PULLING AT THE "DAISY-CHAIN OF CROSS-REFERENCES"[1]: AAA RULE INCORPORATION & DELEGATING THE DETERMINATION OF CLASS ARBITRABILITY

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1. Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 761 (3d Cir. 2016).

I. INTRODUCTION

In 2009, attorney Craig Crockett made a discovery that no practitioner wishes to see. After happily utilizing his LexisNexis service for a number of years, Crockett learned he had incurred enormous service costs, unknown to him due to an alleged defect in LexisNexis' notification system.[2] Knowing he had signed an adhesion contract that included a binding arbitration agreement, Crockett filed an action with the American Arbitration Association (AAA) to challenge the accumulated charges.[3] However, since proceeding against LexisNexis on an individual basis was economically untenable, Crockett filed the arbitration claim as a class action on behalf of those unfortunate attorneys who encountered similar surprises and assessed the damages to be in excess of $500 million.[4] Predictably, LexisNexis sought a forceful response; less predictable, however, was the fashion in which the computer-assisted legal research company responded.[5] Before the arbitrator could rule on whether the agreement allowed class arbitration, LexisNexis sought a declaration from a federal district court that the agreement required bilateral arbitration.[6] This was rather unusual because arbitration agreement drafters are typically quite comfortable before the designated arbitrator, and it is instead the complainant in the consumer dispute that typically seeks refuge in federal court.[7]

Although unusual, LexisNexis' decision was equally strategic: while repeat players in arbitration disputes can generally expect fair—if not preferable—treatment before the selected arbitrator, on the issue of whether an arbitration agreement allows class arbitration, such parties are far more likely to receive a favorable ruling from a federal court.[8] Because the determination that an agreement does allow class arbitration will transform an otherwise miniscule claim into a potential source of vast liability, LexisNexis' response was understandable.

While it is of great consequence whether an arbitrator or a court makes the decision of class arbitrability, the issue concerning the determination of who the proper decision maker is currently splits the

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2. Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 596 (6th Cir. 2013).

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1325 (2019).

8. *Id*. at 1363.

United States Circuit Courts of Appeals.[9] This split has resulted from diverging interpretations and applications from two intersecting lines of Supreme Court cases concerning arbitration. The first line of cases, led by the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, provides a general framework for courts when determining the proper decision maker under an arbitration agreement.[10] The second line of cases concerns the Court's skepticism towards class arbitration.[11]

This Note concerns one such issue at the intersection of these two sets of Supreme Court precedents, causing a split amongst the circuit courts: whether an incorporation of AAA rules delegates to the arbitrator the authority to determine whether an arbitration agreement permits class arbitration. Part II of this Note outlines the overarching principles of arbitration and the doctrines intended to facilitate their application.[12] Part II also provides a review of each circuit court's approach to the issue causing the split.[13] Part III analyzes the reasoning of the various circuit courts and applies the relevant authority to the issue at hand.[14] Part IV concludes that while the reasoning of none of the courts can be considered infallible, the circuit courts concluding that an AAA rule incorporation generally fails to delegate the issue of class arbitrability to the arbitrator have reached the proper holding.[15]

II. BACKGROUND

A. Foundational Concepts and Principles

The issue at the core of this Note, sometimes referred to as "arbitration about arbitration,"[16] has aptly been described as "mind-bending."[17] In an effort to make the subject matter less intimidating, this section will provide an overview of the foundational concepts and principles of arbitration. Once that foundation is set, this Note will embark into more nuanced territory.

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9. *Compare Reed Elsevier*, 734 F.3d at 599, *with* JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019).

10. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940 (1995).

11. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

12. *See infra* Parts II.A, B.

13. *See infra* Part II. C.

14. *See infra* Part III.

15. *See infra* Part IV.

16. Horton, *supra* note 7, at 1325.

17. *Id.*

1. Efficiency and Consent

The overarching principles of arbitration are efficiency and consent.[18] Thus, the objective of arbitration is to provide an efficient alternative to court-managed litigation while preserving the integrity of arbitration as a consent-based alternative.[19] Parties seeking efficient dispute resolution benefit from the less formal structure of arbitration and from the management by arbitrators possessing technical expertise in the subject matter of the dispute.[20] Because the Federal Arbitration Act (FAA) dictates that a court must confirm an arbitrator's decision, save for "extreme defects," arbitration offers a cost-effective and time-effective outlet to resolve disputes.[21]

However, if arbitration lacks effective management, these foundational principles can counteract one another.[22] For instance, an overly zealous arbitrator, committed to resolving any and all disputes between the parties in a final manner, may wander into disputes that the parties did not agree to arbitrate.[23] As a consent-based alternative to litigation, such overstepping by the arbitrator compromises the legitimacy of the arbitration process.[24] On the other hand, an overcorrection to this defect can equally compromise the foundation of arbitration.[25] If the arbitrator is forced to stop proceedings every time a disgruntled party claims it did not consent to arbitrate an issue, the efficiency that makes arbitration attractive would be eviscerated.[26] To balance these conflicting principles, courts and arbitrators have developed a number of doctrines and approaches, including the doctrine of *Kompetenz-Kompetenz* and the Supreme Court's jurisprudence on the "question of arbitrability."[27]

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18. George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 1–2 (2012).

19. *Id.*

20. *Id.* at 2.

21. Horton, *supra* note 7, at 1333 (Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)).

22. *See* William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 AM. U. INT'L L. REV. 837, 855 (2012).

23. Bermann, *supra* note 18, at 5.

24. *Id.*

25. Park, *supra* note 22, at 856.

26. *Id.*

27. *See* William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 136–37 (2007); *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

2. Jurisdictional Challenges and the Doctrine of Kompetenz-Kompetenz

The doctrine of *Kompetenz-Kompetenz* (literally German for "jurisdiction on jurisdiction") states that an arbitrator can rule on challenges to his own jurisdiction.[28] A jurisdictional challenge can take a number of forms but arises when a party argues that the arbitrator lacks authorization to hear a matter.[29] The arbitrator's ability to rule on his own jurisdiction does much to balance the countervailing principles of consent and efficiency.[30] Due to *Kompetenz-Kompetenz*, the disgruntled party described above would not succeed in delaying the proceedings by raising countless challenges to the arbitrator's jurisdiction.[31] Rather than stopping the proceedings and waiting for judicial authorization to continue, the arbitrator may review the challenge, make a determination, and continue if necessary.[32]

However, it bears emphasis that the arbitrator's ability under *Kompetenz-Kompetenz* does not mean that the party, concerned that the arbitrator has wandered into unconsented-to territory, is without recourse.[33] Although the arbitrator has the ability to rule on his own jurisdiction, that does not mean *Kompetenz-Kompetenz* provides the arbitrator with the authority to have the final word on every disputed issue.[34] While the arbitration continues, the jurisdiction-challenging party may be able to seek review on the issue from a court of competent jurisdiction.[35] Thus, while "the arbitration does not necessarily stop, neither does any related judicial action."[36]

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28. Park, *supra* note 27, at 136. It must be noted that the arbitrators' ability to rule on their own jurisdiction is a distinct doctrine from the principle of separability. *Id.* Under the principle of separability, "an arbitration clause remains autonomous from the main agreement in such it has been encapsulated . . . ." *Id.* at 137. Separability is necessary because it provides the arbitrators with the ability to find that a contract is invalid without destroying their authority to make such a determination. *Id*. For example, an arbitrator could find an agreement is invalid because it was fraudulently obtained, but the arbitration agreement, though within the invalid agreement, would avoid the stamp of invalidity.

29. *Id.* at 153 ("The challenge may be directed at the case in its entirety, a particular question (such as a competition counterclaim), or the exercise of a procedural power (such as imposing sanctions for failure to produce documents or granting interest)").

30. *See id.* at 138.

31. *Id*.

32. *Id.*

33. *Id.* at 137.

34. *Id.*

35. *Id.* at 141.

36. *Id.* at 143.

Thus, the doctrine of *Kompetenz-Kompetenz* resolves many jurisdictional challenges in a manner that enhances the principles of efficiency and consent.[37] Frivolous challenges to the arbitrator's authority are addressed and disposed of without entirely halting the arbitration.[38] Meanwhile, jurisdictional challenges receive an adequate avenue for review to ensure that the parties provided the necessary consent to arbitrate.[39] If an arbitrator reviews issues outside his domain, a court of competent jurisdiction may correct the error.[40] Thus, although the parties spent some resources during the arbitrator's unauthorized efforts, the integrity of the consent-based arbitration process remains intact.[41]

However, a general application of *Kompetenz-Kompetenz* does not solve every jurisdictional dispute.[42] Of particular relevance for this Note, *Kompetenz-Kompetenz* fails to address who—the arbitrator or the court—should get the *final* word on an issue.[43] Thus, an arbitrator can decide jurisdictional challenges as they come but does not address the more interesting question of what effect, if any, such a decision has on potential judicial determinations of the same jurisdictional issue.[44] To resolve this and related issues, one must turn to a line of Supreme Court cases, starting with *First Options of Chicago, Inc. v. Kaplan*.[45]

3. First Options and the "Question of Arbitrability"

The dispute that gave rise to this pathbreaking case was brought by a financial services provider, First Opinions of Chicago, Inc., against Manuel and Carol Kaplan and MK Investments, Inc. (MKI), an investment company wholly owned by Mr. Kaplan.[46] First Options demanded the repayment of a loan made to MKI and alleged that the Kaplans were personally liable for any unpaid debt.[47] MKI, having signed the loan agreement that included an arbitration clause, clearly agreed to arbitrate.[48] The Kaplans, however, had not personally signed the agreement and thus argued that they never consented to the

37. *See id.* at 138.
38. *Id.*
39. *Id.* at 141.
40. *Id.*
41. *See* Bermann, *supra* note 18, at 5.
42. *See* Park, *supra* note 27, at 143.
43. *See id*.
44. *See id.*
45. *Id.* at 157; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
46. *First Options*, 514 U.S. at 940 (1995).
47. *Id.*
48. *Id.* at 941.

arbitration agreement.[49] According to the Kaplans, the arbitrators would be exceeding their authority to find non-signatories personally liable.[50] The arbitrators disagreed with the Kaplans' contention, finding their authority to be sufficient.[51]

When the case reached the Supreme Court, the Court took up the task of addressing how a court should review an arbitrator's ruling on a jurisdictional challenge.[52] However, before answering this question, the Court emphasized the narrowness of the question.[53] The Court did this by outlining three distinct disagreements between the parties at that time.[54] First, the parties disagreed on the merits of the case; that is, whether the Kaplans were personally liable for the outstanding loan.[55] Second, the parties "disagree[d] about whether they agreed to arbitrate the merits."[56] This second dispute is the "question of arbitrability."[57] Third, the parties "disagree[d] about *who should have the primary power to decide*" the question of arbitrability.[58] Having carefully defined the issue before it, the Court then proceeded to answer only the third disagreement between the parties.[59]

When determining who has the final word on a given dispute, the answer depends on the type of dispute at issue.[60] When the dispute arises out of an ambiguity as to what the parties agreed to in an arbitration agreement, any doubt concerning who should make the final determination should be decided in favor of the arbitrator.[61] This presumption is rooted in the "liberal federal policy favoring arbitration agreements[.]"[62] However, when the dispute concerns who should decide a "question of arbitrability," that presumption is reversed, and the court should presumably provide the final word on the issue.[63] It must be highlighted that not every jurisdictional challenge or "gateway question"

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49. *Id*.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 942.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 946.
58. *Id.* at 942 (emphasis added).
59. *Id.*
60. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).
61. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).
62. *Id*. at 24.
63. *First Options*, 514 U.S. at 943.

constitutes a "question of arbitrability."[64] Instead, a "question of arbitrability" relates to an issue that the "contracting parties would likely have expected a court to have decided . . . ."[65]

However, after defining the "question of arbitrability," the Court in *First Options* went further. Because the question of who should decide a "question of arbitrability" is based on the parties' presumed intent, and, because consent-based arbitration is a creature of contract, the Court stated that the parties can override the presumption favoring judicial review.[66] When determining the parties' intent in the agreement on the issue of who should ultimately decide a question of arbitrability, the court should apply the relevant state contract law, with one "important qualification."[67] To sufficiently override the presumption that the court should have the final say on the question of arbitrability, the court must find "clear and unmistakable evidence" that the parties intended the arbitrator to decide the question of arbitrability.[68] One way to conceptualize this delegation of authority frames the clear and unmistakable delegation of the question of arbitrability to the arbitrator, as effectively transforming the issue "into a disputed question of fact or law, of which the substantive merits the litigants submit to final determination by an arbitrator."[69]

Commentators have noted the profound impact of *First Options*.[70] On one hand, the ability to delegate any and all issues enhances arbitration's attractive characteristics of flexible, fast, and uninterrupted dispute resolution.[71] Because contracting parties may disapprove of judicial monopoly on the final resolution of questions of arbitrability, parties have the freedom to contract around that presumption with a clear and unmistakable showing of such an intent.[72] Additionally, once demonstrating such an intent, a party cannot retract from that agreement simply because the party no longer benefits from the delegation.[73] Allowing parties the freedom to organize arbitration as they please, and binding them to such agreements, further enhances the efficiency of the dispute resolution.[74] Undoubtedly, this freedom of contract helps some

64. *Howsam*, 537 U.S. at 83 (citing *First Options*, 514 U.S. at 942).
65. *Id*.
66. *First Options*, 514 U.S. at 943.
67. *Id.* at 944.
68. *Id.*
69. Park, *supra* note 27, at 144.
70. *See id.* at 157; *see also* Horton, *supra* note 7, at 1343.
71. Horton, *supra* note 7, at 1343.
72. *Id*.
73. Park, *supra* note 27, at 145.
74. Horton, *supra* note 7, at 1343.

parties more than others.[75] For the corporate drafters of adhesion contracts, the freedom reinforced in *First Options* provided an opportunity.[76] By placing clear and unmistakable intent to arbitrate arbitrability, corporations are increasingly able to "cut courts out of the loop" and proactively prevent the soon-to-be disgruntled adversary (like an employee or a customer) from impeding the most cost effective resolution of the dispute.[77]

Were *First Options* the only case impacting circuit court decisions on who should decide the availability of class arbitration under an agreement, there would likely be little disagreement amongst the circuits.[78] Indeed, every circuit that has reviewed the issue has determined that the incorporation of AAA rules satisfies *First Options*' "clear and unmistakable" standard in showing an intent to have the arbitrators decide the contested question of arbitrability.[79] However, in a separate line of cases, the Court has directly addressed issues concerning the availability of class arbitration.[80] With each review of such issues, the Supreme Court demonstrated an increasing level of skepticism towards class arbitration.[81]

B. The Supreme Court's Hostility Towards Class Arbitration

Unlike the more recent cases that have demonstrated a distrust of class arbitration, the first case on the issue to reach the Supreme Court was not met with open hostility.[82] In *Green Tree Financial Corp. v. Bazzle*, a financial services company and a number of its customers disagreed on whether the contracts in dispute forbade class arbitration.[83] In applying *First Options*, a plurality of the Court found that the

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75. *See id.*

76. *Id*.

77. *See id.*

78. *See* Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031, 1037 (2017).

79. McGee v. Armstrong, 941 F.3d 859, 866–67 (6th Cir. 2019); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013); Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005).

80. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

81. *See* Park, *supra* note 22, at 840–41.

82. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003) (plurality opinion).

83. *Id.* at 452.

availability of class arbitration was not a question of arbitrability presumably for the court to decide.[84] According to the plurality, the availability of class arbitration did not cause disagreement about "*whether they agreed to arbitrate a matter*," but rather "what *kind of arbitration proceeding* the parties agreed to."[85] Under the *Bazzle* plurality's finding that class arbitrability lacks the attributes of a question of arbitrability, the arbitrator presumably decides the issue when the parties' intent as to who should ultimately decide the issue is ambiguous.[86]

Perhaps an indicator of the hostility to come, the reasoning described above could only garner the votes of four justices, thus failing to become the opinion of the Court.[87] The next time the Court would address the issue, it would demonstrate its hostility towards class arbitration and the plurality opinion in *Bazzle* as well.[88]

1. Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

Seven years after the Court mustered its plurality opinion in *Bazzle*, it once again reviewed an arbitrator's decision on the availability of class arbitration.[89] The dispute arose after AnimalFeeds, a supplier of raw ingredients for animal feed, commenced an antitrust class arbitration against Stolt-Nielsen, a shipping company.[90] In proceedings before the arbitrators, AnimalFeeds argued that *Bazzle* required an explicit prohibition of class proceedings and that because the arbitration agreement at issue was "silent" on class arbitration, it was available.[91] Additionally, AnimalFeeds argued to the arbitrators that as a matter of public policy, class arbitration should be permitted.[92] Seemingly unaware just how pivotal the concession would be, counsel of AnimalFeeds explained that by stating the arbitration agreement was "silent" in regard to class arbitration, that did "not simply mean that the clause made no express reference to class arbitration."[93] Instead, counsel stated that silence on the issue of class arbitration meant "there's been *no*

84. *Id.*
85. *Id.* (emphasis added).
86. *Id.* at 453.
87. *Id.* at 447. Justice Breyer was joined by Justices Scalia, Souter, and Ginsburg, with Justice Stevens concurring in the judgment.
88. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 678–79 (2010).
89. *Id.* at 668–69.
90. *Id.* at 667.
91. *Id.* at 672.
92. *Id.*
93. *Id*. at 668–69.

agreement" on the issue.[94] With the arguments presented, the arbitrators ruled that the agreement did allow for class arbitration.[95]

In reviewing the arbitrators' decision, the Court highlighted that the opinion in *Bazzle* was a mere plurality.[96] However, due to AnimalFeeds' concession as to the meaning of "silent," the Court could dispose of the case without further addressing the plurality's reasoning.[97] In accepting AnimalFeeds' concession that "silent" meant "no agreement" on the issue of class availability, the Court concluded there was no contractual basis for finding the agreement allowed (or forbade) class arbitration.[98] Without a valid contractual basis to root their decision, the Court found the arbitrators had exceeded their authority in violation of § 10 of the FAA by only presenting public policy reasons for their ruling.[99] As opposed to common law courts, "the task of an arbitrator is to interpret and enforce a contract, not make public policy."[100]

In a frequently cited section of the opinion, the Court then explained why an agreement to arbitrate generally cannot be construed as "[a]n implicit agreement to authorize class-action arbitration . . . ."[101] The Court instructed that when deciding on the availability of class arbitration, the court or arbitrator must consider the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration."[102] The Court emphasized that "[a]n 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."[103] By highlighting the contrasting risks incurred by the defendants in class arbitration, the Court commenced its showing of skepticism that businesses would willingly consent to the high-stakes of class arbitration,[104] a skepticism that would soon manifest itself again.[105]

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94. *Id.* at 669 (emphasis added) (internal quotation and citation omitted).
95. *Id*.
96. *Id.* at 668.
97. *Id.* at 680.
98. *Id.* at 684.
99. *Id.* at 672.
100. *Id.*
101. *Id.* at 685.
102. *Id.* at 686.
103. *Id.*
104. *Id.* at 686–87.
105. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

2. AT&T Mobility LLC v. Concepcion

If *Stolt-Nielsen* left any doubt as to the Court's skepticism of class arbitration, Justice Scalia eviscerated it in his *Concepcion* opinion.[106] In a dispute between AT&T Mobility and a number of its customers, the adhesion contracts binding the parties stated that disputes were to be arbitrated but also explicitly prohibited class arbitration.[107] Applying the relevant state law, a federal district court found the waiver of class arbitration to be unconscionable and thus refused to compel the consumers to arbitrate.[108]

The Court reversed the lower court's decision, holding that the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was thus pre-empted by the FAA.[109] Central to the Court's finding that the state law interfered with the FAA was the Court's skepticism of class arbitration.[110] Justice Scalia stated that "[a]rbitration is poorly suited to the higher stakes of class litigation."[111] Drawing on *Stolt-Nielsen*, the Court reached its conclusion by addressing some of the "fundamental" differences between bilateral and class arbitration.[112] Chief among these noted differences was the "sacrifice" to the informal structure of arbitration and the significant risk incurred by defendants.[113] Under the *Concepcion* opinion, waivers to class arbitration clauses will be upheld under almost every circumstance.[114]

C. The Circuit Split

When an arbitration agreement fails to incorporate the criticized yet clear holding of *Concepcion* and does not expressly prohibit or allow class arbitration, the two lines of cases discussed above interact in a way that produces unexpected results.[115] This interaction has resulted in significant disagreement amongst the circuits as to who, the court or the

106. *Id.* at 350.
107. *Id.* at 336.
108. *Id.* at 338.
109. *Id.* at 352 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
110. *Id.* at 350.
111. *Id.*
112. *Id.* at 347–48 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010)).
113. *Id.* at 350.
114. *See* Horton, *supra* note 7, at 1325; *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (holding that an arbitration clause with a class action waiver was permissible even if individual arbitration was too costly for plaintiffs to use).
115. Horton, *supra* note 7, at 1326.

arbitrator, should decide whether an agreement permits class arbitration.[116] The first line of Supreme Court cases, starting with *First Options*, provides instruction on how to determine whether class availability is a "question of arbitrability."[117] If it is, *First Options* further states that the presumption that courts should decide the question may be overridden by a "clear and unmistakable" showing that the parties intended the question to go to the arbitrator.[118]

The second line of Supreme Court cases, starting with *Stolt-Nielsen* and forcefully followed by *Concepcion*, instructs courts to be increasingly skeptical of claims that parties consented to class arbitrations.[119] Undoubtably, the instruction of skepticism has been received.[120] Of the circuit courts that have addressed whether class availability is a "question of arbitrability" since *Stolt-Nielsen*, every circuit has turned away from the plurality in *Bazzle* and has found that class availability is a question of arbitrability presumably for the courts to decide.[121] It is at this point in the analysis, however, that agreement amongst the circuits ends.[122]

When addressing whether the parties have clearly and unmistakably shown an intent to arbitrate the availability of class arbitration, the circuits differ on whether courts should treat this issue like other questions of arbitrability or if the Court's skepticism of class arbitration necessitates a higher standard.[123] For instance, every circuit that has ruled on the question has held that an incorporation of the AAA rules alone satisfies the "clear and unmistakable" standard in showing an intent to have the arbitrators decide the question of arbitrability.[124] The basis for

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116. *Compare* Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746 (3d Cir. 2016), *with* JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019).

117. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 946–47 (1995).

118. *Id.* at 944.

119. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010).

120. *See JPay*, 904 F.3d at 923.

121. *See id.*; *see also* Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016); *Chesapeake Appalachia*, 809 F.3d at 754; Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594 (6th Cir. 2013). *But see* Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1253–55 (10th Cir. 2018) (Tymkovich, C.J., concurring).

122. *Compare Chesapeake Appalachia*, 809 F.3d at 746, *with JPay*, 904 F.3d at 923.

123. *Compare Chesapeake Appalachia*, 809 F.3d at 746, *with JPay*, 904 F.3d at 923.

124. McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013); Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005).

this rule is that the specific or relevant set of AAA rules expressly state the arbitrators can "rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[125] When courts apply this rule to the question of class availability, however, the outcome depends upon to which circuit the argument is made.[126] The Third,[127] Fourth,[128] Sixth,[129] and Eighth[130] Circuits note the differences between class and bilateral arbitration highlighted by the Court in *Stolt-Nielsen* and require an express reference to class arbitration to satisfy the "clear and unmistakable" standard. In contrast, the Second,[131] Tenth,[132] and Eleventh[133] Circuits have applied the general rule on delegating questions of arbitrability to the class availability issue without exception. This section will further review the decisions central to the split on whether the incorporation of AAA rules into an arbitration agreement alone demonstrates a "clear and unmistakable" intent to have the arbitrator decide on the availability of class arbitration.

1. Circuits Not Treating an Incorporation of AAA Rules as Satisfying the "Clear and Unmistakable" Standard for Delegating Class Arbitrability.

The first case to address the issue now splitting the circuits involved a familiar product for many readers. In 2007, attorney Craig Crockett, on behalf of his firm, subscribed to a service plan from the computer-assisted legal research company LexisNexis.[134] After years of service, Crockett claimed he was being charged additional fees without proper

125. *See, e.g.*, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 7(a) (AM. ARBITRATION ASS'N 2013), http://www.adr.org/Rules [http://web.archive.org/web/20201005133146/https://www.adr.org/Rules] [hereinafter COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES].

126. *Compare Chesapeake Appalachia*, 809 F.3d at 746, *with JPay*, 904 F.3d at 923.

127. *Chesapeake Appalachia*, 809 F.3d at 758.

128. Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 876–77 (4th Cir. 2016).

129. Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599–600 (6th Cir. 2013).

130. Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972–73 (8th Cir. 2017).

131. Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 395–96 (2d Cir. 2018).

132. Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1246–47 (10th Cir. 2018).

133. Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1232–33 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322, (2019); JPay, Inc. v. Kobel, 904 F.3d 923, 930 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 1545 (2019).

134. *Reed Elsevier*, 734 F.3d at 596.

notice.[135] Thus, Crockett filed two class arbitrations with the AAA, one on behalf of other firms allegedly wrongfully charged and another on behalf of clients, to whom the wrongful fees would have been passed.[136] LexisNexis responded by suing Crockett in federal court to obtain a declaratory judgment that the agreement did not allow class arbitration.[137] LexisNexis was successful at the district court level, resulting in an appeal to the Sixth Circuit.[138]

The Sixth Circuit began its analysis by first addressing whether the issue of class availability constitutes a question of arbitrability.[139] Citing *Stolt-Nielsen*'s articulation of the "fundamental" differences between class and bilateral arbitration, the Sixth Circuit concluded that the availability of class arbitration was a question of arbitrability presumptively for the courts.[140] The court then turned to the arbitration agreement to determine whether the parties showed a "clear and unmistakable" intent to have the arbitrator decide the issue.[141] The arbitration agreement stated:

> Except as provided below, any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of or in connection with this Order (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA").[142]

Although the court did not directly address whether the incorporation of AAA rules was sufficient to meet the "clear and unmistakable" standard, the court clearly reasoned that the arbitration agreement at issue failed to delegate the authority to rule on class arbitrability to the arbitrator.[143] The Sixth Circuit stated that "given the total absence of any reference to classwide arbitration," the arbitration agreement was

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 597.
140. *Id.* at 598–99.
141. *Id.* at 599.
142. *Id.*
143. *Id.*

ambiguous as to who the parties intended to decide that issue.[144] As explained above, under the presumptions laid out in *First Options*, when ambiguity exists concerning who should decide a question of arbitrability, the question is left to the court.[145] Thus, as the first circuit court to address how to apply the "clear and unmistakable" standard to the question of class availability, the Sixth Circuit found that only an express reference to class arbitration satisfies that standard.[146]

Three years after *Reed Elsevier*, the Fourth Circuit joined the Sixth Circuit's reasoning after conducting a nearly identical analysis.[147] The dispute in *Del Webb Communities, Inc. v. Carlson* arose between individual homebuyers and a home construction company after the homebuyers allegedly discovered construction defects in their homes.[148] The sales agreement between the parties included an arbitration agreement that incorporated the rules of the "American Arbitration Association (AAA), published for construction industry arbitrations."[149] A series of procedural maneuvering between state, federal, and arbitration tribunals finally resulted in the federal district court denying the construction company's petition to compel bilateral arbitration.[150] The construction company appealed the federal district court's finding that the issue of class arbitrability was delegated to the arbitrator to the Fourth Circuit.[151]

In examining who should decide on the availability of class arbitration under the agreement, the Fourth Circuit spent much of its analysis on whether the issue was a question of arbitrability.[152] Ultimately, the court followed the Sixth Circuit's analysis, finding that the *Stolt-Nielsen* decision dictates that class availability is a question of arbitrability.[153] Then, the court quickly stated that "the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says nothing at all about the subject."[154] Though rather brief in its analysis, the Fourth Circuit was clear that mere incorporation of AAA rules failed to override the presumption laid out in *First Options*, again requiring an

144. *Id.*
145. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).
146. *Reed Elsevier*, 734 F.3d at 599.
147. Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 876–77 (4th Cir. 2016).
148. *Id.* at 869.
149. *Id.*
150. *Id.* at 869–70.
151. *Id.* at 870.
152. *See id.* at 873–77.
153. *Id.* at 875.
154. *Id.* at 877.

explicit reference to class arbitration to meet the "clear and unmistakable" standard.[155]

The remaining two circuits that make up this side of the circuit split reached the same conclusions.[156] However, for the purposes of this Note, these two decisions differ in a significant way: the two opinions explicitly and substantially addressed the argument that a rule incorporation delegates the relevant authority to the arbitrator.[157]

The most in-depth analysis came in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, which concerned a royalty dispute arising out of oil and gas leases.[158] The lessor filed a demand for class arbitration on behalf of "itself and similarly situated lessors."[159] The oil and gas company successfully petitioned the federal district court to compel bilateral arbitration, resulting in the appeal to the Third Circuit Court of Appeals.[160] Relying on circuit precedent, the court quickly stated that the availability of class arbitration is a question of arbitrability, leaving only the issue of whether the agreement sufficiently showed a clear and unmistakable intent to have the arbitrator decide that issue.[161] The arbitration agreement differed from those in *Reed Elsevier* and *Del Webb* in that it did not reference a specific set of AAA rules, but rather stated:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.[162]

The lessors argued the agreement delegated the issue of class arbitrability to the arbitrator because, under the relevant state-contract law, the reference to the AAA rules was an incorporation of those rules into the agreement.[163] Thus, the applicable Commercial Rules and

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155. *Id.*

156. *See* Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 973 (8th Cir. 2017); *see also* Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 761 (3d Cir. 2016).

157. *Catamaran*, 864 F.3d at 973; *Chesapeake Appalachia*, 809 F.3d at 761.

158. *Chesapeake Appalachia*, 809 F.3d at 748.

159. *Id.* at 751.

160. *Id.* at 752–53.

161. *Id.* at 753.

162. *Id.* at 749.

163. *Id.* at 753–54.

Supplementary Rules for Class Arbitration, which authorized the arbitrator to make the determination at issue, were part of the agreement and were controlling on the dispute.[164] The Third Circuit noted, however, that under *First Options*, the application of state law in interpreting the agreement was subject to a qualification: courts must find "clear and unmistakable" evidence the parties intended to delegate the question of arbitrability.[165] Thus, the "clear and unmistakable" standard was not determined by state law but, rather, was found by the federal court applying federal law.[166]

When reviewing whether the general AAA rule incorporation demonstrated a "clear and unmistakable intent" to provide the arbitrator the authority to rule on the availability of class arbitration, the Third Circuit was not persuaded.[167] First, relying on circuit precedent, the court stated that satisfying the "clear and unmistakable" standard required "express contractual language unambiguously delegating the question of arbitrability to the arbitrator."[168] The court found that this requirement of express language alone resolved the dispute at hand, but still it continued.[169] The Third Circuit highlighted that the general reference to the AAA rules would "incorporate" over fifty sets of rules, including layers of supplementary rules.[170] The court reasoned that to conclude that a given provision of a certain set of rules controlled the issue at hand, one must first navigate "'a daisy-chain of cross-references'—going from the Leases themselves to 'the rules of the American Arbitration Association' to the Commercial Rules and, at last, to the Supplementary Rules."[171] Finally, the Third Circuit expressly reasoned what the Sixth and Fourth had implicitly applied: *Stolt-Nielsen*'s skepticism of class arbitration should not only apply to the issue of whether class availability is an issue of arbitrability but should also be considered when determining whether the parties clearly and unmistakably delegated that question of arbitrability to the arbitrator.[172] In applying *Stolt-Nielsen* in this manner, the Third Circuit stated that an agreement needs not state a

164. *Id.*
165. *Id.* at 761 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).
166. Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1252 n.1 (10th Cir. 2018) (Tymkovich, C.J., concurring).
167. *Chesapeake Appalachia*, 809 F.3d at 761.
168. *Id.* at 753 (citing Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335 (3d Cir. 2014)).
169. *Id.* at 758.
170. *Id.* at 762.
171. *Id.* at 761.
172. *Id.* at 759–60.

"special incantation," such as "the arbitrators shall decide the question of class arbitrability," but it d[oes need to expressly reference class arbitration to meet the "clear and unmistakable" standard.[173]

The last circuit to find the incorporation of AAA rules to be an insufficient showing of the parties' intent to delegate the question of class availability was the Eighth Circuit in *Catamaran Corp. v. Towncrest Pharmacy*.[174] The dispute arose out of a contractual relationship between four pharmacists and a pharmacy benefit manager.[175] After an alleged breach, the pharmacists filed a demand for class arbitration with the AAA.[176] The pharmacists argued that the arbitrator should decide the availability of class arbitration because the arbitration agreement stated "[a]ny controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the applicable rules of the AAA."[177] To bolster their argument, the pharmacists cited three cases of circuit precedent that stated an incorporation of AAA rules clearly and unmistakably demonstrates the parties' intent to delegate the question of arbitrability to the arbitrator.[178]

The Eighth Circuit concluded that the cited circuit precedent, which all concerned bilateral arbitration disputes, were inapplicable to the case at hand.[179] Due to the "fundamental" differences between class and bilateral arbitration outlined in *Stolt-Nielsen*, the court required "clear and unmistakable evidence of an agreement to arbitrate *the particular question of class arbitration*."[180] To meet this heightened standard, the Eighth Circuit followed the Third, Fourth and Sixth Circuits in requiring an explicit reference to class arbitration.[181]

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173. *See id.* at 758.
174. 864 F.3d 966 (8th Cir. 2017).
175. *Id.* at 969.
176. *See id.*
177. *Id.*
178. *Id.* at 973 (citing Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC, 756 F.3d 1098, 1100 (8th Cir. 2014); Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability."); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009)).
179. *Catamaran*, 864 F.3d at 973.
180. *Id.* (emphasis added).
181. *Id.* at 972–73.

2. Circuits Treating an Incorporation of AAA Rules as Satisfying the "Clear and Unmistakable" Standard for Delegating Class Arbitrability.

A year after the Eighth Circuit's ruling in *Catamaran*, the Eleventh Circuit issued an opinion that departed from the consensus amongst the appellate courts.[182] Thus, *Spirit Airlines* created a split on whether an incorporation of AAA rules adequately authorizes an arbitrator to rule on the availability of class arbitration.[183] The underlying dispute arose when four members of Spirit Airlines' "$9 Fare Club" filed a demand for class arbitration with the AAA, alleging Spirit had failed to fulfill several promises made to members.[184] In response, Spirit sought a declaration from the federal district court that the arbitration clause did not allow class arbitration.[185] When the dispute reached the Eleventh Circuit, the parties agreed that the issue of class availability constituted a question of arbitrability. Thus, the court turned straight to the agreement to assess for clear and unmistakable evidence that the parties wished to arbitrate the issue.[186] The agreement under review stated that "[*a*]*ny dispute* arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida *in accordance with the rules of the American Arbitration Association then in effect*."[187]

Despite the converse holdings, the arbitration claim in *Spirit Airlines* was similar to those in *Chesapeake Appalachia* and *Catamaran* in a number of significant ways. Like the agreements addressed by the Third and Eighth Circuits, the agreement in *Spirit Airlines* did not cite a specific set of rules but instead generally incorporated the AAA rules.[188] Furthermore, like *Catamaran*, the Eleventh Circuit had bilateral circuit precedent that stated such an incorporation satisfied the "clear and unmistakable" standard.[189] Yet, despite these similarities, the Eleventh Circuit's analysis dramatically differed from those that had previously addressed the issue.[190] To begin its analysis, the court emulated Justice Breyer's approach in *First Options* by explicitly identifying the three issues present when parties disagree over who should decide a question

182. Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233–34 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322 (2019).
183. *Id*.
184. *Id.* at 1231–32.
185. *Id.* at 1232.
186. *Id.* at 1233.
187. *Id.* at 1232 (emphasis added).
188. *Id.*
189. *Id.* at 1233–34.
190. *See id.* at 1234.

of arbitrability.[191] First, there were the merits of the disagreement—that is, whether Spirit broke its promises concerning the "$9 Fare Club."[192] Second, the parties disputed that they agreed to arbitrate the issue.[193] In the context of this case, the parties disputed whether they agreed to allow class arbitration.[194] Finally, the parties disagreed on who should decide the question of arbitrability, or here, whether the question of class availability is arbitrable.[195]

The Eleventh Circuit did not meticulously distinguish the three layers of dispute to assist in deciding the first or second questions—the first question was certainly for the arbitrator, and the second question was conceded by the parties.[196] Instead, the court made the distinction because it found its sister circuits conflating the distinct issues when answering who should decide a question of arbitrability.[197] Instead of finding the considerations in *Stolt-Nielsen* to be relevant to both the second and third questions in the analysis, the Eleventh Circuit "read *Stolt-Nielsen* to address the question of whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with."[198] By not considering the "fundamental" differences between bilateral and class arbitration highlighted by *Stolt-Nielsen* when deciding the "who should the question of arbitrability go to" question, there was no reason to distinguish the circuit precedent concerning bilateral arbitration.[199] Thus, the Eleventh Circuit applied the relevant precedent and found the incorporation of AAA rules to be "clear and unmistakable" evidence of the parties' intent to arbitrate the availability of class arbitration.[200]

One month after the Eleventh Circuit decided *Spirit Airlines*, it again addressed the issue at the center of the now-established circuit split.[201] Predictably, the court in *JPay, Inc. v. Kobel* followed *Spirit Airlines*, but it also provided noteworthy analysis.[202] The dispute involved JPay, a service that allows family and friends to purchase items on a prisoner's

191. *Id.* at 1232.
192. *Id.*
193. *Id.*
194. *Id.* at 1233.
195. *Id.* at 1232.
196. *Id.* at 1233 n.1.
197. *See id.* at 1234.
198. *Id.*
199. *Id.*
200. *Id.* at 1233–34.
201. *See* JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019).
202. *Id.* at 944.

behalf, and a number of JPay's customers.[203] First, the court demonstrated how strictly the Eleventh Circuit would consider *Stolt-Nielsen* for some issues, but found it wholly inapplicable for others.[204] Unlike the parties in *Spirit Airlines*, both parties in *JPay* did not concede that the availability of class arbitration under the arbitration agreement was a question of arbitrability.[205] Thus, as a matter of first impression for the Eleventh Circuit, the court in *JPay* had to make that determination first.[206] In concluding that the availability of class arbitration constituted a question of arbitrability, the court was heavily influenced by *Stolt-Nielsen*.[207] The court noted that because the differences between class and bilateral arbitration were "substantial," the determination on the availability of class arbitration was "a gateway question that determine[d] what type of proceeding w[ould] determine the parties' rights and obligations."[208] Thus, the Eleventh Circuit found the question of class availability under an arbitration agreement was one of arbitrability, presumptively for the courts to decide.[209]

When the court moved onto the next issue of whether the parties showed a sufficient intent to delegate the issue of arbitrability, it left behind the influence of *Stolt-Nielsen*.[210] Plainly stated, the court found "[t]he concerns raised in *Stolt-Nielsen* d[id] not apply, as a doctrinal matter, to the 'who decides' question of contractual intent to delegate."[211] Rather than relying on *Stolt-Nielsen* and policy arguments, the "who decides" question was, according to the court, "a matter of contract interpretation" resolved by a close textual analysis of the agreement.[212]

Additionally, the Eleventh Circuit addressed the related and repeated requirement stated by its sister circuits: the issue of class availability required a higher showing of intent to delegate it to the arbitrator—namely, an express reference in the agreement to class arbitration.[213] First, the court noted that the Supreme Court has discussed questions of arbitrability in their aggregate, as opposed to on an individual basis.[214]

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203. *Id.* at 927.
204. *See id.* at 937–39.
205. *Id.* at 926.
206. *Id.*
207. *Id.* at 935.
208. *Id.*
209. *Id.*
210. *Id.* at 942.
211. *Id.*
212. *Id.*
213. *See id.* at 942–43.
214. *Id.* at 943 (citing Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010) ("The delegation provision is an agreement to arbitrate threshold issues . . . [P]arties can agree to arbitrate 'gateway' questions of 'arbitrability.'")); First Options of Chicago Inc.

Second, the court found there was good reason for only requiring a general delegation of questions of arbitrability.[215] To do otherwise would require the courts to periodically distinguish which questions of arbitrability require a higher showing than others.[216] Such a system would interfere with contracting parties intending to delegate as much authority to the arbitrator as possible.[217] A failure to include every question of arbitrability-plus could allow unintended judicial interference, slowing down the efficient dispute resolution to which the parties agreed.[218] The court found that a preferable rule for both courts and drafting parties was to have a single standard for the showing of intent required for delegated questions of arbitrability.[219] When the court moved to interpreting the contract, it applied bilateral circuit precedent to conclude that the parties did delegate the question of class availability by incorporating the AAA's Arbitration Rules for the Resolution of Consumer Related Disputes as well as the Commercial Arbitration Rules.[220]

Since the Eleventh Circuit's creation of the circuit split concerning AAA rule incorporation and the delegation of deciding class arbitrability, the Second and Tenth Circuits have joined the Eleventh in its reasoning. In the Second Circuit's *Wells Fargo Advisors, LLC v. Sappington*,[221] a class of former employees of Wells Fargo Advisors, LLC sought unpaid overtime under the Fair Labor Standards Act ("FLSA") and Missouri wage and hour laws, filing their action in Financial Industry Regulatory Authority ("FINRA") and with the AAA.[222] However, the FINRA rejected the action, citing its rules prohibiting class arbitrations.[223] The agreement binding the employees stated "[i]f the FINRA does not accept the controversy, dispute or claim, or any portion thereof, then the non-accepted controversy, dispute or claim shall be submitted for arbitration before the [AAA] pursuant to its Securities Arbitration Rules, effective May 1, 1993."[224] Responding to the class arbitration action filed with the

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v. Kaplan, 514 U.S. 938, 944 (1995) ("Courts should not assume the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so.").

215. *JPay*, 904 F.3d at 943.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 944.
220. *Id.* at 927, 944.
221. 884 F.3d 392 (2d Cir. 2018).
222. *Id*. at 393–95.
223. *Id*. at 395.
224. *Id*. at 934.

AAA, Wells Fargo petitioned the District Court to compel bilateral arbitration.[225]

When the dispute reached the Second Circuit, the court—"without deciding that the question whether an arbitration clause authorize[d] class arbitration [was] a so-called 'question of arbitrability' presumptively for a court, rather than an arbitrator, to decide"—left only the issue of whether the agreement clearly and unmistakably delegated this presumed question of arbitrability.[226] Applying state contract law, the Second Circuit noted that the incorporation of the Securities Rules "'made them as much a part of the contract[s] as any other provision' therein."[227] Turning to the incorporated 1993 Securities Rules, the court highlighted that Rule 1 stated "[t]hese rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration . . . is received by the AAA."[228] The Second Circuit, applying Missouri contract law, construed Rule 1 so that the subsequently added Commercial Rules and the Supplementary Rules for Class Arbitrations were also incorporated into the arbitration agreement.[229]

Finding the arbitration agreement incorporated the AAA's Commercial Rules and Supplementary Rules for Class Arbitrations, the Second Circuit applied these sets of rules in the same fashion as the Eleventh Circuit in *Spirit Airlines* and *JPay*.[230] Applying the Commercial Rule's empowerment of the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim," the court concluded the agreement's incorporation of the Securities Rules clearly and unmistakably delegated the issue to the arbitrator.[231] Furthermore, the Second Circuit found the tangentially-incorporated Supplementary Rules for Class Arbitrations did the same.[232]

Finally, the Tenth Circuit was the last to join the circuit split, joining the Eleventh and Second Circuits through its opinion in *Dish Network*

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225. *Id.* at 935.
226. *Id.* at 934.
227. *Id.* at 397 (quoting City of Chesterfield v. Frederich Constr. Inc., 475 S.W.3d 708, 711 (Mo. Ct. App. 2015)).
228. *Id.* (Rule 1 of the 1993 Rules states that "[t]hese rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration . . . is received by the AAA.").
229. *Id.* at 396–97.
230. *See id*.
231. *Id.* at 397.
232. *Id.*

L.L.C. v. Ray.[233] *Dish Network L.L.C.* also concerned a former employee that commenced a class arbitration action.[234] The agreement binding the parties stated that "[a] single arbitrator engaged in the practice of law from the American Arbitration Association ('AAA') shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes ('Rules')."[235] Like the Second Circuit, the court presumed "without deciding that one of the[] gateway matters [was] whether an arbitration clause authorize[d] class arbitration."[236]

Following the Eleventh and Second Circuits before it, the Tenth Circuit turned to the incorporated AAA rules and circuit precedent to conclude the issue of determining class arbitrability was clearly and unmistakably delegated to the arbitrator.[237] Like the Commercial Rules, the National Rules for the Resolution of Employment Disputes states, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[238] Turning to precedent, the Tenth Circuit relied on *Belnap v. Iasis Healthcare* to determine that an incorporation of AAA rules clearly and unmistakably delegated the issue of class arbitrability to the arbitrator.[239] Notably, the arbitration rules incorporated into the arbitration agreement at dispute in *Belnap* were not produced by the AAA but rather by the Judicial Arbitration and Mediation Services, Inc., a competing arbitration and mediation service.[240] Thus, though an arbitration agreement may cite a specific set of rules, such as the AAA rules, the reasoning and holding from such a decision applied to subsequent cases incorporating different, yet analogous rules.[241]

Together the Second, Tenth, and Eleventh Circuits establish the rule that an agreement concerning a consumer or employee relationship that

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233. 900 F.3d 1240, 1245 (10th Cir. 2018).
234. *Id.* at 1241–42.
235. *Id.* at 1242.
236. *Id.* at 1245 (quoting Wells Fargo Advisors, LLC v. Sappington, 884 F.3d at 395).
237. *Id.* at 1246 (citing Belnap v. Iasis Healthcare, 844 F.3d 1272, 1280 (10th Cir. 2017)).
238. *Id.* at 1245 (citing EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R. 6 (a) (AM. ARBITRATION ASS'N 2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [http://web.archive.org/web/20201005132740/https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf]) (hereinafter EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES).
239. *Id.* (citing *Belnap*, 844 F.3d at 1280).
240. *Belnap*, 844 F.3d at 1282.
241. *Dish Network*, 900 F.3d at 1246 (citing *Belnap*, 844 F.3d at 1282).

incorporates AAA rules, whether to a specific set or generally, is clear and unmistakable evidence that the parties intended the arbitrator to decide on the availability of class arbitration under the agreement.[242]

III. ANALYSIS

A. Stolt-Nielsen *and the "Clear and Unmistakable" Standard*

Before analyzing whether an arbitration agreement incorporating AAA rules delegates the issue of class arbitrability to the arbitrator, the underlying disagreement amongst the circuits concerning the proper application of the "clear and unmistakable" standard must be settled.[243] Predictably, both sides of the circuit split accuse the other of misconstruing and misapplying the "clear and unmistakable" standard.[244] Less predictable, however, is that both sides may be correct in asserting the other has gotten it wrong.[245]

The first grouping of circuits, in finding the clear and unmistakable standard is not met, have required an express reference to class arbitration to sufficiently demonstrate an intent to delegate the issue.[246] This requirement results from consideration of *Stolt-Nielsen*'s emphasis on the stark difference between bilateral and class arbitration.[247] For instance, in *Chesapeake Appalachia*, the Third Circuit stated it looked to *Stolt-Nielsen* "for guidance in answering the 'who decides' question."[248] In *Catamaran*, the Eighth Circuit stated its reliance on *Stolt-Nielsen* when determining whether an arbitration agreement "clearly and unmistakably" delegated the issue of class arbitrability in even clearer terms.[249] The Eighth Circuit found that *because of* the increased stakes inherent in class arbitration that were emphasized in *Stolt-Nielsen*, delegating the question of class arbitrability required a higher showing of

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242. *See* Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233–34 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322, (2019); *see also* JPay, Inc. v. Kobel, 904 F.3d 923, 944 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019); Wells Fargo Advisors, LLC v. Sappington, 884 F.3d, 392, 398 (2d Cir. 2018); *Dish Network*, 900 F.3d at 1247–48.

243. *Compare JPay*, 904 F.3d at 944 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019), *with* Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 758 (3d Cir. 2016).

244. *Compare JPay*, 904 F.3d at 944, *with Chesapeake Appalachia*, 809 F.3d at 758.

245. *Compare JPay*, 904 F.3d at 944, *with Chesapeake Appalachia*, 809 F.3d at 758.

246. *See* Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 677 (4th Cir. 2016); Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

247. *See Chesapeake Appalachia*, 809 F.3d at 759–60.

248. *Id.*

249. *See* Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 973 (8th Cir. 2017).

intent than other questions of arbitrability.[250] That is, because the defendant may be exposed to additional risk, a separate, stricter "clear and unmistakable" standard must be applied.[251] Thus, even if a circuit had precedent finding that an incorporation of AAA rules in a bilateral arbitration agreement satisfied the "clear and unmistakable" standard, such precedent would be inapplicable because that previously empaneled court did not have to consider the higher stakes of class arbitration.[252] Under this requirement of a higher showing of a "clear and unmistakable" intent, each court in this set of circuits concluded the arbitration agreement at issue failed to meet that standard by omitting any reference to class arbitration.[253]

Benefiting from reviewing the issue after its sister circuits, the Eleventh Circuit addressed this application of a *Stolt-Nielsen* influenced "clear and unmistakable" standard directly.[254] Unlike the previous circuits, the Eleventh Circuit placed a fixed limit on the influence afforded to *Stolt-Nielsen*.[255] When determining whether class arbitrability was a question of arbitrability, the policy concerns of *Stolt-Nielsen* regarding the increased stakes of class arbitration appropriately came into consideration.[256] However, once that determination was made, the issue of who decided that question of arbitrability was one of contract interpretation.[257] According to the Eleventh Circuit, determining the manifestations of the parties' intent did "not implicate the fact that class arbitration [was] less efficient, less confidential, and higher stakes."[258] Of particular note, the court did not conclude the concerns expressed in *Stolt-Nielsen* were irrelevant when determining whether an agreement delegated the issue of class arbitrability, but that such concerns were already accounted for in the high "clear and unmistakable" standard.[259] Finally, the Eleventh Circuit concluded that the "clear and unmistakable" standard was met by "conducting a close reading" of the arbitration agreement.[260]

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250. *Id.*
251. *Id.*
252. *Id.*
253. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).
254. JPay, Inc. v. Kobel, 904 F.3d 923, 942 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019).
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 943.
260. *Id.* at 942.

The Eleventh Circuit's reasoning is well grounded. *First Options* and its progeny have never suggested the "clear and unmistakable" standard is on a sliding scale.[261] But to hold that delegating class arbitrability requires a higher showing of intent solely because of the concerns found in *Stolt-Nielsen* is to suggest that the "unmistakable" intent found in an otherwise applicable bilateral precedent is not "unmistakable" *enough*.[262] Deploying different definitions of "unmistakable" depending on the question of arbitrability at bar requires a needless exercise in doublethink. Indeed, suggesting there are degrees of "unmistakable" evidence runs counter to the very meaning of the standard. Instead, as stated by the Eleventh Circuit, the "clear and unmistakable" intent is determined by "conducting a close reading" of the arbitration agreement.[263]

However, applying a uniform "clear and unmistakable" standard to all questions of arbitrability does not settle this circuit split but, rather, simply begs the question. Concluding that bilateral precedent is not inherently inapplicable does not mean it must be applied. It is at this juncture in the analysis that the Eleventh Circuit, and those that follow it, depart from its well-grounded reasoning.[264] The Eleventh Circuit makes this departure by arriving at the untenable conclusion that an arbitration agreement delegates all questions of arbitrability as a "unitary category."[265] Instead, the particular terms of an arbitration agreement can delegate some questions of arbitrability but not others.[266] This balkanization of questions of arbitrability is not because some questions concern higher stakes, but because questions of arbitrability encompass a broad set of issues.[267] The specific terms of the agreement must "clearly and unmistakably" delegate the *particular* question of arbitrability involved.[268] In the present set of agreements, each makes a reference to the AAA rules.[269] Though nearly every circuit possesses precedent asserting that an incorporation of AAA rules can function as a "clear and unmistakable" intent to delegate a question of arbitrability, such an

261. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
262. *See* Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 973 (8th Cir. 2017).
263. *JPay*, 904 F.3d at 942.
264. *See id.* at 943.
265. *See id.*
266. *See* Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 761 (3d Cir. 2016).
267. *See* Park, *supra* note 27, at 144.
268. *Chesapeake Appalachia*, 809 F.3d at 761.
269. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

incorporation does not function as an incantation of delegation.[270] Instead, it must be determined whether the specific reference to AAA rules functions as clear and unmistakable evidence of an intent to delegate the specific question of class arbitrability.[271]

In the cases compiled for this Note, the respective arbitration agreements can be organized into two groups, with each requiring a specific textual analysis to determine who decides the issue of class availability. The first grouping includes the arbitration agreements that made a reference to a specific set of AAA rules.[272] Each set of specifically referenced AAA rules contains a jurisdictional rule that has served as the basis for many delegations of questions of arbitrability.[273] Accordingly, the task is to determine whether the respective jurisdictional rule of the referenced set of AAA rules can be applied to the question of class arbitrability. The second grouping of agreements contains those that referenced the AAA rules but did not reference a specific set of rules.[274] Here, the issue is whether a general reference to AAA rules incorporates all relevant AAA rules, including the Supplementary Rules for Class Arbitration, into the agreement.[275]

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270. *See* McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013); Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005).

271. *See* Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 973 (8th Cir. 2017).

272. *See, e.g.*, Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1242 (10th Cir. 2018) (incorporating the "AAA's National Rules for the Resolution of Employment Disputes"); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 869 (4th Cir. 2016) (incorporating "rules of the American Arbitration Association (AAA), published for construction industry arbitrations"); Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013) (incorporating the "Commercial Rules and supervision of the American Arbitration Association").

273. *See, e.g.*, *Terminix*, 432 F.3d at 1332.

274. *See, e.g.*, Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1232 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322, (2019); Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 749 (3d Cir. 2016).

275. *See generally* SUPPLEMENTARY RULES FOR CLASS ARBITRATION (AM. ARBITRATION ASS'N 2003), https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf [http://web.archive.org/web/20201002022546/https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf] [hereinafter SUPPLEMENTARY RULES].

B. Whether the AAA Jurisdictional Rule Applies to Questions of Class Arbitrability

The AAA has numerous sets of rules that govern specific types of disputes.[276] Drafters of arbitration agreements can often foresee the type of dispute that may arise and, therefore, reference the relevant set of rules as controlling.[277] Many of these sets of rules include a standard rule on jurisdiction, which uniformly states, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[278] Because many questions of arbitrability can be appropriately defined as issues concerning the "existence, scope, or validity of the arbitration agreement,"[279] there is a host of precedent from nearly every circuit that concludes a reference to a specific set of rules that incorporates the AAA jurisdictional rule constitutes "clear and unmistakable" evidence to have the arbitrator decide that issue.[280] However, because this abundance of evidence still fails to solidify such an incorporation of the jurisdictional rule as an incantation, it must be determined whether the issue of class

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276. *See, e.g.*, CONSUMER ARBITRATION RULES (AM. ARBITRATION ASS'N 2014), https://www.adr.org/sites/default/files/Consumer_Rules_Web_1.pdf [http://web.archive.org/web/20201005132524/https://www.adr.org/sites/default/files/Consumer_Rules_Web_1.pdf] [hereinafter CONSUMER ARBITRATION RULES]; EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 238; AMERICAN ARBITRATION ASSOCIATION SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DISPUTES (AM. ARBITRATION ASS'N 2009), https://www.adr.org/sites/default/files/American%20Arbitration%20Association%20Supplementary%20Procedures%20for%20the%20Arbitration%20of%20Olympic%20Sport%20Disputes.pdf[http://web.archive.org/web/20201005132625/https://www.adr.org/sites/default/files/American%20Arbitration%20Association%20Supplementary%20Procedures%20for%20the%20Arbitration%20of%20Olympic%20Sport%20Disputes.pdf] [hereinafter AMERICAN ARBITRATION SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DISPUTES].

277. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

278. *See, e.g.*, CONSUMER ARBITRATION RULES, *supra* note 276, at R. 14; EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 238, at R. 6; COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 125, at R. 7.

279. Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 761, 765 (5th Cir. 2012).

280. McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013); Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006) , *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005).

arbitrability is a jurisdictional issue concerning the "existence, scope, or validity of the arbitration agreement."[281]

The issue at hand is not, of course, a challenge to the existence or validity of the arbitration agreement[282]—every party in the disputes previously reviewed recognized the existence of the arbitration agreement.[283] Instead, the parties disagreed over the *type* of arbitration that inevitably would occur.[284] Nor can the question of class arbitrability be classified as an issue of validity. The Eleventh Circuit opinion in *Terminix International Co. v. Palmer Ranch LP* illustrates a challenge to an arbitration agreement's validity, while also demonstrating why bilateral precedent cannot *automatically* serve as the precedential basis for finding that AAA rule incorporation delegates the question of class arbitrability.[285] In *Terminix*, the claimant argued that the arbitration agreement between the parties was invalid because state law required a severability clause when an agreement contains remedial restrictions, which was allegedly absent from the agreement binding the parties.[286] As a challenge going to the validity of the arbitration agreement itself, the court found the issue to be one of arbitrability.[287] However, under the incorporated jurisdictional rule of the Commercial Arbitration Rules and Mediation Procedures, the arbitrator was provided the authority to rule on the agreement's validity.[288] The Eleventh Circuit, in line with every circuit that has ruled on the issue, found such an incorporation to clearly and unmistakably demonstrate an intent to delegate the issue to the arbitrator.[289]

In contrast, no party in a dispute concerning the availability of class arbitration challenges the validity of the agreement.[290] Again, the parties presume the binding arbitration will occur, but they disagree over the

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281. *See Petrofac*, 687 F.3d at 675; *see also* COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 125, at R. 7.

282. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). In *First Options*, individual defendants claimed no binding arbitration existed because they were not signatories to the contract containing the arbitration agreement. *Id. See also, e.g.*, *Terminix* 432 F.3d at 1332. In *Terminix*, the plaintiff challenged the validity of the arbitration clause due to alleged violations of state contract law. *Id.*

283. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

284. *See, e.g.*, *id.*

285. *Terminix*, 432 F.3d at 1332.

286. *Id.* at 1333.

287. *Id.* at 1331.

288. *Id.* at 1332.

289. *Id.*

290. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

type of proceeding that will occur.[291] Thus, the inapplicability of *Terminix* demonstrates why the Eleventh Circuit's contention of a "unitary category" of delegable questions of arbitrability cannot stand.[292] The relevant language of the specific AAA rule does not empower the arbitrator to rule on any and all questions of arbitrability.[293] Rather, the "clear and unmistakable" standard is met by identifying specific language of an incorporated rule that empowers the arbitrator to determine a question of arbitrability.[294]

The final jurisdictional questions afforded to arbitrators by the jurisdictional rule are those of scope. Upon first glance, identifying class arbitrability as an issue concerning the scope of the arbitration agreement has some appeal.[295] Indeed, one notable commentator has stated that the arbitrator's "procedural powers constitute a fertile ground for jurisdictional conflict."[296] However, references to scope by courts and commentators in the context of questions of arbitrability typically do not concern the procedural powers of the arbitrator.[297] Instead, "scope" concerns the arbitral jurisdiction over the substantive claims covered by the arbitration agreement.[298] In this regard, the Sixth Circuit's recent decision in *McGee v. Armstrong* proves illustrative.[299] *McGee* concerned a terminated employee that brought a host of claims against his former employer.[300] In compelling arbitration, the district court found that all but two of the plaintiff's claims possibly fell within the scope of the arbitration agreement.[301] Pursuant to the incorporated AAA jurisdictional rule, the court delegated the determination of the scope of the arbitration agreement to the arbitrator.[302] On appeal, the plaintiff challenged whether the scope of the arbitration agreement extended to the plaintiff's § 1983 claim.[303] However, recognizing that the determination of the scope of the

291. *See id.*
292. JPay, Inc. v. Kobel, 904 F.3d 923, 942–43 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019).
293. *See, e.g.*, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 238.
294. *See* Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005).
295. *See* Park, *supra* note 27, at 151.
296. *Id.*
297. *See* Bermann, *supra* note 18, at 38; *see also* McGee v. Armstrong, 941 F.3d 859, 865 (6th Cir. 2019).
298. Bermann, *supra* note 18, at 38 (defining "scope" as "whether a given dispute falls within the scope of an arbitration clause").
299. 941 F.3d 859, 865 (6th Cir. 2019).
300. *Id.* at 862–65.
301. *Id.* at 864–65.
302. *Id.* at 865.
303. *Id.*

agreement was delegated to the arbitrator, the Sixth Circuit affirmed the district court's order to compel arbitration.[304]

As a procedural dispute concerning the type of arbitration that will occur, the issue of class arbitrability fails to fall under the typical definition of "scope" of the arbitration agreement.[305] Accordingly, the incorporation of the AAA jurisdictional rule cannot be construed as "clear and unmistakable" evidence of an intent to delegate the issue of class arbitrability to the arbitrator.[306]

Undoubtedly, this may appear to be a strange outcome to some. As eloquently stated in Chief Judge Tymkovich's concurring opinion in *Dish Network*, procedural questions arising out of the dispute are generally not found to be questions of arbitrability at all and thus are presumably settled by the arbitrator in a final manner.[307] Thus, it seems strange that the very quality generally sending the issue of class arbitrability to the arbitrator at the "question of arbitrability" stage would then preclude the arbitrator from deciding the same issue in a final manner under the "clear and unmistakable" analysis. But this seemingly paradoxical outcome is explained by the circuit court's recent emphasis on treating these issues as "two distinct steps: (1) determining whether the question is one of arbitrability presumptively for a court to decide and, if so, (2) determining, on a case-by-case basis, whether there is clear and unmistakable evidence of the parties' intent to let an arbitrator resolve that question."[308] In each decision reviewed above, the court either explicitly found the issue of class arbitrability to be a question of arbitrability[309] or presumed without deciding such to be the case.[310] Once the second distinct issue concerning the clear and unmistakable standard is within the purview of the court, it is beside the point that the

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304. *Id.* at 866.

305. *See, e.g.*, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 238.

306. *See, e.g.*, Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 677 (4th Cir. 2016).

307. Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1254 (10th Cir. 2018) (Tymkovich, C.J., concurring) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002)).

308. Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 398 (2d Cir. 2018).

309. JPay, Inc. v. Kobel, 904 F.3d 923, 927–28 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1545 (2019); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972 (8th Cir. 2017); Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 758 (3d Cir. 2016) (citing Opalinski v. Robert Half Int'l Inc., 761 F.3d 326 (3d Cir.2014)); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 874 (4th Cir. 2016); Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013).

310. *Wells Fargo Advisors*, 884 F.3d at 393; *Dish Network*, 900 F.3d at 1245; Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233 n.1 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322, (2019).

procedural nature of class arbitrability would generally be dispositive in its exclusion from the class of questions of arbitrability. Instead, only a clear and unmistakable showing that the parties intended to delegate the question of class arbitrability will allow the arbitrator to have the final say on the matter.[311] In failing to show that the issue of class arbitrability is clearly and unmistakably delegated through an incorporation of the AAA's jurisdictional rule, such an incorporation does not override the presumption that courts have the final say on the issue of class arbitrability.[312]

C. Whether General Reference to AAA Rules Incorporates All AAA Rules

While the jurisdictional rule found in specific sets of AAA rules cannot be applied to the question of class arbitrability, that does not mean they cannot settle this dispute. Following the Supreme Court's class-friendly decision in *Bazzle*, the AAA declared it would oversee class arbitrations.[313] To provide structure for the more onerous and complex arbitration that would follow, AAA rolled out the Supplementary Rules for Class Arbitration.[314] The first rule of the Supplementary Rules broadly states that they apply to "any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and they shall supplement any other applicable AAA rules."[315] Additionally—and of particular relevance for this Note—Rule 3 of the Supplementary Rules states, "[u]pon 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 . . . ."[316] Thus, Rule 3 clearly and unmistakably delegates the determination of class arbitrability to the arbitrator.[317] While the jurisdictional rule found in the various sets of AAA rules expressly

311. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945–46 (1995).

312. Of course, the courts that have left open the issue of whether class arbitrability constitutes a question of arbitrability may adopt Chief Judge Tymkovich's compelling reasoning, rendering the "clear and unmistakable" analysis irrelevant and leaving the question of class arbitrability presumably for the arbitrator to decide in a final manner. *See Dish Network*, 900 F.3d at 1254 (Tymkovich, C.J., concurring).

313. Horton, *supra* note 7, at 1348–49.

314. *See* SUPPLEMENTARY RULES FOR CLASS ARBITRATION, *supra* note 275.

315. *Id.* R. 1.

316. *Id.* R. 3.

317. *See id.*

provides the arbitrator with the power to determine the existence, scope, and validity of the arbitration agreement, Rule 3 of the Supplementary Rules expressly provides the authority to decide the issue of class arbitrability.[318] Accordingly, courts would follow the established precedent concerning the delegation of issues of existence, scope, or validity and find an incorporation of the Supplementary Rules clearly and unmistakably delegates the question of class arbitrability to the arbitrator.[319]

However, none of the arbitration agreements reviewed above make such a reference to the Supplementary Rules.[320] Lacking an express incorporation of the Supplementary Rules, the question then becomes whether the agreement should be construed so to implicitly incorporate the determinative Supplementary Rules. For some, there is a compelling interest to construe the agreement against the drafter.[321] The drafters of many arbitration agreements are nearly invariably sophisticated corporate parties drafting adhesion contracts.[322] It is, of course, not an unreasonable proposition to suggest that if such corporate drafters—who possess exclusive control of the terms of the agreement—prefer to preclude class availability, they should simply say so.[323] Furthermore, regular application of state contract law may produce such a result.[324]

As noted above, in *Wells Fargo Advisors*, the arbitration agreement in an employment contract incorporated the now-inactive Securities Arbitration Rules.[325] Applying state contract law, the incorporation of the Securities Rules "made them as much a part of the contract[s] as any other provision therein."[326] From there, the court reasoned that because Rule 1 of the incorporated Securities Rules stated that any amendments to the rules would also be incorporated, the Supplementary Rules for

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318. *Compare id. with* COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 125, at R. 7.

319. *See* Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 758 (3d Cir. 2016).

320. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 596 (6th Cir. 2013).

321. *See, e.g.*, Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 397 (2d Cir. 2018) (holding that Wells Fargo could have avoided a finding of delegation by expressly stating the class availability is not arbitrable).

322. *See, e.g.*, Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322, (2019); *Wells Fargo Advisors*, 884 F.3d at 392; Dish Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018).

323. *See Wells Fargo Advisors*, 884 F.3d at 397.

324. *Id.*

325. *Id.*

326. *Id.* (quoting City of Chesterfield v. Frederich Constr. Inc., 475 S.W.3d 708, 711 (Mo. Ct. App. 2015) (internal quotations omitted)).

Class Arbitrations was also incorporated into the agreement.[327] The court concluded that if Wells Fargo intended a different result, it should have expressly excluded the incorporation of rule amendments, or the Supplementary Rules specifically.[328]

Though such a strict interpretation of the arbitration agreement is tempting, it is a stark departure from the "clear and unmistakable" standard that must be applied.[329] First, the Second Circuit erred in applying state contract law when determining whether the clear and unmistakable standard was satisfied.[330] Though federal courts are to apply the relevant state contract law when interpreting an arbitration agreement, this is subject to an "important qualification."[331] This "important qualification" to application of state law dictates that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[332] Thus, as a "creature of Supreme Court precedent," the "clear and unmistakable" standard is determined by federal law.[333] The question is not whether state law clearly and unmistakably delegates the question of arbitrability, but whether the arbitration agreement shows a clear and unmistakable intent, as determined by federal law, to delegate the question of arbitrability.[334]

A proper application of the "clear and unmistakable" standard dictates that neither a general reference to the AAA rules, nor a reference to a different set of rules, functions as an incorporation of the Supplementary Rules for Class Arbitrations.[335] The AAA currently deploys over fifty sets of active arbitration rules, while dozens more lay archived.[336] Indeed, construing a general reference to the AAA rules as clear and unmistakable intent to incorporate any and all potentially

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327. *Id.* (Rule 1 of the 1993 Rules states that "[t]hese rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration . . . is received by the AAA.").

328. *Id.* ("Wells Fargo could have insisted that the 1993 Rules 'except for Rule 1' apply to its employment contracts, including the contracts at issue here, but it did not.").

329. Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 763 (3d Cir. 2016).

330. *See Wells Fargo Advisors*, 884 F.3d at 397 (quoting *City of Chesterfield*, 475 S.W.3d at 711).

331. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

332. *Id.* (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643 (1986)).

333. Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1252 n.1 (10th Cir. 2018) (Tymkovich, C.J., concurring).

334. *Chesapeake Appalachia*, 809 F.3d at 761.

335. *See id.* at 754.

336. *See id.* at 749.

applicable rules invokes the "daisy-chain of cross-references" that made the Third Circuit recoil.[337]

While some may argue that the corporate drafter intended to incorporate countless potentially applicable sets of rules through a single general reference to the AAA rules, such an argument provides but one reasonable interpretation of the agreement.[338] In addition to the countless other reasonable interpretations, the omission of the Supplementary Rules may be construed as an intent to not incorporate such rules, or, in the alternative, it may demonstrate a complete ignorance that such Supplementary Rules exist at all.[339] While it may be tempting to require sophisticated corporate-drafters to create fine-tuned and wholly unambiguous contracts, such an application completely flips the "clear and unmistakable" standard on its head.[340] With no basis in law, such an application must be rejected.[341] Accordingly, because a failure to expressly incorporate the Supplementary Rules leaves ambiguity regarding the parties' intent, it cannot serve as the basis for satisfying the "clear and unmistakable" standard when omitted.[342]

IV. CONCLUSION

The determination of who decides class arbitrability is of great consequence. Yet, when an arbitration agreement makes a reference to the rules promulgated by the AAA, the outcome of the "who decides" question is determined by where the litigation takes place. In contrast to the circuit-based outcomes, a proper determination of this issue requires a proper application of the interacting Supreme Court precedents found in *First Options* and *Stolt-Nielsen*.

Determining whether AAA rule incorporation delegates the question of arbitrability requires an application of the uniform "clear and unmistakable" standard, unheightened by the Court's critiques of class arbitration in *Stolt-Nielsen*. However, the uniform application of the "clear and unmistakable" standard does not result in automatic application of bilateral circuit precedent. Instead, the specific terms of the agreement must "clearly and unmistakably" delegate the particular

337. *Id.* at 761.
338. *Id.* at 754.
339. *Id.*
340. *See id.* at 763. In *Chesapeake Appalachia*, the court construed the agreement in favor of the corporate drafter because only "clear and unmistakable" evidence of intent could override the presumption that the court would decide the question of arbitrability. *Id.*
341. *Id.*
342. *Id.*

question of class arbitrability. Accordingly, neither an arbitration agreement that makes a general reference to the AAA rules nor the incorporation of the common jurisdictional rule satisfies the clear and unmistakable standard. Instead, a proper application of both Supreme Court and relevant circuit precedent dictates that an explicit incorporation of the Supplementary Rules, or some other explicit reference to the delegation of deciding class arbitrability is necessary to satisfy the "clear and unmistakable" standard.

Though litigants seeking refuge in federal courts for the determination of class arbitrability may advocate for the adoption of this Note's reasoning, such class arbitration defendants must be mindful that an increasing number of circuit courts disagree. While a proper application of *First Options* does not require prudence and clarity on behalf of the drafting party, some courts have required just that. Thus, drafters of arbitration agreements should strive for unambiguous manifestations of their intent on the issue of who determines class arbitrability. Still, when ambiguity inevitably arises, all courts should strive for the even-handed application of the precedent that binds them.