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DO ARBITRATORS FOLLOW THE LAW? EVIDENCE FROM CLAUSE CONSTRUCTION

*David Horton**

Courts and scholars have long disagreed about whether arbitrators follow the law. It is difficult, however, to assess whether arbitration is lawless. For one, the process is private, usually confidential, and often generates unreasoned unwritten awards. In addition, determining whether an arbitrator decided a case "correctly" is highly subjective. Thus, the literature on point relies on crude proxies such as surveys of arbitrators, the frequency with which judges vacate awards, and arbitral citation practices.

This Piece offers a different perspective. During the 2010s, it was unclear whether an arbitration provision that did not mention class actions allowed such procedures. But in 2019, the Supreme Court tried to resolve this issue by holding in Lamps Plus, Inc. v. Varela *that the parties must affirmatively authorize class arbitration and that neither "silence" nor "ambiguity" suffices to allow the same.* Lamps Plus *created a proving ground for comparing judges and arbitrators because both types of decisionmakers engage in "clause construction" (determining whether an arbitration clause allows class procedures), and the American Arbitration Association requires its awards on the topic to be reasoned and published. This Piece capitalizes on this window by assembling a dataset of recent court opinions and arbitral awards. It discovers that judges generally read* Lamps Plus *as establishing a bright line rule that generic arbitration clauses function as class waivers, but 27% of arbitrators found a tacit agreement to allow class procedures. The Piece then explores the implications of its findings for the lawlessness hypothesis.*

INTRODUCTION

Suppose a plaintiff files a class action against a defendant, but the parties had signed an arbitration clause that does not say whether it allows or bars class actions. This common fact pattern raises two questions. The first is known as "clause construction": Did the parties agree to class arbitration or only bilateral arbitration? The second is whether a court or an arbitrator should perform clause construction.

* Fair Business Practices & Investor Advocacy Endowed Chair & Martin Luther King, Jr., Professor of Law, University of California, Davis, School of Law.

During the 2010s, both questions were unsettled. The U.S. Supreme Court decided several controversial opinions that interpreted the Federal Arbitration Act (FAA) to require judges to enforce class arbitration waivers even when plaintiffs pursued low value claims that would either be aggregated or abandoned.[1] It was unclear, however, (1) whether an arbitration clause that did not mention class proceedings allowed them, and (2) which decisionmaker should resolve the issue.[2]

Then, in 2019, the Supreme Court tried to put the clause construction dilemma to rest. In *Lamps Plus, Inc. v. Varela*, the Court declared that there must be an "affirmative 'contractual basis'" for class arbitration and that neither "silence" nor "ambiguity" is sufficient.[3] According to the conventional wisdom, *Lamps Plus* slammed the door on anyone interpreting an arbitration clause that did not mention class procedures as authorizing them.[4]

This Piece revisits the subject seven years after the Court's game-changing ruling. It uses *Lamps Plus* to assess one of the most fiercely debated topics in alternative dispute resolution: whether arbitrators follow the law.[5] Concern that arbitration is "lawless" goes back a century.[6] But several factors impede any attempt to test this theory. For one, arbitration awards are often issued without published reasoning and kept confidential.[7] And even if one could peek behind this curtain, systemic differences in the types of disputes that are litigated and arbitrated would

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1. See, e.g., Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) (holding that courts cannot invalidate class arbitration waivers as a matter of federal common law on the grounds that plaintiffs will be unable to vindicate their rights without the class mechanism); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011) (declaring that the FAA preempts a California common law rule that deemed most class arbitration waivers in consumer contracts to be unconscionable).

2. See infra Part II; infra notes 126–127 and accompanying text.

3. 139 S. Ct. 1407, 1416–17, 1419 (2019) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

4. See, e.g., Farfan v. SSC Carmichael Operating Co. LP, No. 18-cv-01472-HSG, 2019 WL 4933577, at *2 (N.D. Cal. Oct. 7, 2019) (granting a motion to reconsider a clause construction ruling that had allowed class-wide arbitration because "*Lamps Plus* . . . is dispositive in this case"); Andrew Faisman, Note, The Goals of Class Actions, 121 Colum. L. Rev. 2157, 2160 n.14 (2021) ("[C]ourts are likely to interpret mandatory arbitration agreements as prohibiting participation in class proceedings even in the absence of . . . explicit waivers.").

5. Compare Stephen J. Ware, Default Rules From Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703, 725 (1999) (declaring that "arbitrators often do not apply the law"), with Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR, 40 Tex. Int'l L.J. 449, 514 (2005) ("[A]rbitrators usually do try their best to model their awards on what courts would do in similar cases—and . . . as often as not they succeed in doing so.").

6. See infra Part I.

7. See Thomas J. Stipanowich, The Third Arbitration Trilogy: *Stolt-Nielsen*, *Rent-A-Center*, *Concepcion* and the Future of American Arbitration, 22 Am. Rev. Int'l Arb. 323, 422 (2011) (explaining that it is hard to "obtain[] sufficient reliable data on largely private arbitration processes").

problematize efforts to draw meaningful inferences from deviations in outcomes.[8] Finally, if simply collecting arbitral awards is difficult, gathering empirical evidence about the lawlessness thesis is nearly impossible because it requires making subjective decisions about whether an arbitrator resolved a case "correctly." Thus, it is not surprising that the literature on point relies on rough proxies and is "ultimately inconclusive."[9]

Yet clause construction cases are different. For starters, their reasoned awards are accessible: To protect the due process rights of absent class members, the American Arbitration Association (AAA) requires arbitrators to explain their determinations in published decisions.[10] Moreover, these matters are practically identical whether they appear in courts or in arbitration. Clause construction raises the same neatly packaged issue of contract interpretation and thus facilitates apples-to-apples comparisons between judges and arbitrators.[11] Lastly, the sweeping nature of *Lamps Plus*'s holding largely—although, admittedly, not entirely—sidesteps chin-stroking questions about what the law is and whether arbitrators applied it faithfully.[12]

To shine fresh light on the claim that arbitration is lawless, the Piece analyzes forty-two judicial opinions and twenty-six arbitral awards that were issued between April 24, 2019, when the Court decided *Lamps Plus*, and December 31, 2024. It finds that judges saw the clause construction issue as "straightforward."[13] In their eyes, *Lamps Plus* prohibited them from discovering implicit consent to arbitrate on a class basis. Thus, their

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8. For instance, a lower plaintiff win rate in arbitration might stem from something as simple as the fact that plaintiffs without legal representation, who fare worse on the merits, are more likely to pursue claims in a tribunal that is less formal than court. See David S. Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1290 (2009) (noting that the same sets of circumstances that drive some plaintiffs toward arbitration—situations "[w]here process costs are high but potential recovery low"—also represent the "classic case where the plaintiff is unlikely to obtain counsel").

9. See Christopher R. Drahozal, Is Arbitration Lawless?, 40 Loy. L.A. L. Rev. 187, 194–204 (2006) (explaining why it is difficult to use arbitral awards, judicial opinions, and surveys of arbitrators to prove that arbitrators reach different decisions than judges).

10. See Am. Arb. Ass'n, Supplementary Rules for Class Arbitrations 3–4 (2003), https://www.adr.org/media/0aalctny/supplementary_rules_for_class_arbitrations.pdf (on file with the *Columbia Law Review*) [hereinafter AAA Class Rules] ("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 . . . .").

11. See David Horton, Clause Construction: A Glimpse Into Judicial and Arbitral Decision-Making, 68 Duke L.J. 1323, 1359–60 (2019) [hereinafter Horton, Clause Construction] (explaining how clause construction cases focus on the same "case stream: those that arise from contracts that contain arbitration clauses").

12. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019) (holding that an ambiguous arbitration clause does not provide consent to arbitration under the FAA, regardless of state law contract principles).

13. Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1069 (9th Cir. 2020).

task consisted of reading the relevant contract to confirm that it "never mentions class arbitration."[14] In stark contrast, 27% of arbitrators held that a generic arbitration provision embodied a tacit agreement to allow class proceedings.[15] This suggests that although arbitral lawlessness may not be widespread, it is very real.

Three clarifications may be helpful. First, this Piece is a sequel to an Article published in 2019 called *Clause Construction: A Glimpse Into Judicial and Arbitral Decision-Making*, which analyzed 150 clause construction orders generated by courts and arbitrators between June 2010 and February 2019.[16] During this period, an adjudicator could defensibly find that an arbitration clause implicitly allowed plaintiffs to aggregate claims.[17] But *Lamps Plus* made reaching such a decision next to impossible.[18] Thus, although this Piece covers the same terrain as *Clause Construction*, it does so to investigate an issue that the earlier article could not: whether arbitrators obey "a change in controlling law."[19]

Second, clause construction inverts the normal dynamic in forced arbitration. Typically, defendants move to compel arbitration and plaintiffs fight tooth and nail to stay in the courts.[20] These tactics stem in part from the belief that arbitrators, who charge by the hour and are chosen by the parties, have economic incentives to cater to the repeat-playing companies that can hire them in the future.[21] Yet when the issue is clause construction, the current runs in the opposite direction. Arbitrators have financial reasons to favor *plaintiffs*: Ordering class arbitration starts the meter running on a long, complex, and profitable multiparty dispute.[22]

Third, this Piece will not use the word "silent" to describe an arbitration clause that says nothing about class actions. As this Piece will

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14. Radcliff v. San Diego Gas & Elec. Co., No. 3:20-cv-01555-H-MSB, 2020 WL 6395677, at *1, *6 (S.D. Cal. Nov. 2, 2020).

15. See infra tbl.1.

16. Horton, Clause Construction, supra note 11, at 1331.

17. See infra text accompanying notes 89–94.

18. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417–18 (2019) (limiting the tools that courts can use to authorize class arbitration).

19. Farfan v. SSC Carmichael Operating Co. LP, No. 18-cv-01472-HSG, 2019 WL 4933577, at *2 (N.D. Cal. Oct. 7, 2019).

20. See, e.g., McLellan v. Fitbit, Inc., No. 3:16-cv-00036-JD, 2018 WL 3549042, at *1 (N.D. Cal. July 24, 2018) (noting "the perception that arbitration is where consumer lawsuits go to die").

21. See, e.g., Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 685 (1996) ("An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award.").

22. Horton, Clause Construction, supra note 11, at 1327 ("If an arbitrator reads a silent arbitration provision to bar class actions, she is left with a single, small-dollar claim that will likely be abandoned. But if she goes the other way, she christens a lucrative multiparty dispute.").

explain, what it means for an arbitration clause to be "silent" about the permissibility of class proceedings is contested.[23] Instead, this Piece will refer to arbitration agreements that do not expressly address the topic as "generic."

The Piece proceeds in three Parts. Two of them provide background: Part I surveys the lawlessness hypothesis and Part II describes the Supreme Court's clause construction jurisprudence. Part III then uses recent clause construction rulings to contrast how judges and arbitrators conceptualize the same narrow issue.

I. THE LAWLESSNESS HYPOTHESIS

This Part sketches the debate over whether arbitrators follow the law. It shows that there is widespread disagreement about the quality of arbitral decisionmaking. It also explains why the lawlessness theory has been so hard to verify or disprove.

Congress passed the FAA a century ago.[24] The statute built the infrastructure to allow merchants to adjudicate fact-bound disputes without judicial involvement.[25] One of its key provisions is section 10, which streamlines conflict resolution by permitting judges to vacate awards only for extraordinary defects.[26] For example, arbitrators cannot "exceed[] their powers" by deciding an issue that the parties did not even agree to arbitrate.[27] But outside of such gateway limitations, section 10 makes court oversight of arbitrators "so limited as to be little better than a rubber stamp."[28]

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23. See infra text accompanying notes 89–94.

24. See Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2018)).

25. See Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926) (explaining that arbitration under the FAA "is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact").

26. See 9 U.S.C. § 10(a)(1)–(4) (allowing parties to seek vacatur of an arbitration award on four grounds, including the partiality, corruption, procedural misconduct, or ultra vires acts of the arbitrator).

27. Id.; see also Aperion Care, Inc. v. Senwell Senior Inv. Advisors, No. 22 C 3120, 2023 WL 1779798, at *2 (N.D. Ill. Feb. 6, 2023) (holding that an arbitrator exceeds their powers by "act[ing] outside the scope of [their] authority, i.e., if [they] issued an award that 'does not draw its essence from the agreement between the parties'" (quoting Yasuda Fire & Marine Ins. Co. of Eur., Ltd. v. Cont'l Cas. Co., 37 F.3d 345, 349 (7th Cir. 1994))). In addition, in some jurisdictions, courts can vacate an award made in "manifest disregard" of the law, which "requires a 'willful flouting of known, governing law.'" Tonnelle N. Bergen, LLC v. SB-PB Victory, L.P., No. 23-CV-03136, 2023 WL 7412936, at *3 (E.D. Pa. Nov. 9, 2023) (quoting Paul Green Sch. of Rock Music Franchising, LLC. v. Smith, 389 F. App'x 172, 178 (3d Cir. 2010)). But see id. (noting circuit split on whether "manifest disregard is a viable theory").

28. Consolidation Coal Co. v. United Mine Workers of America, Dist. 12, Loc. Union 1545, 213 F.3d 404, 406 (7th Cir. 2000).

For decades after the FAA took effect, it was widely assumed that arbitrators did not obey the law. Not only did section 10 insulate awards from judicial review, but arbitrators—who were not always lawyers—were infamous for using "equitable rather than legal principles."[29] As a result, even the FAA's draftsperson, Julius Henry Cohen, cautioned that arbitration was "not the proper method for deciding points of law of major importance."[30] In 1953, the Supreme Court endorsed this sentiment by creating the nonarbitrability doctrine, which exempted federal statutory claims from the FAA, in part, because arbitrators lacked "judicial instruction on the law."[31] Accordingly, there was little doubt that arbitration was "essential[ly] 'lawless[].'"[32]

But early studies of awards painted a more complicated picture. For example, a 1948 Note in the *Harvard Law Review* examined three hundred awards from the AAA's commercial arbitration docket.[33] The student author found that arbitrators obeyed simple legal rules. As they put it, "[n]o one need explain to an arbitrator the social utility of enforcing contractual obligations, in order to convince the arbitrator that a breach of contract should be compensated."[34] Yet the Note also concluded that because arbitrators displayed less allegiance to complex black-letter principles, the "[r]esults in arbitration are sometimes different from those the courts might have reached on the same facts."[35] Similarly, in 1960, Professor Soia Mentschikoff conducted a survey of AAA arbitrators and reported that 80% of them "thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90[%] believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."[36] Both pieces of scholarship observed that the AAA discouraged arbitrators from memorializing their reasoning out of fear that "courts might upset an award which purported to decide an issue according to law but applied wrong principles."[37]

This issue became more important in the second half of the twentieth century, when the FAA was expanded beyond its original

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29. Edward Brunet, Replacing Folklore Arbitration With a Contract Model of Arbitration, 74 Tul. L. Rev. 39, 40 (1999).

30. Cohen & Dayton, supra note 25, at 281.

31. Wilko v. Swan, 346 U.S. 427, 436 (1953), overruled by, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

32. Heinrich Kronstein, Business Arbitration–Instrument of Private Government, 54 Yale L.J. 36, 66 (1944).

33. Note, Predictability of Result in Commercial Arbitration, 61 Harv. L. Rev. 1022, 1024 n.16 (1948).

34. Id. at 1024.

35. Id.

36. Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 861 (1961).

37. Note, supra note 33, at 1024 n.16; see also Mentschikoff, supra note 36, at 857 ("The Association puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts.").

scope. Although the statute was supposed to be merely a procedural rule for federal courts,[38] the Supreme Court held that it applies in state court and preempts state laws that are hostile to arbitration, elevating it to substantive federal law applicable in both federal and state courts.[39] Likewise, the Court disavowed the nonarbitrability doctrine, reasoning that arbitration was just as hospitable to plaintiffs as litigation:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[40]

Businesses inserted arbitration clauses into millions upon millions of consumer and employment contracts, making the word "alternative" in the phrase "alternative dispute resolution" seem like a misnomer.[41]

This trend rekindled interest in whether arbitration is a kind of Wild West. Some critics reasoned this in the abstract, arguing that the process must exist in a legal vacuum because it is not subject to meaningful judicial review.[42] Others cited deeply misguided awards that courts had vacated as a sign that "arbitrators frequently apply statutes in ways that appellate courts would conclude constitute reversible error."[43]

Several prominent scholars pushed back against the Wild West paradigm. For instance, Professor Christopher Drahozal noted that the

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38. See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 37 (1924) (declaring that the FAA "relate[s] to the procedure in the [f]ederal courts" and "is no infringement upon the right of each State").

39. See Southland Corp. v. Keating, 465 U.S. 1, 11 n.11 (1984) (explaining that states cannot "override the declared policy requiring enforcement of arbitration agreements").

40. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

41. See, e.g., David Horton, Forced Arbitration in the Fortune 500, 109 Minn. L. Rev. 2165, 2207–08 (2025) [hereinafter Horton, Forced Arbitration] (finding that about 80% of Fortune 500 companies employ forced arbitration in either the consumer or employment spheres); Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More Than 60 Million American Workers, Econ. Pol'y Inst. (Sep. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ (on file with the *Columbia Law Review*) (estimating that 60.1 million American workers are bound by forced arbitration clauses).

42. See Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 782–83 (2002) ("[W]hatever the rules of law may be, arbitrators are not bound to follow them, and their handiwork is subject to only the most perfunctory of judicial oversight.").

43. Paul F. Kirgis, The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards, 85 Or. L. Rev. 1, 36 (2006); cf. Barbara Black & Jill I. Gross, Making It Up as They Go Along: The Role of Law in Securities Arbitration, 23 Cardozo L. Rev. 991, 992, 1040–42 (2002) (arguing that, in the securities industry, "arbitrators are regularly arriving at results that appear contrary to the law," but observing that these rulings sometimes favor plaintiffs).

little existing concrete data about arbitration does not necessarily show that it dispenses lower quality adjudication than the court system.[44] Drahozal acknowledged that surveys like Mentschikoff's suggest that arbitrators sometimes play fast and loose with controlling authority.[45] Yet Drahozal observed that research into judges and juries has uncovered the same basic phenomenon: "a significant willingness to disregard the law."[46] Indeed, in one study, nearly half of all jurors surveyed stated that they would ignore a judge's instructions to serve the interests of justice; in another, nearly 75% of federal appellate judges said that they would follow their own views over the closest precedent in borderline cases.[47] For these reasons, Drahozal argued that "the available empirical evidence to date provides at best weak support for the view that arbitration is 'lawless.'"[48]

Similarly, in 2012, Professor W. Mark C. Weidemaier compiled perhaps the most detailed account of arbitral decisionmaking and found strong parallels to the way courts resolve disputes.[49] Taking advantage of the fact that some arbitration institutions and legal research platforms make certain kinds of awards available, Weidemaier scraped together 848 arbitral rulings from securities, employment, labor, and class cases (including ninety-seven pre-*Lamps Plus* clause construction decisions).[50] Weidemaier described the dispute resolution process in these cases as "judging-lite":

> [A]rbitrators who write reasoned awards behave much like judges, especially when hearing statutory (as opposed to contract) disputes. They write detailed awards that make extensive use of precedent, although perhaps to a slightly lesser degree than judges. Citations to judicial opinions also dominate the arbitration awards. . . . On the whole, [these findings] . . . undercut the view that arbitration involves a qualitatively different kind of decision-making than judging.[51]

Although Weidemaier conceded that he had no way to gauge how often arbitrators resolved matters "correctly," he argued that because they "wrote reasonably lengthy decisions that were substantially devoted to legal analysis and that made ample use of precedent," it did not seem

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44. See Drahozal, supra note 9, at 197–204.

45. See id. at 197–99.

46. Id. at 199–200.

47. See id. (describing a study which found that 74.3% of judges ranked the "[d]ictates of justice," rather than the closest precedent, higher when deciding cases with ambiguous precedent (citing J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System 165 tbl.6.3 (1981))).

48. Id. at 190.

49. See W. Mark C. Weidemaier, Judging-Lite: How Arbitrators Use and Create Precedent, 90 N.C. L. Rev. 1091, 1139–40 (2012).

50. See id. at 1104–05.

51. Id. at 1093–94.

as though they "render[ed] ad hoc decisions."[52] Thus, Weidemaier's study suggested that there may not be meaningful differences between courts and arbitrators.

In sum, concern that arbitration is "lawless" is nearly as old as the FAA and has long been a flashpoint between arbitration's critics and proponents. But no one has found a way to test how often arbitrators reach demonstrably wrong decisions. The next Part explains why the law that governs clause construction has evolved in a way that can fill this void.

II. CLAUSE CONSTRUCTION

This Part offers a primer on clause construction. It shows that the Court's topsy-turvy case law on the subject culminated in *Lamps Plus*, which tried to ensure that generic arbitration clauses do not allow class actions.

The Supreme Court first encountered the nexus of class actions and the FAA in 2003's *Green Tree Financial Corp. v. Bazzle*.[53] Two groups of borrowers filed class actions against Green Tree.[54] They had signed loans that included generic arbitration clauses.[55] A South Carolina trial court ordered the parties to arbitrate on a class basis, and the arbitrator issued multimillion dollar awards in favor of both classes.[56] On appeal, the South Carolina Supreme Court held that the contracts allowed class arbitration because they did not bar it.[57] The Court granted certiorari to decide whether the FAA "prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration."[58]

Writing for just three other members of the Court, Justice Stephen Breyer reasoned that whether the contracts allowed class arbitration was an issue for the arbitrator.[59] Justice Breyer reasoned that arbitrators are "well situated" to answer a question that revolves around the meaning of the contract and "what kind of arbitration proceeding the parties agreed to."[60] In turn, because only the trial court had engaged in clause

52. Id. at 1139–40.

53. 539 U.S. 444 (2003).

54. Id. at 448–49.

55. Id. at 448.

56. Id. at 449.

57. Id. at 450.

58. Brief of Petitioner at *i, *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 721716.

59. See *Bazzle*, 539 U.S. at 447–49 ("Because the record suggests that the parties have not yet received an arbitrator's decision on that question of contract interpretation, we vacate the judgment of the South Carolina Supreme Court and remand the case so that this question may be resolved in arbitration.").

60. Id. at 452–53 (emphasis omitted).

construction, Justice Breyer remanded the matter so that the parties could "obtain[] the arbitration decision that their contracts foresee."[61]

Justice John Paul Stevens provided the decisive vote, concurring in the judgment but also dissenting in part.[62] He would have ruled that "nothing in the [FAA] . . . precludes" finding that a generic arbitration clause permits class proceedings.[63] Although he agreed that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator,"[64] he remarked that the decision to allow class arbitration was correct on the merits, and therefore he would have preferred to affirm the award instead of sending it back to the arbitrator.[65]

Bazzle helped class arbitration briefly go mainstream. Although it was a plurality opinion, five Justices had agreed both that the FAA did not bar class arbitration and that the default rule is that arbitrators perform clause construction.[66] As a result, the AAA announced that it would handle class claims.[67] It created procedural rules for these disputes, empowered arbitrators to perform clause construction, and mandated that these awards be reasoned and published.[68] Between 2004 and 2009, AAA arbitrators released 135 such rulings, 70% of which allowed class arbitration.[69]

But the pendulum swung violently in the other direction in 2010, when the Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[70] AnimalFeeds and Stolt-Nielsen signed a maritime shipping contract with a generic but broad arbitration provision that applied to "[a]ny dispute arising from [its] making, performance or termination."[71]

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61. Id. at 453.

62. Id. at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

63. Id.

64. Id. at 455.

65. Id.

66. See Joshua S. Lipshutz, Note, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits, 57 Stan. L. Rev. 1677, 1700–03 (2005) ("[W]ith Stevens in agreement, a majority of the current members of the Court believes that whether an arbitration agreement prohibits (or is silent on) class arbitration by its terms is a procedural gateway issue to be decided on by the arbitrator.").

67. See Lawrence J. Bracken II & Caroline H. Dixon, AAA Releases Rules on the Administration of Class Actions, 23 Franchise L.J 215, 215 (2004) (explaining that the AAA's Supplementary Rules for Class Arbitrations were released on the heels of *Bazzle* and that the AAA rules did not previously address class arbitration).

68. See AAA Class Rules, supra note 10, at 3–4, 7.

69. See Brief of Am. Arb. Ass'n as Amicus Curiae in Support of Neither Party at 22, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309, at *22.

70. 559 U.S. 662 (2010).

71. Id. at 667 (internal quotation marks omitted) (quoting Joint Appendix at 96a, *Stolt-Nielsen*, 559 U.S. 662 (No. 08-1198), 2009 WL 2777896).

Later, AnimalFeeds filed an antitrust class action against Stolt-Nielsen, and the parties agreed that a panel of three arbitrators should undertake clause construction.[72] AnimalFeeds argued that the contract allowed class claims for broadly two reasons. First, AnimalFeeds asserted that public policy supported permitting plaintiffs to aggregate complaints when damages were small and thus no individual would have an incentive to prosecute the matter.[73] Second, AnimalFeeds cited *Bazzle* for the proposition that the default rule when a "clause is silent on the issue of class treatment" is that class actions are authorized.[74] AnimalFeeds's lawyers expanded on this point at the oral argument in arbitration, declaring that "the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue, [and] *therefore there has been no agreement to bar class arbitrations*."[75] The arbitrators agreed with AnimalFeeds.[76] They observed that arbitrators in similar cases had read generic arbitration clauses to permit class actions,[77] and that these awards "rel[ied] on the same type of broad wording" that this provision boasted.[78]

The case eventually reached the Supreme Court, which reversed the arbitrators' ruling.[79] Writing for the majority, Justice Samuel Alito explained that the arbitrators had impermissibly invoked their own "view of sound policy regarding class arbitration."[80] Recall that AnimalFeeds's counsel had contended that there was "no agreement" about the propriety of class actions and thus the contract *did not prohibit them*.[81] Focusing exclusively on the first part of this argument, Justice Alito opined that AnimalFeeds had admitted that "there was 'no agreement'" *either* to permit *or* to preclude class arbitration.[82] In turn, he continued, because there was no shared understanding on the topic, the panel could not have grounded its ruling in the language of the arbitration provision; rather, it must have "rested its decision on AnimalFeeds' public policy

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72. Id. at 667–68.

73. Id. at 675 n.7.

74. Id. at 672 (quoting Joint Appendix at A-308–309, *Stolt-Nielsen*, 548 F.3d 85 (2d Cir. 2006) (No. 06-3474-cv)).

75. Joint Appendix at 77a, *Stolt-Nielsen*, 559 U.S. 662 (No. 08-1198), 2009 WL 2777896 (emphasis added).

76. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006) ("[T]he arbitrators . . . nonetheless held that the clauses, though silent, permit class arbitration."), rev'd, 548 F.3d 85 (2d Cir. 2008), rev'd and remanded, 559 U.S. 662.

77. See *Stolt-Nielsen*, 559 U.S. at 669.

78. See Reply Brief for Respondent-Appellant at 12–13, *Stolt-Nielsen*, 548 F.3d 85 (No. 06-3474-cv), 2006 WL 6837690 (quoting Special Appendix for Respondent-Appellant at 5).

79. See *Stolt-Nielsen*, 559 U.S. at 672.

80. Id.

81. See supra text accompanying notes 74–75.

82. *Stolt-Nielsen*, 559 U.S. at 687.

argument."[83] According to Justice Alito, this violated the tenet that "the task of an arbitrator is to interpret and enforce a contract, not to make public policy."[84] Finally, Justice Alito opined that, despite *Bazzle*, the award could not be defended as applying a default rule that generic arbitration clauses allow class proceedings.[85] He explained that the FAA embodies a vigorous preference for individualized dispute resolution:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.[86]

For these reasons, Justice Alito held that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[87]

It would be hard to exaggerate the confusion that *Stolt-Nielsen* spawned. What did Justice Alito mean when he opined that "the parties' *mere silence*" could not "constitute[] consent to resolve their disputes in class proceedings"?[88] Some courts concluded that Justice Alito was referring to the language of the contract—the fact that it did not expressly license class arbitration.[89] Accordingly, these judges held that *Stolt-Nielsen* "squarely foreclose[d] the possibility that the class claims are arbitrable"[90] in such cases, and that generic arbitration provisions "operate[] as an implied waiver of the plaintiff's class claims."[91] This Piece will call this the textual silence reading of *Stolt-Nielsen*. But other judges focused on the fact that *Stolt-Nielsen* involved a deeply idiosyncratic version of "silence": AnimalFeeds's concession that the clause was silent in the sense that "there was 'no agreement'" about class arbitration.[92] In

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83. Id. at 672–73.

84. Id. at 672.

85. Id. at 687.

86. Id. at 686 (citation omitted).

87. Id. at 685.

88. Id. at 687 (emphasis added).

89. See, e.g., Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 642–44 (5th Cir. 2012) (reversing an arbitrator's clause construction award allowing class arbitration because the arbitration clause never mentioned class proceedings), abrogated by, Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013).

90. Goodale v. George S. May Int'l Co., No. 10 C 5733, 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011).

91. Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394, 405 (S.D.N.Y. 2011), rev'd on other grounds sub nom., Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 486 (2d Cir. 2013).

92. *Stolt-Nielsen*, 559 U.S. at 687.

turn, this confined *Stolt-Nielsen* to its odd facts: Indeed, all a plaintiff had to do to distinguish the opinion was not to repeat AnimalFeeds's ill-advised admission.[93] This theory gathered momentum, as several appellate courts affirmed arbitral awards allowing class claims even if the agreement did not "incant[] 'class arbitration' or otherwise expressly provide[] for aggregate procedures."[94] This Piece will refer to this as the stipulated silence view of *Stolt-Nielsen*.

The Supreme Court circled back to the topic in 2013's *Oxford Health Plans LLC v. Sutter*.[95] John Sutter, a doctor, sought to represent a class of other physicians whom Oxford had failed to reimburse properly for costs.[96] The parties' contract stated that "[n]o civil action concerning any dispute arising under this [a]greement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration."[97] Sutter and Oxford entrusted clause construction to the arbitrator, who reasoned that the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions, which therefore must include class claims.[98] Oxford eventually sought review by the Court, and argued that the award violated *Stolt-Nielsen* by finding that it and Sutter had "authorize[d] the use of class procedures simply by agreeing to arbitrate their disputes."[99]

But Justice Elena Kagan upheld the arbitrator's handiwork.[100] Justice Kagan emphasized that when, as here, the parties had assigned clause construction to the arbitrator, the question was "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[101] Justice Kagan then explained that the decision passed this lenient test because it "focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to

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93. See, e.g., Amerix Corp. v. Jones, Civil Nos. JFM-11-2844, JFM-05-3028, JFM-11-2192, JFM-09-1498, 2012 WL 141150, at *7 (D. Md. Jan. 17, 2012) (rejecting the argument that an arbitration clause's textual "'silence' should be read to constitute lack of intent to agree").

94. Fantastic Sams Franchise v. FSRO Ass'n, 683 F.3d 18, 22 (1st Cir. 2012) (internal quotation marks omitted) (quoting Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 222 (3d Cir. 2012)); *Oxford Health*, 675 F.3d at 222 (citing *Stolt-Nielsen*, 559 U.S. at 687 n.10), aff'd, 569 U.S. 564 (2013); see also Jock v. Sterling Jewelers Inc., 646 F.3d 113, 124 (2d Cir. 2011); Truly Nolen of Am. v. Superior Ct., 145 Cal. Rptr. 3d 432, 450 (Cal. Ct. App. 2012).

95. 569 U.S. 564.

96. Id. at 566.

97. Id. (quoting Joint Appendix at 15–16, *Oxford Health*, 569 U.S. 564 (No. 12-135) (2013), 2013 WL 275685).

98. Id. at 566–67.

99. Brief for Petitioner at 13, *Oxford Health*, 569 U.S. 564 (No. 12-135), 2013 WL 244026.

100. See *Oxford Health*, 569 U.S. at 570 (holding that the arbitrator did not exceed his statutorily granted powers).

101. Id. at 569.

arbitration."[102] Finally, she dismissed *Stolt-Nielsen*'s significance by adopting the stipulated silence theory of that opinion:

> We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked . . . a "sufficient" one. The parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. . . . In that circumstance, we noted, the panel's decision was not—indeed, could not have been—'based on a determination regarding the parties' intent.' . . .
>
> Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration.[103]

This Piece's predecessor, *Clause Construction*, was published six years after *Oxford Health*.[104] Its dataset was created by searching Westlaw, Lexis, PACER, and the AAA website for opinions and awards interpreting generic arbitration clauses that were decided between June 1, 2010, and February 15, 2019.[105] That research found that only two of forty-four judges (4.5%) held that the provision authorized class proceedings, but fifty-eight of 106 arbitrators (54.7%) came out the other way.[106] This gulf stemmed from the fact that courts usually adopted the textual silence interpretation of *Stolt-Nielsen*, but arbitrators believed that "[a]n express provision authorizing class arbitration is not required."[107]

In addition, arbitrators often used two tools to interpret prosaic language as authorizing class arbitration. First, they relied on the breadth of the arbitration clause. The paradigmatic "broad" arbitration clause covers "any" or "all" future disputes, and arbitrators held that this expansive commitment encompasses class claims.[108] Second, arbitrators invoked the maxim of contra proferentem, which construes contractual ambiguities against the drafter.[109] Although contra proferentem's normative basis has never been entirely clear, the consensus appears to

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102. Id. at 570.

103. Id. at 571 (citation omitted) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 673 n.4 (2010)).

104. See Horton, Clause Construction, supra note 11, at 1323.

105. Id. at 1358.

106. See id. at 1331 ("This Article then uses this evidence to reexamine the line between judicial and arbitral power.").

107. Id. at 1365 (alteration in original) (internal quotation marks omitted) (quoting Partial Final Award on Clause Construction at 3, 9, Baer v. TruGreen Ltd. P'ship, AAA Case No. 14 160 01482 12 (June 22, 2013) (Feliu, Arb.) (on file with the *Columbia Law Review*)).

108. Id. at 1334, 1366.

109. Id. at 1366.

be that it is a penalty default rule designed to encourage clarity and precision in drafting.[110]

Then, in April 2019, the same month *Clause Construction* appeared in print, the Supreme Court doubled down on the textual silence view of *Stolt-Nielsen* in *Lamps Plus*.[111] Frank Varela filed a class action against his employer, Lamps Plus, after the company allowed a hacker to steal his data and obtain a fraudulent tax return in his name.[112] The parties had signed a generic but comprehensive arbitration provision that applied to "all claims or controversies . . . past, present or future."[113] They agreed that a judge, not an arbitrator, would undertake clause construction.[114] A federal district court and the Ninth Circuit adopted the stipulated silence view of *Stolt-Nielsen*, held that the provision was ambiguous on the issue of class arbitration, and invoked contra proferentem to allow class arbitration.[115] Speaking through Chief Justice John Roberts, the Supreme Court reversed.[116] The Court assumed for the sake of argument that the clause was ambiguous.[117] Yet the Court reasoned that mere ambiguity is not enough to permit class arbitration, citing *Stolt-Nielsen* for the proposition that "[c]lass arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration."[118]

Lastly, the Court held that the FAA preempts the use of contra proferentem to christen class proceedings in arbitration.[119] As the Justices explained, the against-the-drafter principle seeks to achieve the policy objective of encouraging careful authorship.[120] In turn, because it

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110. See David Horton, Flipping the Script: *Contra Proferentem* and Standard Form Contracts, 80 U. Colo. L. Rev. 431, 457 (2009) (referencing the theory that contra proferentem "induces the drafter to fill contractual gaps and edify the other party").

111. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019) (holding that the FAA bars class arbitration not only where an arbitration agreement is "silent" on the issue, but also where an agreement is "ambiguous").

112. Id. at 1412.

113. Varela v. Lamps Plus, Inc., No. CV 16-577-DMG (KSX), 2016 WL 9110161, at *1 (C.D. Cal. July 7, 2016) (quoting the arbitration agreement at 1), aff'd, 701 F. App'x 670, (9th Cir. 2017), rev'd, 139 S. Ct. 1407 (2019).

114. *Lamps Plus*, 139 S. Ct. at 1417 n.4.

115. See *Varela*, 701 F. App'x at 673 ("State contract principles require construction against Lamps Plus, the drafter . . . ."); *Varela*, 2016 WL 9110161, at *7 (finding the contract language "ambiguous as to class claims," construing "the ambiguity against the drafter," and deciding that "the parties may proceed to arbitrate class claims").

116. *Lamps Plus*, 139 S. Ct. at 1419.

117. Id. at 1415.

118. Id. (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018)).

119. See id. at 1417–18.

120. See id. at 1417 ("[C]ontra proferentem resolves the ambiguity against the drafter based on public policy factors, primarily equitable considerations about the parties' relative bargaining strength.").

"seeks ends other than the intent of the parties," it violates the maxim that the parties must consent to class arbitration.[121]

Lamps Plus makes it dramatically more difficult—in fact, arguably impossible—for a decisionmaker to interpret a generic arbitration clause to allow class claims. For one, the Court repudiated the stipulated silence view of *Stolt-Nielsen*.[122] Chief Justice Roberts reasoned that "*Stolt-Nielsen* controls" and that his holding "follows directly from our decision in *Stolt-Nielsen*."[123] These remarks would make no sense if *Stolt-Nielsen* only taught that class arbitration is impermissible in the bizarre situation when the parties agree that they did not reach consensus about that issue. Accordingly, when *Lamps Plus* instructs decisionmakers that "[n]either silence nor ambiguity" can be a hook for class arbitration, it must mean "neither [*textual*] silence nor ambiguity."[124] In turn, because generic arbitration clauses are textually silent (or at best ambiguous) about whether they allow class actions, one can plausibly read *Lamps Plus* as making the outcome of clause construction foreordained.

But even if *Lamps Plus* did not create a one-size-fits-all rule, it closed (or at least narrowed) the two most common paths that decisionmakers had taken to allow class arbitration. For one, recall that after *Stolt-Nielsen*, arbitrators had relied on the breadth of the arbitration clause to imply consent to class proceedings.[125] In *Lamps Plus*, however, a far-ranging agreement to arbitrate "all claims" did not overcome the pull of individualized arbitration.[126] This should give an adjudicator pause before predicating class arbitration on the sweep of the arbitration provision. Likewise, although arbitrators once cited contra proferentem to punish drafters for failing to clarify whether class-wide arbitration is permissible, *Lamps Plus* removed this arrow from the quiver.[127]

In sum, *Lamps Plus* essentially ensures that the clause construction inquiry has a single, correct answer. But is this how judges and arbitrators have understood the opinion? The next Part tackles that question.

III. STUDY AND IMPLICATIONS

This Part investigates how courts and arbitrators have interpreted *Lamps Plus*. It shows that although most judges saw the Court's opinion as a blanket rule against interpreting a generic arbitration clause to allow class proceedings, a substantial minority of arbitrators reached the

121. Id.

122. See supra text accompanying notes 92–94.

123. *Lamps Plus*, 139 S. Ct. at 1415–16.

124. See id. at 1417; see also Robinson v. Home Owners Mgmt. Enters., 590 S.W.3d 518, 534 (Tex. 2019) ("[W]e agree that class arbitration must be explicitly referenced and not merely inferred from the parties' agreement to arbitrate.").

125. See supra text accompanying note 108.

126. See supra text accompanying note 113.

127. See supra text accompanying notes 109, 120–122.

opposite conclusion. Finally, it explains how this finding informs discussions about arbitral lawlessness.

As the Court reeled from *Bazzle* to *Stolt-Nielsen* to *Oxford Health* to *Lamps Plus*, lower courts struggled mightily with whether clause construction is presumptively a matter for judges or for arbitrators.[128] Despite the *Bazzle* plurality's determination that arbitrators enjoy jurisdiction over the topic, most federal appellate courts have now decided that the high stakes of class arbitration tip the scales toward keeping the issue in the court system.[129] Yet it is easy for parties to inadvertently draft around this default principle. For example, in most circuits, simply stating that arbitration should be conducted under the rules of the AAA—which, as noted, contemplate that arbitrators will perform clause construction—passes the baton to arbitrators.[130] In turn,

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128. See, e.g., Catamaran Corp. v. Towncrest Pharmacy, No. 4:14-cv-00383-SMR-HCA, 2016 WL 7494281, at *4–*5 (S.D. Iowa July 5, 2016) (describing the uncertainty that followed *Bazzle*, *Stolt-Nielsen*, and *Oxford Health*), rev'd, 864 F.3d 966 (8th Cir. 2017).

129. See Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1065–66 (9th Cir. 2020) ("The availability of class arbitration raises the question whether any of those possible class members have actually agreed to arbitration in the first place . . . ."); 20/20 Commc'ns, Inc. v. Crawford, 930 F.3d 715, 718–19 (5th Cir. 2019) ("[C]lass arbitrability is a gateway issue for courts, not arbitrators, to decide, absent clear and unmistakable language to the contrary."); Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 506–07 (7th Cir. 2018) ("The availability of class or collective arbitration involves a foundational question of arbitrability: whether the potential parties to the arbitration agreed to arbitrate."); JPay, Inc. v. Kobel, 904 F.3d 923, 935–36 (11th Cir. 2018) ("We leave the question of class availability presumptively with the court because we do not want to force parties to arbitrate so serious a question in the absence of a clear and unmistakable indication that they wanted to do so."); *Catamaran Corp.*, 864 F.3d at 972 ("[W]e conclude that the question of class arbitration belongs with the courts as a substantive question of arbitrability."); Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 873 (4th Cir. 2016) (holding that arbitrability is a threshold question for the courts); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 334–35 (3d Cir. 2014) ("It is presumed that courts must decide questions of arbitrability . . . ."); Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 598–99 (6th Cir. 2013) (holding that when an arbitration clause is silent on class arbitration, the issue should be decided by the courts).

130. Incorporating the rules of an arbitration provider like the AAA can function as what the Court calls a "delegation provision": an agreement to have the arbitrator decide whether a claim falls within the scope of a valid arbitration clause. See Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) (defining a delegation provision); David Horton, Arbitration About Arbitration, 70 Stan. L. Rev. 363, 414 (2018) (discussing how some judges treat delegation provisions as separate arbitration clauses). But circuits are divided over whether this extends to clause construction. Compare *JPay*, 904 F.3d at 936–38 (11th Cir. 2018) (finding that referring to the AAA rules allows the arbitrator to perform clause construction), and Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1245–48 (10th Cir. 2018) (same), and Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 397 (2d Cir. 2018) (same), and Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 635–36 (5th Cir. 2012) (same), with *Catamaran Corp.*, 864 F.3d at 973 (8th Cir. 2017) ("When dealing with class arbitration, we seek clear and unmistakable evidence of an agreement to arbitrate the particular question of class arbitration."), and Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 763 (3d Cir. 2016) (insisting upon "express contractual language unambiguously delegating the question of [class] arbitrability to the

this means that both judges and arbitrators are resolving the issue, and the factors that control where a matter ends up are essentially random.

Accordingly, research for this Piece was conducted by searching Westlaw and Bloomberg for judicial clause construction opinions from between April 24, 2019—when the Court decided *Lamps Plus*—and December 31, 2024. Research for this Piece was also conducted by scouring the AAA's class arbitration docket for clause construction awards from the same period. This yielded sixty-eight documents: forty-two judicial opinions and twenty-six arbitral awards.[131]

Table 1 reveals that, even after *Lamps Plus*, some arbitrators held that a generic arbitration clause allows class procedures. Zero of the forty-two courts (0%) but seven of twenty-six arbitrators (27%) determined that class arbitration was permissible. This difference is statistically significant ($p < 0.001$).

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arbitrator[s]" (internal quotation marks omitted) (quoting *Opalinski*, 761 F.3d at 335)), and *Crockett*, 734 F.3d at 599 (6th Cir. 2013) (demanding that the "language . . . clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration").

131. Because the goal of this research was to see how courts and arbitrators interpreted generic arbitration clauses, the author excluded two oddball cases in which a company had *expressly* authorized class arbitration. See Ocean Cities Pizza, Inc. v. Superior Ct., No. A160891, 2022 WL 3024846, at *1 (Cal. Ct. App. July 29, 2022) (involving parties who agreed to arbitrate "any claim brought on an individual, class action, putative class action, collective action, multiple-party, representative plaintiff and/or private attorney general basis" (internal quotation marks omitted) (quoting the arbitration agreement)); Garner v. Inter-State Oil Co., 265 Cal. Rptr. 3d 384, 387 (Ct. App. 2020) (featuring an arbitration agreement stating that "class action[s] shall be submitted to final and binding arbitration, and not to any other forum" (internal quotation marks omitted)). These black swans seem to be the product of drafters misunderstanding the law and thus are examples of a surprising phenomenon the author has explored elsewhere: sloppy forced arbitration clauses. See Horton, Forced Arbitration, supra note 41, at 2221–22. This Piece also cut cases that either (1) featured unambiguous class arbitration or class action waivers, see Suchite v. ABM Aviation, Inc., 741 F. Supp. 3d 878, 888–89 (S.D. Cal. 2024); (2) grappled with whether a defendant had waived its right to arbitrate, see Qazi v. Stage Stores, Inc., No. 4:18-CV-0780, 2020 WL 1321538, at *8 (S.D. Tex. Mar. 17, 2020); or (3) ordered individualized arbitration under *Lamps Plus* without engaging in clause construction, see Alvitre v. Colonial Life & Accident Ins. Co., No. CV 22-6289-DMG (SKx), 2023 WL 3549743, at *7 (C.D. Cal. Mar. 2, 2023).

TABLE 1. CLAUSE CONSTRUCTION OUTCOMES AFTER *LAMPS PLUS*

	N	Class Actions Allowed
Court	42	0 (0%)
Arbitration	26	7 (27%)*** (p=0.0002)
Total	48	10%
Notes: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$		

Most courts read *Lamps Plus* as a "magic words" test that requires the parties to expressly agree to class arbitration.[132] This reduced the interpretive task to skimming a generic arbitration clause to confirm that the words "class action" did not appear. For instance, this is the entirety of the clause construction discussion in the Ninth Circuit's 2020 opinion in *Shivkov v. Artex Risk Solutions, Inc.*:

> The final issue that we must decide on class arbitration is straightforward. "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself," . . . namely, "the individualized form of arbitration envisioned by the FAA[]" . . . . As the district court concluded, because the Agreements are silent on class arbitration, they do not permit it. Thus, the court properly compelled individual arbitration pursuant to the Agreements.[133]

Likewise, in 2021, the First Circuit tackled clause construction in *American Institute for Foreign Study, Inc. v. Fernandez-Jimenez* with a two-sentence analysis: "The [a]greement does not provide an affirmative basis to conclude that the parties agreed to class arbitration. The arbitration clause is silent about class arbitration."[134] Indeed, the lack of a textual reference to class procedures was considered dispositive even when the parties had broadly agreed to arbitrate "any dispute, claim, or

132. See, e.g., Doe v. Kaiser Found. Health Plan, Inc., 725 F. Supp. 3d 1033, 1045 (N.D. Cal. 2024) ("[A]n agreement must contain a clear indication that there is an intent to allow for class arbitration in order for a class arbitration to proceed; such cannot be implied from silence.").

133. 974 F.3d at 1069 (citations omitted) (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416, 1417 (2019)).

134. 6 F.4th 120, 123 (1st Cir. 2021).

controversy."[135] Thus, the majority of judges believed that "this issue has been definitively resolved by the United States Supreme Court[]."[136]

Admittedly, a few courts did not read *Lamps Plus* as a bright line rule.[137] For example, the Second Circuit took this position in November 2019 when it decided *Jock v. Sterling Jewelers Inc.*[138] A class of female retail sales agents alleged that Sterling Jewelers had violated Title VII by paying them less than their male peers.[139] The parties' contract featured an arbitration provision that incorporated the AAA Rules and allowed the arbitrator "to award any types of legal or equitable relief that would be available in a court of competent jurisdiction."[140] An arbitrator had cited this robust remedial power as a sign that she could aggregate claims and certified a class of about 44,000 women.[141] In the Second Circuit, Sterling asserted that the arbitrator had no right to bind class members who had not opted in to arbitration.[142]

The Second Circuit disagreed.[143] The appellate panel distinguished *Lamps Plus* on the grounds that while the parties in *Lamps Plus* agreed that a judge would perform clause construction, which subjected that decision to de novo review, in *Jock*, the AAA rules had delegated the interpretive task to the arbitrator, which triggered *Oxford Health*'s extraordinarily "deferential standard of review" of the arbitrator's award.[144] This was dispositive because, as noted above, under *Oxford Health*, an "arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."[145] Unfortunately, the Second Circuit did not stop there. Instead, it muddied the waters by adding a throwaway sentence hinting that the

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135. Price v. Santander Consumer USA Inc., No. 3:19-CV-0742-B, 2019 WL 4318883, at *2 (N.D. Tex. Sep. 12, 2019) (quoting the arbitration agreement); see also Grant v. Chevrolet, 847 S.E.2d 806, 809 (S.C. Ct. App. 2020) (finding a similarly expansive clause to be "silent as to class arbitration").

136. Randall v. Cescaphe Ltd., No. 21-2806, 2022 WL 17583639, at *5 (E.D. Pa. Dec. 12, 2022).

137. See, e.g., Catamaran Corp. v. Towncrest Pharmacy, 946 F.3d 1020, 1024 (8th Cir. 2020) (opining that parties can implicitly consent to class arbitration but requiring the parties to have "intended class arbitration and believed that intent was so evident from the terms of the written agreements that it was unnecessary to express that intent within the agreements themselves").

138. 942 F.3d 617, 626 (2d Cir. 2019).

139. Id. at 620.

140. Id. (internal quotation marks omitted) (quoting Joint Appendix at JA-129) (on file with the *Columbia Law Review*).

141. Id. at 621.

142. Id. at 622–23 (quoting Appellee's Letter Brief at 4, *Jock*, 942 F.3d 617 (No. 18-153-cv), 2019 WL 2173574).

143. Id. at 623–26.

144. Id. at 626.

145. Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013) (quoting E. Associated Coal Corp. v. Mine Workers of America, Dist. 17, 531 U.S. 57, 62 (2000)); see also supra text accompanying note 101.

arbitrator had interpreted the contract correctly: "*Lamps Plus* leaves undisturbed the proposition, affirmed in *Stolt-Nielsen*, that an arbitration agreement may be interpreted to include *implicit consent* to class procedures."[146]

Yet *Jock*'s take on *Lamps Plus* never gained traction in the judicial system. This was likely because that portion of *Jock* is dictum. As mentioned, because the Sterling Jewelers contract incorporated the AAA Rules, the propriety of the clause construction award was not under the Second Circuit's microscope; rather, under *Oxford Health*, the key was that the arbitrator simply *tried* to interpret the agreement.[147] Thus, courts engaging in clause construction have not cited *Jock* for the proposition that courts may construe generic arbitration provisions to implicitly permit class arbitrations—not even a 2023 opinion from the Southern District of New York (for which *Jock* is binding authority).[148]

Conversely, arbitration awards tended to fall into one of three rough camps. First, about 20% were indistinguishable from judicial rulings. These private judges echoed their public counterparts by opining that, "[i]n *Lamps Plus*, the majority of the Supreme Court . . . firmly closed the door on the availability of class arbitration in the face of ambiguous contract language."[149] For example, in early 2019, in *Veliz v. University of Southern California*, an arbitrator had interpreted an employment contract to permit class arbitration.[150] But when the Supreme Court

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146. *Jock*, 942 F.3d at 626 (emphasis added). Among courts, *Jock*'s dictum seems only to have surfaced in a decision holding that an arbitrator, not a judge, should engage in clause construction. See Fasano v. Li, No. 16 Civ. 8759 (KPF), 2023 WL 6292579, at *13 (S.D.N.Y. Sep. 27, 2023) (citing *Jock*'s reading of *Lamps Plus* to support its holding). Another potential exception to the idea that *Lamps Plus* makes clause construction open-and-shut is Marbaker v. Statoil USA Onshore Props., Inc., 801 F. App'x 56 (3d Cir. 2020). That unpublished Third Circuit decision cited a pre-*Lamps Plus* case for the proposition that "[w]hile the phrase 'class arbitration' is not essential, its absence makes it harder to show that the parties consented to it." Id. at 60–61 (citing Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 758–59 (3d Cir. 2016)). But just like *Jock*'s dictum, this statement has not caught on with courts. See Randall v. Cescaphe Ltd., No. 21-2806, 2022 WL 17583639, at *5 (E.D. Pa. Dec. 12, 2022) (quoting *Marbaker* but devoting only a few sentences to analyzing whether the parties implicitly agreed to class arbitration "[n]otwithstanding the complete absence of any reference to class-wide arbitration or class actions").

147. See *Oxford Health*, 569 U.S. at 573 (observing that when the parties have agreed that an arbitrator should decide whether class arbitration is permissible, "the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all").

148. See Lopez v. Lidl US, LLC, No. 22-CV-4271 (ALC), 2023 WL 2674757, at *5 (S.D.N.Y. Mar. 29, 2023) (ordering individual arbitration because "the arbitration clauses are silent as to whether the parties agreed to arbitrate claims on a class wide basis").

149. Supplemental Clause Construction Award at 11, Veliz v. Univ. of S. Cal., AAA Case No. 01-17-0002-1323 (Jan. 21, 2020) (Knapp, Arb.) (on file with the *Columbia Law Review*).

150. See id. (summarizing the procedural history in ruling on USC's motion for reconsideration in the aftermath of *Lamps Plus*).

published *Lamps Plus* two weeks later, the arbitrator executed a screeching U-turn and reconsidered her prior determination:

> Regardless of what one thinks about the majority's understanding of either arbitration or class actions, especially in the context of employment contracts, arbitrators do not sit to dispense their own brand of justice. The majority decision in *Lamps Plus* is the law of the land and must be adhered to.[151]

Second, approximately half of the awards also ruled in favor of businesses but offered more nuanced analysis. These arbitrators read *Lamps Plus* as tilting the scales sharply—but not all the way—towards individual arbitration:

> "[C]lasswide arbitration" [need not] be mentioned in the arbitration agreement in order to conclude that the parties intended to arbitrate on a classwide basis, although its absence makes it harder to show that the parties consented to it. Therefore, if there is a failure to mention class arbitration, it is very likely that, at best, the ['']any disputes['] language would be ambiguous [and] . . . such language would not be sufficient to find that there is an affirmative contractual basis for concluding that the parties agreed to classwide arbitration.[152]

The awards then parsed the arbitration clause and held that it did not overcome this strong presumption. The logic varied with the provision's text and the parties' assertions. For example, several plaintiffs cited the absence of a class waiver or the vast scope of an arbitration

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151. Id. at 13; see also Partial Final Clause Construction Award at 6, Reid v. Hosp. Corp., AAA Case No. 01-24-0000-3467 (Nov. 8, 2024) (Lemons, Arb.) (on file with the *Columbia Law Review*) ("It is obvious that Claimant's arguments run headlong into Supreme Court precedent that is dispositive of the issue."); Clause Construction Award at 4, Boyd v. Branson's Nantucket, LLC, AAA Case No. 01-23-0000-3611 (June 29, 2023) (Gilman, Arb.) (on file with the *Columbia Law Review*) (using nearly the same phrase); Partial Final Clause Construction Award at 5, Guevara v. Wheels Fin. Grp., LLC, AAA Case No. 01-20-0000-4741 (Jan. 11, 2021) (Barboza, Arb.) (on file with the *Columbia Law Review*) ("The Supreme Court has clearly mandated that there must be a 'contractual basis' for concluding that parties have agreed to class arbitration. No such language is contained in the arbitration agreement in this matter.") (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416, 1418 (2019)); Award at 5–6, Abreu v. Fairway Mkt. LLC, AAA Case No. 01-19-0000-1482 (Dec. 30, 2019) (Binetti, Arb.) (on file with the *Columbia Law Review*) (holding that *Lamps Plus* and *Stolt-Nielsen* "are controlling" because "the Agreement is deemed silent on this issue, and, at best, ambiguous on the issue of the parties' intent"). Other awards rejected the plaintiff's contract interpretation arguments on the merits and then cited a broad reading of *Lamps Plus* as an alternative ground for mandating bilateral arbitration. See, e.g., Partial Final Clause Construction Award at 11–14, Tapia v. Mercado Latino, Inc., AAA Case No. 01-19-0000-8179 (Nov. 25, 2019) [hereinafter *Tapia* Award] (Hemminger, Arb.) (on file with the *Columbia Law Review*) ("[E]ven if the Arbitrator were incorrect in interpreting the Agreement, this case cannot proceed as a putative class action.").

152. Clause Construction Award at 29, McCrumb v. O.R.G. Rests., LLC, AAA Case No. 01-19-0003-0658 (June 1, 2020) (Epstein, Arb.) (on file with the *Columbia Law Review*).

clause as evidence of intent to allow class procedures.[153] But arbitrators were unpersuaded.[154] They observed that because these features are common to *many* arbitration clauses, the natural "extension of this argument is that most arbitration agreements would then also allow for class arbitration—a conclusion clearly at odds with current U.S. Supreme Court arbitration jurisprudence."[155] Alternatively, some arbitrators found that contract excluded class claims by referring to the relevant signatories in individualized terms—such as "*I and Employer* both agree" to resolve disputes in the arbitral forum.[156] In turn, this winnowing language meant that the transaction "contemplates a two-party arbitration."[157]

Third, and most importantly, the remaining awards allowed class arbitration. These rulings seemed to be heroic efforts to reach a predetermined outcome. Some barely engaged with the Supreme

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153. See, e.g., Order No. 2—Partial Final Clause Construction Award at 3–4, Tirozzi v. Lakeland Tours, LLC, AAA Case. No. 01-22-0003-3726 (Jan. 30, 2023) (Zimmerman, Arb.) (on file with the *Columbia Law Review*) ("Further, Claimants suggest that in light of the prevailing legal atmosphere, one in which explicit class action waivers are effective, for a drafter to not include an express waiver in an arbitration clause suggests that class proceedings are permitted."); Partial Final Clause Construction Award at 8, Spurlock v. Imagn Content Servs., LLC, AAA Case No. 01-21-0002-7387 (Feb. 28, 2022) [hereinafter *Spurlock* Award] (Cheng, Siffert & Silberberg, Arbs.) (on file with the *Columbia Law Review*) ("Claimants contend that the very broad scope of the arbitration provisions, requiring that '*any*' dispute relating in '*any way*' to the AP Agreement or the Images be arbitrated, necessarily includes class claims . . . ."); Clause Construction Award at 6, Bonilla v. City of Hope at 6, AAA Case No. 02-21-0002-6949 (Dec. 1, 2021) [hereinafter *Bonilla* Award] (Freedman, Arb.) (on file with the *Columbia Law Review*) (citing vagueness of language and lack of waiver); See Clause Construction Award at 3–4, Real v. Volt Mgmt. Corp., AAA Case No. 01-19-0002-6249 (Apr. 29, 2020) (Epstein, Arb.) (on file with the *Columbia Law Review*) ("The crux of Claimant's argument with respect to the interpretation of the Arbitration Agreement is that the language . . . is broad enough to encompass an intent to arbitrate class claims.").

154. See, e.g., Partial Final Clause Construction Award at 6, Bieger v. Houzz, Inc., AAA Case No. 01-18-0003-5129 (June 5, 2019) (Sochynsky, Arb.) (on file with the *Columbia Law Review*) (rejecting the plaintiff's argument that the broadness of the provision's language allowed for class proceedings).

155. Id.

156. *Tapia* Award, supra note 151, at 8 (internal quotation marks omitted) (quoting the arbitration agreement at 1).

157. Id. (quoting Nelsen v. Legacy Partners Residential, Inc., 144 Cal. Rptr. 3d 198, 211 (Ct. App. 2012)); see also *Spurlock* Award, supra note 153, at 13 (reasoning that the arbitration clause is limited to disputes stemming from "the specific agreement between Respondent and the individual [plaintiff]"); *Bonilla* Award, supra note 153, at 5–6 ("The words 'your' and 'you' can only mean claimant."); Partial Final Clause Construction Award at 7–8, Sollinger v. SmileDirectClub, LLC, AAA Case No. 01-20-0010-8355 (Nov. 22, 2021) (Forer, Arb.) (on file with the *Columbia Law Review*) (observing that the arbitration clause "refers to Claimant by repeated use of the word 'I' (four times). It does not refer to putative class members, other users of Respondent's products or services, or other claims or disputes"); Partial Final Award on Clause Construction at 5, McKenzie v. AptDeco, Inc., AAA Case No. 01-20-0000-6079 (Oct. 27, 2020) (Feliu, Arb.) (on file with the *Columbia Law Review*) ("[T]he parties here are denoted as each individual independent contractor and [the defendant] . . . .").

Court's clause construction jurisprudence. For instance, in *McCoy v. Road Runner Sports, Inc.*, the arbitrator relied heavily on the fact that the parties had agreed to arbitrate "all disputes"[158]—the type of broad clause that failed to authorize class arbitration in *Lamps Plus*.[159] The award cited *Lamps Plus* just once, in the last substantive line of the decision, at the end of the following sentence: "Considering all the provisions of the arbitration agreement, I find there is an 'affirmative "contractual basis for concluding that [the parties] *agreed* to"' classwide arbitration."[160] This reduced the Court's opinion, which should have been the star of the show, to the role of a faceless extra.

Smith v. STK Bellevue LLC involved a variation on the same theme.[161] A poorly drafted employment agreement appeared both to allow and to bar class arbitration.[162] It mandated arbitration for "claims[] on an individual or class basis" (which the arbitrator termed the "Scope Provision") but also specified that "[c]laims pertaining to different employees will be heard in separate proceedings" (the "Separate Proceedings Provision").[163] The arbitrator noted that ambiguity is not a "sufficient basis"[164] for class arbitration under *Lamps Plus* and that the scope and separate proceedings terms were "at cross-purposes."[165] Yet the arbitrator held that the parties had clearly agreed to arbitrate class claims because the scope provision was "broad and all-encompassing" and the separate proceedings clause did not expressly prohibit class actions.[166]

Strikingly, several arbitrators did something that no court surveyed did: they leaned into *Jock*. One cited the Second Circuit's dictum about clause construction as proof that "an arbitration agreement may be interpreted to include implicit consent to class procedures."[167] Another

158. See Partial Final Clause Construction Award at 6, McCoy v. Road Runner Sports, Inc., AAA Case No. 01-19-0000-4717 (July 9, 2020) (Meyerson, Arb.) (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting the arbitration agreement).

159. See supra notes 124–126 and accompanying text.

160. Id. at 7 (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019)).

161. Partial Final Award on Clause Construction at 2, 4–7, Smith v. STK Bellevue LLC, AAA Case No. 01-22-0001-7639 (Mar. 7, 2023) (Feliu, Arb.) (on file with the *Columbia Law Review*).

162. See id. at 2 ("[T]he Agreement provides that 'any such claims, on an individual or class basis, shall be submitted to final and binding arbitration.' . . . [T]he 'Consolidation Provision' . . . makes clear that the 'arbitrator will not have the authority to consolidate claims of other employees.'" (quoting the arbitration agreement ¶ A.1)).

163. Id. (internal quotation marks omitted) (quoting the Arbitration Agreement ¶ A.1).

164. Id. at 4 (internal quotation marks omitted) (quoting *Lamps Plus*, 139 S. Ct. at 1417).

165. Id.

166. Id. at 4–7.

167. Clause Construction Award at 7, Diaz v. Pilgrim's Pride Corp., AAA Case No. 01-22-0000-9304 (Nov. 7, 2022) (Farber, Arb.) (on file with the *Columbia Law Review*)

mentioned *Jock* several times, distinguished more than a dozen contrary judicial opinions, and faulted these courts for not "consider[ing] the point made by the Second Circuit in *Jock* that the legal sufficiency of implicit consent survives *Lamps Plus*."[168]

One final point deserves emphasis: Litigants appealed five of the awards that allowed class arbitration and lost every time.[169] Under *Oxford Health*, if the arbitrator at least pretended to interpret the contract, their analysis survived, "however good, bad, or ugly."[170] This reinforces that there is almost no chance of escaping a rogue arbitral decision.

(internal quotation marks omitted) (quoting Jock v. Sterling Jewelers Inc., 942 F.3d 617, 626 (2nd Cir. 2019)).

168. Partial Final Award at 20, Fasano v. Li, AAA Case No. 01-22-0003-8285 (Oct. 22, 2024) [hereinafter *Fasano* Award] (Moxley & Narwold, Arbs.) (on file with the *Columbia Law Review*). *Fasano* was easily the most interesting award in the dataset. Minority shareholders in E-Commerce China Dangdang, Inc. sought damages stemming from a merger. See Fasano v. Li, 16 Civ. 8759 (KPF), 2017 WL 6764692, at *1 (S.D.N.Y. Dec. 29, 2017), vacated and remanded sub nom., Fasano v. Yu Yu, 921 F.3d 333 (2d Cir. 2019). The parties' contract mandated arbitration for "[a]ny controversy, claim or cause of action" but also allowed plaintiffs to pursue "[a]ny such controversy, claim or cause of action . . . relating to or based upon the provisions of the [f]ederal securities laws" in court. *Fasano* Award, supra, at 7–8 (quoting the arbitration agreement). In a sixty-page tour de force, two members of a three-arbitrator panel held that because the exclusion from arbitration included class actions, then the universe of claims that needed to be arbitrated also included class proceedings. See id. at 30 ("If the exclusionary provision excluded class actions, the inclusionary provision included class arbitration.").

169. See Pilgrim's Pride Corp. v. Diaz, No. 5:22-cv-04413-JDA, 2024 WL 1051320, at *8 (D.S.C. Mar. 11, 2024) (denying the business's request for an order vacating an arbitration award); Torgerson v. LCC Int'l, Inc., No. 16-2495-DDC-TJJ, 2023 WL 1396479, at *9 (D. Kan. Jan. 31, 2023) ("[T]he court denies LCC's Cross-Motion to Vacate . . . [and] grants plantiffs' Application for Order Confirming Arbitration Award . . . ."); Consol. Wealth Holdings Inc. v. Vincent, No. 4:19-4437, 2021 WL 4167293, at *1 (S.D. Tex. July 29, 2021) ("Based on the motion, the response, the record, and the applicable law, the court denies the motion to vacate."); Road Runner Sports, Inc. v. McCoy, No. 3:20-CV-1539 W (KSC), 2021 WL 3439421, at *5 (S.D. Cal. June 2, 2021) ("[T]he Court further DENIES WITHOUT PREJUDICE Road Runner's Petition to vacate the Arbitrator's Partial Final Clause Construction Award . . . ."); Sci. Games Corp. v. Mohawk Gaming Enters. LLC, 191 N.Y.S.3d 398, 399–400 (App. Div. 2023) ("To review the merits of that interpretation in the face of an arbitration clause that the arbitrator found unambiguous and premised on a construction of the contract would be inconsistent . . . and we decline to do so.").

170. *Pilgrim's Pride*, 2024 WL 1051320, at *7 (quoting Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 571 (2013)). In fact, these decisions arguably show even greater deference to an arbitrator's clause construction award than *Oxford Health*. In that case, the Court only upheld the arbitrator's interpretation of the contract under section 10 of the FAA. See *Oxford Health*, 569 U.S. at 569. But as this Piece notes, see supra note 27, some jurisdictions allow judges to vacate awards for "manifest disregard" of the law, "such as where an arbitrator 'appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.'" Whitehead v. Pullman Grp., LLC, 811 F.3d 116, 121 (3d Cir. 2016) (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)). Although manifest disregard seems tailor-made to challenge clause construction determinations that ignore *Lamps Plus*, every court to consider this theory has rejected it. See *Pilgrim's Pride*, 2024 WL 1051320, at *8; *Torgerson*, 2023 WL 1396479, at *7; *Sci. Games Corp.*, 191 N.Y.S.3d at 399–400.

In sum, at least in the context of clause construction, arbitral lawlessness seems to be a bona fide—albeit not rampant—phenomenon. Defenders of arbitral decisionmaking have observed that there is "little . . . evidence that arbitrators definitively differ from judges in their attitudes and practices toward legal issues."[171] But this Piece finds that courts and arbitrators did not see *Lamps Plus* the same way. Judges almost always interpreted Chief Justice Roberts's opinion as a per se bar on discovering an implicit agreement for class arbitration. But about 80% of arbitrators read the decision as merely clarifying that neither ambiguity nor contra proferentem can "provide the necessary 'contractual basis' for compelling class arbitration."[172] These dueling conceptions of the law led more than a quarter of arbitrators to reach a result that no court did.

To be sure, this discrepancy only proves so much. For starters, many awards seemed like good faith attempts to apply *Lamps Plus*. In addition, arbitrators have become less likely to authorize class arbitration as the Court has made it harder to do so: The rate of awards permitting class claims has declined from 70% (before *Stolt-Nielsen*) to 55% (between *Stolt-Nielsen* and *Oxford Health*) to 27% (after *Lamps Plus*).[173] Finally, clause construction could be unique. Arbitrators might deviate less from judges when they confront, say, a consumer protection or employment discrimination complaint.

Nevertheless, it is unsettling that the lawless arbitrators in this study skewed their rulings in a way that furthered their financial self-interest. Whether plaintiffs or defendants benefit, this potential for bias raises questions about the wisdom of outsourcing an ever-expanding swath of the civil justice system to private judges.

CONCLUSION

Out of the disputes studied, one case perfectly illustrates this Piece's key findings. In 2020, Bally Corporation, which makes gambling equipment, faced two class actions: one in Illinois and one in New York.[174] The plaintiffs, tribal casino owners, alleged that Bally had suppressed competition by obtaining bogus patents for its technology,

171. Drahozal, supra note 9, at 191.

172. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

173. See supra text accompanying notes 69, 106.

174. See Class Action for Damages at 1–3, Tonkawa Tribe of Indians of Okla. v. Sci. Games Corp., No. 1:21-cv-04626, 2022 WL 1591719 (N.D. Ill. May 19, 2022) (No. 1) [hereinafter *Tonkawa* Complaint] (bringing a class action on behalf of other similarly situated United States regulated casinos); Petition to Vacate Class Determination Arbitration Award at 3–4, Light & Wonder, Inc. v. Mohawk Gaming Enters., No. 650148/2025, 2025 WL 1860334 (N.Y. Sup. Ct. July 2, 2025) (No. 1) [hereinafter *Mohawk* Petition] ("Mohawk also alleges that it brings this action on its own behalf and as a class arbitration pursuant to Rule 4 of the AAA Supplementary Rules for Class Arbitration.") (internal quotation marks omitted).

forcing them to pay more to rent its automated playing card shufflers.[175] The lease between the parties contained a generic arbitration clause.[176] The full text of that provision read:

> The parties agree that any and all controversies, disputes or claims of any nature arising directly or indirectly out of or in connection with this Agreement (including without limitation claims relating to the validity, performance, breach, and/or termination of this Agreement) shall be submitted to binding arbitration for final resolution. The arbitration shall follow the Commercial Arbitration Rules of the American Arbitration Association ("AAA") or other mutually agreed-upon procedures and shall be conducted in a mutually agreeable location.[177]

In the Illinois matter, a federal district court held that each plaintiff needed to pursue their own arbitrations against Bally.[178] Quoting *Lamps Plus* twice, the judge devoted just a few sentences to analyzing the issue: "[I]t is undisputed that the parties' arbitration agreements do not provide for class arbitration; the agreements are silent on the topic . . . . Based on this lack of relevant language, the agreements do not provide a 'sufficient basis to conclude that [the parties] agreed to . . . arbitrate on a class-wide basis.'"[179]

Yet the New York case went down a starkly different path. An arbitrator, not a judge, considered whether Bally's arbitration provision allowed class actions.[180] And it was as though this inquiry took place in an alternate dimension. The arbitrator cited *Oxford Health* for the proposition that "[a]n arbitrator may interpret a contract as permitting class arbitration even where the parties['] contract does not specifically mention class arbitration."[181] Then, in an eleven-page award, the arbitrator held that the breadth of the Bally clause, which covered "any and all controversies, disputes[,] or claims of any nature," demonstrated that it "unambiguously permits class arbitration."[182] The matter featured similar plaintiffs and the same defendant making the same arguments about the same contractual text.[183] Only the decisionmaker was different.

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175. See *Tonkawa* Complaint, supra note 174, at 17–18; *Mohawk* Petition, supra note 174, at 3.

176. See *Tonkawa Tribe*, 2022 WL 1591719, at *2; *Mohawk* Petition, supra note 174, at 4.

177. *Tonkawa Tribe*, 2022 WL 1591719, at *2 (quoting the Lease Agreement).

178. See id. at *8.

179. Id. (second alteration in original) (citation omitted) (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019)).

180. See Partial Final Award at 2, Mohawk Gaming Enters. v. Sci. Games Corp., AAA Case No. 01-20-0015-6196 (Aug. 2, 2022) (Wilkinson, Arb.) (on file with the *Columbia Law Review*).

181. Id. at 4.

182. Id. at 10–11.

183. Compare id. at 9–10 (finding an arbitration clause that does not refer to class arbitration nonetheless allows it), with Defendants' Motion to Dismiss Plaintiffs' Second

Amended Complaint or, in the Alternative, Compel Arbitration or Transfer at 18–19, *Tonkawa Tribe*, 2022 WL 1591719 (arguing that where an arbitration agreement does not contain an agreement to class arbitration, consent should not be inferred).