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The Future of Class Arbitration

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In recent years, the Supreme Court has frequently granted *certiorari* in class arbitration cases. In the wake of AT&T v. Concepcion[i] and Stolt-Nielsen v. AnimalFeeds,[ii] commentary addressed the possibility that class arbitration was dead.[iii] Yet, following the Court's most recently decided cases—Oxford Health Plans LLC v. Sutter[iv] and Am. Exp. Co. v. Italian Colors Rest.[v]—it appears class arbitration is still alive. What, then, is the future of class arbitration?

I. The current state of class arbitration proceedings and jurisprudence

Right now, class arbitration is occurring. In fact, according to the AAA's class arbitration case docket, there are 49 active class arbitrations.[vi] Class arbitrations are also allowed under JAMS proceedings.[vii] Although JAMS does not publicize ongoing proceedings, it is fair to assume class arbitrations are also being conducted under its rules. Despite the Supreme Court's recent attention to class arbitration, these cases have been ongoing for a while. Since December 2002, there have been 352 class arbitrations under the AAA alone.[viii] With class arbitration currently being conducted, it is necessary to understand the Supreme Court's jurisprudence in this area in order to shed light on the future of class arbitration.

A. Concepcion

In 2011, the Supreme Court decided *Concepcion*, which "stands for the proposition that courts may not strike down arbitration agreements based on facially neutral rules that disproportionately impact arbitration."[ix] The majority opinion, authored by Justice Scalia, is framed by the "fundamental principle that arbitration is a matter of contract."[x] This principle is based on the idea that defendants would not have willingly agreed to arbitrate if they knew they could be subject to the disadvantages of class proceedings.[xi]

The majority opinion's opposition to class arbitration is also based on the premise "that if the Court were to allow states to condition the enforceability of arbitration agreements on the availability of class proceedings, then it would be obliged to allow states to demand other procedures in arbitration, such as judicially monitored discovery."[xii] The majority sees the shift from individual to class proceedings as one that introduces changes that are "fundamental," including the introduction of absent parties, different procedures, and higher stakes.[xiii] These fundamental changes, according to the majority, would "greatly increase risks to defendants" and force them to accept "in terrorem" settlements of questionable claims.[xiv] Consequently, the majority concludes that judicial decisions that interfere "with [the] fundamental attributes of arbitration," are inconsistent with the purposes of the FAA and should be preempted.[xv]

B. Stolt-Nielsen

In 2010, the Supreme Court decided *Stolt-Nielsen* and held that "arbitrators may not order class arbitration based on an agreement that is silent with respect to class arbitration."[xvi] The

majority concludes that the arbitrators' decision to order class action arbitration, based on their view that public policy favors class action arbitration, exceeded the scope of their powers under Section 10(a)(4) of the FAA and should be disregarded.[xvii] At arbitration, the parties stated that they never agreed to participate in class arbitration.[xviii] As such, the Court specifies that "[a]n implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[xix] What the arbitral panel did wrong in the eyes of the majority has been stated well:

> "[I]nstead of relying on their view of public policy, the arbitrators should have identified a rule of law…that governs the issue of class arbitration. Their failure to do so, combined with their choice to act as a common law court to develop what they viewed as the best rule for the situation, exceeded the scope of the panel's powers under the agreement and, therefore, had to be reversed."[xx]

C. Oxford Health

In *Oxford Health*, the Supreme Court held that that an arbitrator can allow a class arbitration proceeding. Here, Oxford Health agreed that an arbitrator should determine what the contract at issue meant, including whether its terms allowed class arbitration.[xxi] Therefore, the Court says "Oxford [Health] chose arbitration, and it must now live with that choice" because the arbitrator did what the parties requested.[xxii] Importantly, the Court distinguishes this case from *Stolt–Nielsen* by emphasizing that in the latter the arbitrators did not construe the parties' contract and did not identify any agreement authorizing class proceedings.[xxiii]

D. Italian Colors

During the same term as *Oxford Health*, the Supreme Court decided *Italian Colors*. Here, the Court held that the FAA does not allow courts to invalidate a class arbitration waiver through the effective vindication exception. In other words, the Court discusses how a class arbitration waiver may be invalidated if a plaintiff is not able to vindicate his or her statutory remedies due to arbitration filing and administrative fees; yet, no invalidation will occur due to a plaintiff's expenses in proving a statutory remedy, which was at issue here.[xxiv] The importance of this distinction was highlighted even before the Court's decision by a commentator who writes that the vindication of rights doctrine "might not apply where the 'prohibitively expensive' costs are imposed, not by arbitration-specific expenses, but by the claim itself."[xxv] The Court also references its *Concepcion* decision to emphasize how the switch from bilateral to class arbitration sacrifices the principal advantages of arbitration by making the process slower, more costly, and more likely to create a procedural mess.[xxvi]

II. Ways for class arbitration to survive

In light of the above class arbitration jurisprudence, it is evident that the Supreme Court is quite hostile to class arbitration. This is especially true due to the fact that the majority in three out of the above four cases declared that class arbitration is inconsistent with bilateral arbitration.[xxvii] Despite this hostility, class arbitration can survive in limited circumstances under

the Court's jurisprudence. Most obviously, under *Stolt-Nielsen*, class arbitration can occur where there is an explicit agreement authorizing it. After *Oxford Health*, it is clear that class arbitration can proceed when parties agree that an arbitrator should determine what their contract means, including whether its terms allowed class arbitration. Following *Italian Colors*, class arbitration may be allowed if plaintiffs are not able to vindicate their statutory remedies due to arbitration filing and administrative fees. Notwithstanding these avenues for survival, how else will class arbitration occur in the future?

A. National Labor Relations Board (NLRB)

One possible avenue for the survival of class arbitration is under the NLRB. This path is exemplified by a case involving D.R. Horton, Inc.[xxviii] In *D.R. Horton*, the NLRB held that the class action waiver D.R. Horton required its employees to sign violated the National Labor Relations Act (NLRA), which assures employees a right to engage in concerted activities[xxix] and which has been interpreted to allow collective actions in litigation or arbitration.[xxx] A more recent NLRB case also held that class action bans in arbitration agreements are unlawful under the NLRA.[xxxi] Related to these cases are those involving the Fair Labor Standards Act (FLSA). In Raniere v. Citigroup,[xxxii] the court held that the right to proceed collectively under the FLSA could not be waived. Commentators have suggested that the *Raniere* line of precedent could be a vehicle by which low-wage workers can have their claims aggregated.[xxxiii]

Nonetheless, the NLRB's order in *D.R. Horton* has all but been invalidated. First, at least one court within the same jurisdiction opposes its reasoning.[xxxiv] Second, the Fifth Circuit reviewed *D.R. Horton* and issued an opinion on December 3, 2013.[xxxv] In relevant part, the Fifth Circuit disagrees with the NLRB's reasoning by discussing how the FAA is equally as important as the NLRA.[xxxvi] The Fifth Circuit also cites *Concepcion* to say that the NLRB's prohibition of class-action waivers effectively disfavors individual arbitration.[xxxvii] For this reason, the Fifth Circuit says the NLRB's decision violates the FAA.[xxxviii] The opinion supports this finding by stating that neither the NLRA's text nor its legislative history contains a command against application of the FAA.[xxxix] Moreover, the Fifth Circuit emphasizes that every sister circuit to consider this issue has declared that it would not defer to the NLRB's rationale in *D.R. Horton* and held that class waivers in arbitration agreements are enforceable.[xl]

Serious doubt has also been cast upon *Raniere*. Indeed, the Second Circuit reviewed that decision and held that the FLSA does not preclude class waivers.[xli] First, the Second Circuit discusses how no congressional command requires it to reject the waiver of class arbitration in the FLSA context.[xlii] Second, the Second Circuit cites *Italian Colors* to reason that the effective vindication doctrine does not apply simply because it is not "economically feasible" for a plaintiff to enforce his statutory rights individually.[xliii] Put another way, the Second Circuit reiterates the Supreme Court's position in *Italian Colors* that the expense in proving a statutory remedy does not foreclose the right to pursue that remedy.[xliv]

For these reasons, it appears that the door to the future for class arbitration under both the NLRA and FLSA has been shut. Therefore, as one commentator has noted, in the context of employment arbitration "individual arbitration of wage claims might be the only avenue left for many low-wage workers."[xlv]

B. State unconscionability defenses

In order to avoid the Supreme Court's declaration in *Concepcion* that state rules that interfere with "with [the] fundamental attributes of arbitration," are inconsistent with the purposes of the FAA and should be preempted,[xlvi] state courts are analyzing arbitration agreements to see if unconscionability impacted the formation of the contract.[xlvii] This analysis is being conducted because the doctrine of unconscionability remains a basis for invalidating arbitration provisions.[xlviii] In particular, state courts use the doctrine to guard against one-sided contracts, oppression, and unfair surprise, which can occur during the process of contract formation because it is at that time that a party is required to agree to objectively unreasonable terms.[xlix] For example, in Brewer v. Missouri Title Loans,[l] the Missouri Supreme Court found an entire arbitration agreement unconscionable because it was non-negotiable and its terms were extremely one-sided.[li] While unconscionability may invalidate entire arbitration agreements, this defense may not aid much in the survival of class arbitrations.

This avenue for survival is likely limited because *Concepcion* is being interpreted to mean that a court cannot invalidate an arbitration agreement on the sole basis that it contains a class waiver.[lii] This means that the existence of a class waiver, alone, will not make the entire arbitration agreement unconscionable. Instead, class arbitration will likely only survive under state unconscionability defenses when arbitration agreements containing class waivers can be invalidated as a whole because of non-negotiable and extremely one-sided terms, as in *Brewer*. Yet, even that may not be enough if courts begin following the reasoning of recent Sixth Circuit case law that says an agreement is not unconscionable even when an arbitration agreement is one-side and adhesive.[liii] Reliance on state unconscionability defenses to help ensure the survival of class arbitration may also prove limited due to the following: wide variation among jurisdictions in applying the doctrine, the ability to use choice of law clauses to avoid jurisdictions that take a liberal approach to unconscionability, and the potential of FAA preemptions of state unconscionability law.[liv]

C. Agency Regulations

Class arbitration may survive in a limited fashion under recently enacted regulations. Specifically, the Consumer Financial Protection Bureau issued "Regulation Z,"[lv] which prohibits mandatory arbitration clauses and waivers of certain consumer rights. Because Regulation Z only relates to mortgage-related consumer transactions, it likely has a limited effect on the survival of class arbitration. Yet, class arbitration could be conducted in this context, especially because Regulation Z expressly allows a consumer and creditor to agree to use arbitration to resolve a dispute after it arises.[lvi] Because this regulation became effective June 1, 2013, very little litigation concerning its provisions has occurred.[lvii] Nonetheless, commentators predict that more will surely follow.[lviii] Therefore, this avenue for class arbitration's survival is only beginning to take shape.

D. Mass and collective arbitral procedures

Class arbitration may survive inside and outside the U.S., albeit in different forms. Abaclat v. Argentine Republic[lix] has been labeled as one of the most controversial international arbitrations in recent years because 60,000 claimants joined their claims in a single arbitration.[lx] For the proceeding to progress, the majority in *Abaclat* frames the arbitration as a "mass" action

in order to avoid the U.S.'s hostility to class arbitration.[lxi] To do this, the majority uses a hybrid of aggregate and representative relief, which allows it to consider questions of consent and admissibility separately.[lxii] Conducting a large-scale arbitration in this fashion may provide a path for class arbitration's survival internationally despite existing in a modified form.

Additionally, another aggregate arbitral procedure exists. "Collective arbitration" has developed as an alternative and is different from class arbitration in that it involves opt-in procedures rather than opt-out procedures.[lxiii] Collective arbitrations have been conducted in the U.S.,[lxiv] and they could help ensure the survival of aggregate arbitral procedures in general because parties may implicitly agree to them within an arbitration agreement.[lxv]

Consequently, it appears that class arbitration may survive in the U.S. although it could take on a different form. Regardless of the official form of the proceeding, the fundamental quality of class arbitration—the aggregation of claims—would remain. Nonetheless, the possibility exists that the Supreme Court's hostility to anything other than bilateral arbitration could impair class arbitration's ability to take on alternative forms. While the future of class arbitration is still cloudy in the U.S. along these lines, *Abaclat* has broken new ground abroad, which has led most commentators to agree that the door has been opened to mass claims in the international investment arbitration arena.[lxvi]

III. The future debate surrounding class arbitration

In addition to a lack of clarity regarding the avenues through which class arbitration may survive, debate surrounding class arbitration will likely continue, which will fuel uncertainty about class arbitration's future. Several areas of debate seem to be especially contentious.

A. The nature of arbitration

As mentioned, in *Concepcion*, *Stolt-Nielsen*, and *Italian Colors*, the majority declares that class arbitration is inconsistent with bilateral arbitration.[lxvii] *Stolt-Nielsen* and *Concepcion* most clearly describe the Supreme Court's current view on the nature of arbitration by emphasizing how the shift from individual to class proceedings introduces changes that are "fundamental," including the introduction of absent parties, different procedures, and higher stakes.[lxviii] Is the Supreme Court correct or is it misconstruing the true nature of arbitration?

Commentary admits that class arbitration does not resemble the traditional view of arbitration as a bilateral procedure with few witnesses, documents, or formalities.[lxix] Yet, perhaps it is not clear that this traditional model still holds true or should hold true.[lxx] First, commentary argues that *Stolt-Nielsen* and *Concepcion*'s conclusion that class arbitration changes the nature of arbitration is questionable because of the flexibility inherent in arbitration.[lxxi] Second, other commentators reveal there is no support at all in the legislative history of the FAA for the idea that the Act was intended to prohibit state laws that preserve the right of claimants to arbitrate collectively.[lxxii] Third, commentary points out that multiparty proceedings have been arbitrated for decades.[lxxiii] Fourth, although class arbitration may be more formal, the presence of court-like procedures has never made an arbitration proceeding illegitimate except with respect to class arbitration.[lxxiv] Fifth, despite the complexities involved in class arbitration, it is perhaps disingenuous to suggest that arbitrators are unable to handle such procedures.[lxxv] Sixth, although class arbitration makes use of representative relief, the formalism of arbitration, itself,

perhaps allows all parties to be heard.[lxxvi] For these and other reasons, commentators oppose the Supreme Court's idea that class arbitration changes the nature of traditional, bilateral arbitration. The debate on this topic surely will continue and may affect how class arbitration is perceived and interpreted under the FAA.

B. Ethical problems

Some commentators believe that class arbitration creates ethical problems for arbitrators through conflicts of interest.[lxxvii] Do these problems actually exist?

At the beginning of class arbitration, it is alleged that there is no standard to keep arbitrators neutral and their class counsel selections unbiased from financial and social influence.[lxxviii] Commentators speculate that bias is created when an arbitrator chooses as class counsel the original counsel who participated in the selection of the arbitrator, filed the claim, and/or advanced fees to the arbitrator.[lxxix] Yet, the FAA allows for vacatur of an arbitral award "where the award was procured by corruption, fraud, or undue means; or where there was evident partiality or corruption in the arbitrators."[lxxx] Whether these grounds for vacatur adequately curb bias in arbitrators or whether additional standards could be beneficial may be valid questions in this debate; however, it appears that a standard does, in fact, exist.

At the end of class arbitration, commentators contend that there is a strong financial incentive for the arbitrator to be more concerned with the interests of class counsel than with class members due to their receipt of payment for their services.[lxxxi] This alleged ethical issue is made worse, the commentators argue, because the arbitrators' final awards can contain amounts for their own fees.[lxxxii] Nonetheless, the AAA, which is currently conducting class arbitrations, has a code of ethics for its neutrals.[lxxxiii] Canon I within the code specifically addresses how an arbitrator should only accept payment if he or she can serve impartially and independently of the parties, witnesses, and other arbitrators.[lxxxiv] And, Canon VII addresses how arbitrators should adhere to integrity and fairness when making arrangements for compensation.[lxxxv] Therefore, it may be worthwhile to inquire to what extent the AAA's code of ethics is being complied with or whether specific canons should be developed with respect to class arbitration. Yet, it does appear that current codes of ethics for arbitrators address commentators' ethical concerns.

C. Procedural issues

Issues may also arise in the future depending on whether the AAA or JAMS is administering class arbitration due to differences in the rules published by each. First, under the AAA, the arbitrator decides whether class arbitration may proceed, unless otherwise ordered by the court; yet, under JAMS the court decides whether a class arbitration waiver should be enforced or waived.[lxxxvi] Second, the AAA dictates that at least one of the arbitrators must be appointed from its roster of arbitrators while the JAMS rules neither have qualifications for the arbitrator nor a requirement as to the number of arbitrators.[lxxxvii] These differences, among others, have the potential to create variety in class arbitration proceedings. Whether these differences are creating problems in the class arbitrations currently being conducted is unknown, but insight along those lines could shape how class arbitration is conducted in the future. Furthermore, commentary reveals open questions in the AAA and JAMS rules that could be

addressed in the future: how the procedure in selecting the arbitrator will work if there are multiple class representatives and/or lawyers, whether bifurcation of liability and damages issues should be required, and whether discovery and information exchange rules should be modified.[lxxxviii]

D. Arbitration Fairness Act

The Arbitration Fairness Act (AFA) also has potential to shape the future of class arbitration. Although it does not mention class arbitration, the AFA partially seeks to legislatively overrule Supreme Court jurisprudence that the AFA's proponents believe changed the meaning of the FAA.[lxxxix] In other words, the AFA has the potential to overrule any case—namely, *Concepcion*, *Stolt-Nielsen*, and *Italian Colors*—in which the Court has substituted its own policy preferences for Congress's by reading into the FAA its opposition to class actions.[xc] The current version of the bill is not expected to be adopted;[xci] however, Congress has enacted mini-AFA regulations[xcii] that are viewed as counterweights to the Supreme Court's jurisprudence.[xciii] Any future regulation that acts as a counterweight to the Court's class arbitration jurisprudence would surely shape the future of class arbitration.

IV. Conclusion

Some aspects of class arbitration's future are clear: (1) the Supreme Court's hostility to such proceedings is consistently making its way into recent case law and (2) the very limited avenues for class arbitration's survival under the Court's jurisprudence are becoming more defined. Other aspects are less clear. In particular, although additional paths to class arbitration's survival exist, they are either in serious doubt or just beginning to be defined. Indeed, class arbitration may even take on alternate forms. Regardless of its future form and status, the battle over class arbitration "will likely continue for some time, reflecting the bitter debate that has been waged for years with respect to judicial class actions."[xciv]

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[i] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
[ii] Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).
[iii] *See*, *e.g.*, Maureen A. Weston, *The Death of Class Arbitration After Concepcion?,* 60 U. KAN. L. REV. 767, 768 (2012) (discussing how the Roberts Court has taken a critical view of class arbitration and has "potentially allowed for [its] evisceration").
[iv] Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013).
[v] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).
[vi] AAA Class Arbitration Case Docket, http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket?_afrLoop=21307877 18273437&_afrWindowMode=0&_afrWindowId=1a48ggsbbr_38#%40%3F_afrWindowId%3D 1a48ggsbbr_38%26_afrLoop%3D2130787718273437%26_afrWindowMode%3D0%26_adf.ctrl -state%3Dwllaeryr8_84 (last visited December 2, 2013).
[vii] JAMS Class Action Procedures, http://www.jamsadr.com/rules-class-action-procedures/ (last visited December 2, 2013).
[viii] *Id*.
[ix] Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 HARV. J.L. & PUB. POL'Y 991, 1003 (2012).

[x] *See* Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 565-67 (2012) (citing *Concepcion*, 131 S. Ct., at 1745).
[xi] *See id*. at 584 (citing *Concepcion*, 131 S. Ct. at 1752 ("We find it hard to believe that defendants would bet the company with no effective means of review....")).
[xii] *See id*. at 565 (citing *Concepcion*, 131 S. Ct at 1747).
[xiii] *Concepcion*, 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776).
[xiv] *Id*. at 1752; *see also* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 489 (2011) (discussing how the Court views class arbitration as different from bilateral arbitration in that the process is slower, more expensive, more procedurally formal, and more likely to create risks to defendants).
[xv] Rudolph Cole, *On Babies and Bathwater*, at 489.

[xvi] *Id*. at 506.
[xvii] *Stolt-Nielsen*, 130 S. Ct. at 1767-68.
[xviii] *Id*. at 1775.
[xix] *Id*. at 1771-72, 1775.
[xx] *See* Rudolph Cole, *On Babies and Bathwater*, at 484 (citing *Stolt-Nielsen*, 130 S. Ct. at 1768-70, which held that the arbitrators exceeded their power and that an arbitrator's authority is derived from the agreement of the parties).
[xxi] *Oxford Health*, 133 S. Ct. at 2071.
[xxii] *Id*.
[xxiii] *Id*. at 2070.
[xxiv] *Italian Colors*, 133 S. Ct. at 2310-11.
[xxv] *See* Spencer, *Arbitration, Class Waivers, and Statutory Rights*, at1012 (citing Kaltwasser v. AT & T Mobility LLC, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011)).
[xxvi] *Italian Colors*, 133 S. Ct. at 2312.
[xxvii] *Concepcion*, 131 S. Ct. at 1750; *Stolt-Nielsen*, 130 S. Ct. at 1775; *Italian Colors*, 133 S. Ct. at 2312.
[xxviii] In Re D. R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012).
[xxix] *See* Rhonda Wasserman, *Legal Process in A Box, or What Class Action Waivers Teach Us About Law-Making*, 44 Loy. U. Chi. L.J. 391, 413-14 (2012) (citing 29 U.S.C. § 157 (2012)).
[xxx] *See id*. (citing D.R. Horton, 357 N.L.R.B. No. 184, at *2-3).
[xxxi] *See* 24 Hour Fitness USA, Inc., 20-CA-035419, 2012 WL 5495007 (Nov. 6, 2012) (holding that employers may not compel employees to waive their right to collectively pursue litigation in all forums, arbitral and judicial).
[xxxii] 827 F. Supp. 2d 294, 299 (S.D.N.Y. 2011).
[xxxiii] Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1147 (2012)
[xxxiv] LaVoice v. UBS Fin. Servs., Inc., No. 11-2308, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (declining to follow *D.R. Horton* and emphasizing how *Concepcion* stands "against any argument that an absolute right to collective action is consistent with the FAA's 'overarching purpose"').
[xxxv] D.R. Horton, Inc. v. N.L.R.B., No. 12-60031, 2013 WL 6231617 (5th Cir. Dec. 3, 2013).
[xxxvi] *Id*. at *9.
[xxxvii] *Id*. at *11.
[xxxviii] *Id*.; *see also* Wasserman, *Legal Process in A Box*, at 431 (predicting that the Supreme Court will likely have to resolve the conflict between the NLRA, along with FINRA Rules that also invalidate class action waivers in certain circumstances, and the Court's pro-arbitration policy under the FAA).
[xxxix] *Id*. at *12.

[xl] *See id*. at *14 (citing Richards v. Ernst & Young, LLP, No. 11–17530, 2013 WL 4437601, at *2 (9th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297–98 n. 8 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013).
[xli] Raniere v. Citigroup Inc., 11-5213-CV, 2013 WL 4046278, *2 (2d Cir. 2013).
[xlii] *Id*.
[xliii] *Id*.
[xliv] *Id*.
[xlv] Ruan, *What's Left to Remedy Wage Theft?*, at 1141.
[xlvi] Rudolph Cole, *On Babies and Bathwater*, at 489.

[xlvii] *See* Brian J. Murray, *I Can't Get No Arbitration: The Death of Class Actions That Isn't, at Least So Far*, 60-SEP FED. LAW., 62 (2013) (discussing how state courts have resisted *Concepcion* by characterizing rules that are anti-arbitration in practice as being general in theory and holding entire arbitration clauses unconscionable instead of deciding whether the class action waiver within the clause was enforceable).
[xlviii] *Id*.; *see also* 9 U.S.C.A. § 2 (West) (permitting agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability)
[xlix] Brewer v. Missouri Title Loans, 364 S.W.3d 486, 492-93 (Mo. 2012) *cert. denied*, 133 S. Ct. 191 (U.S. 2012) *reh'g denied*, 133 S. Ct. 684 (U.S. 2012).
[l] *Id*.
[li] *Id*.
[lii] Davis v. Sprint Nextel Corp., No. 12-01023, 2012 WL 5904327, *2 (W.D. Mo. Nov. 26, 2012); *see also* Robinson v. Title Lenders, Inc., 364 S.W.3d 505, 515 (Mo. 2012) (citing *Concepcion*, 131 S. Ct. at 1748).
[liii] *See* Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 600 (6th Cir. 2013) (holding that the arbitration agreement at issue was not unconscionable despite its one-sided and adhesive nature because *Italian Colors* held that the absence of a class action right does not make an agreement unenforceable notwithstanding other unconscionability concerns).
[liv] Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 308 (2012).
[lv] 12 C.F.R. § 1026.36(h).
[lvi] *Id*.
[lvii] The only case the author could find concerning § 1026.36 is CFPB, v. Castle & Cooke Mortg., et al., 2013 WL 4047047 (D. Utah), which alleges the defendant is in violation of § 1026.36(d)(1)(i) by paying its loan officers bonuses based on terms or conditions of consumer-credit transactions secured by a dwelling. No case could be located concerning Regulation Z's prohibition of mandatory arbitration clauses and waivers under § 1026.36(h).
[lviii] Murray, *I Can't Get No Arbitration*, at 62-63.
[lix] Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at http:// italaw.com/sites/default/files/case-documents/ita0236.pdf
[lx] S.I. Strong, *Mass Procedures As A Form of "Regulatory Arbitration"-Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259 (2013).
[lxi] *Id*. at 267.
[lxii] *Id*. at 267-68.
[lxiii] *Id*. At 285-86.
[lxiv] *See* Velez v. Perrin Holden & Davenport Capital Corp., 769 F. Supp. 2d 445, 446-47 (S.D.N.Y. 2011) (permitting collective arbitration for labor and compensation disputes); *see also* JetBlue Airways Corp. v. Stephenson, 88 A.D.3d 567, 573-74, (N.Y. App. Div. 2011) (allowing collective arbitration for statutory claims).
[lxv] *See* Strong, *Mass Procedures As A Form of "Regulatory Arbitration"*, at 285 (citing *JetBlue Airways Corp*., 88 A.D.3d at 573-74 to discuss how courts can distinguish *Stolt-Nielsen* because under a collective action all of those affected are actual parties, unlike in a class arbitration. Therefore, because collective and class procedures are different and because a collective action is not so fundamentally different from an ordinary arbitration, parties can implicitly agree to a collective arbitration unlike the class arbitration in *Stolt-Nielsen*).
[lxvi] *Id*. at 321-22.

[lxvii] *Concepcion*, 131 S. Ct. at 1750; *Stolt-Nielsen*, 130 S. Ct. at 1775; *Italian Colors*, 133 S. Ct. at 2312.
[lxviii] *Concepcion*, 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776).
[lxix] 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, 203 (2012).
[lxx] *See id*. at 203-04 (contending that the term "arbitration" has been used to describe a wide variety of processes, both bilateral and multilateral).
[lxxi] *See id*. at 204 (suggesting that the nature of arbitration is not something that can or should be both defined and universally agreed upon).
[lxxii] *See* Wasserman, *Legal Process in A Box*, at 399-401 (discussing how the Supreme Court's recent jurisprudence has substituted its own policy preferences for Congress's by reading into the FAA its opposition to class actions).
[lxxiii] *See* Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, at 211-13 (pointing out that multiparty arbitrations are occurring with increasing frequency and now constitute a significant proportion of the caseload of some arbitral institutions, which means that class arbitration cannot be said to change the nature of a proceeding that has already handled large-scale claims).
[lxxiv] *Id*. at 255.
[lxxv] *See id*. at 263-64 (citing several commentators who propose that arbitrators are just as competent to deal with class arbitration's procedural complexities as courts).
[lxxvi] *See id*. at 266-67 (discussing how class arbitration is an adjudicatory process just like judicial class actions, which means that it appropriately allows parties to be heard regardless of the existence of representative relief).
[lxxvii] Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309-10 (2011).
[lxxviii] *See id*. at 310 (contending that an attorney's selection by an arbitrator as class counsel and subsequent payment of fees to the arbitrator creates a strong appearance of partiality); *see also id*. at 322 (claiming that there is an appearance of misconduct in class arbitration because arbitrators are not subject to Judicial Canons).
[lxxix] *Id*. at 321.
[lxxx] 9 U.S.C. § 10(a)(1)-(2) (2011).
[lxxxi] *See* Powell & Bales, *Ethical Problems in Class Arbitration*, at 310 (positing that arbitrators' lack of concern for class members is exacerbated because arbitrators are not bound by Fed. R. Civ. P. 23).
[lxxxii] *Id*. at 326.
[lxxxiii] Am. Arbitration Ass'n, The Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased (last visited December 2, 2013); *see also* JAMS, Arbitrators Ethics Guidelines, http://www.jamsadr.com/arbitrators-ethics/ (last visited December 2, 2013).
[lxxxiv] *Id*. at 2-3.
[lxxxv] *Id*. at 7-8.
[lxxxvi] *See* Larry R. Leiby, *Class Arbitrations Under Attack—But Survive,* 7 No. 1 JOURNAL OF THE AMERICAN COLLEGE OF CONSTRUCTION LAWYERS 4 (2013) (citing AAA Class Arbitration Rule 4(a) and JAMS Class Action Procedure Rule 1(a)).
[lxxxvii] *Id*.
[lxxxviii] *Id*.
[lxxxix] Wasserman, *Legal Process in a Box*, at 406-08.
[xc] Wasserman, *supra* note 73.

[xci] Wasserman, *Legal Process in a Box*, at 406-08.
[xcii] *See* Malin, *The Arbitration Fairness Act*, at 289 (discussing the 2010 Department of Defense Appropriations Act banning pre-dispute agreements to arbitrate sexual harassment claims and the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibiting pre-dispute agreements to arbitrate claims under commodities and securities whistleblower provisions).
[xciii] John R. Snyder, *Supreme Court Stays Active in the Arbitration Arena*, 130 BANKING L.J. 234-35 (2013).
[xciv] Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, at 269-70.