THE SUPREME COURT TRILOGY AND ITS IMPACT ON U.S. ARBITRATION LAW

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I. INTRODUCTION

The Supreme Court's most recent "trilogy" of arbitration law rulings – *Stolt-Nielsen*,[1] *Rent-A-Center*[2] and *AT&T Mobility* v. *Concepcion*[3] – deserves the lavish attention it has been receiving, as evidenced by the contributions of Tom Stipanowich[4] and Alan Rau[5] in this special issue. Professors Stipanowich and Rau rightly view the three rulings as "of a piece,"[6] revealing a determination on the part of the Court's majority to enhance the autonomy and effectiveness of arbitration as a dispute resolution mechanism, even at the expense of consumer welfare. The trilogy has the result, and most likely the purpose, of weakening safeguards that had traditionally served to ensure the fairness of arbitral adjudication, while keeping arbitration at a safe distance from dispute resolution on a class-wide basis. By all accounts, the trilogy's chief beneficiaries are those economic actors best capable of protecting their own interests in the contracting process.[7]

Like past Supreme Court trilogies in the arbitration field,[8] the present trilogy represents a coordinated movement of the case law, a movement that Professors

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[1] Stolt-Nielsen, S.A. v. AnimalFeeds Int'l, 130 S. Ct. 1758 (2010).

[2] Rent-A-Center, West v. Jackson, 130 S. Ct. 2772 (2010).

[3] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[4] Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, *supra* in this issue at 323 [hereinafter Stipanowich].

[5] Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, *supra* in this issue at 435 [hereinafter Rau].

[6] Rau, at 486, refers to the cases as "fit[ting] together seamlessly." He writes, "All three [rulings] confirm the impression of a highly politicized subject now remarkably and tightly intertwined with wider issues of social justice and corporate power. All three are exactly what we might expect from the current Court." *Id*.

[7] While *Stolt-Nielsen* was not a consumer case, its central and defining element was the Court's determination that a dispute could not proceed on a class arbitration basis unless the underlying contract contemplated it. The Court was necessarily aware of the fact that efforts at class arbitration are especially prominent in the consumer arbitration context, and that whatever position it would take in *Stolt-Nielsen* on the availability of class arbitration would exert its greatest effect on consumer cases.

[8] What is commonly regarded as the first trilogy consisted of United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The second trilogy consisted of Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Southland Corp. v. Keating, 465 U.S. 1 (1984); and

Stipanowich and Rau admirably depict. Their highly textured portrayals of the trilogy lay out the facts of the cases and the judicial reasoning of the majority in useful detail, while identifying, correctly in my view, their political economy dimension. My purpose, while two-fold, is more modest. I focus first on what I see as the shift in doctrinal premises that the trilogy entails,[9] attempting to gauge the measure of that shift. I then try to determine – again largely in doctrinal terms – the degree to which the trilogy has narrowed the options for advocates and courts that may be inclined to resist it. I find that, while the three decisions are indeed of a piece, each is distinctive in the extent to which it required the Court to turn its back on settled understandings of U.S. arbitration law. I find that the decisions also differ in the degree to which they resolve definitively the issue before the Court, in the sense of actually foreclosing the results they were designed to foreclose. In short, while acknowledging the heavy impact of all three decisions, I seek to identify precisely the magnitude of the shift in premises that each of them entails and to measure the latitude that advocates and courts still enjoy in the trilogy's wake.

II. THE TRILOGY

A. *Rent-A-Center*

The *Rent-A-Center* decision, like the *Concepcion* decision that was to come, targets the role of unconscionability in the enforcement of agreements to arbitrate. The decision can be, and has been, read as according parties the freedom to delegate to an arbitral tribunal the determination of whether the arbitration agreement to which a delegation is attached is unconscionable[10] and therefore

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Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). A third trilogy was composed of Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Pacificare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); and Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[9] "Regardless of one's views about the wisdom of that decision, it would be hard to dispute that *AT&T Mobility* and other recent United States Supreme Court decisions represent a shift in the federal law regarding the enforceability of arbitration agreements." D'Antuono v. Service Road Corp., 789 F. Supp. 2d 308, 322 (D. Conn. 2011).

[10] The Court specifically recognized unconscionability as a ground for denying effect to arbitration agreements in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) ("Generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] Section 2"). Courts have relied extensively on unconscionability doctrine to deny enforcement of agreements to arbitrate.

The relevant contract provision in *Rent-A-Center* stated:

> The Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

unenforceable.[11] Viewed in those terms, *Rent-A-Center* allows parties to reverse the separability-based presumption in American case law, according to which threshold challenges that specifically affect the arbitration clause are subject to early judicial determination, while those affecting the parties' contract as a whole (along with the arbitration clause) are reserved for initial determination by the arbitrators.[12]

Delegations to tribunals of the authority to resolve threshold issues that may ordinarily be raised in court prior to arbitration are, as Stipanowich says, "ubiquitous."[13] Their effect is essentially to turn what, under traditional separability reasoning, would otherwise be "gateway" issues (hence for initial judicial determination) into "non-gateway" issues (hence for initial determination by arbitrators).[14] Such delegations come in various stripes. The least contentious are those that delegate to tribunals authority to determine whether a given dispute falls within the scope of the arbitration agreement;[15] these are the least contentious because they entail contract interpretation – an exercise arbitral tribunals are meant generally to perform. More problematic are delegations of authority to determine whether an arbitration agreement (as distinct from the contract of which it is a part) was ever formed[16] or, if formed, binds a non-signatory.[17] Similarly contested has been the possibility of delegating to arbitrators the authority to decide whether an agreement to arbitrate is unconscionable and, for that reason,

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[11] Professor Stipanowich describes the decision in *Rent-A-Center* as one in which "public policies promoting enforcement of arbitration agreements effectively trump the authority of courts . . . to police arbitration agreements for unconscionability." Stipanowich, at 326.

[12] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

[13] Stipanowich, at 347. According to established Supreme Court case law, parties may delegate to arbitrators the decision whether an arbitration agreement covers a particular dispute. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986). Even the decision whether a contract exists and/or is binding on a given non-signatory is delegable, provided the delegation is expressed clearly and unmistakably. First Options of Chicago v. Kaplan, 514 U.S. 938 (1995). For criticism, see Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. 159, 159-60 (2009).

[14] *See generally*, George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012).

[15] *See* AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986).

[16] In *China Minmetals Materials Import & Exp. Co. v. Chi Mei Corp*., 334 F.3d 274 (3d Cir. 2003), the court did not decide whether authority to decide the existence of a contract could be delegated to the arbitrators. But it did hold that the question is generally for a court rather than a tribunal to decide, even though the existence question pertained to the contract as a whole rather than to its arbitration provision in particular.

[17] First Options of Chicago v. Kaplan, 514 U.S. 938 (1995) (allowing authority to determine whether a non-signatory is bound to be delegated to the arbitral tribunal, if the intention to delegate is clear and unambiguous).

unworthy of enforcement. The latter question has taken on heightened importance as unconscionability has emerged as the prime doctrinal basis for denying effect to arbitration agreements in consumer contracts.[18] The Court granted certiorari in the *Rent-A-Center* case precisely to resolve this question and, according to a widely held view, gave its blessing to delegations of this sort.

I suggest that the Court did not in fact quite settle the issue. Rather than decide whether parties may delegate to arbitrators the question of an arbitration agreement's conscionability or unconscionability, the Court ruled that the consumer challenging the delegation in *Rent-A-Center* had not in fact directed his arguments to the delegation provision in particular, but instead had targeted the arbitration agreement as a whole. On that descriptive basis, the majority then invoked the separability doctrine – a notion designed to distinguish between an arbitration agreement and the contract as a whole – deploying it as a means of distinguishing between a specific feature of an arbitration agreement and the arbitration clause generally. Because the consumer had invoked defects applicable to the arbitration agreement as a whole, he was not entitled to mount a threshold judicial challenge to the delegation. The validity of the delegation would accordingly be determined by the tribunal to which the delegation had been made.

The majority's use of the separability doctrine was of course completely disingenuous. Separability has no place within the four corners of the arbitration agreement itself. The justification for employing the separability doctrine to define arbitral jurisdiction in the first place is that when a party challenges an arbitration agreement on the basis of defects unique to it, it challenges the arbitral tribunal's authority to decide anything, and not least the validity of the very agreement from which the tribunal purports to derive that authority; it does not invite the court to make a judgment about either the meaning or validity of the contract as a whole – issues that, because they implicate the merits of a dispute, fall to the arbitrators to decide, assuming of course that the arbitration agreement is otherwise valid and enforceable. Importing separability into the interstices of the arbitration agreement serves no comparable purpose and has no comparable justification. The validity of an arbitration agreement as a whole is no more a merits issue than the validity of that agreement's delegation provision. In sum, there is no reason in logic or principle why a party challenging an agreement to arbitrate should be required to confine its challenge to one particular feature of the arbitration agreement and avoid leveling attacks on any of its other features or on the arbitration agreement as a whole. Put still more simply, the majority's use of

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[18] *See generally* Stipanowich, at 352, and cases cited therein. *See also* Karen Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. DISP. RESOL. 1 (2011); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006).

the separability doctrine in *Rent-A-Center* is nothing less than a perversion of it, and the fallacy of the maneuver was not lost upon the dissenting justices.

Frustrating though the *Rent-A-Center* ruling may be, the Court did not in the end squarely decide whether the parties to an arbitration agreement may validly delegate to an arbitral tribunal the question of the conscionability of an arbitration agreement. To be sure, the majority held that a party challenging a delegation of the unconscionability question must confine itself to the delegation,[19] and a challenger who confines an unconscionability attack to features specific to the delegation admittedly faces a very uphill battle establishing unconscionability – much more uphill than would be the case if it could attack all features of the arbitration agreement viewed collectively.[20]

Even assuming the majority's use of separability to be apt, it was mistaken. Suppose, for example, that an arbitration clause, besides containing a delegation provision, also (a) designates as the place of arbitration the merchant's place of business, rather than the domicile of the consumer ("a situs provision"), (b) dispenses with any requirement of oral hearings ("a 'documents-only' provision") and (c) bars discovery in aid of any arbitration pursuant to the arbitration agreement ("a 'no-discovery' provision"). Suppose further that a consumer challenging the delegation provision as unconscionable also, and at the same time, independently challenges the other three provisions (the situs provision, the "documents-only" provision, and the "no-discovery" provision) as unconscionable. In that scenario, the unconscionability challenge is admittedly not confined to the delegation.[21] But the reason why an invalidity challenge under traditional separability doctrine ends up being reserved initially for the arbitrators, and not a court, is that the same considerations that lead to invalidity of the arbitration clause under that particular challenge would necessarily also lead to invalidity of the entire contract – a "merits" determination that is properly for the tribunal, and not the court, to make. But, in my example, the same considerations that might lead to invalidity of the delegation provision would *not* necessarily lead to invalidity of the situs provision, the "documents-only" provision, or the "no-discovery" provision, much less the invalidity of the arbitration agreement it its entirety. The unconscionability of the delegation provision neither implies nor presupposes the unconscionability of the three other provisions, or of the

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[19] Professor Stipanowich reads *Rent-A-Center* as establishing that "[f]rom now on, the presence of clear 'delegation' language in arbitration agreements will mean that the judicial 'gatekeeper' role is limited to consideration of defenses specifically aimed at the delegation provision itself." Stipanowich, at 367. After *Rent-A-Center*, parties that fail to confine their challenge to the delegation provision as such are ordinarily required to present that challenge to the arbitrators. *See, e.g.*, Womack v. Career Educ. Corp., 2011 U.S. Dist. LEXIS 138699 (E.D. Mo. Dec. 2, 2011).

[20] In *Howard v. Rent-A-Center, Inc*., 2010 U.S. Dist. LEXIS 76342 (E.D. Tenn. July 28, 2010), the party resisting arbitration convinced the court that her attacks were all specific to the delegation provision rather than the arbitration clause as a whole. She was thus permitted to present that challenge to the court, though she lost on the merits.

[21] *See* Stipanowich, at 365.

arbitration agreement as a whole. The reason for this is that, at least in most U.S. jurisdictions, the substantive prong of any unconscionability analysis depends entirely on the fairness of the particular provision in question.[22]

The point becomes even clearer if we imagine that a consumer clearly did what the consumer in *Rent-A-Center* may have thought he had done, namely challenge the delegation provision in an arbitration agreement and, in so doing, merely make reference to the three other provisions, without, however, mounting an unconscionability attack on any of them. Suppose, more particularly, that the consumer expressly refers to those other provisions in his or her challenge for the limited and sole purpose of underscoring the stakes of the delegation provision, i.e. to demonstrate that the delegation is a highly consequential one, thus all the more unconscionable. After all, a delegation provision can be more or less serious depending on the number and the magnitude of issues that, by virtue of that provision, end up being delegated. A consumer who alleges that a delegation provision, if upheld, would transfer from a court to a tribunal other weighty issues concerning the fairness of the arbitration agreement does not cease to challenge the delegation provision only. The fact of the matter is that the court, if allowed to do so, could find the delegation provision to be unconscionable in light of the stakes (as evidenced, at least in part, by the other three provisions), without necessarily finding that any of these other provisions is itself unconscionable.[23] In

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[22] Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 767, 6 P.3d 669, 690 (2002); Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (1981). *See generally* David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13 (2011).

The case of *Washington v. William Morris Endeavor Entertainment, LLC*, 2011 U.S. Dist. LEXIS 81346 (S.D.N.Y. July 20, 2011), illustrates well how little *Rent-A-Center* can be relied on to bar challenges to the unconscionability of a provision delegating to arbitrators the determination of an arbitration agreement's unconscionability. The party resisting arbitration there was found to have specifically mentioned the delegation provision only once in the course of its argument that the arbitration agreement was "unfair, one-sided, and the product of undue influence." The district court nevertheless interpreted the challenge as targeting the delegation provision and proceeded to address it on the merits. On the merits, however, the court found the delegation provision not to be unconscionable. *See* note 25, *infra*.

[23] Professor Stipanowich concludes:

> A party seeking to avoid arbitration will not be able to bring before a court any of a litany of concerns about other elements of the arbitration agreement – those relating to costs, discovery, nature and location of hearings, form of award, kind of remedies, etc. – unless they can be shown to have an impact on the validity of the delegation provision.

Stipanowich, at 368. Arguably, such other features do heighten the impact of the delegation provision.

This is consistent with the view expressed by Professor Rau to the effect that courts may justifiably "atten[d] to individual hardship, permitting a tailored effort that is aimed at minimizing interference both with federal policy and the concerns of private autonomy." Rau, at 548.

fact, the majority opinion in *Rent-A-Center* contains language that supports this very interpretation.[24] Even so, a showing of unconscionability of the delegation provision will ultimately be very difficult,[25] though not necessarily impossible,[26] to establish.

Strained though it may appear, the analysis I offer here would lessen the impact of *Rent-A-Center* on challenges to delegations to tribunals of authority to determine the conscionability or unconscionability of an arbitration agreement. The fact that a party challenges several discrete components of an arbitration clause (including a delegation provision) does not mean that the challenge to the delegation provision is not unique. Moreover, a party should be entitled to strengthen its challenge to a provision delegating authority to arbitrators to determine the unconscionability of an arbitration agreement by invoking provisions of that agreement other than the delegation clause, without being seen as challenging those other provisions directly.

The question of course remains as to how, if and when the courts do agree to address a challenge to the delegation of authority to decide the question of unconscionability, they will decide that question. There is Supreme Court case law suggesting that such a delegation, if established, will ordinarily be upheld. In the *First Options* case, the Supreme Court held that parties may, if they do so clearly and unmistakably, delegate to arbitrators the question whether a contract binds a non-signatory.[27] Thus, under *First Options*, even a party that steadfastly insists that it is a stranger to an agreement may, by virtue of clear and unmistakable language in the contract, find itself having given a tribunal primary

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[24] "[H]ad [the consumer] challenged the delegation provision by arguing that . . . common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court." 130 S. Ct. at 2780 (emphasis added). One lower court relied precisely on this language to examine the conscionability of an arbitration agreement, a delegation provision notwithstanding. Quilloin v. Tenet Healthsystem Philadelphia, Inc., 763 F. Supp. 2d 707, 723 (E.D. Pa. 2011).

[25] In *Washington v. William Morris Endeavor Entertainment, LLC*, *supra* note 22, the district court determined the conscionability of the delegation provision in an arbitration agreement, even though the challenger had not exclusively targeted that aspect of the agreement. The party resisting arbitration argued that the delegation provision was unconscionable because it "leaves no room for judicial review of the [arbitral] decision." The court rightly rejected that argument on the ground that the delegation provision itself did not and could not have any impact on the authority of a court to vacate the eventual award. (The court also determined that the provision was not procedurally unconscionable because the party resisting arbitration had not attempted to negotiate the terms of the Agreement and because a contract is not procedurally unconscionable merely because it was offered on a "take-it-or-leave-it" basis and not subject to negotiation).

[26] In *Morocho v. Carnival Corp*., 2011 U.S. Dist. LEXIS 4316 (S.D. Fla. Jan. 14, 2011), the party resisting arbitration evidently confined his attack to the delegation provision, and yet succeeded in having it declared unconscionable. Unfortunately, the decision offers little if any reasoning, largely because it merely adopts a magistrate's report and recommendation to that effect.

[27] *First Options*, *supra* note 17.

authority to answer that very question. In its *Granite Rock* decision,[28] the Court similarly suggested that parties may delegate to a tribunal the question whether the main agreement was ever formed in the first place, again provided the agreement so provides.

However, the question in *Rent-A-Center* pertained to the alleged unconscionability not of the main contract, but of the arbitration clause itself, or a part of it. Generally speaking, challenges that target the *existence* of an arbitration agreement itself are thought to go directly enough to the issue of consent that they should be decided by a court rather than an arbitral tribunal – the reason being that a tribunal derives its very being from the clause whose existence is in question.[29] If that is so, it would not require a great leap also to treat as unenforceable a delegation to arbitrators of the power to determine the *unconscionability* of the arbitration clause – at least if one views unconscionability as seriously implicating consent.[30] That is the question that the majority in *Rent-A-Center* left unresolved and that remains ultimately to be decided.

But there is a further reason, with even broader consequences, why *Rent-A-Center* may not put an end to challenges to delegations of authority to arbitrators to determine the conscionability or unconscionability of an arbitration agreement. Often overlooked in *Rent-A-Center* is the fact that the majority analyzed the main contract as containing two arbitration clauses, not one. The potential significance of that fact may not have been apparent at the time, but some lower courts have seized upon it to distinguish *Rent-A-Center* from the cases at hand, holding that where the delegation provision is part and parcel of the agreement to arbitrate, no distinction may be drawn between them, and no separability argument can therefore be made.[31] A party resisting arbitration presumably then becomes free

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[28] Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847 (2010).

[29] On the close affinity between the question of whether a delegation is "real" and the principle of consent, see Rau, at 497 et seq.

[30] *See* Justice Stevens' dissent in *Rent-A-Center*, 130 S. Ct. at 2784 (delegation of authority to determine the conscionability of an arbitration agreement directly implicates consent). Professor Rau believes that whether or not determining the unconscionability of an arbitration agreement is assimilable to determining the existence of the arbitration agreement – and, like it, non-delegable – depends on the circumstances. Rau, at 503 ("Is it the case that the asserted 'unconscionability' of an arbitration clause should be taken to impair the willingness of the parties to arbitrate the matter? Pretty clearly the answer is the reliably infuriating 'maybe.'").

[31] Quilloin v. Tenet Healthsystem Philadelphia, Inc., 763 F. Supp. 2d 707, 722-23 (E.D. Pa. 2011):

> However, in *Rent-A-Center*, there were two agreements to arbitrate, the first to arbitrate employment disputes, and the second to arbitrate disputes as to the unconscionability of the first (the "delegation provision"). Under the *Prima Paint* framework, the Supreme Court found that the agreement to arbitrate employment disputes constituted the contract as a whole, while the delegation provision constituted a separate agreement to arbitrate. Therefore, the Court concluded that it could only consider the validity of the delegation provision, and could not

to challenge any and all aspects of the arbitration agreement together, and not merely the delegation provision (or any other single provision of the arbitration agreement) in isolation – precisely the result the *Rent-A-Center* majority sought to foreclose.

> reach the validity of the broader agreement. Because Jackson had addressed his agreements to the unconscionability of the contract as a whole, the Court referred his claims to arbitration.
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> The contract at issue in this case does not resemble the contract at issue in *Rent-A-Center*. In *Rent-A-Center*, there were two clear agreements to arbitrate, one to arbitrate employment disputes, one to arbitrate challenges to the validity of the agreement. There is no such agreement to arbitrate challenges to the validity of the agreement in this case. Rather, there is a single agreement to arbitrate, and challenges to that agreement to arbitrate can be decided by judges as before under the *Prima Paint* line of cases.
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> . . .
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> Thus Plaintiff's challenges to the various provisions of the [arbitration agreement] constitute challenges to the agreement to arbitrate, which are for a court to decide.

By no means have all cases since *Rent-A-Center* adopted this analysis. For some courts, the placement of the delegation provision – whether within the arbitration clause or separate from it – makes no difference:

> Pre-*Rent-A-Center*, a contract was divided into two parts: (1) the arbitration clause; (2) the rest of the contract. Under this system, courts decided claims that an arbitration clause was invalid or unenforceable. However, claims that the entire contract was invalid were left for arbitration. Therefore, a plaintiff could argue: "these limitations on discovery make it unconscionable to force me to arbitrate my discrimination claim." However, claims that he was fraudulently induced to enter into the contract as a whole were relegated to arbitration.
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> Post-*Rent-A-Center*, the line has shifted. Now, the same contract, if it contains a delegation clause, is divided into: (1) the delegation clause; (2) the rest of the contract. Under this new system, if the contract contains a delegation clause, courts decide only if the delegation clause is valid and enforceable. Arbitrators decide claims relating to the underlying contract, plus those related to the rest of the arbitration clause. For example, the plaintiff can argue: "these limitations on discovery make it unconscionable to force me to arbitrate my claim that the arbitration agreement is void and unenforceable." However, he can no longer argue: "these limitations on discovery make it unconscionable to force me to arbitrate my discrimination claim."
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> As prescribed by *Rent-A-Center*, this Court must examine Plaintiff's claims to see if he challenges the Arbitration Agreement as a whole, or the Delegation Clause itself.

Sajay Rai v. Ernst & Young, LLP, 2010 U.S. Dist. LEXIS 93196, at *9-11 (E.D. Mich. Sept. 8, 2010). *See also* Madrigal v. AT&T Wireless Servs., Inc., 2010 U.S. Dist. LEXIS 134347, at *9 (E.D. Cal. Dec. 20, 2010) (the result in *Rent-A-Center* did not turn on the fact that the agreement was a "stand-alone" arbitration agreement).

B. *Stolt-Nielsen*

Upholding the parties' right to delegate the unconscionability question to the arbitrators is only one means available to a majority of the Court for enhancing the autonomy and efficacy of the arbitral process. Arguably, another means would be to permit arbitrations to proceed on a class-action basis. Prima facie, class arbitration stands to bring to arbitration advantages comparable to those that class actions have brought to litigation. The Supreme Court majority in *Stolt-Nielsen*, however, held otherwise, finding that, far from promoting arbitration's basic purposes, class arbitration offended them. To reach that result, the Court had no choice but to drive a thick wedge between arbitration, on the one hand, and class arbitration, on the other.

The majority in *Stolt-Nielsen* essentially held that class arbitration is not merely a distinctive *species* of arbitration, but practically an altogether different *genus*.[32] To be sure, class arbitration is no less distinctive from garden-variety bilateral arbitration than class-action litigation is from garden-variety bilateral litigation.[33] But the Court found class arbitration to be more than merely distinctive from arbitration generally; it found class arbitration to be virtually antithetical to it. It is of course understandable that the Court would display caution in reading consent to class arbitration into consent to arbitration. U.S. courts did not embrace class-action litigation entirely on their own. They did so only after the Federal Rules of Civil Procedure – for all practical purposes a federal statute – specifically authorized federal courts to entertain litigation in that aggregate form. Just as class-action litigation was seen as differing sufficiently from ordinary litigation to warrant specific authorization by statute, so too could class arbitration be viewed as differing sufficiently from ordinary commercial arbitration to warrant authorization by party agreement.

But creating that much distance between class arbitration and arbitration generally required the Court to retreat from some basic and longstanding axioms of the law of arbitration, as understood in the U.S. Ironically, all these axioms

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[32] "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen*, 130 S. Ct. at 1776. The majority cited (1) the large number of disputes commonly embraced in class arbitration, (2) the lack of privacy and confidentiality that class arbitration would entail, (3) the impact on absent class members, and (4) the ordinarily high commercial stakes. *Id*.

[33] *See, e.g*., Government of the United Kingdom of Great Britain and Northern Ireland v. Boeing Co., 998 F.2d 68, 73 (2d Cir. 1993); Amer. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991). It is true that most courts prior to the Supreme Court's decision in *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003), treated the question of consolidation of multi-party disputes involving multiple contracts as a matter for judicial determination, on the understanding that the consent of the parties was implicated. *See* Stipanowich, at 334.

reflect the very pro-arbitration philosophy that the *Stolt-Nielsen* majority itself purported to vindicate.[34]

A first corollary of U.S. law's general pro-arbitration stance is the proposition that arbitrators enjoy broad latitude in determining the procedural contours of an arbitration, insofar as the contracting parties have not prescribed otherwise. In *Stolt-Nielsen*, the parties had neither expressly embraced nor rejected class arbitration; the agreement was silent on the matter, precisely the circumstance in which arbitrators are ordinarily permitted to make independent procedural determinations. It is difficult to reconcile the Court's position in *Stolt-Nielsen* with the U.S. judiciary's many pronouncements over the years in favor of arbitral discretion on matters of procedure. The majority facilitated this move by effectively placing class arbitration largely beyond the perimeter of what ordinarily passes for arbitration. In the process it also abandoned its suggestion in the case of *Green Tree Financial Corp.* v. *Bazzle* that whether the parties contemplated class arbitration constituted a "procedural question growing out of the dispute," thus one for the tribunal primarily to resolve.[35]

A second corollary of the pro-arbitration stance of U.S. law is the notion that arbitration agreements are to be interpreted broadly. Consequently, a court, faced with an arbitration clause that *could be understood* as embracing class arbitration arguably *should be willing to understand* it as doing so. But what the Court said instead in *Stolt-Nielsen*, and would later reaffirm in *AT&T Mobility* v. *Concepcion*,[36] is that arbitration and class arbitration are in fact so different in kind that parties should not be held to have contemplated the latter merely by having contemplated the former.

According to a third corollary of the pro-arbitration policy underlying U.S. arbitration law, the interpretation of a contract, including its arbitration clause, is primarily a matter for the arbitrators. To be sure, this deference to the arbitrators does not extend to all issues. Ordinarily, gateway issues, such as whether an arbitration agreement was ever formed, whether a party against whom an arbitration agreement is invoked is indeed bound by it, or whether any given dispute is among those that the parties intended to submit to arbitration, are not ones on which deference is *a priori* owed to the arbitrators. But otherwise deference largely obtains. Accordingly, courts should refrain from announcing a limiting rule of contract interpretation intended to bind the arbitrators. Yet that is precisely what the majority in *Stolt-Nielsen* did when it apparently ruled that contracts that are silent with respect to class arbitration must be understood as *not* authorizing it.

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[34] *See generally* Richard Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011); Stacie I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017 (2009).

[35] 539 U.S. 444 (2003). The category of procedural issues that are presumptively for arbitrators to resolve was established by the Court in *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79 (2002).

[36] *See* Section C, *infra*.

Fourth, and most fundamentally, arbitration agreements, like contracts generally, are subject to interpretation – whether by courts or arbitrators – in accordance with the substantive rules of the relevant contract law, typically state contract law.[37] But the rule of contract interpretation that the Court announced in *Stolt-Nielse*n is plainly not a substantive rule of the applicable state law of contract; it is a substantive rule of federal law, and more particularly a federal arbitration law largely of the Court's own making. As the Court's subsequent decision in *AT&T Mobility* v. *Concepcion* would show, substitution of federal for state law on the question of whether a given arbitration agreement permits class arbitration can be entirely outcome-determinative.[38]

Finally, regardless of the correctness of its position as a matter of substantive contract law, the Court in *Stolt-Nielsen* made a legally dubious move in vacating the tribunal's clause construction award. The Court essentially vacated the award for legal error – namely error that consisted of interpreting an arbitration agreement in a manner inconsistent with the federal rule of contract interpretation disfavoring class arbitration that the Court announced in *Stolt-Nielsen* itself.[39] This move is all the more curious in view of the Court's emphatic assertion, elsewhere in the *Stolt-Nielsen* opinion itself, that legal error – even "serious" legal error[40] – is not a valid ground for vacatur of an award.[41] Moreover, as Professor Rau points out,[42] the majority's suggestion that the tribunal was required, on pain of vacatur, to "[inquire] whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing

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[37] In *Stolt-Nielsen*, the Court effectively admitted that contract interpretation was subject to state law. 130 S. Ct. at 1773, *quoting* Volt Info. Servs. v. Bd. of Trustees of Stanford Univ., 489 U.S. 468 (1989). I do not agree with Professor Rau's apparent suggestion that the state contract law referred to in FAA § 2 "merely qualifies and gives full meaning to a federal right: identifying what will best serve federal policy is essential simply in order to spin out the dimensions of this right – which remains a matter of national concern, 'precisely because Congress has dealt with it.'" Rau, at 529 (citation omitted).

[38] Professor Stipanowich refers to "the wellspring of divined 'federal substantive law' under the FAA." Stipanowich, at 326. In fact, the case law on this point is well established. *See* Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Perry v. Thomas, 482 U.S. 483, 489 (1987) ; Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984).

[39] Professor Stipanowich refers to "the rare spectacle of the nation's high court directing vacatur of a commercial arbitration award." Stipanowich, at 340.

The majority more specifically ruled that, assuming the "manifest disregard of the law" standard for vacatur to be intact, that standard was met because the tribunal failed to base its clause construction award on any particular body of law, but rather on its own policy preference for class arbitration.

[40] 130 S. Ct. at 1767.

[41] Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC, 497 F.3d 133 (2d Cir. 2007); D.H. Blair, & Co. v. Gottdiener, 462 F.3d 95 (2d Cir. 2006). *See generally* Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1950).

[42] Rau, at 472.

class arbitration in the absence of express consent" is far removed from our usual understandings of international arbitration. Arbitral tribunals are not generally required, as a matter of law, to search for applicable default rules or otherwise satisfy reviewing courts that they fully identified and articulated the basis of their reasoning and refrained from expansive contract interpretations, on pain of vacatur. Nor should they be required to do so, if arbitration is to be a fully functioning alternative to litigation.

I emphasize all of this merely to underscore the extent to which the Supreme Court majority was prepared to go in *Stolt-Nielsen* in order to render it unlikely that arbitrations conducted in the United States would proceed along class-arbitration lines. Achieving that result necessitated departures from several of U.S. arbitration law's most fundamental precepts – departures that the majority was not even willing to acknowledge.

Notwithstanding the apparent boldness of the *Stolt-Nielsen* decision, one cannot correctly gauge its significance without considering the role played in that decision by the parties' express stipulation that their agreement was silent on the matter of class arbitration.[43] It is far from certain how bound lower courts will feel to read an agreement as precluding class arbitration merely because it contains no express language on the subject.[44] Some courts have taken that position,[45] but it appears that even more have not.[46] Thus, subsequent to *Stolt-Nielsen* numerous

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[43] 130 S. Ct. at 1776. As Professor Rau rightly points out, it is likely that the parties merely meant to stipulate that the arbitration agreement failed to mention class arbitration expressly, not that they never contemplated or could have intended class arbitration. *See* Rau, at 457, claiming that the majority in *Stolt-Nielsen* "ran away with" the stipulation.

[44] Justice Ginsburg, dissenting in *Stolt-Nielsen*, stressed that the Court's ruling did not establish that consent to class arbitration necessarily had to be express. 130 S. Ct. at 1783. Although Professor Rau sees ample room for accommodating class arbitration even if the agreement is literally silent on the issue, he expresses some skepticism that courts will allow the evident purpose of the majority in *Stolt-Nielsen* to be so easily circumvented. Rau, at 478, suggesting that, to achieve that result, will require "some heavy lifting indeed."

[45] Chen-Oster v. Goldman, Sachs & Co, 785 F. Supp. 2d 394, 404-05 (S.D.N.Y. 2011) (agreement to class arbitration cannot be simply inferred); Sanders v. Forex Capital Mkts, LLC, 2011 U.S. Dist. LEXIS 137961, at *28 (S.D.N.Y. Nov. 29, 2011) (consumer must arbitrate his claims and "must do so on an individual basis, as there is no provision in the contract which contemplates class arbitration"); In re California Title Ins. Antitrust Litig., 2011 U.S. Dist. LEXIS 71621, at *13 (N.D. Cal. June 27, 2011) (court cannot order arbitration to proceed on a class-wide basis unless arbitration clause contains a provision for class-wide resolution of claims); Quinonez v. Empire Today, LLC, 2010 U.S. Dist. LEXIS 117393, at *14 (N.D. Cal. Nov. 4, 2010) (company that wanted a class arbitration should have written a provision that explicitly contemplated it).

[46] Opalinski v. Robert Half Int'l, Inc., 2011 U.S. Dist. LEXIS 115534, at *10 (D. N.J. Oct. 6, 2011) (class arbitration not necessarily foreclosed merely because arbitration agreement is silent on the issue); Botello v. COI Telecom, LLC, 2010 U.S. Dist. LEXIS 138572, at *16 (W.D. Tex. Dec. 30, 2010) (same); Sutter v. Oxford Health Plans LLC, 2011 U.S. Dist. LEXIS 17123, at *12-16 (D.N.J. Feb. 22, 2011) (arbitrator could reasonably find consent to class arbitration even if agreement is silent on the issue); La.

courts have been willing to accept (or, more accurately, allow arbitrators to accept) evidence of consent to class arbitration in sources extrinsic to the arbitration agreement, provided the applicable state law of contract so permits,[47] or to conclude more or less summarily that the arbitrator had the discretion under state contract law to find that class arbitration was within the parties' contemplation.[48] The courts' latitude to do so is of course not unlimited. And any

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Health Serv. Indemnity Co. v. Gambro, 756 F. Supp. 2d 760, 768 (W.D. La. 2010) (arbitral tribunal applied legal principles, not their own policy choices, in finding action could proceed on a class basis); Aracri v. Dillard's, Inc., 2011 U.S. Dist. LEXIS 41596, at *9-10 (S.D. Ohio Mar. 29, 2011) (*Stolt-Nielsen* distinguishable on account of parties' stipulation that the agreement was silent on class arbitration); Yahoo! Inc. v. Iversen, 2011 U.S. Dist. LEXIS 117149, at *13 (N.D. Cal. Oct. 11, 2011) (interpretation of an arbitration agreement is generally a matter of state law, and state law generally permits a decision-maker to "look beyond the four corners of the contract where appropriate"); Hayes v. Servicemaster Global Holdings Inc., 2011 U.S. Dist. LEXIS 70160, at *12 n.3 (N.D. Cal. June 29, 2011) (arbitration clause need not explicitly mention that the parties agree to class arbitration in order for a decision-maker to find that they did so consent); Angermann v. General Steel Domestic Sales, LLC, 2010 U.S. Dist. LEXIS 123145, at *6 (D. Colo., Nov. 8, 2010) (although there is nothing in a contract to suggest that the parties contemplated class-wide arbitration, the question whether class-wide arbitration is appropriate is for the arbitrator); Southern Communications Servs., Inc. v. Thomas, 2011 U.S. Dist. LEXIS 131344, at *33-34 (N.D. Ga. Nov. 3, 2011) (to hold that an arbitrator should automatically assume the parties intended to preclude class arbitration whenever class proceedings are not explicitly authorized in writing would require the court to ignore the arbitrator's duty to apply a rule of law governing contract interpretation to determine the parties' intent); Bergman v. Spruce Peak Realty, LLC, 2011 U.S. Dist. LEXIS 131366, at *11-13 (D. Vt. Nov. 14, 2011) (arbitration agreement may contain an implicit authorization of class arbitration).

[47] For a leading example, see Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 124 (2d Cir. 2011) (arbitrator acted within scope of her authority and within the bounds of state contract law in construing a contract to permit class arbitration; authorization of class arbitration need not be expressly stated in the arbitration agreement in order to be found consistent with the parties' intentions).

On the *Jock* case, *see* Rau, at 460 nn.88-89. *See also* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. 1103, 1155 (2011).

[48] *See, e.g.*, Smith & Wollensky Rest. Group, Inc. v. Passow, 2011 U.S. Dist. LEXIS 4495, at *3-4 (D. Mass. Jan. 18, 2011), stating:

> In Stolt-Nielsen, "the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." Here, there was no such stipulation and . . . [the] arbitrator ruled that the parties intended that class-action claims and relief were contemplated and permitted by the [arbitration agreement] and the Court concludes that the language of the [agreement] supports such a ruling.
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> The arbitrator found that the arbitration clause . . . was broad in its reach, covering "any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state and federal law." The arbitrator noted that "any claim" is defined as "any claims for wages, compensation and benefits" and that both the FLSA and Massachusetts wage laws statutorily authorize an

court that adopts such an approach does so in the shadow of a possible reversal by an appellate court that is more responsive to the Supreme Court majority's evident hostility to finding consent to class arbitration in the absence of real evidence to the contrary.

C. *Concepcion*

I have sought thus far to demonstrate that, however strong their messages, the majority opinion in *Rent-A-Center* does not foreclose all possibility of defeating a delegation to arbitrators of authority to determine the conscionability or unconscionability of an agreement to arbitrate and the majority opinion in *Stolt-Nielsen* did not shut the door entirely on reading contracts as authorizing class arbitration even when containing no express language to that effect.

It is more difficult to read the third decision in the trilogy – *AT&T Mobility* v. *Concepcion* – quite so indulgently. There, a majority of the Court squarely rejected, as contrary to the Federal Arbitration Act, and indeed preempted by it, California case law declaring class-arbitration waivers in consumer contracts to be unconscionable and unenforceable.[49] The majority justified this result on the

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> individual employee to bring a class-action in a court of law. The arbitrator further found that the [agreement] expressly provided that the "[a]rbitrator may award any remedy and relief as a court could award on the same claim," that the applicable statutes provide for class relief and the statutes were in existence when the DRA was executed. The arbitrator also noted that "wage and hour claims like those in play here are frequently pursued as class or collective actions, and both [parties] must be deemed to understand that."
>
> The arbitrator's award was the result of a reasonable interpretation of the [agreement]. Given this Court's limited standard of review, such interpretation must stand.

[49] Section 2 of the FAA reads "save upon such grounds as exist at law or in equity for the revocation of any contract."

Following *Stolt-Nielsen*, the Second Circuit in In re *American Express Merchants' Litigation*, 634 F.3d 187 (2d. Cir. 2011), held a class-action waiver to be unenforceable because "effectively depriving plaintiffs of the statutory protections of the antitrust laws," due to individual arbitration being prohibitively expensive. The Second Circuit relied on *Green Tree Fin. Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 92 (2000), requiring a party challenging an arbitration agreement on the ground that arbitration would be prohibitively expensive to prove that fact.

On the conscionability or unconscionability of class-arbitration waivers, see Alexander J. Casey, *Arbitration Nation: Wireless Service Providers and Class Arbitration Waivers*, 6 WASH. J. LAW, TECH. & ARTS 15 (2010); Yongdam Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Arbitration/Arbitration Waivers*, 31 WHITTIER L. REV. 665 (2010); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response,* 47 AM. BUS. L.J. 361 (2010); William H. Baker, *Class Action Arbitration,* 10 CARDOZO J. CONFL. RESOL. 335 (2009); Heather Bromfield, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315 (2009).

ground that applying California unconscionability doctrine in that fashion operated to discriminate against arbitration in violation of the FAA, in part by denying effect to a feature of the arbitration agreement (viz. the class-action waiver) to which the parties subscribed.[50] The ruling has wider significance than may at first appear. It has been cited for the general proposition that "the unavailability of class arbitration . . . is not a ground for a finding of substantive unconscionability," even in cases that do not involve class-arbitration waivers,[51] as well as in cases involving other arbitration clause features in combination with class-action waivers.[52]

For all its assertiveness, the *Concepcion* ruling, like *Rent-A-Center* and *Stolt-Nielsen*, is both logically flawed and at odds with established understandings of U.S. arbitration law. Logically, the decision was not even necessary. The Court's purpose in *Stolt-Nielsen* had been precisely to ensure that class arbitration would not take place in the absence of substantial affirmative evidence that the parties specifically contemplated it. If *Stolt-Nielsen* were to accomplish that purpose – that is, if courts in fact were seldom to conclude that an arbitration agreement authorizes class arbitration – waivers of class arbitration would have no real relevance, much less utility. Few if any consumer contracts contain the positive language inviting class arbitration that *Stolt-Nielsen* arguably requires, and they are even less likely to do so in the future. In short, the Court in *Concepcion* took the policy underlying *Stolt-Nielsen* not only to new, but also to unnecessary lengths.

But, like *Rent-A-Center* and *Stolt-Nielsen*, *Concepcion* is also at variance with established understandings in U.S. arbitration law. The principal argument that the majority gave for upholding class-arbitration waivers is that class arbitration's

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Many courts, including in California, have used the contract-law doctrine of unconscionability to deny enforcement to arbitration agreements or certain of their terms. *See, e.g.*, Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1219-21 (9th Cir. 2008); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893-95 (9th Cir. 2002); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 369-70, 372-73 (N.C. 2008); Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 680-90 (Cal. 2000).

[50] *Concepcion*, 131 S. Ct. at 1747. For decisions following the rule in *Concepcion*, see, for example, Litman v. Cellco Pshp., 655 F.3d 225 (3d Cir. 2011); Green v. Super Shuttle Int'l, Inc., 653 F.3d 766 (8th Cir. 2011); Jones v. DirecTV, Inc., 2011 U.S. App. LEXIS 23586 (11th Cir. Nov. 22, 2011); Valle v. Lowe's HIW, Inc., 2011 U.S. Dist. LEXIS 93639 (N.D. Cal. Aug. 22, 2011); King v. Advance America, Cash Advance, Centers, Inc., 2011 U.S. Dist. LEXIS 98630 (E.D. Pa. Aug. 31, 2011); AT&T Mobility LLC v. Bernardi, 2011 U.S. Dist. LEXIS 124084 (N.D. Cal. Oct. 26, 2011); Day v. Persels & Assocs., LLC, 2011 U.S. Dist. LEXIS 49231 (M.D. Fla. May 9, 2011); Bernal v. Burnett, 793 F. Supp. 2d 1280 (D. Colo. 2011).

[51] Sanders v. Forex Capital Markets, 2011 U.S. Dist. LEXIS 137961, at*17 (S.D. N.Y. Nov. 29, 2011).

[52] Antkowiak v. Taxmasters, Inc., 2011 U.S. App. LEXIS (3d Cir. Dec. 22, 2011) (*Concepcion* ruling applicable to provisions requiring consumer to bear all costs of arbitration).

principal features are antithetical to arbitration's core purpose of avoiding the complexity, expense and delay commonly associated with litigation.[53] But, as the Supreme Court held in its seminal *Volt* decision,[54] and has frequently reiterated since, the Federal Arbitration Act does not embody a commitment to any single idealized model of arbitration, even a streamlined and efficient one. The FAA does not, in other words, dictate arbitral design.[55] Despite Justice Scalia's suggestion that class arbitration might not even be arbitration at all,[56] an arbitral proceeding may well be more, rather than less, resource-intensive – i.e., complex, expensive and prolonged – and still constitute arbitration.

Of course, as the Court rightly observes, parties cannot be required by state law to adopt for their arbitration full-blown pretrial discovery or jury trials.[57] Parties have the right to dispense with those adjudicatory features if they wish, and they regularly do, albeit most often only through incorporation of institutional rules or otherwise implicitly. For a state to make their availability non-waivable would deprive contracting parties of the right effectively to opt for an arbitration of their own procedural design, as is their prerogative.

But does it follow that a state also may not make a party's entitlement to class arbitration (assuming it to be so entitled under a fair reading of the arbitration agreement) non-waivable? In my view, it does not. The fact that the FAA does not allow states to impose pretrial discovery and jury trials in arbitration does not mean, and should not mean, that states cannot override party agreements that would deprive arbitration of its basic fairness. Moreover, pretrial discovery and jury trials are precisely the kind of litigation features that U.S. civil litigation generally entails and that the FAA purposefully permits parties to avoid through arbitration. For state law to mandate these features in arbitration would not simply constrain party autonomy; it would actually prevent parties' from avoiding the very formalities from which arbitration meant to allow them to escape. In any

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[53] 131 S. Ct. at 1749-50.

[54] Volt Info. Servs. v. Bd. of Trustees of Stanford Univ., 489 U.S. 468 (1989).

[55] *See generally* George A. Bermann, *Ascertaining the Parties' Intentions in Arbitral Design*, 113 PENN ST. L. REV. 1013 (2009).

[56] According to Justice Scalia, class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." 131 S. Ct. at 1753. What Justice Scalia was probably saying is not that class arbitration is not arbitration, but that it changes the nature of arbitration. *Id*. at 1748 ("[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"). Professor Rau rightly cautions against over-reading Justice Scalia's remark. Rau, at 479 (reading the remark as suggesting that "the arbitrators' imposition of a class-wide proceeding was so far outside the scope of the probable expectations of the contracting parties, and in consequence would so drastically alter the cost/benefit calculus of their original decision to arbitrate, that their agents should not have taken it upon themselves to do so – not, at least, without some further indicia of the parties' agreement").

[57] 131 S. Ct. at 1747.

event, California law did not mandate class arbitration. As noted above,[58] under *Stolt-Nielsen*, an arbitration agreement will only be read to authorize class arbitration if there is positive evidence that the parties contemplated arbitration of that sort. Moreover, class adjudication, though permissible in U.S. civil litigation, is by no means one of its standard features. In the U.S. litigation system, parties ordinarily litigate on an individual basis, proceeding on a class basis only if and when certain exceptional preconditions are satisfied.

The reasoning of the majority in *Concepcion* is flawed not merely because it mistakenly treats class arbitration as lying beyond the realm of arbitration (which it does not) and because it mistakenly assumes that California law imposes class arbitration on the parties (which it does not). It is even more fundamentally flawed. California's application of unconscionability to class-arbitration waivers does not in fact discriminate against arbitration, however one looks at it. California law treats countless other types of contractual waivers as fundamentally unfair and unenforceable; class-arbitration waivers are hardly alone in that regard. To insulate them from standard unconscionability analysis under California contract law would amount, if anything, to discriminating *in their favor*, which the FAA certainly does not require. The FAA guarantees that arbitration agreements will be treated on an equal footing as compared to other contracts; it does not guarantee that they will be treated better.[59]

California law's neutrality becomes still further evident if we compare its policy on waiver of class arbitration with its policy on waiver of class litigation. From this perspective, too, California law does not discriminate against arbitration, since it treats waivers of class litigation and arbitration identically.[60] Waivers of both kinds are unenforceable. Relatedly, California's treatment of agreements to arbitrate is no less favorable than its treatment of conventional forum selection clauses. California law generally respects and enforces forum selection clauses, along the general lines established by the Supreme Court in *Bremen* v. *Zapata Off-Shore Co.*[61] However, it rejects such clauses when they are found, under all the circumstances, to be substantively and procedurally unfair.[62] California law thus treats arbitration agreements and forum selection clauses in

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[58] *See* note 32 *supra*, and accompanying text.

[59] Justice Thomas, concurring, would treat the FAA as immunizing arbitration agreements from challenges to their substantive terms. 131 S. Ct. at 1755.

[60] The Concepcions made precisely this argument, 131 S. Ct. at 1746, citing America Online, Inc. v. Superior Court, 108 Cal. Rptr 2d 699, 711-13 (Cal. App. 2001) (unavailability of class-action relief is sufficient in and by itself to preclude enforcement of a forum selection clause). In fact the California Supreme Court, in adopting its position on class-arbitration waivers in the *Discover Bank* case, expressly relied on *America Online*. On the non-discriminatory character of the class-arbitration waiver bar, see Justice Breyer's dissent in *Concepcion,* 131 S. Ct. at 1758-59.

[61] 407 U.S. 1 (1972).

[62] *See* CQL Original Products, Inc. v. National Hockey League Players' Assn., 39 Cal. App. 4th 1347, 46 Cal. Rptr. 2d 412 (1995); Hall v. Superior Court, 150 Cal. App. 3d 411, 197 Cal. Rptr. 757 (1983).

comparable fashion. I conclude that the majority in *Concepcion* simply had insufficient evidence of discriminatory intent or effect to justify barring California from applying its standard unconscionability doctrine to class-arbitration waivers and that, in ruling as it did, exacted an unjustifiably high price in federalism terms.[63]

Though *Concepcion* probably represents a more serious threat to established arbitration law than either *Rent-A-Center* or *Stolt-Nielsen*, its significance, too, should not be exaggerated. Certainly, under *Concepcion*, courts cannot deny enforcement of class-arbitration waivers in consumer contracts as categorically unconscionable under state law. However, some lower courts have held that arbitration agreements containing class-action waivers may still be analyzed under the particular facts and circumstances established, and thus have granted or denied enforcement on a strictly case-by-case basis.[64] They have accordingly held an arbitration agreement containing a class-arbitration waiver to be unenforceable, not because of the waiver per se, but because the arbitration clause, including the waiver, was generally "confusing and unfair"[65] or because the arbitration agreement contained other provisions alongside the waiver that rendered it unconscionable.[66]

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[63] *See* Stipanowich, Section III C 3. *See also* Rau, at 534-35. However, Professor Rau expresses doubt that the requirements of the FAA are satisfied merely because no discrimination against agreements to arbitrate, as distinct from contracts generally, can be shown. *Id*. at 536-37.

[64] AT&T Mobility LLC v. Fisher, 2011 U.S. Dist. LEXIS 124839, at *20-21 (D. Md. Oct. 28, 2011); Brown v. Ralph's Grocery Company, 197 Cal. App. 4th 489, 128 Cal. Rptr. 3d 854 (2011); Plows v. Rockwell Collins, Inc., 2011 U.S. Dist. LEXIS 88781, at *10-12 (C.D. Cal. Aug. 9, 2011); Tory v. First Premier Bank, 2011 U.S. Dist. LEXIS 110126, at * 9-13 (N.D. Ill. Sept. 26, 2011).

The court in *Fisher*, *supra*, relied on the Eleventh Circuit decision in *Cruz* v. *Cingular Wireless, LLC*, 648 F.3d 1205, 1214-15 (11th Cir. 2011). In *Cruz*, the court enforced a class-action waiver because the consumer had based the unconscionability argument on the very same ground advanced in *Concepcion*, namely that the case involved numerous small-dollar claims by consumers against a corporation, many of which could only be brought on a class basis. But the court implied that a different and stronger showing might have produced a different result. *See also* Lewis v. UBS Fin. Servs., 2011 U.S. Dist. LEXIS 116433, at *5 (N.D. Cal. Sept. 30, 2011).

But see Kaltwasser v. AT&T Mobility LLC, 2011 U.S. Dist. LEXIS 106783, at *17 (N.D. Cal. Sept. 20, 2011), stating that "it is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake."

[65] Williams v. Securitas Security Servs USA, Inc, 2011 U.S. Dist. LEXIS 75502, at *9-10 (E.D. Pa. July 13, 2011).

[66] In re Checking Acct Overdraft Litig., 2011 U.S. Dist. LEXIS 118462, at *48-69 (S.D. Fla. Sept. 1, 2011) (arbitration agreement's fee-shifting provisions, which accompanied a class-action waiver, render arbitration agreement unconscionable and unenforceable).

The recent *Chen-Oster* case[67] is particularly revealing in this regard. There, a federal magistrate declined to enforce an arbitration agreement on the ground that depriving the plaintiffs of access to a class-arbitration remedy would seriously impair enjoyment of the federal statutory rights conferred by Title VII of the 1964 Civil Rights Act, and, when specifically asked to reconsider that decision in light of *Concepcion*, declined to do so.[68] Significantly, the arbitration agreement in

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Obviously, with or without a class-arbitration waiver in the mix, an arbitration agreement may be examined for its conscionability on the basis of other of its features – taken alone or in combination – and be granted or denied enforcement accordingly. *See, e.g.*, Alvarez v. T-Mobile USA, Inc., 2011 U.S. Dist. LEXIS 146757, at *16 (E.D. Cal. Dec. 21, 2011), stating that "[i]n the wake of *Concepcion*, the decision has been interpreted to bar challenges to arbitration agreements on the grounds that they contain class action waivers, but not to prevent courts from considering other unconscionability arguments that do not 'interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.'" *See also* Carrell v. L&S Plumbing Pshp., Ltd, 2011 U.S. Dist. LEXIS 84391, at *10-14 (S.D. Tex. Aug. 1, 2011) (considering on the facts whether arbitration agreement is unenforceable due to provisions requiring that arbitration be held in an inconvenient venue and that each party bear an equal share of the expenses, regardless of outcome); Davis v. Global Client Solutions, LLC, 2011 U.S. Dist. LEXIS 116063, at * 7-13 (W.D. Ky. Oct. 6, 2011) (considering effect on conscionability of arbitration clause of various factors, including timing of receipt, limitation on remedies, exculpatory clauses, fine print, and other party's right to select the arbitrator); In re DirecTV Early Cancellation Fee Mktg and Sales Practices Litig., 2011 U.S. Dist. LEXIS 102027, at *26-27 (C.D. Cal. Sept. 6, 2011) (court considers and rejects claim of unconscionability based on lack of mutuality between the parties); Palmer v. Infosys Tech. Ltd., Inc, 2011 U.S. Dist. LEXIS 130104, at *14 (M.D. Ala. Nov. 9, 2011) (same); Kanbar v. O'Melveny & Myers, 2011 U.S. Dist. LEXIS 79447, at *15-24 (N.D. Cal. July 21, 2011) (court finds arbitration agreement unconscionable due to its containing a short limitations period, a requirement of confidentiality and a right of the economically stronger party to resort to court on certain issues; a refusal to enforce these provisions is not anti-arbitration); Daugherty v. Encana Oil & Gas (USA), Inc., 2011 U.S. Dist. LEXIS 76802, at *31-34 (D. Colo. July 15, 2011) (requirement that plaintiffs pay one-half of the total fees and costs of arbitration effectively precludes them from pursuing their claims and is unconscionable).

[67] Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394 (S.D. N.Y. 2011). The court relied on In re *American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011), where the court found that bringing individual arbitrations would be prohibitively expensive. It declined to enforce the class-arbitration waiver, but rather than compel arbitration on an individual basis, treated the arbitration agreement as unenforceable altogether, paving the way for class litigation instead.

[68] Chen-Oster v. Goldman, Sachs & Co., 2011 U.S. Dist. LEXIS 73200 (S.D.N.Y. July 7, 2011). To the same effect, see Raniere v. Citigroup, Inc., 2011 U.S. Dist. LEXIS 135393, at *37-56 (S.D.N.Y. Nov. 22, 2011), holding that *Concepcion* leaves intact the authority of courts to deny enforcement of an agreement to arbitrate if remitting the parties to arbitration would effectively deprive them of important statutory rights, as established in cases such as *American Express Co.* v. *Italian Colors Rest.*, 634 F.3d 187, 199 (2d Cir. 2011) ("American Express II"). *See also* Ragone v. Atlantic Video at the Manhattan

Chen-Oster did not contain a class-arbitration waiver. The majority had simply read the agreement as barring class arbitration under *Stolt-Nielsen* on account of its silence on the matter.

III. CONCLUSION

There can be no question that a Supreme Court majority has eliminated important safeguards central to the legitimacy of arbitration, particularly in the consumer contract context.[69] What is remarkable is not only what the majority has accomplished, but the extent to which its accomplishment required that it turn its back on some of the most basic and, up to now, enduring, principles of the U.S. law of arbitration. The majority's candor in its solicitude for certain economic interests in the arbitration context[70] and its hostility to class arbitration[71] is not matched with candor in its disregard of established understandings about arbitration under U.S. law.

And yet, despite the clarity of what Professors Stipanowich and Rau depict as a virtual campaign against values of consumer welfare in the context of

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Center, 595 F.3d 115, 125-26 (2d Cir. 2010); D'Antuono v. Service Road Corp., 789 F. Supp. 2d 308, 322 (D. Conn. 2011) (same); Urbino v. Orkin Servs. of Calif., Inc, 2011 U.S. Dist. LEXIS 114746, at *33-40 (C.D. Cal. Oct. 5, 2011) (enforcing class-action waiver would frustrate purposes of California's Labor Code Private Attorneys General Act (PAGA); Daugherty v. Encana Oil & Gas (USA), Inc., 2011 U.S. Dist. LEXIS 76802, at *32-34 (D. Colo. July 15, 2011) (arbitration clause's fee-shifting provisions undermines purposes of Fair Labor Standards Act and is unenforceable).

[69] According to Professor Stipanowich, "in its zeal to further its evolving vision of the FAA the Court has eliminated key safeguards aimed at ensuring fundamental fairness to consumers and employees in arbitration," thus revealing the Court's "largely unmitigated pro-arbitration stance." Stipanowich, at 327, 433. (The court subsequently denied the motion by Goldman, Sachs to dismiss the complaint in *Chen-Oster* on the ground that the plaintiff had raised exclusively individual claims in her administrative complaint before the Equal Employment Opportunity Commission. 2011 U.S. Dist. LEXIS 112294 (S.D. N.Y. Sept. 29, 2011)).

[70] Justice Scalia writes:

> [C]lass arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

131 S. Ct. at 1752.

[71] *Id*. at 1751-52.

arbitration, none of the decisions in the trilogy – whether viewed alone or in tandem with the others – has dealt a decisive blow to those values. Advocates and courts can continue in good conscience to pursue those values in the arbitration context, though they must navigate with extreme caution to avoid the various roadblocks that the latest trilogy of Supreme Court decisions has erected along that path.[72] But careful navigation is nothing new in the practice of advocates and judges within the American legal system.

Still, there is ultimately something deeply unwholesome about the entire enterprise that we are observing. On the one hand, the Court is pursuing a pro-arbitration philosophy at the expense not only of consumer welfare, but also of some of U.S. arbitration law's most basic understandings. On the other hand, consumer advocates respond in kind, resisting the jurisprudence of the Supreme Court majority, if need be through argumentation and advocacy that is frankly no less strained than the majority's jurisprudence itself.[73] The trilogy of cases, coupled with the reactions triggered, offers the best evidence to date that, whether subjecting consumer cases to pre-dispute arbitration agreements is good or bad for consumers,[74] it is not particularly good for arbitration.

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[72] Professor Rau nicely describes the navigation to which I refer:

> The nicer and fussier and more discriminating the conceptual inquiry . . . the wider, in consequence, may be the opening for manipulation by aggressive counsel and recalcitrant judges.

Rau, at 522.

[73] *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

[74] In any event, the U.S. remains somewhat out of line with the dominant world trend restricting the enforcement of pre-dispute arbitration agreements in consumer as well as employment contracts.

However, see the numerous legislative proposals limiting the enforceability of pre-dispute arbitration agreements in the consumer and employment settings. Stipanowich, at 397 n.450. Among those enacted are the 2010 Department of Defense Appropriations Act, H.R. 3326, 111th Cong. (2010) (non-waivability of right to a judicial forum for Title VII sexual harassment claims of employees of federal government contractors), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (non-waivability of right to a judicial forum for claims under the Act by employee whistleblowers and non-arbitrability of claims against mortgage lenders under the Truth in Lending Act). The latter enactment (in Secs. 928 and 1028) authorizes the Securities and Exchange Commission and the newly created Consumer Financial Protection Bureau (CFPB) to regulate pre-dispute arbitration agreements in the securities industry and the consumer financial products and services sector, respectively.

The most general enactment would be the Arbitration Fairness Act (AFA), discussed in Stipanowich, at 400-04, which in its latest iteration renders unenforceable pre-dispute arbitration agreements concerning employment, consumer and civil rights disputes. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011), H.R. 1873, 112th Cong. (2011).