus Compression Servs., AAA No. 01-15-0002-4344 at 2-3 (July 28, 2015).

## Contract characteristics—what does the operative language say?



With few exceptions, the contracts did not specify whether the parties could arbitrate on a class basis, leaving the arbitrators to decide whether the language of the contract was so broad as to permit class arbitration.<sup>109</sup> Of the four arbitrations involving explicit class action bans, two were filed before *Stolt-Nielsen* and all predate *Italian Colors*.<sup>110</sup> The status of class action bans would have been in doubt. Now that such bans are clearly allowed, plaintiffs with contracts including them are unlikely to attempt class arbitration.

Many of the contracts predate recent Supreme Court decisions.<sup>111</sup> All but two contracts were entered into before *American Express v. Italian*

<sup>109</sup> The awards involving a contract with a class action waiver were: *Elmore v. Time Warner Cable*, AAA No. 01-14-0001-0481 at 4 (Feb. 13, 2015); *Brainard v. Career Educ.*, AAA No. 33-20-1300-0437 at 4 (Dec. 4, 2014); *Muhammed v. Delaware Title Loans*, AAA 18-434-00804-13 at 7 (Feb. 10, 2014); *Demetriou v. Earthlink*, AAA No. 11-117-00273-10 at 4 (Sept. 1, 2010). In all arbitrations but *Demetriou*, the arbitrators applied the class action waiver in the contract. In *Demetriou*, a district court had previously ruled the class action waiver unconscionable. As unconscionability is a matter for the courts, the arbitrator applied the district court’s ruling. *Id.* at 12. In *Adams v. Tesco*, AAA No. 01-14-0000-7367 at 8 (July 16, 2015), two of three arbitrators read the contract as explicitly allowing class proceedings.

<sup>110</sup> AAA clause construction award data on file with author.

<sup>111</sup> I used dates in the papers filed by plaintiffs to determine the date of their contracts in all but one instance. I then compared these dates to Supreme Court decisions that might have prompted changes to contract language.

*Colors*, and *Oxford Health Plans*, which were decided on the same day in 2013. Additionally, all but 12 contracts were entered into before the 2011 decision in *AT&T Mobility v. Concepcion*. That case is particularly salient because of the comparatively large number of arbitrations from California. Prior to *Concepcion*, California companies would have likely expected that they would be unable to limit consumers to bilateral arbitration.<sup>112</sup> About 79% of the California consumer contracts were entered into before *Concepcion*, accounting for 37% of this set. Thirty-five contracts predate even *Stolt-Nielsen*. This result corresponds to Peter Rutledge and Christopher Drahozal's study of franchise contracts, which found that businesses did not necessarily rush to update their contracts in the wake of *Concepcion* and *Italian Colors*.<sup>113</sup>

CONTRACT DATE (GROUPED BY SUPREME COURT DECISION)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Pre-Bazze	5	7.8	7.9	7.9
	Post-Bazze, Pre-Stolt-Nielsen	34	53.1	54.0	61.9
	Post-Stolt-Nielsen, Pre-Concepcion	12	18.8	19.0	81.0
	Post-Concepcion, Pre-Italian Colors	10	15.6	15.9	96.8
	Post-Italian Colors	2	3.1	3.2	100.0
	Total	63	98.4	100.0	
Missing	No date available	1	1.6		
Total		64	100.0		

The arbitrations began more recently. Even including all five 2011 decisions as cases filed before *Stolt-Nielsen*, most cases in which clause construction was decided after *Stolt-Nielsen* would have been filed

<sup>112</sup> See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

<sup>113</sup> Rutledge & Drahozal, "Sticky" Clauses, *supra* note 76, at 1005 (many franchisors did not change arbitration clauses).

after *Stolt-Nielsen*.<sup>114</sup> Defendants likely would have had the opportunity to change their arbitration clauses. These changes might not have helped defendants, however, if the cause of action accrued before any changes went into effect.<sup>115</sup>

## 2. *Who Arbitrates?*

Differences in claims or contracts do not seem to account for the split among arbitrators. The identity of the parties and arbitrators goes further in explaining the split. Repeat players have long been a feature in the study of courts and arbitration institutions, with many authors using Marc Galanter's definition of "repeat player" in his classic work on the subject.<sup>116</sup> I thus investigated whether a decision involved any repeat participants who might be inclined to "play for rules" and thus be invested in either ending or continuing class arbitration in the face of changing precedent.<sup>117</sup> My definition of repeat participant is not as stringent as Galanter's. I include in my definition those who appeared no more than twice on AAA's class dockets. The system does not have frequent repeat players on the scale discussed by Galanter. AAA's class

---

<sup>114</sup> The eight arbitrations in which awards were rendered in 2010 were likely filed before *Stolt-Nielsen*. Other arbitrations were more recent. Two hundred and twenty-two putative class arbitrations have been filed since April 27, 2010, when *Stolt-Nielsen* was decided. AAA's online dockets show 10 filings in 2010 after that date, followed by 23 in 2011, 27 in 2012, 28 in 2013, 42 in 2014, and 43 in 2015. In 2016, a year not covered by my study, there were 24 filings and there have been 38 filings in 2017 to date. The decision in *Oxford Health* in 2013 might have led to increased confidence on the part of plaintiffs and increased filings in 2014 and 2015.

<sup>115</sup> The arbitrator in *Kissel v. Sirius XM Radio* analyzed exactly this point, distinguishing claims that had accrued before the defendant wrote a class action ban into its consumer contracts from claims that had accrued after that point. *Kissel v. Sirius XM Radio, Inc.*, AAA No. 13-156-00198-13 at 17 (Dec. 6, 2013).

<sup>116</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

<sup>117</sup> *Id.* at 100. I define repeat participants as any person or entity appearing on more than one class arbitration docket, as identified through a keyword search of AAA's database. That they are repeat participants generally does not mean that they had experience specifically with the clause construction phase at the time the hearing was held and the award rendered. In some cases, as when a prior case was initiated in 2006, it is likely that they had such experience. However, closer initiation dates and award dates are an imperfect guide because of the delay involved in litigating these complex cases. A party might have been to a hearing in another case first, but still be waiting for that award to be rendered. With more resources, it would be possible to go through the docket and track whether parties and arbitrators had specific experience with clause construction prior to the date of the relevant hearing or the award. My data is less fine-grained because my main goal was gauging engagement and familiarity with the class arbitration system as a whole, rather than with the clause construction phase specifically. The effects of being a repeat player—better knowledge of and relationships with the arbitrators and the institution, ability to take away repeat business, and better ability to decide when to continue to arbitrate—do not depend on prior experience with the clause construction phase specifically.



arbitration system is an approximately twelve-year-old system involving complex civil cases that take years to litigate. It has relatively low case volume compared to the courts, and arbitrations do not all originate in the same location.

In bilateral arbitrations in which the same defendants frequently appear, the interests of arbitrators align with deciding in favor of these repeat defendants and their repeat lawyers. The arbitrators want repeat business.<sup>118</sup> The defendants hold the key to this repeat business through their form contracts.<sup>119</sup> Incentives do not necessarily work the same way with class arbitration. In the arbitrations I studied, no party was a serial repeat player. The plaintiffs who sought to become class representatives were classic “one-shot” plaintiffs unlikely to sue again.<sup>120</sup> Most were individuals and no plaintiffs have been involved in more than one class arbitration.<sup>121</sup> The defendants who authored the contracts were businesses of various sizes and from a variety of industries.<sup>122</sup> Defendants are also more likely to be one-shot players within the class arbitration context. Whether they won or lost on clause construction, defendants were unlikely to be a source of repeat class arbitration business. Having faced the prospect of class arbitration, they would presumably be motivated to change their form contracts to include a class action waiver.<sup>123</sup> Both sides might also have few repeat players because large

---

<sup>118</sup> Horton & Chandraseker, *supra* note 16, at 63 (describing the influence of firms that become “extreme repeat players” due to the mass of bilateral claims plaintiffs file against them).

<sup>119</sup> Galanter, *supra* note 116, at 98.

<sup>120</sup> *Id.* at 97–98.

<sup>121</sup> The exceptions were plaintiffs in commercial and insurance disputes. Shamrock Shell, LLC v. Baker, Donaldson, Bearman, Caldwell & Berkowitz, PC, AAA No. 01-14-0001-8085 at 1 (July 8, 2015); Emergency Physicians of St. Clare’s LLC v. Proassurance Corps., AAA No. 11-195-Y-01789-10 at 1–2 (Apr. 11, 2011); SWLA Hosp. v. Corvel, AAA No. 11-193-02760-06 at 2 (Sept. 30, 2010).

<sup>122</sup> Sometimes plaintiffs listed additional defendants if the contract authors had insurance or used subcontractors, but for present purposes the authors of the arbitration clauses are the defendants that matter. The awards I analyzed involve 61 separate defendants. A plurality of these defendants were national companies (25), others were local or regional (12 each), or American firms doing business internationally (10). Only two awards involved foreign companies doing business in the United States. The most common industry for them to be involved with was the building industry (9); followed by for-profit colleges (7, several of these defendants were sued by the same plaintiffs’ lawyers); financial services, healthcare, and professional services (6 each); food service (5); energy, telecom, travel and entertainment (4 each); and retail (3). Industries represented by one award include auto repair, trucking, high-end manufacturing, a delivery service, lawn care, an energy drink company, and an insurer.

<sup>123</sup> I attempted to determine whether defendants indeed changed their contracts after their encounter with class arbitration, but was unsuccessful in finding the contracts through internet searches.

repeat defendants facing large repeat plaintiffs' firms might work out a settlement before going to arbitration.<sup>124</sup>

Thirteen awards concerned eleven defendants that have been involved in more than one class arbitration.<sup>125</sup> I did not observe a repeat player effect in relation to these defendants. No statistically significant correlation exists between being a repeat defendant and blocking class arbitration at the clause construction stage.

Plaintiff and defense counsel were more likely to be repeaters in the system.<sup>126</sup> Repeat firms typically specialized in employment or consumer litigation. Most cases (47) involved one or more firms that could be considered repeaters and in 20 cases, repeaters represented both plaintiffs and defendants. On the defendant side, 20 firms appeared on more than one class arbitration docket. Their firms were listed on 36 dockets of 62 total dockets.<sup>127</sup> Repeat firms included several large international "big law" firms, such as Orrick, Sidley Austin, and DLA Piper. On the plaintiff side, 29 firms appeared on 63 dockets. These repeaters were involved in 31 of the 64 awards for which information was available. Most were smaller plaintiff's side firms rather than national names. Firm experience sometimes correlated to a better outcome for the client. A defense firm's involvement in other class arbitrations strongly correlated with winning at the clause construction phase ( $\chi^2=6.67$ ,  $p=.01$ ). The dockets do not indicate repeat firm-arbitrator pairings, suggesting that any advantage from experience came from experience with the system rather than familiarity with a specific arbitrator. However, a plaintiffs' firm's involvement in other class arbitrations had no relationship with success at then clause construction

---

<sup>124</sup> Samuel Issacharoff and John Witt have described how this process occurred with respect to "mature torts" such as workplace and automobile accidents. Samuel Issacharoff & John Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1613–14 (2004) (describing the rise of repeat-play plaintiff's firms and their dealings with repeat-play defendants). Certain types of claims, such as wage and hour claims, would lend themselves to similar easy valuation.

<sup>125</sup> The repeat defendants were for-profit colleges, Concorde Career College, Career Education, and United Career Institute; Sirius Satellite Radio; the genetic testing service 23andme; a security company, Universal Protection Service; a computer hardware company, NCR Corporation; Pizza Hut; fast-fashion retailer Forever 21; CSA-Credit Solutions; and a natural-gas company, Chesapeake Energy.

<sup>126</sup> I counted a clause construction award as involving a "repeat" if any law firms on either side were involved in more than one class arbitration on the assumption that lawyers within firms talk to each other, and that lawyers from firms with arbitration experience would likely confer with counterparts in cases with multiple counsel.

<sup>127</sup> The 64 awards were on 63 different dockets because two awards were issued in one matter in two separate years. Additionally, one docket only included information about the plaintiff's firm, although the award suggested that both parties were represented.

phase; in fact, non-repeat firms did a little better. It is not immediately clear why repeat plaintiffs' firms should fare worse than repeat defense firms. The difference may be a matter of the small number of awards.<sup>128</sup>

Repeat arbitrators might "play for rules" in a different way from a partisan repeat player. Repeat arbitrators might decide in favor of class arbitration because greater experience brings greater comfort with the system. These arbitrators would be more likely to be familiar with AAA's previous default in favor of class arbitration and the bases on which arbitrators justified it.<sup>129</sup> Moreover, a repeat arbitrator who hears a larger number of class cases might be more invested in class arbitration's continued existence, as presiding over such arbitrations represents a specialized skill set and source of income. Repeat arbitrators might thus be more motivated to find ways around seemingly contrary precedents like *Stolt-Nielsen* or *Concepcion*.

Forty-six different arbitrators heard the cases considered here. The arbitrators also sat mostly alone. Only five cases involved a panel of three<sup>130</sup> and one involved a panel of two.<sup>131</sup> Arbitrators with experience as a state or federal judge authored nineteen of the awards.<sup>132</sup> In fifty arbitrations, at least one of the arbitrators rendering an award was involved with more than one class arbitration. Although the frequency of repeat arbitrators suggests that AAA works with a limited list of arbitrators that parties may select, no one arbitrator dominated the selection post-*Stolt-Nielsen*.<sup>133</sup>

Experience mattered to award outcomes. The presence of a repeat arbitrator, alone or on a panel, was strongly correlated with a decision that AAA can administer a class arbitration ( $\chi^2=10.5, p=.001$ ). This correlation reflects the choices of non-repeat arbitrators. In contrast, repeat arbitrators were split nearly evenly, deciding to administer a class arbitration in a slight majority of cases. Only one non-

---

<sup>128</sup> Plaintiff's firms did not have the volume of repeat business of some defense firms, but it is unclear what effect high volume has. I did not find a clear relationship between experience as measured by number of other arbitrations and the likelihood that the firm's client would prevail in a given clause construction dispute. The small number of awards was again a problem. Even a firm with a long history of appearing in class arbitrations might be involved in only three or four post-*Stolt-Nielsen* arbitrations.

<sup>129</sup> W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69 (2007).

<sup>130</sup> Clause construction award data, on file with author.

<sup>131</sup> SWLA Hosp. v. Corvel, AAA No. 11-193-02760-06 at 23-24 (Sept. 30, 2010).

<sup>132</sup> Because magistrate judges see the same types of cases as do federal district judges, I included experience as a federal magistrate judge as "federal judicial experience."

<sup>133</sup> The most frequently chosen were Paula Hemminger and Edith Dinneen, career arbitrators who presided over six and five cases respectively during the relevant period. Dinneen and Hemminger both primarily heard employment matters.

repeat arbitrator found that a contract allowed AAA to administer a class arbitration. Predictions that *Stolt-Nielsen* would end the use of class arbitration held true for the smaller, non-repeat arbitrator group. I tracked the number of cases with which each repeat arbitrator was involved, but found no relationship between involvement in a higher number of cases and interpretations of contracts as allowing or not allowing class arbitration. What mattered was whether the arbitrator had any experience with the system.

HAS THE ARBITRATOR CONDUCTED MORE THAN ONE CLASS ARBITRATION?  
 DID THE ARBITRATOR DECIDE THAT AAA HAD JURISDICTION TO HEAR THE  
 MATTER AS A CLASS ARBITRATION? CROSSTABULATION

Count

		Did the arbitrator decide that AAA had jurisdiction to hear the matter as a class arbitration?		Total
		No	Yes	
Has the arbitrator been assigned more than one class arbitration?	No	13	1	14
	Yes	22	28	50
Total		35	29	64

Arbitrators whose contact with AAA class arbitration was occasional and only began after *Stolt-Nielsen* might have been more likely to view class arbitration as a strange and extraordinary proceeding. The experienced arbitrators had heard cases pre-*Stolt-Nielsen* under the previous regime that favored class.

### C. Award Characteristics

The arbitrators' style and reasoning demonstrate the degree to which AAA class arbitration has become judicialized. This judicialization helps explain why arbitrators would respond to changes in the law, but might not respond by simply abandoning procedures they had used in the past. Clause construction awards were quite different from the unwritten awards AAA once encouraged.<sup>134</sup> In writing their awards, arbitrators followed the pattern of reasoning familiar to lawyers,

---

<sup>134</sup> See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEXAS INT'L L.J. 449, 512 (2005) (noting that the AAA has "traditionally discouraged" commercial arbitrators from writing reasoned awards).

explaining the facts and relevant contract language, laying out the governing law, and then applying it to the contract. No award lacked reasoning or otherwise appeared capricious. The awards show close attention to relevant law, and tended to reject the idea that they should follow a court's prior order. Instead, most claimed authority to decide clause construction for themselves.

Arbitrator approaches to clause construction after *Stolt-Nielsen* fell into several broad categories. If the arbitrator or the panel determined that an ambiguous contract did not allow class arbitration, they used three primary rationales: 1) *Stolt-Nielsen* establishes a new default rule against class; 2) respondents could not anticipate that the contract would be read to allow class arbitration; and 3) the contract used "bilateral" language incompatible with class arbitration.<sup>135</sup> If the arbitrator or panel determined that the contract allowed for class arbitration, they mostly did so because: 1) AAA's default rule at the time the contract was made was to allow class arbitration; 2) the claimants could not anticipate not being allowed to bring a class arbitration; 3) the language in the contract is broad, covering class proceedings; and 4) claimants have specific statutory rights to aggregate proceedings, mostly under the FLSA and state equivalents.

The split among arbitrators is a product of their approaching clause construction in much the same way judges would, interpreting unclear contract provisions in an area in which they have broad discretion. Unlike judges, however, arbitrators lack the authority to resolve the split by creating general default rules to fill contract gaps.

### 1. *A Judicialized Approach*

The arbitrators' awards often included detailed discussion of the law, allowing evaluation of their reasons for the decision. Writing on the use of arbitral precedent a few months after *Stolt-Nielsen*, Mark Weidemaier noted that AAA arbitrators wrote decisions that were unusually detailed compared with other public arbitration awards and that they relied heavily on precedent.<sup>136</sup> In Weidemaier's sample, which consisted of clause construction awards as well as other class arbitration awards, around 72% cited judicial or "arbitral" precedents.<sup>137</sup> Weidemaier reported that the awards revealed no evidence that arbitrators relied on arbitral precedent to decide issues courts had decided.<sup>138</sup> Instead, awards

---

<sup>135</sup> As discussed above, arbitrators were presented with three contracts that contained valid class action waivers, and one which the arbitrator read as explicitly allowing class. These awards are not part of my analysis for arguments for and against class in ambiguous cases. However, the arbitrators still wrote full awards.

<sup>136</sup> Weidemaier, *supra* note 71, at 1124.

<sup>137</sup> *Id.* at 1112. Most in this group of awards (83.8%) cited judicial precedents, while a smaller percentage of awards (15.5%) cited arbitral precedent alone or in addition to other sources. *Id.* at 1115, 1124–25.

<sup>138</sup> *Id.* at 1127.

typically referred to other arbitration awards only when no controlling precedent was on point,<sup>139</sup> an observation that holds for newer awards as well.

The post-*Stolt-Nielsen* clause construction awards cited precedent even more frequently. All awards but one cited relevant precedent and statutory law.<sup>140</sup> Only three awards did not mention *Stolt-Nielsen*. One of the three cited no federal, state, or arbitral precedent.<sup>141</sup> Another focused on a state law matter involving later cases related to *Stolt-Nielsen* and *Concepcion*.<sup>142</sup> The third also involved state-law specific issues and has since been overruled by the arbitrators in a decision applying *Stolt-Nielsen* explicitly.<sup>143</sup> Other cases also appeared frequently.<sup>144</sup>

Citation to certain cases was associated with decisions for or against administering a class arbitration.<sup>145</sup> One might expect a large increase in decisions finding authority for class arbitration in the past two years, after *Oxford Health Plans* was decided. However, the awards show a different pattern. Most decisions were issued after *Oxford Health Plans* and the results of these decisions were split 50-50.

---

<sup>139</sup> *Id.*

<sup>140</sup> Clause Construction Award Statistics, on file with author.

<sup>141</sup> *Ormiston v. Red Bull*, AAA No. 72-160-01077-12 at 1 (April 18, 2013).

<sup>142</sup> *Stone v. Universal Protection Serv.*, AAA No. 01-15-0002-7497 at 2 (Nov. 16, 2015).

<sup>143</sup> *Garcia-Herman v. Greystar*, AAA No. 73-169-0149-13 at 4 (Oct. 11, 2013) (*Greystar I*); *Garcia-Herman v. Greystar*, AAA No. 73-20-1300-0149 at 10 (Feb. 3, 2015) (*Greystar II*).

<sup>144</sup> Over half of awards (57% or 30 of 53) cited *AT&T v. Concepcion* after it was issued in 2011. Once the Court clarified that arbitrators had the ability to decide on their jurisdiction over class arbitration in 2013 in *Oxford Health Plans*, 71% (35 of 49) of later awards cited this holding. A smaller percentage of awards looked to the Second Circuit decision in *Jock v. Sterling Jewelers* (30% or 16 of 52 awards after the case was decided) and the Fifth Circuit's decision in *Reed v. Florida Metropolitan College* (14% or 9 of 49 awards rendered after the case was decided) even though few putative class arbitrations were situated in those circuits. Finally, 13 awards of the total 64 (20%) cited prior AAA awards.

<sup>145</sup> That arbitrators included case citations does not mean that the cited cases determined their decisions. As with the citation practices of judges, a researcher cannot distinguish whether the arbitrator decided first on the outcome of her decision, or on the law that she found to be a persuasive support for this outcome. See Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law,"* in MANDATORY RULES IN INTERNATIONAL ARBITRATION 77, 129 (George Bermann & Loukas A. Mistelis, eds., 2011) ("[T]he need to justify results . . . is less likely to have a constraining effect on behavior, than it is to pose a challenge to arbitral craftsmanship.").

WHEN WAS THE CLAUSE CONSTRUCTION AWARD ISSUED? DID THE  
ARBITRATOR DECIDE THAT AAA HAD JURISDICTION TO HEAR THE MATTER AS  
A CLASS ARBITRATION? CROSSTABULATION

Count

	Did the arbitrator decide that AAA had jurisdiction to hear the matter as a class arbitration?	
	No	Yes
When was the clause construction award issued? after <i>Oxford Health Plans</i> (2013)	25	24
after <i>Concepcion</i> (2011), before <i>Oxford Health Plans</i> (2013)	3	1
after <i>Stolt-Nielsen</i> (2010), before <i>Concepcion</i> (2011)	7	4
Total	35	29

Arbitrators finding that they had jurisdiction were significantly more likely to cite *Oxford Health Plans* ( $\chi^2=5.95$ ,  $p<.05$ ). This citation may seem odd considering the Court's dicta. Although the court held that the arbitrators in *Oxford Health Plans* had not exceeded their powers in ordering class arbitration, it criticized the arbitrators' reasoning in reading an open-ended contract to allow class arbitration and made clear that it did not agree.<sup>146</sup> I found no association between citation to major circuit decisions and decisions for or against AAA's ability to administer a class arbitration.<sup>147</sup> I also found no association with citation to *Concepcion*, despite the strong criticism of class arbitration in that decision.

State case law also mattered. A California case on "bilateral" contract wording, *Kinecta*, was influential.<sup>148</sup> The case involved a dispute over bank fees in which the contract specified that the customer and the bank would arbitrate, but did not contain an explicit class action waiver.<sup>149</sup> The appellate court determined that words in the arbitration clause referring to the account holder as "I" and "me" demonstrated that it contemplated only bilateral arbitration.<sup>150</sup> In California cases, citation

<sup>146</sup> *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013).

<sup>147</sup> Based on Pearson chi-square test. Clause construction award data on file with author.

<sup>148</sup> *Kinecta Alt. Fin. Sols., Inc. v. Super. Ct of L.A. Cty*, 205 Cal. App. 4th 506, 510 (2012).

<sup>149</sup> *Id.* at 509.

<sup>150</sup> *Id.* at 518.

to *Kinecta* was associated with a decision that AAA did not have authority to administer a class arbitration and the correlation was statistically significant ( $\chi^2 = 4.5$ ,  $p < .05$ ).

Few arbitrators were constrained by any prior court order. Courts remain split on whether judges or arbitrators should decide whether to allow class arbitration.<sup>151</sup> If a court decided the issue first, it might be that arbitrators were just following the court's order. A substantial minority (30%) of awards addressed the line between court and arbitral jurisdiction. Parties in these cases first filed suit in court and sought to have the judge address class arbitration. However, only four arbitration awards cited a court's prior decision as a reason for interpreting a contract a certain way.<sup>152</sup> On the other hand, arbitrators would take notice of parties' statements in court, applying a doctrine of estoppel if one party had already agreed to a certain interpretation.<sup>153</sup>

Finally, arbitrators paid attention to statutes that were clearly directly applicable. If faced with a clear federal or state command to allow some form of collective action, and no clear class action waiver, arbitrators more frequently decided that class arbitration must be allowed.<sup>154</sup> The FLSA and state equivalents thus featured prominently in employment arbitrations.

Another statute that might have been relevant rarely made an appearance. The National Labor Relations Board (NLRB) decided in 2012 in *D.R. Horton* that employers could not contract around the National Labor Relations Act's (NLRA) collective action provision and that employees had the right to pursue grievances collectively in arbitration.<sup>155</sup> The Fifth Circuit rejected the Board's interpretation in that case and in the subsequent *Murphy Oil*.<sup>156</sup> The court read the NLRA as only preventing employers from prohibiting employees from filing charges with the Board, not as protecting rights to collective redress more generally.<sup>157</sup> Other circuits have split on the issue,<sup>158</sup> and the

---

<sup>151</sup> See *infra* Part III.A.

<sup>152</sup> One of the exceptions was *Her v. Club One Casino, Inc.*, AAA No. 160-01109-12 at 9 (July 29, 2013).

<sup>153</sup> *E.g.*, *Robbins v. Kellen Rest. Mgmt. Corp.*, AAA No. 58-20-1300-0214 at 10 (June 15, 2015).

<sup>154</sup> A cross-tabulation of results and citation to the relevant provision showed a *p*-value approaching statistical significance. Had the sample size been larger, the relationship likely would have been significant.

<sup>155</sup> *D.R. Horton, Inc.*, 357 NLRB Dec. (CCH) 184, 2292 (2012).

<sup>156</sup> *D.R. Horton, Inc. v. Nat'l. Labor Relations Bd.*, 737 F.3d 344, 348 (5th Cir. 2013) (ruling in favor of the Board on other grounds); *Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd.*, 808 F.3d 1013, 1015 (5th Cir. 2015).

<sup>157</sup> *Murphy Oil USA*, 308 F.3d at 1019–20.

<sup>158</sup> *Compare Cellular Sales of Mo., LLC v. Nat'l Labor Relations Bd.*, 824 F.3d 772, 776 (8th Cir. 2016) and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir.



Supreme Court has granted certiorari.<sup>159</sup> Although most awards post-date the NLRB's decision, few arbitrators made explicit reference to it. Those that did followed the Fifth Circuit in rejecting the Board's reading.<sup>160</sup>

2. *Reasons Arbitrators Found They Did Not Have Authority to Administer a Class Arbitration*

A few clause construction awards read *Stolt-Nielsen* to require affirmative consent to class arbitration (6 of 35 awards finding no jurisdiction).<sup>161</sup> Even arbitrators who did not go so far sometimes cited *Stolt-Nielsen* to the effect that class arbitration was unusual. One arbitrator described it as “fundamentally opposed to the goals of the FAA because of the dramatic changes from a streamlined, bilateral arbitration brought on by procedurally intense, high stakes class action litigation.”<sup>162</sup> In 7 of 35 awards, arbitrators cited the parties' inability to anticipate class proceedings based on their contract. By far the most common reason given was that the contract's “bilateral” wording did not admit an interpretation allowing class arbitration (21 of 35). This approach received support from the California courts in *Kinecta*, a case frequently cited and applied by arbitrators in California cases.<sup>163</sup> Arbitrators might point to “singular words” such as “employee,” “me,” or “I” as evidence of intent to contract only for bilateral arbitration.<sup>164</sup>

2013) (per curiam), *with* *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016) and *Morris v. Ernst & Young LLP*, 834 F.3d 975, 990 (9th Cir. 2016).

<sup>159</sup> *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017).

<sup>160</sup> *Kiran v. 99 Rests., LLC*, AAA No. 11-20-1300-1293 at 11 (Oct. 27, 2014) (following the Fifth Circuit); *Beery v. Quest Diagnostics, Inc.*, AAA No. 32-160-00323-13 at 12 (Feb. 11, 2014) (following Fifth and other circuits); *McCullough v. Terminal Trucking Co., LLC*, AAA No. 31-160000371-12 at 6, 18 n.26 (Sept. 17, 2013) (declining to decide the NLRA issue). The Second and Eighth Circuits adopted views similar to the Fifth Circuit. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). A more recent case affirmed the Board's broad reasoning, suggesting that arbitrators could have as well, but they did not do so. *See Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016).

<sup>161</sup> *E.g., Maslo v. Oak Pointe*, AAA No. 11-181-02243-06 at 7 (June 10, 2010) (relying on Justice Ginsburg's dissent for the proposition that parties must affirmatively consent to class arbitration). In one case, one arbitrator on a panel of three held the view that affirmative consent to class proceedings was required and wrote in dissent—the only dissent in the set of 64. *Adams v. Tesco*, AAA No. 01-14-0000-73 at 8 (July 16, 2015) (Susan S. Soussan, dissenting) (accusing the majority of attempting to “circumvent the Supreme Court's silence-does-not-equal-class holdings”).

<sup>162</sup> *Brainard v. Career Educ.*, AAA No. 33-20-1300-0437 at 16 (Dec. 4, 2014).

<sup>163</sup> *Kinecta Alt. Fin. Sols., Inc. v. Super. Ct of L.A. Cty.*, 205 Cal. App. 4th 506, 518–19 (2012).

<sup>164</sup> *E.g., Aikin v. U.S. TelePacific Corp.*, AAA No. 01-15-0003-0890, JAMS No. 1210032558 at 3 (Nov. 12, 2015); *Hernandez v. Custom Fiberglass*, AAA No. 01-14-0002-2663, JAMS No. 120005016 at 2 (Oct. 7, 2015); *King v. Concorde Career Colleges*, AAA No. 72-20-1400-0143 at 11 (Aug. 24, 2015).

The arbitrator's decision that the arbitration clause mandated bilateral arbitration in *Houk v. Career Education*, a fraud case against a for-profit college, turned on the singular terms in the agreement. The relevant arbitration agreement contained no class waiver, but "repeatedly refer[ed] to 'the student' in the singular."<sup>165</sup> The arbitrator rejected as "without merit" the plaintiff's arguments that the agreement should be read against the drafter and that Career Education could easily have included a specific class action waiver had it wanted one.<sup>166</sup> Courts had accepted awards that made such an argument, such as the award in *Jock*, but this, he correctly noted, was based on their limited ability to review awards.<sup>167</sup> He also stated that the plaintiff's reliance on Florida public policy was misplaced because the FAA preempted state law.<sup>168</sup>

The *Houk* arbitrator did not simply state that *Stolt-Nielsen* creates a default rule against class arbitration. He sought a textual hook in singular terms. However, *Houk* was an arbitration under Florida, not California law.<sup>169</sup> The "singular terms" argument is thin evidence for intent to bar class proceedings as opposed to simply being stock language in the agreement. The arbitrator seemed to say as much when, responding to the plaintiff, he noted that there was "nothing" to construe against the drafter.<sup>170</sup> The agreement was simply silent and the effect of *Stolt-Nielsen* was, in essence, to create a default against class arbitration. The arbitrator also seems to have misconstrued the origin of his inability to rely on public policy—under *Concepcion*, Florida courts cannot rely on public policy to treat arbitration clauses differently from other contracts by requiring class arbitration.<sup>171</sup> An arbitrator does not face this FAA prohibition, but under *Stolt-Nielsen*, he too cannot refer to public policy.<sup>172</sup>

### 3. *Reasons Arbitrators Decided They Had Authority to Administer a Class Arbitration*

Arbitrators often cited the "broad" or "open-ended" wording of the arbitration clause as a reason that they had jurisdiction to conduct class arbitrations (22 of 29 awards finding jurisdiction to conduct class arbitration). As some awards noted, such reasoning proved sufficient to allow clause construction decisions in *Jock* and *Oxford Health Plans* to survive potential scrutiny by a court.<sup>173</sup> Other common reasons were that the plaintiff could not anticipate giving up rights to class procedures (9

<sup>165</sup> *Houk v. Career Educ.* AAA No. 33-20-1400-0040 at 6 (Oct. 23, 2014).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 9.

<sup>168</sup> *Id.* at 8.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> *Id.* at 7.

<sup>171</sup> *Id.* at 6.

<sup>172</sup> *Id.*

<sup>173</sup> *E.g.*, *Burkett v. Chesapeake Energy Corp.*, AAA No. 14-20-1300-0436 at 9 (Sept. 11, 2014).

of 29) and that the defendant, solely responsible for the wording of the contract, could easily have explicitly banned class arbitration (13 of 29) if it had wanted to do so. Essentially, the arbitrators assumed a default rule in favor of class arbitration. For instance, one arbitrator in a consumer case noted that “class processes also operate to make viable many small claims which would not individually be economically amenable to prosecution in any forum, judicial or arbitral.”<sup>174</sup> As a result, he concluded, the issue was so important that a defendant would not provide adequate notice to a plaintiff unless the contract involved an explicit class arbitration waiver.<sup>175</sup> A few decisions (8 of 29) also cited AAA’s previous default of allowing class arbitration—a defendant writing a contract choosing AAA arbitration during the pre-*Stolt-Nielsen* period might be expected to anticipate facing class arbitration.<sup>176</sup>

*Burkett v. Chesapeake Energy Corp.* was unusual for involving a panel of three retired federal judges.<sup>177</sup> However, the approach the panel chose covers many common arguments. First, the panel rejected the notion that a court, and not the arbitrators, should decide clause construction on the basis that the agreement referred to AAA rules and that the class arbitration rules give the clause construction decision to the arbitrator.<sup>178</sup> The panel then distinguished *Stolt-Nielsen* on the basis that the parties in that case “stipulated there was ‘no agreement’” on class arbitration.<sup>179</sup> Arbitrators in *Oxford Health Plans*, the panel noted, concluded that language submitting all disputes to arbitration was agreement to class arbitration.<sup>180</sup> While the Court might not have liked this reasoning, it did accept it, and so courts could accept the present award as well.<sup>181</sup> Next, the panel argued that Chesapeake could have included a class action waiver.<sup>182</sup> Its failure to do so again demonstrated a decision to allow possible class arbitration. Finally, it noted that Chesapeake was trying to negotiate a class settlement with another set of plaintiffs in court. It would be “inherently inconsistent” for it to avoid doing the same in arbitration.<sup>183</sup>

---

<sup>174</sup> *Betts v. Fastfunding the Co., Inc.*, AAA No. 33-516-00012-13 at 5 (Aug. 21, 2013).

<sup>175</sup> *Id.*

<sup>176</sup> *Benson v. CSA-Credit Sols. of Am., Inc.*, AAA No. 11-160-M-02281-08 at 1–2 (July 6, 2010).

<sup>177</sup> *Burkett v. Chesapeake Energy Corp.*, AAA No. 14-20-1300-0436 at 5 (Sept. 11, 2014). The relevant clause stated that “any claim controversy or dispute” would be resolved by binding arbitration.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> *Id.* at 9.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 9–10.

<sup>182</sup> *Id.* at 11–12.

<sup>183</sup> *Id.* at 13.

This last point, on the equities of allowing Chesapeake to avoid class in arbitration, may explain the panel's willingness to read "any . . . dispute" as affirmative authorization for class arbitration. In stating that Chesapeake could have contracted for a class waiver, the panel was, in effect, assuming a default in favor of class arbitration, at least if a contract gives broad powers over "all disputes." Should no such default exist, it would not make sense for Chesapeake to be required to explicitly contract around it. Yet, reference to "all" or "any" disputes or claims, coupled with the failure of the defendant to carve out class arbitration, was a feature of many of awards in favor of plaintiffs. Arbitrators were still assuming a default. This assumption makes sense if arbitration is positioned "[a]s a surrogate for judicial redress."<sup>184</sup> Arbitrators might argue that a clause "cannot rationally be read as excluding certain actions Claimant could bring in court."<sup>185</sup>

Finally, a group of employment decisions (8 of 29) relied on statutory rights specifically guaranteed to employees. For instance, the arbitrator in *Gutierrez v. Drill-Cuttings* acknowledged the force of "bilateral language" arguments, but rejected them, because "the particular type of claim at issue here—an FLSA claim—includes as a statutorily-prescribed incident of such a claim the section 216(b) right to proceed collectively."<sup>186</sup> Similarly, one arbitrator treated Worker Adjustment and Retraining Notification Act claims as inherently collective.<sup>187</sup> Several arbitrators cited the FLSA or PAGA in rejecting arguments based on *Kinecta* and the use of singular words in the contract.<sup>188</sup> Some California awards suggested that access to class arbitration must be maintained in relation to PAGA claims, even if it is otherwise contracted away.<sup>189</sup> Prior to *Concepcion*, California courts treated as unconscionable contracts that might hamper vindication of wage claims by way of class action, but the California Supreme Court held that this rule cannot stand under *Concepcion*.<sup>190</sup>

---

<sup>184</sup> Price v. NCR, AAA No. 51-160 908-12 at 14 (Oct. 24, 2013).

<sup>185</sup> *Id.*

<sup>186</sup> Gutierrez v. Drill-Cuttings, AAA No. 01-15-0002-6872 at 12 (Aug. 14, 2015).

<sup>187</sup> McCullough v. Terminal Trucking Co., LLC, AAA No. 31-160000371-12 at 12 (Sept. 17, 2013).

<sup>188</sup> Stone v. Universal Protection Serv., AAA No. 01-15-0002-7497 at 6 (Nov. 16, 2015); Gutierrez v. Drill-Cuttings, AAA No. 01-15-0002-6972 at 12 (Aug. 14, 2015); Chae v. W. Dental, AAA No. 11-160-424-11 at 3 (Sept. 20, 2011); *but see* Kiran v. 99 Rests., LLC, AAA No. 11-20-1300-1293 at 11 (Oct. 27, 2014).

<sup>189</sup> Stone v. Universal Protection Serv., AAA No. 01-15-0002-7497 at 7 (Nov. 16, 2015); Lips v. Cedars-Mount Sinai, AAA No. 01-14-0000-2256 at 7 (Dec. 17, 2014) (failure to allow class arbitration of PAGA claims would be contrary to California public policy and unenforceable under that state's law).

<sup>190</sup> Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 137 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

#### 4. *What Accounts for the Split Among Arbitrators?*

The clause construction awards demonstrate both the utility and the limits of an analogy between arbitrators and judges. In rendering their awards, arbitrators reasoned as adjudicators.<sup>191</sup> The split among arbitrators is easy to analogize to a split among judges interpreting precedent. But unlike judges, arbitrators lack the authority to resolve the debate among themselves.

AAA has a class arbitration system, and not merely a collection of arbitrators who conduct class arbitrations. The system's contours were predictable. The parties had little procedural discretion and the governing rules and sets of arguments that either side would likely deploy were clearly marked. Public access to previous decisions aids coordination on such matters. Uniform practice once led to a relatively uniform result—a default in favor of jurisdiction to administer class arbitration. Arbitrators maintained this default in part by referencing their own previous decisions. In 2010, *Stolt-Nielsen* disrupted both the default rule and the practices by which it was maintained.

Like AAA class arbitration, court systems feature institutional processes and personnel that do not change. Courts can also be expected to be responsive to those higher in the judicial hierarchy. Yet procedural change does not always take place smoothly in court systems.<sup>192</sup> Inconsistencies in judicial decisions may develop due to mistake,<sup>193</sup> resistance on the part of lower courts that believe they know better,<sup>194</sup> and most simply, from inconsistency in the law itself. The first possibility, mistake, seems unlikely. The arbitrators were clearly aware of the relevant law and its impact on clause construction. The other two possibilities are more likely.

Some arbitrators stated their disagreement with the Supreme Court in their awards. Shortly after the Court handed down *Stolt-Nielsen*, the arbitrators in a business-to-business dispute over insurance

---

<sup>191</sup> Markovits, *supra* note 14, at 470 (“Arbitration that carries on in this style employs procedures that are equivalently intensive to those associated with adjudication, and it does so in the services of applying substantive law that, like the law applied in adjudication, is a creature of the tribunal rather than of the parties.”).

<sup>192</sup> Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After Ebay: An Empirical Study*, 101 IOWA L. REV. 1949, 2002–04 (2016) (describing district courts' inconsistent use of the Ebay standard for granting patent injunctions).

<sup>193</sup> Brian Soucek has persuasively argued that this situation occurred in the Second Circuit, when the circuit's central legal staff failed to correctly articulate a change in immigration law. Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 154, 160–64 (2012).

<sup>194</sup> For instance, a state court might balk at or seek to minimize the effects of a decision based on federal preemption on the theory, implicit or explicit in its reasoning, that the Supreme Court did not truly understand state law. The Supreme Court seems to have believed that the California Court of Appeals was doing so in last term's *DIRECTV* case. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–70 (2015).

reimbursement went out of their way to criticize the Supreme Court while ordering class arbitration under Louisiana law:

Intending no disrespect whatsoever, we would be disingenuous if we did not acknowledge that despite reading and re-reading *Stolt-Nielsen*, we were unable to discern the constitutional or legislative source of these FAA ‘fundamental’ or ‘fundamentally important’ rights other than the majority’s pronouncement that such ‘fundamental rights’ exist under the FAA.<sup>195</sup>

An arbitrator in a consumer fraud arbitration against a for-profit college stated that he had to refuse to allow class arbitration under *Stolt-Nielsen*, but wrote that “one can still question whether it is good public policy to permit corporations to place arbitration agreements which would preclude class arbitration in consumer contracts of adhesion,” and called for legislation against the practice.<sup>196</sup> Arbitrators making such statements knew their awards would be public and were likely writing for audiences beyond the parties. However, they presented themselves as seeking to persuade rather than to defy. Thirteen awards included some critique of *Stolt-Nielsen*, but in seven of the thirteen awards, arbitrators refused to allow class arbitration. Nearly all arbitrators claimed that their decisions complied with *Stolt-Nielsen*, often striving to demonstrate compliance at some length.

Judges who disagree with controlling precedent have more subtle options than openly defying it. If ambiguity or room for discretion exists, they may choose to “read down” the precedent so that it does not disturb existing practice as much.<sup>197</sup> Arbitrators could emphasize *Stolt-Nielsen*’s narrow holding that hinged on the parties’ agreement that their contract was silent on issues of class.

Although *Stolt-Nielsen* was not terribly ambiguous, it does not provide a path to consistency. The decision took certain tools off the table for arbitrators writing clause construction awards, but its holding did not give them a default rule to apply. Arbitrators are supposed to decide whether to allow class arbitration by reading the relevant arbitration clause. When this clause is loosely constructed and does not provide a clear answer, *Oxford Health* suggests that almost any decision will be upheld in court as long as it is framed as coming from the words of the contract.<sup>198</sup>

The sometimes-thin reasoning arbitrators on both sides offered for their decisions reflects the difficulty of their brief—to fill in terms

---

<sup>195</sup> SWLA Hosp. v. Corvel, AAA No. 11-193-02760-06 at 14 n.20 (Sept. 30, 2010).

<sup>196</sup> Mensch v. Alta Colleges, AAA No. 11-516-00995-09 at 45 (July 16, 2010).

<sup>197</sup> See Arthur R. Miller, *Preservation and Rejuvenation of Aggregate Litigation: A Systemic Improvement*, 64 EMORY L.J. 293, 311 (2014) (predicting that judges will continue to preserve the class action in part because not all will be subject to appeal).

<sup>198</sup> Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2070 (2013).

without resorting to rules beyond the contract.<sup>199</sup> As the *Houk* and *Burkett* awards illustrate, arbitrators claiming to apply *Stolt-Nielsen* and to read the individual contract ended up relying on default rules in all but name. They just disagreed about what that default was. On the one side, an arbitrator might mechanically cite *Stolt-Nielsen*, reading the case to create a new rule against class arbitration in ambiguous cases. This view is problematic because the majority in *Stolt-Nielsen* took the parties to have agreed that their contract contained no agreement to arbitrate on a class basis. Also common was reliance on *Kinecta's* reasoning about the wording of a contract. However, it is difficult to see why words such as “you” clearly notify the plaintiff that class actions are not allowed. On the other side, arbitrators sometimes followed the *Oxford Health Plans* arbitrators in arguing that a reference to “all disputes” or “any claims” clearly contemplated class arbitration. As Alan Rau has noted, such reasoning offers “the thinnest ‘textual’ veneer.”<sup>200</sup> Given the Supreme Court’s repeated references to the deficiencies in the reasoning of the award in *Oxford Health Plans*, it hardly provides an obvious example to follow. The next category includes arguments about notice to the plaintiff, especially in light of statutes that would give the plaintiff the impression that he could bring a collective claim. Given the unsettled state of arbitration law, such claims are more persuasive.

Faced with a similar dilemma, common law judges have other options. With little controlling precedent, they can draw on the resource of persuasive precedent, justifying their decisions with reference to what previous members of the same court have done. They might also look to whether state public policy dictates a particular reading. As a result, the law of contracts is replete with default rules imposed by courts.<sup>201</sup> Rau sees no reason why arbitrators cannot also make use of defaults.<sup>202</sup> Rau’s equivalence between judges and arbitrators for this purpose mirrors Justice Ginsburg’s *Stolt-Nielsen* dissent, which noted that a New York state court would certainly be permitted to order class proceedings.<sup>203</sup> AAA rules themselves, with their federal parallels and focus on responsibility to absent parties, may “encourage arbitrators to view class arbitration merely as a class action that happens to occur in arbitration.”<sup>204</sup> An arbitrator reaching for such a general rule is more than the “gap-filling” agent that Rau describes,<sup>205</sup> filling a contract gap with a particular rule for

---

<sup>199</sup> Rau notes the common “reliance on a variety of supposedly ‘textual’ elements which, however ingenious, . . . are unqualifiedly irrelevant.” Rau, *supra* note 79, at 998.

<sup>200</sup> Rau, *supra* note 79, at 998 (describing defects in the *Oxford Health Plans* award).

<sup>201</sup> *Id.* at 38–41.

<sup>202</sup> *Id.* at 42.

<sup>203</sup> *Stolt-Nielsen*, 559 U.S. at 698 (Ginsburg, J., dissenting).

<sup>204</sup> Weidemaier, *supra* note 129, at 95.

<sup>205</sup> Rau, *supra* note 79, at 1000-01.

that case, and more like a common-law judge, filling the gap with a general rule. *Stolt-Nielsen* states that such a role is closed to arbitrators.<sup>206</sup> The majority had good reasons for viewing arbitrator authority as more limited. Judges claim their authority to develop the law from public selection processes. Arbitrators are selected as private agents of the parties. However, this limit on arbitral authority leaves arbitrators without the resources to resolve their split on clause construction.

### III. DEVELOPING NEW DEFAULTS

The picture painted above is troubling. New arbitrators are mostly unwilling to order class arbitration and more experienced arbitrators are split on whether, or when, to do so. Parties that do not have tightly-worded contracts are left with little ability to predict outcomes and make choices about how to pursue or defend against a claim. This uncertainty is especially problematic because of the importance of clause construction to the ultimate outcome of an arbitration. The lack of docket activity after clause construction awards are issued suggests that they are often de facto dispositive. Defendants that win have likely made it too expensive for plaintiffs to arbitrate, while those that lose may want to enter settlement discussions before the number of potential class members expands. Plaintiffs' ability to get relief through settlement after a clause construction decision comes down to the defendant's failure to change a contract and the arbitrator's reading of *Stolt-Nielsen*.

In rendering their decisions, arbitrators cannot openly acknowledge that they are filling contract gaps, as opposed to deriving an answer from the words of the contract.<sup>207</sup> They do not have the authority to develop a general default rule for how gaps should be filled through their awards alone. As each decision appears as a reading of a specific contract, arbitrators are required to side-step the major public policy issue involved in clause construction—plaintiffs' ability to vindicate their rights and to know, through an explicit class waiver, if they are giving that ability up. The parties are left with a hard-to-predict decision that will likely determine the outcome of their arbitration. Moreover, a decision with public, regulatory consequences is being made by private actors who lack the authority necessary to take those consequences into account beyond occasional dicta expressing their frustration.

The current situation leads to basic unfairness, especially to plaintiffs who likely had little chance to consider their arbitration clauses. They are faced with a process in which the two biggest determinants of their access to a class proceeding are the defendant's drafting choices and the arbitrator's professional history. Restoring a default rule for

---

<sup>206</sup> *Stolt-Nielsen*, 559 U.S. at 678.

<sup>207</sup> See Rau, *supra* note 79, at 985.



filling gaps in contracts that do not explicitly allow or waive class could at least address the second problem. The *Stolt-Nielsen* and *Concepcion* majorities obviously preferred a default rule that class arbitration is not allowed, even if they left the decision to arbitrators. This preference seems to have been based on a romanticized view of arbitration as having all the attributes modern class litigation lacks. The AAA class arbitration dockets suggest that this romantic view has little basis in reality.

The arguments for the arbitrator-developed pre-*Stolt-Nielsen* default of allowing class arbitration rest on a more solid foundation. A rule in favor of authorizing class arbitration would operate as a penalty-default with respect to defendants.<sup>208</sup> If defendants fail to write an explicit class waiver, they will be subject to class arbitration. Plaintiffs might not be able to secure their rights without collective arbitration.<sup>209</sup> If defendants wishing to avoid class arbitration have to explicitly say so in their contracts, potential plaintiffs will have a better understanding of what rights they are giving up. These potential plaintiffs may not read their contracts, or be terribly concerned with these rights, but advocacy campaigns have made consumers more aware of arbitration.<sup>210</sup> A penalty default at least makes the potentially objectionable provision explicit so that groups of consumers and employees can respond if they wish.

Perhaps five years is simply not enough time for AAA's class arbitration system to resolve the split among experienced arbitrators. However, the tools that judges use to resolve these debates, persuasive, and controlling precedent developed as cases move up an appellate hierarchy, do not exist in AAA's class arbitration system. Moreover, arbitrators are confined to giving reasons within the specific contract in front of them, instead of discussing other factors, such as a view of public policy, which might motivate their decisions and have more general application. This restriction further limits their ability to talk to and persuade each other, an important consideration because arbitrators facing their first class arbitration seem to rule differently. If experienced arbitrators are motivated to continue to allow class arbitration by systemic concerns, arbitrators new to the system may never know.

Defendants could resolve the problem by drafting more explicit contracts. They will not necessarily do so.<sup>211</sup> Some defendants may simply

---

<sup>208</sup> Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 120 (1989).

<sup>209</sup> See Resnik, *supra* note 16, at 2893–94 (arguing that individual arbitration is little-used by consumers).

<sup>210</sup> For example, General Mills ended attempts to get consumers to agree to arbitration through such actions as downloading coupons. Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES (Apr. 20, 2014), <https://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?mcubz=0>.

<sup>211</sup> Rutledge & Drahozal, "Sticky" Clauses, *supra* note 76, at 977–82 (detailing possible reasons why firms do not change contracts).

not have altered their contracts because of the costs associated with doing so, including the cost of legal advice. They may, rightly or wrongly, assume that they are unlikely to be subject to a class arbitration.<sup>212</sup> Others may be reluctant to write class action waivers into their contracts because they want to have things both ways. They may want the ability to avoid class suits, but also the ability to settle with a large group of plaintiffs at once. Defendants that write a class waiver into their contracts might still be able to achieve an aggregate settlement through informal mechanisms.<sup>213</sup> In arbitration, however, informal aggregation may be difficult or unwieldy because individual arbitrations are typically not public. What happens in one arbitration cannot bind another arbitrator if the second arbitrator does not know about it. This secrecy can work against a defendant as well as against plaintiffs. Defendants might also settle in court by simply not invoking their arbitration clause.<sup>214</sup> If they do invoke their arbitration clause, however, and they specify AAA, they will be unable to invoke AAA's class arbitration process as a means of consolidating claims for settlement.<sup>215</sup> A default rule would limit after-the-fact defendant gamesmanship, making arbitration more predictable for plaintiffs.

One danger of this approach is that a default rule would push defendants to alter their contracts because they would be on notice that failing to do so would subject them to class arbitration. Should defendants choose this course of action, even fewer plaintiffs will have access to a class mechanism. However, the defendants now subject to potential class arbitration have already chosen not to change their contracts after it became clear that they could easily ban class arbitration. This group of defendants may not be terribly sensitive to changes in the law.

If the bad news is that clause construction decisions have become inconsistent, the good news is that class arbitration is judicialized enough

---

<sup>212</sup> See *id.* at 975–76.

<sup>213</sup> See Gregory C. Cook, *Why American Express v. Italian Colors Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After Concepcion*, 46 UNIV. MICH. J.L. REFORM CAVEAT 104, 106 (2012).

<sup>214</sup> An attempted in-court settlement was the ultimate fate of the class in *American Express v. Italian Colors*. See *In re Am. Exp. Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221 NGG RER, 2015 WL 4645240, at \*4 (E.D.N.Y. Aug. 4, 2015) (rejecting the settlement for unrelated reasons).

<sup>215</sup> Some arbitration clauses have been drafted with an anti-severability provision, so that failure of a class arbitration ban sends the entire matter to court. *E.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015) (contract stating that if “the law of your state” does not allow class arbitration waivers, no arbitration will occur and the case will be heard in court). However, these contracts still lock defendants in to individual arbitration if they choose to invoke the arbitration clause. In court, plaintiffs sometimes use informal coordination mechanisms rather than class actions, and this approach might be replicated in arbitration.

that it can become consistent again. The clause construction awards show arbitrators writing awards within the confines the Supreme Court set for them in *Stolt-Nielsen*. This choice is a good way to avoid having the award vacated, but a bad way to develop any general rule about how to treat the contract language they are interpreting. However, the reasoning arbitrators used in their awards suggests that they would respond to changes in the law or in AAA's own regulations. If they cannot act as common law judges,<sup>216</sup> they might be "civil law judges" unable to create their own default rule but able to use one enunciated by a source with rule-making power.<sup>217</sup>

Courts might take the clause construction decision from arbitrators entirely and develop rules based on precedent and public policy. If they do so, however, they are unlikely to favor class arbitration. Legislation could be another source. Although change at the national level is unlikely, state legislators might create subject-specific defaults. Finally, AAA itself might step in, as might JAMS to the extent it faces the same issues. A defendant might choose to leave an arbitration clause ambiguous on the issue of class in order to retain more control over the shape of any group litigation. However, many defendants have strong incentives to designate a large arbitration organization to handle any arbitration rather than spending the resources to develop their own rules. Arbitration organizations can create default rules so that the choice of the organization in the contract is also the choice of its default.

#### A. Courts

As long as the clause construction issue belongs to the arbitrator, courts are unlikely to offer more guidance. Federal and state courts might take over the business of interpreting ambiguous arbitration clauses. Because judges may refer to precedent and public policy, they may more readily develop a default rule. Cases in which the parties have not specified whether class is allowed or who should decide the issue, such as the arbitrations discussed here, are the subject of a circuit split. In *Bazzle*, the plurality determined that the arbitrators, not judges, had

---

<sup>216</sup> *Stolt-Nielsen S.A. et al. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 673–74 (2010) (“[T]he panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.”).

<sup>217</sup> Civil law judges traditionally recognized only “statutes, regulations, and custom as sources of law.” JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 24 (3d ed., 2007). Modern reality is a bit more complicated, and it is also true that when arbitrators read and engage with caselaw they do so as lawyers in the common law tradition, rather than engaging with precedent in the manner of civil-law trained adjudicators. See Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 170–71 (2013) (describing differences between common law precedent and civil law “reasoning with previous decisions”).

the power to decide whether the arbitration agreement authorized class action.<sup>218</sup> *Oxford Health Plans* sidestepped the issue.<sup>219</sup> The Third, Fourth, and Sixth Circuits have since decided that clause construction is a matter courts must resolve prior to arbitration.<sup>220</sup> However, the Fifth Circuit, Seventh Circuit, and the California Supreme Court all ruled the other way.<sup>221</sup>

Class action advocates have argued that clause construction should be decided in arbitration.<sup>222</sup> *Oxford Health* suggests that much of the reasoning used by arbitrators allowing class arbitration would not pass judicial muster.<sup>223</sup> District courts deciding on the availability of class arbitration before ordering arbitration often do so on the basis of the significant gulf they see between class arbitration and “traditional” bilateral arbitration.<sup>224</sup> Unsurprisingly, they then find no basis in the contract to allow class arbitration.<sup>225</sup>

The clause construction award data both confirms and complicates advocates’ assessment that their arguments for class arbitration will find a more sympathetic hearing in arbitration. The data confirms this view because it shows that arbitrators familiar with the class arbitration system remain willing to use it. However, the clause construction award data also show that AAA’s system has not been as impervious to change as figures like Rau expected. Arbitrators are not uniformly allowing class arbitration. Sending the clause construction issue to the arbitrator is riskier for plaintiffs than they may have appreciated.

---

<sup>218</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453–54 (2003).

<sup>219</sup> *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013).

<sup>220</sup> *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016); *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014) (availability of class arbitration is matter for the court); *Reed Elsevier Inc. v. Crockett*, 734 F.3d 594, 597 (6th Cir. 2013). For more on the choice between arbitrator and court, see George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 *YALE J. INT’L L.* 1, 8 (2012).

<sup>221</sup> *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 196 (5th Cir. 2016); *Sandquist v. Lebo Auto., Inc.* 376 P.3d 506, 511 (Cal. 2016).

<sup>222</sup> *See, e.g., Sandford Heisler and Public Justice Win Key Decision in California Supreme Court*, *PUB. JUSTICE* (July 28, 2016), <http://www.publicjustice.net/wp-content/uploads/2015/05/Sandquist-CA-Sup-Ct-release-WIN-07286.pdf> (celebrating the plaintiff’s ability to bring the clause construction question to arbitration after the trial court had construed the relevant arbitration clause as forbidding class proceedings).

<sup>223</sup> Rau, *supra* note 79, at 59.

<sup>224</sup> *See Henderson v. U.S. Patent Comm’n, Ltd.*, 188 F. Supp. 3d 798, 803–05 (N.D. Ill. 2016); *Bird v. Turner*, No. 5:14CV97, 2015 WL 5168575, at \*7 (N.D.W. Va. Sept. 1, 2015).

<sup>225</sup> *See, e.g., JPay, Inc. v. Kobel*, No. 16-20121-CIV, 2016 WL 2853537, at \*4 (S.D. Fla. May 16, 2016); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 945 (N.D. Cal. 2015).

Even if a court has ruled on clause construction prior to ordering arbitration, it may not be the end of the matter. The arbitrators viewed their obligation to follow court orders on clause construction as a matter of AAA's internal rules and did not necessarily accept that the courts had competence to decide the issue for them.<sup>226</sup> In one instance, the court ruled that the arbitrators should decide the issue.<sup>227</sup> In the other, the arbitrator followed the court's decision on clause construction, but conducted a separate analysis of the arbitration clauses in question, suggesting at least some concern that AAA's rule was not an adequate basis for the decision.<sup>228</sup>

### B. *Legislation or Regulation*

Congressional action would be the surest way to resolve the issue of when class arbitration should be allowed. Despite proposals to prohibit consumer and employment arbitration,<sup>229</sup> Congress is unlikely to amend the FAA, instead relying on industry-specific carve-outs.<sup>230</sup>

Agencies may also regulate arbitration. The NLRB's interpretation of the NLRA to bar class waivers as an unfair labor practice is one example, assuming it survives Supreme Court scrutiny.<sup>231</sup> However, the clause construction award data suggest that merely banning class waivers, as the NLRB has done, is not sufficient to ensure that all plaintiffs have access to class proceedings. The CFPB issued a rule that required financial services companies it regulated to give consumers the option of bringing a class action in court, although they would also have been able to seek class arbitration.<sup>232</sup> The agency explained that it chose the language it did in part because industry interests regularly chose class actions over class arbitration. Most contracts that it studied included provisions that would not allow arbitration if an anti-class arbitration provision was found unenforceable.<sup>233</sup> This rule avoids the problem of lack of predictability in arbitration by requiring class actions in court. However, agency regulations may not survive either judicial scrutiny or

<sup>226</sup> *Garcia-Herman v. Greystar* AAA No. 73-160-00149-13 at 2 (Feb. 3, 2015) (*Greystar II*); *Her v. Club One Casino, Inc.*, AAA No. 160-01109-12 at 9 (July 29, 2013).

<sup>227</sup> *Garcia-Herman v. Greystar* AAA No. 73-160-00149-13 at 4 (Feb. 3, 2015) (*Greystar II*).

<sup>228</sup> *Her v. Club One Casino, Inc.*, AAA No. 160-01109-12 at 9 (July 29, 2013).

<sup>229</sup> Arbitration Fairness Act of 2015, S.1133, 114th Cong. (2015).

<sup>230</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3084–90 (2015).

<sup>231</sup> See *supra* note 155 and associated text.

<sup>232</sup> Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040.4).

<sup>233</sup> *Id.*

the present political environment.<sup>234</sup> The Solicitor General is no longer defending the NLRB's position.<sup>235</sup> Congress struck out the CFPB's rule under the Congressional Review Act.<sup>236</sup>

Legislative or regulatory action at the state level is more likely. The FAA preempts much state regulation of arbitration through the court system. However, the clause construction awards suggest that state legislatures can influence outcomes in arbitration. Although more data would be necessary to test the strength of the correlation, language explicitly allowing class or representative actions seems to make a difference in what arbitrators believe the parties expected. State legislators could seek to impose subject-specific default rules.

In ambiguous cases, arbitrators are likely to heed clear statutory commands to allow the plaintiff to bring a collective action, creating a default rule. This approach may be particularly appealing to states that lack other avenues to protect rights to collective action. Under the Supreme Court's interpretation of the FAA, state law is preempted even when chosen by contract.<sup>237</sup> However, arbitrators may have greater scope to enforce state rules.

### C. *A Private Solution*

A final option might be for organizations like AAA to adopt a similar penalty default rule governing all potential class arbitrations, a rule contract drafters would choose by choosing AAA. AAA has incentives to make such a rule.<sup>238</sup> AAA's judicialized treatment of class arbitration seems to have come about in part because the organization wanted to be seen as self-regulating.<sup>239</sup> Self-regulation might help it avoid laws or administrative rules that reduce its ability to administer arbitrations.

Self-regulation by arbitration organizations has a mixed record. Organizations want to stay in business and have been accused of favoring repeat players, and several studies suggest that they do so in at least some

---

<sup>234</sup> David L. Noll, *Deregulating Arbitration*, 30 LOY. CONSUMER L. REV. 3 (forthcoming 2017).

<sup>235</sup> Amy Howe, *Murphy Oil's Law: Solicitor General's Office Reverses Course in Arbitration Cases, Supports Employers*, SCOTUS BLOG (Jun. 19, 2017), <http://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers/>.

<sup>236</sup> Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES, Oct. 24, 2017, <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>.

<sup>237</sup> DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015).

<sup>238</sup> See Weidemaier, *supra* note 129, at 108 (explaining how the provider rules can evolve to protect consumers in class arbitration).

<sup>239</sup> See Brief, *supra* note 13, at 4 (discussing the organization's rule-making with respect to class arbitration).

settings.<sup>240</sup> In this case, incentives may favor a default rule for class arbitration. The users that the organization's leaders might seek to court are not the contract drafters—examination of recent awards reveals no parties that drafted contracts explicitly to allow class arbitration—but plaintiffs' lawyers. Claimants pay a larger fee for initiating a putative class arbitration than they do for initiating individual arbitration<sup>241</sup> and arbitrators may be able to command higher rates. Thus, AAA is likely in no hurry to see that arbitrators follow an expansive reading of *Stolt-Nielsen*, cutting off class arbitrations early in the process.

If arbitrators cannot develop a default rule by reference to past awards, could AAA itself impose one through rule-making? The courts rarely address the role of arbitration organizations separately from that of arbitrators. This gap in the case law may be addressed as courts confront routinization in both transnational and domestic arbitration. However, the most likely outcome would be that an arbitrator would have no more authority to apply an organizational default rule the contract does not specifically choose than the arbitrator has authority to apply a default based on arbitral precedent.

With reform of the FAA unlikely, advocates should pursue avenues such as state legislation and organizational rule changes to restore a default rule in favor of class. Doing so requires arguing for continuing class arbitration and for a judge-like role for arbitrators in that process. However, advocates should not expect arbitrators to be able to do everything common law judges can. Instead, they will need legislation, regulation, and organizational rules to respond to changes in arbitration law.

## CONCLUSION

Analysis of the past five years of AAA clause construction awards shows that the Supreme Court's decisions have made a significant difference to arbitration outcomes. The decisions also seem to have added new uncertainties that are a potential source of unfairness as similar contracts are no longer treated alike. They have changed what appears to have been an arbitrator-developed default rule in favor of class. In their public awards, arbitrators put forward an approach to class arbitration that is integrated with the wider legal system. This integration

---

<sup>240</sup> Horton & Chandraseker, *supra* note 16, at 110, 113–15. The leaders of one organization that conducted class arbitrations, the National Arbitration Foundation, entered into a consent judgment promising not to administer consumer arbitrations after prosecutors discovered that the organization had significant and undisclosed ties to debt collectors. Consent Judgment, *Minnesota v. National Arbitration Forum, Inc.*, 27-CV No. -09-18550 (D. Minn. July 17, 2009).

<sup>241</sup> See, e.g., AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES: FEE SCHEDULE 3–4 (Jul. 1, 2016).

is partly to blame for the inconsistent nature of post-*Stolt-Nielsen* rulings. Arbitrators are striving to follow inconsistent Supreme Court precedent and to reconcile it with other law suggesting plaintiffs sometimes have a right to collective action. The awards also provide an example of the limits of judicialization. In the court system, judges could develop precedents and general rules that would gradually reduce uncertainty over outcomes. Arbitrators cannot. At this juncture, only legislative intervention is likely to bring much consistency to the system.

Plaintiffs' advocates will be heartened to know that class arbitration remains available under some circumstances. Defendants can still contract out of class arbitration with a waiver provision, and it would take a change to federal law to prevent them from doing so. However, state legislatures can create a penalty default under which companies will have to write such explicit waivers in order to be sure they will not face class arbitration. Given the importance of the clause construction decision for whether plaintiffs are able to vindicate their rights, state legislatures should act to explicitly protect collective proceedings.

This case study also helps put to rest the idea that one may sensibly discuss the merits of "arbitration" or even "domestic arbitration." Most commentators have followed the Supreme Court in comparing class arbitration with bilateral domestic arbitration.<sup>242</sup> However, relatively informal bilateral arbitration may be the wrong comparator if one seeks to understand trends in AAA class arbitration, which is far more judicialized than most bilateral arbitrations, with its rigid rules and public, reasoned awards.<sup>243</sup> Each arbitration system needs to be evaluated on its own merits for better policy choices to be made. Such evaluation is difficult due to the secrecy surrounding most domestic arbitration. AAA's online class arbitration dockets made it possible to determine how the organization's arbitrators had implemented a set of watershed Supreme

---

<sup>242</sup> S.I. Strong is a notable exception. Her book compares U.S. class arbitration to mass and collective arbitrations in international law and with court-based procedures. STRONG, *supra* note 15. Strong argues that aggregate arbitration is a useful way to resolve issues of jurisdiction that might arise with a large, multi-jurisdictional group of potential plaintiffs and highlights the form's potential procedural flexibility, cost savings, and speed. *Id.* at 289, 294–303. Strong's list of potential strengths is problematic when applied to class arbitration in the United States. It is simply the same list that applies to defenses of bilateral arbitration.

<sup>243</sup> See Weidemaier, *supra* note 129, at 83 (observing that domestic bilateral arbitrations "might not permit the economies of scale needed to justify substantial litigation investments, specialized training, or efforts to develop case inventory."); accord DEZALAY & GARTH, *supra* note 9, at 124–25 ("Domestic arbitration, lacking the foundation in learned law of international arbitration and involving relatively small claims in which there is little incentive to invest in much law, is much closer to the pole of business than to that of law."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387–88 (1978) (describing mid-century AAA arbitration).



Court decisions with the potential to radically alter this area of arbitration, and with it the rights of many plaintiffs. The full story remains inaccessible due to the possibility of secrecy at AAA and the default of secrecy at JAMS.

Beyond class arbitration, the clause construction awards raise concerns over transparency and protections for parties in AAA's push to take on arbitral business for state regulatory bodies. There, as here, greater judicialization may enhance perceptions of arbitration's legitimacy and reduce regulation. The arbitral systems will be open to greater scrutiny than AAA's "traditional" commercial arbitrations. However, AAA ultimately controls what we can learn about its system and observers will have difficulty knowing whether the information they glean from public sources is truly accurate.

Moreover, arbitrators themselves lack the full tools that would be available to state or federal judges to fix problems that occur. They are civil law judges in a common law system. Many would be rightly disturbed at the idea of private paid judges being allowed to develop the law in processes that are often shielded from view. Limiting their power, however, also comes with a cost. Legislatures and appellate courts in common law systems can to some extent rely on lower courts to resolve areas of confusion left by unclear legislation and vague controlling precedent. Arbitrators cannot be responsible for restoring legal certainty in areas of considerable consequence—in this instance, a clear rule for determining when a contract prohibits class arbitration. Using arbitrators as adjudicators thus puts a greater burden on legislators and regulators to respond to any problems that may arise, even as it makes it harder for them to identify such problems in the first place.