CLASS ARBITRATION: THE NECESSARY COUNTERPART TO THE ARBITRABILITY OF STATUTORY RIGHTS

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Abstract

Why is it so problematic to restrict the availability of class arbitration in the United States? I will argue in my paper that class arbitration is a compromise between the pro-arbitration policy and the protection of weaker parties and thus necessary to sustain the liberal American model of arbitration. It is indeed the necessary counterpart to the arbitrability of statutory rights.

During the last thirty years, the policy of the United States towards arbitration has become increasingly favourable and the introduction of arbitration clauses into all sorts of contracts, including adhesion contracts between parties of highly unequal bargaining power, has become common practice. This has led to the development of class arbitration proceedings endorsed by courts and institutions. Corporations, however, continued trying to avoid all sorts of class proceedings and with its recent jurisprudence, the Supreme Court can be said to have taken their side. The resulting decisions have been highly criticized, especially, but not exclusively for their consequences for the protection of the rights of weaker parties such as consumers and employees. Forced into highly expensive arbitration proceedings and without the class arbitration device at their disposal, these weaker parties lose the right to class proceedings and are, accordingly, often unable to file their claims in any forum. Numerous courts, finding these consequences objectionable on public policy grounds, have been and are evading the Supreme Court’s decision.

I will argue that the origin and the development as well as the reactions to the restriction of class arbitration demonstrate that its existence is necessary to provide a counter-balance to the liberal policy of arbitrability adopted by U.S. courts. Class arbitration is necessary to make the current U.S. arbitration policy sustainable for low-value plaintiffs. An alternative would only be to follow the model of the European Union: excluding statutory rights from the scope of arbitrability.
### Acronyms

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<td>American Arbitration Association</td>
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<td>Amex</td>
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<td>Bazzle</td>
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Introduction

Recent developments in the field of class arbitration have drawn increased attention to this procedural device of collective relief. Class arbitration proceedings are proceedings that “explicitly import [...] elements of U.S.-style class actions (i.e., large-scale lawsuits seeking representative relief on behalf of dozens to hundreds of thousands of injured parties) into the arbitral context.” 1 Nevertheless, class arbitration differs significantly from class litigation: “class arbitration incorporates a number of procedures that are unique to the arbitral realm, such as those regarding the naming or challenging of arbitrators, the form of an award, etc.” One of the main characteristics of class action proceedings – punitive damages – is not required in class arbitration. 2 Class arbitration is a procedure mainly used in large-scale consumer and employment disputes but can “involve everything from insurance and financial disputes to maritime and antitrust claims.” 3 In existence since the early 1980’s, class arbitration has been widely used since the U.S. Supreme Court decided Green Tree Financial Corp. v. Bazzle (“Bazzle”) 4 in 2003 and various U.S.-based arbitral institutions 5 promulgated special rules for class arbitration proceedings. During the last years, class arbitration proceedings have, thus, become a regular device in the United States for the resolution of consumer, employment and other disputes involving low-value claims and parties of very unequal bargaining power.

So far limited to the United States, class proceedings, or similar devices of collective dispute resolution mechanisms, are slowly starting to spread to other regions such as Europe. 6 Germany, though not accepting class arbitration proceedings, has developed the DIS arbitration rules, which share a lot of characteristics with class arbitration. 7 The Netherlands passed a law in 2006 that allows mass settlements of claims although it does not allow the litigation of class claims. 8 Moreover, Canada 9 and Colombia 10 are no longer resolutely

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2 Id. p. 7.
3 Id. p. 8.
5 Such as the American Arbitration Association (“AAA”).
excluding the use of class arbitration. Furthermore, class arbitration proceedings did not only start to expand geographically but also to other forms of dispute resolution. In fact, class arbitration was used for the first time in investment arbitration under the ICSID Convention in the case *Abaclat et al. v. Argentina* in 2011. In this case the majority of the arbitral panel held that it had jurisdiction to hear the claims of over 60,000 Italian investors against Argentina under the ICSID Convention and the Argentina-Italy BIT.11

While gaining momentum in other legal systems and other fields, class arbitration experienced the opposite evolution in the United States. Recent Supreme Court cases restricted its use and limited its availability to plaintiffs, including claims arising out of adhesion contracts – the field where they had been used the most.12 This caused, however, very harsh criticism and resulted in wide opposition in lower courts.

Why is it so problematic to restrict the availability of class arbitration in the United States? After showing how class arbitration developed as a compromise between the pro-arbitration policy of the U.S. courts and the necessary protection of statutory rights (I), I will analyze the Supreme Court’s restriction of the availability of class arbitration and the harsh criticism it encountered (II) and finally argue that it is the need for the protection of statutory rights which is the main motivation behind the circumvention of the Supreme Court’s restriction of class arbitration by state courts (III).

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I. Class Arbitration Develops as a Compromise between the Pro-Arbitration Policy and the Necessary Protection of Statutory Rights: A Balance Emerges

A. Arbitrability and Class Relief

1. A Strong Pro-Arbitration Policy and a Large Definition of Arbitrability

- An Increasingly Strong Federal Pro-Arbitration Policy Expressed in the FAA

Arbitration is a process by which the parties to a dispute submit their differences to the judgment of an impartial person or group of persons appointed by the mutual consent of the parties. Parties can agree to arbitration either before or after the dispute arises. While arbitration as such is an ancient method of dispute resolution,13 its common use as a dispute resolution method in the United States is more recent. In 1925, the American Congress enacted the Federal Arbitration Act (the “FAA”).14 It “provided for arbitration agreements in contracts involving maritime transactions and contract evidencing transactions involving interstate or foreign commerce. ‘The FAA essentially made agreements to arbitrate enforceable and gave them the same rights as any other contract.’”15

Under the FAA, “[a] written provision in an agreement shall be ‘valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.’”16 This provision, found in §2 of the FAA, is commonly called the ‘Savings Clause’ as it provides the courts with the possibility to invalidate arbitration agreements on generally applicable contract defenses.17 This clause puts arbitration clauses “on equal footing” with other contracts but avoids the discrimination against arbitration by courts that would be sceptical towards this private method of dispute resolution.18

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16 Id.
18 Id.
In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[^19] Justice Brennan expressed the opinion that “Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any substantive or procedural policies to the contrary”[^20] and thus gave a first impression of the pre-empting nature of the FAA. One year later, when the U.S. Supreme Court decided in *Southland Corp. v. Keating* (“*Southland*”)[^21] that the FAA created a federal substantive law of arbitration and that Congress intended for the FAA to apply not only in federal courts, but also in state courts,[^22] the Savings Clause gained more importance and “received much closer scrutiny”[^23] as it became the vehicle for state courts to apply state law to arbitration issues in spite of the FAA. As dicta in a footnote, the Supreme Court stated, however, in *Perry v. Thomas*[^24], that traditional state law defenses can be applied to revoke an arbitration agreement under the Savings Clause of the FAA, only if these principles, such as unconscionability, are applied in the same way to any contracts and not just to arbitration clauses. While State courts thus have a certain freedom to apply state law defenses to arbitration clauses, this freedom is limited to the extent that they do not discriminate against arbitration. “In other words, if a state court’s Unconscionability Doctrine is applied differently to arbitration agreements than it is to other contracts, then the Supremacy Clause[^25] requires that the FAA pre-empt the state court’s attempt to regulate the law of arbitrability.”[^26] The FAA pre-empts state arbitration law that conflicts with the liberal arbitration policy of the FAA.

This pro-arbitration policy and pre-emption of state law defenses would be less problematic if not combined with a large scope of arbitrability. In fact, more and more diverse issues have been decided to be arbitrable and the use of arbitration has been expanded to almost all disputes containing a contractual element.[^27] Moreover, it has been held that “doubts about the scope of arbitrable issues or the meaning of arbitration clauses should be resolved in

[^23]: Id. p. 552.
[^25]: Article 6, Clause 2 of the U.S. Constitution: in cases of conflict between state and federal law, federal law trumps state law.
[^27]: *See* Subsequent Subsection.
favor of arbitration.” This led to the frequent inclusion of arbitration clauses in adhesion contracts in sensible fields such as consumer or labour law.

- An Increasingly Broad Definition of Arbitrability Including Statutory Rights

The policy increasingly favourable towards arbitration pre-empting the applicability of state defenses to arbitration clauses between parties of unequal bargaining power started putting the protection of certain rights at risk. In fact, “[s]ome critics of arbitration even argue that arbitration infringes upon the civil liberties of low-income consumers and other disadvantaged groups.”

The enactment and the use of the FAA primarily served the goal of simply overcoming the judicial hostility towards arbitration. Since the 1980’s, the FAA has, however, been more clearly employed to favour arbitration: the Supreme Court has held that arbitration agreements are enforceable in state and federal courts and limited the state courts’ ability to question the validity of arbitration clauses. This evolution led to the fact that “[w]here consumers have attacked alternative dispute resolution mechanisms contained in standard form contracts of adhesion, courts have regularly upheld the contracts on the ground that the parties were able to choose their dispute settlement procedure.” Arbitration agreements in contracts of adhesion between corporations and consumers are now widely used and deemed enforceable by the courts. “Consumers are constantly faced with mandatory arbitration clauses in connection with their landline and cellular telephones, credit cards, cable services, health care providers, and commercial and residential leases [and u]nder the FAA, courts have the power to stay litigation and require parties to arbitrate if they have so contracted.” Considering, however, the unequal bargaining power between the parties concluding a contract of adhesion, it is safe to say that weaker parties are increasingly forced into individual arbitration, which is often perceived as endangering the protection of their rights.

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30 See Previous subsection.
32 Id.
consumer must pay substantially more to arbitrate than to litigate a dispute arising out of a contract for goods or services.”

The high costs of arbitration result out of the fees for the arbitrators and the costs for the hearing room, clerk, reporter… This means that the costs can be too high for a consumer to be able to pursue his claim, or in other words that “the excessive cost of arbitration could bar consumers from vindicating their claims against businesses, a phenomenon the Supreme Court recently acknowledged in *Green Tree Financial Corp v. Randolph*” (“Randolph”), although it finally imposed individual arbitration in spite of this statement.

This evolution was even more accentuated by the increasingly liberal policy concerning the arbitrability of statutory rights. Through a series of cases, the Supreme Court opened up fields such as antitrust, labour and consumer protection law to arbitration and thus rendered the protection of these statutory rights vulnerable by subjecting them to the decisions of private arbitrators not submitted to any sort of appeal.

In the case *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* ("Mitsubishi") the Supreme Court famously decided that antitrust claims under the Sherman Act are arbitrable. The Sherman Act is silent on the question of arbitrability but has been construed as authorizing arbitrability of claims falling within its scope. The court held that the respect of statutory rights guaranteed by this Act will still be controlled by American courts at the award-enforcement stage and that therefore rendering such claims arbitrable does not hinder the vindication of these rights. The majority decided that §2 of the FAA applied to antitrust claims statutorily, holding them protected in the arbitral forum, although Justice Stevens, dissenting, disagreed with this decision. The fact that the silence of the Act was interpreted as allowing arbitrability of antitrust claims, clearly demonstrates the pro-arbitration policy applied every time there is doubt regarding the arbitrability of a statute. Under the influence of *Mitsubishi*, lower courts have favored enforcement of arbitration agreements even where public law claims are made.

In *Gilmer v. Interstate/Johnson Lane Corp.*, the plaintiff challenged the arbitration agreement on the grounds that it did not permit class proceedings. The Supreme Court held, however, that as the plaintiffs could vindicate their statutory rights in the arbitral forum,

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34 Id. p. 681.
35 Id.
37 Id. pp. 682 and 685.
40 Id. p. 300.
bilateral arbitration of this discrimination claim should be compelled.\textsuperscript{42} This case determined “that claims under the Age Discrimination in Employment Act are arbitrable.”\textsuperscript{43}

Then again, this expansion of the scope of arbitrability has not provoked exclusively positive reactions: Indeed, “the Supreme Court’s increased willingness to endorse arbitration in so many areas of contract law has been greatly criticized […]. Many critics of arbitration feel that the drafters of the FAA intended it to apply only to contracts between business people and that its extension to consumer contracts is well beyond its intended scope.”\textsuperscript{44} Other critics feel that the inequities between the arbitral and judicial processes will not only limit a consumer’s important rights but contradict the very notion of freedom of contract.\textsuperscript{45} The solution thus seemed to be to either limit arbitration to business relationships or to find another mechanism able to compensate the potential loss of rights weaker parties experience by being forced to arbitrate. At this point of the reflection, class proceedings came into play.

2. The Rebalancing in Favour of the Protection of Statutory Rights
Through Class Arbitration

- \textit{The Role of Class Litigation in the Protection of Statutory Rights}

An important feature of the American judicial landscape is the availability of class litigation for plaintiffs who have to join forces in order to make their claims sustainable and pursuable. “Class actions, unlike arbitration, have been incorporated into the American legal system with little controversy.”\textsuperscript{46} Class actions in the U.S. are regulated by Federal Rule of Civil Procedure 23.\textsuperscript{47} This rule is intended to promote judicial economy by preventing multiple suits on the same subject-matter, to provide relief to those who would not otherwise be able to bring a suit individually either because the claim is too small or because the costs of litigation would outweigh the possible recovery, and finally to ensure uniformity of decisions through the formation of class actions instead of multiple individual suits.\textsuperscript{48}

\textsuperscript{43} Id. at p. 279.
\textsuperscript{45} Id.
Aggregation of claims is also considered to be helpful because it treats all plaintiffs equally, especially if there is a limited amount to recover.\textsuperscript{49}

In fact, “[c]lass-action suits have long provided a forum of dispute resolution for customers and employees with small-scale claims against larger companies and employers with greater bargaining power.”\textsuperscript{50} Collective relief was accordingly the exact answer to the problem described above: If excessive costs can deter people from vindicating their rights and thus effectively deprive them of any kind of relief, class proceedings present the solution. Preferring class action suits to arbitration was, however, contrary to the pro-arbitration policy the American courts had adopted. As it was not possible to give up arbitration in favour of class litigation, a compromise was needed.

- \textit{Class Arbitration as a Compromise between the Necessary Protection of Statutory Rights and the Pro-Arbitration Policy: A Reaction to a Reaction}

As class actions are intended to ensure relief to those who would otherwise be unable to bring suit individually, they are exactly the sort of procedural device consumers need to protect their rights against economically more powerful corporations. Collective relief was thus said to be needed to compensate the high costs of arbitration proceedings rendered mandatory through arbitration clauses frequently contained in adhesion contracts.\textsuperscript{51} The problem is, however, that companies insert arbitration clauses in their contracts exactly to avoid class actions.\textsuperscript{52} This leaves the weaker party in a situation in which judicial class actions are excluded in favour of individual arbitration, which is, however, so costly that no effective relief remains available.\textsuperscript{53} The pro-arbitration policy combined with the large definition of the arbitrability of statutory rights thus leads to a situation in which the protection of statutory rights is endangered through the effective impossibility to bring a class action suit in court (pre-empted by arbitration) and to start bilateral arbitral proceedings (too costly).

The American courts have tried to solve this question by authorizing class proceedings in arbitration – the so-called class arbitration proceedings or class action arbitration proceedings. “Class arbitration […] explicitly imports elements of U.S.- style class actions into the arbitral context […] and thus reflects] a strong bias toward U.S. conceptions of collective justice.”54 John M. Townsend describes class arbitration as “a reaction to a reaction to a reaction: A reaction of the courts to the reactions of class actions lawyers to the reactions of corporations to class actions.”55 In his opinion corporations discovered that by inserting arbitration clauses in their contracts, they were able to convince the courts that this type of dispute resolution was inconsistent with collective relief, even though the individual claim of the class representative might be for such a small amount that it would be impossible to pursue it on an individual basis.56 The fact that the FAA protected them from potential anti-arbitration state legislation even increased the corporations’ willingness to avoid class proceedings by opting for arbitration.57 From this he deduced that corporations were quasi-immune from persecution for “small sins” and thus able to fraud a large number of customers for a small amount at a time unworthy of being pursued individually.58

He explains that the counter-movement to this behaviour was to plead that these arbitration clauses were unconscionable under §2 of the FAA and thus revocable on the same grounds as any other contract.59 This led to the setting aside of the arbitration clauses, which harmed arbitration.60 The courts then reacted by trying to combine both: class relief and arbitration, and developed class arbitration proceedings: “Eventually, […] some U.S. courts began to hold that class actions may, in principle, be asserted in arbitral proceedings, depending upon the terms of the parties’ arbitration agreement. As Gabrielle Nater-Bass put it: “As a result of the frequency with which standard form contracts in various industries – such as in telecommunications (mobile and land), insurance and financing (e.g., credit card policies) – include arbitration clauses, it comes as no surprise that class actions are no longer limited to state court litigations, but are now regularly seen in arbitration proceedings as

57 Id.
58 Id.
59 Id.
60 Id.
well."\(^{61}\) Most courts initially held, however, that class arbitration was only permissible where the parties’ arbitration agreement explicitly allowed it.\(^{62}\)

Once it was accepted that class arbitration could be a valid form of arbitration proceedings, the question arose under which circumstances these collective proceedings would be available. Express consent apart, can a court or an arbitrator infer consent to class arbitration from an arbitration clause that is silent on this matter? The answers to this question show the tension between, on the one hand, the respect for the parties agreement and the corporations’ wish to avoid class litigation and, on the other hand, the need to ensure the availability of effective relief and the protection of rights of weaker parties. Before the *Bazzle* decision, which is the subject of the next subsection, the majority of federal circuit courts had held that arbitrations could not be consolidated in the absence of an express agreement among all the parties.\(^{63}\) Other courts, especially in California, had held, however, that the unavailability of class proceedings was unconscionable.\(^{64}\) It is in this context that the Supreme Court decided *Bazzle* and paved the way for a widespread use of class arbitration.

**B. The Establishment and Development of Class Arbitration**

1. *Bazzle* and its Aftermath: the Establishment of Class Arbitration

   - *The Bazzle Decision: Silence has to be Interpreted in Favour of Class Arbitration*

   As explained above, “[I]n recent years, arbitration has become increasingly favored by courts [and] has been described as ‘sweeping across the American legal landscape… fundamentally reshaping the manner in which disputes are resolved,’”\(^{65}\) and consequently courts turned to class arbitration to compensate the negative consequences of this evolution. The exact conditions for the availability of class arbitration remained, however, unclear for quite a while. Although arbitrators are benefitting from a large degree of deference by the courts, they have found difficulties in deciding whether or not, under state and federal arbitration law, an arbitration agreement being silent on the issue of class arbitration should

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\(^{62}\) Gary Born, *Parties to International Arbitration Agreements*, Chapter 9, F. Class Arbitrations, pp. 422-23.


\(^{64}\) Id. p. 350.

be construed as authorizing this type of proceedings.\textsuperscript{66} The question of whether class arbitration is available is easy to answer if the arbitration provision clearly mentions this option. In such a case, arbitrators honor the express wish of the parties. In the face of silent provisions which neither authorize nor prohibit class arbitration, courts have, however, been torn between their power to resort to any procedural tool available to courts, such as collective relief, and their respect for arbitration as a business tool deployed to discourage consumer-friendly procedures. They have, as a result, issued a wide range of decisions regarding this issue spanning everything from outright prohibition\textsuperscript{67} to acceptance\textsuperscript{68} of class action arbitration. While the reasoning underlying the prohibition of class arbitration in case of a silent agreement was to respect the parties’ wishes and the business interests of the corporations involved, other courts found that “compelling individual arbitration would force individuals already straitjacketed by an industry-wide practice of arbitration agreements to fight alleged improprieties at an exorbitant economic cost” and that the effective protection of fundamental interests would accordingly be impaired.\textsuperscript{69} This division of the courts has been, and still is today, characteristic of the debate about the use of class arbitration to compensate for the alleged risk of the abuse of statutory rights.

In \textit{Green Tree Financial Corp. v. Bazzle}, the United States’ Supreme Court reviewed a decision by the Supreme Court of South Carolina\textsuperscript{70} and finally issued its first opinion regarding the controversial issue discussed above. The Supreme Court took position in favour of class arbitration on June 23, 2003 by deciding that, even in cases falling under the scope of the FAA, state law governs whether the parties’ agreement permits or forbids class arbitration when the agreement is silent and that moreover, the threshold question of contract interpretation of whether or not the arbitration agreement is silent on the question of class arbitration, should be decided by the arbitrators and not by the courts.\textsuperscript{71} Justice Breyer, writing for the majority, arrived at this conclusion by noting that the parties had definitely agreed on arbitration, and that the only remaining question was on what kind of arbitration\textsuperscript{72} – a procedural question that has be to be decided by the arbitrators and not the courts. Justice Stevens, concurring and dissenting in part, expressed the opinion that “there is nothing in the Federal Arbitration Act that precludes either of these determinations”, while Justice Thomas,
writing a separate dissent, expressed the view that the FAA does not apply to proceedings in state court and that consequently, the FAA cannot be a ground for pre-empting a state court’s interpretation of a private arbitration agreement.\(^{73}\)

The Supreme Court had thus decided the controversy between the lower courts in favour of class arbitration in case the agreement is silent and had prepared the way for a widespread use of this procedural tool for the protection of statutory rights of weaker parties against their abuse by economically more powerful actors. The *Bazzle* decision “created the platform for arbitral tribunals to permit class arbitrations”\(^{74}\) and, accordingly, the balance between the protection of statutory rights and pro-business oriented arbitration had found an equilibrium through the use of class arbitration.

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**The Aftermath of Bazzle: Institutions and Courts Adapt**

As soon as the Supreme Court had given the green light to class arbitration proceedings in the *Bazzle* decision, arbitration associations and courts followed suit and adapted the judicial and regulatory landscape to this new development. In fact, just a few weeks after the decision in which the Supreme Court decided that where an arbitration agreement was silent regarding the availability of class action arbitration, the arbitrator, and not the court, must decide whether class relief is permitted, the American Arbitration Association, (the “AAA”), issued a new policy on class arbitration: Its Supplementary Rules on Class Arbitration. These rules are very similar to the Federal Rule of Civil Procedure 23.\(^{75}\)

Soon afterwards, JAMS, another commercial arbitral institution, also published rules for actions similar to the federal ones,\(^{76}\) the JAMS Class Action Procedures.\(^{77}\)

The AAA’s Policy states that, in light of the *Bazzle* decision: [T]he American Arbitration Association will administer Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.\(^{78}\) Under the AAA Rules on class arbitration, the class arbitration process is divided into three phases to permit at the end of each phase the possibility of a stay thus guaranteeing the fairness of the proceedings. The stay allows the

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\(^{73}\) *Id.*


\(^{76}\) *Id.* p. 304.

\(^{77}\) *Id.*

parties to seek judicial approval or disapproval of the decision by the arbitrator if they find it necessary.\(^{79}\) The first phase is the Clause Construction Award Phase during which the arbitrator decides whether the arbitration clause authorizes class proceedings. Then follows the Class Determination Award Phase and finally the Final Award Phase.\(^{80}\) What is interesting is that the AAA decided to make the filings and hearings in class arbitration proceedings public, unlike most arbitration proceedings, which are normally confidential. The association wanted to ensure that all members of the putative class could monitor the proceedings.\(^{81}\) By rendering the proceedings public and providing the parties with opportunities to ask for judicial approval, the AAA tried to avoid ethical problems regarding the special character of class arbitration proceedings. Moreover, the fact that the class action arbitration procedures administered by the AAA are public makes it possible to obtain statistical information about the AAA’s experience with class arbitration: Since 2003 the AAA has administered over 300\(^{82}\) class arbitrations. “The impressive docket of [class] arbitration proceedings administered by the AAA confirms this development.”\(^{83}\) The docket can be found on the website of the AAA.\(^{84}\)

The AAA did not only issue rules applying to class arbitration after \textit{Bazzle} but did, in fact, follow its pro-class arbitration holding very closely: As of August 2008, sixty-seven arbitrators or panels in arbitrations being administered under the AAA’ class arbitration rules have issued clause construction awards and in every single case except two, the arbitrator or tribunal held that a silent clause permitted class arbitration.\(^{85}\)

Concerning the authorization of class arbitration in cases in which the agreement expressly prohibits class arbitration, an issue addressed in the next subsection, the AAA took position in favour of the enforcement of class arbitration waivers on the grounds that this issue had not been settled and courts seemed to consider it to be a gateway question that had to be addressed by the courts and not the arbitral institutions.\(^{86}\) JAMS had, however, stated at first that it “[u]nequivocally takes the position that it is inappropriate for a company to restrict the right of a consumer to be a member of a class action arbitration or to initiate a class action arbitration.”\(^{87}\) This meant that JAMS refused to enforce class arbitration waivers in the

\(^{79}\) Cindy Fazzi, \textit{AAA Files Amicus Brief in Stolt-Nielsen, 64 J. Disp. Resol. 4 (October 2009)}.

\(^{80}\) See Supplementary Rules for Class Arbitration (Website of the AAA; \url{www.adr.org}).

\(^{81}\) Cindy Fazzi, \textit{AAA Files Amicus Brief in Stolt-Nielsen, 64 J. Disp. Resol. 4 (October 2009)}.

\(^{82}\) \textit{Id.}


\(^{84}\) \textit{Id.}


\(^{86}\) \textit{Id.} p. 340.

arbitration proceedings it administered. After being ordered by a court to enforce such a 
waiver, JAMS decided, nonetheless, to rescind its policy of not enforcing class arbitration 
waivers.\footnote{Id.}

These cautious positions can be explained by the disagreement that still reigned 
among the lower courts concerning these issues – even after the \textit{Bazzle} decision – and that 
ultimately led to the new Supreme Court decisions discussed in this paper.

Not only the institutions, but also the courts followed the Supreme Court’s \textit{Bazzle} 
decision: \textit{Bazzle} became for example law of the state of Texas, when the “Supreme Court of 
Texas decided the question of “whether an arbitrator or a court should rule on class 
certification issues when the contracts at issue committed all disputes arising out of the 
agreement to the arbitrator” by stating that “such authority resides in the arbitrator” and held 
that the \textit{Bazzle} opinion was “directly on point.”\footnote{Fred Hagans, Jennifer B. Rustay, \textit{Class Actions in Arbitration}, 25 Rev. Litig. 293 (2006), p. 305.} “Other courts followed suit.”\footnote{Id.} As the 
Personnel of Texas, Inc. (“\textit{Pedcor}”)}\footnote{\textit{Pedcor}, 343 F.3d 355, 363 (5th Circ. 2003).} showed, federal courts also accepted and adopted the 
\textit{Bazzle} holding. The Fifth Circuit held that “arbitrators should decide whether class arbitration 
is available or forbidden,” and specifically rejected the “now-flawed premise that a District 
Court maintains the initial authority to order class arbitrations.” Instead, the \textit{Pedcor} Court 
held that \textit{Bazzle} effectively overruled Fifth Circuit precedent that placed the threshold 
decision whether arbitrations could be consolidated in the hands of the trial court.\footnote{Id. p. 306.}

However, they were still divided concerning issues that were left open by the Supreme 
Court or perceived as being insufficiently decided. The tensions between the pro-arbitration 
(in the bilateral/individual sense) and pro-business side and the advocates of consumer rights 
grew stronger once the availability of class arbitration was instituted, and new issues arose.\footnote{See Subsequent Section.} As “[o]ne has to keep in mind [corporations thought initially] that by introducing arbitration 
clauses in their standardized mass contracts, they had found a tool to avoid class actions.”\footnote{Gabrielle Nater-Bass, \textit{Class Action Arbitration: A New Challenge?}, ASA Bulletin, (Kluwer Law International 2009 Volume 27 Issue 4 ) pp. 671 – 690.}
2. The Tensions Persist: the Pro-Business Stance Regains Ground

- New Attempts to Avoid Class Proceedings After Bazzle: Class Waivers

After the holding of the Supreme Court in *Bazzle* that an arbitrator can induce consent to class arbitration from an arbitration clause that is silent on this issue, and the following expansion and institutionalisation of class proceedings in arbitration, the corporations which, in the first place, opted for arbitration to avoid collective relief, thought of new ways to avoid class arbitration rather than simply omitting this issue in their clauses.⁹⁵ “Corporate defendants detest class action litigation”⁹⁶ and their reasoning was that if silence could be interpreted as consent, the solution must be to explicitly exclude the availability of class arbitration from their arbitration clauses. Thus, corporations started including class action waivers in their contracts that precluded class arbitration in favour of individual arbitration proceedings. [M]any corporations that had, before *Bazzle*, simply used arbitration clauses to ward off class actions, refused to accept the inevitability of class procedures. […]M]ost continued to resist class treatment of any description. Their reaction to the *Bazzle* decision was to begin to incorporate explicit class action waivers into their contracts with consumers and employees.”⁹⁷

Class arbitration waivers are typically found “buried in an arbitration clause and mandate that a party bringing any claim against the other party to the contract do so on an individual basis.”⁹⁸ The language of a waiver excluding class arbitration and class litigation could be worded as follows: “If a party elects to arbitrate a Claim, the arbitration will be conducted as an individual action.”⁹⁹

Without any guidance by the Supreme Court on how to treat class arbitration waivers in arbitration clauses, the courts were split again.¹⁰⁰ The same tensions as those influencing the reactions regarding the interpretation of silent arbitration clauses, also governed the courts in this question: the protection of the weaker parties was again opposed to the interests of the

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⁹⁶ Id.
⁹⁹ Id, p. 7.
¹⁰⁰ Id, p. 8.
business community. Courts were confronted with the question of whether they should enforce class arbitration waivers and compel consumers to arbitrate their disputes individually and not as a class. Questions arose: “[W]hat happens when these individual consumers and employees buy a product or sign an employment contract containing an arbitration agreement that expressly prohibits class actions? Have they waived the right to bring a class-action suit or their constitutional right to a jury trial? Have they entered into a contract of adhesion thereby invalidating the arbitration agreement – or possibly the entire contract – on grounds of unconscionability?”

- The Courts are Split: The Supreme Court has to Arbitrate

Bernhard Hanotiau predicted in 2006 that “[g]iven the [Bazzle] decision of the United States Supreme Court, it is most probable that companies will quickly revise their arbitration agreements to provide that customers or employees agree to waive their right to proceed by way of class action in arbitration, or even in both arbitration and litigation.” He was right. “If one looks at the form contract [one] receives regarding [one’s] credit card, cellular phone, land phone, insurance policies, mortgage, and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions of class actions. Companies use these clauses to shield themselves from class action liability, either in court or in arbitration.” The question thus arose whether those waivers were enforceable or unconscionable and the opinions of the courts differed as to what should be the answer.

The dispute over class-action waivers has been fought particularly severely in cases involving consumer contracts. Szetela v. Discover Bank (“Discover Bank”) was one of the earliest and most important of these cases, deciding against the enforceability of class waivers. It held that the class arbitration waiver could not be enforced because it was not only procedurally, but substantively unconscionable as it precluded customers with small claims

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101 Id. p. 8.
106 Id.
from obtaining relief, thereby providing Discover Bank with “virtual immunity” from class actions.\textsuperscript{107} The Court held that:

“By imposing the clause on its customers, Discover [Bank] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any customers will seek legal remedies, and that any remedies obtained will only pertain to that single-customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored.”\textsuperscript{108}

The Court revoked the class arbitration waiver but upheld the arbitration agreement thus providing the plaintiffs with the opportunity to arbitrate as a class. Many other courts followed the analysis of the Court in Discover Bank.\textsuperscript{109} In Fensterstock v. Education Finance Partners (“Fensterstock”),\textsuperscript{110} Judge Kearse for the Second Circuit for example also held that the arbitration provision containing the class waiver was unconscionable, not only on substantive but also on procedural grounds. “A clause presented to the weaker party on a take-it-or-leave-it basis without the opportunity of meaningful negotiation, is under California law, oppressive, and hence satisfies the requirement that there be at least a minimum showing of procedural unconscionability.”\textsuperscript{111} The Court also considered the clause to be substantively unconscionable because under California law it is “substantively unconscionable and intolerable as a matter of public policy to permit a party with superior bargaining power to use class action or class arbitration waiver clauses to insulate itself from remedial action when it is alleged to have ‘deliberately cheated large numbers of consumers out of individually small sums of money.’”\textsuperscript{112} The Eleventh Circuit also invalidated a class arbitration waiver in Kristian v. Comcast Corp. (“Comcast”)\textsuperscript{113}: It considered that the waiver, if enforced, would effectively preclude subscribers of Comcast cable from asserting low-value claims, “allowing Comcast to engage in unchecked market behaviour that may be unlawful.”\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{108} Id. p. 81.
\item \textsuperscript{110} Fensterstock, 611 F.3d at 140.
\item \textsuperscript{111} Alan S. Kaplinsky, Mark K. Levin, Martin C. Bryce, \textit{Arbitration Developments: Has the Supreme Court Finally Stepped In?}, 66 Bus. Law. 530 (2010-2011), pp. 530-31.
\item \textsuperscript{112} Id. p. 531.
\item \textsuperscript{113} Comcast, 446 F.3d 25, 54 (1st Cit. 2006).
\end{itemize}
Circuit resorted again to the same doctrine – of unconscionability – in Ting v. AT&T – to revoke a class arbitration waiver. The First Circuit, on the other hand, refused to enforce a class arbitration waiver based on the Vindication of Rights Doctrine and not based on unconscionability grounds. Indeed, the First and the Second Circuits have resorted to the statutory rights doctrine and not to unconscionability in order to invalidate class arbitration waivers.

Other Circuits have, however, decided to enforce class arbitration waivers – at least under certain circumstances. The U.S. Court of Appeals for the Third Circuit for example enforced a class action waiver in Kanef v. Delaware Title Loans, Inc. Applying Pennsylvania law, the Court held that despite the small sum in question, the arbitration agreement containing the class arbitration waiver was not unconscionable. Equally, the Eighth Circuit did not find unconscionability in an arbitration agreement containing a class waiver under Missouri law and enforced it in Cicle v. Chase Bank. “[W]here other courts found the contracts to be procedurally unconscionable because they were contracts of adhesion, the Eighth Circuit refused to label the contract procedurally unconscionable simply for that reason. The Court noted that adhesion contracts are standard in today’s business and finding them to be unconscionable or require individual negotiation to make them enforceable would bring much of commerce to a screeching halt. Without more evidence of coercion on the part of Chase, the Court was not willing to find procedural unconscionability.” Moreover, the Court refused to find substantive unconscionability as it found that Cicle’s cost information was only speculative and did not prove that it was impossible to arbitrate bilaterally.

115 Id.
116 Id.
121 Ruthmann Elder, Mis-Concepcion About Arbitration: A Critical Analysis of AT&T Mobility LLC v. Concepcion, p. 11.
122 Id. p. 11.
II. The Supreme Court’s Restriction of the Availability of Class Arbitration
Encounters Harsh Criticism: The Balance is Disturbed

A. The Supreme Court Sides with the Pro-Business Section:

1. By Reinterpreting the Meaning of Silence and Waivers

- Of Silence: Stolt-Nielsen

Despite the interpretation of the Bazzle decision as being in favour of class arbitration, the question of whether or not an arbitration agreement that is silent on the issue of class arbitration should be construed as authorizing it, was perceived as left unanswered.\(^{123}\) The majority had only decided that this question depended on state law and had to be answered by the arbitrator depending on the individual facts of the case and the agreement in question. It did not provide a substantive solution. This led to disagreement among the courts regarding this issue: The Supreme Court had to arbitrate.\(^{124}\)

In Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.\(^{125}\) (“Stolt-Nielsen”), the Supreme Court finally gave its view on this question, which was, however, considered surprising as it differed from the stance the Court had taken in Bazzle\(^{126}\). The Supreme Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The question presented to the Court was “whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the FAA”\(^{127}\) or more precisely “whether vacatur of the arbitration award was appropriate because the arbitrators ‘exceeded their powers’ under the arbitration agreements”.\(^{128}\)

AnimalFeeds International Corp., customers of the shipping company Stolt-Nielsen S.A., brought a federal class action suit against this company and others, claiming that they were trying to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws. The suit was brought on behalf of a class of all purchasers

\(^{124}\) Id. at p. 152.
\(^{125}\) 559 U. S. (2010).
\(^{126}\) Id. at p. 155.
\(^{128}\) Id.
of parcel tanker transportation services from Stolt-Nielsen during a period from 1998 until 2002. The suit was filed at first in the United District Court for the Eastern District of Pennsylvania but then transferred to the Connecticut District Court. The Second Circuit later found that the parties’ transactions were governed by contracts containing valid arbitration clauses and the parties’ thus eventually agreed to arbitrate the antitrust claims asserted by AnimalFeeds. The parties agreed that the arbitration clauses were silent on the issue of class arbitration and thus the arbitral panel, basing its decision on Bazzle and other awards issued since the Bazzle decision, found that class arbitration was permitted and decided in favour of AnimalFeeds. Disagreeing with this decision, Stolt-Nielsen petitioned the Federal District Court of the Southern District for New York to vacate the Clause Construction Award. This Court decided in favour of Stolt-Nielsen and vacated the award, holding that the arbitrators had acted in manifest disregard of the law when they construed a silent agreement to authorize class arbitration. As a result, AnimalFeeds appealed to the Second Circuit, as a result, and the Second Circuit held that the arbitration panel did not act in manifest disregard of the law and reversed the decision of the District Court. For the Second Circuit, the ‘Manifest Disregard’ doctrine allows to vacate an award only on the ground that ‘the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless wilfully flouted the governing law by refusing to apply it. It concluded that this was not the case concerning the award in question.

The Supreme Court, however, reversed the Second Circuit’s decision and vacated the award. While it acknowledged that the interpretation of an arbitration agreement is generally a matter of state law, it held that the FAA imposed certain rules of fundamental importance, including the basic concept that arbitration “is a matter of consent, not coercion” and that arbitrators, while enforcing an agreement to arbitration or construing an arbitration clause, must “give effect to the contractual rights and expectations of the parties”. In the opinion of the Supreme Court this meant that, under the FAA, parties may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to this possibility. The Court held that while some procedural questions can be presumed implicitly from an agreement to arbitrate, class arbitration changes the nature of arbitration to such a

130 Id.
131 Id. p. 1112.
132 Id. p. 1115.
133 Id. p. 1116.
degree that it cannot be inferred without explicit consent by both parties. For these reasons the Court decided that the panel exceeded its powers by imposing class procedures based on policy judgments rather than the arbitration agreement itself and that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the “changes brought about by the shift from bilateral arbitration to class-arbitration” are “fundamental”.\textsuperscript{135} In the view of the Supreme Court, the Second Circuit Court “had erred, because it had read Bazzle to require that the arbitrators, rather than the court should decide if a silent arbitration clause permits an arbitration to go forward as a class arbitration”.\textsuperscript{136} The Stolt-Nielsen Court went on to state that when an arbitration clause is silent on a question, “an arbitrator must find and identify a rule of law to supply the answer to that question”.\textsuperscript{137} The Court concluded that “the arbitrators had, instead, answered the question based on their own view of public policy, and found such a determination inconsistent with the rule that ‘courts and arbitrators must give effect to the contractual rights and expectations of the parties’”.\textsuperscript{138}

“In [Stolt-Nielsen], the Supreme Court thus substantially distanced itself from the holding in Bazzle”\textsuperscript{139}. The Court decided that silence was not enough to deduce party consent to class arbitration. It noted that Bazzle “did not establish the rule to be applied in deciding whether class arbitration is permitted” and stated that it was only in this case that the question would be answered: a silent arbitration clause cannot be construed to permit class arbitration proceedings.\textsuperscript{140}

- **Of Waivers: Concepcion**

After having decided in Stolt-Nielsen that express consent and not only silence is needed to authorize class arbitration proceedings, the Supreme Court held in AT&T Mobility v. Vincent Concepcion (“Concepcion”)\textsuperscript{141} in the spring of 2011, that the FAA pre-empts the Californian Discover Bank Rule, a judicial doctrine that allows courts to hold class arbitration

\textsuperscript{135} Stolt-Nielsen, 559 U. S. (2010).
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{140} Stolt-Nielsen, 559 U. S. (2010).
\textsuperscript{141} Concepcion, 131 S. Ct. 1740 (2011).
waivers in consumer agreements unconscionable. It thus decided the controversy regarding the enforceability of class arbitration waivers in favour of individual arbitration.

The Concepcions entered into a cellphone service contract with Cingular Wireless in February 2002. The contract included an arbitration clause that required all claims be brought in the party’s individual capacity, and not as a plaintiff or a class member in any purported class or representative proceeding. AT&T Mobility LLC (Hereafter “AT&T) acquired Cingular three years later and assumed all of its consumer contracts. Vincent and Liza Concepcion signed a contract with AT&T after seeing an advertisement promising free phones but felt deceived when they had to pay $30.22 in sales tax per phone in spite of the phone being advertised as free. They thus filed suit for fraud in the United States District Court for the Southern District of California where the suit was consolidated with a putative class action suit against AT&T based on the same claims by other plaintiffs.

AT&T referred to the contracts and asked the Court to compel arbitration based on their language. The arbitration clauses at issue contained, however, a class arbitration waiver and the Concepcions thus argued that the agreements were unconscionable under California law. Although the Californian trial court noticed the particularly consumer-friendly provisions of the arbitration clauses at issue, it found that the Discover Bank Rule (explained in a previous subsection) applied to this case and held the clauses to be unconscionable thus refusing to compel individual arbitration proceedings. The Ninth Circuit stated that AT&T had not shown that bilateral arbitration was an adequate substitute for the availability of class actions and affirmed the trial court’s decision. It, moreover, added that the FAA did not pre-empt the Discover Bank Rule.

The Supreme Court disagreed. It held in a 5-4 decision that the FAA pre-empts the Discover Bank Rule which is holding arbitration agreements that preclude class arbitration unconscionable, and revokes them for that reason. This rule allegedly discriminates against arbitration proceedings and harms the pro-arbitration policy favoured by Congress. It,

\begin{itemize}
    \item[143] Id. p. 274.
    \item[144] Id.
    \item[145] Id.
    \item[146] Id.
    \item[147] Id. p. 275.
    \item[148] Id.
    \item[150] Id.
    \item[151] Id.
\end{itemize}
therefore, supposedly does not fall under the Savings Clause of Section 2 of the FAA.\textsuperscript{152} Although the Rule can be argued to apply in the same way to class action and to class arbitration waivers and not to target arbitration agreements specifically, the Supreme Court held that the Savings Clause does not preserve state-law rules that interfere with fundamental attributes of arbitration and mandate specific procedures in arbitration agreements, requiring for example as in the present case, the availability of class arbitration.\textsuperscript{153} In the view of the Supreme Court, “the Discover Bank Rule disrupts the principal purpose of the FAA, to enforce arbitration agreements according to their terms, and therefore cannot be used to invalidate the arbitration agreement between the Concepcions’ and the mobile phone company.”\textsuperscript{154} “The Court stated that ultimately, parties choose arbitration over going to court because of its speed and efficiency, and both attributes are lost if the state forces class-arbitration on them.”\textsuperscript{155} Second, it argued that class arbitration requires procedural formalities that must be agreed to by contract and that state law cannot impose them on the parties without their consent.\textsuperscript{156} Because it stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress, the Supreme Court held California’s Discover Bank Rule to be pre-empted by the FAA and enforces the class arbitration waiver.

Within a short time period, the Supreme Court eliminated class arbitration, for practical purposes, in cases in which arbitration agreements are silent on this issue as well as when class proceedings are explicitly prohibited.\textsuperscript{157} It is necessary to analyze the underlying ways of reasoning of the different actors involved in order to understand what wide-ranging consequences these decision will have for the availability of class arbitration.

2. By ‘Killing’ Class Arbitration Proceedings

   - Through Stolt-Nielsen

In Stolt-Nielsen, the Supreme Court decided that the consent to class arbitration proceedings cannot be inferred from an arbitration agreement that is silent on this issue. “Stolt-Nielsen seems to signal the end of inferred class arbitration, at least in a commercial, non-consumer setting. A court cannot compel class arbitration without a contractual basis for

\textsuperscript{152} Id.
\textsuperscript{153} Id. p. 276.
\textsuperscript{154} Id. p. 277.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} This is the combined result of Stolt-Nielsen and Concepcion.
concluding that the parties agreed to it, and presumably no potential defendant would agree to it.158 In fact, the wide use of class arbitration resulted of the arbitrators’ willingness to induce consent to class arbitration procedures from silent clauses.159 This now seems to have been precluded by the Supreme Court if the arbitrator does not want to see his award vacated in the same way as the arbitrator who decided the Stolt-Nielsen case.

Class relief is particularly useful and necessary in consumer, labour or antitrust law cases – in fields in which a great number of individuals have the same low-value claims.160 Then again, it is in these fields that it has become common to insert arbitration clauses into the adhesion contracts exploiting the consumers’ unequal bargaining power and resulting inability to negotiate.161 Corporations have no interest at all in including the option of class arbitration in their contracts, and as they are the ones writing the contracts without a say for the consumers, it is highly unlikely that an adhesion contract ever mentions a hint to class arbitration.162 Consequently, most adhesion contracts are silent on the issue of class arbitration. This means that while the holding in Bazzle led to class arbitration being widely available, Stolt-Nielsen and its view on the interpretation of silent arbitration clauses, effectively precludes the option of class arbitration from disputes arising out of adhesion contracts.163

“Where the Stolt-Nielsen decision leaves class arbitration is apparent from the Second Circuit decision in Fensterstock. […] After a careful analysis of the Stolt-Nielsen decision, the Second Circuit read Stolt-Nielsen ‘to foreclose an order compelling arbitration on a classwide basis in this case.’164 As understood by the Second Circuit, the Stolt-Nielsen court ‘concluded that since there was no agreement on arbitration on a class basis, the courts had no authority to compel arbitration on that basis.’165

159 See Section I. B. 1.
160 See Section I. A. 2.
161 See Section I. A. 2.
165 Id.
“The parties plainly did not agree that arbitration may be conducted on a classwide basis, and we do not see that an order for classwide arbitration can be premised on the Note’s severability provision. Excising the Note’s class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under Stolt-Nielsen we have no authority to order class-based arbitration.”

This case clearly demonstrates that Stolt-Nielsen, if interpreted by the lower courts as meaning that consent to class arbitration cannot be inferred from a silent arbitration agreement, as does the court in Fensterstock, the use of class arbitration will become a rare occurrence. “The Stolt-Nielsen decision has thus brought us back to where we were before Bazzle. The Bazzle court directed an arbitrator to decide whether a silent arbitration clause permitted an arbitration to go forward on a class basis. The Stolt-Nielsen Court has reversed direction, albeit without quite admitting that it is doing so.” After Stolt-Nielsen, arbitrators and courts will hesitate to interpret a silent clause to constitute consent to class arbitration proceedings. The situation could thus be resumed as follows: “Unless corporations give up on class action waivers, and begin to provide explicitly for class arbitration as preferable to trying a class action to a jury, the class arbitration device is likely to whither away when the current docket of cases is concluded.”

- Through Concepcion

As John M. Townsend mentions, the only possibility to save the current use of class arbitration despite the Supreme Court’s holding in Stolt-Nielsen would be for companies to explicitly include class arbitration proceedings in their arbitration clauses. This is, not only, as he says, very unlikely to happen, but, in fact, the opposite is true. Instead of agreeing to class arbitration proceedings, corporations are inserting waivers into their arbitration clauses explicitly precluding class relief. They do not trust that silence will be sufficient and thus make sure that their opposition to class arbitration is marked explicitly in their arbitration agreements. While these waivers had been susceptible to revocation based on the

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166 Id.
168 Id.
169 Id.
Unconscionability Doctrine or other defenses of contract law, the Supreme Court pronounced itself in favour of the enforcement of such waivers in *Concepcion*.172 Since this decision, class arbitration waivers in arbitration clauses – even in contracts of adhesion in consumer settings – have been enforceable and, consequently, class arbitration proceedings, as well as class litigation, are quasi-eliminated.173 Indeed, companies wanting to get rid of class proceedings are thrilled about this possibility and will not let it pass unnoticed: As Prof. Strong mentions, “AT&T has been heralded as marking the end of both class arbitration and class actions in the United States (since it is believed that the vast majority of corporate defendants will now use arbitration agreements in conjunction with class waivers to eviscerate class suits in both courts and arbitration).”174

Companies will impose arbitration clauses on consumers by including them in their adhesion contracts and thus bar potential plaintiffs from filing class action suits in courts by compelling them to arbitrate the disputes instead. Class arbitration, on the other side, will be prevented through class arbitration waivers, which, since *Concepcion*, will have to be enforced by courts and arbitrators.175

“Read broadly, the decision in [*Concepcion*] strikes a blow to the ability of consumers to bring suits against companies, both inside and outside of arbitration.”176 This consequence was even mentioned in the New York Times: “Though the decision concerned arbitrations, it appeared to provide businesses with a way to avoid class-action lawsuits in courts.”177 Prof. Brian T. Fitzpatrick was quoted by the same article saying that “[t]he decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements.” He considered *Concepcion* to be a “game-changer for businesses.”178 In fact, the result of *Stolt-Nielsen* and *Concepcion* will thus, not only be to prevent consumers from starting class proceedings, but for practical purposes, to prevent them from vindicating their rights at all.

172 See Previous Subsection.
178 Id.
B. General Perception and Consequences for the Respect of Statutory Rights

The decisions of the Supreme Court in *Stolt-Nielsen* and *Concepcion* have been interpreted by some as eliminating class arbitration procedures and have thus been widely criticized.\(^{179}\) They were, however, not only criticized for this result, but also for their allegedly false assumptions about the nature of arbitration and the flaws in their reasoning.\(^{180}\) While the importance of these decisions cannot be questioned, it is still interesting to analyze the criticism they receive.

1. General Perception and Critiques

   - *Misconceptions About the Nature of Arbitration Expressed in the Two Decisions*

   The response to the decisions of the Supreme Court in *Stolt-Nielsen* and *Concepcion* has not always been positive. Many were surprised by the majority’s view of the nature of arbitration and some authors\(^{181}\), as well as Justices\(^{182}\), overtly disagree with the decision and its reasoning.

   In *Stolt-Nielsen*, the Supreme Court stated that “[a]n implicit agreement to authorize class-action arbitration […] is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator”.\(^{183}\) In *Concepcion*, the Supreme Court advanced this argument even further, holding that class arbitration is opposed to the fundamental nature of arbitration envisioned by the FAA.\(^{184}\)

   Indeed, Scalia, writing for the majority, claimed that class arbitration was not a real form of arbitration in the sense contemplated by the FAA. In his opinion class arbitration needs more procedural formality, makes the process slower, more costly, and more likely to

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\(^{179}\) See Subsequent Section.

\(^{180}\) See for example George A. Bermann, *The Supreme Court Trilogy and its Impact on U.S. Arbitration Law*, 22 Am. Rev. Int’l Arb. 551 (2011), p. 568: “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.”

\(^{181}\) See Subsequent Section.

\(^{182}\) Justice Breyer dissenting from the majority opinion in *Concepcion*.


\(^{184}\) Id.
generate procedural morass than bilateral arbitration. He also noted that “class arbitration greatly increases the risk for defendants” by aggregating claims without providing the possibility of appeal and review. The majority described arbitration as being “poorly suited to the higher stakes of class litigation” and argued that, as class arbitration had not yet existed in 1925 when the FAA was enacted, the Federal Arbitration Act could not have envisioned it, thus concluding that class arbitration is not arbitration under the FAA. Colin Marks calls the approach of the majority the “Fundamental Attributes of Arbitration Approach” Under this approach, the focus is not on whether, on its face, the state is impermissibly treating arbitration differently from other procedures. Instead, what is important is the purpose of the FAA when it was enacted […] and what characteristics Congress envisioned an arbitration to have at that time.” This was the reasoning underlying the conclusion of the majority that state law rules such as the Discover Bank Rule, which require the availability of class arbitration, undermine the purpose of the FAA as they privilege a ‘bad’ form of arbitration (class arbitration) over the ‘real’ form of arbitration.

Justice Breyer wrote a dissent to the majority’s decision in Concepcion which Justices Ginsburg, Sotomayor and Kagan joined. The dissent’s criticism of Justice Scalia’s view of arbitration became clear through his question “Where does the majority get its contrary idea – that individual, rather than class, arbitration is a fundamental attribute of arbitration?”

Gary Born also deeply disagrees with the majority’s decision and criticizes it harshly: “Turning to the law, Justice Scalia’s opinion is profoundly misconceived and fundamentally misunderstands the arbitral process. Most importantly, Justice Scalia’s declarations about the supposed ‘fundamental’ character of arbitration, which is envisioned by the FAA, are both woefully inaccurate and dangerous: indeed, those declarations threaten the broader scope of U.S. arbitration law by suggesting that the FAA only protects a particular type of arbitration,” – the one envisioned by the FAA in 1925. Justice Scalia’s assertions about the fundamental nature of arbitration can be refuted one by one. First of all, there is no one single “archetype” of arbitration. On the contrary “arbitration has historically taken widely

185 Id.
186 Id.
187 Id.
190 For information on the Discover Bank Rule, See Section I. B. 2.
191 Justice Breyer dissenting from the majority opinion in Concepcion.
193 Id.
varying forms, in widely varying settings – ranging from institutional to ad hoc arbitration, from trade, commercial, religious and international to investor-state arbitration, ranging from documents only, on-line or quality arbitrations to arbitrations resembling trial court litigations.”¹⁹⁴ Moreover, arbitration does not have to be informal. The most important characteristic of arbitration is the parties’ procedural autonomy and procedural autonomy means that parties can decide for themselves if they want their proceedings to be formal or informal. Arbitration does not have to be informal to fall under the scope of the FAA.¹⁹⁵ Finally, there is “nothing in arbitration that limits it to small stakes. On the contrary, enormous disputes have always been, and still are, decided in arbitration.”¹⁹⁶

Nagareda criticizes Concepcion by mentioning that the “Court does not explain why the claim-enabling effect of the class mechanism – its capacity to ‘adjudicate the rights of absent parties beyond those already at hand’ – is game-changing for arbitration but merely incidental in litigation.”¹⁹⁷ He then, however, explains that this difference in the treatment of class litigation and class arbitration must be due to the need for enforcement of arbitral awards in foreign countries that might have objections on public policy grounds to class arbitration proceedings and might therefore refuse enforcement.¹⁹⁸ This reasoning is, however, contradicted by Prof. Strong who “takes the view that class awards issued out of the United States should receive the same presumption of international enforcement that is afforded to other awards under the New York Convention and national law, even in cases where the arbitration agreement is silent or ambiguous as to class treatment.”¹⁹⁹

The criticism addressed to the Supreme Court’s recent jurisprudence on arbitration is not limited to the assertions over the nature of arbitration. Other perceived flaws in the reasoning, and the change of policy direction have also attracted disapproval.

- Flaws in the Reasoning of the Two Decisions

Another critique addressed to the Supreme Court’s recent decisions on class arbitration concerns its change of policy direction between Bazzle on the one hand and Stolt-
Nielsen and Concepcion on the other.\textsuperscript{200} This inconsistency is alleged to make it hard for parties and lower courts to know which weight they should give to pronouncements of the Supreme Court on the interpretation of the FAA and, furthermore, to provoke an important waste of resources.\textsuperscript{201} “The erratic course of ushering in class arbitration in Bazzle, followed by largely or entirely ushering it out again a decade later in Stolt-Nielsen and Concepcion, is both an institutional embarrassment and a profligate waste of resources.”\textsuperscript{202} The new stance of the Supreme Court on the interpretation of the FAA and class arbitration makes it difficult to foresee what will happen with the numerous class arbitration proceedings currently pending.\textsuperscript{203}

Another commentator particularly lamented the false emphasis on party autonomy in the two decisions.\textsuperscript{204} “Indeed, the thrust of the Court’s class arbitration criticism is based on the idea that the defendants would not have willingly agreed to arbitrate if they knew they could be subject to the disadvantages of class proceedings. But contract autonomy is a two-way street.”\textsuperscript{205} Upholding a class arbitration waiver cannot be considered to respect the principle of party autonomy as, in most cases, the simple existence of the waiver demonstrates the lack of party autonomy of the weaker party. The Court’s reasoning thus lacks the necessary foundation and can be analyzed as “[prioritizing] economic liberty over sensible and socially desirable regulation.”\textsuperscript{206} The social consequences of the Court’s recent jurisprudence on class arbitration form, in fact, the cornerstone of the criticism it received.

2. The Perceived Consequences for the Public and the Protection of Individual Plaintiffs’ Rights

While the majority was criticized for its assumptions about the nature of arbitration and the flaws in the reasoning of the decisions, it was even more violently attacked for the result these decisions will have on the public and particularly on consumers and the protection of their rights. As seen above, the decisions of the Supreme Court in Stolt-Nielsen and Concepcion effectively eliminated class relief from consumer contracts and thus forced consumers to arbitrate the disputes arising out of adhesion contracts individually. This is

\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
perceived by many as depriving them of relief in general, as individual arbitration often enough, is not an option for an individual plaintiff with low-value claims.\textsuperscript{207}

- **The Consequences for Individual Plaintiffs**

“\textit{If mandatory arbitration catches on, it could wipe out years of progress in consumer protection.}”\textsuperscript{208} This warning, pronounced in the 1990’s has fallen on deaf ears and definitely been ignored by the Supreme Court deciding \textit{Concepcion}. In the words of Jean R. Sternlight “[i]t is highly ironic but no less distressing that a case with a name meaning conception should come to signify death for the legal claims of many potential plaintiffs.”\textsuperscript{209} In his opinion, “\textit{Concepcion} will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued […]and] opens the door for companies to pickpocket $10 dollars at a time from millions of consumers.”\textsuperscript{210} \textit{Stolt-Nielsen} and \textit{Concepcion} have put an end to the widespread use of class arbitration and the consequences of this result are perceived as being particularly negative for consumers.\textsuperscript{211} Why? Without the possibility to resort to class arbitration, consumers are often left without effective means to assert their low-value claims.\textsuperscript{212} This is due to several particularities of the situation of consumers who typically have limited financial means as compared to corporations.

The first characteristic of the consumers’ situation is the often extremely low value of their claims. Too small a sum is, however, not worth suing for, as the costs of pursuing such a claim individually, in arbitration or litigation would, in any case, be much higher than any potential recovery.\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{208} Daniel Higgenbotham, \textit{Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers}, 58 Duke L.J. 103 2008, p. 103.
\item \textsuperscript{210} Id. p. 2.
\item \textsuperscript{211} Jill Gross, \textit{AT&T Mobility and FAA Preemption}, Pace Law School, 13 March 2012, p. 2.
\item \textsuperscript{212} Colin P. Marks, \textit{The Irony of AT&T v. Concepcion} (Draft), Indiana Law Journal (Supplement), Forthcoming, p. 2: \textit{Concepción}: “In striking down the defense of unconscionability to class actions waivers as inconsistent with the purposes of the FAA, the majority opinion, has, in effect, denied a large swath of individuals the realistic opportunity to ever bring their claims, in arbitration or otherwise.”
\item \textsuperscript{213} Ruthmann Elder, \textit{Mis-Concepcion About Arbitration: A Critical Analysis of AT&T Mobility LLC v. Concepcion}, p. 27: “The cost of maintaining such an action may outweigh any recovery that individual might obtain.”
\end{itemize}
Accordingly, excluding the possibility to sue as a class through mandatory arbitration agreements including class arbitration waivers leaves the plaintiffs without access to justice and provides companies with the possibility to fraud individual consumers each for a small sum at a time. “Several scholars have demonstrated that class waivers, by rendering many valid claims economically unfeasible, have a disastrous impact on consumers’ abilities to prevent businesses from engaging in unfair and potentially illegal activities.” Professor Marc Galanter is one of the commentators criticizing such waivers. He makes the point that by increasing plaintiffs’ transaction costs, defendants can induce them to accept lower settlements or even drop their claims altogether. The problem is that, on the one hand, it is simply irrational for individual plaintiffs to bring small claims without the availability of class proceedings but that, on the other hand, “a company that has perpetrated small-dollar illegal acts against numerous consumers should not be permitted to escape liability simply because it would be irrational or impossible for any single individual to bring the claim.”

The other particularity of the situation of individual consumers facing mandatory arbitration is their lack of information as to the merits or the claim or the nature of arbitration. Consumers often don’t notice the fraud or do not know that the defendant’s conduct is illegal and that they could bring a claim to recover their losses. Considering the small amounts of most potential claims in consumer disputes, plaintiffs don’t find it worth their time to even inquire whether or not they would have a case against the defendant. AT&T customers prove this statement to be true: Of the 70 million customers AT&T had at the time, only 570 filed demands for arbitration during the time the arbitration clause in question in Concepcion was in effect. Class proceedings, on the contrary, make sure that putative class members are notified of the potential violation of their rights and given the opportunity to opt in or out of the class and are, therefore, a way of remediating the lack of information individual consumers face regarding their rights.

Moreover, class proceedings attract lawyers working on a contingency fee basis and, consequently, consumers are provided with legal advice they would be unable to afford.

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217 Id.
218 Id. p. 88.
219 Id.
By cumulating a large number of small claims, class proceedings allow the consumers to form a much higher claim, thus justifying the legal costs a suit entails. Justice Breyer’s question in his dissent to the holding of the majority in Concepcion, “[w]hat rational lawyer would have signed on to represent the Concepcons in litigation for the possibility of fees stemming from a $30,22 claim?”\(^{222}\), rightly shows that legal costs would outweigh any possible recovery of a low-value claim. Class proceedings thus provide a means of individual compensation that would otherwise not be available to consumers.\(^{223}\)

While this analysis concentrates on consumers, the same is true for example concerning employees. “[W]hen the disputes involve high stakes and high costs, arbitration can be particularly unfair to even employee and consumer plaintiffs. For example, expensive investigations may be necessary for plaintiffs in unfair termination cases who often have to do in depth examinations of potential defenses to dig out what an employer’s true motives may have been for a firing.”\(^{224}\)

The enforceability of class waivers has thus important negative consequences for individual plaintiffs. These are, however, not limited to those but also concern the public as a whole.\(^{225}\) “Corporate respondents find representative actions both risky and expensive, […] and] business interests are therefore inclined to do everything possible to minimize or eliminate class relief in all possible forms […]. Corporate concerns do not always align with larger social interests, and there are numerous reasons why abandoning or curtailing the class mechanism in arbitration would be problematic as a matter of U.S. law and policy.”\(^{226}\)

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**The Consequences for the Public**

The disappearance of class proceedings (in litigation and arbitration), through class waivers in arbitration clauses, and its replacement by bilateral arbitration does also have negative effects for the public as a whole and not only for those individual plaintiffs who are unable to vindicate their rights. Indeed, “it does appear appropriate to view class arbitration as playing some sort of regulatory role, since they are used in both the U.S. and Canada as a

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\(^{221}\) Id. p. 27.

\(^{222}\) Justice Breyer dissenting from the majority opinion in Concepcion.


\(^{225}\) See below.

means of relieving public entities of the burden of enforcing certain public laws.”

Class proceedings “serve as a deterrent for corporate misconduct.” If corporations know that plaintiffs are unable to sue as a class and are therefore likely to abandon their actions, they know that they won’t be held liable for fraud up to a certain ceiling, and have thus no incentive to follow the law. Corporations use class waivers to avoid liability for their conduct and accordingly, the Court is harshly criticized for ‘taking the side’ of the corporations in this matter.

The deterrent function of class arbitration does not only result from the fact that a lot of plaintiffs would otherwise not be able to bring their claims at all but also from the fact that “many types of relief can be afforded only on a group basis.” Paying off some plaintiffs’ arbitrations individually does not have the same effect as large punishments attacking the whole policy of the corporation. Moreover, the public character of class arbitration, as opposed to bilateral arbitration proceedings, also contributes to the benefits of class relief for the public as it has an informative function for other potential plaintiffs.

It is undisputed that class arbitration is not a perfect mechanism and can be justly criticized. Nevertheless, “[c]lasswide arbitration as Sir Winston Churchill said of democracy, must be evaluated not in relation to some ideal but in relation to its alternatives,” and the alternatives to class arbitration – as demonstrated above – are worse.

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228 Ruthmann Elder, Mis-Concepcion About Arbitration: A Critical Analysis of AT&T Mobility LLC v. Concepcion, p. 27.
III. The Need for the Protection of Statutory Rights Motivates the Circumvention of the Restriction of Class Arbitration: The Balance is Reinstated

Before going into the details of how courts proceeded to circumvent and distinguish *Stolt-Nielsen* and *Concepcion*, it is important to mention their strong willingness to do so. As explained above, the consequences of these decisions were perceived to harm the protection of statutory rights, a result many lower courts were unwilling to cause. And where there’s a will, there is a way. The following section will thus analyze the means lower courts have been employing to evade the Supreme Court’s decisions. While many of the courts resort to several of the arguments that will be mentioned below, it is, nevertheless, helpful to categorize and distinguish them in order to be able to follow the underlying ways of reasoning.

A. Distinguishing Facts, Policies and State Defenses

1. Factual, Procedural and Policy Distinctions

- Factual Distinctions

*Stolt-Nielsen* was interpreted to signify that consent to class arbitration cannot be deduced from an arbitration agreement that is silent on this issue and that explicit consent is needed for class arbitration to be available. While this was perceived by many as meaning that unless there is explicit language in the arbitration clause providing for class proceedings, courts or arbitrators cannot authorize it. However, lower courts disagreed with this conclusion and distinguished *Stolt-Nielsen*. Several commentators and authors have written about these ways to evade the Supreme Court’s holding.

Justice Ginsburg, dissenting from *Stolt-Nielsen*, was the first one to say that the Court’s decision should not actually be read as meaning that explicit agreement is needed to make class arbitration available to the parties: “[T]he Court does not insist on express consent to class arbitration. Class arbitration may be ordered if “there is a contractual basis for concluding that the parties agreed to ‘submit to class arbitration’”*234 While no explicit wording

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thus seems to be necessary, the question arises of how to define a contractual basis that would be sufficient to provide for class arbitration proceedings.

One author stated that it might be possible to look at the availability of class arbitration at the time the parties concluded their contract in order to deduce their expectations as to the availability of class arbitration. If the arbitration clause was drafted before the *Bazzle* decision and the subsequent expansion of class arbitration, like it was the case in *Stolt-Nielsen*, the parties would be unlikely to have counted on the availability of class arbitration by leaving the agreement silent on this issue. If, however, the agreement was drafted after *Bazzle*, then class arbitration should have been on their minds and if they had wanted to exclude it, they could have done so. Another commentator mentioned the possibility of looking at the arbitration rules and the substantive law chosen by the parties. If the parties opted for the AAA arbitration rules and/or a substantive law allowing class relief, implicit consent could be deduced from this choice. “Arguments of implied consent may be seen on the basis of the parties’ selection of institutional rules, such as the AAA’s ‘Supplementary Rules for Class Arbitrations’, authorizing class arbitration proceedings (although, the same rules provide that ‘the arbitrator shall not consider the existence of these Supplementary Rules… to be a factor either in favor of or against permitting the arbitration to proceed on a class basis’ (Rule 3).” Yet another author stated that the interpretation of a silent arbitration clause could depend on the legal culture of the parties. If they come from a jurisdiction that frequently allows class proceedings, the parties would not be able to argue that they did not think of this possibility and therefore should have excluded it if they had wanted to do so. The term “All disputes” could thus have very different meanings depending on the legal culture of the parties.

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236 *Id.*: “The new majority in Stolt-Nielsen leaves no doubt that Stolt and AnimalFeeds agreed to the “silent” arbitration clause at a time before Bazzle had been decided and, hence, before the possibility of class arbitration was generally known. As a result, class arbitration could not have been within their expectations. What guidance does Stolt-Nielsen then have for interpretation of arbitration agreements entered into post-Bazzle? Can it be assumed that parties to such later agreements do contemplate class arbitration even if their contract contains no express reference to it? Or can one argue that class arbitration was not within their contemplation because Stolt-Nielsen itself seemed to call for more than silence?”
238 On the ground that they offer class arbitration rules.
240 *Id.*
242 *Id.*
agreement between the parties on whether class arbitration should be available. All in all, numerous authors seem to agree with Prof. Strong’s statement that “Stolt-Nielsen is better read as holding that consent to class procedures can be demonstrated implicitly.”

Sutter v. Oxford Health Plans LLC (“Sutter”) is a famous case circumventing Stolt-Nielsen on grounds mentioned above. In this case, the arbitrator had decided that the arbitration clause was very broad, and that it embraced “all conceivable court actions, including class actions.” Since “all such disputes” were to be arbitrated, that included class disputes. The Third Circuit Court of Appeals resorting to the deferential standard of review applied to arbitral awards, upheld the arbitrator’s award and decided that no explicit agreement was necessary for class arbitration to be an option for the parties. On the contrary, intent was said to be implied from the language of the contracts and other sources. “Judge Fuentes stated, what matters is the intent of the parties, which can be determined from contractual language or other appropriate sources.” In the Court’s opinion, the circumstances in this case were, moreover, much larger and distinct from Stolt-Nielsen, as the parties in this case did not agree on their arbitration agreement being silent on the issue of class proceedings.

The circumstances of the Stolt-Nielsen case were, indeed, special: The parties explicitly agreed that their arbitration clause was silent on the question of whether class arbitration should be allowed. The Sutter Court was not the only one noting the important difference between cases in which parties agree on the silence of their clauses and cases in which they disagree. Other courts could also resort to this particularity of Stolt-Nielsen to distinguish the case. They could decide, as the Third Circuit, that the holding of Stolt-Nielsen only applies to cases in which the parties equally agreed on their clause being silent and decided that, if this is not the case, the judges would have discretion to have a look at other sources to find an implied agreement on the availability of class arbitration.

245 F.3d (3d Cir. 2012).
247 Id.
248 Id.
249 Id.
252 Peter Phillips, Third Circuit Permits Class Arbitration, Distinguishes Stolt-Nielsen, Business Conflict Blog,
Laryssa Jock & others v. Sterling Jewelers, Inc., (“Sterling”),253 the Second Circuit adopted this exact reasoning. In this case the parties did not agree but disagreed on whether their agreement was silent on class arbitration, and the court therefore held that the circumstances of this case differed from Stolt-Nielsen thus distinguishing its holding.254

Another way of distinguishing Stolt-Nielsen from other cases was to mention that Stolt-Nielsen concerned a dispute between two corporate parties and not a contractual relationship arising out of an adhesion contract.255 Lower courts could thus argue that the holding of Stolt-Nielsen cannot be transposed to consumer or labour disputes in which the availability of class arbitration is much more crucial.256

In Concepcion the Supreme Court held that class arbitration waivers are enforceable – even in a consumer dispute.257 This decision can be distinguished from other cases on two main factual grounds: In this case, the provisions of the arbitration agreement were extremely consumer-friendly, thus rendering the availability of class arbitration almost unnecessary, as parties were still able to vindicate their rights without it.258 Lower courts could thus hold that the holding of Concepcion should be limited to cases in which the provisions of the arbitration agreement are equally positive for consumers and that it does not apply to cases in which consumers would remain without relief should class arbitration be found to be excluded.259 In Re Checking Account Overdraft Litigation260, the U.S. District Court for the Southern District of Florida found arbitration agreements with class action waivers to be unenforceable on substantive unconscionability grounds despite Concepcion.261 It distinguished the character of the two waivers and found the provisions in Re Checking Account “to be overly oppressive and one-sided in favor of the banks. It was clear from the order that the arbitration agreements the banks used did not contain the kind of consumer-
friendly provisions that were lauded by the Supreme Court in *Concepcion*, such as paying for all costs for non frivolous claims by its customers, holding arbitrations in the country where the customer was billed, allowing the parties to opt to bring a claim in small claims court in lieu of arbitration, allowing arbitration by telephone or based on submissions for claims under $10,000, and allowing arbitrators to award any form of individual relief, such as an injunction or punitive damages.”

Moreover, there is the possibility for lower courts to challenge the language of the waiver. In *NAACP of Camden County East v. Foulke Management Corp.* (“*NAACP*”), New Jersey’s highest court invalidated for example an arbitration agreement on the grounds that it was too confusing, too vague, and too inconsistent to be enforced.

- **Strategic Judging: Distinctions Based on Political Analysis**

*Concepcion* was decided with a 5-4 majority, which as such does not increase the credibility of the decision’s holding. The majority was not only tight but, in addition to this, it was divided. Indeed, Justice Thomas still disagrees with the holding in *Southland* that the FAA is applicable in state courts and interprets the FAA differently. This could have the consequence that *Concepcion*’s holding could be restricted to federal courts and would not apply in state courts, as Justice Thomas might be dissenting from such a case thus depriving the Court of a majority that would be opposed to the use of class arbitration. State courts, fully aware of this possibility might engage in strategic judging and evade *Concepcion* in favour of their view of public policy and the availability of class arbitration. “[G]iven the penchant of courts to engage in strategic judging, *Concepcion* will only be as strong as its weakest link.”

“Put more starkly, state courts must be fully aware that the Supreme Court – as currently constituted – will not reverse any of their decisions in which they continue to apply rules similar to those struck down in *Concepcion.*” This implied limitation of *Concepcion* to state courts has become apparent already when a California state court noted in

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262 *Id.*
263 *Id.*
265 Justices Breyer, Ginsburg, Sotomayor and Kagan dissented from the majority opinion.
266 Justice Thomas only concurred with the 5 to 4 majority.
268 *Id.* at p. 14.
270 *Id.*
Hartley v. Superior Court\textsuperscript{271} “the possibility that Justice Thomas’ continued unwillingness to join decisions resting on Southland might limit the applicability of Supreme Court decisions that include Justice Thomas in the majority.”\textsuperscript{272}

State courts did, however, not only analyze whether Concepcion might be inapplicable in state courts but also if Concepcion’s holding might be limited to state contract defense rules as broad as the Discover Bank rule, thus distinguishing other state law rules.\textsuperscript{273}

2. The Distinction Between Different State Law Defenses

Some state courts have proven a surprising willingness to limit the applicability of the recent Supreme Court decisions on class arbitration, which causes consequences that, as a matter of public policy, they find objectionable. To do so they have, among other things, made efforts to distinguish the Discover Bank rule – in question in Concepcion – from other state law defense rules that could be applied to revoke a class waiver from an arbitration agreement and allow the parties to engage in class arbitration proceedings instead: It has, for example, been stated that Concepcion could be said to apply only to state law rules that are as broad as the Discover Bank rule and hold class arbitration waivers per se unenforceable without considering the particular circumstances of each individual case.\textsuperscript{274}

- Traditional Unconscionability

Others have held that traditional unconscionability is outside of the scope of Concepcion and still applicable in spite of this decision: The Northern District of California relied for example on traditional unconscionability to void an arbitration agreement after the holding of the Supreme Court in Concepcion.\textsuperscript{275} It based its decision on the grounds that the agreement was unconscionable procedurally as well as substantively.\textsuperscript{276} Procedural unconscionability has, indeed, been authorized as ground for the revocation of an arbitration agreement by Justice Thomas concurring in the majority opinion of the Supreme Court in

\begin{footnotesize}
\textsuperscript{271} 127 Cal. Rptr. 3d 174, 179 (Ct. App. 2011).
\textsuperscript{273} See subsequent subsection.
\textsuperscript{276} James D. Smith, \textit{Important Limits On Class Action Arbitration Waivers}, Dritoday Blog, 6 February 2012.
\end{footnotesize}
This has been acknowledged by the New Jersey Court deciding *NAACP*, which came to the conclusion that “the majority opinion in *Concepcion* did not leave litigants bereft of other contract defenses, including the procedural conscionability question of contract formation or contract interpretation principles.” Moreover, Section 2 of the FAA, the Savings Clause, was still in force and thus “[t]he power of courts to use common law contract principles – including unconscionability – to invalidate arbitration agreements was alleged to remain intact post-*Concepcion* [as long as they do not target arbitration agreements].” This was also the conclusion the Missouri Supreme Court reached in *Brewer v. Missouri Title Loans* ("*Brewer*"). It was one of the first and clearest to show *Concepcion*’s potential limitations by holding that it would be a mistake to read *Concepcion* to conclude simply because “the *Discover Bank* rule was pre-empted by the [FAA…] that all state law unconscionability defenses are pre-empted by the FAA in all cases.” It held that the FAA “pre-emption analysis requires a case-specific assessment of the arbitration contract at issue.” The court also came to the conclusion that one of the reasons why the Supreme Court decided in *Concepcion* that the *Discover Bank* Rule was pre-empted by the FAA was because this rule “was too broad and provided plaintiffs too much leeway to void otherwise valid arbitration agreements simply because they contained a class-action waiver – even without considering pro-consumer provisions in the same agreement.” It thus cannot be concluded that all unconscionability rules are also pre-empted even if they are less broad than the *Discover Bank* Rule and imply an individual analysis of each case and agreement. Indeed, in *Hamby v. Power Toyota Irvine* another court acknowledged that the ruling in *Concepcion* does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable.” As the court in *Alvarez v. T-Mobile USA, Inc.* noted, since *Concepcion* courts attempting to apply the Unconscionability Doctrine to

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281 *Id.* p. 8.
282 *Id.* p. 8.
consumer contracts involving class action waivers have done so by engaging in a general unconscionability analysis.\textsuperscript{285}  

- The Gentry Test

Moreover, the \textit{Gentry} Test, another state law defense, has been considered to remain applicable as it has a federal equivalent and therefore not to fall within the category of state law defenses targeting arbitration clauses and harming the FAA.\textsuperscript{286} This doctrine is also said to be more flexible and adaptable to individual circumstances and thus less repugnant to the FAA.\textsuperscript{287} As has been said: “The \textit{Gentry} test is sufficiently distinguishable from the \textit{Discover Bank} Rule overruled in \textit{Concepcion} because (a) it is an application of a fundamentally more important contract law doctrine, (b) it has a federal equivalent recognized by the Supreme Court, (c) it is not far removed from traditional contract law, and (d) it is applied in a case-by-case analysis.”\textsuperscript{288}

B. The Right to Class Proceedings and the Vindication of Rights Doctrine

1. The Distinction Between State Law and the Federal Right to Class Proceedings

Courts and commentators are not only distinguishing state courts from federal courts in order to evade the Supreme Court’s recent jurisprudence on class arbitration, but also state law from federal law. To be able to distinguish new cases from \textit{Concepcion}, courts have indeed held that \textit{Concepcion}’s holding is limited to matters addressed under state law and that cases under federal law are outside of the scope of this decision.\textsuperscript{289}

Courts can, in fact, distinguish cases from \textit{Concepcion} by referring to the federal nature of the claims: On January 3, 2012, the National Labor Relations Board (“NLRB”) decided in \textit{D. R. Horton, Inc. and Michael Cuda}\textsuperscript{290} that mandatory arbitration agreements

\textsuperscript{285} Id.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{290} D. R. Horton, 12-CA-25764.
which preclude employees from joining together in a class action lawsuit or class arbitration to pursue employment-related claims violate the National Labor Relations Act ("NLRA"). A homebuilder had required his employees to sign a mandatory arbitration agreement as a condition of employment. This agreement contained a class waiver that was declared unenforceable by the NLRB. In the opinion of the Board, the case in question differed from *Concepcion* in that it involved the waiver of rights that were protected by a federal statute – the NLRA. Indeed, the NLRB found that the right to collective relief was a right protected by Section 7 of the NLRA, therefore a right protected by a federal statute and thus a right that cannot be waived through an arbitration agreement. In the Board’s view, the employer’s class arbitration waiver prevents employees from exercising their right “to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection” under Section 7 of the NLRA. The Board stated that

“[w]hen multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she ‘seeks to initiate or to induce or to prepare for group action.’ Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.”

The Board also argued that *Concepcion* does not apply to claims protected under the NLRA because the NLRA has been enacted after the FAA and therefore trumps the latter in cases of conflicts. In the Board’s view, it does not make sense to contend that the FAA would overrule a right protected under the NLRA if the latter has been adopted afterwards.

While the Board limited the scope of its decision by stating that *Concepcion* does not apply to cases under the NLRA, other courts have also resorted to the distinction between state law and federal statutes in order to distinguish the Supreme Court’s case and uphold their view of public policy regarding this issue. It is not important whether a state prefers class proceedings to bilateral arbitration. The only valid ground for revoking a class

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292 *Id.*
293 *Id.*
294 *Id.*
296 See Subsequent Paragraphs.
arbitration waiver is the fact that the right to class proceedings is anchored in a federal statute thus becoming itself a federal statutory right.

Other substantive areas of law, apart from the NLRA, which may not be reached by the holding in Concepcion, include Title VII pattern and practice discrimination claims, Clayton Act antitrust claims and Fair Labor Standards Act (“FLSA”) claims. In these areas courts have also read the statutory schemes controlling these claims as requiring that class or collective procedures are available or as prohibiting such claims from being brought as individual claims. They thus decided that class arbitration waivers must be invalidated in cases in which their enforcement would harm the respect of federal statutory rights, despite the recent Supreme Court decision in Concepcion. In Raniere v. CitiGroup Inc. for example a class arbitration waiver was declared unenforceable on the grounds that collective actions must be available under the FLSA. In AT&T Mobility LLC v. Fisher, the same result was reached on the grounds that the enforcement of the class arbitration waiver would make it impossible to enforce representative Clayton Act antitrust claims. Finally, in Chen-Oster v. Goldman Sachs & Co, the Southern District of New York “apparently sticking its tongue out toward Washington, D.C., invalidated a class action waiver the day after the Supreme Court released Concepcion because it would require plaintiffs to forfeit their Title VII pattern and practice discrimination claims as these cannot be brought as individual claims but only in class proceedings. The federal magistrate indeed found 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.”

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297 Anthony Lathrop, Litigation: Does your class arbitration waiver hinder the vindicating of rights? Assess the enforceability of class arbitration waivers by examining court decisions, InsideCounsel Blog, 29 December 2011.
298 Id.
299 Id.
300 Id.
303 Anthony Lathrop, Litigation: Does your class arbitration waiver hinder the vindicating of rights? Assess the enforceability of class arbitration waivers by examining court decisions, InsideCounsel Blog, 29 December 2011.
claims that can only be vindicated on a class basis.”  

In this case, there was no actual class arbitration waiver but the silence of the arbitration agreement had been interpreted as barring class arbitration by the majority. Another author held that “other federal statutes may trump the FAA, such as the Securities Exchange Act of 1934’s anti-waiver provision which may prevent the enforcement of a class arbitration waiver in the securities context.”

Several lower courts thus decided that the priority for arbitration does not apply where rights created by a competing federal statute are infringed by an arbitration agreement. Courts can, however, like the Second Circuit did in its third ruling [in the federal antitrust case In re American Express Merchants’ Litigation III (“Amex III”)], “give more teeth to the Vindicating Statutory Rights’ ground as the ultimate policier of the fairness of arbitration, and thus rebalance the allocation of power between the states and federal government in the arbitration law arena.”

2. The Vindication of Rights Doctrine

As seen above, some of the lower courts decided to distinguish Concepcion on the grounds that a case involved a claim under a federal statute that stated a right to class proceedings or that only provided for collective relief thus prohibiting individual claims. The important point in this reasoning is not the legal basis as such but the respect of federal statutory rights. If a federal statute and the rights it guarantees are at play, it can be considered to be more important to provide a plaintiff with a proper forum than if a case only concerns claims under state law. It is, indeed, the duty to respect federal statutory rights, which often is at the origin of the lower courts’ willingness to oppose the Supreme Court’s recent jurisprudence on class arbitration. As Prof. Strong states, “the debate in the U.S. focuses on whether and to what extent arbitration is able to give effect to certain statutory rights” also confirming the focus of lower courts on the respect of statutory rights.

The Vindicating Statutory Rights Doctrine was derived from the Supreme Court’s pronouncement in Mitsubishi that an arbitration agreement is enforceable “so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral

308 Id.
forum, the federal statute providing that the cause of action will continue to serve its remedial and deterrent function.\textsuperscript{310} A disputant can thus argue that an arbitration agreement is unenforceable because an unfair aspect of the arbitration process would preclude the party from vindicating its statutory rights.\textsuperscript{311} Supreme Court decisions prior to \textit{Concepcion} recognized that this doctrine could be applied to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive\textsuperscript{312}, to ensure a plaintiff’s ability to enforce his or her statutory rights.\textsuperscript{313} Lower courts have employed this principle to distinguish \textit{Concepcion}.

One example of this is \textit{Feeney v. Dell}, where the Massachusetts State Superior Court invalidated a class arbitration waiver anchoring its ruling in the small value of the individual claims at issue.\textsuperscript{314} Although the majority in \textit{Concepcion} seems to have rejected the argument that bilateral arbitration precludes relief in low-value claims cases, the Massachusetts Court relied on the argument that, given the low value of the claim in question, bilateral arbitration would make the enforcement of the statutory right impossible and preclude any possible relief for the plaintiff. The majority however seems to have refuted this argument in \textit{Concepcion}: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”\textsuperscript{315} The Massachusetts Court resorted, nonetheless, to the Vindication of Statutory Rights Doctrine, holding that “the class arbitration procedure was necessary for plaintiffs to vindicate their rights because, absent a class procedure, there was no incentive for a plaintiff to pursue an individual claim.”\textsuperscript{316}

The statutory rights analysis has been used to circumvent both \textit{Stolt-Nielsen} and \textit{Concepcion}.\textsuperscript{317} In \textit{In re American Express Merchants’ Litigation I} (Hereafter “\textit{Amex I}”), the Second Circuit invalidated a class action waiver in an antitrust case against American Express because the arbitration proceedings would have been too costly and effectively stripped the

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\textsuperscript{310} & Jill Gross, \textit{AT&T Mobility and FAA Preemption}, Pace Law School, 13 March 2012, p. 16. \\
\textsuperscript{311} & \textit{Id.} \\
\textsuperscript{314} & Tony Lathrop, \textit{Lower Courts Probe the Line Drawn by Concepcion: Class Arbitration Waivers and Vindication of Rights}, LitigationBlog, 6 December 2011. \\
\textsuperscript{315} & 131 S.Ct. at 1753. \\
\textsuperscript{316} & Tony Lathrop, \textit{Lower Courts Probe the Line Drawn by Concepcion: Class Arbitration Waivers and Vindication of Rights}, LitigationBlog, 6 December 2011. \\
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plaintiffs of their statutory rights under the Sherman Act. After having decided *Stolt-Nielsen*, the Supreme Court vacated and remanded this decision in light of *Stolt-Nielsen*. Basing its decision on the Vindication of Statutory Rights Doctrine, the Second Circuit however reaffirmed its previous decision in *Amex II*. The Vindication of Statutory Rights Doctrine had also been mentioned by Justice Ginsburg in her dissent to the *Stolt-Nielsen* majority which gave further leeway to the Second Circuit. She stated that she would take this approach and that “class proceedings may be ‘the thing’ in the small claims context because ‘without them, potential plaintiffs will have little, if any, incentive to seek vindication of their rights.’” After the Supreme Court’s decision in *Concepcion*, the Second Circuit Court of Appeals reconsidered its decision for the second time – this time in light of Concepcion. The Court found that Concepcion did not alter its prior analysis, which rested on a different ground than Concepcion. It held that “[h]ere… our holding rests squarely on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability,” and that “Because plaintiffs in this case demonstrated, through expert testimony, that pursuing their statutory claims individually as opposed to through class arbitration would not be economically feasible, ‘effectively depriving plaintiffs of the statutory protections of the antitrust laws,’ the Court of Appeals directed the District Court to deny defendant’s motion to compel arbitration.” The Second Circuit went even further: on May 29, 2012, it denied rehearing *In re American Express Merchants’ Litigation*. The Court reaffirmed again that *Concepcion* addresses state contract rights and does not apply to *Amex III* since *Amex III* deals with federal statutory rights. Judge Pooler, concurring in the denial of rehearing *en banc* stated:

“The limited holding in this case is not governed by the Supreme Court’s reasoning in *AT&T Mobility LLC v. Concepcion*. *Concepcion* holds that the Federal Arbitration Act preempts state laws hostile to arbitration, and focuses its analysis on pre-emption issues. In contrast, analysis in *Amex III* rests squarely on a vindication of statutory rights analysis – an issue untouched in *Concepcion*.”

319 Id.
320 Id.
322 Id.
323 Disputing – KarlBayer.com, 12 June 2012.
324 Disputing – KarlBayer.com, 12 June 2012.
Comparing Amex with Concepcion, one notices that the same arguments the Second Circuit used to allow class proceedings, could have been applied to Concepcion – even more so since Concepcion was a consumer law case while Amex involved two businesses. The difference between the two cases is the federal nature of the claims in Amex. This makes it possible to conclude that courts are more likely to resort to the Vindication of Statutory Rights Doctrine in favour of federal statutory claims than in favour of state law claims. Under Amex III, “a class arbitration waiver will be invalid if it precludes plaintiffs from bringing a federal statutory claim, but not if it merely precludes them from bringing a state law claim.”325

A lot of different means were employed and arguments put forward by lower courts to evade the Supreme Court’s decisions in Stolt-Nielsen and Concepcion as their consequences were often perceived as objectionable on public policy grounds. This last sort of arguments – the Vindication of Statutory Rights doctrine – clearly shows that it is, above all, the impossibility for plaintiffs to obtain relief without the availability of class proceedings, which motivates the lower courts’ willingness to oppose the Supreme Court. In line with this, it is possible to say that class arbitration is necessary to compensate the negative consequences of the pro-arbitration policy of the courts and the large scope of arbitrability including claims of statutory rights. Class arbitration is the necessary counterpart to the liberal American model of arbitration.

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Conclusion

Why is it so problematic to restrict the availability of class arbitration in the United States? Class proceedings are an important part of the American legal system compensating the large degree of party autonomy and the wide scope of arbitrable rights. The development of class arbitration proceedings, their acceptance by the Supreme Court and their widespread use under the specialized procedure designed by the AAA and JAMS followed a logic: it was the counter-reaction to the pro-arbitration policy expressed in the Supreme Court’s interpretation of the FAA and the extension of arbitrability to statutory rights. Indeed, once plaintiffs were obliged to arbitrate low-value claims arising in the fields of consumer, labour, antitrust or finance law, they had to look for a new way of being able to vindicate their rights. Bilateral arbitration being too costly for individual plaintiffs, class arbitration seemed to be the solution.

Nonetheless, the Supreme Court changed direction and rendered class arbitration less available, compelling plaintiffs to arbitrate individually instead. These decisions by the Supreme Court were widely opposed by the lower courts, which proved to be inventive in finding numerous arguments to limit the scope of the decisions and distinguishing them from the cases they had to decide. How can this will to make class arbitration available to plaintiffs be explained? Courts, as well as a great number of authors, feel that class arbitration is necessary to guarantee the respect of statutory rights and give plaintiffs the possibility to vindicate their rights. Considering the harshness of the criticism the Supreme Court decisions received and the reactions of lower courts, it is possible to argue that the current extent of pro-arbitration and pro-arbitrability policy adopted by the Supreme Court is unsustainable, without class arbitration as compensation. An exclusively pro-arbitration and thus pro-business stance is untenable: a balance is needed between the protection of rights and the protection of business interests.

Authorizing a widespread use of class arbitration is not only necessary to guarantee the protection of rights but, above all, is needed to ensure the most fundamental character of arbitration: The parties’ consent. No consumer or employee would ever voluntarily agree to be locked into bilateral arbitration – at least, no more than a corporation would agree voluntarily to arbitrate against a class – and, accordingly, it is ironic to prohibit class arbitration on the premises that corporations did not agree to this option. If there is not enough political will to limit the possibility to arbitrate, allowing plaintiffs to arbitrate as a class would be a way of respecting the essence of arbitration – the equal consent of the parties. The
Supreme Court said itself in *Stolt-Nielsen* that “arbitration is a matter of consent, not coercion.” It should start to act accordingly.

One might ask how it is possible that class arbitration has so far been widely used only in the United States, while arbitration is an international phenomenon and why this absence of class proceedings does not cause problems elsewhere. This is due to the fact that other legal systems, such as the European Union, have limited the scope of arbitratability thus leaving the protection of statutory rights in the hands of public courts instead of private arbitrators paid and nominated by the parties. This conclusion indicates an alternative solution for the United States, should the Supreme Court refuse to reinstitute class arbitration proceedings as a viable option – at least in consumer disputes: Congress could change the legislation in order to exclude certain statutory rights from the scope of arbitratability.

In fact, this solution would not be novel and it has already been suggested that “consumers and their advocates must turn to Congress for assistance with this major concern.” Moreover, Congress is actually considering to enact new legislation – the Arbitration Fairness Act (AFA), which seeks to amend the FAA to prevent the use of pre-dispute mandatory arbitration clauses in consumer, employment and franchise agreements and civil rights disputes “Commentators have labelled it as attempt to restore Congress’ original intent of only applying the FAA to parties with relatively equal bargaining power.” It has also been suggested that Congress amend the FAA to establish class arbitration as an accepted mode of arbitration, to provide instruction to parties and courts on how to interpret class arbitration waivers and to set a standard for arbitration agreements that are silent on the issue of class arbitration.

This evolution will have to be followed in the future.

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