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Splitting Hairs: Resolving the Circuit Split on AAA Incorporation in Class Arbitration Delegation

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I. INTRODUCTION

"Who decides whether class arbitration is available?" This seemingly simple question has fueled much litigation and is hotly debated between the Federal Courts of Appeals. This question also implicates other foundational questions: "Is class arbitration a proper remedy *in this case*?" "Is class arbitration a good tool to resolve disputes?" "Are the class-action waivers that lead to the use of class arbitration conscionable?" "Is the use of arbitration clauses in consumer, employment, and other contracts between large organizations and single persons a just practice?"

This article does not presume to answer any of those questions. Instead, this article examines a very narrow issue that has caused a substantial circuit split: "Is incorporation of the American Arbitration Association (AAA) rules in an arbitration clause a proper delegation of authority to the arbitrator to decide whether class arbitration is available?" The solution to this problem, and to the class arbitrability delegation problem in general, is important because it will determine how many claims go to class arbitration. Arbitrators are more likely to decide that class arbitration is available because they believe they can handle the challenge and can bill much more time in a class arbitration. Courts, meanwhile, will embrace the Supreme Court's skepticism against class arbitration and rule that it is not available. Therefore, a resolution on this issue will have a profound impact on the number of class arbitrations filed and resolved.

I begin with a brief examination of the background of arbitration, the delegation doctrine, and class arbitration. Then, I examine the Supreme Court's treatment of class arbitration and the question of who decides class arbitrability. Next, I define the different positions the federal circuits have taken on the AAA incorporation question, which has resulted in a four to three circuit split. Finally, I propose my own resolution of the split, analyze the Supreme Court's likely solution, and examine possible effects of that decision.

II. BACKGROUND: ARBITRATION, DELEGATION, AND CLASS ARBITRATION

a. Brief History of Arbitration

Arbitration is a quasi-judicial alternate dispute resolution process where the parties agree to present their dispute to a neutral entity (generally one person or a panel of three) to issue a binding decision on the merits of the case.[2] Clauses requiring arbitration are a common feature of modern consumer agreements, employment contracts, and website terms and conditions. Arbitration is often preferred to litigation in commercial contexts because it is cheaper and faster than litigating a lawsuit, and the ability to choose the decision-maker means the parties can ensure the arbitrator has subject-matter knowledge.[3]

In the first century and a half of American jurisprudence, judges were loath to enforce agreements to arbitrate signed before the dispute arose because they infringed on the jurisdiction of the courts to resolve disputes.[4] To counteract this hostility, the United States Congress passed the Federal Arbitration Act (FAA) in 1925. The Act holds agreements to arbitrate disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[5] It also allows a party to petition a court to compel arbitration[6] and to confirm arbitral awards.[7] Parties can also ask a court to vacate or modify an award under limited circumstances.[8]

[2] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 382 (2002).
[3] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682–83 (2010).
[4] Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942).
[5] Federal Arbitration Act, 9 U.S.C. § 2.
[6] *Id.* at § 4.
[7] *Id.* at § 9.
[8] *Id* at §§ 10–11; *see, eg.* Lawrence R. Mills & Thomas J. Brewer, *"Exceeded Powers": Exploring Recent Trends in Cases Challenging Tribunal Authority*, 31 ALTS. TO HIGH COST LITIG. 113 (2013) (finding vacatur in around 20% of petitions).

Arbitrations are often conducted through arbitral organizations. One of the most prominent is the American Arbitration Association (AAA), a group founded in 1926 to provide an out-of-court solution to resolve disputes.[9] The AAA publishes and maintains a variety of rules that are often incorporated into arbitration clauses, even if the arbitration will not be administered by the AAA. Unless otherwise stated, incorporating AAA rules into an arbitration clause is an incorporation of the Rules of Commercial Arbitration.[10]

The Supreme Court initially maintained some skepticism about arbitration after the FAA was ratified.[11] Starting in the 1980s, though, the Supreme Court has held consistently in favor of binding arbitration agreements, finding that the FAA supported an overall "federal policy favoring arbitration."[12] Supreme Court and the federal circuits have found this policy to overrule traditional contract defenses such as lack of mutual assent,[13] unconscionability,[14] and the inability to vindicate rights.[15] Courts have also found this policy to overrule constitutional defenses based in the Fifth Amendment Due Process Clause[16] and the Seventh Amendment right to a civil jury.[17] The Supreme Court's expansive support for arbitration has resulted in the common use of arbitration clauses in adhesive contracts, because the drafters can be sure that the clauses will be enforced, and it is highly unlikely that the courts will step in to interfere.

[9] *AAA Mission Statement*, AM. ARB. ASS'N, www.adr.org/mission (last visited Dec. 23, 2019).
[10] *Commercial Arbitration Rules and Mediation Procedures*, Am. Arb. Ass'n, 10 (rules effective Oct. 1, 2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [hereinafter AAA *Commercial Arbitration Rules*].
[11] *See, e.g.* Wilko v. Swan, 346 U.S. 427, 436–37 (1953) (finding that arbitration could not be compelled in a claim brought under the Securities Act because arbitration did not allow full vindication of the plaintiff's rights).
[12] *See, e.g.* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").
[13] Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).
[14] Chavarria v. Ralphs Grocery, Inc., 733 F.3d 916 (9th Cir. 2013).
[15] Am. Express Co., v. Italian Colors Rest., 570 U.S. 228 (2013).
[16] Davis v. Prudential Sec., Inc., 59 F.3d 1186 (11th Cir. 1995).
[17] Janiga v. Questar Cap. Corp., 615 F.3d 735 (7th Cir. 2010).

b. Delegation of Authority Between Courts and Arbitrators

However, there is one question where courts consistently assert their authority over arbitration: whether and how the parties agreed to resolve their dispute through arbitration in the first place, and whether a court or arbitrator decides these questions. These questions are split into "substantive" arbitrability (whether the parties agreed to arbitration in the first place) and "procedural" arbitrability (the specific procedures to be followed in arbitration). Courts presumptively decide questions of substantive arbitrability unless the parties clearly and unmistakably delegate otherwise.[18] If there is such a delegation, the decision of whether a specific dispute is subject to arbitration will be decided by the arbitrator(s).[19] The courts' power over the arbitral process only applies to these "gateway questions" of whether the dispute goes to arbitration at all. Once it is found or agreed that a dispute will be arbitrated, all question of "procedural arbitrability" will be decided by the arbitrator, who is presumably better suited to determine what procedures will best fit the situation.[20]

c. Class Arbitration

Emerging in the 1980s,[21] class arbitrations allow a party to file and proceed with an arbitration for or against a class in a manner similar to class-action lawsuits. Class-action lawsuits, authorized by Rule 23 of the Federal Rules of Civil Procedure, allow parties to assert a claim on behalf of or sue a class of parties "so numerous that joinder of all parties is impracticable," among other criteria.[22] Class action suits are often filed on behalf of a group of

[18] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT&T Tech., Inc. v. Commc'n Workers, 475 U.S. 643, 649 (1986)).
[19] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
[20] *Howsam*, 537 U.S. at 86.
[21] S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T, *and A Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 206 (2012) (citing Keating v. Superior Court, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom*; Southland Corp. v. Keating, 465 U.S. 1 (1984)).
[22] *See* FED. R. CIV. P. 23.

people or organizations seeking recourse for damages that are too small to bring suit over when compared to the costs of litigation.[23] Under Supreme Court precedent, waivers against filing or participating in class action suits incorporated in an arbitration clause are enforceable.[24] Class arbitration is a unique device that imports elements of judicial class actions to adjudicate class disputes that are subject to an arbitration clause.[25]

These proceedings are often conducted according to rules promulgated by the AAA, who published Supplementary Rules for Class Arbitrations in 2003.[26] Rule 3 of these Rules holds that it is the arbitrator's duty to analyze a contract to determine the availability of class arbitration.[27] The Federal Courts of Appeals are split on the question of whether incorporating the AAA Rules of Commercial Arbitration also incorporate the Supplementary Rules for Class Arbitrations (detailed in § V, *infra*).

III. The Supreme Court's Attitude Toward Class Arbitration

The United States Supreme Court has considered class arbitrations a few times within the last twenty years, starting with *Bazzle*, followed by *Stolt-Nielsen*, *Concepcion*, and *Oxford Health Plans*. In these cases, the Court's attitude toward class arbitration as a procedure has shifted, and no decisions regarding whether class arbitrability is a procedural or substantive

[23] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 245 (2013) (Kagan, J., dissenting).
[24] *Id.* at 238 (citing AT&T Mobility v. Concepcion, 563 U.S. 333, 351 (2011)).
[25] Strong, *supra* note 20, at 205–06.
[26] *Supplementary Rules for Class Arbitrations*, Am. Arb. Ass'n (rules effective Oct. 8, 2003), https://adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf [hereinafter AAA *Supplementary Rules*].
[27] *Id*. at 4.

question of arbitrability have stuck. These cases lay the groundwork for the consideration of the law and policy behind AAA incorporation delegating class arbitrability.[28]

The first case essential to this analysis is *Green Tree Fin. Corp. v. Bazzle*.[29] In *Bazzle*, two separate plaintiffs in South Carolina filed claims against a lender.[30] The plaintiffs moved to certify a class-action suit in state court, and Green Tree responded with a motion to compel arbitration under an arbitration clause per the FAA.[31] The court certified the class, compelled arbitration, and ordered class arbitration.[32] After arbitrators selected by Green Tree, found in plaintiffs' favor in both cases, Green Tree moved to vacate the arbitrator's awards, claiming the arbitration clause did not allow for class arbitration.[33] The South Carolina Supreme Court held that that class arbitrations were allowed in the dispute because the clause was silent on the matter. Green Tree appealed to the United States Supreme Court.[34]

The Court ruled by a plurality (4–1–4) that under the contract's arbitration clause, the question should have been resolved by the arbitrator. The plurality opinion held that the contract clause submitted all questions and controversies to the arbitrator, which included whether class arbitration was available.[35] The Court noted that courts decide only the "gateway" issues of substantive arbitrability that class arbitration is not one of those issues because it is a matter of contract interpretation after arbitrability has been decided, and arbitrators are well suited to

[28] Because they were decided after the Circuit cases I discuss below and did not influence those decisions, I will be examining Epic Sys Corp. v. Lewis, 138 S. Ct. 1612 (2018) and Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019), the latest Supreme Court cases about class arbitration, below.
[29] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, (2003).
[30] *Id.* at 448.
[31] *Id.*
[32] *Id.* at 449.
[33] *Id.*
[34] *Id*. at 449–50.
[35] *Id*. at 451–52.

interpret such matters.[36] In essence, *Bazzle* held that class arbitrability was a procedural question for the arbitrator to decide.[37] Justice Stevens held in concurrence that South Carolina made the right decision allowing class arbitration. However, because the plurality opinion more closely matched his own, he joined it to avoid a deadlocked Court.[38]

In addition to delegating class arbitrability to the arbitrator, *Bazzle* signaled the Court's implicit approval of class arbitration.[39] In response, the AAA created and released its Supplementary Rules of Class Arbitrations, mere months after the *Bazzle*'s opinion.[40]

The Court stepped back from *Bazzle* (but did not overrule it) in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.[41] In *Stolt-Nielsen*, an arbitrator certified a class arbitration in an anti-trust claim brought against a shipping company, which decision the parties appealed all the way to the United States Supreme Court.[42] In the lower court, the parties stipulated that the agreement was silent on class arbitration.[43]

Justice Alito penned the 5-3 majority opinion rejecting the arbitrator's decision to allow class arbitration. The Court took a skeptical view of class arbitration, stating that it brings "fundamental changes" to the arbitration process: it does not solve a single dispute, but many with a single stroke of a pen; it is not confidential (confidentiality being a large draw of arbitration); it binds many absent parties to an arbitration award; and companies can be held

[36] *Id*. at 453.
[37] *Id*. at 451.
[38] *Id*. at 455 (Stevens, J., concurring).
[39] While the plurality decision does not discuss the merits of class arbitration as a procedure, its implicit acceptance of class arbitration in holding that arbitrators will decide class arbitrability acted as a silent approval of the procedure.
[40] AAA *Supplementary Rules*, *supra* note 25.
[41] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).
[42] *Id*. at 669–70.
[43] *Id*. at 662.

liable for large awards just like in traditional class-actions, with much less recourse for judicial or appellate review.[44] Therefore, the Court ruled that where a contract is silent on class arbitration, it is not allowed.[45] Overall, *Stolt-Nielsen* is openly skeptical of class arbitration when compared to *Bazzle*'s silent acceptance.

Justice Ginsburg's dissent held that because the parties had submitted the question of class arbitrability directly to the arbitrator, they properly delegated the issue to the arbitrator.[46] She also disputed the majority's skepticism toward class arbitration by noting that class arbitrations, much like class-action suits, are often the only way for people to litigate small claims against large companies, and therefore, should not be made more difficult to start or join.[47]

Stolt-Nielsen's majority opinion seemed to establish that class arbitrability was not a procedural question of arbitrability, which under the *First Options*[48] rule would leave the question of whether a contract allows for class arbitration to the courts. However, Justice Alito's majority opinion did not address that question directly, so there was still no direct answer to the question of "who decides" whether class arbitration is available in a silent contract.

The Court's decision in *AT&T Mobility LLC v. Concepcion*[49] doubled down on the Court's skepticism towards class arbitration. In addition to the misgivings expressed in *Stolt-Nielsen*, Justice Scalia noted that arbitrators are generally not qualified to certify a class.[50] Justice

[44] *Id*. at 686–87.
[45] *Id*. at 687.
[46] *Id*. at 693–96 (Ginsburg, J., dissenting).
[47] *Id*. at 699.
[48] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
[49] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[50] *Id*. at 347–51.

Scalia also extended *Stolt-Nielsen*'s attack on class arbitration, noting, "[w]e find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."[51] Therefore, the Court was vocally resistant of any finding that required parties to participate in class arbitration not explicitly agreed to.[52]

The Supreme Court's ruling in *Oxford Health Plans LLC v. Sutter*[53] left open the question of who decides whether class arbitration is available.[54] Instead, it seemingly took a step back from *Stolt-Nielsen* by establishing that an arbitrator's clause construction award will be upheld under the FAA as long as the arbitrator "(even arguably) interpreted the contract."[55] *Oxford Health Plans* is largely silent as to the desirability or lack thereof of class arbitration. Therefore, *Stolt-Nielsen* and *Concepcion* spoke loudest, and both were skeptical (to put it lightly) of class arbitration. These four decisions laid the groundwork for the subsequent circuit split on proper delegation of class arbitrability decisions.

IV. THE CIRCUIT SPLIT

The Supreme Court's decisions in *Bazzle*, *Stolt-Nielsen*, *Concepcion*, and *Oxford Health Plans* left open the questions of whether the availability of class arbitration is a substantive or procedural question of arbitrability, and of what constitutes "clear and unmistakable" delegation

[51] *Id.* at 351.
[52] *Id.*
[53] Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013).
[54]The Court noted that Oxford would have had a good chance to argue that issue in this case, had they not agreed in the lower courts to have the arbitrator decide. *Id.* at 569 n.2.
[55] *Id.* at 569.

of authority when it comes to class arbitration decisions. The circuits all agree that the question of class arbitrability in the absence of a delegation is decided by courts.[56]

Instead, the circuits are split on the much narrower question of whether incorporating the procedural rules of the AAA acts as an incorporation of Rule 3 of the Supplementary Rules of Class Arbitrations and shows "clear and unmistakable" intent to delegate the question of class arbitrability to the arbitrator.[57]

a. Initial Decisions for Courts: Reed Elsevier *and the "Daisy-Chain"*

The Sixth Circuit Court of Appeals was the first circuit to consider this question in the wake of *Stolt-Nielsen* and *Concepcion* in *Reed Elsevier Inc. v. Crockett.*[58] There, the court considered whether class arbitration was available in a dispute between a lawyer and Reed Elsevier Inc., owner of legal research database LexisNexis. Per the arbitration clause of his contract with LexisNexis, Crockett filed a grievance against LexisNexis with the AAA claiming his firm was being charged more than it agreed to in the contract.[59] The arbitration clause stated that "any controversy, claim or counterclaim . . . arising out of this Order . . . will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ('AAA')."[60] The complaint alleged two class claims for arbitration: a class of law firms who had been overcharged, and a class of clients to whom those

[56] *See* Reed Elsevier Inc. *ex rel*. LexisNexis v. Crockett, 734 F. 3d 594, 598–99 (6th Cir. 2013); Del Webb Communities, Inc. v. Carlson, 817 F.3d 867, 873 (4th Cir. 2016); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335–36 (3d Cir. 2014); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972 (8th Cir. 2017); Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 395 (2d Cir. 2018) ("assume[d] without deciding"); Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1232 (11th Cir. 2018); Dish Network LLC v. Ray, 900 F.3d 1240, 1243-45 (10th Cir. 2018).
[57] *See* cases cited *supra* note 17.
[58] *Reed Elsevier*, 734 F.3d at 594.
[59] *Id.* at 596.
[60] *Id.* at 599.

overcharges had been passed.[61] LexisNexis responded by filing suit in the Southern District of Ohio, asking for a declaration that the arbitration clause did not allow class arbitration and to enjoin the filed class arbitration.[62] The Court granted summary declaratory judgment denying class arbitration,[63] and an appeal followed.[64] The Sixth Circuit found that while the contractual language closely mirrored the contract in *Bazzle* (which the Supreme Court had found to be a proper delegation of the class arbitrability question), the fact that the contract did not mention class arbitration meant that *Stolt-Nielsen* applied, and the courts would decide whether class arbitration was available.[65]

The Fourth Circuit was the next court to consider the AAA incorporation issue in *Del Webb Communities, Inc. v. Carlson.*[66] In *Del Webb,* the parties' dispute over construction defects in new homes led to the invocation of an arbitration clause: "The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding[.]"[67] After winding through South Carolina state courts, Carlson filed a demand for class arbitration with the AAA on behalf of approximately 2,000 other plaintiffs, at which point the AAA case manager announced the arbitrator would decide class arbitrability. Del Webb moved again to compel bilateral arbitration, stating the court should decide class arbitrability. The district court found that, under *Bazzle,* class arbitrability is a procedural question and that the arbitrator decides it as a matter of course, and an appeal followed.[68]

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[61] *Id.*
[62] *Id.*
[63] Reed Elsevier, Inc. v. Crockett, No. 3:10CV248, 2012 WL 604305, at *13 (S.D. Ohio Feb. 24, 2012), *aff'd sub nom. Reed Elsevier*, 734 F.3d 594 (6th Cir. 2013).
[64] *Reed Elsevier*, 734 F.3d at 596.
[65] *Id.* at 599–600.
[66] Del Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016).
[67] *Id.* at 869.
[68] *Id.* at 869–70.

The Fourth Circuit's opinion focuses on the Supreme Court's criticisms of class arbitration, as seen in *Stolt-Nielsen* and *Concepcion*.[69] Like those cases, the opinion in *Del Webb* holds that because class arbitration is too different from ordinary arbitration, it is not considered to be agreed upon in a standard arbitration clause.[70] The Fourth Circuit remanded the case to the district court to decide arbitrability.[71] While the circuit did not make an express decision regarding AAA incorporation as it relates to class arbitrability delegation, the fact that they ordered the district court to decide class arbitrability under a clause incorporating AAA rules indicates they would rule alongside the Sixth, Third, and Eighth Circuits in finding that AAA incorporation is not a valid delegation.

The Third Circuit Court of Appeals has considered class arbitration issues on several occasions. In 2014, the circuit held as a preliminary matter that the availability of class arbitration is a question of substantive arbitrability for the court to decide.[72] The court then ruled in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*[73] that AAA incorporation does not delegate class arbitrability to the arbitrator. In *Chesapeake*, parties to a mineral rights lease disputed royalties owed under the contract.[74] The arbitration clause held, in relevant part: "[D]isagreement between Lessor and Lessee . . . shall be determined by arbitration in accordance with the rules of the American Arbitration Association."[75] After Scout Petroleum filed a class arbitration with the AAA, Chesapeake filed for declaratory judgment with the Middle District of

[69] The court cited *Stolt-Nielsen*'s holding that class arbitration is so fundamentally different as to constitute a different procedure, and *Concepcion*'s holding that because arbitration awards cannot be appealed, companies are more likely to suffer grievous losses to an arbitral mistake versus the lesser amounts at stake in most bilateral arbitrations. *Id*. at 875–76 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) and AT & T Mobility LLC. v. Concepcion, 563 U.S. 333, 350 (2011).
[70] *Del Webb*, 817 F.3d at 876–77.
[71] *Id.* at 877.
[72] Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335–36 (3d Cir. 2014).
[73] Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746 (3d Cir. 2016).
[74] *Id.* at 748.
[75] *Id.* at 749.

Pennsylvania in April 2014, asking that the court declare class arbitration was not available. The motion was denied, sending the question of class arbitrability to the arbitrators. On July 30, 2014, the Third Circuit released its opinion in *Opalinski* that availability of class arbitration is for the court to decide. The arbitrators soon ruled that the incorporation of the AAA rules acted as a clear and unmistakable delegation of authority to the arbitrators and asked the parties to submit briefs as to whether class arbitration was allowed.[76] Chesapeake filed with the court to vacate the class construction award, which the court granted because the award was contrary to *Opalinski*.[77] After multiple district courts found they would decide class arbitrability in cases against Chesapeake Appalachia,[78] Scout Petroleum and other plaintiffs appealed to the Third Circuit to resolve the issue of whether AAA incorporation was "clear and unmistakable" enough to delegate the class arbitrability decision to the arbitrator.[79]

The Court concluded that the arbitration clauses did not overcome the "onerous burden" to conclude that courts decide class arbitrability.[80] The opinion heavily cited *Reed Elsevier*, *Opalinski*, *Stolt-Nielsen*, and *Oxford Health Plans* to support its decision, but the most interesting analysis in the decision concerns the "daisy-chain of cross-references" required to find a delegation of authority through AAA incorporation.[81] The court laid out the chain as such: in order to find a delegation, a court must look first to the lease, which incorporates the AAA rules.[82] Rule 1 of the AAA Rules of Commercial Arbitration holds that unless contracted

[76] *Id.* at 751.
[77] *Id*. at 752.
[78] While it is beyond the scope of this article, a full examination of the procedural and arbitral history of *Chesapeake* would make a fascinating case study on the interweaving of arbitration and litigation and whether arbitration is *really* cheaper or faster than litigation in the current legal climate.
[79] *Chesapeake Appalachia*, 809 F.3d 746.
[80] *Id*. at 758.
[81] *Id*. at 758–61.
[82] *Id*. at 749.

otherwise, AAA incorporation clauses refer to the Rules of Commercial Arbitration.[83] Rule 7 of those rules delegates authority to the arbitrator to decide their own jurisdiction.[84] The court found that at the time of their decision, there was no direct reference in the Rules of Commercial Arbitration to the Supplementary Rules of Class Arbitrations. However, the court found that they would have to make a jump to the Supplementary Rules of Class Arbitrations to answer the "who decides class arbitration" question. Specifically, a court would have to go to Rule 3 of the Supplementary Rules to find that the AAA rules delegate the ability to certify a class to arbitrators.[85] However, the Court found that because there are no references in the Rules of Commercial Arbitration to the Supplementary Rules, the leap from AAA incorporation to delegation of class arbitrability is a step too far to be "clear and unmistakable."[86] Thus, the Third Circuit held that AAA incorporation is not a sufficient delegation of authority to decide class arbitrability.

The Eighth Circuit became the most recent to rule that AAA incorporation is not a proper delegation of authority to decide class arbitrability in *Catamaran Corp. v. Towncrest Pharmacy.*[87] In this case, a putative class of over eighty-five pharmacies claiming they had not been paid under a prescription drug benefits plan filed for a class arbitration with the AAA, per their contract holding that disputes would be arbitrated by the AAA according to its rules. Catamaran filed suit in district court seeking declaratory judgment that the contract did not allow

[83] *Id.*
[84] *Id*. at 749–50.
[85] *Id*. at 762.
[86] The Court found that while the overwhelming weight of case law indicates that AAA incorporation *is* a valid delegation of arbitrability questions to arbitrators in bilateral arbitrations, they followed *Stolt-Nielsen* in holding that class arbitrations are sufficiently different procedures to justify creating a new rule. *Id.* at 763–65.
[87] Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017).

for class arbitration.[88] The district court denied Catamaran's summary judgment motion, finding that incorporation of AAA rules was a proper delegation to the arbitrator to decide class arbitrability, and Catamaran appealed.[89]

The Eighth Circuit found the district court would decide class arbitrability in the presence of a AAA incorporation.[90] Their decision explicitly followed the Sixth Circuit's skepticism toward class arbitration in *Reed Elsevier* and the Third Circuit's finding in *Chesapeake* that AAA incorporation is not proper delegation. Thus, the Court overruled the district court's summary judgment and remanded for the district court to determine class arbitrability.[91]

Thus, by the end of 2017, four circuits had held that AAA incorporation is not sufficiently clear and unmistakable delegation to overcome the strong presumption that a court should decide class arbitrability. The Sixth Circuit led the charge in *Reed Elsevier* by holding that the significant differences between bilateral and class arbitration means an explicit delegation of authority is required for an arbitrator to decide class arbitrability. Then, the Fourth Circuit applied the Supreme Court's skepticism against class arbitration in reaching a similar decision in *Del Webb.* The Third Circuit in *Chesapeake* expanded on these holdings, noting that finding a clear delegation of authority through incorporation of the AAA rules requires a "daisy-chain" of cross-references that takes a court far afield of the actual text of the contract. With the Eighth Circuit's decision in *Catamaran* marking the Fourth Circuit to rule in favor of courts

[88] *Id*. at 969.
[89] *Id*. at 970.
[90] *Id*. at 973.
[91] *Id*. at 972–73.

deciding class arbitrability with no dissent, the answer to the question of AAA incorporation could safely have been said to be "well-settled law."

b. Opening the Split: Sappington *and Its Progeny*

However, in 2018, three circuits went against the tide and opened a circuit split. The Second Circuit opened the split in *Wells Fargo Advisors, Inc. v. Sappington.*[92] There, two separate groups of employees filed class arbitration claims for unpaid overtime with both the Financial Industry Regulatory Authority ("FINRA") and the AAA per their employment contracts, which required FINRA to arbitrate all disputes and AAA to arbitrate if FINRA rejected the claim.[93] One of the clauses in dispute specifically stated, "[a]ny controversy relating to your duty to arbitrate . . . or enforceability of this arbitration clause . . . shall also be arbitrated before the FINRA."[94] After FINRA declined to arbitrate because it forbids class arbitration, Wells Fargo moved to compel bilateral arbitration in all claims before the AAA per the employment contract, which the district court declined. Wells Fargo then appealed to the Second Circuit.[95]

The Second Circuit "assumed without deciding" that class arbitrability is a gateway matter for the courts to decide, absent clear and unmistakable evidence that the parties agreed otherwise.[96] However, the Second Circuit found that under Missouri law, the delegation of "any controversy or dispute," buffered by their exclusion of specific controversies from arbitration, indicated a clear delegation to decide all disputes about arbitrability to the arbitrator.[97] They then

[92] Wells Fargo Advisors v. Sappington, 884 F.3d 392 (2d Cir. 2018).
[93] *Id*. at 394–95.
[94] *Id*. at 395.
[95] *Id*. at 394–95.
[96] *Id*. at 395–96.
[97] *Id*. at 396 (emphasis in original).

tackled *Chesapeake*'s "daisy-chain" reasoning directly, holding that by incorporating the 1993 AAA rules into the contract, the parties agreed to Rule 1's provision that the AAA's rules in effect at the time arbitration commences will be enforced.[98] Therefore, the 2013 edition of the Commercial Arbitration Rules and Rule 3 of the Supplementary Rules for Class Arbitrations both applied and delegated authority to the arbitrator.[99] They responded to Wells Fargo's "chain of inferences" argument by noting that Missouri state law necessitates full incorporation of the rules. The Second Circuit then criticized its sister circuits for "apparently" ignoring state law in holding that incorporation was not a sufficient delegation.[100] While the Second Circuit acknowledged the issues of class arbitration as laid out in *Chesapeake* and *Catamaran*, it found the arbitration clause to be clear enough to warrant allowing the arbitrator to decide class arbitrability.[101]

Next, the Eleventh Circuit weighed in with *Spirit Airlines, Inc. v. Maizes*.[102] There, a group of Spirit customers claimed the airline was breaking promises in fare-club agreements.[103] Spirit sued in the Southern District of Florida seeking a declaration stating that the clause did not allow class arbitration. The clause informed that "[a]ny dispute arising between Members and Spirit will be resolved by . . . arbitration . . . in accordance with the rules of the American Arbitration Association then in effect." The district court granted the class representatives' motion to dismiss the suit, and Spirit Airlines appealed.[104]

[98] *Id*. at 396–97.
[99] *Id*. at 397.
[100] *Id.* at 397–98.
[101] *Id.* at 399.
[102] Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230 (11th Cir. 2018).
[103] *Id.* at 1231–32.
[104] *Id.* at 1232.

The Eleventh Circuit found incorporation of the AAA rules gives clear and unmistakable delegation of authority to the arbitrator. Precedent informed proper delegation from AAA incorporation in a bilateral arbitrability dispute.[105] The court was unconvinced by its sister circuits' decisions contrary to *Reed Elsevier*. One such case, *Stolt-Nielsen*, did not justify holding class arbitrability to a different standard than bilateral arbitrability.[106] Finally, the court looked at the clause through Florida contract law, which supported delegation as well.[107] Thus, although the decision never cited *Sappington*, the Eleventh Circuit agreed with the Second Circuit's reasoning in finding proper delegation through AAA incorporation.

The Tenth Circuit followed *Maizes* ten days later in its *Dish Network, LLC v. Ray* opinion.[108] There, an arbitration clause between Dish Network and an employee incorporated the AAA rules, but had no other express delegation clauses[109] (unlike the contract in *Sappington*, which textually delegated almost all authority to the arbitrator[110]). The parties initially submitted clause construction to the arbitrator, who ruled both that they had the authority to decide class arbitrability, and that class arbitration was allowed under the contract.[111] Dish Network moved to vacate, was denied, and appealed to the Tenth Circuit.[112]

The court found under both Tenth Circuit precedent and Colorado state law that the broad language of the contract incorporated Rule 7 of the AAA Commercial Arbitration Rules and Rule 3 of the Supplementary Rules for Class Arbitrations.[113] Thus, it was a clear delegation to

[105] *Id.* at 1233–34 (citing Terminix Int'l Co., LP v. Palmer Ranch, LP, 432 F.3d 1327, 1332 (10th Cir. 2005)).
[106] *Maizes*, 899 F.3d at 1234.
[107] *Id.* at 1235–36.
[108] Dish Network, LLC v. Ray, 900 F.3d 1240 (10th Cir. 2018).
[109] *Id.* at 1241–42.
[110] Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 395 (2d Cir. 2018).
[111] *Ray*, 900 F.3d at 1242.
[112] *Id.* at 1242–43.
[113] *Id.* at 1245.

the arbitrator to decide their own jurisdiction.[114] It also reasoned by example from a series of cases holding incorporation of the JAMS (a different arbitration organization) rules of arbitration constituted a proper delegation of class arbitrability decisions.[115] It additionally incorporated *Sappington*'s critique of the other circuits' decisions.[116] Therefore, *Ray* deepened the circuit split and raised questions about the incorporation of other arbitration organization rules.

There are a few common threads to pull from these decisions. First is the greater reliance on state law. The pro-court decisions rarely, if ever, relied on state cases in examining the AAA incorporation issues, while *Sappington*, *Maizes*, and *Ray* all relied on their interpretations of state law in their opposite rulings.[117] Additionally, these cases rejected *Reed Elsevier* and *Stolt-Nielsen* by finding that class arbitration is not so different from bilateral arbitration to warrant different treatment under the delegation doctrine.[118] Finally, they rejected *Chesapeake*'s "daisy-chain" reasoning by noting that, per state law, incorporation of arbitral organization rules acts as a full incorporation and does not trigger a chain of references analysis.[119]

V. RESOLVING THE SPLIT

Therefore, at the time of writing, there was a four to three split on the question of whether AAA incorporation is a proper delegation of class arbitrability decisions. The primary disagreements fall along two lines: interpretation of the Supreme Court's attitude toward class arbitration and whether the leap from AAA incorporation to AAA Supplementary Rules for

[114] *Id.*
[115] Namely, the First, Second, Fifth, Ninth, and Eleventh Circuits. See quotations in *Ray*, 900 F.3d at 1245. It is interesting to note that all these circuits have either not ruled on AAA incorporation or ruled that it is proper delegation, which indicates these circuits would side with the Second Circuit that AAA incorporation is a sufficient delegation. *Ray*, 900 F.3d at 1244–45.
[116] *Id.* at 1247.
[117] *See* cases cited *supra* notes 91, 94, 101, 107.
[118] *Id.*
[119] *Id.*

Class Arbitrations Rule 3 is too attenuated to be read as a "clear and unmistakable" delegation of authority to the arbitrator.

The "improper delegation" camp (led by the Sixth Circuit) cites the Supreme Court's skepticism of class arbitration by ruling that because class arbitrations are so fundamentally different from bilateral arbitrations they require precise delegation language.[120] Additionally, the Third Circuit in *Chesapeake* laid out a strong argument that the chain of cross-references required to move from incorporating AAA rules to finding delegation of class arbitrability is too attenuated to be "clear and unmistakable."[121]

The "proper delegation" camp (led by the Second Circuit) responds by arguing that their sister courts did not properly apply state law,[122] that the differences between class arbitration and bilateral arbitration are not large enough to warrant different treatment,[123] and the "daisy-chain" is not long enough to violate the "clear and unmistakable" standard.[124] These positions on the AAA incorporation issue are mutually exclusive, so when the Supreme Court weighs in there will be a winner and a loser. How will this split be resolved?

a. Author's Solution

If I were on the Supreme Court deciding this issue, my opinion would focus heavily on *Howsam*'s "clear and unmistakable" delegation standard.[125] As an initial matter, I would agree with the circuits in holding that class arbitrability is an issue of substantive arbitrability that is

[120] Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013).
[121] Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 748–51 (3d Cir. 2016).
[122] Dish Network LLC v. Ray, 900 F.3d 1240, 1245 (10th Cir. 2018); Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1235–36 (11th Cir. 2018); Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 397–98 (2d Cir. 2018).
[123] *Maizes*, 899 F.3d at 1234.
[124] *Ray*, 900 F.3d at 1244–45; *Sappington*, 884 F.3d at 396.
[125] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

left to the court absent clear delegation otherwise.[126] I hold as such because class arbitration uses a radically different set of rules from traditional bilateral arbitration, so finding it to be a mere "procedural" difference from bilateral arbitration does not make sense.[127] Therefore, I would rule in accord with the Courts of Appeals that class arbitrability is a substantive question for the courts to decide (absent proper delegation).

As to the matter of AAA incorporation, I find the Third Circuit's "daisy-chain of cross references" reasoning in *Chesapeake*[128] to be persuasive. Under *Howsam*, courts decide questions of substantive arbitrability unless the contract "clearly and unmistakably provide[s] otherwise."[129] In situations where a contract is ambiguous or silent on delegation, courts presumptively decide.[130] Taking *Howsam*'s requirement for a "clear and unmistakable delegation" at face value, a clause that arbitration is controlled by the rules of the AAA does not textually establish that an arbitrator will decide class arbitrability. Rule 1 of the AAA Rules of Commercial Arbitration states that incorporation of AAA rules refers to the Rules of Commercial Arbitration unless otherwise stated. The Rules of Commercial Arbitration, in turn, do not mention class arbitration or the Supplementary Rules thereof.[131] Because the Commercial Arbitration Rules do not mention class arbitration or the Supplementary Rules, analysis of the contract then takes the reader further afield to find an answer to the question of "who decides class arbitrability." Following this chain requires one to find the AAA's Supplementary Rules for Class Arbitrations, then finally Rule 3 delegating authority to the arbitrator.[132] Because finding

[126] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).
[127] In this, I agree with the Court's holding in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686–87 (2010).
[128] Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 748–51 (3d Cir. 2016).
[129] *Howsam*, 537 U.S. at 83.
[130] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995).
[131] AAA *Commercial Arbitration Rules*, *supra* note 9, at 10.
[132] AAA *Supplementary Rules*, *supra* note 25, at 3–4.

delegation requires looking outside not only the text of the contract, but outside the incorporated Commercial Arbitration Rules to the unmentioned Supplementary Rules of Class Arbitrations (requiring analysis three steps removed from the contract), the leap from AAA incorporation to delegation of class arbitrability is too attenuated to meet the "clear and unmistakable" standard established by *Howsam.*

Another important factor is party expectations. When reviewing for arbitrability and delegation, courts are instructed to follow relevant state laws to determine the intent of the parties.[133] In doing so, courts must determine whether parties would expect a court to decide the question.[134] Per *Stolt-Nielsen*, silence on class arbitration is not seen as acceptance of class arbitration.[135] It is reasonable to assume that attorneys drafting an arbitration clause that does not explicitly mention class arbitration would expect courts to decide whether or not class arbitration is available.[136] By leaving class arbitrability with the courts absent a clear delegation, party expectations in the wake of *Stolt-Nielsen* will be upheld.

Finally, my analysis advances the policy of protecting unsophisticated parties. Signers of consumer and employment contracts are often unrepresented and have little to no legal training. Courts should encourage clear and careful contract drafting that uses plain language so unrepresented parties understand what they are agreeing to. My resolution of the AAA incorporation question limits contractual analysis to only the text of the contract and to the incorporated AAA Rules of Commercial Arbitration (available to even unsophisticated parties

[133] *First Options*, 514 U.S. at 944.
[134] *Howsam*, 537 U.S. at 83.
[135] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686–87 (2010).
[136] Further assuming they even considered the possibility of class arbitration while drafting the clause. In cases where the drafters did not contemplate class arbitration, they would also have a valid expectation to have a court review the contract to determine whether they agreed to class arbitration.

via internet search). Therefore, unrepresented parties who take time to research a contract before signing can determine what they are agreeing to without having to hire an attorney to follow the daisy-chain to the Supplementary Rules. Ruling that AAA incorporation is a proper delegation would require unrepresented parties to have the knowledge and resources to be able to follow the daisy-chain and be able to understand what a class arbitration is and who will decide if it is available. While this policy argument can be easily countered by pointing out that an unsophisticated party would not even know what delegation is, let alone how to check for it, an overarching policy favoring clear contract drafting requires ruling this way even on obscure legal issues in order to set precedent that encourages drafting more easily-understood contracts.

Because class arbitrability is a substantive question of arbitrability, the leap from AAA incorporation to the Supplementary Rules of Class Arbitrations is too attenuated, parties would reasonably expect a court to decide class arbitrability absent clear delegation, and public policy favors encouraging plain language in contracts to protect unsophisticated parties. Therefore, I would side with the circuits that rule AAA incorporation does not delegate class arbitrability.

b. The Supreme Court's Solution

The real question, however, is how the Supreme Court will rule on this issue. I predict the Court will rule AAA incorporation to not be sufficient delegation, but for different reasons. Specifically, the Court's skepticism of class arbitration, as discussed above, will play a large role in finding no delegation. I base this conclusion on the changes to the Court since *Oxford Health Plans* and the positions the new justices staked out in *Epic Systems Corp. v. Lewis*[137] and *Lamps Plus, Inc., v. Varela*.[138]

[137] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[138] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

I examined the high Court's skepticism above, but to review: in *Stolt-Nielsen*, the Court held that class arbitration changes the nature of arbitration by including parties not subject to the contract, resolving many ongoing and potential disputes at once, binding absent parties to that resolution, and subjects defendants to massive liability without effective appellate review.[139] *Concepcion* echoed these concerns, also adding that class arbitration takes longer and is more expensive than bilateral arbitration, and that many arbitrators are not qualified to handle class certification.[140]

However, the Court has welcomed two new justices since the decisions in *Stolt-Nielsen* and *Concepcion.* In 2017, Justice Gorsuch filled Justice Scalia's vacant seat,[141] and Justice Kavanaugh replaced Justice Kennedy in 2018.[142] Scalia and Kennedy both ruled with the majority opinions in *Stolt-Nielsen* and *Concepcion*, so replacing them may have caused a change in the Court's opinion toward class arbitration. However, examination of the Court's recent class arbitration decisions shows that the majority will not shift its skepticism to class arbitration.[143]

In 2018, the Court released its opinion in *Epic Systems Corp. v. Lewis.*[144] *Epic Systems* resolved several cases concerning a National Labor Relations Board (NLRB) decision creating a right under the National Labor Relations Act (NLRA) for employees to demand class arbitration even through a valid class-action waiver.[145] Then-new Justice Gorsuch wrote for the majority, finding the NLRB decision to be in error because the agency overstepped its bounds in issuing a

[139] *Stolt-Nielsen*, 559 U.S. at 686–87.
[140] AT&T Mobility LLC v. Concepcion,563 U.S. 333, 347–51 (2011).
[141] *Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch (last visited Dec. 3, 2019).
[142] *Brett M. Kavanaugh*, OYEZ, https://www.oyez.org/justices/brett_m_kavanaugh (last visited Dec. 3, 2019).
[143] Since this piece was authored, Justice Ginsburg passed away and was replaced by Justice Barrett. However, because the Court has not released any class arbitration decisions since Justice Barrett's appointment, the author declines to analyze her possible decision on this issue.
[144] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[145] *Id.* at 1620–21.

ruling that infringed on the FAA, so the Court brought the ruling in harmony with the FAA.[146] The opinion firmly stood by *Concepcion*[147] and rejected Justice Ginsburg's NLRA and public policy-based defense of class arbitration as a tool for workers to combat exploitive employers[148] by noting that a "mountain of precedent" supports the Court's policy favoring arbitration.[149] The Court has a duty to find a balance between seemingly conflicting federal statutes (like the NLRA and FAA in this case).[150] *Epic Systems* showed that Justice Gorsuch respects *Stolt-Nielsen*'s and *Concepcion*'s skepticism towards class arbitration, as well as the Court's overwhelming policy in favor of arbitration.

In 2019, the Supreme Court decided *Lamps Plus, Inc. v. Varela*, the most recent Supreme Court decision to deal with class arbitration.[151] There, the parties asked the Court to resolve the question of class arbitrability in a case involving a contract ambiguous (but not silent) about class arbitration.[152] Justices Gorsuch and Kavanaugh signed Chief Justice Robert's majority opinion that extended *Stolt-Nielsen* to forbid finding class arbitrability in ambiguous as well as silent contracts.[153] The decision heavily quoted *Stolt-Nielsen*, *Concepcion*, and *Epic Systems* in laying out the familiar arguments holding class arbitration in a separate category from bilateral arbitration when construing arbitration agreements.[154] Because the new Justices signed onto this opinion echoing past skepticism of class arbitration, it is logical to assume that they will continue to follow that policy in the future. Both *Epic Systems* and *Lamps Plus* were clean 5-4 splits

[146] *Id.* at 1624–25.
[147] *Id.* at 1622–23.
[148] *Id.* at 1640–41 (Ginsburg, J., dissenting).
[149] *Id.* at 1630.
[150] *Id.* at 1631–32.
[151] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
[152] *Id.* at 1413.
[153] *Id.* at 1415.
[154] *Id.* at 1416.

between the "conservative" and "liberal" wings of the Court, showing that this Court will maintain the skepticism against class arbitration well into the future.[155]

Analyzing this skepticism is important because it will play a major role in the Supreme Court's decision to rule in favor of the courts deciding class arbitrability in AAA incorporation cases. As discussed above, logic dictates that arbitrators are much more likely to find class arbitrability than a court because it allows them to bill more hours and they believe they can handle the complexity of class certification (despite Justice Scalia's contrary belief[156]). Courts, bound by the Supreme Court's precedential skepticism toward class arbitrations and the multiple rulings against finding class arbitrability in *Stolt-Nielsen, Concepcion, Epic Systems*, and *Lamps Plus*, are unlikely to find class arbitrability.

Because it will reduce the amount of class arbitrations initiated, the Supreme Court will rule that delegation on class arbitrability must be explicit to qualify under *Howsam*, and incorporation of the AAA rules is not "clear and unmistakable" enough to delegate that authority.

c. Effects of This Decision

A decision in favor of courts on this issue will have some immediate effects on drafters and signers of arbitration clauses, and on the general practice of contract drafting to account for class arbitrations.

The likely positive effect of such a decision will be to encourage more careful drafting of arbitration clauses. Because drafters will (in theory) have to explicitly consider class arbitration

[155] *Epic Sys. Corp. v. Lewis*, OYEZ, https://www.oyez.org/cases/2017/16-285 (last visited Dec. 3, 2019) ("swing vote" Justice Kennedy sided with the conservatives, as he did in *Stolt-Nielsen* and *Concepcion*); *Lamps Plus, Inc. v. Varela*, OYEZ, https://www.oyez.org/cases/2018/17-988 (last visited Dec. 3, 2019).
[156] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348.

when writing clauses, they will write more detailed clauses that will be easier to understand based purely on the text of the contract. Those who wish to delegate class arbitrability will have to do so explicitly, leading to more careful drafting. Another positive effect will be the reduction of litigation around AAA and other organization incorporations, because the question of class arbitrability delegation has been answered, reducing case load in the federal courts.

However, the reduced availability of class arbitration will make it much harder for parties to class-action waivers to combine their claims in arbitration, leading to further reduction of the ability to effectively vindicate smaller claims.[157] Additionally, this ruling will close a loophole currently available in the "proper delegation" circuits that allows a class to use AAA incorporation as a work-around to class-action waivers. Finally, contracting costs may increase as more time is required to draft and revise arbitration clauses to take note of class arbitration possibilities.

VI. CONCLUSION

The circuit split on the question of AAA incorporation's delegation of class arbitrability opens a fascinating window on the state of arbitral procedure, principles of contract construction, and the judiciary's role in the evolution of a private parallel to class-action lawsuits. Resolving this question is important because it has opened a circuit split with mutually exclusive decisions and clouds the law around class arbitration. Although there is not currently an answer, an examination of the Supreme Court's skeptical view of class arbitration shows it is likely the Court will side with the Sixth, Fourth, Third, and Eighth circuits by finding AAA incorporation is NOT a proper delegation of the class arbitrability decision to the arbitrator.

[157] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 248–49 (2013) (Kagan, J., dissenting).