

Recent Developments in Alternative Dispute Resolution

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I. Alternative Dispute Resolution

John Jay Range

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A. INTRODUCTION

Cases involving class arbitration continue to play a predominant role in recent developments in alternative dispute resolution. Supreme Court decisions have generally expanded and protected party autonomy in fashioning arbitration agreements. For better or worse, the Court has enhanced the ability of corporations to remove disputes, particularly consumer disputes that are a frequent target of class action litigation, from the jurisdiction of state and federal courts by resorting to arbitration. The Court has expansively read the Federal Arbitration Act (FAA)¹ to preempt state laws that purport to restrict or burden the right to arbitrate disputes on public policy, unconscionability, or other grounds.

Recent Supreme Court rulings have also allowed companies to force all claims into bilateral dispute resolution by enforcing waiver provisions in arbitration agreements that prohibit class action arbitration, joinder of third parties, or consolidation of similar claims.² In addition, the Court has held that the “effective vindication” doctrine, which protects the right to prosecute federal statutory claims, does not invalidate class action arbitration waivers merely because bilateral arbitration (i.e., arbitration of individual claims as opposed to class claims)

John Jay Range is a partner in the Washington, D.C., office of Hunton & Williams LLP. He is the chair of the Alternative Dispute Resolution Committee and a member of the Advisory Committee for the ABA Section of Dispute Resolution.

1. 9 U.S.C. §§ 1–307 (2012).

2. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

is cost-prohibitive, exceeding the claim's value.³ As a practical matter, this means that if a dispute resolution clause requires all disputes to be arbitrated and includes an express waiver of class action arbitration, both class action litigation and class arbitration are precluded.

Class action arbitration remains a heavily litigated issue, however, if the arbitration agreement does not explicitly waive class arbitration, or at least require bilateral arbitration.⁴ In part, this is because the Supreme Court has not definitively resolved the gateway issue of “who decides”—courts or arbitrators—whether an arbitration agreement permits class arbitration. But even in jurisdictions where the controlling authority provides that class arbitration is presumptively for courts to decide, there is judicial disarray concerning the proper application of the Supreme Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*⁵ U.S. district courts and state courts in California are split on whether the mere reference in an arbitration agreement to the AAA arbitration rules is “clear and unmistakable evidence” that the parties intended for arbitrators rather than courts to decide class arbitrability.

This report focuses on the consistently inconsistent results reached by courts respecting the gateway issue and the application of *Stolt-Nielsen*. It discusses case law developments since June 2013, when the Supreme Court rendered its decision in *Oxford Health Plans LLC v. Sutter*.⁶ It focuses on the recent rulings of the Third and Sixth Circuits holding that class arbitration is a gateway issue for courts to decide, *unless* the arbitration agreement provides “clear and unmistakable evidence” that the parties intended class arbitrability to be decided by arbitrators. Next, the report addresses the split among district courts in the Third Circuit and elsewhere concerning whether inclusion in an arbitration agreement of a more-or-less standard form AAA arbitration clause requires submission of the issue of class arbitrability to the arbitrator. Finally, this report recommends that, given the current disarray in the courts, parties automatically include waivers of class-action arbitration in their arbitration agreements if they want to participate only in bilateral arbitration.

3. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The undisputed evidence in *American Express* was that the cost of an economist to provide testimony necessary to prosecute an antitrust claim having a value of \$38,549 would exceed \$1 million. *Id.* at 2308.

4. Class arbitration is available if the parties unequivocally consent to that form of arbitration and design a dispute resolution mechanism that addresses the added complexity of class adjudication. This article focuses on those situations where, after the fact, the parties fall into dispute about whether their dispute resolution clause reflects mutual consent to class arbitration. Obviously, with respect to new contracts, this problem could be addressed through careful drafting, including use of waivers of class arbitration. But parties continue to use standard form arbitration clauses recommended by arbitral institutions, such as the American Arbitration Association (AAA). These standard form clauses are silent on the issue of class arbitration, do not request the parties to identify whether they want courts or arbitrators to decide issues of arbitrability, provide no option to accept or waive class arbitration, and sometimes incorporate separate rules for conducting class arbitrations. The result is that courts and arbitrators are divided over the proper interpretation of standard form arbitration clauses as they relate to class arbitration.

5. 559 U.S. 662 (2010).

6. 133 S. Ct. 2064 (2013).

B. JUDICIAL DISARRAY ON THE ISSUE OF “WHO DECIDES” CLASS ARBITRABILITY

1. Supreme Court Has Not Resolved Whether Class Arbitrability Is a Gateway Issue

Parties to arbitration contracts are free to decide whether disputes will be resolved in the first instance by courts or arbitrators,⁷ as arbitration “is a matter of consent, not coercion.”⁸ “If the contract is silent on the matter of who primarily is to decide ‘threshold’ questions about arbitration, courts determine the parties’ intent with the help of presumptions.”⁹ Courts presume that parties intend courts, not arbitrators, to decide disputes about issues of arbitrability, which include questions such as whether parties are bound by a given arbitration clause,¹⁰ whether a concededly binding arbitration clause applies to a particular type of controversy,¹¹ whether the arbitration clause should be applied to a person who did not sign it,¹² or disputes over formation of the parties’ arbitration agreement.¹³ Courts presume that parties intend arbitrators, not the courts, to decide disputes about the meaning and application of particular procedures in the arbitration.¹⁴ These procedural matters include claims related to satisfaction of “pre-requisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate”¹⁵; claims of “waiver, delay, or a like defense to arbitrability”¹⁶; or other purely procedural requirements.

In *Green Tree Financial Corp. v. Bazzle*,¹⁷ the Supreme Court was presented with the issue of whether party consent to class action arbitration was a threshold question of arbitrability for the court or a procedural question for the arbitrator to resolve. The case involved contracts between a commercial lender, Green Tree, and its customers, which required arbitration of disputes but did not expressly mention class arbitration. The arbitrator ordered class arbitration proceedings, a ruling affirmed by the South Carolina Supreme Court, despite its finding that the arbitration clause in the Green Tree contracts “was *silent* regarding class-wide arbitration.”¹⁸

When *Bazzle* reached the Supreme Court, a majority of the Justices were unable to agree on a single rationale to dispose of the case, resulting in a plurality

7. *See, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

8. *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

9. *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

10. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

11. *Id.*

12. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995).

13. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299-300 (2010).

14. *Howsam*, 537 U.S. at 86.

15. *Id.* at 85 (emphasis omitted).

16. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

17. 539 U.S. 444 (2003).

18. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 359 (S.C. 2002) (emphasis in original), *vacated by* 539 U.S. 444 (2003).

opinion.¹⁹ The plurality ruled that whether the parties had consented in their arbitration clause to class arbitration was a procedural question for the arbitrator to decide. In reaching this conclusion, Justice Breyer argued that the question before the Court was not “*whether they agreed to arbitrate a matter,*” but “*what kind of arbitration proceeding the parties agreed to.*”²⁰ This presented, in the plurality’s view, a procedural question to be decided by arbitrators rather than a question of arbitrability to be decided by the courts. Justice Breyer also noted “the arbitration contracts’ sweeping language concerning the scope of the questions committed to arbitration.”²¹

Since the *Bazze* decision was rendered, the Court has pointedly noted that it is merely a plurality decision and therefore not binding.²² The Court, however, has not had an opportunity to revisit the gateway issue in its later decisions. In *Stolt-Nielsen*, the Court held that parties could not be compelled to participate in class action arbitration unless there was a contractual basis for concluding they had mutually consented to class arbitration.²³ The Court further held that consent could not be inferred simply from the fact that parties agreed to arbitrate their disputes.²⁴ But the gateway issue of “who decides” whether the arbitration agreement reflects consent to class action arbitration was not presented in *Stolt-Nielsen* because the parties entered into a supplemental agreement in which they authorized the arbitration panel to decide the issue of class arbitration.²⁵

Similarly, in *Oxford Health Plans*, the Court had no opportunity to revisit *Bazze* and decide the gateway issue. Oxford conceded in its briefing that the “arbitrator should determine whether its contract with Sutter authorized class procedures.”²⁶ As a result, the gateway issue of who decides whether the arbitration clause permits class arbitration—the court or the arbitrator—has remained open for more than a decade. In instances where construction of the arbitration clause

19. Justice Breyer wrote the opinion in which Justices Scalia, Souter and Ginsburg joined, and Justice Stevens filed a separate opinion concurring in the judgment and dissenting in part. Chief Justice Rehnquist, joined by Justices O’Connor and Kennedy, dissented, and Justice Thomas wrote a separate dissenting opinion.

20. *Bazze*, 539 U.S. at 452 (emphasis in original).

21. *Id.* at 453.

22. *Stolt-Nielsen*, 559 U.S. at 680; *Oxford Health Plans*, 133 S. Ct. at 2068, n.2. The “who decides” question arguably became more important after the *Stolt-Nielsen* decision because arbitrators have been misapplying the holding of that case, as demonstrated by the Supreme Court’s opinion in *Oxford Health Plans*, which was sharply critical of the arbitrator’s construction of the arbitration clause. Given the deferential standard of review under the FAA, the Supreme Court has no effective means of enforcing the *Stolt-Nielsen* holding unless class action arbitration presents a question of arbitrability to be decided by the courts.

23. *Stolt-Nielsen*, 559 U.S. at 684 (“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.*”) (emphasis in original).

24. *Id.* at 685 (“[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement of arbitrate.”).

25. *Id.* at 680. Obviously, a stipulation between the parties that the arbitrator should decide the issue of class arbitrability is “clear and unmistakable evidence.”

26. *Oxford Health Plans*, 133 S. Ct. at 2069 n.2.

was left to arbitrators, a surprisingly large number decided that contracts, which were silent on the issue of class arbitration, nevertheless authorized class arbitration, at least implicitly. As demonstrated by the Supreme Court's decision in *Oxford Health Plans*, courts lack an effective means to police enforcement of the holding in *Stolt-Nielsen*. As long as arbitrators make a good faith effort to construe the arbitral agreement, their decisions, no matter how hapless, cannot be scrutinized for compliance with *Stolt-Nielsen* given the deferential standard of review required by Section 10(a)(4) of the FAA. Courts have no alternative in most instances but to affirm the arbitral decision, even if the court is persuaded the arbitrator "got it wrong."

2. Two Circuit Courts Have Rejected *Bazze*, Holding Class Arbitrability Is a Gateway Issue for Judges to Decide

Many federal courts that have addressed the issue of class arbitrability since *Stolt-Nielsen* have continued to conclude, consistent with the *Bazze* plurality, that availability of class arbitration is a procedural question for arbitrators to decide.²⁷ Since the Supreme Court's decision in *Oxford Health Plans*, the Sixth Circuit, and later the Third Circuit, have held that consent to class action arbitration is a question of arbitrability to be decided by judges rather than arbitrators. But the district court decisions continue to split on this issue. As discussed below, the disarray is so great that different judges in the Middle District of Pennsylvania, which is within the Third Circuit, have reached diametrically opposed positions involving the same plaintiff and the same AAA arbitration clause.

a. Sixth Circuit Decides Class Arbitrability Is Gateway Issue for Courts to Decide

In *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett*,²⁸ a dispute arose between LexisNexis, a business division of Reed Elsevier, and Craig Crockett and his former law firm, Dehart & Crockett, P.C., concerning LexisNexis subscription services. Crockett filed an arbitration demand with the AAA against LexisNexis on behalf of himself and two putative classes, one composed of law firms and the other of law firm clients. LexisNexis filed suit against Crockett in federal district court in Ohio seeking a declaration that the arbitration clause did not authorize class arbitration. The district court granted summary judgment in favor of LexisNexis.

On appeal, the Sixth Circuit affirmed, holding the question whether an arbitration agreement permits classwide arbitration is a gateway issue, which is reserved for judicial determination unless the parties clearly and unmistakably

27. See, e.g., *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656 (AJN), 2014 WL 2445756, at *10 (S.D.N.Y. May 29, 2014); *Kovachev v. Pizza Hut, Inc.*, No. 12 C 9461, 2013 WL 4401373, at *1 (N.D. Ill. Aug. 15, 2013); *Lee v. JPMorgan Chase & Co.*, 982 F. Supp. 2d 1109, 1112 (C.D. Cal. 2013).

28. 734 F.3d 594 (6th Cir. 2013).

authorize the arbitrator to make the decision.²⁹ The Sixth Circuit specifically noted the Supreme Court’s statement in *Stolt-Nielsen* that *Bazze* was only a plurality decision and thus non-binding. After reviewing the Supreme Court’s decisions involving class arbitrability since *Stolt-Nielsen*, the Sixth Circuit noted that “the Supreme Court’s puzzle of cases on this issue is not yet complete”³⁰ and thus the issue “remains an open one,” but the Supreme Court “has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one.”³¹ The Sixth Circuit therefore held that “the question whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved ‘for judicial determination unless the parties clearly and unmistakably provide otherwise.’”³²

b. Third Circuit Agrees Classwide Arbitrability Is Issue for Courts to Decide

The Third Circuit, in *Opalinski v. Robert Half International Inc.*,³³ joined the Sixth Circuit, concluding that there were “fundamental differences between classwide and individual arbitration,” such that “the availability of classwide arbitration is a substantive ‘question of arbitrability’ to be decided by a court absent clear agreement otherwise.”³⁴

In *Opalinski*, the disputed employment agreements contained an arbitration clause providing that “[a]ny dispute or claim arising out of or relating to Employee’s employment, termination of employment or any provision of this Agreement’ shall be submitted to arbitration.”³⁵ The employer moved the court to compel arbitration. The district court granted arbitration, but held that the propriety of bilateral versus class arbitration was for the arbitrator to decide. The case proceeded to arbitration, where the arbitrator entered a partial award ruling that the employment agreements permitted classwide arbitration. The employer then moved the district court to vacate the partial award, which motion was denied.

On appeal, the Third Circuit found that the employment agreements were silent on the issue of classwide arbitration. In the face of such silence, the court held “the availability of classwide arbitration is to be decided by a court rather than an arbitrator.”³⁶

29. *Id.* at 597, citing *Howsam*, 537 U.S. at 83. The court in *Reed Elsevier* stated “Gateway disputes include ‘whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy,’” citing *Bazze*, 539 U.S. at 452. Gateway matters are “important enough that courts ‘hesitate to interpret silence or ambiguity’ as grounds for giving an arbitrator the power to decide them because ‘doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.’” *Reed Elsevier*, 734 F.3d at 597, citing *First Options of Chicago*, 514 U.S. at 945.

30. *Id.* at 597.

31. *Id.* at 598.

32. *Id.* at 599, citing *Howsam*, 537 U.S. at 83.

33. 761 F.3d 326 (3d Cir. 2014).

34. *Id.* at 329.

35. *Id.*

36. *Id.* at 330.

In reaching this conclusion, the court arguably did an “about face” from its decision two years earlier in *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*³⁷ In *Quilloin*, the Third Circuit had concluded that classwide arbitration was *not* a question of arbitrability.³⁸ The court distinguished its prior decision, however, noting the parties in *Quilloin* had stipulated the arbitrator should be the one to determine whether the contract provided for class action arbitration.³⁹ Since the Third Circuit decided *Quilloin* after *Stolt-Nielsen*, it seems clear that the Supreme Court’s decision in *Oxford Health Plans*, combined with the Sixth Circuit’s decision in *Reed Elsevier*, influenced the Third Circuit to revisit the issue and hold that courts should decide the availability of class action arbitration.⁴⁰

3. State and U.S. District Courts Consistently Reach Inconsistent Results

a. State Courts in California

Three California state courts of appeal have reached diametrically opposed results on the gatekeeper issue within the last three years, all for different reasons. In *Rivers v. Cedars-Sinai Medical Care Foundation*,⁴¹ the California Second District Court of Appeal reversed the decision of the trial court dismissing a wage-and-hour class action litigation and compelling the claimant to arbitrate. The appellate court followed *Bazzle*, holding that whether the parties agreed to arbitrate their dispute was a “procedural question” for the arbitrator and not a substantive “question of arbitrability” for the court to decide. In reaching this holding, the court explicitly disagreed with the Fifth Circuit’s analysis in *Reed Elsevier*, particularly its conclusion that since *Bazzle* the Supreme Court had given “every indication, short of an outright holding, that classwide arbitrability is a gateway question.”⁴²

By contrast, the California Fourth District Court of Appeal concluded in *Universal Protection Service, L.P. v. Superior Court of San Diego County*⁴³ that *Bazzle* was “a nonbinding plurality opinion, casting doubt on whether it should be accorded any deference.”⁴⁴ The court held class arbitrability presented “a gateway question of arbitrability” for the court to decide “*in the absence of a clear indication that the parties intended otherwise.*”⁴⁵ The appellate court held, however, that the parties, by selecting arbitration under the AAA Employment Arbitration Rules and Mediation Procedures (AAA Employment Rules), demonstrated a clear and unmistakable intent to allow the arbitrator to decide

37. 673 F.3d 221 (3d Cir. 2012).

38. *Id.* at 232.

39. *Id.* See *Quilloin v. Tenet HealthSys. Philadelphia, Inc.*, 763 F. Supp. 2d 707, 727 n.22 (E.D. Pa. 2011), *rev’d* 673 F.3d 221 (3d Cir. 2012).

40. *Opalinski*, 761 F.3d at 332.

41. No. B249979, 2015 WL 166867 (Cal. Ct. App. Jan. 13, 2015).

42. *Id.* at *6 (internal quotation marks omitted).

43. 234 Cal. App. 4th 1128 (Cal. Ct. App. 2015). This is another wage and hour dispute concerning overtime pay.

44. *Id.* at 1135.

45. *Id.* at 1136 (emphasis in original).

the arbitrability issue. The court reasoned that the AAA Employment Rules provide “[t]he arbitrator shall have the power to rule on his or her own jurisdiction” and incorporate the AAA’s Supplementary Rules for Class Arbitrations (Supplementary Rules).⁴⁶ The appellate court held that when parties agree to resolve their dispute under arbitration rules providing “that the arbitrator shall decide whether the parties’ arbitration agreement permits class and/or representative arbitration,” there is “clear and unmistakable evidence that the parties intended to delegate to the arbitrator that question.”⁴⁷

This holding is contrary to the view of the California First District Court of Appeal in *Ajamian v. Cantorco2e, L.P.*,⁴⁸ which “seriously question[ed],” albeit in dicta, whether the incorporation of AAA rules into an agreement provided clear and unmistakable evidence that the parties intended to submit the issue of unconscionability (another gateway issue) to an arbitrator as opposed to a court.⁴⁹ Thus, the California District Courts of Appeal are split not only on the gateway issue of whether arbitrators or courts decide class arbitration, but also on the legal significance of the arbitration agreement referencing the AAA rules and whether that reflects an intent to delegate the class arbitrability issue to an arbitrator.

b. U.S. District Courts

In sheer numbers, a clear majority of the recent district court decisions hold that arbitrators, not courts, should decide the issue of class arbitration. The most common rationale for adopting this view is either reliance on the plurality decision of the Supreme Court in *Bazze* or reference to the AAA rules in the arbitration agreement.

For example, in *In re A2P SMS Antitrust Litigation*,⁵⁰ the U.S. District Court for the Southern District of New York held that the issue of class arbitrability was an issue for the arbitrator to decide. In reaching this conclusion, the court relied primarily on the Supreme Court’s plurality decision in *Bazze*,⁵¹ the Second Circuit’s decision in *Jock v. Sterling Jewelers Inc.*,⁵² and the Third Circuit’s decision in *Quilloin*.⁵³ It all but ignored the Supreme Court’s decision in *Oxford Health Plans*,

46. *Id.* at 1138.

47. *Id.* at 1139.

48. 203 Cal. App. 4th 771 (Cal. Ct. App. 2012).

49. *Id.* at 790.

50. No. 12 CV 2656 (AJN), 2014 WL 2445756 (S.D.N.Y. May 29, 2014).

51. The district court concluded: “*Bazze* remains the most pertinent authority and, in the absence of other Supreme Court or Second Circuit precedent or a clear trend to the contrary among lower courts, the Court assigns its analysis substantial weight.” *Id.* at *11. *Stolt-Nielsen* and *Concepcion* are not characterized as significant harbingers of change. The Sixth Circuit’s contrary conclusion in *Reed Elsevier* (finding class arbitration is a gateway decision for courts to make) is barely mentioned as a chain cite.

52. 646 F.3d 113 (2d Cir. 2011).

53. The district court’s decision in *A2P SMS* relying in part on the Third Circuit’s decision in *Quilloin* was rendered May 29, 2014. The Third Circuit’s decision in *Opalinski*, which for all practical purposes reaches the opposite result of *Quilloin* on the gateway issue of “who decides,” was filed two months later, on July 30, 2014. It is unclear whether the district court’s decision in *A2P*

making no reference to the Alito concurring opinion, which the Sixth Circuit in *Reed Elsevier* apparently found instructive as to the Supreme Court's current views.

A district court for the Northern District of Illinois concluded in *Kovachev v. Pizza Hut, Inc.*⁵⁴ that when an arbitration agreement is silent as to whether class arbitration is permissible, an arbitrator should decide the question.⁵⁵ In support of its decision, the district court relied on a Seventh Circuit case⁵⁶ involving consolidation of claims, which held that consolidation was a procedural question for arbitrators to decide.⁵⁷

A district court for the Central District of California concluded in *Lee v. JPMorgan Chase & Co.*⁵⁸ that arbitrators and not courts should construe whether an arbitration clause permits class action arbitration of claims. After discussing the *Stolt-Nielsen* and *Oxford Health Plans* decisions, the court relied on the Supreme Court's plurality decision in *Bazzele* and the Third Circuit's decision in *Quilloin* to conclude that the arbitrator should be the gatekeeper to decide whether the parties' contract permitted class adjudication.

In *Marriott Ownership Resorts, Inc. v. Flynn*,⁵⁹ a district court in Hawaii, after surveying the case law, concluded there was a "significant split in authority" whether class arbitration is a "question of arbitrability" for courts or one of "procedure" for arbitrators.⁶⁰ The court concluded that it did not need to resolve the split because the parties, by selecting the AAA Commercial Arbitration Rules in their arbitration agreement, had evinced an intent to allow the arbitrator to decide class arbitrability.⁶¹ The mere reference to the AAA arbitration rules was sufficient for the court to conclude as a matter of law that the parties intended to delegate the issue of arbitrability to the arbitrator.

In *Torres v. CleanNet, U.S.A., Inc.*,⁶² the Middle District of Pennsylvania stayed Torres' class action lawsuit, holding that a non-signatory to an arbitration agreement, CleanNet, could enforce the agreement to arbitrate against Torres on

SMS would have been different if *Opalinski* had been decided several months sooner. The district court made no mention of the Sixth Circuit's decision in *Reed Elsevier* other than to note it was a divergent result from *Quilloin*. See *A2P SMS*, 2014 WL 2445756, at *9.

54. No. 12 C 9461, 2013 WL 4401372 (N.D. Ill. Aug. 15, 2013).

55. *Kovachev*, 2013 WL 4401373, at *1–2. This case was decided before the Sixth Circuit's *Reed Elsevier* decision.

56. *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir. 2006). This case involved whether a claimant in a reinsurance case could compel its insurers to consolidate two separate reinsurance claims in a single arbitration. The Seventh Circuit discussed *Bazzele* but disagreed with the Fifth Circuit's decision in *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) that *Bazzele* was binding precedent. The Seventh Circuit proceeded to rely on *Howsam* to conclude consolidation of two bilateral arbitrations into one case was a procedural issue for the arbitrators to decide. *Employers Insurance Co.*, 443 F.3d at 581, citing *Howsam*, 537 U.S. at 84.

57. See *Kovachev*, 2013 WL 4401373, at *3 and n.4.

58. 982 F. Supp. 2d 1109, 1113 (C.D. Cal. 2013). This case was decided just a week after the Sixth Circuit's *Reed Elsevier* decision.

59. No. 14-00372-JMS-RLP, 2014 WL 7076827 (D. Haw. Dec. 11, 2014).

60. *Id.* at *11.

61. *Id.* at *9.

62. No. 14-2818, 2015 WL 500163 (E.D. Pa. Feb. 5, 2015).

the basis of equitable estoppel.⁶³ The district court then held, based on the Third Circuit’s decision in *Opalinski*, that “‘whether an agreement provides for class-wide arbitration is a “question of arbitrability” to be decided by the District Court.’”⁶⁴ The court concluded there was a valid waiver of class arbitration in the dispute resolution clause and compelled the parties to participate in a bilateral rather than class arbitration.⁶⁵

The degree to which the district court decisions are fractured on the “who decides” issue is revealed in two other Middle District of Pennsylvania decisions, which involved the same plaintiff, identical arbitration clauses, and similar leases for mineral rights from fracking operations.⁶⁶ Yet the courts reached diametrically opposed constructions of the arbitration clause⁶⁷ despite the Third Circuit’s recent holding in *Opalinski*.

Judge Mannion, in *Chesapeake Appalachia, LLC v. Burkett*,⁶⁸ acknowledged that the holding in *Opalinski* required courts, not arbitrators, to decide the issue of class arbitration. But the court accepted the landowner’s argument that because the arbitration clause stated all disputes would be resolved in accordance with the “rules of the American Arbitration Association,” there was “clear and unmistakable evidence” in the arbitration clause that the parties intended a panel

63. CleanNet U.S.A., Inc. (CleanNet) operated in Pennsylvania through two sub-franchisors, or “area operators,” MKH Services, Inc. (MKH) and CleanNet Systems of Pennsylvania, Inc. Torres entered into a franchise agreement with MKH to become a CleanNet franchisee. CleanNet was not a party to this franchise agreement. But since Torres was claiming as a CleanNet franchisee, CleanNet was allowed as a nonsignatory to enforce the clause under the theory of equitable estoppel. Under Pennsylvania law, the doctrine of equitable estoppel applies to bind a nonsignatory to an arbitration clause if (1) there is a close relationship between the entities involved, and (2) the claims against the nonsignatory are “intimately founded in and intertwined with the underlying contractual obligations.” *Id.* at *8 (internal quotation marks and citation omitted). Torres conceded he had a close relationship with the other entities involved in the dispute.

64. *Id.* at *10 (quoting *Opalinski*, 761 F.3d at 332).

65. *Id.* at *9. The franchise agreement provided that “[a]ll disputes, controversies, and claims of any kind’ . . . shall be settled by arbitration administered AAA . . . in accordance with the Federal Arbitration Act and the Commercial Rules of the AAA. . . .” *Id.* at *1. On its face, the clause is silent as to the issue of “who decides” as well as on the issue of consent to class arbitration. The district court did not consider whether the adoption of the AAA rules in the arbitration agreement was “clear and unmistakable evidence” that the parties intended the arbitrator rather than the court to decide the issue of class arbitrability. Under Judge Mannion’s ruling in *Burkett*, the arbitrator, not the judge should have decided whether the class action waiver was enforceable.

66. The plaintiff, Chesapeake Appalachia, LLC (Chesapeake), executed leases with a large number of landowners to drill for, collect, and produce oil and gas. The leases promised the landowners royalty payments on Chesapeake’s gross proceeds on the gas, less its production costs. Not surprisingly, disputes arose when the landowners accused Chesapeake of artificially inflating its production costs, thereby reducing royalty payments.

67. The arbitration clause provided:

In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by the Lessee’s operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

Chesapeake Appalachia, LLC v. Burkett, No. 3:13-3073, 2014 WL 5312829 at *4 (M.D. Pa. Oct. 17, 2014).

68. *Id.*

of AAA arbitrators to decide the class arbitrability issue.⁶⁹ The court noted that AAA Commercial Arbitration Rule 7(a) 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.”⁷⁰ In addition, the AAA Supplementary Rules for Class Arbitration provide in Rule 1(a) that:

[t]hese [Supplementary Rules] shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (‘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.⁷¹

Supplementary Rule 3 provides that “‘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.’”⁷² Based on these AAA rules, the district court concluded there was “clear and unmistakable evidence” that an arbitrator should decide whether to permit class arbitration.

Two months later, in *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*,⁷³ Judge Brann in the Middle District of Pennsylvania issued an opinion that disagreed with Judge Mannion’s decision. Judge Brann began his analysis by noting that “the ‘who decides’ issue is an unsettled area of law in the class arbitrability arena.”⁷⁴ But Judge Brann held that as a result of the *Opalinski* decision, the “[t]he Third Circuit has now held that, in the absence of clear and unmistakable evidence to the contrary, the district courts decide the ‘who decides’ issue.”⁷⁵ Judge Brann explicitly disagreed with Judge Mannion’s conclusion that the parties, by agreeing to AAA arbitration and therefore AAA rules, had manifested their intent to engage in class arbitration. Because two judges in the same district had reached diametrically opposed decisions on a similar dispute involving identical arbitration clauses, Judge Brann certified the case for interlocutory appeal to the Third Circuit.

69. *Id.* at *3.

70. *Id.* at *5.

71. *Id.*

72. *Id.* The court noted that under Supplementary Rule 3, arbitrators may not “‘consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.’” The court also noted that the Sixth Circuit in *Reed Elsevier* expressly rejected the argument that incorporation of the AAA rules into an arbitration agreement is clear and unmistakable evidence that the parties agreed to submit the “who decides” issue to the AAA panel. *Id.* at *7. But Judge Mannion held the Sixth Circuit’s decision was not binding on him, even though the Third Circuit had closely followed the *Reed* decision. *Id.* No. 4:14-CV-0620, 2014 WL 7335045 (M.D. Pa. Dec. 19, 2014).

74. *Id.* at *1. Judge Brann identified three Third Circuit opinions prior to *Opalinski* that, in his view, “appear to have adopted the *Bazzle* plurality’s decision, without expressly holding as such,” citing *Vilches v. Travelers Co., Inc.*, 413 Fed. App’x 487 (3d Cir. 2011); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012); and *Quilloin v. Tenent Health System*, 673 F.3d 221 (3d Cir. 2012). *Id.* at *7.

75. *Id.* at *1.

Meanwhile, a third identical suit was filed by Chesapeake Appalachia in the Northern District of West Virginia, *Chesapeake Appalachia, LLC v. Suppa*.⁷⁶ This court also rejected Chesapeake's argument that the broad form of the arbitration clause, combined with the adoption of the AAA rules, demonstrated "clear and unmistakable evidence" that the parties intended an arbitrator rather than a judge to decide the class arbitration issue.⁷⁷

4. Conflicting Holdings on Class Arbitration Involve Two Primary Issues

The split in authority reflected in the recent state and federal court rulings on class arbitrability primarily involve two issues. First, whether class arbitrability presents a gatekeeper issue, which issues are primarily reserved for courts to decide. Second, whether arbitrators should decide class arbitrability if the arbitration agreement makes general reference to institutional arbitration rules and those rules state an arbitrator has the power to decide disputes over arbitrability. The second issue potentially subsumes the first issue because institutions whose rules provide that arbitrators have the power to decide arbitrability issues administer the vast majority of all arbitrations. If mere general reference to institution rules in the arbitration agreement is deemed to be clear and unmistakable evidence of intent to arbitrate class arbitrability, the gatekeeper issue is virtually irrelevant. In most instances, arbitrators rather than courts will decide class arbitrability. Since the "who decides" question is often outcome determinative, it is useful to consider in more depth the questions the appellate courts will have to decide.

a. Arguments Concerning Whether Reference to AAA Rules Create a Presumption that Arbitrators Decide Questions of Class Arbitrability

At this time, there is not a clear circuit split to facilitate Supreme Court review of the gatekeeper issue. The older circuit court decisions that appear to follow *Bazze* are distinguishable from the more recent Third and Sixth Circuit decisions rejecting *Bazze*.⁷⁸ It is likely that the current disarray in the district courts

76. No. 1:14CV159, 2015 WL 966326 (N.D. W.Va. Mar. 4, 2015). The *Suppa* judge suggested *Burkett* "misjudged the high hurdle presented by the 'clear and unmistakable' standard," which the Third Circuit characterized as "'onerous,'" requiring "'express contractual language.'" *Id.* at *10, quoting *Opalinski*, 761 F.3d at 335.

77. *Suppa*, 2015 WL 966326, at *10.

78. For example, in *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18 (1st Cir. 2012), the First Circuit allowed the arbitrator to decide whether, in a dispute between a franchisor and its franchisees, the arbitration clause permitted arbitration by an association of franchisees in a representational capacity. As such, the First Circuit's holding technically applies to the issue of *associational* arbitration, which the court recognized was not "equivalent to a class action" by unrelated individuals. *Id.* at 23. The Second Circuit's decision in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), involved parties who had stipulated that the arbitrator rather than the court should decide the issue of whether class arbitration was permitted by the arbitration agreement. As a result, the "who decides" question was not before the Second Circuit. Similarly, the Fifth Circuit in *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630, 635–36 (5th Cir. 2012), *abrogated by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), found that the parties had "a clear agreement to allow the arbitrator to decide whether the party's [sic] agreement provides for class arbitration."

on the gatekeeper issue will continue until either a new consensus emerges or a circuit split develops so that the Supreme Court can grant certiorari to address the issue.

The Third Circuit will have to address the impact of an arbitration agreement referencing the AAA rules on the “who decides” question because that issue was certified for interlocutory appeal in the *Scout Petroleum* case. Among the first issues the Third Circuit will have to address is the line of authority, developed outside the context of class arbitration, where numerous courts, including most of the circuits, have held that referencing the AAA rules in an arbitration agreement constitutes clear and unmistakable evidence that the parties agreed to arbitrate issues of arbitrability.⁷⁹ Most of the district courts holding that arbitrators should decide the arbitrability issue have relied on this line of authority for the proposition that the parties intended arbitrators to decide the class arbitrability issue.

Reliance on this line of cases in the context of class arbitration, however, raises a number of potential problems. First, because these cases did not involve the issue of class arbitration, they do not address the concern that the Supreme Court raised first in *Stolt-Nielsen* and later in *Concepcion* and *Oxford Health Plans* that bilateral and class arbitration are fundamentally different, such that consent to arbitration is not ipso facto consent to class arbitration. One of the fundamental differences is that class arbitration would purport to bind absent class members, who are non-signatories to the arbitration agreement before the court. Arguably, this fact distinguishes class arbitrability from other cases

Despite this finding, the court proceeded to scrutinize the arbitrator’s decision to allow class arbitration, vacating the arbitrator’s award. Arguably, the Fifth Circuit reached the wrong conclusion on both issues. First, having concluded that the parties reached a “clear agreement” that the arbitrator would decide the arbitrability question, the Fifth Circuit should have limited itself to deferential review of the arbitrator’s award under Section 10(a)(4) of the FAA. Second, the Fifth Circuit’s rationale for concluding the parties had a “clear agreement” to allow the arbitrator to decide the class arbitration issue is arguably inconsistent with the Supreme Court’s decision in *Stolt-Nielsen*, as it was based solely on the fact that the parties had adopted AAA arbitration rules, which incorporated the AAA’s Supplementary Rules for Class Arbitration. As discussed *infra*, mere incorporation of the AAA’s rules, including its rules for class arbitration, might not be sufficient evidence of consent to class arbitration.

79. See, e.g., *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (“[T]he express adoption of [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”); *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir. 2010) (when “parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator”) (internal quotation marks omitted); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (determining that AAA Commercial Rule 7(a) gave the arbitrator the power to determine arbitrability); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (discussing different AAA rules); *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (similar); *Contec Corp. v. Remote Solutions Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (similar). At least one court has suggested, however, that this presumption is rebuttable. See *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 & n.1, 780 (10th Cir. 1998) (although AAA commercial rules incorporated into arbitration agreement, subsequent settlement agreement created ambiguity regarding the parties’ intent to delegate to the arbitrator the issue of arbitrability).

where the AAA rules are deemed incorporated into bilateral arbitration agreements. The incorporation by reference argument is much stronger between parties to a bilateral agreement than it is with respect to a party who is requested to arbitrate against absent claim members. The Second Circuit, which has repeatedly held that reference to AAA rules in an arbitration agreement binds the signatories to arbitrate arbitrability, nevertheless recognizes “that just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory.”⁸⁰ In order to decide whether arbitration of arbitrability is appropriate, the Second Circuit cited the Supreme Court’s requirement that a court must first determine whether the parties have a sufficient relationship to each other and the rights created under the agreement.⁸¹ Justice Alito’s concurring opinion in *Oxford Health Plans* clearly suggests absent class members lack this relationship.⁸²

Second, the recent district court decisions holding that reference to the AAA rules binds the parties to arbitrate arbitrability do not address whether *Stolt-Nielsen* imposes an additional, and perhaps even more rigorous requirement, than was imposed by *First Options* for overcoming the presumption that courts decide questions of arbitrability. *Stolt-Nielsen* imposes a dual requirement: (1) the parties’ arbitration agreement affirmatively demonstrate consent to class arbitration, and (2) *consent cannot be inferred merely from the agreement to arbitrate*. In most cases, the parties’ only reference to AAA rules occurs in the portion of their dispute resolution clause containing the parties’ agreement to arbitrate. The primary reason for referencing the AAA rules in the agreement to arbitrate is to identify the AAA as the arbitral institution that will administer the arbitration and to specify which of the AAA rules the arbitrators should apply. The AAA Guidelines for Drafting Dispute Resolution Clauses⁸³ suggest parties use the following sample language to express their intent to arbitrate:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Optional Rules for Emergency Measures of Protection], and judgment on the award rendered by the arbitrators(s) may be entered in any court having jurisdiction thereof.⁸⁴

80. *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F. 3d 205, 209 (2d Cir. 2005).

81. *Id.* at 209, citing *First Options*, 514 U.S. at 944–45 (discussing the necessity of a threshold determination by the courts before referring issues of arbitrability to arbitrators). The Third Circuit in *Opalinski* stated courts should be wary of concluding that the availability of classwide arbitration is for arbitrators to decide because that decision implicates the rights of absent class members without their consent. *Opalinski*, 761 F.3d at 332–33 (citing the concurring opinion of Justice Alito in *Oxford Health Plans*, 133 S. Ct. at 2071–72).

82. *Oxford Health Plans*, 133 S. Ct. 2071–72 (Alito, J. concurring) (“at least where absent class members have not been required to opt in, it is difficult to see how an arbitrator’s decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used” (emphasis in original)).

83. This guide “has been updated to correspond with the AAA’s Commercial Arbitration Rules in effect on October 1, 2013” and is available at <http://www.adr.org>.

84. AAA, DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICAL GUIDE, at 10.

This sample broad form arbitration clause⁸⁵ demonstrates that the standard incantation for requesting AAA arbitration (whether bilateral or class action) includes referencing the AAA rules. The decisions holding that reference to the AAA rules constitutes “clear and unmistakable evidence” of consent to have the arbitrator decide class arbitrability do not consider whether, as a matter of fact, the parties’ intent in referencing the rules is limited solely or primarily to forming a valid agreement to arbitrate.⁸⁶ *Stolt-Nielsen* prohibits concluding party consent to class arbitration solely from the parties’ agreement to arbitrate a dispute.

Third, a problem with the presumption that reference to the AAA rules implies an intent to arbitrate arbitrability is that the Supplementary Rules undermine this presumption, at least in part. Supplementary Rule 3 provides in pertinent part that “[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, *or any other AAA rules*, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.”⁸⁷ While this Rule is focused on the arbitrators’ decisional process, it nevertheless raises a question whether, for example, Rule 7(a) of the AAA Commercial Arbitration Rules can fairly be read in conjunction with the Supplementary Rules to demonstrate party intent to have arbitrators decide the issue of class arbitration.

Finally, as a practical matter, virtually every arbitral institution has sample arbitration clauses that reference the rules of that institution for purposes of forming an agreement to arbitrate.⁸⁸ In addition, virtually every arbitral institution has adopted rules providing that its arbitrators have the power to decide their

85. Courts and arbitrators have drawn inferences from the fact that the AAA arbitration clause is broadly drafted to include essentially “all disputes.” From this, courts and arbitrators conclude the parties must have intended to include class arbitration. But arbitration clauses are in fact typically broad in scope to avoid litigation over whether the parties intended to arbitrate all disputes or to arbitrate some and litigate others. For this reason, “broad form” arbitration agreements are just as necessary in bilateral arbitration as in class action arbitration. The mere fact that the clause is broadly drafted does not, in and of itself, indicate the parties had any intent with respect to the question of consent to class arbitration.

86. The Sixth Circuit concluded in *Reed Elsevier* that the relatively standard form AAA arbitration clause used in that case reflected nothing more than the parties’ intent to arbitrate. *Reed Elsevier*, 734 F.3d at 600.

87. AAA Supplementary Rule 3 (emphasis added), available at <http://www.adr.org>. No doubt many parties who elect AAA arbitration are unaware of the fact that the AAA offers many different sets of rules (e.g., Commercial rules, Construction Industry rules, Employment rules, Wireless Industry rules, Real Estate Industry rules, etc.); that all of these rules provide arbitrators the power to rule on their jurisdiction; and that all of these rules are deemed to incorporate the Supplementary Rules.

88. See, e.g., JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES AND AGREEMENTS (effective Apr. 1, 2015), available at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>; International Institute for Conflict Prevention and Resolution (CPR) Administered Arbitration Rules (July 1, 2013), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Languages.aspx>; Standard ICC Arbitration Clauses (July 1, 2012), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>.

own jurisdiction.⁸⁹ If by referencing an institution's arbitration rules parties are deemed to have consented to arbitrators deciding the issue of class arbitrability, the holding in *Stolt-Nielsen* is, in effect, turned on its head. In the vast majority of cases, the presumption will be that arbitrators rather than courts will decide the gateway question of arbitrability. The only way a party could consent to arbitration under these circumstances without simultaneously consenting to arbitrators deciding the issue of class arbitrability would be to either include a specific statement that they intended courts to decide the issue or, more simply, by inserting a waiver of class arbitration in the parties' dispute resolution provision.

C. CONCLUSION

Whether class arbitration presents a gateway issue, and whether courts rather than arbitrators will decide that issue if the parties' arbitration agreement references AAA rules, will remain unsettled questions for an indeterminate period of time, as courts will likely continue to reach inconsistent results interpreting similar contractual provisions. If arbitrators decide the issue of class arbitrability, past experience suggests they will find parties have consented to class arbitration more frequently than would federal judges. Further, those arbitral decisions will be largely immune from substantive judicial scrutiny because of the FAA's deferential standard of review. Consequently, parties desiring to avoid class arbitration would be well-advised to include an explicit waiver of class arbitration in all their arbitration agreements. Such agreements, properly drawn, are enforceable and will reduce exposure given the unsettled state of the current law.

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89. See, e.g., JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(b) (July 1, 2014) ("Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator."), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>; CPR Administered Arbitration Rules, Rule 8.1 and 8.2 (July 1, 2013) ("The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."), available at <http://www.cpradr.org/>; ICC Rules of Arbitration, Article 6(3) (July 1, 2012) ("If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction . . . [s]hall be decided by the arbitral tribunal. . . ."), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.