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The Problem with Class Arbitration

Neal R Troum
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by Neal Troum

Abstract: Class actions require much process. Arbitration is a medium where the parties get to make the rules. Class arbitration thus presents problems. Under the Supreme Court’s reading of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, however, class arbitration is permitted. It should not be, but not because the process required to extinguish absent class members’ rights cannot be imposed on arbitration—though, realistically, it cannot. Arbitrators possess the power to adjudicate only with the consent of the parties. Absent class members by definition have not given such consent. Preclusion of absent class members’ rights is a fundamental aspect of the class action, however. A class arbitration award thus purports to bind absent class members who have not given their consent to having their claims adjudicated by an arbitrator. This should not be allowed, but it is permitted under the current state of the law. This paper offers a reading of the FAA that gives effect to its plain language and that demonstrates that a class award should in all instances be subject to vacatur by courts, contrary to the current state of the law.
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I. Introduction

Much has been said about the incompatibility of class actions with arbitration. Class actions require all the process that can be afforded. Absent class members’ right are extinguished, and in order for that to happen, we insist on many procedural safeguards. Class counsel, for example, have duties running to absent class members, people they don’t know. Settlements require court approval and consideration of the public interest. The general public gets to chime in on whether they think things are fair. If an absent class member is to forfeit his right to sue without his consent, it must be done in the fairest manner possible.

Contrast this highly regimented system with arbitration. Arbitration is what the parties make it to be, and the law governing arbitration, the Federal Arbitration Act (FAA), is consistently read to embody a deference to arbitrators and a freedom of parties to resolve their disputes outside of the court system as they wish. This laissez faire environment is not one in which the class action vehicle belongs.

This is not news. A majority of the Supreme Court (through such recent cases as AT&T Mobility v. Concepcion and Stolt-Nielsen v. AnimalFeeds) sees class arbitration as problematic. It recognizes that what arbitration has to offer—speed, privacy, less cost, informality—does not jibe with the class action vehicle. The Justices are right on this point; class actions do not proceed expeditiously, they do not cost less than bilateral suits, they are extremely rule-intensive, and they are intentionally publicized.

But there are scenarios in which class arbitration might make sense. Think of a toxic tort, where there is no question as to liability, and a large but bounded set of plaintiffs. Those injured might reasonably want to arbitrate their disputes on a class basis rather than proceed with a class action in court—to get matters resolved more quickly, perhaps, or to keep things confidential, or to ensure some consistency in amounts awarded. These are things (speed, confidentiality, consistency among awards to different
plaintiffs) that parties can bargain for in arbitration, but which cannot be ensured in litigation. Judges decide things on their own time table; there is a presumption of public access to courts; and judges can meddle or tinker with class settlements (if they think they are not fair) in ways that arbitrators generally do not. A defendant might also want class arbitration, so that it can resolve all claims at once, with the assurance that any future suits will be barred.

Should class arbitration be allowed, and a class arbitration award deemed by courts to have the same preclusive effect as a class award issued by a court? This is the current state of the law: With the consent of plaintiff and defendant, an arbitrator can enter a class award that a court will confirm and which will have the same res judicata effect as a class judgment following a class action in court.

There is a problem with this. It is not the incompatibility of the class action’s traits with those of the arbitral realm, however (which is how a majority of the Supreme Court sees things). It is instead that an arbitrator possesses what power he has only with the consent of the parties before him. As a result, a class arbitration judgment simply should not be deemed to have preclusive effect on absent (i.e., non-consenting) class members, like a class judgment in court, issued by a judge. This not the law, however.

Plaintiff and defendant in the court system do not choose who will decide their dispute. A court can call an unwilling defendant before it, and judge and jury will decide the law and the facts relating to the claims brought against that defendant, consent or no. But the power of an arbitrator to adjudicate is different. It comes into existence only with consent of the parties, coupled with the FAA’s core precept of giving effect to the parties’ alternative dispute resolution mechanism of their choosing. Where a party has not consented to arbitration, however, no arbitration can take place. No one chooses his judge, but every arbitrator must be a wanted arbitrator, so to speak.

I argue that the FAA should be read as barring class arbitration, contrary to the current state of the law. Among the grounds for vacatur set forth in § 10(a) of the FAA is where arbitrators have “exceeded their powers.” This ground should be read literally to prevent courts from giving effect to class arbitration awards. If it is the consent of the parties that gives an arbitrator what power he has to adjudicate parties’ disputes, any act beyond the scope of the adjudicative authority allotted an arbitrator should be deemed an act in excess of an arbitrator’s power, and so subject to vacatur under § 10(a)(4) of the FAA.

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14 Fed.R.Civ.P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).
15 Class action judgments typically bind all class members from bringing suit. See Kemp v. Birmingham News Co., 608 F.2d 1049, 1054 (5th Cir. 1979). “Generally, principles of res judicata, or claim preclusion, apply to judgments in class actions as in other cases.” Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998).
17 Roughneck Concrete Drilling & Sawing Co. v. Plumbers’ Pension Fund, Local 130, UA (United Association), 640 F.3d 761, 766 (7th Cir. 2011) (“Ordinarily, just as two parties to a dispute can agree to settle it, thereby surrendering the procedural rights they would have had if they had litigated to judgment, they can agree to arbitration even if by agreeing they give up procedural rights they would otherwise enjoy.”).
But the Supreme Court permits class arbitration awards to be enforced under the FAA. The cases that so hold—Concepcion and Stolt-Nielsen—ignore the text of the FAA and read this statute in a manner at odds with many of the Court’s past statements. This paper critiques Concepcion and Stolt-Nielsen as unfaithful to statutory text and irreconcilable with long-standing FAA policy.

Section II of this paper examines Concepcion, which addresses a consumer’s efforts to compel class arbitration. Concepcion allocates to courts the ability to define arbitration and preempt state law inconsistent with that picture. Thus, where state law had insisted that class proceedings be available (despite a class action waiver in the parties’ agreement), the Court held that the FAA preempted that state law because what arbitration had to offer—speed, informality, less cost—could not be squared with the attributes of the class action. While this is true—class actions are not fast, informal, or cheap—it is not the point. Courts have no business insisting that parties resolve their disputes in arbitration in a particular way (fast, informally, etc.); freedom of parties to design the alternative dispute resolution mechanism of their choosing is a central tenet of federal arbitration law, and the Supreme Court has insisted on this point time and again.19

Section III turns to Stolt-Nielsen and its progenitor, Green Tree v. Bazzle. These cases addressed whether an award permitting class arbitration could be enforced where the contract was silent as to the availability of class proceedings. Bazzle produced four opinions and no majority, offering little guidance to parties or courts. Stolt-Nielsen held that that express consent of the parties was needed for class arbitration to go forward. Stolt-Nielsen, like Concepcion, is difficult to reconcile with the Court’s past FAA rulings; it is also difficult to reconcile with the language of the governing FAA provisions. Stolt-Nielsen is moreover problematic in that it vacates an arbitration award (which permitted class arbitration to take place) not by examining the panel’s conclusion (that class arbitration was allowed) but by focusing on the process by which the panel had arrived at its conclusion (here, acting like a common law court). But the Supreme Court has reminded us countless times that judges are to review what arbitrators decide, not how they arrive at their decisions.20

Section IV looks at the grounds for vacatur under the FAA in general, and § 10(a)(4), providing for vacatur where arbitrators have “exceeded their powers,” in particular. There are three different ways a court could deem an arbitrator to have exceeded his powers: by focusing on the result he has reached, on the means by which that result was reached, or on the propriety of answering a particular question in the first instance. Stolt-Nielsen, for example, employs the second of these, a process-centric (and not a results- or topic-centric) analysis. I argue that this is improper, and only a focus on whether an arbitrator has the power to answer a question before it (a topic-centric analysis) is a proper means of analyzing whether arbitrators have exceeded their powers. Under this analysis, it can be seen that an arbitrator’s issuance of an award that purports to bind absent class members is an act in excess of his powers, and so should be subject to vacatur under the FAA.

By giving effect to the straightforward language of the FAA, and with the recognition that arbitrators have limits on their adjudicative power that do not apply to judges, class arbitration awards should, as a matter of course, be deemed inconsistent with, and subject to vacatur under, the FAA.

II. Compelling Class Arbitration—Concepcion v. AT&T Mobility

Can a court compel class arbitration? Where the contract between the parties allows for it, class arbitration remains permitted under the FAA and can be compelled under §§ 3 and 4. Most contracts, however, do not explicitly allow for class arbitration; indeed, many, especially in the consumer and employment contexts, expressly prohibit it.21

The question whether class arbitration could be compelled under the FAA was the subject of Concepcion, where state law purported to invalidate a class action waiver in a contract containing an arbitration clause, and it had to be decided whether class arbitration could be compelled. Can that state rule stand? Or is it preempted under the FAA?

The FAA’s preemption power is well-established.22 Section 2 of the FAA, the “primary substantive provision of the Act,”23 makes agreements to arbitrate enforceable just like any other contractual agreements.24 It provides:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.25

Courts have interpreted this language as preventing states from singling out agreements to arbitrate and treating such agreements differently from other contractual provisions. Section 2’s so-called “savings clause” protects state court rules that are of general application—“grounds as exist at law or in equity for the revocation of any contract”—from preemption under the FAA as applied to arbitration agreements.26 States cannot, among other things, outlaw arbitration,27 forbid arbitration of certain

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21 Especially after Bazzle, 539 U.S. 444 (2005), the Court’s first class arbitration ruling, discussed below
24 Which was not always the case. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (The FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”).
26 Kilgore v. KeyBank N.A., 673 F.3d 947, 963 (9th Cir. 2012) (“the [FAA]’s savings clause preserves generally applicable contract defenses . . . so long as those doctrines are not applied in a fashion that disfavors arbitration”).
27 Southland, 465 U.S. at 10 (section 2 “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”). See also Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 281 (1995) (“What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”).
claims, or require special notice requirements in agreements to arbitrate. State contract law controls the interpretation of agreements to arbitrate, just as it does all contracts, but the state must treat arbitration agreements like all other agreements. Otherwise, the FAA’s § 2 preemption power kicks in and such law is preempted.

Concepcion is an example of just such a flexing of the FAA’s preemption muscle. The Concepcions and AT&T entered into a contract, agreeing to arbitrate their disputes but waiving the right to seek class relief. The Concepcions sought just that, filing a lawsuit against AT&T in federal court that was later consolidated with a putative class action. Their complaint was that AT&T had promised them a free phone, but they had to pay $30.22 in taxes. AT&T moved to compel arbitration, and the Concepcions opposed, arguing that the arbitration provision was “unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures.” The courts below agreed. They applied California’s Discover Bank rule, which provided that class action waivers were unenforceable as unconscionable in certain consumer contracts, and allowed the Concepcions to proceed along with a class of plaintiffs against AT&T, in arbitration.

The Supreme Court reversed. It began with the uncontroversial § 2 precept that “agreements to arbitrate [can] be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” State law must treat arbitration agreements like other contract provisions; that is old hat.

Then things get iffy. We are told that “the [preemption] inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.” Facially arbitration-neutral, state-law contract doctrines that are applied in a manner that is hostile to arbitration cannot stand, true, but why is that “complex”? Moreover, why should it matter here? The Discover Bank rule, as the Court explicitly recognizes, is “applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well.” It therefore does not “apply only to arbitration or . . . derive [its] meaning from the fact that an agreement to arbitrate is at issue.”

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31 131 S.Ct. at 1744.
32 Id.
33 Id. at 1745.
34 Id. at 1746.
35 See Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 457 (10th Cir. 1957) (“Congress intended by § 2 of the Act to . . . place arbitration agreements on the same footing as other contracts.”).
37 131 S.Ct. at 1747.
38 Id. at 1746 (emphasis added).
39 As the Discover Bank court explained in no uncertain terms, “the principle that class action waivers are, under certain circumstances, unconscionable . . . does not specifically apply to arbitration agreements, but to contracts generally.” Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005).
Nonetheless, according to the Supreme Court, “a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” It is not clear what this could mean under the facts of Concepcion.

Perhaps realizing that the explanation for its holding left unanswered questions, Concepcion gives examples of other types of rules of general applicability that improperly single out agreements to arbitrate (and thus would be preempted) like the Discover Bank rule at issue. Rules that “would have a disproportionate impact on arbitration agreements; but . . . would presumably apply to contracts . . . in litigation as well,” such as: (1) a state’s refusal to enforce contract provisions that provide for discovery without judicial oversight, and (2) a state’s refusal to enforce arbitration agreements that do not provide for application of the Federal Rules of Evidence at trial.

But those are easy, and the intention to single out arbitration by means of what appears to be a facially arbitration-neutral rule is plain enough in the examples the Court provides. Every trial in federal court proceeds under the Federal Rules of Evidence; so a state statute requiring that the F.R.E. apply in every dispute resolution would obviously be directed at singling out arbitration and imposing rules on it (since states can do with their evidence rules as they like). Such a law would thus be incompatible with the FAA and preempted under § 2. The same is true with judicially-monitored discovery—discovery in cases in court is by definition judicially-monitored, so requiring court-monitored discovery in all dispute resolution effectively forces only arbitrants to employ procedures other than those of their choosing. California’s Discover Bank rule, however, is not like these examples. It does not take a court procedural rule and (*wink*) require its use everywhere. The Discover Bank Rule applies equally to court cases and arbitrations. Contrary to the Court’s insistence, it very much is emphatically “a far cry from” the Court’s examples. Nonetheless, Concepcion held, it was preempted by §2 of the FAA.

What, then, is the basis for Concepcion’s holding? The Court begins with an insistence that the “point” of arbitration—what it’s all about, presumably—is “efficient, streamlined procedures,” where “the decisionmaker [can] be an expert in the relevant field,” the “proceedings [can] be kept confidential to protect privacy,” and there is “informality,” thus “reducing the cost and increasing the speed of dispute resolution.”

Having so defined arbitration, the Court looks at the class action vehicle and decides it is incompatible with this picture, concluding that the “changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental,” involving “absent parties,” “additional and different procedures,” and “higher stakes.” In arbitration, “[c]onfidentiality becomes more difficult,” and “arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.” All of this, we are told, is “obvious as a structural matter.” The Court wraps up the point thus: “The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.”

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40 Id. at 1747.
41 We are told that “[o]ther examples are easy to imagine.” Id. I do not agree.
43 131 S.Ct. at 1749.
44 Id. at 1750-51. Another problem that would have arisen if Concepcion had let stand the Ninth Circuit opinion invalidating the class action waiver as unconscionable would be what happened next. While Concepcion would have proceeded as class arbitration in that case, other courts invalidating class action waivers in arbitration
Is Concepcion right to paint a picture of arbitration as it sees it and preempt state laws that are incompatible with that picture? No. Parties can choose a specialist to be their arbitrator, but they need not; they may want privacy, but they may also seek celebrity (or they may merely wish to have the last word on privacy/publicity, as to opposed to court proceedings, where there is a presumption of public access); formality may be desired in some arbitration contexts, or not; and it is not uncommon for litigants to make strategic decisions that will cause a case to move more quickly (or slowly) where that is in a party’s interest.

It is by defining arbitration as necessarily involving specialized decision-makers, privacy, informality, and speed that the Court is able to deem class actions inconsistent with arbitration and so the California rule requiring the availability of the class action vehicle preempted. But there is no authority, and the Concepcion Court provides none, for the proposition that courts have any business deciding what the “point” of arbitration is in the first place. Indeed, it is well established that the FAA’s fundamental policy preference—what the FAA is about, really—is a preference for permitting parties to design the ADR mechanism of their choosing. Moreover, the Court has in the past expressly eschewed the principle that the FAA must be interpreted to provide for speedy and efficient resolution; it outright “reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.” Not here, however, though it is not clear why.

Concepcion is also problematic in that it ignores the language of the FAA applicable where a party seeks to compel arbitration, which is what AT&T Mobility sought to do. Section 3 of the FAA requires courts to determine if the “issue [presented is] referable to arbitration”—to look at whether the dispute falls within the scope of the arbitration agreement (in which case a court must stay an action). Section 4 requires consideration of whether “the making of the agreement for arbitration . . . is not in issue”; where it is not, arbitration must be compelled. But neither AT&T nor the Concepcions argued that the agreements have thrown out the arbitration clause bath water with the class action waiver baby, insisting that the case proceed as a class action in court.

45 See United States v. Amodeo, 44 F.3d 141, 145-46 (2d Cir. 1995) (“The public has a common law presumptive right of access to judicial documents.”).

46 Recent commentary on Concepcion has focused on the compatibility of the class action with the arbitral forum, but in terms relating to the purported “whole point” of arbitration, speed and efficiency. See Frank Blechschmidt, “All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers,” 60 U. Pa. L. Rev. 541, 543 (2012) (referencing “this method of dispute resolution [] is antithetical to the whole point of arbitrating in the first place, which is to provide a speedy and efficient alternative to litigation”). This paper argues the same result but by a totally different reasoning, further concluding that it is unnecessary (and improper) to impose the essential attributes of efficiency or speed on arbitration in order for it to be arbitration. Though this is understandable after Concepcion.

47 9 U.S.C. § 4 (A party “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”) (emphasis added); see also Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (referring to the federal policy “to ensure the enforceability, according to their terms, of private agreements to arbitrate”); EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (“[P]arties may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed.”).


49 Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); see also Moses H. Cone, 460 U.S. at 10.

50 Courts interpret § 4 grounds broadly: “[A]lthough section 4 . . . speaks only of challenges to ‘the making’ of the agreement to arbitrate, the term has been held to encompass any challenge to the validity of the agreement, even
issue presented—were the Concepcions overcharged?—did not fall within the scope of the arbitration clause. Nor did anyone claim that some question existed as to whether the parties had entered into the agreement at issue or as to the validity of its arbitration clause. Under §§ 3 and 4, where neither of these questions is presented, courts must compel arbitration. Thus, Concepcion answers a question best left to the arbitrators, and it does so by means of reasoning that is suspect at best.  

Further, as discussed further below, Concepcion allows the parties to elect to empower arbitrators to adjudicate someone else’s rights. There is no authority by which they can do so.

III. To Confirm or to Vacate

When a court reaches a decision, and that holding is appealed, it can be reversed by an appellate court for myriad reasons. But the grounds for vacatur under § 10(a) of the FAA are few. The first looks at whether an award “was procured by corruption, fraud, or undue means.” The second, “where there was evident partiality or corruption in the arbitrators.” And the third, “where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.” The final ground is open ended: “where the arbitrators exceeded their powers.” Where a court finds none of this, it must confirm an arbitration award under §9.

51 Courts in the wake of Concepcion are all over the map where class action waivers and arbitration agreements are at issue. The Third Circuit, for example, sees Concepcion’s holding as “both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration ‘is desirable for unrelated reasons.’” Litman v. Celco P’Ship, 655 F.3d 225, 231 (3d Cir. 2011). Giving effect to the class action waiver, Litman allowed bilateral arbitration to proceed. Id. The Second Circuit, in In re American Express Merchants’ Litig., 667 F.3d 204 (2d Cir. 2012), held that where a federal statutory right could realistically not be exercised bilaterally, the class action waiver and arbitration clause must both go and the case proceeds as a class action in court. Concepcion is distinguished as dealing with state contract law rights, not federal Sherman Act rights. The Ninth Circuit, in turn, in Coneff v. AT&T Corp., 673 F.3d 1155 (2012), interpreted Concepcion as barring only substantive state law unconscionability that invalidated a class action waiver in an arbitration clause, sending the consolidated cases back to the lower court to determine if procedural unconscionability applied to invalidate the class action waiver.  

52 Bases for reversal of a court decision include an appellate court’s de novo review of decisions of law, Maldonado v. U.S. Atty. Gen., 664 F.3d 1369, 1375 (11th Cir. 2001); review of findings of fact under clear error standard, In re Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 69 (1st Cir. 2011); a plain error standard in connection with evidence adduced at trial to which there was no objection, U.S. v. Moody, 664 F.3d 164, 166-67 (7th Cir. 2011); abuse of discretion for other evidentiary rulings, Ferguson v. United States, 484 F.3d 1068, 1074 (8th Cir.2007); review of a jury verdict for rational basis, Walker v. Bd. of Regents of the Univ. of Wis. Sys., 410 F.3d 387, 393 (7th Cir.2005); and review of erroneous jury instructions looking at whether they were, as a whole, confusing, misleading, or prejudicial, United States v. Harrod, 168 F.3d 887, 892 (6th Cir.1999); etc.


54 Id. § 10(a)(2).

55 Id. § 10(a)(3).

56 Section 10(a)(4) does not merely deal with exceeding powers; it also provides for vacatur where arbitrators “so imperfectly execute[] [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made.” This second half of § 10(a)(4) is perhaps the most defensible basis by which more a substantive and less deferential standard of review can be found in the FAA. It too is an invitation to interpretation, because it
A. **Green Tree Financial v. Bazzle**

*Bazzle* was the Court’s first foray into class arbitration, and things did not go well. The Bazzles borrowed money from lender Green Tree, by means of a contract that contained an arbitration clause that was silent on class actions. They filed a class action lawsuit in court in connection with Green Tree’s lending practices. The state trial court certified a plaintiff class and then compelled arbitration. The arbitrator ultimately awarded $10 million to the plaintiff class. Green Tree appealed, arguing that the contract did not permit class arbitration.

The South Carolina Supreme Court held that, since the contract was silent on class arbitration, class arbitration was permitted. The question presented to the Court was whether the arbitrator’s class arbitration award could stand; that is, whether the arbitrators’ ruling was subject to vacatur or could be confirmed.

*Bazzle* produced four splintered opinions that offered little guidance to lower courts. Justice Breyer, writing for himself and Justices Scalia, Souter, and Ginsberg, believed that whether class arbitration had been allowed was not the proper question. Instead, it was the arbitrator, and not the court, that must make the initial class arbitrability decision.

The Breyer opinion took the simple tack of noting that (1) the contract required all disputes to be resolved by an arbitrator; (2) whether class arbitration was allowed was in dispute; and thus (3) with all doubts resolved in favor of arbitration and deference to arbitrators, the question of whether class arbitration could proceed was for the arbitrator to decide.

Justice Breyer’s opinion is thus one of threshold arbitrability (i.e., who decides who decides), and says nothing about whether class arbitration itself was proper under the parties’ contract. The case thus went to the arbitrator to decide whether class arbitration was allowed.

does not deal with black-and-white rules looking to whether an arbitrator was allowed to do what he did (or do something in a manner not allowed). It instead requires judgment as to how badly the arbitrator exercised his power. “The purpose of [the imperfectly-execute language in § 10(a)(4)] is merely to render unenforceable an arbitration award that is either incomplete . . . or so badly drafted that the party against whom the award runs doesn’t know how to comply with it.” *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001). It is the difference between you-can’t-do-that versus you-did-that-really-badly. The former looks at whether the decision made is one that the parties empowered the arbitrator to decide; the latter requires an evaluation of how well the arbitrator did what he did. This second half of § 10(a)(4)—imperfect execution of an arbitrator’s powers—thus presents a context in which the “how” and not the “what” could properly be the focus of court review, unlike the simple exceeded-their-powers ground for vacatur. But that is not the state of the law.

57 9 U.S.C. § 9. Section 10(a) of the FAA therefore employs the everything-is-permitted-except-what-is-forbidden approach. As it is said: In England, anything which is not forbidden is allowed, while in Germany, the opposite applies so everything which is not allowed is forbidden. This may be extended to France—everything is allowed even if it is forbidden—and Russia where everything is forbidden, even that which is expressly allowed.


59 This appeal was consolidated with a similar case and tried before the same arbitrator, who awarded that class $9.2 million. *Id.* at 449.

60 *Id.* at 451.

61 “[T]he parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.” *Id.* at 451-52.

62 Threshold arbitrability questions require resolution of issues that are antecedent to the merits of the dispute between the parties. The parties do not ask the court to determine who wins, but rather who should decide who wins. Procedurally, threshold arbitrability questions arise where one party requests that a court stay litigation and compel arbitration (under §§ 3 and 4 of the FAA) and the other raises a question relating to the whether arbitration is appropriate. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

63 The Justices could simply have held that class arbitration was not allowed unless the parties expressly agreed to it (i.e., reversed the court below on a substantive question of interpretation of the FAA and the permissibility of
From the parties’ point of view, this must have seemed a curious result. The Court sent the question whether class arbitration was permitted to the arbitrator who had just tried two class arbitrations. The Court nonetheless concluded that “the record suggests that the parties have not yet received an arbitrator’s decision” as to whether class arbitration was permitted.\(^\text{64}\) That the arbitrator had already presided over class arbitrations did not enter into the equation.

Justice Stevens dissented in part and concurred in the judgment. He would have simply affirmed the decision by the South California Supreme Court, which held that class arbitration was permitted under the contract, though he admitted that “[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the court.”\(^\text{65}\) However, because “there would be no controlling Judgment of the Court,” and because Justice Breyer’s opinion “expressed[ed] a view of the case close to [his] own,” Justice Stevens concurred in the judgment, sending the case back to the South Carolina courts to be sent back to the arbitrator to decide whether he had had the power to conduct the two class arbitrations over which he had just presided.\(^\text{66}\)

The essence of Chief Justice Rehnquist’s dissent (which Justices Kennedy and O’Connor joined) was that the threshold question, whether class arbitration was proper, was not for the arbitrator but instead for the court, contrary to what the state court had ruled. As to whether class arbitration was allowed, according to Rehnquist, the language of the contract was clear and class arbitration was \textit{not} permitted.\(^\text{67}\)

While the Justices disagreed as to whether class arbitration was permitted,\(^\text{68}\) eight of the nine would have sent the case back to South Carolina, either for another call on the class arbitrability question or for bilateral arbitration to proceed instead.\(^\text{69}\) None would have simply affirmed the arbitration award. What is astonishing, however, is that the court vacates the arbitration award before it without \textit{any}
discussion (or recognition) of the statutory standards governing vacatur of class awards under § 10(a) of the FAA. There is nary a mention of these standards in this case.

B. **Stolt-Nielsen v. AnimalFeeds**

*Stolt-Nielsen* addressed the same question as *Bazzle*—could an arbitration award permitting class arbitration be confirmed, or was it subject to vacatur under § 10(a)?

The parties in *Stolt-Nielsen* had a controversy arising under an agreement containing an arbitration clause whose scope included such controversy. *AnimalFeeds* served a demand for class arbitration on *Stolt-Nielsen*, and the parties “entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators,” and “stipulat[ing] that the arbitration clause was ‘silent’ with respect to class arbitration.”71 The panel concluded that class arbitration was allowed under the contract and stayed the proceeding so the parties could seek judicial review of that decision.72

The Supreme Court’s majority opinion is inscrutable. The basis for the Court’s ruling was § 10(a)(4) of the FAA, which provides for court vacatur of an arbitration award “where the arbitrators exceeded their powers.”73 The exceeded-their-powers ground for vacatur is difficult to satisfy; and, as the Court acknowledged, to obtain such relief a party “must clear a high hurdle”:

> It is not enough for petitioners to show that the panel committed an error—or even a serious error. It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable.”74

“Industrial justice” – strong stuff.

Even under this stringent standard, the Court did not hesitate in concluding that “what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.”75 In so doing, *Stolt-Nielsen* held, the arbitrators exceeded their powers in contravention of § 10(1)(4). The Court explained:

> [T]he panel appears to have rested its decision on . . . public policy argument. . . . [T]he arbitrators’ proper task was to identify the rule of law that governs in that situation. . . . [T]he panel based its decision on post- *Bazzle* arbitral decisions that ‘construed a wide variety of clauses

70 130 S.Ct. 1758.
71 Id. at 1765-66.
72 Id. at 1766. The *Stolt-Nielsen* parties apparently heeded the implicit warning of *Bazzle* that the fact of class arbitration haven taken place with the presumed consent of an arbitrator did not ensure the courts would assume such a proceeding had been proper under the FAA. This did not have the result they might have expected, however, as discussed herein.
73 Id.
74 Id. at 1767 (internal quotation marks omitted).
75 Id. at 1967-68.
in a wide variety of settings as allowing for class arbitration.’ The panel
did not mention whether any of these decisions were based on a rule
derived from the FAA . . . .

This is a frustrating holding to say the least.77 While what Bazzle held was not completely clear, the
judgment of the Court in that case sent back to the arbitrator the question whether class arbitration was
allowed where the arbitration clause at issue was silent on the issue. So the parties did in Stolt-Nielsen
just what they were told to do in Bazzle—have the arbitrators decide in the first instance whether class
arbitration was allowed. For the Stolt-Nielsen court to review just such a situation (where the parties
asked the arbitrator to decide in the first instance whether class arbitration was permitted) and vacate
the award as a decision made in excess of the arbitrators’ powers is akin to Charlie Brown, Lucy, and the
football.

What did the Stolt-Nielsen majority hold? While the reasoning is murky, the rule handed down was
clear: “[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,” because “[a]n implicit agreement to
authorize class-action arbitration . . . is not a term that [an] arbitrator may infer solely from the fact of
the parties’ agreement to arbitrate.”78 It apparently could not arise from a party’s agreement that an
arbitrator could conclude class arbitration was permitted; it had to be explicit in the agreement itself.
“[T]he panel regarded the agreement’s silence on the question of class arbitration as dispositive. The
panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a
matter of consent.”79 To consent to an arbitrator deciding the class arbitrability question is thus not the
“consent” that lies at the heart of the FAA;80 it must be the explicit consent of the parties as set forth in
their arbitration clause to arbitrate on a class basis.81 It is not clear why this is so—i.e., why parties
cannot ask an arbitrator to make a particular decision, as they did here. Stolt-Nielsen thus held that the
parties are not free to empower an arbitrator to decide whether class arbitration is permitted.

This makes no sense. For an arbitrator to exceed his powers can mean many things; one thing it cannot
mean, however, is that an arbitration panel that issues an award on a question the parties have

76 Id. at 1768.
77 Or, as the dissent put it, “hardly fair comment.” Id. at 1780 (Ginsberg, J., dissenting). “The opinions in Bazzle
appear to have baffled the parties in this case at the time of the arbitration proceeding.” Id. at 1772. The majority
speaks as if the holding of Bazzle were crystal clear. Courts and commentators have disagreed. See, e.g., Dealer
Computer Services, Inc., 623 F.3d 348, 357 n.4 (6th Cir. 2010) (referring to the “confusion” caused by Bazzle); David
S. Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 Ind. L.J. 239, 258 (“Bazzle thus contributes mightily
toward a hopeless confusion . . . .”); Rhetoric Versus Reality In Arbitration Jurisprudence: How The Supreme Court
Flaunts And Flunks Contracts, 75 Law & Contemp. Probs. 129, 141 (2012) (“Bazzle confused people (as much of the
Court’s arbitration jurisprudence does) . . . .”).
78 130 S.Ct. at 1775.
79 Id.
80 Consent is the cornerstone of the FAA. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford
Junior Univ., 489 U.S. 468, 479 (1989) (“[T]he FAA imposes certain rules of fundamental importance, including the
basic precept that arbitration is a matter of consent, not coercion.”).
81 See 130 S.Ct. at 1776 (“[W]e see the question as being whether the parties agreed to authorize class arbitration.
Here, where the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties
cannot be compelled to submit their dispute to class arbitration.”). The dissent made this explicit as well. Id. at
1782 (“For arbitrators to consider whether a claim should proceed on a class basis, the Court apparently demands
contractual language one can read as affirmatively authorizing class arbitration.”).
empowered it to decide has acted in excess of its powers. Such an award may be wrong; it may misread the contract at issue (though it did not appear to do so here); but it is issued by a panel acting within an express grant of authority by the parties to do just what it has done. An arbitrator cannot exceed his powers when he answers a question he has been empowered to decide. This is essentially the Stolt-Nielsen dissent’s position. As it aptly put it, “The panel did just what it was commissioned to do. It construed the broad arbitration clause . . . and ruled, expressly and only, that the clause permitted class arbitration.” It is hard to argue with this point.

It is plain that the Stolt-Nielsen majority thinks class arbitration is a bad idea. Stolt-Nielsen makes this point with some emphasis, “[c]onsider[ing] just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration.” Further:

[T]he presumption of privacy and confidentiality that applies in many bilateral arbitrations shall not apply in class arbitrations, thus potentially frustrating the parties' assumptions when they agreed to arbitrate. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited.83

But why should that matter? Why is that a sufficient basis to vacate an arbitrator’s ruling allowing class arbitration under § 10(a)(4)? This is the same problem present in Concepcion—the Court defines arbitration as having certain traits, it finds those traits incompatible with a class proceeding, and it then vacates an award of a panel of arbitrators that allows class arbitration to proceed.

There is an inkling in Stolt-Nielsen of the problem with class action’s preclusive effect on absent (and, thus, non-consenting) class members:

The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.84

In so noting the Court hits the mark. But, in the end, the Stolt-Nielsen Court only observes the differing natures of class actions and consensual, bilateral arbitration and moves on, basing its holding on the newly-minted rule that, absent explicit agreement to proceed on a class basis, class arbitration is not permitted and a class arbitration award is subject to vacatur. Stolt-Nielsen does not prevent class arbitrations from going forward, it merely tells you what you must do in order to have class arbitration.

IV. Limits on Arbitrators’ Powers and Acts in Excess of Those Powers

Arbitration awards are hard to reverse, and intentionally so. Three of the four grounds for vacatur are basic rules of fairness, as much process as Congress has seen fit to impose on arbitration. Subsections 10(a)(1)-(3) of the FAA thus provide that an arbitrator cannot engage in fraud, be corrupt, be partial, or engage in misconduct leading to prejudice, among other things. The fourth ground for vacatur is where arbitrators have “exceeded their powers.” This is not like the other three, and it must be given content.

82 Id. at 1780.
83 Id. at 1776.
84 Id. (citations and internal quotation marks omitted).
It begs the question—what are the sources and limits on arbitrators’ powers? Without defining the boundaries of what arbitrators can do, it cannot be determined whether an arbitrator has transgressed (i.e., exceeded) those limits.

Judges can exceed their powers, of course. They can resolve causes of action over which they lack subject matter jurisdiction. They can adjudicate claims involving individuals over whom they lack personal jurisdiction. But to say an arbitrator has exceeded his powers does not have anything to do with subject matter jurisdiction or personal jurisdiction. Arbitrators can, with few exceptions, hear any kind of claim, and a party’s contacts with the forum in which the arbitration is to occur are generally irrelevant to whether the arbitrator is acting within the confines of the power allotted him.

The sole source of an arbitrator’s power to adjudicate is the agreement of the parties, as arbitration is a creature of contract. It is the decision to arbitrate a dispute in the first instance that embodies an arbitrator with what power he possesses. Therefore, “the limits of an arbitrator’s authority are defined by the terms of the parties’ own submission,” which is the “source and limit’ of the arbitrator’s power.” If the parties have not allowed it, the arbitrator cannot do it, as an arbitrator “has no independent source of jurisdiction apart from the consent of the parties.” For an arbitrator to exceed his powers should thus mean, simply and in the most literal sense, that an arbitrator has done

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85 There are also the standing, ripeness, and mootness doctrines. See, e.g., Air Line Pilots Ass’n, Intern. v. UAL Corp., 897 F.2d 1394, 1396 (7th Cir. 1990) (court exceeds its power under Article III of the Constitution where it decides a matter that is moot); In re Baltimore Emergency Services II, Corp., 432 F.3d 557, 563 (4th Cir. 2005) (“A court greatly exceeds its power. . . by granting . . . a remedy to a party that has not demonstrated standing to request it.”).

86 There are exceptions to this rule. Congress can provide that a statutory cause of action preempts the FAA and thus arbitration is unavailable where such a cause of action is asserted. See CompuCredit Corp. v. Greenwood, 132 S.Ct. 665, 669 (2012) (The FAA “requires courts to enforce agreements to arbitrate according to their terms” “unless the FAA’s mandate has been overridden by a contrary congressional command.”) (internal quotation marks omitted). Nonetheless, while the term “subject matter jurisdiction” is at times used in discussing the propriety of an arbitrator adjudicating a certain claim, Salim Oleochemicals v. M/V SHROPSHIRE, 278 F.3d 09, 91 (3d Cir. 2002) (referencing arbitrator’s dismissal for lack of subject matter jurisdiction), courts have noted that the analogy of arbitrability to subject matter jurisdiction is false because, among other reasons, parties may waive arguments as to an arbitrator’s authority but cannot consent to a court’s proceeding where subject matter jurisdiction is absent. See Fansteel, Inc. v. Int’l Assoc. of Machinists & Aerospace Workers, 708 F. Supp. 891, 903-04 (N.D. Ill. 1989).

87 While courts do evaluate whether a party can be required to arbitrate a dispute in terms of personal jurisdiction, see Hicks v. Bank of America, N.A., 218 Fed.Appx. 739, 746 (10th Cir. 2007) [noting that the “argu[ment] that the arbitrator lacked personal jurisdiction” – because the party was a non-signatory to the arbitration agreement – had been waived), this is nothing like the contacts/fairness analysis that determines whether a court has personal jurisdiction over a party before it.

88 Mitsubishi, 473 U.S. at 625 (“The FAA is “at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .”); Concepcion, 131 S.Ct. at 1745 (referencing the “fundamental principle that arbitration is a matter of contract”).

89 I.S. Joseph Co., Inc. v. Michigan Sugar Co., 803 F.2d 396, 399 (8th Cir. 1986) (“[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties.”); Fagnani v. Integrity Finance Corp., 167 A.2d 67, 73-74 (Del. Super. 1960) (“[T]he authority if the arbitrators is derived from the mutual assent of the parties to the terms of the agreement.”).

90 Richmond, Fredericksburg & Potomac R. Co. v. Transportation Communications Intern., 573 F.2d 276, 279 (4th Cir. 1972).


92 I.S. Joseph Co., 803 F.2d at 399.
something that the parties have not empowered him to do. Where that happens, such an award should be subject to vacatur under § 10(a)(4). That is the only sensible way to read § 10(a)(4).

A. Three Ways Arbitrators Can Exceed Their Powers

There are three ways an arbitrator could act in ways that exceed the power allotted him. He could arrive at an improper answer (a focus on results); he could resolve a question by reasoning that is not permitted (a focus on process); or he could reach a question that he is not empowered to answer (a focus on topic). Stolt-Nielsen and courts interpreting § 10(a)(4)’s exceeded-their-powers language focus on the second of these in applying this ground for vacatur, on the process and reasoning employed by an arbitrator. I argue, however, that only the first of these (a focus on topic, on the propriety of deciding a particular question) is a proper reading of this ground for vacatur under the FAA.

Under a results-centric view, an arbitrator does not have the power to get it wrong, and when he does a court will vacate his award. This reading can quickly be discarded. It is black-letter law that “[t]he fact that an arbitrator makes a mistake . . . does not provide grounds for vacating an award.” The second possible reading of § 10(a)(4) is process-centric, focusing on how an arbitrator exercises his power, the reasoning on which an award rests. A process-centric view of an arbitrator’s exceeding his powers focuses on how the arbitrator arrived at his conclusion. Stolt-Nielsen took this approach, holding that the arbitration panel exceeded its powers by “impos[ing] its own view of sound policy regarding class arbitration.” This approach is problematic for a number of reasons.

First, the plain language at issue—“exceeded their powers”—should mean just what it says—that an arbitrator made a decision beyond the scope of his delegated adjudicative power. “Exceed” means “to extend outside of.” Thus, an arbitrator can do certain things, but, where he makes a decision that extends outside of the realm of what is permitted, a court will vacate that decision as beyond his powers. Stolt-Nielsen was wrongly decided under this view, because, as noted above and as is hard to refute, the parties in Stolt-Nielsen had authorized the arbitrators to decide what they decided. The arbitrators did nothing more than what had been asked of them.

Second, parties should be entitled to ask their arbitrators for reasoned decisions, and not merely summary awards, and a focus on process is likely to make arbitrators say less. Reasoning never set forth cannot be scrutinized or a source of vacatur. But parties should be free to specify the form of their arbitrator’s decision.

Finally, Stolt-Nielsen’s process-centric approach flies in the face of explicit past statements by the Court. “The Court has consistently made clear that a court may not decline to enforce an award simply because

93 Flexible Mfg. Systems Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996). Courts have for more than fifty years insisted that vacatur is not proper for an error of law or fact. Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).
94 130 S.Ct. at 1967-68.
95 Webster’s Ninth Collegiate Dictionary at 342 (1989).
96 Stolt-Nielsen, 130 S.Ct. at 1765 (“The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators . . . .”).
97 See, e.g., American Arbitration Association, Commercial Arbitration Rule 42(b) (an arbitration panel “need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate”).
it disagrees with the arbitrator’s legal reasoning,” the Supreme Court has insisted.98 It is difficult to reconcile this sentiment with the ruling in Stolt-Nielsen.

The third possible reading of the meaning of “exceeded their powers” is a topic-centric view approach. Under this view, an arbitration award is subject to vacatur where the question posed—for example, is class arbitration proper?—was not one the arbitration panel was empowered to answer. The problem was reaching that question presented in the first place. I argue that this is the proper way to interpret the § 10(a)(4) ground for vacatur.

If for arbitrators to exceed their powers is to have them do something that parties have not authorized, parties may be able to effectively expand the § 10(a) grounds for vacatur by including in their arbitration agreements more of what they do and do not want. If there is a rule of law that the arbitrator gets wrong in his award, for example, that is, as a general matter, not subject to vacatur under the FAA.99 If that same rule is memorialized in an arbitration agreement, however, an arbitration award contrary to that rule could be viewed as subject to vacatur as an arbitrator’s exceeding his powers under § 10(a)(4)—in getting wrong not just the rule of law, but the command of the parties.100 This suggests that the more rules parties put in their arbitration agreement, the more possible bases for vacatur of an arbitration award could exist. Punitive damages are generally not available for breach of contract, for example;101 if an arbitrator got that wrong and awarded punitive damages in a breach of contract case he would presumably just be committing error that would not warrant vacatur.102 But if an arbitration clause forbid an award of punitive damages and an arbitrator awarded them, that could be deemed an act in excess of the arbitrator’s powers and so subject to vacatur under § 10(a)(4).103

Allowing parties to effectively create more grounds for vacatur could be a good thing. After Hall Street Associates v. Mattel, Inc.,104 we know that parties cannot contract for stricter standards of review. If parties contractually forbidding an arbitrator from doing things has the effect of providing

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99 E.g., Flexible Mfg. Systems Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996).
100 Cf. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57-58 (1995) (“[O]ur decisions . . . make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners’ claim for punitive damages.”).
101 See Restatement (Second) of Contracts § 355, at 154 (1981) (punitive damages are not recoverable in action for breach of contract).
102 Publisher’s Ass’n of New York City v. Newspaper and Mail Deliverers’ Union, 111 N.Y.S.2d 725, 730 (N.Y. Supr. 1952) (“It is well settled that arbitrators, in the absence of an express requirement to the contrary in submission to arbitration or the contract providing for arbitration, need not follow legal principles as stated by judicial decisions” in connection with their award of punitive damages for breach of contract where such an award was not permitted by the law of the state); but see Complete Interiors, Inc. v. Behan, 558 So.2d 48, 50 (Fla. App. 1990) (absent agreement by the parties, arbitration award of punitive damages in breach of contract action exceeded scope of arbitrator’s powers where such relief was not permitted under law).
103 See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) (discussing this issue in the context of whether choice-of-law clauses in arbitration agreements incorporating state law rules (such as a ban on punitive damages) make an arbitrator’s violation of those rules an act in excess of his power).
additional grounds for vacatur on review of an arbitration award, so be it. Giving parties greater contractual freedom in connection with their ADR choices does not seem problematic.

B. Irrationality and Manifest Disregard of the Law

While Stolt-Nielsen’s process-centric view of what it means for an arbitrator to exceed his powers is problematic, the Court’s analysis—which found that the panel acted like a common law court making policy—is not one that has been applied much elsewhere. That is, courts are not following Stolt-Nielsen en masse in vacating arbitration awards for reaching results by improperly assuming the mantle of a common law court making policy.

Instead, courts, in general, in interpreting § 10(a)(4)’s exceeded-their-powers ground for vacatur, say: “Arbitrators exceed their powers . . . not when they merely interpret or apply the governing law incorrectly, but when the award [1] is completely irrational, or [2] exhibits a manifest disregard of law.”

 Manifest disregard of the law, it is held, “means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law.”

 Rather, “[t]o vacate an arbitration award on this ground, it must be clear from the record that the arbitrators recognized the applicable law and then ignored it.”

Thus, when determining whether an arbitrator has exceeded his powers by means of the general (non-Stolt-Nielsen) definition of “exceeded their powers,” it is not the result or the topic that matters, that comprises an excess of power exercised, but the explanation and reasoning (not irrationally, not by ignoring something obvious) for that result. “Exceeded their powers” is, as a matter of course in the eyes of the courts, process-centric.

In addition to the reasons set forth above as to why the process-centric view of arbitrators’ exceeding their powers is problematic, it is difficult to reconcile the phrases manifest disregard the law and act irrationally with the plain meaning of exceeded their powers. For an arbitrator to manifestly disregard applicable law—to say this is the law that applies but I will not apply it and shall reach my conclusion another way, and this is manifest, obvious—looks nothing at all like an arbitrator exceeding his powers.

 “[E]xceeded their powers” means an arbitrator did something he was not supposed to do, that he did something beyond that which was permitted; manifest disregard means that he improperly failed to consider (i.e., disregarded) something he should have considered in reaching a conclusion, and this is manifest, plain to see. To act irrationally—that is, without reason, or “[a]ffected by loss of usual or normal mental clarity; incoherent, as from shock”—is also not to act in excess of power. It is instead to use a particular (i.e., non-rational) method. This has nothing to do with transgressing limits on power. All of which is to say that, above and beyond Stolt-Nielsen, courts get it wrong in ascribing a process-centric analysis to § 10(a)(4).

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106 Id.
107 Id.
108 Mirrian-Webster online dictionary.
V. Class Arbitration Awards Are in Excess of Arbitrators’ Powers

If “exceeded their powers” is interpreted with a focus on topic (and not process or result), a class arbitration award should be subject to vacatur. Here’s why: The source of an arbitrator’s power to decide is the agreement of the parties to submit their dispute for resolution to an arbitrator, coupled with the FAA’s § 2 core power of ensuring that arbitration agreements are enforced according to their terms. Absent class members, however, cannot by definition have empowered an arbitrator to adjudicate their claims. An arbitrator thus exceeds his powers where he issues an award that purports to bind parties who have not consented to such adjudication. In such an instance, an arbitrator has done something the parties have not given him the power to do, and his award should be subject to vacatur under § 10(a)(4) of the FAA.

Importantly, this is not the same preclusion problem presented in all class actions, where questions remain as to the propriety of foreclosing absent class members’ rights to sue. It instead concerns something more fundamental, the right of the decision-maker to preside over any party, present or absent. Courts call before them unwilling parties all the time—most people would prefer not to be defendants. But where a court has personal jurisdiction over a party, that party must appear before the tribunal or suffer the consequences. Arbitrators, unlike judges, do not have innate power. It is only with the consent of the parties before the arbitrator—never mind absent parties—that an arbitrator possesses any power whatsoever. The problem with the preclusion of absent class members’ rights in the arbitral realm is thus something more than the usual class action preclusion problem.

VI. Conclusion

Arbitration is a system whose essential attribute is the freedom of parties to choose whatever method of dispute resolution they wish. With few exceptions, there are (and should be) no limits on how parties’ ADR must be structured (apart from the § 10(a)(1) – (3) vacatur grounds discussed above). Class actions, in turn, are by necessity regimented. They require court involvement to, among other things, ensure fairness, obtain public input, ensure strict adherence to rules, and provide other procedural safeguards. While class litigation allows adjudication of rights that might otherwise never

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109 See 21 Williston on Contracts § (4th ed.) (arbitration award “is not conclusive as to parties who did not join in the submission in the first instance, or ratify the award after its issuance”).

110 Stolt-Nielsen thus gets it only partly right where it notes that arbitration “is a matter of consent, not coercion.” The consent that matters, I argue, is the consent of parties to be bound by an arbitrator at all, not the consent to a certain type of arbitration.

111 See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (parties are “free to structure their arbitration agreements as they see fit”).

112 See Jones Dairy Farm v. Local No. P–1236, United Food and Commercial Workers Int’l Union, 760 F.2d 173, 176 (7th Cir.1985) (“If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop them.”).

113 See Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994) (“The requirements of Rule 23 are meant to ensure that class action treatment makes sense, in that it is necessary, efficient, and fair to the interested parties.”) (internal quotation marks omitted).

114 See UAW v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007) (among the criteria for determination of whether a class action settlement is fair, courts consider “the reaction of absent class members” and “the public interest”).


be vindicated, it also extinguishes absent class members’ claims without their knowledge or consent. It does so, however, only by means of an elaborate set of rules that ensure that everything is as fair as possible. Without adherence to all the rules that govern the entry of a class action judgment in court, due process would not permit absent class members’ rights to be compromised.

Arbitration can be defined in many ways, but one thing it cannot mean—without rewriting a century of FAA case law—is that courts will enforce an arbitration award where parties have not consented to arbitration. It is for this reason that courts should refuse to confirm class arbitration awards. A proper reading of § 10(a)(4) of the FAA—which courts do not at this point employ—reaches just this result. Stolt-Nielsen, Concepcion, and other decisions implementing § 10(a)(4)’s exceeded-their-powers language cannot withstand scrutiny. This paper offers an alternative.

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117 Class actions are effective where the amount at issue for each plaintiff class member is insufficient to justify litigation, and where, absent class litigation, such harm would go without redress.

118 See Hansberry v. Lee, 311 U.S. 32, 40, 41 (1940) (“It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party,” which is an equitable exception to this bedrock principle); 18 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4449, at 417 (1981) (it is a “deep-rooted historic tradition that everyone should have his own day in court,” which, creates the core of due process: the rights to notice, to control one’s own case, and to an opportunity to be heard); General Motors Corp. v. Bloyed, 916 S.W.2d 949, 953 (Tex.1996) (“class actions are extraordinary proceedings with extraordinary potential for abuse.”); cf. Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077–78 (2d Cir. 1995) (Kearse, J.) (noting that court, class counsel, and class representatives all have a continuing duty to protect absent class members).

119 Johnson v. General Motors Corp., 598 F.2d 432, 435, 437 (5th Cir.1979) (“Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process.”).