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Arbitration in the Roberts Supreme Court

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ARBITRATION IN THE ROBERTS SUPREME COURT

GEORGE A. BERMANN*

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The Supreme Court’s most recent set of arbitration law rulings — *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l*,¹ *Rent-A-Center West v. Jackson*,² and *AT&T Mobility v. Concepcion*³ — merits all the attention it has been receiving. Taken collectively, the three decisions evidence the powerful commitment of a Supreme Court majority to arbitration as an alternative form of dispute resolution — a commitment so strong as to override important consumer welfare interests. At a minimum, the trilogy erects substantial barriers to the conduct of class arbitration, a form of arbitration that consumer advocates regard as essential to protecting consumer welfare.⁴

In this article, I wish to gauge the doctrinal importance of the three

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1. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

2. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

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

4. 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. *See Stolt-Nielsen*, 130 S. Ct. at 1775 (“[I]t follows 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.”).

rulings in terms both of their departure from long-established axioms of arbitration and the definitiveness with which they have disposed of the politically charged issues they address. I conclude that these decisions are both bold and deeply flawed, but that they also leave open possibilities for advocates and courts that are inclined to resist the sharp movement in the law that the trilogy represents.⁵

RENT-A-CENTERWEST V. JACKSON

The Court granted certiorari in *Rent-A-Center* to determine whether parties could validly delegate to arbitrators the question of an arbitration agreement's conscionability or unconscionability.⁶ Delegations of this sort are extremely common, and often enough found in boiler-plate provisions of standardized consumer contracts.⁷ Their importance, even in doctrinal terms, should not be underestimated. Under traditional severability reasoning, the question of the conscionability or unconscionability of an arbitration agreement (as distinct from the main contract as a whole) is a "gateway" issue for full judicial consideration, if raised at the threshold of arbitration.⁸ It has long been the Court's position that courts may, upon request, entertain at the outset those validity challenges that specifically target the arbitration clause, but not those that pertain to the parties' whole contract.⁹ The latter are deemed to be inextricably tied to the merits of the eventual dispute and thus reserved for the arbitral tribunal to resolve.¹⁰

5. For a fuller version of this argument, see George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551 (2011) [hereinafter Bermann, *Supreme Court Trilogy*].

6. *Rent-A-Center*, 130 S. Ct. at 2775.

7. See Bermann, *Supreme Court Trilogy*, *supra* note 5, at 553 (describing Thomas J. Stipanowich's observation that that the delegation of "threshold issues" are "ubiquitous").

8. See George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 44 (2012) [hereinafter Bermann, *International Commercial Arbitration*].

9. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator").

10. See *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (explaining the principle established in prior cases that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a

Not all delegations of gateway issues to arbitral tribunals raise the same level of concern. Arbitration agreements commonly purport to give the tribunal exclusive authority at the outset to determine whether a given dispute falls within the scope of the arbitration agreement.¹¹ Such delegations are generally uncontroversial since they essentially serve only to enhance the tribunal's prerogatives of contract interpretation.¹² The courts have been more dubious — and rightly so — about delegations to tribunals of authority to determine whether an arbitration agreement was ever formed in the first place¹³ or, if formed, binds a non-signatory.¹⁴ The question of conscionability lies somewhere between those two extremes. Determining whether an arbitration agreement is unconscionable does not call into question whether an agreement to arbitrate ever came into existence, even though it does call into question whether it is enforceable at law. On the other hand, it surely is not a pure exercise in contract interpretation, inasmuch as it raises basic fairness concerns. The question whether a determination of unconscionability can be delegated is a high-profile one, not merely because it defies easy categorization, but also because unconscionability has become a prime tool for courts in policing arbitration agreements in the consumer context and in denying effect to those they find to be

court is not to rule on the potential merits of the underlying claims”).

11. See Bermann, *International Commercial Arbitration*, *supra* note 8, at 30 (“Moreover, parties who concede both that they entered into a contract and that the contract contains a clause submitting all disputes under that contract exclusively to an arbitral tribunal should fully expect a tribunal, and not a court, to rule on the validity of the contract if it is called into question.”).

12. See *id.* (observing that the “presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements.”).

13. In *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (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. That holding is consistent with the Supreme Court's dictum in the case of *Cardegnà*, 546 U.S. 440.

14. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *Comm'ns Workers of Am.*, 475 U.S. at 649) (“Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”) (alteration in original).

unfair and to have been entered into unfairly.¹⁵

Although the Supreme Court granted certiorari in *Rent-A-Center* precisely to resolve the question of the enforceability of delegations of the power to determine the conscionability or unconscionability of arbitration agreements, and although the decision appears to bless such delegations, I find that the Court did not put the question altogether to rest. In fact, it held that Mr. Jackson, the consumer, had failed to focus his conscionability challenge on the delegation provision of the arbitration agreement at hand; rather, he had challenged the validity of the arbitration agreement itself.¹⁶ A majority of the Court reasoned that, just as separability requires a party objecting to arbitration to challenge a feature specific to the arbitration agreement and not common to the contract as a whole, so too does it require a party seeking to challenge the delegation feature of an arbitration agreement to challenge that feature alone and not other aspects of the arbitration agreement that he or she might find objectionable.¹⁷ Based on this analogical use of separability, the Court required the unconscionability challenge to the arbitration agreement, under the circumstances of *Rent-A-Center*, to go directly to the tribunal itself for determination.¹⁸

From a doctrinal viewpoint, the majority's reasoning is deeply flawed and indeed disingenuous. As ordinarily applied, the separability doctrine has a solid logical basis. A party that challenges

15. See generally 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) (offering empirical evidence regarding the overuse of the unconscionability doctrine); Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1 (2011) (recognizing the efficiency and consistency in deferring judicial review but raising concerns regarding one-sided arbitration agreements, especially in the consumer context); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009) (noting that unconscionability has been used successfully with increasing frequency in mandatory arbitration cases over the past fourteen years); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (arguing that judges have expanded unconscionability beyond its normal area of use in order because they are generally hostile to arbitration).

16. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779–80 (2010).

17. *Id.* at 2779.

18. *Id.*

an arbitration agreement on the basis of defects unique to it mounts a fundamental challenge to the arbitral tribunal's legitimacy, and indeed to the tribunal's authority to decide anything, much less the arbitration agreement's basic fairness.¹⁹ Moreover, determinations concerning the enforceability of an arbitration agreement do not implicate the merits of the underlying dispute in the way that challenges to the enforceability of substantive contract provisions do.²⁰ On the other hand, if courts are permitted to entertain objections to an arbitration agreement that can just as easily be lodged against the contract as a whole, and thereby referred to a court at the threshold, the arbitrators will be deprived of the possibility of performing what is surely among their core functions in contract cases, namely determining whether a contract is or is not enforceable.²¹

The basic rationale supporting the separability doctrine (viz. that a challenge confined to the arbitration agreement should be treated differently than a challenge extending to the main contract) has no application to the relationship between parts of the arbitration agreement itself. A court's threshold ruling on the validity of an arbitration agreement's delegation clause has no direct bearing on — and certainly will not prejudge — the validity of the arbitration agreement's other features.²² In short, there is no rationale and no justification for splitting up an arbitration agreement into its component parts and requiring that a party focus on one of its features to the exclusion of all others. Such a position is at odds with the very notion of unconscionability, which mandates that judgments should be based on a totality of the circumstances.²³ Why, in any

19. See Bermann, *Supreme Court Trilogy*, *supra* note 5, at 554.

20. *Id.*

21. *Cf.* *S. Commc'ns Servs., Inc. v. Thomas*, No. 1:10-CV-2975-AT, 2011 U.S. Dist. LEXIS 131344, at *33 (N.D. Ga. Nov. 3, 2011) (explaining that the "arbitrator's duty [is] to apply a rule of law governing contract interpretation to determine the parties' intent.").

22. In most U.S. jurisdictions, the substantive prong of any unconscionability analysis depends entirely on the fairness of the particular provision in question.

23. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981) (examining the adhesiveness and the unconscionability of the contract in question "in light of all of the circumstances presented"); David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13 (2011).

event, must a party challenging a delegation of authority to decide unconscionability refrain from mentioning anything else about the agreement to arbitrate? As a simple matter of logic, a delegation that is accompanied by other objectionable features in the arbitration agreement is more serious and detrimental to the consumer's interest than a delegation unaccompanied by any such features.²⁴ From that point of view, these other features are relevant, not because they themselves are being challenged, but because they heighten the challenge to the delegation provision.

Objectionable though the use of separability in *Rent-A-Center* may be, the fact that a majority of the Court relied on it, and it alone, to reject Jackson's challenge to the delegation suggests that Jackson might arguably have cured his problem through a more careful pleading. It is true that courts have understood *Rent-A-Center* as essentially prohibiting any threshold judicial challenge to an arbitration agreement's delegation provision.²⁵ However, I would dispute that conclusion. Although the Supreme Court was unwilling to do so in *Rent-A-Center*, courts may well find that a challenge to an arbitration agreement is indeed confined to its delegation feature. In one case, the challenger persuaded the court that her attacks were all specific to the delegation provision and did not implicate other aspects of the arbitration agreement or the arbitration agreement as a whole.²⁶ Rightly or wrongly, courts may even choose to view a challenge as targeting the delegation provision despite the fact that other aspects of that agreement happen to come under fire as well.²⁷ Finally, at least

24. See Bermann, *Supreme Court Trilogy*, *supra* note 5, at 556.

25. See, e.g., *Womack v. Career Educ. Corp.*, No. 4:11 CV 1003 RWS, 2011 U.S. Dist. LEXIS 138699, at *4 (E.D. Mo. Dec. 2, 2011) (concluding that in cases where an arbitration clause has a "clear and unmistakable" agreement to arbitrate arbitrability, "issues of the clause's enforceability will be for the arbitrator to decide unless the provision delegating such authority is specifically challenged").

26. *Howard v. Rent-A-Center, Inc.*, No. 1:10-CV-103, 2010 U.S. Dist. LEXIS 76342, at *12 (E.D. Tenn. July 28, 2010). The unconscionability challenge failed on the merits, however. *Id.* at *15–16.

27. In *Washington v. William Morris Endeavor Entm't, LLC*, No. 10 Civ. 9647 (PKC) (JCF), 2011 U.S. Dist. LEXIS 81346, at *20 (S.D.N.Y. July 20, 2011), the challenger 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." Still, the district court read the challenge as targeting the delegation provision, construing the argument liberally as a result of the

one court has interpreted *Rent-A-Center* as limited to cases in which the delegation provision is located in a contract clause other than the arbitration agreement itself.²⁸ The majority in *Rent-A-Center* did in fact say that had 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.”²⁹

I do not mean to minimize the difficulty, in the wake of *Rent-A-Center*, of mounting a successful threshold attack on a delegation of authority to determine an arbitration agreement’s conscionability or unconscionability. The challenger must first somehow persuade a court that the challenge is focused on the agreement’s delegation provision. The challenger must then persuade the court that the delegation provision is itself unconscionable under the relevant jurisdiction’s prevailing unconscionability doctrine. The examples of success in these twin showings are few and far between.³⁰ But the door to such success is simply not closed.

Of course, the Supreme Court is likely to address the unconscionability challenge to delegation clauses head-on at some point. The existing case law of the Court suggests that when it does, it will uphold them. After all, in *First Options*, decided in the annulment context, the Court stated squarely that if the parties clearly and unmistakably delegate to arbitrators the question of whether a contract binds a non-signatory, the arbitrators’ finding on that matter will be given deference.³¹ Similarly, the Court stated in *Granite Rock* that parties may delegate to the arbitrators the question of whether the main agreement was ever formed in the first place.³² If

challenger's pro se status. *Id.* at *21. The challenge was unsuccessful. *Id.* at *23–25.

28. *Quilloin v. Tenet Healthsystem Phila., Inc.*, 763 F. Supp. 2d 707, 723 (E.D. Pa. 2011).

29. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2780 (2010).

30. *Morocho v. Carnival Corp.*, No. 10-21715-CIV-Martinez-Brown, 2011 U.S. Dist. LEXIS 4316, at *4 (S.D. Fla., Jan. 14, 2011) (noting that the challenger’s attack was confined to the delegation provision and therefore declaring the provision unconscionable).

31. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

32. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010). *But see Rent-A-Center*, 130 S. Ct. at 2784–85 (Stevens, J., dissenting) (positing that a delegation of authority to determine the conscionability of an arbitration

the Court considers questions of basic assent to arbitration to be delegable, it will likely consider the question of unconscionability to be delegable as well.

STOLT-NIELSEN S.A. V.
ANIMALFEEDS INT'L CORP.

By the time the Supreme Court decided *Rent-A-Center*, it had already rendered judgment in *Stolt-Nielsen*, finding class-wide arbitration sufficiently alien to arbitration to be foreclosed in the absence of an affirmative indication that class-wide arbitration is something that the parties had contemplated.³³ To reach that result, the majority had to find — and did find — that class-wide arbitration is not merely a distinctive species of arbitration, but practically an altogether different genus.³⁴ In fact, the majority came close to describing class-wide arbitration as altogether antithetical to arbitration as it is understood generally.³⁵ Thus, while the majority in *Stolt-Nielsen* was certainly justified in pointing out the singular features of class-wide arbitration, it went a great deal further. To go that distance, it could not help but give short shrift to some of the most basic axioms underlying the U.S. law of arbitration — axioms that, ironically, support the very robustness of arbitration that the majority claimed to uphold.

What are these axioms? First, the Court sidestepped the proposition fundamental to U.S. arbitration law to the effect that arbitrators have broad latitude in fixing the procedural parameters of an arbitration, unless the parties have stipulated otherwise.³⁶ The fact

agreement directly indicates consent to arbitrate).

33. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010).

34. *See id.* at 1775–76 (discussing the considerable and material differences between bilateral arbitration and class-action arbitration).

35. *See id.* at 1776 (“[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.”). 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.* at 1775–76.

36. *See, e.g., Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th

is that in *Stolt-Nielsen*, the parties neither expressly embraced nor rejected class-wide arbitration.³⁷ Though procedural silence is precisely the circumstance in which arbitral tribunals fill gaps, the majority foreclosed arbitrators from doing so, turning its back on its prior ruling in the case of *Green Tree Financial Corp. v. Bazzle*, where it ruled that whether the parties contemplated class arbitration is a procedural question growing out of the dispute, and therefore one left primarily to the arbitral tribunal to decide.³⁸

Relatedly, under longstanding Supreme Court jurisprudence, agreements to arbitrate merit broad interpretation.³⁹ The effect of *Stolt-Nielsen*, however, was to place class-wide arbitration presumptively outside the scope of the arbitration agreement to which the parties could be found to have agreed. The Court would emphatically reinforce this view in its subsequent ruling in *AT&T Mobility v. Concepcion*.

Third, arbitrators are generally said to be entitled to deference in the interpretation of arbitration agreements.⁴⁰ To be sure, this deference does not extend to all issues. While courts, by definition, resolve gateway issues if asked to do so, the question of whether the parties assented to class-wide arbitration is not squarely a gateway issue, but rather one posed to the arbitrators as contract interpreters.⁴¹ Notwithstanding, the *Stolt-Nielsen* majority did nothing short of laying down for arbitral tribunals a strict rule of contract interpretation under which contracts that are silent on the matter of class-wide arbitration must be understood as foreclosing it.⁴²

Cir. 1997) (quoting *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985)) (“An arbitrator enjoys wide latitude in conducting an arbitration hearing.”).

37. *Stolt-Nielsen*, 130 S. Ct. at 1766.

38. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003). The Court, at the same time that *Bazzle* was decided, recognized that procedural issues arising in or out of an arbitration are presumptively for arbitrators to resolve. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

39. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that congressional intent promotes “a liberal federal policy favoring arbitration agreements”).

40. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

41. *Bermann, Supreme Court Trilogy*, *supra* note 5, at 561.

42. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

If any body of law is meant to supply the canons of construction applicable to contracts, including arbitration agreements, the Federal Arbitration Act designates the substantive law of contract of the relevant state.⁴³ However, the rule of construction of arbitration agreements announced by the Court is not one to be found in state contract law. The Court's subsequent ruling in *AT&T Mobility v. Concepcion* demonstrates that substitution of a federal rule of contract construction in the arbitration field for the otherwise applicable state law can produce a decisive difference in outcome.⁴⁴

Finally, it should not be forgotten that the majority in *Stolt-Nielsen* ultimately vacated the clause construction award issued by the tribunal⁴⁵ for what amounts to an error of law. As noted, there is little by way of precedent to support the majority's view that, in the absence of an ascertainable default rule favoring interpretations of arbitration agreements as contemplating class-wide arbitration, a court cannot read an arbitration agreement as having that meaning. But even if the tribunal had erred in failing to follow that rule of interpretation, error of law on a tribunal's part does not ordinarily warrant vacatur.⁴⁶

I conclude that the majority in *Stolt-Nielsen* not only came down very hard on class-wide arbitration so as to ensure that arbitrations conducted in the United States would rarely proceed on a class-wide basis, but in doing so also bent some of the most fundamental principles of U.S. arbitration law. But here too, just as in *Rent-A-Center*, the apparent decisiveness of *Stolt-Nielsen* ruling may be somewhat deceptive.

First, the majority laid great emphasis on the parties in *Stolt-Nielsen* having expressly stipulated that their agreement was silent as

43. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

44. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that “California’s *Discover Bank* rule is preempted by the [Federal Arbitration Act]”).

45. See *Stolt-Nielsen*, 130 S. Ct. at 1767–68 (concluding that “what the arbitration panel did was simply . . . impose its own view of sound policy regarding class arbitration” rather than “interpret and enforce a contract”).

46. Indeed the majority in *Stolt-Nielsen* elsewhere expressly acknowledged that a legal error committed by the tribunal, even if serious, is not ground for vacatur. *Id.* at 1767.

to the availability of class-wide arbitration.⁴⁷ But not all courts have understood *Stolt-Nielsen* as precluding a clause construction award in favor of class-wide arbitration simply because the arbitration agreement contains no language, one way or the other, on its availability. The courts are actually quite divided. While some courts find that contractual silence on the matter bars tribunals from ordering class-wide arbitration,⁴⁸ a larger number regard themselves as free to infer a willingness to arbitrate on a class-wide basis either from other language in the contract or, more often, from extrinsic evidence of one kind or another.⁴⁹ In *Jock v. Sterling Jewelers, Inc.*,⁵⁰

47. *Id.* at 1776.

48. See *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 405 (S.D.N.Y. 2011) (concluding that an agreement to class arbitration cannot be simply inferred); *Sanders v. Forex Capital Mkts., LLC*, No. 11 Civ. 0864 (CM), 2011 U.S. Dist. LEXIS 137961, at *28 (S.D.N.Y. Nov. 29, 2011) (holding that a 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”); *Cal. Title Ins. Antitrust Litig.*, No. 08-01341 JSW, 2011 U.S. Dist. LEXIS 71621, at *13 (N.D. Cal. June 27, 2011) (recognizing that “in the absence of a class-wide arbitration provision, class arbitration would not have been available”); *Quinonez v. Empire Today, LLC*, No. C 10-02049 WHA, 2010 U.S. Dist. LEXIS 117393, at *14 (N.D. Cal. Nov. 4, 2010) (“If the company had wanted a class arbitration, it should have written a provision that explicitly contemplated class proceedings and laid out the appropriate protections.”).

49. See *Bergman v. Spruce Peak Realty, LLC*, No. 211-cv-127, 2011 U.S. Dist. LEXIS 131366, at *11–13 (D. Vt. Nov. 14, 2011) (observing that an arbitration agreement may contain an implicit authorization of class arbitration); *S. Commc’ns Servs., Inc. v. Thomas*, No. 1:10-CV-2975-AT, 2011 U.S. Dist. LEXIS 131344, at *33 (N.D. Ga. Nov. 3, 2011) (stating that to hold “that an arbitrator should automatically assume the parties intended to preclude class arbitration any time 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”); *YAHOO! Inc. v. Iversen*, No. 11-CV-03282-LHK, 2011 U.S. Dist. LEXIS 117149, at *13 (N.D. Cal. Oct. 11, 2011) (quoting *Vazquez v. ServiceMaster Global Holding, Inc.*, No. C 09-05148 SI, 2011 U.S. Dist. LEXIS 69753, at *3 n.1 (N.D. Cal. June 29, 2011)) (stating that interpretation of an arbitration agreement is generally a matter of state law, and state law generally permits a decisionmaker to “look beyond the four corners of the contract where appropriate”); *Opalinski v. Robert Half Int’l, Inc.*, Civil Case No. 10-2069 (FSH) (PS), 2011 U.S. Dist. LEXIS 115534, at *10 (D.N.J. Oct. 6, 2011) (rejecting the notion that *Stolt-Nielsen* stands for the proposition that class arbitration is prohibited “in any case in which the arbitration clause is silent on the issue”); *Hayes v. Servicemaster Global Holdings, Inc.*, No. C 10-03887 SI, 2011 U.S. Dist. LEXIS 70160, at *12–13 n.3 (N.D. Cal. June 29, 2011) (reasoning that an arbitration clause need not explicitly mention that the parties agree to class

for example, the Second Circuit found the arbitrator to have acted within the scope of her authority, as well as within the bounds of state contract law, when she construed a contract to permit class arbitration even though it contained no provision on the subject.⁵¹ This is not an isolated case,⁵² even if it remains exceptional.

arbitration in order for a decisionmaker to find that they did so consent); *Aracri v. Dillard's, Inc.*, No. 1:10cv253, 2011 U.S. Dist. LEXIS 41596, at *10–11 (S.D. Ohio Mar. 29, 2011) (distinguishing *Stolt-Nielsen* on account of the parties' stipulation that the agreement was silent on class arbitration); *Sutter v. Oxford Health Plans LLC*, Civ. No. 05-2198 (GEB), Civ. No. 10-4903 (GEB), 2011 U.S. Dist. LEXIS 17123, at *12–16 (D.N.J. Feb. 22, 2011) (concluding that an arbitrator could reasonably find consent to class arbitration even if agreement is silent on the issue); *Botello v. COI Telecom, L.L.C.*, No. SA-10-CV-305-XR, 2010 U.S. Dist. LEXIS 138572, at *16 (W.D. Tex. Dec. 30, 2010) (observing the silence in arbitration agreement of the parties but concluding that standing alone they do not preclude class arbitration); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 768 (W.D. La. 2010) (concluding that the arbitral tribunal applied legal principles, not their own policy choices, in finding action could proceed on a class basis); *Angermann v. Gen. Steel Domestic Sales, LLC*, No. 10-cv-00711-REB-MJW, 2010 U.S. Dist. LEXIS 123145, at *6 (D. Colo. Nov. 8, 2010) (noting that 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”).

50. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011).

51. *Id.* at 127. See also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1154–55 (2011) (describing pre-*Stolt-Nielsen* approaches to clause construction awards).

52. In *Smith & Wollensky Restaurant Grp., Inc. v. Passow*, No. 10-11498-EFH, 2011 U.S. Dist. LEXIS 4495, at *3–4 (D. Mass. Jan. 18, 2011), the court ruled as follows:

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.

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 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

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It would appear from the foregoing that a majority of the Supreme Court thought it necessary, in order to fortify arbitration against the consumer-driven challenges posed by the *Rent-A-Center* and the *Stolt-Nielsen* decisions, to depart from a number of established understandings about the U.S. law of arbitration — not that it acknowledged doing so. But it also appears that neither ruling puts a categorical end to the challenges to arbitration that those two cases raise.

Much the same can be said about the third decision in the Supreme Court trilogy, *AT&T Mobility v. Concepcion*. In *Concepcion*, a majority of the Court held that the federal interest in arbitration, embodied in the Federal Arbitration Act, barred the courts of California from declaring class-wide arbitration waivers in consumer contracts to be unconscionable and unenforceable.⁵³ According to the majority, applying California unconscionability doctrine in the fashion the California courts had done discriminated against arbitration in violation of the FAA, notably by frustrating the agreement between the parties disallowing the class-wide arbitration of disputes.⁵⁴ Despite the FAA's having made enforcement of arbitration agreements subject to basic state contract law principles, application of California unconscionability law in that fashion was

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.

53. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

54. *Id.* at 1747-48. See, for example, *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Jones v. DirecTV, Inc.*, No. 11-10887, 2011 U.S. App. LEXIS 23586, at *1 (11th Cir. Nov. 22, 2011) (per curiam); *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011); *AT&T Mobility LLC v. Bernardi*, No. C 11-03992 CRB, No. C 11-04412 CRB, 2011 U.S. Dist. LEXIS 124084, at *1 (N.D. Cal. Oct. 26, 2011); *King v. Advance Am., Cash Advance, Ctrs., Inc.*, Civil Action No. 07-237, Civil Action No. 07-3142, 2011 U.S. Dist. LEXIS 98630 (E.D. Pa. Aug. 31, 2011); *Valle v. Lowe's HIW, Inc.*, No. 11-1489 SC, 2011 U.S. Dist. LEXIS 93639, at *1 (N.D. Cal. Aug. 22, 2011); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011); and *Day v. Persels & Assocs., LLC*, No. 8:10-CV-2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, at *1 (M.D. Fla. May 9, 2011), for decisions following the rule in *Concepcion*.

effectively preempted.⁵⁵

Curiously, if the decision in *Stolt-Nielsen* served its intended purpose, the decision in *Concepcion* should not even have been necessary. That ruling, it will be recalled, sought to ensure that no dispute would be subject to class-wide arbitration unless the parties affirmatively evidenced that intention, presumably by express language in the arbitration agreement.⁵⁶ Both logic and experience tell us that in the wake of *Stolt-Nielsen*, class-wide arbitration waivers in consumer contracts may no longer be necessary.

But apart from that, the *Concepcion* ruling, like *Rent-A-Center* and *Stolt-Nielsen*, is both logically flawed and inconsistent with established understandings of U.S. arbitration. First, the majority in *Concepcion* emphatically advanced the view that class-wide arbitration is at cross-purposes with arbitration's core objective of avoiding the complexity, expense, and delay commonly associated with litigation.⁵⁷ That position, however, sits uncomfortably with the Court's own often-quoted observation, in the case of *Volt Information Services v. Board of Trustees of Stanford University*,⁵⁸ which held that the Federal Arbitration Act is not a federal endorsement of any single idealized arbitration model — not even one that is admirably streamlined and efficient.⁵⁹ If the FAA does not dictate adherence to any one arbitral design,⁶⁰ then Justice Scalia is on shaky ground in suggesting in *Concepcion* that class arbitration, on account of its unwieldiness, might not even constitute arbitration at all.⁶¹

55. Section 2 of the FAA makes agreements to arbitrate judicially enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.” Federal Arbitration Act, 9 U.S.C. § 2 (2006).

56. *Concepcion*, 131 S. Ct. at 1750–51.

57. *Id.* at 1749.

58. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

59. *Id.*

60. See George A. Bermann, *Ascertaining the Parties' Intentions in Arbitral Design*, 113 PENN ST. L. REV. 1013, 1015 (2009) (indicating that the Supreme Court's definition of the “federal interest in arbitration” is not premised on a fixed arbitration model).

61. See *Concepcion*, 131 S. Ct. at 1753 (arguing that class arbitration “is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.”).

Justice Scalia is right, of course, in suggesting that states cannot, consistent with the FAA, require parties to subject themselves to full-scale discovery or jury trials in arbitration against their wishes.⁶² Parties are entitled in principle to do away with any such features of litigation if that is their preference — a preference they often express by incorporation institutional rules of arbitration that have precisely that effect. Were a state to mandate such features in arbitration, by rendering them non-waivable, it would violate the cardinal principle that contracting parties have the prerogative to design their own arbitration.

But the fact that the FAA does not allow states to impose pretrial discovery and jury trials in arbitration does not mean that states cannot override party agreements that would jeopardize arbitration's basic fairness. The fact is that pretrial discovery and jury trials are precisely the kind of U.S. litigation features that the FAA and the jurisprudence under it want parties to be able to avoid.⁶³ More importantly, California law did not in any event mandate class-wide arbitration; it merely pledged to enforce class-wide arbitration if the parties could be said to have agreed to it.⁶⁴ After *Stolt-Nielsen*, agreement to class-wide arbitration will not be easy to establish. Thus, the reasoning of the majority in *Concepcion* is flawed not merely because, as in *Stolt-Nielsen*, it places class-wide arbitration outside the realm of arbitration, but also because it wrongly reads California case law as imposing class-wide arbitration on parties even if they did not agree to it.

However, the problem with *Concepcion* is even more basic. When California courts apply standard unconscionability doctrine to class-wide arbitration waivers, they do not in any meaningful way discriminate against arbitration. California courts treat waivers of class-wide arbitration no more harshly than they treat waivers of class action litigation; both kinds of waiver are unenforceable.⁶⁵

62. *Id.* at 1747.

63. *Cf.* *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’”).

64. *Concepcion*, 131 S. Ct. at 1750.

65. The *Concepcions* made precisely this argument, citing *Am. Online, Inc. v.*

More generally, California law accords agreements to arbitrate no less favorable treatment than it grants to forum selection clauses designating a foreign court.⁶⁶ In barring California from applying its standard unconscionability doctrine to waivers of class-wide arbitration, the majority in *Concepcion* unjustifiably encroached on the state's freedom to develop its own general contract law principles and to apply them to contracts that take the form of agreements to arbitrate.

But again like *Rent-A-Center* and *Stolt-Nielsen*, the importance of *Concepcion* must not be overstated. As I read it, *Concepcion* at most precludes courts from categorically denying effect to waivers of class-wide arbitration in consumer contracts on grounds of unconscionability under state contract law.⁶⁷ But it does not prevent courts from analyzing arbitration agreements containing class action waivers under the particular facts and circumstances established in any given case, with the possibility of denying them enforcement on a case-by-case basis. Courts need not declare class action waivers unenforceable per se in consumer contracts when they can reach the same result through ad hoc decisionmaking. Even in the short time that has elapsed since *Concepcion*, lower courts have done precisely that on a number of occasions.⁶⁸

Superior Court, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001). *Concepcion*, 131 S. Ct. at 1746. See *Am. Online*, 108 Cal. Rptr. 2d at 712 (“The unavailability of class action relief . . . is sufficient in and by itself to preclude enforcement of [a] forum selection clause.”).

66. California law generally respects and enforces forum selection clauses in keeping with the principles laid down by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See *CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n.*, 39 Cal.App.4th 1347, 1353, (Cal. Ct. App. 1995) (recognizing and upholding the “modern trend favoring enforceability of forum selection clauses.”); *Hall v. Superior Court*, 150 Cal.App.3d 411, 419 (Cal. Ct. App. 1983) (“The law is clearly that forum selection clauses . . . will be enforced by the California courts.”).

67. See *Concepcion*, 131 S. Ct. at 1750–51 (“[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”).

68. See *AT&T Mobility LLC v. Fisher*, Civil Action No. DKC 11-2245, 2011 U.S. Dist. LEXIS 124839, at *20–21 (D. Md. Oct. 28, 2011) (“The Eleventh Circuit has concluded that *Concepcion* means that arbitration agreements with class action waivers must be analyzed under the particular circumstances of each case and may not categorically be considered either unenforceable or acceptable.”); *Tory v. First Premier Bank*, No. 10 C 7326, 2011 U.S. Dist. LEXIS 110126, at *9–

CONCLUSION

Through its latest set of arbitration decisions, a Supreme Court majority has measurably strengthened its commitment to the enforcement of arbitration agreements, but has done so to the detriment of consumer protection interests. The fact that the Court would vigorously pursue its pro-arbitration philosophy is less surprising than the extent to which it was willing to override established understandings in the U.S. law of arbitration or the fact that it did not even acknowledge that it was doing so.

And yet none of the three decisions erects insuperable roadblocks to those who would defend consumer interests in the arbitration context. On the contrary, we may anticipate a continuing struggle in the courts between those who share the Supreme Court majority's outlook and those who are prepared resourcefully to resist it, with both sides straining mightily in order to achieve their objectives.⁶⁹ Maintaining the arbitrability of consumer disputes under U.S. law is proving to take an ever greater toll on integrity and principle in the U.S. law of arbitration.⁷⁰

13 (N.D. Ill. Sept. 26, 2011); *Plows v. Rockwell Collins, Inc.*, No. SACV 10-01936 DOC (MANx), 2011 U.S. Dist. LEXIS 88781, at *10–12 (C.D. Cal. Aug. 9, 2011); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011). The court in *Fisher*, *supra*, relied on the Eleventh Circuit decision in *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (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. *Id.* at 1214–15; *see also* *Lewis v. UBS Fin. Servs. Inc.*, No. C 10-04867 SBA, 2011 U.S. Dist. LEXIS 116433, at *5 (N.D. Cal. Sept. 30, 2011). *But see* *Kaltwasser v. AT&T Mobility LLC*, No. C 07-00411, 2011 U.S. Dist. LEXIS 106783, at *17 (N.D. Cal. Sept. 20, 2011) (“[I]t 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.”).

69. *See generally* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (discussing the recent evolution in arbitration law, specifically in the context of unconscionability, and highlighting the opposing viewpoints that are accentuated by recent Supreme Court decisions).

70. There is some, albeit halting and irregular, movement toward excluding consumer contract disputes from arbitration's domain. Congress has declared a small number of narrow sectoral contract disputes to be non-arbitrable. *See* Dodd-

Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (granting itself the authority to restrict mandatory pre-dispute arbitration “between covered persons and consumers in connection with the offering or providing of consumer financial products or services.”); H.R. REP. NO. 111-230 (2009) (providing for non-waivability of right to a judicial forum for Title VII sexual harassment claims of employees of federal government contractors). The latter enactment (in sections 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 is the Arbitration Fairness Act (AFA), which in its latest iteration renders unenforceable pre-dispute arbitration agreements concerning employment, consumer and civil rights disputes. Arbitration Fairness Act of 2011, H.R. 1873 § 402, 112th Cong. (2011).