Class Arbitration: Who Decides?

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OVER the past several years, the U.S. Supreme Court has clarified a myriad of issues surrounding the availability of class arbitration, including most recently with the court's 2018 decision in *Epic Systems Corp. v. Lewis* providing firm guidance that express provisions precluding class arbitration will be enforced. However, one question remains unanswered by the high court: When an arbitration provision is silent as to class arbitration and a party seeks to include a class in the arbitral proceedings, who decides arbitrability—the court or the arbitrator? Put another way, is the question simply a procedural issue to be decided by the arbitrator, or is it a "gateway" issue which must be decided by the court? The Circuits remain divided on this point, so the question may soon make its way to the Supreme Court for resolution.

I. Arbitration background

The federal policy in support of arbitration is well established.[1] So too is the rule that courts must "enforce the bargain of the parties to arbitrate."[2] When the Federal

[1] KPMG LLP v. Cocchi, 565 U.S. 18, 132 S. Ct. 23, 25, 181 L. Ed. 2d 323 (2011) *(per curiam)* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)).

[2] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

Arbitration Act ("FAA")[3] applies, it preempts any contrary state laws.[4]

For there to be an enforceable arbitration provision there must be (1) a writing,[5] and (2) a contractual relationship between the parties.[6] "[A]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[7] At the same time, arbitration agreements can be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[8] This 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.[9] Challenges to the validity of the agreement to arbitrate are to be decided by the court,[10] while challenges to the validity of the contract or instrument containing the arbitration provision is to be decided by the arbitrator.[11]

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[3] 9 U.S.C. § 1, *et seq*.

[4] AT&T Mobility LLC v. Concepcion, 563 U.S. 563, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[5] 9 U.S.C. § 2; Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 836; 130 L. Ed. 2d 753 (1995); Campbell v. General Dynamics Government Systems Corp., 407 F.3d 546 (1st Cir. 2005).

[6] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010); Interocean Shipping v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir. 1972); Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp., 455 F. Supp. 211 (S.D.N.Y. 1978).

[7] United Steelworkers v. Gulf Navigation Co., 363 U.S. 574, 582-583, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

[8] 9 U.S.C. § 2.

[9] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); *see also* Perry v. Thomas, 482 U.S. 483, 492-493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

[10] There is an exception when the parties' arbitration agreement clearly and unmistakably provides that the arbitrator will determine the question of arbitrability. *See* Opalinski v. Robert Half International Inc., 761 F.3d 326, 329, 335-336 (3d Cir. 2014), cert. denied, 135 S. Ct. 1530, 191 L. Ed. 2d 558 (2015); Houston Refining, L.P. v. United Steel Workers Local Union No. 13-227, 765 F.3d 396 (5th Cir. 2014).

[11] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).

II. *Epic Systems Corp. v. Lewis*

Despite the myriad rulings of the Supreme Court on arbitration issues, by mid-2018 a significant question remained: can employers require that employees agree to one-on-one arbitrations, or does Section 7 of the National Labor Relations Act[12] supersede the Federal Arbitration Act and permit class arbitration? Or, in a broader sense, will provisions in agreements requiring one-on-one arbitrations be enforced? Most recently, in *Epic Systems*[13] the Supreme Court concluded that where there are express provisions that preclude class arbitration, these provisions are enforceable and may be adjudicated by the arbitrator. The long and tortured history of what ultimately spawned the U.S. Supreme Court decision in *Epic Systems* began some 13 years ago. On September 27, 2005, David Ho, an employee of the accounting firm of Ernst & Young ("E&Y"), filed a purported class action in California state court, asserting claims under the Fair Labor Standards Act ("FLSA")[14] and the California Labor Code ("CLC") alleging that E&Y failed to compensate them for overtime or required breaks. E&Y removed the case to the Northern District of California, and Ho amended his complaint to add three additional plaintiffs, one of whom was Sarah Fernandez.[15] After the district court granted summary judgment against Ho, and two of the additional plaintiffs voluntarily withdrew, only Fernandez remained to represent the putative class.[16] Two additional cases involving putative classes asserting claims under the CLC[17] were consolidated with the *Ho* action, which was renamed *Fernandez* for class certification purposes.

Plaintiffs in the three cases sought to represent two classes of current and former E&Y employees: (1) Staff, consisting of first- and second-year employees and (2) Seniors, third- and fourth-year employees, in the auditing and tax groups at E&Y's offices in California. On September 20, 2011, the court in the Northern District of California District denied certification with respect to the auditing employees

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[12] 29 U. S. C. §157 guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[13] -- U.S. --, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

[14] 29 U.S.C. § 201 *et seq*.

[15] *See* Ho v. Ernst & Young LLP, 2009 U.S. Dist. LEXIS 5294 (N.D. Cal. Jan. 15, 2009).

[16] 2009 U.S. Dist. LEXIS 5294 at *1-*2.

[17] Landon v. Ernst & Young, 2009 U.S. Dist. LEXIS 119387 (N.D. Cal. Dec. 2, 2009) *and* Richards v. Ernst & Young, 2010 U.S. Dist. LEXIS 16366 (N.D. Cal. Feb. 24, 2010).

but granted the motion with respect to the tax employees.

The denial of certification in *Fernandez* was based on the fact that Fernandez herself was not an adequate class representative.[18] Following denial of class certification, the *Fernandez* plaintiffs moved to add Stephen Morris as a new plaintiff. The court denied Morris's attempt to join the suit, finding that plaintiffs had unduly delayed in attempting to add Morris, but pointed out that Morris could file his own suit. Morris brought suit in the Southern District of New York where another suit by E&Y employees was pending.[19] E&Y moved to transfer the cases to the Northern District of California and the court granted the motion.[20]

When the cases arrived in the Northern District of California, E&Y moved to compel arbitration and to dismiss the cases. The court granted the motion,[21] and the plaintiffs appealed. The Ninth Circuit, in a 2-to-1 decision, reversed the district court and held that an employer violates the National Labor Relations Act ("NLRA")[22] by requiring employees to sign an arbitration agreement precluding them from bringing a class arbitration regarding wages, hours, and terms and conditions of employment. The majority relied on a 2012 ruling by the National Labor Relations Board ("NLRB") that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial. . . . [W]e find that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act ("FAA")."[23]

The import of the 2012 NLRB ruling had been considered previously in in *D.R. Horton, Inc. v. NLRB* ("*Horton*").[24] In *Horton*, the Fifth Circuit disagreed with the

[18] *See* Ho v. Ernst & Young, LLP, 2011 U.S. Dist. Lexis 106658, at *10-11.

[19] *See* Sutherland v. Ernst & Young, 768 F. Supp.2d 547 (S.D.N.Y. 2011). The *Sutherland* plaintiffs asserted a FLSA claim and sought to certify a nationwide FLSA class. Unlike Morris's case, *Sutherland's* putative class involved Staff employees, not Seniors, and asserted state law claims under New York Labor Law, and sought to certify a FED. R. CIV. P. Rule 23 class on behalf of only New York-based employees.

[20] Morris v. Ernst & Young, LLP, 2012 U.S. Dist. LEXIS 129414 (S.D.N.Y., September 11, 2012).

[21] Morris v. Ernst & Young LLP, 2013 U.S. Dist. LEXIS 95714 (N.D. Cal., July 9, 2013).

[22] 29 U.S.C. § 151 *et. seq*.

[23] 357 N.L.R.B. 2277 (2012).

[24] 737 F.3d 344, 357 (5th Cir. 2013). *See also* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Convergys Corp. v. NLRB, 866 F.3d 635 (5th Cir. 2017).

NLRB's ruling, and held that arbitration agreements precluding employees from bringing a class arbitration are "generally lawful" but that agreements which could be reasonably interpreted as prohibiting the filing of an unfair labor practice charge were not.[25] To reach this holding, the court argued that "[t]he use of class action procedures, though, is not a substantive right." This argument relied on previous precedent in *Amchem Prods., Inc. v. Windsor*,[26] and *Deposit Guar. Nat'l Bank v. Roper*,[27] neither of which involved arbitration. The *Horton* court did not discuss the issue of arbitrability in purported class arbitrations or who decides.

The *Epic Systems* Court expressly considered *Horton* and rejected the argument that *Horton* created a conflict between the NRLA and the FAA. The Court pointed out, "In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date . . ."[28] In tacitly approving the *Horton* decision, the Court made clear that even if a statute makes express provision for collective legal actions, that does not preclude dispute resolution through arbitration in the absence of specific statutory provisions prohibiting arbitration.

Although *Epic Systems* dealt specifically with arbitration provisions in the context of employer-employee relations, the decision has far greater implications. Absent some statutory provision which expressly prohibits enforcing one-on-one arbitration provisions, parties will now be free to require one-on-one arbitrations.

III. Deference to the Arbitrator

After *Epic Systems,* it should be fairly clear that clauses that expressly permit or preclude class arbitration must be enforced. But what about clauses where such a clause does not exist? A sharp distinction exists between arbitration clauses which expressly delegate to the arbitrator the exclusive authority to determine the arbitrability of any dispute and those which are silent on the determination of arbitrability. Generally, where the parties agree that the arbitrator will have discretion to determine arbitrability, that contractual agreement is honored.

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[25] *Murphy Oil*, 808 F.3d at 1021.

[26] 521 U.S. 591, 612-613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

[27] 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[28] 138 U.S. at 1627. Emphasis original.

In *Rent-A-Center, West, Inc. v. Jackson*,[29] the Supreme Court held "that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."[30]

Rule 7 of the American Arbitration Association ("AAA") Commercial Arbitration Rules provides, in pertinent part:

> a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.[31]

In *Anderson v. Comcast Corp.*,[32] Anderson sued Comcast in a purported class action in Massachusetts state court for costs associated with his rental of a cable box. Comcast removed the case to federal court and moved to compel arbitration in accordance with an arbitration provision in Comcast's customer agreement. The provision barred recovery of attorney's fees, precluded arbitration on a class action basis, and prohibited the imposition of punitive damages. The district court ruled that the arbitration agreement's bar on class actions and multiple damages awards were invalid because of a Massachusetts statute.[33] The First Circuit reversed in part, leaving "determination of the class action

[29] 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).
[30] *Id*. at 68-69.
[31] The AAA also has rules for labor and employment matters, consumer claims, and construction disputes.
[32] 500 F.3d 66 (1st Cir. 2007).
[33] Massachusetts Consumer Protection Act, MASS. GEN. LAWS ch. 93A, § 9(2), provides: "Any persons entitled to bring such action may . . . bring the action on behalf of himself and such other similarly injured and situated persons."

question in the first instance to the arbitrator." [34] Given *Epic Systems,* the express preclusion of class arbitration at issue in *Anderson* would likely be enforced, nevertheless, the *Anderson* court did not squarely address the issue of class arbitrability beyond a brief, passing reference.

IV. When AAA Rules apply

Similarly, when the parties to the arbitration agreement have designated a specific set of rules to govern the arbitration, and the designated rules provide that the arbitrator will decide class arbitration issues, it should generally be clear that the arbitrator will determine class arbitrability. A later case in the Tenth Circuit, *Dish Network L.L.C. v. Ray* ("*Ray*"), [35] seemingly questioned the Fourth Circuit decision of *Del Webb Communities, Inc. v. Carlson*, ("*Carlson*")[36] on this basis without expressly referring to *Carlson*. The *Ray* court held that because the parties agreed to apply the AAA's National Rules for the Resolution of Employment Disputes, the arbitrator must decide the class issue. Ray was a sales associate with Dish. He signed an arbitration agreement governed by the Federal Arbitration Act ("FAA")[37] as part of his employment process. When he was terminated, Ray sued Dish in federal court under the FLSA and several Colorado statutes. Dish moved to compel arbitration. Ray dismissed his court case and filed the same claims with the AAA.

Ray then sought to have a class arbitration. The arbitrator determined that he had jurisdiction to decide the issue, reasoning that the determination of whether an arbitration agreement permits class-wide arbitration was not a "gateway issue," an issue that is normally decided by courts rather than arbitrators. In addition, the arbitration agreement provided that questions of arbitrability were to be resolved by the arbitrator rather than the courts. The arbitrator decided that class-wide arbitration was permissible. On appeal, the Tenth Circuit agreed that the arbitration agreement in issue required that the arbitrator, not the court, make the arbitrability decision.

Citing the AAA Employment Rules, the Tenth Circuit ruled that the arbitrator had the power to decide the arbitrability and class

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[34] *See also* Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007) ("The question of whether plaintiffs otherwise meet the requirements for a class action are for the arbitrator to decide.").

[35] 900 F.3d 1240 (10th Cir. 2018).

[36] 817 F.3d 867 (4th Cir. 2016). *Carlson*, which addresses the question of interpretation of an arbitration clause where class arbitrability is silent, is discussed *infra.*

[37] 9 U.S.C. § 1 *et seq*.

action issues because the parties "clearly and unmistakably" gave that authority to the arbitrator. At the same time, while noting that the issue of class arbitration "appears to be advancing . . . ," the court declined to resolve the issue in the *Ray* case. The Chief Judge wrote a scholarly concurring opinion in which he opined that "whether a claimant can proceed on behalf of a class is classically a matter of procedural rule, not substantive right." If the Chief Judge's concurring opinion is subsequently followed when the issue is squarely presented to the Tenth Circuit, it will put the Tenth Circuit into what appears to be a clear minority position.

The "arbitrator-vs.-court" issue was highlighted in *Marriott Ownership Resorts, Inc. v. Flynn*.[38] Between 2004 and 2013, the Flynns purchased multiple weekly timeshare interests in two Hawaii resorts from Marriott entities (collectively, "Marriott"). In June 2010, Marriott made changes to its timeshare program which allegedly made it more difficult to use the Flynns' interests and diminished the value of their timeshares. The Flynns, individually and on behalf of a potential class, demanded arbitration claiming the changes breached their timeshare agreements and violated state law.

Marriott contended that the Flynns' claims were not subject to mandatory arbitration and brought an action for declaratory and injunctive relief, seeking a ruling that the dispute was not subject to arbitration and/or an order enjoining the Flynns' demand for arbitration. The Flynns' timeshare agreement contained an arbitration provision which provided:

> Any disagreement or controversy between the Developer and the Association with respect to the question of the fulfillment of the Developer's obligations [(a)] to complete and pay for any Improvement included in the Program,[39] [(b)] to pay for Basic or Special Charges as the Owner of the Developer Ownership Interests in the Program or [(c)] to pay the costs of operating the Program and maintaining it under a Subsidy Agreement shall, at the request of either party, be submitted to arbitration in accordance with the commercial arbitration

[38] 2014 U.S. Dist. LEXIS 171722 (D. Haw. December 11, 2014).

[39] Pursuant to the Timeshare Agreements, Marriott is the "Developer," the "Association" is comprised of all unit owners, and the "Program" is "the common scheme and plan" with regard to timeshare interests and units.

> rules of the American Arbitration Association. . . . Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration; all other respects of the dispute shall be interpreted in accordance with, and the arbitrator shall apply and be bound to follow, the substantive laws of the State of Hawaii.[40]

The *Marriott* court analyzed the issue of arbitrability when the arbitration provision is silent as to class arbitration, observing that "[m]any courts have since relied on *Bazzle*[41] to conclude that the question is 'procedural,' and should be decided by an arbitrator."[42] At the same time, the Marriott court noted that "[t]wo Circuit courts have held otherwise, determining that whether class arbitration is available is indeed a 'question of arbitrability' for a court (absent clear and unmistakable evidence otherwise).[43] These decisions rely primarily on reasoning in *Stolt-Nielsen* and *Concepcion*[44] describing fundamental differences between bilateral arbitration and class arbitration."[45]

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[40] *Marriott* at *13.

[41] *Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).

[42] *Marriott* at *27-28, citing *In re* A2P SMS Antitrust Litig., 2014 U.S. Dist. LEXIS 74062, at *10 (S.D.N.Y. May 29, 2014); Harrison v. Legal Helpers Debt Resolution, LLC, 2014 U.S. Dist. LEXIS 117154, at *4 (D. Minn. Aug. 22, 2014); Kovachev v. Pizza Hut, Inc., 2013 U.S. Dist. LEXIS 115284, at *2 (N.D. Ill. Aug. 15, 2013); Lee v. JP Morgan Chase & Co., 982 F. Supp.2d 1109, 1112 (C.D. Cal. 2013); Hesse v. Sprint Spectrum L.P., 2012 U.S. Dist. LEXIS 20389, at *2 (W.D. Wash. Feb. 17, 2012); *cf*. Employers Ins. Co. Of Wausau v. Century Indem. Co., 443 F.3d 573, 577 (7th Cir. 2006) ("We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve."); Fantastic Sams Franchise Corp. v. FSRO Ass'n, 683 F.3d 18, 25 (1st Cir. 2012) (holding that an arbitrator decides whether an agreement permits "associational arbitration" because the question is not a "question of arbitrability."); *In re A2P SMS Antitrust Litig*., 2014 U.S. Dist. LEXIS 74062, at *9. ("Associational arbitration" has been defined as "whether an association could represent its members in an arbitration proceeding.").

[43] Citing *Opalinski* 761 F.3d at 332; Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013), cert. denied, 2014 U.S. LEXIS 3516 (May 19, 2014).

[44] *Concepcion*, 563 U.S. 333.

[45] *See Opalinski,* 761 F.3d at 334 ("[W]e read the Supreme Court [in *Stolt-Nielsen* and *Concepcion*] as characterizing the permissibility of classwide arbitration not solely as a question of procedure or contract interpretation but as a substantive gateway dispute qualitatively separate from deciding an individual quarrel. Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes . . . to the very type of controversy to be resolved."); *Reed Elsevier*, 734 F.3d at 598 ("[T]he Court has given every indication, short of an outright holding, that classwide arbitrability is a

The court continued, pointing out "[h]ere, as discussed above with arbitration in general, the relevant Timeshare Agreements provide that certain disputes 'shall . . . be submitted to arbitration in accordance with the commercial arbitration rules' of the AAA. . . . In turn, Rule 7(a) of the AAA commercial arbitration rules provides that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.' . . . And more particularly, an agreement to the AAA's commercial arbitration rules also includes an agreement to the AAA Supplementary Rules for Class Arbitration."

The AAA Supplementary Rules provide, in part:

> These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.[46]

The AAA Supplementary Rules also provide for "construction of the arbitration clause," as follows:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or

gateway question rather than a subsidiary one.").

[46] AAA Suppl. Rule 1(a).

> to vacate the Clause Construction Award.[47]

The *Marriott* court also observed that "[m]any courts have held that 'consent to any of the AAA's substantive rules also constitutes consent to the Supplementary Rules and, if a dispute that otherwise would be arbitrated under the AAA rules involves a purported class, then the proceeding is governed by both the AAA rules and the AAA Supplementary Rules for Class Arbitrations.'[48] . . . And it follows that . . . incorporation of the Supplementary Rules constitutes clear and unmistakable evidence of an intent to have an arbitrator address the question of class arbitrability."[49]

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[47] AAA Suppl. Rule 3.

[48] *Marriott*, at *31-32, citing Chesapeake Appalachia, LLC v. Burkett, 2014 U.S. Dist. LEXIS 148442, at *7 (M.D. Pa. Oct. 17, 2014) (citing Bergman v. Spruce Peak Realty, LLC, 2011 U.S. Dist. LEXIS 131366, at *3 (D. Vt. Nov.14, 2011) (relying upon the Supplementary Rules when referring class arbitration issue to the arbitrator, where parties agreed to "the Commercial Arbitration Rules of the AAA")); S. Commc'ns Servs., Inc. v. Thomas, 829 F. Supp.2d 1324, 1336-1338 (N.D. Ga. 2011) (holding that AAA Wireless Industry Arbitration Rules "incorporate the AAA Supplementary Rules for Class Arbitrations, which gave the arbitrator the power to decide whether the Arbitration Clause implicitly authorized class proceedings"); Yahoo! Inc. v. Iversen, 836 F. Supp.2d 1007, 1011-1012 (N.D. Cal. 2011) (holding that parties' agreement to AAA National Rules for the Resolution of Employment Disputes also constituted agreement to the Supplementary Rules); Price v. NCR Corp., 908 F. Supp.2d 935, 945 (N.D. Ill. 2012) ("[T]he parties' agreement to proceed 'under the AAA's rules' incorporates the Supplementary Rules for Class Arbitrations."); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 635 (5th Cir. 2012) ("[C]onsent to any of the AAA's substantive rules also constitutes consent to the Supplementary Rules."), abrogated in part on other grounds in Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

[49] *Id.*, citing *Iversen*, 836 F. Supp.2d at 1011-1012 ("[T]he Supreme Court has never held that a class arbitration clause must explicitly mention that the parties agree to class arbitration in order for a decisionmaker to conclude that the parties *consented* to class arbitration."). *See also* Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017); *Price*, 908 F. Supp.2d at 945 ("[T]he parties' agreement to proceed 'under the AAA's rules' incorporates the Supplementary Rules for Class Arbitrations. By adopting AAA Supplementary Rule 3 in their Agreement, the parties agreed that an arbitrator, and not this Court, would determine whether the Agreement authorizes class arbitration."); *Reed*, 681 F.3d at 635-636 ("The parties' consent to the Supplementary Rules, therefore, constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration."); *Ex parte* Johnson, 993 So. 2d 875 (Ala. 2008); Langston v. Premier Directional Drilling, L.P., 203 F. Supp.3d 777 (S.D. Tex. 2016); Harper v. Ultimo, 113 Cal. App.4th 1402, 7 Cal. Rptr. 3d 418 (Cal. App. Ct. 2003) (arbitration unenforceable where BBB rules not attached); *cf.* A 1 Premium Acceptance, Inc. v. Hunter, 2018 Mo. LEXIS 445, 2018 WL 4998256 (Mo. Oct. 16, 2018) (arbitration not compelled where designated arbitral organization cannot serve); Flanzman v. Jenny Craig, Inc., 2018

V. What if the arbitration clause is silent?

Silence in an arbitration clause on both the availability of class arbitrability, and also the role and duties of the arbitrator, give rise to the obvious question of whether a true meeting of the minds occurred. Yet silence alone on the issue of class arbitration is not necessarily determinative of the issue. In *Green Tree Financial Corp. v. Bazzle*,[50] the Bazzles entered into loan contract and security agreement with Green Tree Financial for a mobile home purchase. The arbitration agreement provided that the arbitrator "shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief."[51] The Bazzles were not provided a legally required form and filed an action in state court seeking damages. They asked the court to certify a class and order arbitration. The court certified the class and the arbitrator "administered" the arbitration as a class arbitration. Later, another couple having the same claim sought class arbitration by the same arbitrator. The arbitrator ruled that class arbitration was proper based upon the previous class certification, and again proceeded to handle the arbitration as a class arbitration. The trial court in South Carolina confirmed both awards and Green Tree appealed.[52] The South Carolina Supreme Court withdrew both cases from the Court of Appeals, assumed jurisdiction, and consolidated the proceedings.[53] The South Carolina high court then held that although the contracts were silent with respect to class arbitration, they nevertheless authorized class arbitration, and that arbitration had properly taken that form.

The United States Supreme Court granted certiorari to consider whether that holding was consistent with the Federal Arbitration Act. The parties agreed to submit to the arbitrator "***all*** disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract."[54] The Court pointed out that the dispute about what the arbitration contract in each case meant (*i.e.*, whether it forbids the use of class arbitration procedures) was a dispute "relating to this contract" and the resulting

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N.J. Super. LEXIS 142, 2018 WL 5019942 (N.J. App. Div., Oct. 17, 2018) (no arbitration where no arbitrator or procedure set forth in arbitration provision).

[50] 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).

[51] *Id.* at 448.

[52] *See* Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 898 (S.C. 1998).

[53] Bazzle v. Green Tree Financial Corp. 351 S.C. 244, 249, 569 S.E.2d, 349, 351 (S.C. 2002).

[54] *Id.* (emphasis original).

"relationships." The Court observed that the dispute "concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide." Because the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation the case was remanded "so that the arbitrator may decide the question of contract interpretation--thereby enforcing the parties' arbitration agreements according to their terms."[55] The *Bazzle* decision rested on a unique set of circumstances where a court had made the class determination in the first instance.

However, when arbitration clauses fail to address whether class arbitration is permissible **and** who should decide arbitrability, the Supreme Court has sometimes offered to courts a broader role in determining whether class arbitration is permissible. In *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*,[56] the Supreme Court reviewed a petition to vacate an arbitration award that questioned whether a party could be compelled to enter into class arbitration when the agreement is silent on such procedures. The court determined that the plurality opinion in *Bazzle*[57] was not applicable to that dispute because *Bazzle* only answered the question of who decides whether class arbitration is available, not the standard for determining when it is in fact permissible.[58] As a result, the Supreme Court held that while it is clear "that parties may specify *with whom* they choose to arbitrate their disputes,"[59] . . . "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[60]

Similarly, in *Carlson,* homeowners signed a sales agreement for the purchase of a lot and construction of a home. The agreement contained an arbitration clause but did not specify the use of AAA rules. The homeowners sought to arbitrate class action claims under the agreement. The district court held that the availability of class arbitration under an arbitration agreement is a

[55] *Bazzle*, 539 U.S. at 454. *See also* Romney v. Franciscan Med. Grp., 399 P.3d 1220 (Wash. App. 2017); Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc., 343 F.3d 355 (5th Cir. 2003).

[56] 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).

[57] 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).

[58] *Stolt-Nielsen*, 559 U.S. at 679.

[59] *Id*. at 683. Emphasis original.

[60] *Id*. at 684.

procedural question for the arbitrator to decide, rather than a question for the court. The Tenth Circuit reversed, holding, "that whether parties agree to class arbitration is a gateway question for the court."[61] Nevertheless, the court remanded the case "for the district court to determine whether the arbitration clause permits class arbitration." On remand, the district court refused to permit class arbitration, following the holding in *Reed Elsevier, Inc. v. Crockett*[62] wherein the Sixth Circuit concluded that the arbitration clause in issue there did not authorize classwide arbitration because "the clause nowhere mentions it."[63]

But what about an arbitration agreement which fails to provide express guidance on class arbitrability, fails to delegate clearly to the arbitrator the authorization to make such a determination, and also makes no mention of specific rules, state statutes or class arbitration and yet is subject to the FAA? The issue of who decides the class arbitrability question currently depends upon the Circuit. The Third,[64] Fourth,[65] Sixth,[66] Seventh,[67] Eighth,[68] Ninth[69] and Eleventh[70] Circuits have held that the decision on class arbitrability is a "gateway" issue which must be decided by the court. The First[71] and Fifth[72] Circuits have held that the issue should be decided by the arbitrator, while the Tenth Circuit[73] has yet to squarely decide the issue. The arbitration community anxiously awaits the final word from the United States Supreme Court.

There is a certain Catch-22 element connected with the election of a party to have the decision on arbitrability decided by the arbitrator rather than the court. In *Paduano v. Express Scripts, Inc.*,[74] HM Compounding Services, LLC

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[61] *Carlson,* 817 F.3d at 869.
[62] 734 F.3d 594 (6th Cir. 2013).
[63] *Id*., 734 F.3d at 599.
[64] *Opalinski*, 761 F.3d 326 (the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court absent clear agreement otherwise).
[65] *Carlson*, 817 F.3d 867 (gateway issue; must be decided by the court).
[66] *Crockett*, 734 F.3d 594 (6th Cir. 2013), cert. denied, 2014 U.S. LEXIS 3516 (May 19, 2014).
[67] Herrington v. Waterstone Mortgage Corp., 2018 U.S. App. LEXIS 29643 (7th Cir. Oct. 22, 2018).
[68] Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017).
[69] O'Connor v. Uber Techs., Inc., 2018 U.S. App. LEXIS 27343 (9th Cir. Sept. 25, 2018).
[70] JPay, Inc. v. Kobel, 904 F.3d 923, 926-927 (11th Cir. 2018) (question of availability of class arbitration presumptively for court to decide absent "a clear and unmistakable intent to overcome that presumption").
[71] *Anderson*, 500 F.3d 66.
[72] Robinson v. J & K Admin. Mgmt. Servs., 817 F.3d 193 (5th Cir. 2016), cert. denied, 2016 U.S. LEXIS 6515 (U.S., Oct. 31, 2016) (class arbitrability to be decided by the arbitrator).
[73] *Ray*, 900 F.3d 1240 (not a gateway issue; arbitrator can decide class issue).
[74] 55 F. Supp.3d 400 (E.D.N.Y. 2014).

("HMC") brought a multi-party antitrust case against a number of defendants. Among the defendants, CVS Caremark Corporation ("Caremark"),[75] Optum Rx, Inc. ("Optum"), and Prime Therapeutics, LLC ("Prime") all had arbitration provisions in their contracts with HMC.[76] Each moved the court to sever the claims against it and send the claims to arbitration while the case proceeded in court against the remaining defendants. After a scholarly analysis of the applicable law, the court ordered the claims against Caremark, Optum and Prime to arbitration, while recognizing "that severing HMC's claims against Caremark, Optum, and Prime and submitting them to arbitration . . . may lead to inconsistent results. Further, if one or more of the arbitrators deems the relevant [agreements] to be contracts of adhesion or finds that HMC's respective claims are not 'arbitrable,' HMC would only have the opportunity to start at square one in this Court. It is always more expeditious to try related claims in one forum rather than several, . . . Furthermore, the Court finds that HMC, a sophisticated corporate entity, assumed these risks when it entered into the relevant arbitration provisions . . . ."[77]

VI. Conclusion

Although *Epic Systems* dealt with arbitration provisions in employer-employee settings, the decision has far greater implications for the entire range of business transactions. Businesses engaged in all forms of commercial transactions are likely to utilize one-on-one provisions in their contracts to avoid the possibility of being faced with class arbitrations.

[75] Today known as "CVS Health Corporation".

[76] The other defendant, Express Scripts, Inc., had a forum selection provision in its contracts, but no arbitration clause.

[77] *Id*. at 438; *cf*., Paragon Litig. Trust v. Noble Corp. PLC (*In re* Paragon Offshore PLC), 2018 Bankr. LEXIS 2322 (D. Del., August 6, 2018).