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TOO DARN BAD: HOW THE SUPREME COURT’S CLASS ARBITRATION JURISPRUDENCE HAS  
UNDERMINED ARBITRATION

By  
Adam Raviv\*

In recent Supreme Court cases addressing the validity of class action waivers in arbitration agreements, arbitration nominally won the battle. But it lost the war. In 2011, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act preempted a California state rule that prohibited companies from including an arbitration clause with a class action waiver in their customer contracts.<sup>1</sup> Two years later, in *American Express v. Italian Colors Restaurant*, the Court held that a class action waiver in an arbitration agreement does not prevent consumers from enjoying “effective vindication” of their legal rights under federal antitrust law, and therefore is enforceable under the FAA.<sup>2</sup>

Not surprisingly, the *Concepcion* and *Italian Colors* decisions have inspired a great deal of commentary.<sup>3</sup> Whatever their views on whether the cases were correctly decided, most observers agreed that the decisions at least promoted arbitration.<sup>4</sup> In doing

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\* Counsel, Wilmer Cutler Pickering Hale and Dorr LLP. The opinions expressed in this article are the author’s alone and do not necessarily reflect the views of his employer. The author’s firm, but not the author himself, took part in some of the cases discussed in this article. An earlier version of a portion of this article was presented at the New Voices from New Professionals panel at the 106<sup>th</sup> Annual Meeting of the American Society of International Law.

<sup>1</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>2</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) and *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013), addressing the scope of an arbitrator’s authority to order class arbitration. However, neither case addressed whether a class action waiver was enforceable, because the governing contract in each case was silent as to class proceedings.

<sup>3</sup> See, e.g., Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISPUTE RESOL. 21 (2012); David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151 (2013); Harvard Law Review Assoc., *The Supreme Court 2012 Term Leading Cases – American Express Co. v. Italian Colors Restaurant*, 127 HARV. L. REV. 278 (2013); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOTIATION L. REV. 201 (2012); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767 (2012); Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2d 375 (2010); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 128 (2011); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323 (2011); Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPPLEMENT 31, 43-45 (2012); 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 (2012).

<sup>4</sup> With respect to *Concepcion*, see Catherine M. Amirfar & David W. Rivkin, *Current Challenges to Consumer Arbitration in the United States: Much Ado About Nothing For International Arbitration?*, ARB. REV. AMERICAS (2012) (explaining that *Concepcion* “preserve[s] the federal policy of promoting arbitration”); Jennifer B. Poppe & Alithea Z. Sullivan, *Could the Supreme Court’s Enforcement of*

so, they reflected the Court’s claim that its decisions furthered a “national policy favoring arbitration.”<sup>5</sup>

This article questions that conclusion. In fact, although the Court’s recent class arbitration decisions have nominally “favored” arbitration by upholding particular arbitration provisions, in fact the rulings may ultimately undermine the use of arbitration as an efficient, flexible means of resolving disputes, both in the U.S. and internationally. In particular, these decisions: (1) undersold the efficiency benefits of class arbitration, thereby promoting inefficient piecemeal proceedings, (2) made it likely that fewer rather than more claims will be arbitrated, (3) incorrectly claimed that arbitration is inappropriate and undesirable in high-stakes cases, (4) denigrated the abilities and expertise of arbitrators, (5) made it possible that certain arbitration agreements will be *less* enforceable in the international context than domestically, (6) signaled a very narrow view of proper arbitration to the rest of the world, (7) prompted a legislative backlash that could ultimately lead to far more limited use of arbitration, (8) prompted a backlash among federal regulators to protect certain types of class actions, creating an ironic and unwarranted gap between particular class actions and all others, and (9) induced many lower courts to try to limit the application of the Supreme Court’s rulings.

## I. THE CASES

### A. *Concepcion*

Vincent and Liza Concepcion were aggrieved by a tax charge imposed by the corporate predecessor of AT&T Mobility and filed a complaint in the United States

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*Arbitration in Concepcion Reverberate in the Securities Litigation Sphere?*, 8 SEC. LITIG. REP. (Sept. 2011), at 2 (referring to “*Concepcion*’s pro-arbitration holding”); Nixon Peabody, Class Action Alert (Mar. 12, 2012) (referring to the “pro-arbitration message from *AT&T Mobility LLC v. Concepcion*”), available at [http://www.nixonpeabody.com/Ninth\\_Circuit\\_applies\\_Concepcion](http://www.nixonpeabody.com/Ninth_Circuit_applies_Concepcion); Dirk W. de Roos & Russell O. Stewart, *Legal Trends and Best Practices in Class Arbitration*, 40 COLO. LAW. 47, 52 (2011) (“*Concepción* is a pro-arbitration decision”); Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Doctrine Under Rent-a-Center, West, Inc. v. Jackson*, 60 AM. U. L. REV. 1673, 1676 n.13 (2011) (explaining that in *Concepcion*, “[t]he Court extended the pro-arbitration trend”).

With respect to Consumer Financial Services Group, *Italian Colors*, see *Pro-Arbitration Ruling Likely from Supreme Court*, BALLARD SPAHR LLP LEGAL ALERTS (Feb. 28, 2013), available at <http://www.ballardspahr.com/alertspublications/legalalerts/2013-02-28-pro-arbitration-ruling-likely-from-supreme-court.aspx>; Kim Rinehart et al., *Supreme Court Update: American Express Co. v. Italian Colors Restaurant (12-133) and Descamps v. United States (11-9540)*, WIGGIN & DANA (Jun. 21, 2013) (“The Court continued its march of pro-arbitration decisions in *American Express Co. v. Italian Colors Restaurant*”), available at <http://www.wiggin.com/14425>; Aubrey Holland, et al., *Supreme Court Votes Pro-Arbitration Once Again and Upholds Class Arbitration Waiver*, ORICK EMPL. L. & LITIG. BLOG (Jun. 26, 2013), available at <http://blogs.orrick.com/employment/2013/06/26/supreme-court-votes-pro-arbitration-once-again-and-upholds-class-arbitration-waiver/>; Christian R. Urresti, *Arbitration Clauses in Corporate Bylaws: Forestalling Costly and Burdensome Shareholder Litigation*, THE NETWORK: BUSINESS AT BERKELEY LAW (Dec. 13, 2013) <http://thenetwork.berkeleylawblogs.org/2013/12/13/arbitration-clauses-in-corporate-bylaws-forestalling-costly-and-burdensome-shareholder-litigation/> (“Thus, *Amex* should be seen as promoting arbitration by eliminating uncertainty in contracting and removing a barrier to efficient resolution of disputes— a resounding victory for freedom-of-contract principles.”).

<sup>5</sup> *Concepcion*, 131 S. Ct. at 1749 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

District Court for the Southern District of California. This complaint was eventually consolidated into a larger putative class action against AT&T Mobility alleging false advertising and fraud in connection with the sales tax.<sup>6</sup>

In March 2008, AT&T Mobility moved to compel individual arbitration of the Concepcions' claims.<sup>7</sup> In their cellular phone contract, the parties "agree[d] to arbitrate any and all disputes and claims . . . arising out of or relating to this Agreement."<sup>8</sup> The contract also provided that claims must be brought in the parties' individual capacity, and not as part of any class proceeding. In opposition to the motion to compel, the Concepcions argued that the arbitration clause—in particular, the prohibition on bringing claims as part of a class—was unconscionable and therefore unenforceable under California law.<sup>9</sup>

The District Court sided with the Concepcions, holding that the class action waiver was unconscionable under state law, based on the California Supreme Court's decision in *Discover Bank v. Superior Court*.<sup>10</sup> On appeal, the United States Court of Appeals for the Ninth Circuit affirmed, holding that "under California law, the present arbitration clause is unconscionable and unenforceable."<sup>11</sup>

The Ninth Circuit also rejected the phone company's claim that the Federal Arbitration Act preempted California's unconscionability law.<sup>12</sup> The Ninth Circuit held that the FAA did not preempt California's *Discover Bank* rule because of the so-called "saving clause" in section 2 of the FAA, which allows for the non-enforcement of arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract."<sup>13</sup>

In a 5-4 decision, the Supreme Court reversed the Ninth Circuit, holding that California's *Discover Bank* rule was preempted by the FAA. Writing for the majority, Justice Scalia observed that section 2 of the FAA "reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract."<sup>14</sup> Justice Scalia stated that "our cases place it beyond dispute that the FAA was designed to promote arbitration."<sup>15</sup>

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<sup>6</sup> *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*2 (S.D.Cal., Aug. 11, 2008) *rev'd by Concepcion*, 131 S. Ct. 1740.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Laster*, 2008 WL 5216255, at \*2.

<sup>10</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

<sup>11</sup> *Laster v. AT&T Mobility, LLC.*, 584 F.3d 849, 852-59 (9<sup>th</sup> Cir. 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 852.

<sup>14</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted).

<sup>15</sup> *Id.*

Justice Scalia also observed that the FAA’s saving clause “permits agreements to arbitrate to 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.”<sup>16</sup> However, the California Supreme Court in *Discover Bank* made clear that the rule against class action waivers was a generally applicable contract defense, because it “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.”<sup>17</sup>

The general applicability of the *Discover Bank* rule thus required the Court to consider whether the FAA preempted the rule for another reason. Justice Scalia explained that a state law that “prohibits outright the arbitration of a particular type of claim . . . is displaced by the FAA. But the 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.”<sup>18</sup> He observed that “[a]lthough § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>19</sup>

Justice Scalia concluded that the California *Discover Bank* rule as applied to arbitrations with class waivers is a generally applicable rule that nonetheless “interferes with arbitration” and is therefore preempted.<sup>20</sup> Building off the Court’s 2010 decision *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>21</sup> Justice Scalia found that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>22</sup>

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<sup>16</sup> *Id.* at 1746 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652 (1996)).

<sup>17</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 165-66 (2005).

<sup>18</sup> *Concepcion*, 131 S. Ct. at 1747. A doctrine that is generally applicable on its face but effectively disfavors arbitration, the Court explained in *Perry v. Thomas*, is impermissible because it is effectively a back-door invalidation via a rule that “rel[ies] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” 482 U.S. 483, 493 n.9 (1987).

<sup>19</sup> *Concepcion*, 131 S. Ct. at 1748. Notably, the FAA does not actually define what arbitration is. Rather, as one commentator puts it, the Supreme Court “has taken it upon itself to craft a vision of arbitration and attribute that vision to the Congress that enacted the FAA.” M.H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 310 (2012); see also H.N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1238 (2011) (“[T]he language of the FAA is simply too indeterminate, and the congressional record leading to its enactment too sparse, to draw any firm conclusions about its original meaning.”)

<sup>20</sup> *Concepcion*, 131 S. Ct. at 1750; see also Marks, *supra* note 4, at 43-45 (explaining how the *Concepcion* decision went beyond the principle that “state laws and court-created doctrines may not single out arbitration provisions for different treatment,” instead holding that a rule against class action waivers violates the “fundamental attributes of arbitration”).

<sup>21</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758 (2010).

<sup>22</sup> *Concepcion*, 131 S. Ct. at 1750.

## B. Italian Colors

In 2013, the Supreme Court revisited the question of class action waivers in arbitration agreements. This time, the challenge to class waivers was based on federal rather than state law.

Retail merchants that accepted American Express cards had a contract with the card issuer that required all disputes between them to be resolved by arbitration, and also provided that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.”<sup>23</sup> Notwithstanding these clauses, the merchant plaintiffs brought a putative class action in the Southern District of New York, alleging that American Express had used its monopoly power to force them to pay above-market rates to accept its cards, in violation of the § 1 of the federal Sherman Act.<sup>24</sup>

American Express moved to compel arbitration. In opposition, the plaintiffs submitted a declaration from an economist who estimated that the expert analysis necessary to prove the antitrust claims would cost “at least several hundred thousand dollars.”<sup>25</sup> This amount would greatly exceed the maximum possible recovery for an individual plaintiff, which was \$38,549.<sup>26</sup> The district court granted American Express’s motion to compel arbitration but the Second Circuit reversed, holding that the class waiver was unenforceable because plaintiffs “would incur prohibitive costs if compelled to arbitrate under the class action waiver.”<sup>27</sup>

Over the next three years, the case went through multiple further appeals and remands in light of developing Supreme Court case law on class arbitration, in the form of *Stolt–Nielsen* and *Concepcion*. But eventually, the Second Circuit came to the same conclusion as before: the class action waiver was unenforceable because “the cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”<sup>28</sup>

The Supreme Court granted certiorari and the same five-Justice majority as in *Concepcion* reversed the Second Circuit and upheld the class waiver.<sup>29</sup> Justice Scalia’s opinion observed that the Federal Arbitration Act requires courts to “‘rigorously enforce’”<sup>30</sup> arbitration agreements “unless the FAA’s mandate has been “‘overridden by a

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<sup>23</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *In re American Express Merchants’ Litigation*, 554 F.3d 300, 315-16 (2d Cir. 2009).

<sup>28</sup> *In re American Express Merchants’ Litigation*, 667 F.3d 204, 212 (2d Cir. 2012) (quoting *In re American Express Merchants’ Litigation*, 634 F.3d 187, 196 (2d Cir. 2011)).

<sup>29</sup> *American Express Co. v. Italian Colors*, 133 S. Ct. 2304, 2312-13 (2013) (Justice Sotomayor, who was part of the panel in the initial Second Circuit appeal, recused herself, leaving the remaining three Justices in the minority).

<sup>30</sup> *Italian Colors Rest.*, 133 S. Ct. at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

contrary congressional command.”<sup>31</sup> He concluded that “[n]o contrary congressional command requires us to reject the waiver of class arbitration here,” because “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>32</sup> The majority pointed out that the federal antitrust laws were enacted decades before federal class actions were made possible by Federal Rule of Civil Procedure 23.<sup>33</sup>

The majority also rejected the proposition that the class waiver should be invalidated because it would “prevent the ‘effective vindication’ of a federal statutory right,” as it would give plaintiffs “no economic incentive to pursue their antitrust claims individually in arbitration.”<sup>34</sup> The “effective vindication” principle originated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>35</sup> where the Court observed that statutory claims such as antitrust claims are arbitrable “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>36</sup> Justice Scalia’s *Italian Colors* opinion acknowledged that “a provision in an arbitration agreement forbidding the assertion of certain statutory rights” would “certainly” be prohibited by the “effective vindication” requirement.<sup>37</sup> He also acknowledged that the requirement “would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>38</sup> But he drew the line at a provision that would make the effective cost of proving a case exceed the value of the claim: “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>39</sup>

Justice Scalia pointed out that the earlier result in *Concepcion* “all but resolves this case” because it held that the FAA preempted a state law “conditioning enforcement of arbitration on the availability of class procedure because that law ‘interfere[d] with fundamental attributes of arbitration.’”<sup>40</sup> *Concepcion* specifically rejected the argument that class arbitration was necessary to prosecute claims “that might otherwise slip through the legal system.”<sup>41</sup>

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<sup>31</sup> *Id.* (quoting *CompuCredit Corp. v. Greenwood* 132 S. Ct. 665, 669 (2012)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2310.

<sup>35</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).

<sup>36</sup> *Id.* at 637; see also Gary Born, *Challenges to the Validity of Agreements to Arbitrate State-Law Claims for the Public Benefit*, KLUWER ARB. BLOG (Nov. 5, 2013), <http://kluwerarbitrationblog.com/blog/2013/11/05/challenges-to-the-validity-of-agreements-to-arbitrate-state-law-claims-for-the-public-benefit/> (discussing the application of the “effective vindication” principle).

<sup>37</sup> *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

<sup>38</sup> *Id.* at 2310-11 (citing *Green Tree Financial Corp.—Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

<sup>39</sup> *Italian Colors Rest.*, 133 S. Ct. at 2311.

<sup>40</sup> *Id.* at 2312 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)).

Justice Kagan’s much-quoted dissent chided the majority for being callous and disingenuous:

[The arbitration clause between Italian Colors and American Express] imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.<sup>42</sup>

Justice Kagan began her analysis “with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability—say, ‘Merchants may bring no Sherman Act claims’—even if that clause were contained in an arbitration agreement.”<sup>43</sup> She then moved on to cleverer ways a company might insulate itself from liability through an arbitration clause, including “an absurd (*e.g.*, one-day) statute of limitations”; or “prohibiting any economic testimony (good luck proving an antitrust claim without that!)”; or “appoint[ing] as an arbitrator an obviously biased person—say, the CEO of Amex.”<sup>44</sup>

Justice Kagan characterized the “effective vindication” principle first established in *Mitsubishi Motors* as holding that “[a]n arbitration clause will be enforced only ‘so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.’”<sup>45</sup> In particular, a clause will not be valid “if ‘proceedings in the contractual forum will be so gravely difficult’ that the claimant ‘will for all practical purposes be deprived of his day in court.’”<sup>46</sup>

To support her view that an overly costly arbitral procedure can violate the “effective vindication” principle, Justice Kagan pointed in particular to the Court’s 2000 decision in *Green Tree Financial Corp.-Ala. v. Randolph*,<sup>47</sup> which indicated that an arbitration clause could be unenforceable if it imposed “high filing and administrative fees.”<sup>48</sup> Justice Kagan argued that “*Randolph* gave no hint of distinguishing among the

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<sup>41</sup> *Id.* (quoting *Concepcion*, 131 S. Ct. at 1753).

<sup>42</sup> *Id.* at 2313 (Kagan, J., dissenting).

<sup>43</sup> *Id.*

<sup>44</sup> *Italian Colors Rest.*, 133 S. Ct. at 2314.

<sup>45</sup> *Id.* (quoting *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

<sup>46</sup> *Id.* (quoting *Mitsubishi*, 473 U.S. at 632).

<sup>47</sup> *Green Tree Fin. Corp. - Ala. v. Randolph*, 531 U.S. 79 (2000).

<sup>48</sup> *Italian Colors Rest.*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (citing *Green Tree Fin. Corp.*, 531 U.S. at 90).



different ways an arbitration agreement can make a claim too costly to bring. Its rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device.”<sup>49</sup>

Justice Kagan detailed her view of the purpose of the FAA, as furthered by the effective vindication principle:

What the FAA prefers to litigation is arbitration, not de facto immunity. The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.<sup>50</sup>

## II. NINE WAYS *ITALIAN COLORS* AND *CONCEPCION* UNDERMINE ARBITRATION

Various lower courts have cited the Supreme Court’s decisions in *Concepcion* and *Italian Colors* as supporting a “national policy favoring arbitration.”<sup>51</sup> But for all their rhetoric about promoting arbitration, the Court’s class arbitration decisions have actually undermined arbitration in numerous important ways.

### A. *The Decisions Promote Inefficiency*

In his *Concepcion* opinion, Justice Scalia emphasized that efficiency is a key—if not the key—benefit of arbitration. He argued that “[a] prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.”<sup>52</sup> In explaining why a prohibition on class waivers in arbitration agreements interferes with the purpose of the FAA, Justice Scalia explained that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”<sup>53</sup>

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<sup>49</sup> *Id.* at 2318 (Kagan, J., dissenting).

<sup>50</sup> *Id.* at 2315 (Kagan, J., dissenting).

<sup>51</sup> *See, e.g.*, *In re Am. Exp. Merchs’ Litig.*, 667 F.3d 204, 212-13 (2d Cir. 2012); *Gore v. Alltel Commc’ns, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012); *Gray Holdco, Inc. v. Cassidy*, 654 F.3d 444, 451 (3d Cir. 2011); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1210 (11th Cir. 2011); *Schiffer v. Slomin’s, Inc.*, 970 N.Y.S.2d 856, 860 (N.Y. Civ. Ct. June 26, 2013).

<sup>52</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (quoting *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008)).

<sup>53</sup> *Concepcion*, 131 S. Ct. at 1749 (citing *14 Penn Plaza, LLC, v. Pytt*, 556 U.S. 247 (2009); *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

Justice Scalia argued that application of the *Discover Bank* rule to prohibit waivers of class arbitration “would frustrate” the FAA’s goal of “efficient and speedy dispute resolution.”<sup>54</sup> He outlined the ways in which “the switch from bilateral to class arbitration . . . makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>55</sup>

What Justice Scalia’s discussion seemed to forget was that a major reason for the existence of class proceedings—just like arbitrations—is that they can make the adjudicatory process *more* efficient.<sup>56</sup> The Supreme Court itself has acknowledged that “efficiency and economy . . . is a principal purpose” of class actions.<sup>57</sup> Although class actions by their nature have additional procedural requirements that make them more complicated than individual cases, in the aggregate, they can promote the efficient disposition of large numbers of similar claims. In his *Concepcion* dissent, Justice Breyer observed that “a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act.”<sup>58</sup>

Justice Breyer also argued that “if incentives are at issue, the *relevant* comparison is . . . between class arbitration and judicial class actions.”<sup>59</sup> He cited AAA’s amicus brief in the Court’s 2010 class-arbitration case, *Stolt-Nielson*, which concluded that “class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court.”<sup>60</sup> Thus, if companies really prefer class litigation to class arbitration, efficiency is probably not the reason why.

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<sup>54</sup> *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>55</sup> *Id.* at 1751.

<sup>56</sup> *See, e.g.*, J.C. Alexander, *An Introduction to Class Action Procedure in the United States* (July 21-22, 2000) (presented at conference: Debates over Group Litigation in Comparative Perspective) (“Class actions can also provide a more efficient way to conduct litigation, eliminating the need to relitigate the common issues in a large number of individual cases.”).

<sup>57</sup> *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). Justice Scalia also argued that requiring class proceedings in arbitration “sacrifices the principal advantage of arbitration—its informality.” *Concepcion*, 131 S. Ct. at 1751. This claim betrays a serious misunderstanding of why parties enter into arbitration agreements in the first place. Informality is only one of those reasons, and increasingly not the most important one. Moreover, it is hardly the case that arbitrations are always informal. *See, e.g.*, Born, *supra* note 4, at 39-40 (“Arbitrations with a high degree of procedural formality are conducted around the United States, and the world, every day – if that is what the parties desire and agree upon. Contrary to the Court’s suggestions, there is nothing inherent in arbitration that excludes formality, motions, or complexity.”); Strong, *supra* note 4, at 244 (“[A]rbitration can adopt highly formal procedures mimicking litigation....”).

<sup>58</sup> *Concepcion*, 131 S. Ct. at 1759-60.

<sup>59</sup> *Id.* at 1759.

<sup>60</sup> *Id.* (quoting Brief for Am. Arbitration Ass’n as Amicus Curiae Supporting Neither Party at 24, *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 U.S. S. Ct. Briefs LEXIS 875, at \*32 [hereinafter AAA Amicus]).

Surprisingly, Justice Breyer did not also point out that enhanced efficiency is a requirement of the federal rule that governs class actions in litigation. Rule 23 of the Federal Rules of Civil Procedure provides that a court should allow a class action to go forward only if “the court finds that ... that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>61</sup> A U.S. court considering a putative class action can only certify the class if doing so promotes the efficient disposition of the claims at issue.

This principle is also reflected in arbitral rules for class proceedings. AAA’s class arbitration rules share Federal Rule 23’s requirement that “[a]n arbitration may be maintained as a class arbitration” only if “the arbitrator finds ... that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>62</sup> This requirement has borne out in practice; AAA arbitrators have proven willing to refuse to certify classes.<sup>63</sup> Likewise, the JAMS class arbitration rules expressly incorporate the “criteria set forth in the Federal Rules of Civil Procedure, Rule 23(b),” including the requirement that the arbitrator find that “a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy” before allowing a class arbitration to proceed.<sup>64</sup>

Thus, by their own terms, both U.S. courts and arbitral institutions provide for class proceedings only where they make the resolution of disputes more, rather than less, efficient. If a goal of arbitrations is to promote efficiency, and class actions promote efficiency, then shouldn’t class arbitration be extra-efficient?<sup>65</sup> Even if it does not quite combine the best of both worlds, would class arbitration not at least be at least as expedient as (1) individual arbitration of numerous similar small claims brought by consumers, and (2) class litigation of the same claims?

Recent developments in mass consumer actions bear this out. Not surprisingly, the Supreme Court’s recent decisions on class arbitration have not caused plaintiffs’ lawyers to quietly slink away. Plaintiff-side consumer lawyers have enormous financial incentives to find ways to bring large-scale claims. Thus, when class waivers bar actual class arbitration or class litigation, plaintiffs’ firms have instead begun to file numerous identical individual actions against the same company.<sup>66</sup> In fact, a nonprofit group and

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<sup>61</sup> FED. R. CIV. P. 23(b)(3).

<sup>62</sup> SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, AM. ARBITRATION ASS’N (2003), available at [https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg\\_004129.pdf](https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf); see FED. R. CIV. PROC. 23(b)(3).

<sup>63</sup> Among the AAA arbitrations that have proceeded to a determination whether to certify a class, class certification was granted in 50% of the cases, denied in 38% of the cases, and the class was certified by stipulation among the parties in 13% of the cases. AAA Amicus, *supra* note 61, at 22.

<sup>64</sup> CLASS ACTION PROCEDURES, JAMS, available at <http://www.jamsadr.com/rules-class-action-procedures/> (last visited Apr. 7, 2014); see FED. R. CIV. P. 23(b)(3).

<sup>65</sup> See Hans Smit, *AT&T v. Mobility v. Concepcion: Can Actions Be Brought in Arbitration?*, 20 AM. REV. INT’L ARB. 469, 474 (2009) (“The class-action device has been created to adjudicate in an efficient and cost-effective manner numerous claims that cannot efficiently be adjudicated separately. There is no reason why this device should not be available in arbitration if the proper safeguards for protecting the interests of unnamed members of the class can be created.” (citation omitted)).

web site called “Consumers Count” was formed as a way to “crowdsource” consumer complaints against companies with class waivers.<sup>67</sup> When the number of complaints against a company reaches a “critical mass,” the matter is referred to an affiliated law firm which will file individual consumer actions.<sup>68</sup>

There is little doubt that filing dozens, hundreds, or thousands of individual arbitrations against the same company would be less efficient than a single class action. Indeed, most arbitral institutions may not even have the resources to handle such an endeavor, particularly if the underlying contract – like the contracts in *Concepcion* and *Italian Colors* – does not allow any kind of aggregation, but rather requires separate written submissions, separate adjudicators, separate testimony, and separate hearings. But that may be the laborious result when class arbitration is a casualty in the arms race between plaintiffs’ counsel and the companies they sue.

Moreover, the premise that arbitrations primarily promote efficiency is also dubious. In fact, growing evidence over the years has called into question whether arbitration—both domestic and international—really is a cost and time saver.<sup>69</sup> Thus, Justice Scalia’s argument about efficiency seems to have sailed in opposite directions, both of them dubious—first in claiming that class actions diminish efficiency, and second in claiming that *individual* arbitration really is especially efficient.

### *B. The Decisions Will Lead to Fewer Arbitrations*

Another likely result of the recent decisions is that they will lead to fewer arbitrations. Insofar as more arbitration is a goal of the FAA—and the majority and

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<sup>66</sup> See, e.g., Terry Baynes, *Law Firm Strikes Back at AT&T Over Merger*, REUTERS (Jul. 27, 2011, 7:13 PM), available at <http://www.reuters.com/article/2011/07/27/us-att-merger-arbitration-idUSTRE76Q7F320110727> (last visited Apr. 7, 2014); Nicole Flatow, *To Fight Class Action Limits, Lawyers To Inundate Corporations With Claims*, THINKPROGRESS (Nov. 12, 2012, 2:20 PM), available at <http://thinkprogress.org/justice/2012/11/08/1166341/to-fight-class-action-limits-lawyers-to-inundate-corporations-with-claims/> (last visited Apr. 7, 2014).

<sup>67</sup> See CONSUMERS COUNT, [www.consumerscount.org](http://www.consumerscount.org) (last visited Apr. 7, 2014); see also Myriam E. Gilles & Anthony J. Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, DEPAUL L. REV. (forthcoming) (on file with Cardozo School of Law Institute for Advanced Legal Studies), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2263443](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263443).

<sup>68</sup> See *About Us*, CONSUMERS COUNT, available at <http://consumerscountlitgroup.com/aboutus.html> (last visited Apr. 7, 2014).

<sup>69</sup> See, e.g., FULBRIGHT & JAWORSKI L.L.P., 8TH ANNUAL LITIGATION TRENDS SURVEY REPORT, TRENDS IN INTERNATIONAL ARBITRATION 3 (2011), available at <http://aryme.com/docs/adr/2-2-2684/tendencias-arbitraje-2012-usa-uk-fulbright-arbitration-survey.pdf> (reporting on a 2007 survey of in-house counsel which found that “only 9% of respondents believed that international arbitration was cheaper than litigation” and 11% believed arbitration was quicker than litigation); Nicholas Roxborough & Donna Puyot, *Dispelling Some Myths about Arbitration*, L.A. LAW., Sept. 2011, at 44, available at <http://www.lacba.org/Files/LAL/Vol34No6/2837.pdf> (“Arbitration can be quite costly, especially since fees for both arbitration and arbitrators have increased significantly in recent years. ... According to a recent survey by Public Citizen, a consumer watchdog group, the cost just to initiate an arbitration is notably higher than the cost of filing a lawsuit: \$6,650 to \$11,625 to initiate a claim to arbitrate a consumer claim worth \$80,000 versus \$221 to file that action in an average county court. And unlike traditional court proceedings in which judges are paid by the states, parties in arbitration must pay the arbitrators themselves.”)

dissent in *Italian Colors* disputed whether that is so—the likely result of the decisions is fewer arbitrations.

Toward the end of his *Concepcion* opinion, Justice Scalia essentially acknowledged that it was possible that “small-dollar claims” would “slip through the legal system” if they could not be aggregated into a class.<sup>70</sup> However, Justice Scalia sidestepped the implication of this holding by pointing that it was not a real danger in the cell phone contract before the Court, because of provisions making individual arbitration more attractive: “the arbitration agreement provides that AT & T will pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT & T’s last settlement offer.”<sup>71</sup>

However, while Justice Scalia trumpeted the \$7,500 payout provision,<sup>72</sup> the majority’s ruling in no way hinged on its existence. Rather, the opinion made clear that the FAA preempted the *Discover Bank* rule against class arbitration waivers for the independent reason that requiring class proceedings undermines the FAA’s pro-arbitration policy, and “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>73</sup>

The consumer-friendly provisions were obviously included to shield the agreement from claims that it was unconscionable and therefore unenforceable. And in the wake of *Concepcion*, some companies apparently did include similar provisions in their consumer contracts.<sup>74</sup> But because the actual result in *Concepcion* did not depend on such provisions, if anything, the *Concepcion* decision made it *less* necessary for companies to include sweeteners like the \$7,500 clause and the other claimant-friendly parts of the contract.

The subsequent *Italian Colors* decision resolved any doubt whether “consumer friendly” provisions are necessary to ensure the validity of class arbitration waivers. There, Justice Scalia explained that *Concepcion* “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”<sup>75</sup> He left out that his earlier opinion had also argued that the *Concepcion*’s claim was *unlikely* to slip through the system because AT&T’s arbitration provision gave them a financial incentive to sue individually.

In a footnote in *Italian Colors*, the majority also rejected the dissent’s suggestion that adjudication of meritorious claims is a goal of the FAA. Rather, citing *Concepcion*,

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<sup>70</sup> AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011).

<sup>71</sup> *Id.* at 1753; see generally Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012).

<sup>72</sup> See *Concepcion*, 131 S. Ct. at 1744.

<sup>73</sup> *Id.* at 1753; see also Nagareda, *supra* note 5, at 1115-20 (considering the exculpability issue in *Concepcion*).

<sup>74</sup> Gilles, *supra* note 72, at 829 (finding that “many large and well-known consumer-oriented companies have over time incorporated ‘friendly’ provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising ‘bounty’ or premium payments to claimants who achieve a better outcome in arbitration than the company’s last-best offer”).

<sup>75</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (quoting *Concepcion*, 131 S. Ct. at 1753).

the majority argued that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said [in *Concepcion*], is ‘unrelated’ to the FAA. Accordingly, the FAA does, contrary to the dissent’s assertion, favor the absence of litigation when that is the consequence of a class-action waiver.”<sup>76</sup> Thus, under the majority’s view, the FAA requires enforcement of arbitration agreements, even doing so will lead to fewer, not more, arbitrations.

*Italian Colors* confirms that companies that include class arbitration waivers in contracts can be confident in the waivers’ validity. And the companies that do include class waivers in their agreements are legion. A 2013 study by the federal Consumer Financial Protection Bureau, discussed in greater detail below, found 93.9% of arbitration clauses in credit card agreements clauses – representing 99.9% of credit card loans outstanding that were subject to arbitration clauses – included terms limiting class proceedings.<sup>77</sup> Similar numbers were found for bank checking account agreements and prepaid payment cards.<sup>78</sup> Likewise, a 2008 study of major American companies’ contracts found that 100% of the consumer arbitration agreements surveyed – 20 out of 20 – included class arbitration waivers.<sup>79</sup> Notably, however, another recent empirical study of franchise agreements found that in the wake of *Concepcion*, “the predicted tsunami of arbitral class waivers has not occurred.”<sup>80</sup>

### C. The Decisions Ignore the Attraction of “High Stakes” Arbitration

The majority and dissent in *Concepcion* clashed over the former’s contention that “[a]rbitration is poorly suited to the higher stakes of class litigation.”<sup>81</sup> Justice Scalia observed that in litigation, class certification decisions and final judgments are subject to appellate review, while the FAA allows courts to vacate final judgments only on very narrow grounds.<sup>82</sup> He concluded that it was “hard to believe that defendants would bet the company with no effective means of review.”<sup>83</sup> He also noted that class

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<sup>76</sup> *Id.* at 2312 n.5 (quoting *Concepcion*, 131 S. Ct. at 1748, 1752-53).

<sup>77</sup> ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(a) STUDY RESULTS TO DATE, CONSUMER FINANCIAL PROTECTION BUREAU 37-38 (2013) [(hereinafter CFPB ARBITRATION STUDY], [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 884 (2008). By contrast, just two out of seven materials contracts with arbitration clauses, and zero out of thirteen employment contracts, included class arbitration waivers. *Id.*

<sup>80</sup> P.B. Rutledge & C.R. Drahozal, “Sticky” Arbitration Clauses?: *The Use of Arbitration Clauses after Concepcion and Amex*, VAND. L. REV. (forthcoming).

<sup>81</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 179 (2006) (“Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The ‘devil you know’ phenomenon is compounded by the

arbitrations—like class actions—may lead to “*in terrorem*” settlements” when companies face “even a small chance of a devastating loss.”<sup>84</sup>

In response, Justice Breyer argued that this claim “lacks empirical support” and pointed to reports of several arbitral judgments and settlements worth hundreds of millions of dollars.<sup>85</sup> Justice Scalia countered that these examples were all anecdotal and not relevant unless “it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered.”<sup>86</sup>

Neither the majority nor the dissenters actually presented empirical proof of whether parties resist arbitration in class actions and other high-stakes cases. But as a general matter, Justice Scalia surely overstated matters to claim that defendants are unwilling to “bet the company” in arbitration. Multiple commentators have criticized the majority’s suggestion that arbitration is “ill-suited” for high-stakes disputes.<sup>87</sup> Many of the highest-stake civil disputes in the United States and in the world have proceeded through arbitration. Moreover, it is hardly the case that the defendants in these cases were all dragged kicking and screaming into arbitral proceedings when they would have preferred to be in court. On the contrary, it is easy to find examples of defendants who move to compel arbitration after being sued in court, even when facing massive potential liability.<sup>88</sup>

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uncertainty of judicial review of class certification in arbitration and the concomitant fear of a ‘renegade arbitrator’ certifying a class and exposing a company to massive liability.”).

<sup>84</sup> *Concepcion*, 131 S. Ct. at 1752.

<sup>85</sup> *Id.* at 1760 (Breyer, J., dissenting).

<sup>86</sup> *Id.* at 1752 n.8.

<sup>87</sup> See, e.g., Catherine M. Amirfar & David W. Rivkin, *Current Challenges to Consumer Arbitration in the United States: Much Ado About Nothing For International Arbitration?*, in *THE ARB. REV. AMERICAS* (2012) (“it is clear that the Court evinced a misunderstanding of the nature of arbitration, particularly in its contention that arbitration is not meant for ‘high stakes’ disputes”), available at <http://globalarbitrationreview.com/reviews/39/sections/137/chapters/1422/current-challenges-consumer-arbitration-united-states-ado-nothing-international-arbitration/>; Born & Salas, *supra* note 4, at 41 (“[C]ontrary to the Court’s stated views, there is nothing inherent in arbitration that limits it to small stakes. On the contrary, enormous disputes have always been, and still are, decided in arbitration.”).

<sup>88</sup> See, e.g., *Conn. General Life Ins. Co. v. Sun Life Assur. Co. of Can.*, 210 F.3d 771, 772-73 (7th Cir. 2000) (defendants facing claims that could “exceed \$2 billion” moved to compel arbitration); *In re Cajun Elec. Power Co-op., Inc.*, 791 F.2d 353, 356 (5th Cir. 1986) (defendant in claim for “damages in excess of \$200 million” moved to compel arbitration); *Motorola Credit Corp. v. Uzan*, 275 F. Supp. 2d 519, 520-21 (S.D.N.Y. 2003) (defendants in multi-billion dollar fraud claim moved to compel arbitration); *New York Cross Harbor R.R. Terminal Corp. v. Consolidated Rail Corp.*, 72 F. Supp. 2d 70, 73, 75 (E.D.N.Y. 1998) (defendant facing multiple claims of \$100 million each, plus hundreds of millions more in punitive damages, moved to compel arbitration); *Prospect Capital Corp. v. Enmon*, 2010 WL 907956, at \*1 (S.D.N.Y. Mar. 9, 2010) (defendant in claims for “fifty million dollars plus interest, attorneys’ fees, costs and exemplary damages,” moved to compel arbitration); *Fluor Daniel Intercontinental, Inc. v. General Elec. Co.*, 2007 WL 766290, at \*1 (S.D.N.Y. Mar. 13, 2007) (defendant in \$160 million claim moved to compel arbitration); *Camferdam v. Ernst & Young Intern., Inc.*, 2004 WL 307292, at \*1 (S.D.N.Y. Feb. 13, 2004) (defendants in claims “in excess of \$40 million in compensatory damages and \$1 billion in punitive damages” moved to compel arbitration); *ACE Ltd. v. CIGNA Corp. & CIGNA Holdings, Inc.*, 2001 WL 767015, at \*1 (S.D.N.Y. July 6, 2001) (defendant in \$49 million claim moved to compel arbitration); *Bank*

Many defendants in high-stake cases are willing to forgo appellate rights to enjoy the potential benefits of arbitration, including limited discovery, cross-border enforcement rights, potentially lower litigation costs, confidentiality, and choice of adjudicators. Justice Scalia also offered no reason why the risk of companies being forced into “*in terrorem*” settlements is worse in class arbitrations than in other kinds of high-stakes arbitrations, or for that matter in class litigation. Whether the risk of a rogue arbitral tribunal is worse for defendants than the risk of a runaway jury (whose verdict may or may not be vulnerable on appeal) is far from obvious.

Justice Scalia’s suggestion that even parties that end up in arbitration where large sums of money are at stake could not have predicted it *ex ante* is equally unconvincing. The agreements underlying many enormous commercial transactions often contain arbitration clauses.<sup>89</sup> The sophisticated parties and counsel that negotiate major mergers, acquisitions, and joint ventures are well aware that disputes might eventually arise out of these contracts, and that the sums at stake in these disputes can be huge.

True, companies may be particularly hesitant to subject themselves to class arbitration, as opposed to other types of high stakes arbitration. For example, the amicus curiae brief of the wireless communication industry’s trade organization, CTIA, in the *Concepcion* case claimed that “[t]he arbitration clauses in the terms of service of many CTIA members expressly provide that their arbitration clauses have no force if the class waiver is deemed unenforceable.”<sup>90</sup> In particular, the service agreements offered by Sprint and Verizon provided that if the class waiver was held unenforceable, then the whole arbitration provision would not apply.<sup>91</sup> Likewise, after the Ninth Circuit’s decision below in *Concepcion*, Comcast announced that it would not seek to enforce its arbitration agreements with California customers.<sup>92</sup> Thus, at least in these cases, the companies apparently did prefer class litigation over class arbitration.

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of Tokyo-Mitsubishi, Ltd. v. J.A. Jones, Inc., 1998 WL 283355, at \*1 (S.D.N.Y. May 29, 1998) (defendant in claim for “over \$100 million in damages” moved to compel arbitration); Int’l Bank of Com.-Brownsville v. Int’l Energy Dev. Corp., 981 S.W.2d 38, 42 (Tex. App. 1998) (defendant in claim for “actual damages of \$104 million and statutory damages of \$312 million” moved to compel arbitration).

<sup>89</sup> See, e.g., BAYPO Ltd. P’ship v. Tech. JV, LP, 940 A.2d 20, 22-23 (Del. Ch. 2007) (\$2.45 billion corporate acquisition agreement contained “a broad arbitration clause”); Fairchild Corp. v. Alcoa, Inc., 510 F. Supp. 2d 280, 283 (S.D.N.Y. 2007) (\$657 million acquisition agreement contained arbitration clause); Duthie v. Matria Healthcare, Inc., 535 F. Supp. 2d 909, 911-912 (N.D. Ill. 2008) (merger agreement in “a deal valued at almost a half billion dollars” contained arbitration clause); Matria Healthcare, Inc. v. Coral SR LLC, 2007 WL 763303, at \*1 (Del. Ch., Mar. 1, 2007) (\$445 million merger agreement “provide[d] broadly for arbitration of disputes”); Bitumenes Orinoco, S.A. v. New Brunswick Power Holding Corp., 2007 WL 485617, at \*1, 8 (S.D.N.Y., Feb. 13, 2007) (“20-year, multi-billion dollar, fuel supply agreement” contained an arbitration clause); Alpert v. Nat’l Ass’n of Sec. Dealers, LLC, 2004 WL 3270188, at \*19 (N.Y. Sup., July 28, 2004) (1998 agreement merging the National Association of Securities Dealers and the American Stock Exchange “required the parties to submit disputes arising out of that agreement to arbitration”).

<sup>90</sup> Brief of CTIA: Wireless Assoc. as *Amicus Curia* in Support of Petitioner at 19, *AT&T Mobility, v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (No. 09-893).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 19-20.



Likewise, in *Stolt-Nielsen*, the Court considered “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the Federal Arbitration Act.”<sup>93</sup> Importantly, that case was not a mass consumer action in which each potential plaintiff had a small claim. Rather, the Court observed that the parties, including the claimants, were “sophisticated business entities.”<sup>94</sup> The amounts at stake were not trivial for all the claimants, some of whom might well have had an incentive to bring suit in an individual capacity. Nonetheless, the respondents opposed class certification and fought it up to the Supreme Court. For these respondents at least, class arbitration was undesirable even if the alternative was numerous individual arbitrations.<sup>95</sup>

But not so fast. Trade organizations that opposed the *Discover Bank* rule had every incentive to demonstrate that it would discourage arbitration. They accordingly presented several examples of companies that apparently preferred no arbitration at all over the prospect of class arbitration. But were these companies the exception or the rule? After all, the California Supreme Court decided *Discover Bank* in 2005. In the six years between that ruling and the U.S. Supreme Court’s *Concepcion* decision, countless companies drafted customer agreements that included arbitration clauses with class waivers. Moreover, the California courts were not alone in holding class action waivers in arbitration clauses unconscionable; numerous state and federal courts elsewhere had also done so.<sup>96</sup> Thus, the lawyers who drafted and vetted consumer contracts of adhesion were well aware that class waivers in arbitration agreements could be held unenforceable. However, they continued to include them in numerous consumer agreements, and many such agreements lacked any provision that voided the entire arbitration agreement if the class waiver clause were held unconscionable.

The 2013 study by the Consumer Financial Protection Board found that approximately half the arbitration clauses in consumer credit card agreements and checking account agreements, and less than 30% of clauses in prepaid payment card

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<sup>93</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010).

<sup>94</sup> *See id.* at 684.

<sup>95</sup> In a prelude to the *Concepcion* opinion that he would later join, Justice Alito, writing for the *Stolt-Nielsen* majority, observed that “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,” and cited this fact as an indication that companies would be unlikely to subject themselves to the risks of class arbitration. *Id.* at 686-87 (citations omitted).

<sup>96</sup> *See, e.g.*, *Scott v. Cingular Wireless*, 160 Wash.2d 843, 851-860 (Wash. 2007); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59 (1st Cir. 2007); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (2008); *Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or.App. 553 (Or. Ct. App. 2007); *Edwards v. Blockbuster Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005); *Luna v. Household Fin. Corp.* III, 236 F. Supp. 2d 1166, 1178 (W.D. Wash. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000); *Leonard v. Terminix Int’l Co., L.P.*, 854 So.2d 529, 538 (Ala. 2002); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless, L.L.C.*, 857 N.E.2d 250 (Ill. 2006); *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Muhammad v. Cnty. Bank of Rehoboth Beach*, 912 A.2d 88 (N.J. 2006); *Schwartz v. Alltel Corp.*, 2006 WL 2243649 (Ohio Ct. App. 2006); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006); *Woods v. QC Fin. Servs., Inc.*, 2007 WL 4688113 (Mo. Cir., Dec. 312007).

agreements, included “anti-severability” clauses that provided that if the class waiver were held unenforceable, the entire arbitration clause would be unenforceable.<sup>97</sup> Likewise, a 2008 empirical study of major companies contracts found that 8 out of 20 consumer contracts with class arbitration waivers did not contain a provision voiding the arbitration clause in the event class arbitration was permitted.<sup>98</sup> Thus, in the remainder of the arbitration agreements, the companies subjected themselves to the possibility of class arbitration (though, post-*Concepcion* and *Italian Colors*, the likelihood of such a company being forced into class arbitration is remote).

In fact, many consumer agreements include severability provisions, which ensure that the company would still be required to arbitrate even if the class waiver is struck down—thus making the companies subject to the possibility of class arbitration.<sup>99</sup> And some practitioners have argued that companies may find that class arbitration, whatever its differences from individual arbitration, nonetheless “may be better than the alternative” of class litigation.<sup>100</sup>

Moreover, if a company is really worried about the risks of an adverse class arbitral award, there may be other safeguards it can put in place. For example, the JAMS rules of arbitration expressly provide that arbitrators’ decisions on class certification are “subject to immediate court review.”<sup>101</sup> And in late 2013, AAA introduced its own optional internal appellate mechanism.<sup>102</sup>

It is thus an open question whether most companies are really averse to the possibility of class action arbitration, and more generally to high-stakes arbitration. By relying on this debatable premise, the Supreme Court has sold short the many reasons why a company might prefer to handle a big-money case via arbitration. The Court’s claim that arbitration is ill-suited for high-stakes cases would likely be a surprise to the

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<sup>97</sup> CFPB ARBITRATION STUDY, *supra* note 77, at 39.

<sup>98</sup> T. Eisenberg, et al., *supra* note 80, at 883.

<sup>99</sup> It is possible that a company that wants to avoid class arbitration might simply decline to enforce its arbitration clause if the class waiver is invalidated. However, this strategy would not protect it from consumers who initiate class arbitrations rather than suing the company in court.

<sup>100</sup> Michael Starr & Katherine Marques, *Mandatory Arbitration of Employment Class Actions*, NAT’L L.J., Apr. 23, 2012, at 9.

<sup>101</sup> CLASS ACTION PROCEDURES, *supra* note 65. The Supreme Court has strictly limited the grounds for judicial review of a final arbitral award to those expressly set forth in sections 10 and 11 of the FAA, even where the parties themselves have a written agreement providing for other bases for judicial review. *See* *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). But the Court in *Stolt-Nielsen* suggested that an arbitrator’s interim decision on class certification is immediately reviewable. There, the Supreme Court and the lower courts reviewed an arbitration award imposing class arbitration, before the final disposition of the case on the merits. The dissenters in the Supreme Court criticized the majority for being willing to do so, arguing that the Court had never before “approved immediate judicial review of an arbitrator’s decision as preliminary as the ‘partial award’ made in this case.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010) (Ginsburg, J., dissenting); *see also* W.W. Park, *Arbitration in Autumn*, 2 J. INT’L DISPUTE SETTLEMENT 11 (2011) (“The chief mischief of *Stolt-Nielsen* lies in its potential to decrease the finality of arbitration by making it easier for courts to vacate awards.”).

<sup>102</sup> OPTIONAL APPELLATE ARBITRATION RULES, AMERICAN ARBITRATION ASSOCIATION (2013), available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218&revision=latestreleased>

many practitioners and their clients who arbitrate large-scale disputes every day throughout the world—and are often grateful to be doing so out of court.

*D. The Court Has Discounted the Abilities of Arbitrators*

In support of his view that class actions are fundamentally incompatible with arbitration, Justice Scalia argued in *Concepcion* that “arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”<sup>103</sup> This observation is rather condescending to the abilities of arbitrators and dismissive of the flexibility of arbitration. Arbitrators are frequently called on to master various new types of law and procedure and to deal with the laws of numerous jurisdictions around the world. Class actions are not some uniquely arcane process that is beyond the abilities of experienced arbitrators. Indeed, the opinion itself acknowledges that the American Arbitration Association has its own class action rules and has overseen hundreds of class actions.<sup>104</sup> Moreover, many arbitrators are themselves former judges.

The Court’s reliance on arbitrators’ alleged unfamiliarity with class proceedings is puzzling because in other contexts, the Court has repeatedly acknowledged that arbitrators’ lack of expertise in an issue is not a legitimate obstacle to the arbitrability of those issues. In *Mitsubishi Motors*, the Court “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.”<sup>105</sup> More recently, in *14 Penn Plaza LLC v. Pyett*,<sup>106</sup> the same five justices that made up the *Concepcion* and *Italian Colors* majorities disavowed past holdings that “questioned the competence of arbitrators to decide federal statutory claims.”<sup>107</sup> Rather, the majority emphasized that “[a]n arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to” statutory antidiscrimination claims.<sup>108</sup>

Although those cases concerned whether arbitration was appropriate for particular substantive causes of action rather than for certain types of judicial procedures, there is no reason why arbitrators are any less capable of administering class proceedings than they are of handling the enormous range of legal and factual issues that come before them. As one commentator has argued, “[t]he flexibility and informality of arbitration do not make it unsuitable for class litigation; quite the contrary. These attributes permit

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<sup>103</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

<sup>104</sup> *Id.* at 1751.

<sup>105</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634 (1985).

<sup>106</sup> *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

<sup>107</sup> *Id.* at 268 (citing *Alexander v. Gardner–Denver Co.*, 415 U.S. 36 (1974)).

<sup>108</sup> *See id.* at 269; *see also Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (“arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision.”).

arbitrators to implement innovative procedures that courts have been hesitant to accept.”<sup>109</sup>

Indeed, in *Concepcion*, Justice Scalia acknowledged that it was “theoretically possible to select an arbitrator with some expertise relevant to the class-certification question.”<sup>110</sup> In fact, courts have often cited particularized knowledge as an advantage of arbitration over litigation. In a 2002 dissent, three members of the *Concepcion* and *Italian Colors* majority, including Justice Scalia, observed that “most arbitrators[] possess special expertise or knowledge in the area subject to arbitration.”<sup>111</sup> Arbitrators can develop expertise in class proceedings, just as they develop expertise in numerous other areas of law; the fact that class actions are a procedural mechanism rather than a “substantive” area of law does not change that. Indeed, a specialized class arbitrator would likely be at least as skilled at overseeing class proceedings as a generalist judge for whom class actions are just a small part of a diverse docket.

#### *E. The Recent Rulings May Not Apply to International Agreements*

The Supreme Court’s decisions in *Concepcion* and *Italian Colors* addressed whether the FAA overrode state and federal policies that supposedly favored class proceedings. However, international arbitration agreements are not governed solely by the FAA, and the Supreme Court’s recent rulings did not discuss whether applied equally to international agreements governed by the New York Convention, which is the primary basis for the international enforcement of arbitral agreements and awards. It is far from clear that a class action waiver in an international arbitration agreement will meet the same fate in many courts as the provisions that the Supreme Court upheld in its recent decisions upheld in those two cases.

As of this writing not a single reported case in any U.S. court, state or federal, has substantially assessed how *Concepcion* or *Italian Colors*’ treatment of class proceedings applies to international arbitration agreements. This is surprising, given that the cases have been cited in more than a thousand lower court decisions. The courts’ lack of attention to how *Concepcion* applies to transnational agreements raises the question whether the ruling has any implications for international commercial arbitration. According to some commentators, the answer is no.<sup>112</sup> After all, *Concepcion* involved domestic consumer disputes, not international commercial disputes. Moreover, class actions are unusual in an international, non-consumer context (though not unheard of, as shown by *Stolt-Nielson*).

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<sup>109</sup> W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 96 (2007); see also Strong, *supra* note 4, at 263-64 (“[C]lass arbitration has been in existence for thirty years, and it seems strange, if not disingenuous given existing precedent, to suggest now that arbitrators lack the competence to handle such matters.”); STIPANOWICH, *supra* note 4, at 388 (“The notion that arbitration is simply incompatible with large and complex cases flies directly in the face of numerous statements by the Court in furtherance of the expansion of arbitration into a virtual all-purpose civil court surrogate.”).

<sup>110</sup> AT&T Mobility LLC v *Concepcion*, 131 S. Ct. 1740, 1750 (2011).

<sup>111</sup> *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 398 (2002) (Thomas, J., dissenting).

<sup>112</sup> See, e.g., Amirfar & Rivkin, *supra* note 5 (“the Court’s decision, right or wrong, is unlikely to affect international arbitration for a number of reasons.”).

On first impression, one would expect the Supreme Court’s enforcement of class arbitration waivers to be at least as applicable to international agreements. As the Court held in *Mitsubishi Motors*, “the emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.”<sup>113</sup> Moreover, as the Court has explained, “[t]he goals of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”<sup>114</sup> Insofar as the Court has held that a rule requiring class arbitration “interferes with fundamental attributes of arbitration,”<sup>115</sup> presumably the same logic would apply to international agreements. But a close look at the text of the New York Convention raises questions about such a conclusion.

### *1. The FAA Versus the New York Convention*

The New York Convention—not the FAA—takes precedence in assessing international arbitration agreements. The federal statute that codifies the New York Convention provides that the FAA applies to international arbitration agreements “to the extent that chapter is not in conflict with . . . the Convention as ratified by the United States.”<sup>116</sup> Thus, as the Second Circuit has explained, “the FAA and the Convention have ‘overlapping coverage’ to the extent that they do not conflict.”<sup>117</sup>

The question, then, is whether the FAA and the New York Convention conflict in a way that calls into question whether the Supreme Court’s recent rulings on class arbitration applies equally to international agreements. This question’s difficulty is exacerbated by peculiarities in the New York Convention.

### *2. The New York Convention’s Saving Clause*

The FAA and the New York Convention have different saving clauses. Section 2 of the FAA requires the enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>118</sup> Article II, section 3 of

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<sup>113</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

<sup>114</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

<sup>115</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

<sup>116</sup> 9 U.S.C. § 208.

<sup>117</sup> *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 18 (2d Cir. 1997) (emphasis added); *see also Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (Posner, C.J.) (agreeing that the FAA and New York Convention have overlapping jurisdiction where they do not conflict); *Satyam Com. Servs., Ltd. v. Venture Global Eng’g, LLC*, No. 06-CV-50351-DT, 2006 WL 6495377, at \*4 (E.D. Mich., July 13, 2006) (whereas the FAA allows a court to vacate an award where the arbitrator exceeded her powers by issuing an award that exhibits a “manifest disregard of the law,” a court cannot do so for international arbitral awards because it is not one of the seven exclusive grounds on which a court may refuse to enforce an award under the New York Convention).

<sup>118</sup> 9 U.S.C. § 2.

the New York Convention requires a court to enforce an arbitration agreement “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”<sup>119</sup>

The New York Convention’s clause does not contain the FAA’s suggestion that a court can refuse to enforce an arbitration agreement only on grounds that apply equally to other types of contracts. This is the language that the Supreme Court has relied on in holding in *Concepcion* that a state contract rule cannot render an arbitration agreement unenforceable under the FAA if the rule is not generally applicable, or if the rule “disfavors arbitration.”<sup>120</sup>

A logical corollary of this difference is that under the New York Convention, legal rules that are *not* generally applicable can still render an agreement unenforceable. Rather, as long as an agreement is “null and void, inoperative or incapable of being performed,” it is unenforceable even if the basis for such a finding is a legal rule that is not generally applicable or one that does supposedly disfavor arbitration. Does the California *Discover Bank* rule of unconscionability, or other state or federal laws that promote aggregation of claims, meet that standard?

Some courts have appeared to assume that, as a general matter, an unconscionable arbitration agreement can be “null and void” under Article II(3) of the Convention. In 2005, the Eleventh Circuit characterized an argument that an agreement was unconscionable as “a ‘null and void’ claim” under the Convention.<sup>121</sup> In 2008, the Ninth Circuit assumed *arguendo* that “unconscionability renders an agreement ‘null and void’ under the Convention,” before going on to hold that the arbitration agreement at issue was not unconscionable in any event.<sup>122</sup> And in 1996, the Northern District of California considered a claim that an “agreement to arbitrate is ‘null and void’ because it is unconscionable.”<sup>123</sup> None of the courts delved deeply into whether an unconscionable contract should really be considered “null and void” under the Convention, because in each case it was unnecessary: the courts all found that the agreements in question were not unconscionable in any event.

Moreover, outside the New York Convention context, an array of state and federal courts in the U.S. have held that an unconscionable contract is null and void.<sup>124</sup> But

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<sup>119</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II § 3, June 7, 1959, 84 Stat. 692, 330 U.N.T.S. 38; *see also generally* D. Schramm, et al., *Article II, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, 102-07 (H. Kronke et al., eds. 2010).

<sup>120</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

<sup>121</sup> *Bautista v. Star Cruises*, 396 F.3d 1289, 1301-02 (11th Cir. 2005).

<sup>122</sup> *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008).

<sup>123</sup> *TWI Lite Intern., Inc. v. Anam Pac. Corp.*, Nos. C-96-2323 SI, C-96-2664 SI, 1996 WL 637843, at \*4 (N.D. Cal., Oct. 24, 1996).

<sup>124</sup> *See, e.g.*, *Franklin Fire Ins. Co. v. Noll*, 58 N.E.2d 947, 949 (1945) (holding a contractual provision “would be null and void as unconscionable”); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa. 1979) (“because such contracts are unconscionable . . . , these contracts are null and void”); *Neal v. Lacob*, 334 N.E.2d 435, 437 (Ill. App. 1 Dist. 1975) (observing that the court below “found that the contract was unconscionable and consequently held that it ‘should be declared null and void’”); *Gavin v. Johnson*, 41

courts have recognized that they do not have great leeway to find agreements unenforceable under Article II(3) of the Convention, particularly with respect to the “null and void” language. As the Third Circuit has explained, “[t]he ‘null and void’ language must be read narrowly, for the signatory nations [to the N.Y. Convention] have jointly declared a general policy of enforceability of agreements to arbitrate.”<sup>125</sup> The District Court for the District of Columbia observed in 2007 that “[f]ederal courts have consistently found that the ‘null and void’ language in Article II(3) is to be narrowly construed.”<sup>126</sup>

Following these principles, the D.C. District Court refused to recognize unconscionability as a basis for invalidating an international arbitration agreement, holding that “unconscionability is *not*—and indeed *cannot* be—a recognized defense to the enforceability of arbitration agreements falling under the N.Y. Convention.”<sup>127</sup> The court reasoned that “while public policy and discretion of the courts may be a predominant characteristic of domestic arbitration, international arbitration requires *certainty* to ensure unified standards by which agreements to arbitrate are observed and arbitral awards are enforced.”<sup>128</sup> The court concluded that “the defense of unconscionability seeks to promote those very tenets that are contrary to a finding of certainty, namely: policy, fairness, and appeals to a court’s discretion outside of the letter of the law.”<sup>129</sup>

That decision was something of an outlier, however. As Gary Born explains, it “ignores the fact that unconscionability is a well-settled ground for contractual invalidity in virtually all jurisdictions.”<sup>130</sup> Most jurisdictions worldwide have recognized that unconscionability is a legitimate ground for refusing to recognize the validity of a contract.<sup>131</sup> Indeed, even in *Concepcion*, the U.S. Supreme Court acknowledged that

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A.2d 113, 117 (Conn. 1945) (if “unconscionable advantage has been taken of [a mortgagor] . . . , the transaction will be treated as null and void”); *see also* *McAlpine v. McAlpine*, 650 So.2d 1142, 1147-48 (La. 1995) (Kimball, J., dissenting) (“If a post-separation agreement waiving alimony were unconscionable at the time of the divorce judgment, would not the courts strike that contract as being null and void?”); *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 230 (Va. 1992) (reversing a trial court’s holding that an agreement was “unconscionable and, therefore, null and void”).

<sup>125</sup> *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983).

<sup>126</sup> *Khan v. Parsons Global Servs., Ltd.*, 480 F. Supp. 2d 327, 339 (D.D.C. 2007), *rev’d on other grounds*, 521 F.3d 421 (D.C. Cir. 2008) (citing *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953, 960 (10th Cir. 1992)).

<sup>127</sup> *Khan*, 480 F. Supp. at 340.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 726 (2009).

<sup>131</sup> *See, e.g.*, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS § 3.2.7(1) (2010) (“A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage.”); K. ZWIEGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 343 (1998); D.B. Cellini & B. Wertz, *Unconscionable Contract*

unconscionability could be a valid ground for refusing to enforce an arbitration agreement.<sup>132</sup>

However, while unconscionability might theoretically be a basis for holding an arbitration agreement null and void under the New York Convention, it is a high bar to clear. Although arbitration agreements could still be held unconscionable under the FAA post-*Concepcion*, the decision significantly narrowed the grounds under which this was possible.<sup>133</sup>

The determination whether a state rule against class action waivers can survive *Concepcion* in international agreements necessarily implicates important choice-of-law questions. After all, if federal law governs the validity of international agreements, then the state rule is inapplicable even if the Convention's saving clause does differ from the FAA's. The Second Circuit has held that in cases arising out of the New York Convention, "we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable."<sup>134</sup> Moreover, U.S. courts are split on whether state law or federal law should govern in unconscionability challenges to arbitration agreements in cases where the FAA governs.<sup>135</sup>

But the vast majority of U.S. courts that have assessed international arbitration agreements under Article II(3) have applied neither state nor federal common law principles of contract formation, but have rather applied international law.<sup>136</sup> The

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*Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 193 (1967) ("The beginnings of the unconscionability concept go back at least as far as the Roman law . . .").

<sup>132</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>133</sup> See, e.g., Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U. L. REV. COLLOQUY 53, 53-54 (2011) ("While *Concepcion* sanctions the continued theoretical applicability of unconscionability to arbitration provisions, it leaves very little room for the actual application of the doctrine."); D. Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13 (2011) (arguing that *Concepcion* did not and should not eliminate unconscionability as a valid ground for refusing to enforce arbitration agreements); STIPANOWICH, *supra* note 4, at 61 ("In the wake of *Concepcion*, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements.").

<sup>134</sup> *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999); see also *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 578-80 (7th Cir. 2007) (applying federal law in interpreting an arbitration agreement under the Convention); *InterGen N.V. v. Grina*, 344 F.3d 134, 143-44 (1st Cir. 2003).

<sup>135</sup> Interestingly, in *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285-286 (9th Cir. 1988), and *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1024 (9th Cir. 1986), which arose under the FAA, the Ninth Circuit applied federal law and rejected the assertion that state common law adhesion contract principles rendered an arbitration agreement unenforceable as unconscionable. But in *Ticknor v. Choice Hotels Intern., Inc.*, 265 F.3d 931, 941-942 (9th Cir. 2001), the court overruled *Cohen* "insofar as [it] h[e]ld that state law adhesion contract principles may not be invoked to bar arbitrability of disputes under the Arbitration Act." See also *Choice Hotels Intern., Inc. v. Chewl's Hospitality, Inc.*, 91 Fed. Appx. 810, 814-815 (4th Cir. 2003) (applying Maryland state law); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258-59 (5th Cir. 1996) (applying state law).

<sup>136</sup> See BORN, *supra* note 131, at 495-497 (collecting cases).



majority of courts in other countries have done so as well, although some authorities have applied national law.<sup>137</sup> The First Circuit explained in 1982 that “the clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.”<sup>138</sup> Likewise, in 1983 the Third Circuit held that “an agreement to arbitrate is ‘null and void’ only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state.”<sup>139</sup> As discussed, unconscionability *is* a widely recognized contract defense and *does* contravene fundamental policies of most if not all jurisdictions. But whether international standards can encompass the particular holdings of the courts of California and many other places—but by no means *all* other jurisdictions—that class arbitration waivers in consumer contracts of adhesion are unconscionable is a much more difficult question.

But as discussed in the next section, answering that question may not even be necessary.

### 3. *The New York Convention’s Other Saving clause*

To make matters more complicated, the “null and void” provision in Article II, section 3 is not the only saving clause in the New York Convention. Rather, under Article V, section 1(a), a court may refuse to recognize or enforce an arbitral *award* if “the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”<sup>140</sup> Thus, the Convention contains one saving clause (Article II(3)) relating to the enforceability of an agreement at the initial stage of an arbitration, and a separate, differently worded clause (Article V(1)(a)) at the award stage. This is an odd feature of the Convention, and is less likely the result of a deliberate plan than of the vagaries of the drafting of the Convention.<sup>141</sup>

Moreover, insofar as the Convention provides choice-of-law guidance as to the enforceability of agreements, that guidance is found in Article V(1)(a) rather than Article II(3), which is silent on the question. Indeed, some authorities, when making a choice-of-law determination under Article II(3), have even looked to the language in Article

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<sup>137</sup> See Schramm et al., *supra* note 120, at 103-04.

<sup>138</sup> *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *see also* *Bautista v. Star Cruises*, 396 F.3d 1289, 1302 (11th Cir. 2005); *Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 340 (S.D.N.Y. 2010); *Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1259 (S.D.Cal. 2000); *Gates Energy Prods., Inc. v. Yuasa Battery Co., Ltd.*, 599 F. Supp. 368, 371 (D. Colo. 1983).

<sup>139</sup> *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983).

<sup>140</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V § 1(a), June 7, 1959, 84 Stat. 692, 330 U.N.T.S 38; *see also generally* Patricia Nacimiento, *Article V(1)(a)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 205, 220-230 (H. Kronke, et al., eds. 2010).

<sup>141</sup> *See* BORN, *supra* note 131, at 94-95 (explaining that the Convention was originally intended only to be about the enforcement of arbitral awards, but at the end of the process Article II was hastily drafted to include a section recognizing the validity of arbitral agreements as well).

V(1)(a) in making that determination.<sup>142</sup> Unless we want courts to apply differing law depending on the stage of the proceeding—which would be a vast waste of energy and likely was not the intent of the Convention’s drafters—the choice of law principle outlined in Article V(1)(a) is the most logical one to use at both the agreement-recognition stage and the award-recognition stage.<sup>143</sup> Although some courts have held otherwise,<sup>144</sup> this is the most sensible solution.

If anything, Article V(1)(a) of the Convention is friendlier to local legal rules than Article II(3) is. Article V(1)(a) expressly refers to (i) the governing law to which the parties subjected the arbitration agreement, or (ii) absent such governing law, the arbitral seat. Moreover, Article V(1)(a)—like Article II(3) and unlike the FAA—does not restrict non-enforcement of arbitration agreements only to generally applicable rules that apply to all contracts. Thus, if Article V(1)(a) governs international agreements, then it is entirely possible that a local rule limiting class action waivers might be upheld, even if the same rule does not survive FAA preemption in the domestic context.

If an arbitration agreement with a class waiver has a California choice-of-law provision,<sup>145</sup> the analysis may be relatively straightforward if Article V(1)(a) governs. Under California law, the provision is unenforceable because it is unconscionable. The fact that the FAA preempts the law does not change this result, since Article V(1)(a)’s broader recognition of local law will trump the FAA’s narrower tolerance only for generally applicable state rules.

Most arbitration clauses in commercial contracts do not contain choice-of-law provisions. Moreover, authorities in the U.S. and elsewhere are split on whether a choice-of-law provision in an underlying contract—but not part of the arbitration clause within that contract—governs the arbitration agreement.<sup>146</sup> If a court or arbitral panel decides that an arbitration agreement is not subject to a choice-of-law clause in the contract itself, then under Article V(1)(a), the applicable law is the “law of the country where the award was made.”<sup>147</sup> If an arbitration is seated in California—perhaps pursuant to a clause similar to the one in *Concepcion* that provided that the arbitration would take place in the county of the claimant’s residence<sup>148</sup>—and an award is rendered there, California law could apply.

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<sup>142</sup> See Schramm et al., *supra* note 120, at 104.

<sup>143</sup> See BORN, *supra* note 131, at 462 (observing that it makes little sense to apply “two different substantive laws of contractual validity to the same arbitration agreement, with the result varying depending on the point in time at which the issue is considered”).

<sup>144</sup> See *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983); *Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Servs., Inc.*, 760 F. Supp. 1036, 1042 (E.D.N.Y. 1991).

<sup>145</sup> Very few mass consumer agreements will likely have such provisions, given California courts’ history of being less accommodating than other states to corporate interests.

<sup>146</sup> BORN, *supra* note 131, at 445-451 (citing cases); NACIMIENTO, *supra* note 141, at 223-224

<sup>147</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V §1(a), June 7, 1959, 84 Stat. 692, 330 U.N.T.S 38

<sup>148</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

Although Article V(1)(a) refers to “the law of the *country* where the award was made,” a court or arbitrator might conclude that framers of the Convention did not have federalism principles in mind when they drafted this language, and that the law of the arbitral seat, including the state law, should govern. This conclusion would be bolstered by the fact that the “law to which the parties have subjected it” language immediately preceding is not limited to national law, and there is little reason to think that the first part of the saving clause was intended to apply state law while the second part was not.

One might counter that the governing state contract law should nonetheless be inapplicable insofar as it is itself invalidated by the international pro-enforcement principles inherent in the New York Convention. However, the Convention recognizes that local legal principles can be applied to determinations of the validity of arbitral awards. True, it would not be in the spirit of the Convention to enforce a local rule that drastically limits the enforceability of awards. Interpreting Article V(1)(a) in this way would risk allowing the saving clause to swallow up the rest of the Convention. But Article V(1)(a)’s choice-of-law language allows a good deal of room for differences among jurisdictions. This space could easily encompass local principles like California’s *Discover Bank* rule.

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All this is not to say that it is realistically likely that the current majority on the Supreme Court would uphold a *Discover Bank*-type rule as applied to arbitration agreements governed by the New York Convention. Having held that class arbitration is not consistent with its view of the fundamental nature of arbitration—and in light of its recognition in *Mitsubishi Motors* that “the emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce”<sup>149</sup>—the majority would likely make quick work of a state rule against class arbitration waivers in international agreements.

But until that time, it far from implausible that a lower court that has traditionally been less supportive of arbitration—say, the California courts or their federal counterparts in the Ninth Circuit—might invoke the differing language of the New York Convention’s saving clause(s) and refuse to enforce a class arbitration waiver in an international agreement. The fact that the state law is preempted by the FAA would not be relevant, insofar as the saving clauses of the FAA and the Convention conflict. Courts would have a strong argument for doing so, because the New York Convention—particularly Article V(1)(a)—is, on its face, arguably more receptive than the FAA to local rules of arbitral contract validity.<sup>150</sup> The unusual possibility that an arbitral clause

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<sup>149</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

that is enforceable under the FAA could be invalid under the New York Convention is yet another indication that the recent decisions on class arbitration have left a complicated legacy.

*F. The Decisions Sent an Anti-Arbitration Message to Other Countries and Arbitral Institutions*

Apart from highlighting possible conflicts between the FAA and the New York Convention, the U.S. Supreme Court's view of class arbitration also sends an important message to other countries about the limitations of arbitration. When the United States' highest court says that class proceedings are incompatible with the fundamental nature of arbitration, it sends a signal to the rest of the world that arbitration need not provide for class proceedings.

The *Concepcion* and *Italian Colors* decisions are particularly striking in an international context, because they run counter to the trend in other countries, which have been moving *toward* class arbitration—even though, for many countries, the idea of class proceedings in arbitration *or* litigation is a relatively new one.<sup>151</sup> For example, in 2011, the Supreme Court of Canada refused to enforce a class-waiver provision in an arbitration

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<sup>150</sup> Some case law in the context of insurance suggests a possible contrary result, although those instances are distinguishable. The federal McCarran-Ferguson Act, 15 U.S.C. § 1012(b), exempts insurers from most federal regulation, instead providing that states regulate insurers. The Act “reverse-preempts” the FAA such that states may restrict arbitration clauses in insurance contracts. *See, e.g.,* State, Dept. of Transp. v. James River Ins. Co., 176 Wash.2d 390, 401, 292 P.3d 118, 124 (Wash. 2013); Southern Pioneer Life Ins. Co. v. Thomas, 2011 Ark. 490, 385 S.W.3d 770, 773 (Ark. 2011). Nonetheless, some lower courts have held that even if the McCarran-Ferguson Act empowers state law to override the FAA, it does not override the New York Convention in international contracts. Most notably, in 2009, the *en banc* Fifth Circuit held that the New York Convention superseded a state law that prohibited arbitration agreements in insurance contracts and thus required enforcement of an arbitration agreement governed by the Convention. Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 724-725 (5th Cir. 2009) (*en banc*). However, that decision focused only on Article II of the Convention and did not consider the locality-friendly language of Article V. *Id.* at 719, 725. Moreover, the decision involved a state statute that restricted arbitration agreements, not a contractual provision that was allegedly unconscionable and thus “null and void” under Article II.

<sup>151</sup> *See, e.g.,* S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?* 29 ASA BULL. 45, 46 (2011) (describing recent developments in Germany); S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 493 (2010) (reporting that “legislatures and public officials in a variety of jurisdictions have already begun to discuss the possible development of collective arbitration within their own national borders” (citing MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS, REPORT 15, MANITOBA LAW REFORM COMMISSION 3-4, 22-23 (2008); S. Bodoni, *UBS, HSBC Custodians Have Duty to Pay Madoff Investors*, *Frieden Says*, BLOOMBERG NEWS, June 4, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8KUxW1cXdvU> (last visited Apr. 14, 2014); R. Dendorfer, *ADR and Arbitration Compromise or Development in Corporate Disputes* 10 (paper presented at CILS Symposium on Arbitration, Mediation and ADR) (discussing recent provisions for collective shareholder arbitration [Beschlussmängelstreitigkeiten] under German law and the DIS–German Institution for Arbitration Supplementary Rules for Corporate Law Disputes following an April 2009 decision by the German Federal Court of Justice [Bundesgerichtshof or BGH] declaring shareholder disputes arbitrable).

agreement similar to the one in *Concepcion*.<sup>152</sup> To the extent U.S. courts now begin to move away from appreciating the benefits of class actions, other countries may follow.

Likewise, the Supreme Court's aversion to multiparty arbitration sets back the cause of multiparty arbitration in international proceedings. In the investor-state context, one of the most noted arbitral decisions of recent years was the jurisdictional award in *Abaclat v. Argentine Republic*, where for the first time an ICSID tribunal allowed a group of 60,000 individual claimants to join together to bring a claim against Argentina.<sup>153</sup> But unlike the AAA and JAMS rules, no major international arbitral institution has procedural rules for class arbitration. Even the ICDR, the international counterpart to AAA, does not provide for class proceedings in its rules.<sup>154</sup> International institutions are less likely to facilitate class arbitrations where national courts suggest that they are not really arbitrations in the first place.<sup>155</sup>

### *G. The Legislative Backlash*

The Supreme Court's treatment of class arbitration also threatens to undermine arbitration by prompting a populist backlash.<sup>156</sup> Writing in the *New York Times*, one legal historian went so far as to analogize the use of arbitration in consumer disputes to the watered-down courts "established in the Reconstruction South to provide justice to the recently freed slaves."<sup>157</sup>

Days after the *Concepcion* ruling, several members of Congress reintroduced the federal "Arbitration Fairness Act,"<sup>158</sup> which had seen previous iterations in 2007 and

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<sup>152</sup> *Seidel v. TELUS Comm'ns Inc.*, [2011] 329 D.L.R. 577 (Can.) (refusing to enforce a class-waiver provision in an arbitration agreement similar to the one in *Concepcion*); see also S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. & COM. REG. 921, 951-56 (2012) (discussing the Canadian Supreme Court's decision in *Seidel*); STIPANOWICH, *supra* note 4, at 70-73.

<sup>153</sup> *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011).

<sup>154</sup> See INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, AMERICAN ARBITRATION ASSOCIATION (2010), available at [https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTG\\_002037&revision=latestreleased](https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased).

<sup>155</sup> Indeed, the dissenting opinion in *Abaclat* by Georges Abi-Saab cited the *Concepcion* and *Stolt-Nielsen* decisions in support of his view that there are "fundamental differences between the two modes of arbitration, the regular bilateral one and the class action or representative proceedings arbitration." *Abaclat*, Case No. ARB/07/5 at ¶¶ 148-153 (Abi-Saab, G., dissenting).

<sup>156</sup> See, e.g., *Gutting Class Action: The Five Conservatives of the Supreme Court Chose Corporations Over Everyone Else*, N.Y. TIMES, May 13, 2011, at A26 ("The Supreme Court's 5-to-4 vote in *AT&T Mobility v. Concepcion* is a devastating blow to consumer rights.").

<sup>157</sup> Amalia D. Kessler, *Stuck in Arbitration*, N.Y. TIMES, Mar. 7, 2012 at A27; (arguing that requiring consumers to arbitrate disputes with companies "bears a troubling likeness to the 19th-century concept of conciliation as a practice suited only for a subservient underclass").

<sup>158</sup> Arbitration Fairness Act, S. 878, 113th Cong. (2013); see also *Sen. Franken Leads Charge to Protect Legal Right to Day in Court*, OFFICE OF SEN. AL FRANKEN, May 13, 2013, [https://www.franken.senate.gov/?p=hot\\_topic&id=2392](https://www.franken.senate.gov/?p=hot_topic&id=2392).

2009. The Act was introduced yet again in 2013, after the oral argument in *Italian Colors*. Although the passage of something like the Arbitration Fairness Act in the near future is unlikely given the current conditions in Washington, its repeated introduction shows how the *Concepcion* and *Italian Colors* decisions invite an eventual legislative response.

The 2013 iteration of the Arbitration Fairness Act would render invalid and unenforceable any “predispute arbitration agreement” that requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”<sup>159</sup> The “findings” in the Act state that its purpose is to revitalize the original intention of the FAA, which was to recognize arbitration agreements “between commercial entities of generally similar sophistication and bargaining power.”<sup>160</sup> However, the definitions in the law are so broad that they can easily cover many cases where the parties are all “entities of generally similar sophistication and bargaining power.” For example, the Act defines “employment dispute” as “a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938.”<sup>161</sup> This can encompass high-ranking corporate executives in major corporations, who would have considerable means and access to high-priced counsel.

The Arbitration Fairness Act, if enacted, would do far more to limit the use of arbitration than contrary rulings in *Concepcion* or *Italian Colors* would have, because the Act would invalidate the vast majority of agreements that are currently subject to mandatory arbitration. American companies are significantly *more* likely to include arbitration clauses in their consumer contracts and employment contracts than in their contracts with other businesses.<sup>162</sup>

Moreover, the Act, if enacted into law, might well violate the New York Convention and could thus disrupt the entire worldwide system of mutual enforcement and comity among signatory nations. As discussed, federal law provides that, to the extent the FAA and the New York Convention conflict, the latter controls with respect to arbitration agreements subject to the Convention.<sup>163</sup> This provision avoids any risk that the mandates of the FAA would violate the U.S.’s treaty obligations. However, the Arbitration Fairness Act contains no such provision. Rather, the Act is silent as to how to handle conflicts between it and the Convention. This would pose dilemmas for a court confronted with an international arbitration agreement that is subject to the Convention but clearly unenforceable under the Arbitration Fairness Act—for example, the employment contract of an American executive of a foreign corporation, or a foreigner who purchases a vacation home in the U.S.

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<sup>159</sup> S. 878, 113th Cong. § 402(a) (2013).

<sup>160</sup> *Id.* at § 2(1).

<sup>161</sup> *Id.* at § 401(4).

<sup>162</sup> T. Eisenberg, et al., *supra* note 80, at 883 (For example, a 2008 study of major telecommunications, credit, and financial services companies found that 76.9% of the companies’ consumer contracts and 92.9% of their employment contracts required arbitration of disputes. But only 23.7% of the companies’ material contracts—which were contracts with other businesses—required arbitration).

<sup>163</sup> 9 U.S.C. § 208.

Moreover, with American mass retailers shipping to overseas customers, eventual disputes over the enforceability of arbitration agreements between American companies and foreign customers are inevitable.<sup>164</sup> A court confronted with this conflict might well decline to enforce the agreement in question, on the longstanding principle that where two laws conflict, “the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”<sup>165</sup> If U.S. courts start to do this, it could encourage other countries to pass national legislation that does the same.

Of course, the fact that Congress might eventually amend the FAA to counteract the Supreme Court’s class arbitration decisions does not itself mean that these cases were wrongly decided. But for those who believe in the many benefits of arbitration, particularly in the international commercial context, the resulting backlash could undermine arbitration in contexts where it is widely agreed to be appropriate, fair, and consensual.

### *H. The Regulatory Backlash*

Legislators are not the only branch of the federal government that is trying to countervail *Concepcion*’s effect. Several federal regulatory agencies have also opposed companies’ efforts to require individual arbitration.

#### *1. Shareholder Suits*

The most successful, and ironic, of these regulatory pushbacks is the Securities and Exchange Commission’s effort with respect to shareholder litigation. In September 2011, the Carlyle Group, a major private equity firm, filed documents with the SEC indicating its intention to sell its shares to the public for the first time.<sup>166</sup> Four months later, Carlyle filed an amendment that would require public shareholders to arbitrate all disputes with the company, and would bar all class or consolidated actions.<sup>167</sup>

Carlyle’s filing faced furious opposition from plaintiffs’ lawyers,<sup>168</sup> several U.S. Senators who have been critical of arbitration,<sup>169</sup> and—most importantly—the SEC. The

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<sup>164</sup> See, e.g., S. Clifford, *U.S. Stores Learn How to Ship to Foreign Shoppers*, N.Y. TIMES (Mar. 20, 2012) (discussing various American companies that are “trying to extend [their] international presence to [their] Web operations by shipping overseas”), available at [http://www.nytimes.com/2012/03/21/business/us-stores-learn-the-ropes-of-shipping-to-foreign-shoppers.html?\\_r=0](http://www.nytimes.com/2012/03/21/business/us-stores-learn-the-ropes-of-shipping-to-foreign-shoppers.html?_r=0)

<sup>165</sup> *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936).

<sup>166</sup> Gregory Zuckerman, *Carlyle Gets Set for Stock Debut*, WALL ST. J. (Sept. 7, 2011), available at <http://online.wsj.com/news/articles/SB10001424053111904900904576554260537365344>.

<sup>167</sup> S.M. Davidoff, *Carlyle Readies an Unfriendly I.P.O. for Shareholders*, N.Y. TIMES DEALBOOK (Jan. 18, 2012), <http://dealbook.nytimes.com/2012/01/18/carlyle-readies-an-unfriendly-i-p-o-for-shareholders>; Miles Weiss, *Carlyle Seeks to Ban Shareholder Lawsuits Before Public Offering*, BLOOMBERG NEWS (Jan. 18, 2012), <http://www.bloomberg.com/news/2012-01-18/carlyle-seeks-to-ban-shareholder-lawsuits-before-initial-public-offering.html>.

<sup>168</sup> See SEC SHOULD REJECT CARLYLE’S ATTACK ON INVESTOR RIGHTS, AMERICAN ASSOCIATION FOR JUSTICE (2012), <http://www.justice.org/cps/rde/justice/hs.xsl/17674.htm>.

Commission's opposition followed its longstanding policy against allowing public companies to require arbitration of federal securities law claims.<sup>170</sup> This policy reflects, in part, decisions by some courts holding that agreements to arbitrate such claims are unenforceable.<sup>171</sup>

Faced with the SEC's stark opposition—which threatened to hold up Carlyle's public offering—Carlyle backed off quickly and removed the arbitration clause and class waiver from its IPO filing documents.<sup>172</sup> This reversal disappointed those who would have liked to see the issue litigated.<sup>173</sup> Indeed, it is far from clear that the SEC would prevail in such a case.<sup>174</sup> And it may not be long before another company takes the SEC to court rather than accede to its policy.<sup>175</sup>

The continuing survival of a rule against arbitration clauses and class waivers in the securities filing context is a paradoxical result of *Italian Colors* and *Concepcion*. If

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<sup>169</sup> LETTER FROM FRANKEN, BLUMENTHAL, & MENENDEZ, U.S. SENS., TO SCHAPIRO, SEC. EXCH. COMM'N CHAIRMAN (Feb. 3, 2012), available at <http://www.scribd.com/doc/80406909/Senate-Letter-on-Carlyle-I-P-O-Provisions> (urging the SEC “to maintain its longstanding policy of opposing the inclusion of provisions requiring mandatory arbitration of shareholder disputes in the corporate documents of public companies...Prohibiting claims brought as a class...make the hurdles to vindicate shareholders’ rights unsurmountable.”).

<sup>170</sup> See *id.* (explaining that in 1990, the SEC refused to allow a company to include an arbitration provision in its corporate documents); see also Barbara Black, *Access to Justice: Investor Suites in the Era of the Robert Court: Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time has Come?*, 75 L. & CONTEMP. PROB. 107, 116-117 (2012) (describing the SEC’s position that position that “arbitration clauses in corporate documents of publicly traded issuers are contrary to federal public policy”).

<sup>171</sup> But see *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (holding an agreement to arbitrate claims under the Securities Act of 1933 was enforceable, overruling prior Supreme Court rulings to the contrary); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing an agreement to arbitrate claims under the Securities Exchange Act of 1934).

<sup>172</sup> Kevin Roose, *Carlyle Drops Arbitration Clause From I.P.O. Plans*, N.Y. TIMES DEALBOOK (Feb. 3, 2012), available at <http://dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/>; Steven M. Davidoff, *In Private Equity I.P.O., a Shareholder Fear of Losing Favor*, N.Y. TIMES DEALBOOK (Mar. 13, 2012) (Interestingly, Carlyle’s subsequent apparent trouble in attracting investors to its IPO fueled speculation that its attempt to limit shareholders’ ability to litigate “has left potential investors wary.”), available at <http://dealbook.nytimes.com/2012/03/13/in-private-equity-i-p-o-a-shareholder-fear-of-losing-favor/>.

<sup>173</sup> See Black, *supra* note 171, at 124 (“*Concepcion* provides an incentive for publicly traded issuers that wish to eliminate securities class actions seriously to consider amending their governance documents to include an arbitration provision with a class action waiver.”); John C. Coffee, Jr., *The Death of Stockholder Litigation?*, NAT’L L.J. (Feb. 13, 2012) (“[I]f Carlyle had persisted in appealing to the D.C. Circuit, it stood a good chance of eventually winning its fight at the D.C. Circuit level.”).

<sup>174</sup> See Black, *supra* note 171, at 124-28 (discussing whether a public issuer’s arbitration provision with a class action waiver would be legal post-*Concepcion*).

<sup>175</sup> See Daniel Morrissey, *A Fatal Threat to Shareholder Litigation*, NAT’L L.J. (Mar. 12, 2012), at 43 (“[I]t probably won’t be long before another company, emboldened by the unfriendly attitude of some judges [in the D.C. Circuit] toward SEC regulation, tries a like maneuver and pushes it all the way to the Supreme Court.”); see also Coffee, Jr., *supra* note 174 (reporting that “shareholder activists at both Pfizer Inc. and Gannett Co. Inc. have submitted proxy proposals to the SEC seeking bylaw amendments that would introduce similar arbitration provisions at these companies”).



there is one kind of class action to which Congress has been most hostile in recent years, it is shareholder actions.<sup>176</sup> The Private Securities Litigation Reform Act of 1995 imposed heightened pleading requirements and other restrictions on claims brought under the Exchange Act of 1934.<sup>177</sup> The law was passed to curtail “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action.”<sup>178</sup> That shareholder securities actions are now particularly shielded against mandatory arbitration and class waivers is odd to say the least.<sup>179</sup>

## 2. Labor Claims

The National Labor Relations Board—albeit much less successfully—has also tried to limit arbitration agreements barring class proceedings. On January 3, 2012, the NLRB ruled unlawful any employment agreement that bars employees “from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.”<sup>180</sup> The Board found that such agreements conflict with employees’ rights under the National Labor Relations Act to “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>181</sup> The Board found that its decision did not conflict with the FAA because it did not disfavor arbitration in particular: “To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law.”<sup>182</sup>

Given *Concepcion* and other recent FAA jurisprudence, the NLRB’s rationale was unlikely to survive challenge in court. And indeed, in late 2013, the Fifth Circuit reversed the NLRB’s decision, holding that “[t]he use of class action procedures . . . is not a substantive right” safeguarded under the NLRA and that the NLRA did not override the

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<sup>176</sup> To be sure, the skepticism of Republicans in Congress and the White House toward class actions more generally was reflected in the Class Action Fairness Act of 2005. See 28 U.S.C. § 1332(d); 28 U.S.C. § 1453, 28 U.S.C. §§ 1711-1715 (2005). However, that law’s primary aims were (1) to reduce forum shopping to plaintiff-friendly state courts by expanding federal jurisdiction over class actions, and (2) to require greater judicial scrutiny of class action settlements. The law did not directly make it more difficult to bring a class action or to get a class certified.

<sup>177</sup> Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>178</sup> H.R. Conf. Rep. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730.

<sup>179</sup> See William D. Cohan, *Carlyle IPO Exposes Wall Street Justice Sham*, BLOOMBERG VIEW (Feb. 12, 2012) (expressing incredulity at the fact that the SEC prohibited the arbitration requirement in Carlyle’s IPO filing even as it permitted Wall Street’s use of FINRA arbitration—“financial firms’ kangaroo-court system” in other contexts), *available at* <http://www.bloomberg.com/news/2012-02-13/carlyle-ipo-exposes-wall-street-justice-sham-william-d-cohan.html>.

<sup>180</sup> *D.R. Horton, Inc.*, 357 NLRB No. 184, at 1 (N.L.R.B. Jan 3, 2012).

<sup>181</sup> 29 U.S.C. § 157.

<sup>182</sup> *Horton*, 357 N.L.R.B. No. 184, at \*11.

FAA’s mandate to enforce arbitration agreements.<sup>183</sup> In doing so, the Fifth Circuit was just one of multiple other lower courts that had also distinguished or declined to follow the NLRB’s analysis.<sup>184</sup>

### 3. Consumer Financial Products

The 2010 Dodd-Frank financial reform law, enacted before the *Concepcion* and *Italian Colors* decisions, included a provision authorizing the new federal Consumer Financial Protection Bureau to “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”<sup>185</sup>

Two years later the CFPB launched an initial inquiry into the use of arbitration clauses in customer contracts for financial products and services.<sup>186</sup> Among other things, the CFPB’s study examined the use of class action waivers in arbitration agreements. As discussed above, the CFPB’s 168-page report on its “Preliminary Results,” issued in December 2013, found that class waivers are a nearly universal part of arbitration agreements.<sup>187</sup>

Whether the CFPB’s statutory authorization and report will eventually lead to regulatory restrictions on arbitration agreements remains to be seen. But if the CFPB eventually declines to regulate any aspect of consumer financial arbitration clauses, its leadership will likely face hard questions from the Congressional members who passed Dodd-Frank in the wake of the 2008 financial collapse.

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The SEC’s actions in particular show that certain types of private class actions may withstand the Supreme Court’s recent class arbitration jurisprudence where a particular federal agency acts as its protector. It is difficult to discern a clear policy reason why certain actions require class proceedings, whereas numerous other types of claims would be subject to class arbitration waivers. But that is the effect of *Italian Colors* and *Concepcion*, which enforce class-opt-out clauses, except when they don’t.

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<sup>183</sup> D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 357, 360 (5th Cir. 2013).

<sup>184</sup> See, e.g., Walthour v. Chipio Windshield Repair, LLC, No. 13–11309, 2014 WL 1099286 (11th Cir. Mar. 21, 2014); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-55 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013); Sanders v. Swift Transp. Co. of Ariz., LLC, No. 10-cv-03739, 2012 WL 523527, at \*3 n.1 (N.D. Cal. Jan. 17, 2012); Palmer v. Convergys Corp., No. 7:10-CV-145 HL, 2012 WL 425256, at \*3 n.2 (M.D. Ga. Feb. 9, 2012); LaVoice v. UBS Fin. Servs., Inc., 2012 WL 124590, at \*6 (S.D.N.Y., Jan. 13, 2012); Brown v. Trueblue, Inc., 2012 WL 1268644, at \*4-\*6 (M.D.Pa., Apr. 16, 2012).

<sup>185</sup> 12 U.S.C. § 5518(b).

<sup>186</sup> REQUEST FOR INFORMATION REGARDING SCOPE, METHODS, AND DATA SOURCES FOR CONDUCTING STUDY OF PRE-DISPUTE ARBITRATION AGREEMENTS, BUREAU OF CONSUMER FINANCIAL PROTECTION (Apr. 24, 2012), available at [http://files.consumerfinance.gov/f/201204\\_cfpb\\_rfi\\_predispute-arbitration-agreements.pdf](http://files.consumerfinance.gov/f/201204_cfpb_rfi_predispute-arbitration-agreements.pdf).

<sup>187</sup> CFPB ARBITRATION STUDY, *supra* note 78, at 37-38.

### I. The Judicial Backlash

Most audaciously, elements in the third branch of government have also taken steps to limit the effect of the Supreme Court's class arbitration rulings. Though all lower courts in the United States are, of course, bound by the Supreme Court's pronouncements on federal law, many such courts have begun to find ways around the Supreme Court's recent decisions.<sup>188</sup> As of March 2014, more than seventy lower courts have cited *Concepcion* in a ruling but avoided applying it or otherwise recognized its limited effect by declining to extend it, distinguishing it, or recognizing that other courts had done so.<sup>189</sup> Out of the 85 cases decided in the Supreme Court's 2010 term, only four others have garnered more "negative" references by lower courts.<sup>190</sup>

To take a few examples: In *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit held that an employer's arbitration policy was unconscionable under California law, notwithstanding *Concepcion*, and allowed a putative class action to go forward.<sup>191</sup> In *Noohi v. Toll Bros., Inc.*, the Fourth Circuit held that, the FAA did not preempt Maryland law requiring independent consideration for an arbitration clause.<sup>192</sup> And in *In re Checking Account Overdraft Litigation MDL No. 2036*, the Eleventh Circuit held that a fee-shifting provision was unconscionable under South Carolina law.<sup>193</sup>

These rulings do not, of course, override the Supreme Court's decisions. Numerous lower courts that tried to distinguish or refused to extend *Concepcion* and *Italian Colors* have seen their rulings reversed, vacated, or abrogated.<sup>194</sup> And hundreds of courts have faithfully followed the guidance provided in *Concepcion* and *Italian Colors*. But the unusually large number of courts that have sought to distinguish or otherwise avoid applying these decisions suggest that there is judicial resistance to their full application. Since only a tiny percentage of cases ever make their way to the Supreme Court, lower courts' reluctance to fully embrace the Supreme Court's strict enforcement of class arbitration waivers may have a limiting effect on the practical effect of the recent decisions.

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<sup>188</sup> To be sure, *Concepcion* and *Italian Colors* are not the first Supreme Court opinions that lower courts skeptical of arbitration have tried to find ways around. See generally A.P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (analyzing how lower courts have responded to pro-arbitration Supreme Court rulings, and how the Supreme Court has responded in turn).

<sup>189</sup> Westlaw search of "Negative Cases," citing *Concepcion* (conducted Mar. 14, 2014).

<sup>190</sup> Full list of cases on file with author. The four cases with more negative references than *Concepcion* are *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); and *Freeman v. United States*, 131 S. Ct. 2685 (2011).

<sup>191</sup> *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013).

<sup>192</sup> *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013) *cert. dismissed*, 134 S. Ct. 48 (2013).

<sup>193</sup> *In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269 (11th Cir. 2012).

<sup>194</sup> See, e.g., *Feeney v. Dell Inc.*, 465 Mass. 470, 471-472, 989 N.E.2d 439 (Mass. 2013), *recognized as abrogated*, *Machado v. System4 LLC*, 466 Mass. 1004, 993 N.E.2d 332 (Mass. 2013); *Owen v. Bristol Care, Inc.*, 2012 WL 1192005, at \*4-\*5 (W.D.Mo., Feb. 28, 2012), *rev'd*, 702 F.3d 1050 (8th Cir. 2013).

### *J. Conclusion*

Superficially, the Supreme Court's recent class arbitration cases favored arbitration by protecting one type of arbitration clause against state and federal legal principles that would have held it unenforceable. Moreover, class arbitration is no panacea for people with small claims. Commentators have noted that class arbitration does have problems, including potential due process concerns.<sup>195</sup> But while the Supreme Court's recent decisions on class arbitration held themselves out as promoting arbitration, there are many reasons to believe that the rulings' reasoning and effect will ultimately contribute—both in the U.S. and internationally—to the undermining of arbitration as a versatile tool for the resolution of disputes. In purporting to further the pro-arbitration goals of federal law, the Court ironically undercut and underestimated the potential of arbitration in many ways.

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<sup>195</sup> See Malin, *supra* note 19, at 313-14; Scott L. Nelson, *Bazzle, Class Actions, and Arbitration: An Unfinished Story*, 1 PRAC. LAW INST. 307, 307 (2005); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006); Adam Klein & Nantiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective of Plaintiffs' Counsel*, in ARBITRATION 2008: U.S. AND CANADIAN ARBITRATION: SAME PROBLEMS, DIFFERENT APPROACHES, PROCEEDINGS OF THE SIXTY-FIRST ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 142, 150 (Patrick Halter & Paul D. Staudohar eds., 2009); Andrew Remy Norton, Note, *Rules for a New Game: Finding a Workable Solution for Applying Class Actions to the Arbitration Process*, 2 J. DISP. RESOL. 495 (2005); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006).