Excerpts from Christopher R. Drahozal, *The Supreme Court and Class Arbitration: There and Back Again, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (Arthur Rovine ed. Martinus Nijhoff Publishers, forthcoming 2014)

I. Introduction

The Supreme Court's "class arbitration trilogy"[1] — its decisions in *Green Tree Financial Corp. v. Bazzle*,[2] *Stolt-Nielsen, S.A. v. AnimalFeeds International, Inc.*,[3] and, most recently, *Oxford Health Plans v. Sutter*[4] — has resulted in much uncertainty for the arbitration community and accomplished very little.[5] *Bazzle* resulted in a dramatic growth in class arbitration, but *Stolt-Nielsen* slowed the filings substantially.[6] The underlying issue in the cases — who decides whether a "silent" arbitration clause authorizes class arbitration — remains unresolved. The Court instead decided two cases on the standard of review of arbitral awards, one of which (*Sutter*) was necessary only because the other (*Stolt-Nielsen*) had the potential to expand court oversight of awards unduly. Indeed, the most important aspect of *Sutter* was that it did not extend *Stolt-Nielsen* but instead properly deferred to the arbitrator's decision. To a large degree the law is now back where it was before *Bazzle* — there and back again, indeed.

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Part II describes how the Court's class arbitration journey began with *Bazzle*. Part III continues on the journey with *Stolt-Nielsen*, while Part IV traces the return to the beginning with *Sutter*. Part V offers some thoughts on the issue still unresolved after all three cases — who decides whether a silent arbitration clause authorizes class arbitration. Part VI concludes.

II. *Green Tree Financial Corp. v. Bazzle*: An Unexpected Party

Class arbitration has existed in the United States for decades.[7] For example, a class arbitration was involved in the Supreme Court's 1984 decision in *Southland Corp. v. Keating*,[8] although the Court addressed only the preemption issue in the case and not the class arbitration issue.[9] But class arbitration did not become commonplace (at least relatively) until after the

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[1] Others have identified different trilogies in the Court's recent cases. *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2011); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011). Here I focus on the substantive relationship among the cases rather than their temporal closeness in defining what I call the Court's "class arbitration trilogy."

[2] 539 U.S. 444 (2003).

[3] 559 U.S. 662 (2010).

[4] 133 S. Ct. 2064 (2013).

[5] Others have made this same point. *See, e.g.*, Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL 21, 21 ("The tortuous path of these various [class arbitration] decisions has caused substantial uncertainty and an enormous waste of resources."); John Townsend, *The Rise and Fall of Class Arbitration, in* AAA YEARBOOK ON ARBITRATION & THE LAW 395 (Ben H. Sheppard, Jr. & Stephen K. Huber eds., 23rd ed. 2011) ("The *Stolt-Nielsen* decision has thus brought us back to where we were before *Bazzle*.").

[6] *See infra* text accompanying notes 64-66.

[7] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 40-42 (2000).

[8] 465 U.S. 1, 4-5 (1984).

[9] *Id.* at 8-9.

Court's decision in *Green Tree Financial Corp. v. Bazzle*.[10] So the unexpected party in *Bazzle* is the start of the class arbitration journey.

In *Bazzle*, the South Carolina Supreme Court had interpreted South Carolina law to permit a court to order class arbitration when the arbitration agreement was silent on the matter, and held that the FAA did not preempt that state rule.[11] The U.S. Supreme Court reversed and vacated the South Carolina court's judgment in a fractured decision.[12] Green Tree argued before the Court that the South Carolina court improperly relied on a state law default rule because the arbitration agreement was not in fact silent on whether class arbitration was permitted.[13] Justice Breyer's plurality opinion concluded that it was for the arbitrator, rather than a court, to decide whether the arbitration clause was silent or whether it in fact forbids class arbitration.[14] Justice Stevens concurred in the judgment, only so that there would be a judgment for the Court.[15] He did not join the plurality opinion, instead concluding "the decision to conduct a class-action arbitration was correct as a matter of law."[16] Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented on the ground that determining whether the arbitration clause forbids class arbitration is a matter for the court to decide and that requiring class arbitration here "contravene[d]" the arbitrator selection provisions of the agreement.[17] Justice Thomas also dissented, reiterating his usual position that the FAA does not apply in state court.[18]

In response to *Bazzle*,[19] the American Arbitration Association adopted Supplementary Rules for Class Arbitration, based in important parts on Federal Rule of Civil Procedure 23, the class action rule in federal court.[20] The AAA rules set out a three-step process for administering a class arbitration proceeding. Reflecting the reasoning of the plurality opinion in *Bazzle*, the first step in the process was for the arbitrator to determine whether the parties' arbitration agreement "permitted" class arbitration.[21] If it did, the second step was the class determination

[10] 539 U.S. 444 (2003).
[11] Bazzle v. Green Tree Fin'l Corp., 569 S.E.2d 349, 360-61 (S.C. 2002), *rev'd*, 539 U.S. 444 (2003).
[12] 539 U.S. at 447.
[13] Stated otherwise, the issue in *Bazzle* was whether there was a gap in the contract that could be filled by a state gap-filler — i.e., whether the contract permitted or forbid class arbitration. For a discussion of the implications of this formulation of the issue in *Bazzle*, see Rau, *supra* note 1, at 440-41.
[14] *Id*. at 453 (Breyer, J.).
[15] *Id*. at 454 (Stevens, J., concurring in the judgment and dissenting in part).
[16] *Id*. at 455.
[17] *Id*. at 458-59 (Rehnquist, C.J., dissenting).
[18] *Id*. at 460 (Thomas, J., dissenting).
[19] As Alan Rau explains, despite the fractured nature of the decision, "*Bazzle* was immediately taken to be an endorsement by the Court of a new norm of class-wide arbitrations." Rau, *supra* note 1, at 445.
[20] Am. Arb. Ass'n, Supplementary Rules for Class Arbitration (Oct. 8, 2003), http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf [hereinafter cited as AAA Class Arbitration Rules]. JAMS did the same. *See* JAMS, JAMS Class Action Procedures (May 1, 2009), http://www.jamsadr.com/rules-class-action-procedures/.
[21] AAA Class Arbitration Rules, *supra* note 25, Rule 3 ("Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award').").

phase, essentially the class certification process of Rule 23.[22] Finally, if the arbitrators certified a class, they would proceed to resolve the merits of the case on a class basis.[23]

Subsequently, the AAA promulgated a policy specifying when it would administer cases under its class arbitration rules:

> [T]he American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.[24]

If the arbitration agreement is not silent on class claims — i.e., if it "prohibits class claims, consolidation, or joinder" — the AAA will administer the case only if directed to do so by court order.[25]

By 2008, parties had filed 283 class arbitrations with the AAA, almost half of which resulted in clause construction awards.[26] Strikingly, the arbitrators overwhelmingly concluded that silent arbitration clauses permitted class arbitration, so holding in 93.1% (95 of 102) of the contested clause construction awards.[27] A case in which the arbitrators construed a silent clause as permitting class arbitration would be the next step on the Supreme Court's class arbitration journey.

III. *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*: The Clouds Burst

Unlike *Bazzle*, the dispute in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* involved only businesses: a putative class of shippers seeking to recover for alleged price fixing by the respondent carrier.[28] Also unlike *Bazzle*, the arbitration process in *Stolt-Nielsen* was already underway.[29] Indeed, the arbitrators in *Stolt-Nielsen* had issued a clause construction award, concluding that the parties did not "intend[] to preclude class arbitration" and relying on prior arbitral awards that construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration."[30]

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[22] *Id.* Rules 4-5; *see* Fed. R. Civ. P. 23.
[23] AAA Class Arbitration Rules, *supra* note 25, Rule 7.
[24] Am. Arb. Ass'n, AAA Policy on Class Arbitration (July 14, 2005), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840.
[25] *Id.*
[26] Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party 22, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (No. 08-1198) (reporting 135 clause construction awards). In 48 of those cases the arbitrators issued class determination awards. *Id.* At that time, none of those cases had resulted in a final award on the merits, although the AAA reported that one was "imminent." *Id.* at 23.
[27] *Id.* at 22. In another 33 cases, the parties stipulated that the clause permitted class arbitration. *Id.*
[28] 559 U.S. 662, 667 (2010).
[29] Although the case proceeded under the AAA's class arbitration rules, it was not administered by the AAA.
[30] AnimalFeeds Int'l Corp. v. Stolt-Nielsen S.A., Partial Final Clause Construction Award at 5, 7 (Dec. 20, 2005) (ad hoc arbitration award), *reprinted in* Petition for Writ of Certiorari, at app. D. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 129 S. Ct. 2793 (2009) (No. 08-1198).

The respondent sought vacatur of the clause construction award, and the district court agreed, holding that the award manifestly disregarded the law.[31] The Second Circuit reversed, applying the usual deference shown to arbitral awards.[32] The Supreme Court then reversed the Second Circuit.[33]

First, the Supreme Court held that the award should be vacated under FAA section 10(a)(4) because the arbitrators exceeded their powers.[34] According to the Court: "[I]nstead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers."[35] Second, having vacated the award, the Court concluded that because "there can be only one possible outcome on the facts before us," it could interpret the arbitration clause itself (rather than allowing the arbitrators to do so).[36] Finally, the Court determined that for arbitration to proceed on a class basis, an arbitration clause must affirmatively authorize (rather than just permit) class arbitration, and that the agreement here did not authorize class arbitration.[37] In reaching that conclusion, the Court: (1) stated that *Bazzle* does not itself require the arbitrator to determine whether an arbitration clause permits class arbitration because only a plurality of the Court decided that issue;[38] (2) concluded that arbitrators may not infer an agreement to authorize class arbitration "solely from the fact of the parties' agreement to arbitrate;"[39] and (3) relied on the parties' stipulation that they had reached "no agreement" on class arbitration to find that the arbitration agreement in the case did not "authorize" class arbitration.[40]

The Court's ultimate decision in *Stolt-Nielsen* — effectively holding that the default interpretation of an arbitration clause in a commercial charter party should be that it does not permit class arbitration — is defensible and probably even sensible.[41] The Court's analytical path to reach that result in *Stolt-Nielsen* is neither, for reasons Bo Rutledge and I have explained elsewhere.[42] In brief, the Court in *Stolt-Nielsen* adopted a "bit of a watershed" approach, by vacating an award "on the basis of a procedural determination by the arbitrator as to a matter

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[31] 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006).
[32] 548 F.3d 85, 95-96 (2d Cir. 2008).
[33] *Stolt-Nielsen*, 559 U.S. at 687.
[34] *See* 9 U.S.C. § 10(a)(4). In a footnote, the Court also held that the award was in manifest disregard of the law, assuming without deciding that manifest disregard was available as a ground for vacating awards. 559 U.S. at 672 n.3
[35] *Id.* at 676-77.
[36] *Id.* at 677.
[37] *Stolt-Nielsen* thus amounts to a shift from how *Bazzle* had been interpreted, focusing on whether the clause "authorized" class arbitration instead of whether the clause "permitted" class arbitration. *Id.* at 687.
[38] *Id.* at 680. The Court highlighted a number of "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration," *id.* at 686, changes that it relied on in *AT&T Mobility LLC v. Concepcion* to hold that the FAA preempted California's application of its unconscionability doctrine in that case. 131 S. Ct. 1740, 1750-52 (2011).
[39] 559 U.S. at 685.
[40] *Id*. at 684.
[41] *See id.* at 674 (citing "undisputed evidence that the Vegoilvoy charter party had 'never been the basis of a class action'" and "expert opinion that 'sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration'").
[42] *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. 1103, 1144-53 (2011).

where the agreement was silent"; vacated an award for manifest disregard of the law after assuming that the ground exists (i.e., after assuming away a party's argument that it does not exist); and interpreted the arbitration agreement itself, even though the parties had agreed to arbitrate that issue, contrary to several of the Court's own decisions.[43] If applied broadly, the *Stolt-Nielsen* Court's decision could undercut the enforceability of arbitration awards more generally, increase court interference in the arbitral process, and damage the acceptability of arbitration as a means of dispute resolution. And since *Stolt-Nielsen* involved a wholly commercial case (i.e., not a consumer or employment arbitration), that damage would have been fundamental indeed.

The Court could have avoided the problematic analysis in *Stolt-Nielsen* had it been able to characterize the question whether an arbitration clause authorizes class arbitration as a gateway (or arbitrability) issue. If so, a court could review the issue de novo even after an award was made.[44] The *Stolt-Nielsen* Court seemed to be heading toward that approach when it carefully analyzed and then undercut the precedential effect of the plurality opinion in *Bazzle*.[45] But it then — quite correctly — backed away, recognizing that the parties had delegated the issue to the arbitrators, meaning that it was not properly before the Court.[46] Instead, the Court had to apply the usual standards for reviewing arbitral awards, which is where the case becomes problematic.

Even after *Stolt-Nielsen*, at least some arbitrators continued to construe silent clauses as authorizing (rather than just permitting) class arbitration. Indeed, five of eight clause construction awards in AAA class arbitrations did so, even under the tightened standards of *Stolt-Nielsen*.[47] When those awards were challenged in court, *Stolt-Nielsen* left the courts a difficult choice. It departed from the deference usually shown by courts reviewing arbitration awards, suggesting that perhaps class awards should be treated differently from other awards (or that arbitral awards were not as final as usually believed). But its facts were unusual, and the Court's reasoning was very narrow, suggesting that perhaps the decision was much more limited than it appeared. As such, it was not surprising when the circuits split over how to apply *Stolt-Nielsen*.[48] The Court's next, and most recent, step on the class arbitration journey was to resolve the conflict.

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[43] *Id.* at 1143 n.139 & 1148-50; *see also, e.g.*, Rau, *supra* note 1, at 469 ("For my money, then, the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration, is this line of Justice Alito's in *Stolt-Nielsen:* The award must be vacated, he writes, because 'the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.'").
[44] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995).
[45] *Stolt-Nielsen*, 559 U.S. at 678-80.
[46] *Id.* at 680.
[47] Drahozal & Rutledge, *supra* note 47, at 1157-58.
[48] *Compare* Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 219 (3d Cir. 2012) (finding arbitrators did not exceed their powers) *and* Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121-22 (2d Cir. 2011) (same) *with* Reed v. Florida Metropolitan Univ., 681 F.3d 630, 646 (5th Cir. 2012) (vacating award for excess of powers).

IV. *Oxford Health Plans LLC v. Sutter*: The Return Journey

The case in which the Supreme Court granted review was *Oxford Health Plans LLC v. Sutter*.[49] *Sutter*, like *Stolt-Nielsen*, involved a business dispute, here a putative class of doctors bringing breach of contract and other claims against a health insurance company.[50] Also as in *Stolt-Nielsen*, the arbitrator had already issued an award construing a silent clause as authorizing class arbitration.[51] But the arbitrator's rationale differed from that in *Stolt-Nielsen* because here the arbitrator at least purported to construe the contract.[52]

Once again, if the Supreme Court wanted to address whether and when silent arbitration clauses authorize class arbitration, the Court could do so most readily — and most consistently with current doctrine — by treating it as a gateway issue. But in *Sutter* that option again was not available to the Court, because, as in *Stolt-Nielsen*, the parties had agreed post-dispute to have the arbitrator decide it.[53] Instead, the Court's options were either to (1) hold that the award should be vacated, which it could do only by extending *Stolt-Nielsen* well beyond its facts; or (2) to uphold the award applying usual principles of deferential court review.

The Court took the latter approach, unanimously upholding the award.[54] The opinion was straightforward and reminiscent of most appellate court opinions affirming the confirmation of arbitral awards:

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process."
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> A party seeking relief under [FAA § 10(a)(4)] bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error — or even a serious error." … Only if "the arbitrator act[s] outside the scope of his contractually delegated authority" — issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract" — may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

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[49] 133 S. Ct. 2064 (2013).
[50] *Id.* at 2067.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 2068 n.2.
[54] Justices Alito and Thomas concurred, asserting that "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." *Id.* at 2071-72 (Alito, J., concurring). This possibility of collateral attack, they concluded "should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide." *Id.* at 2072.

> …Twice, then, the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not "exceed[ ] [his] powers."[55]

The Court distinguished *Stolt-Nielsen*, in which "the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings."[56] By comparison, in *Sutter*, the Court stated, "the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration."[57] As a result, the Court upheld the award.

In a footnote, the Court acknowledged that the "who decides" issue remains open, despite the Court's varying opportunities to resolve it ….[58] Although the Court cited the *Bazzle* plurality, it did so only to identify the general category of gateway issues, not for its decision that the issue is one for the arbitrator.

At bottom, the most important aspect of *Sutter* was what the Court did not do: it did not extend *Stolt-Nielsen* beyond its facts. Instead, it upheld the award under usual arbitration law principles of deference to the arbitrator's interpretation of the contract.

V. After *Sutter*: The Last Stage

The number of class arbitrations has dwindled since *Stolt-Nielsen*. From a high of 57 cases in 2006, the AAA's class filings declined to 27 in 2010, 36 in 2011, and 9 in the first half of 2012.[59] As of September 27, 2013, the AAA class arbitration web page shows only 10 class arbitrations filed in 2013,[60] although the web page data are unreliable.[61] The frequency of class arbitration has not returned to where it was prior to *Bazzle*, but has declined significantly since *Stolt-Nielsen*.

After *Sutter*, the law on "silent" arbitration clauses is pretty much back where it was before *Bazzle*, with the question of who decides whether a clause authorizes class arbitration remains undecided.[62] At least now the Court has flagged the issue, and seems to understand that deciding the issue requires it to take a case in which the parties have not delegated the issue to the arbitrators.

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[55] *Id.* at 2068-69 (citations omitted).
[56] *Id.* at 2071.
[57] *Id.*
[58] *Id.* at 2068 n.2 (citations omitted).
[59] Gregory A. Litt & Tina Praprotnik, *After* Stolt-Nielsen, *Circuits Split, but AAA Filings Continue*, MEALEY'S INT'L ARB. REP., July 2012, at 1.
[60] Am. Arb. Ass'n, Class Arbitration Docket (last visited Sept. 27, 2013), http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket.
[61] Drahozal & Rutledge, *supra* note 47, at 1157 n.188.
[62] *Sutter*, 133 S. Ct. at 2068 n.2.

At present, the lower courts are divided on the question, with the apparent majority following the *Bazzle* plurality and holding that the issue is one for the arbitrators.[63] That said, given the Court's views of class arbitration as stated in *Stolt-Nielsen* and *AT&T Mobility LLC v. Concepcion*, there is a reasonable chance that, if and when it faces the issue, the Court will reject the *Bazzle* plurality and hold that whether an arbitration clause authorizes class arbitration is a gateway question — i.e., one for the court to decide. In both *Stolt-Nielsen* and *Concepcion* the Court emphasized what it saw as fundamental differences between class arbitration and individual arbitration.[64] In *Stolt-Nielsen*, the Court concluded that those differences meant that a court could not infer that the parties authorized class arbitration from a general arbitration clause alone.[65] It would only be one (perhaps small) step further for the Court to conclude that those differences also preclude inferring from a general arbitration clause that the parties assented to having the arbitrator determine whether the arbitration clause authorized class arbitration.

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[63] *Compare* Vilches v. Travelers Cos., 413 Fed. Appx. 487, 492 (3d Cir Feb. 9, 2011) (unpublished opinion) ("refer[ring] the question[] of whether class arbitration was agreed upon to the arbitrator"); Sullivan v. PJ United, Inc., 2013 WL 4827605, at *2 (N.D. Ala. Sept. 10, 2013) ("The collective action waiver in this agreement becomes a procedural issue where the arbitrator must decide how the claims are to proceed through the arbitration system."); Kovachev v. Pizza Hut, Inc., 2013 WL 4401373, at *2 (N.D. Ill. Aug. 15, 2013) ("*Stolt-Nielsen* does not change the Court's analysis. The arbitrator should decide whether arbitration will proceed on an individual or class-wide basis."); Cramer v. Bank of America, N.A., 2013 WL 2384313, at *4 (N.D. Ill. May 30, 2013) ("Defendants' argument that the Agreement does not permit class arbitration raises a question of procedural arbitrability.… The Supreme Court's decision in *Stolt-Nielsen* did not make this a 'gateway' question for the Court …. Since questions of procedural arbitrability are reserved for an arbitrator and there is no dispute over substantive arbitrability in the instant case, Defendants' petition to compel individual arbitration should be decided by the arbitrator."); Hanna v. Pizza Hut of Am., Inc., 2012 WL 5378734, at *1 (M.D. Fla. Oct. 30, 2012) ("The arbitrator must decide whether an arbitration agreement permits class arbitration."); Brookdale Senior Living, Inc. v. Dempsey, 2012 WL 1430402, at *3 (M.D. Tenn. Apr. 25, 2012) ("[N]umerous courts have continued to apply the plurality's ruling in Bazzle even after Stolt-Nielsen was decided."); *and* Guida v. Home Savings of Am., Inc., 793 F. Supp. 2d 611, 616 (E.D.N.Y. 2011) ("This Court concludes, in light of *Stolt-Nielsen* and *Bazzle*, that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide.") *with* Mork v. Loram Maintenance of Way, Inc., 844 F. Supp. 2d 950, 953 (D. Minn. 2012) ("[T]he Court also concludes that the question of whether arbitration can proceed on a collective basis is appropriate for judicial determination in the first instance."); *and* Reed Elsevier, Inc. v. Crockett, 2012 WL 604305, at *6 (S.D. Ohio Feb. 24, 2012) ("[T]his Court concludes that the issue of whether an arbitration agreement authorizes class arbitration fits more closely with the decisions of the Supreme Court, addressing the question of arbitrability, and that, therefore, this Court must resolve the question of whether the parties' arbitration agreement authorizes such arbitration.").

By comparison, courts have consistently held that consolidation is a procedural matter for the arbitrators to decide. Blue Cross Blue Shield of Mass. v. BCS Ins. Co., 671 F.3d 635, 640 (7th Cir. 2011) (distinguishing consolidation from class actions: "Just as consolidation under Rule 42(a) does not change the fundamental nature of litigation, so consolidation of the plans' claims would not change the fundamental nature of arbitration."); Rice Co. v. Precious Flowers LTD, 2012 WL 2006149, at *4 (S.D.N.Y. June 5, 2012) ("[C]ourts have uniformly held that, absent a clear agreement to the contrary, the question of whether arbitration proceedings should (or should not) be consolidated is a procedural matter to be decided by the arbitrators, not by a court.").

[64] *Stolt-Nielsen*, 559 U.S. at 686-87; *Concepcion*, 131 S. Ct. at 1751-52. For critical views of this analysis, see, *e.g.*, Born & Salas, *supra* note 5, at 39-43 (arguing that "Justice Scalia's reasoning — which, on its own terms, would withhold FAA protection from any type of arbitration not envisioned by Congress in 1925 — is manifestly wrong"); S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T, *and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 271 (2012) (concluding that "there is nothing about class arbitration that "changes the nature of arbitration").

[65] *Stolt-Nielsen*, 559 U.S. at 685.

On the other hand, the limited available empirical evidence provides some support for the approach taken by the *Bazzle* plurality. Bo Rutledge and I found that a slight majority of arbitration clauses in the credit card agreements we studied (51.3% of issuers covering 52.6% of credit card loans outstanding) delegated all issues as to the interpretation and enforceability of the arbitration clause — including all class arbitration issues — to the arbitrators.[66] A number of agreements (30.8% of issuers but covering only 12.8% of credit card loans outstanding) excluded class arbitration issues from the arbitrator's authority and left them to the courts, while delegating all other issues to the arbitrators.[67] Only 10.3% of agreements (but covering 29.2% of credit card loans outstanding) provided that all issues as to the interpretation and enforceability of the arbitration clause were for the court to decide.[68] To the extent one follows a majoritarian theory of default rules — i.e., with the goal of crafting a gap-filling rule so that it matches what most contracting parties would do, thus minimizing transactions costs[69] — this evidence provides some support for a default rule delegating the decision to the arbitrators.

Perhaps more importantly, the delegation clauses in the credit card agreements serve as a reminder that the issue is to a substantial degree within the parties' control. If the Supreme Court concludes that the issue is one for the arbitrators to decide, the parties can contract around that default by agreeing to have the court decide the issue instead. If the Supreme Court concludes that the issue is a gateway issue to be resolved finally by the courts, the converse result likely holds. As long as the parties' assent to the arbitration clause is not at issue, a court should give effect to language in that clause delegating the class arbitration issue to the arbitrators.[70] Certainly the parties could so agree after the dispute has arisen (as they did in both *Stolt-Nielsen* and *Sutter*). But as a general matter a pre-dispute agreement should work as well.

VI. Conclusion

With its class arbitration trilogy, the Supreme Court has taken the arbitration community on a journey that ended up mostly back where it began. The number of class arbitrations has declined substantially from its post-*Bazzle* peak, and the "who decides" question — that is, who decides whether an arbitration clause authorizes class arbitration, the court or the arbitrator — remains unanswered. Fortunately, by properly deferring to the arbitrator's contract interpretation, the Court in *Sutter* avoided the damage that would have resulted had it extended *Stolt-Nielsen*'s more interventionist approach. Now that the Court seems to have identified the type of case in which it can actually resolve the "who decides" question, perhaps it can bring the class arbitration journey to its long overdue conclusion.

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[66] Rutledge & Drahozal, *supra* note 1, at 35.
[67] *Id.*
[68] *Id.* The remaining 7.7% of agreements (covering 5.4% of credit card loans outstanding) do not include any sort of delegation clause. *Id.*
[69] *E.g.*, Ian Ayres, *Preliminary Thoughts on the Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 5 (1993); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993).
[70] If a party's assent to the arbitration agreement is at issue, pre-dispute attempts to delegate that issue to the arbitrators may amount to little more than boot-strapping — asserting that the parties assented to a provision when their very assent is what is at issue.