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## Mind the Gap

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# Mind the Gap

Charles H. Brower II

## INTRODUCTION

Klaus Peter Berger describes contractual gap-filling by arbitrators as an important and controversial issue that has confounded observers of international commercial arbitration for over a generation.<sup>1</sup> Consistent with Berger's assessment, the issue of arbitral gap-filling reached the United States Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,<sup>2</sup> a 2010 decision that leading observers have described as incorporating "startling,"<sup>3</sup> "troubling,"<sup>4</sup> "mystifying,"<sup>5</sup> and ultimately "crabbed"<sup>6</sup> views about the powers of arbitrators to fill gaps in arbitration agreements and contracts.

Faced with such alarming pronouncements, one may seek guidance from the famous admonition to "Mind the Gap."<sup>7</sup>

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\* Professor, Wayne State Law School; Of Counsel, Miller Canfield; Vice Chair, Institute for Transnational Arbitration; Fellow, American Bar Foundation; Elected Member, American Law Institute; Winner of the Smit-Lowenfeld Prize (2013).

1. See Klaus Peter Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*, 17 ARB. INT'L L. 1 (2001) ("The search for the power of international arbitrators to fill gaps and revise contracts is of extreme practical relevance. It also belongs to the most controversial issues of arbitral doctrine of the past three decades."); see also JULIAN D M LEW QC ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 652 (2003) (describing gap-filling and contractual adaptation as issues that have "been of paramount importance and widely debated" in the field of international arbitration).

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

3. Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 473 (2011).

4. *Id.* at 454.

5. *Id.* at 469.

6. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1110 (2011).

7. The phrase "Mind the Gap" represents an iconic message painted in the London underground as a means of warning passengers to take care around a gap between the platform and the subway cars. See Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153, 153 (2012); see also Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2470 (1989) ("The traveler on the London subway, the 'Tube' or 'Underground,' hears a warning whenever a train pulls into a stop: 'MIND THE GAP,' intones a forbidding, mechanical voice. The warning causes the traveler to

Embedded in these words lie three principles critical to navigating the doctrinal terrain of gap-filling by arbitrators.<sup>8</sup> First, gaps have become a more common feature of modern contracts that establish complex, long-term arrangements among parties who inhabit increasingly global and unstable fields of endeavor.<sup>9</sup> Second, when encountering those gaps, courts and arbitrators should strive to protect the legal interests of contracting parties. And, third, that undertaking requires considerable attention to nuance.

Seeking to elaborate the points just made, Part I clarifies the scope of inquiry by defining what constitutes a genuine “gap” in the context of contracts and arbitration agreements. It also explains the common reasons for the presence of such gaps. Building on those observations, Part II surveys the evolution of doctrine related to gap-filling in the context of substantive laws governing contracts in the United States, and laws governing arbitral procedure worldwide. In the process, it explores two different visions of the parties’ interest in freedom of contract. Subsequently, Part III uses *Stolt-Nielsen* and criticisms of that decision to illustrate the need for attentiveness in specifying the gap-filling powers of arbitrators. In addition to traversing the Supreme Court’s clumsy framing of certain points, Part III asserts that critics themselves have overlooked important context and passages of the Court’s opinion, both of which suggest a more generous (or at least less “crabbed”) view of arbitrators’ powers to fill gaps in contracts and arbitration agreements. Seeking to keep pace with assessments of the Supreme Court’s evolving jurisprudence, Part IV addresses contentions that the 2013 decision in *Oxford Health Plans, LLC v. Sutter* circumvents the Court’s jurisprudence on *gap-filling* by vesting arbitrators with virtually unrestricted powers to pluck fundamental terms for arbitration agreements out of thin air under the rubric of contractual *interpretation*.

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notice that the platform and threshold of the train car are not a continuous surface, that a narrow but potentially perilous gap separates the two.”).

8. See Harrington, *supra* note 7, at 153 (“This simple warning is applicable in many contexts.”).

9. See *infra* notes 36, 43–44 and accompanying text.

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## I. GAPS

Any discussion regarding the gap-filling powers of arbitrators must begin by identifying (1) the situations involving genuine gaps, and (2) the common reasons for the presence of such gaps in commercial agreements. Starting with the definition of genuine gaps, a recent paper by Alan Rau illustrates the potential for confusion, and the extent to which even this basic question remains a source of controversy. In his paper, Rau leads with the theoretical possibilities that gaps could mean everything (in the sense that all contracts are incompletely specified) or nothing at all (in the sense that the latticework of contract law provides an answer to all questions that arise among the parties).<sup>10</sup>

Ultimately, Rau settles on the proposition that gaps represent nothing in particular. To the contrary, he asserts that gap-filling lies on the same continuum as contractual interpretation;<sup>11</sup> that

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10. Alan Scott Rau, “*Gap Filling*” by Arbitrators, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES, 2014 (2015).

11. *See id.* at 39 (referring to the “barely perceptible” step between interpretation and gap-filling); *see also* Rau, *supra* note 3, at 463.

interpretation and gap-filling both aim to specify the obligations of the parties;<sup>12</sup> that they differ only in degree;<sup>13</sup> and that any doctrinal separation between the two lacks coherence, stability, and utility.<sup>14</sup> Viewed from this set of assumptions, Rau implies that Supreme Court's recent treatment of interpretation and gap-filling in *Green Tree Financial Corporation v. Bazzle*,<sup>15</sup> *Stolt-Nielsen*,<sup>16</sup> and *Oxford Health Plans*<sup>17</sup> should have reflected the linear exposition of a single theme.<sup>18</sup> Instead, the Court broadly defined the *interpretive* powers of arbitral tribunals in *Bazzle*, recognized the existence of strict limits on their *gap-filling* powers in *Stolt-Nielsen*, and returned to embrace an almost limitless *interpretive* power in *Oxford Health Plans*, a sequence that Rau describes as encompassing a “dizzying series of twists and turns.”<sup>19</sup>

On the one hand, Rau's points seem incontestable. One can describe interpretation and gap-filling as involving a common effort to specify the obligations of the parties. On the other hand, differences in degree matter. For example, a series of tasks may all involve the splitting of wood, but the process and the tools may change dramatically depending on whether one splits twigs, branches, or logs. Even focusing on logs, it makes a huge difference whether one splits southern yellow pine (which weighs roughly fifty-two pounds per cubic foot),<sup>20</sup> or quebracho (which weighs over seventy-seven pounds per cubic foot and takes its name from the Spanish words for “axe-breaker”).<sup>21</sup>

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12. Rau, *supra* note 10, at 974–75; *see also* Rau, *supra* note 3, at 464–65.

13. Rau, *supra* note 10, at 974; Rau, *supra* note 3, at 464.

14. Rau, *supra* note 10, at 976–77; *see also* Rau, *supra* note 3, at 467.

15. 539 U.S. 444 (2003).

16. 559 U.S. 662 (2010).

17. 133 S. Ct. 2064 (2013).

18. *See* Rau, *supra* note 10, at 953 (emphasizing that the three cases were “all quite similar” and “all pos[ed] more or less the same question”).

19. *See* Rau, *supra* note 10, at 956–57, 971–84, 991–1004.

20. Wood Species–Weight at Different Moisture Contents, THE ENGINEERING TOOLBOX, [http://www.engineeringtoolbox.com/weight-wood-d\\_821.html](http://www.engineeringtoolbox.com/weight-wood-d_821.html) (last visited Sept. 16, 2015).

21. *See* Quebracho, THE WOOD DATABASE, <http://www.wood-database.com/lumber-identification/hardwoods/quebracho> (last visited Sept. 16, 2015) (also mentioning the wood's “high cutting resistance,” as well as its “pronounced blunting effect on cutters”).

The fact is that interpretation and gap-filling involve distinct undertakings.<sup>22</sup> Interpretation requires an examination of the parties' intent based on express terms,<sup>23</sup> testimony regarding their intentions,<sup>24</sup> implied terms drawn from the overall structure of the agreement,<sup>25</sup> course of performance,<sup>26</sup> course of dealing,<sup>27</sup> and usage

22. See *Lerner v. Lerner Corp.*, 750 A.2d 709, 715 (Md. Ct. Spec. App. 2000) (indicating that “the supplying of an omitted term is not technically within the Restatement’s definition of interpretation”); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. c (AM. LAW INST. 1981) (explaining that “the supplying of an omitted term is not within the [Restatement’s] definition of interpretation”); E. ALLAN FARNSWORTH, *CONTRACTS* 480 (4th ed. 2004) (emphasizing that “[c]ourts must resolve . . . disputes arising from *omission* by some process other than that of interpretation”); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 485 (5th ed. 2011) (“When an omitted term is supplied by a court, it is not *interpreting* the contract . . .”).

23. See RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”); RANDY E. BARNETT, *CONTRACTS* 93 (2010) (“First, we try to establish if both parties subjectively attached the same meaning to the term . . .”); FARNSWORTH, *supra* note 22, at 445 (indicating that “the resolution of the dispute begins . . . with the meanings attached by each party at the time the contract was made”); see also *Misano di Navigazione, SpA v. United States*, 968 F.2d 273, 275 (2d Cir. 1992) (“The parties’ manifest purpose . . . controls the interpretation of the contract provisions.”).

24. FARNSWORTH, *supra* note 22, at 453. The parol evidence rule does not affect recourse to extrinsic evidence for purposes of interpretation. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 461; MURRAY, *supra* note 22, at 442. Likewise, the plain meaning rule does not restrict introduction of extrinsic evidence for purposes of interpreting terms that reasonably support different meanings. FARNSWORTH, *supra* note 22, at 462–69.

25. See *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (recognizing that a reasonable-efforts term did not appear “in so many words,” but concluding that term could be “fairly . . . implied” in fact because the “writing [was] ‘instinct with [such] an obligation,’ imperfectly expressed”) (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909)); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. c (AM. LAW INST. 1981) (indicating that “interpretation may be enough” when “there is tacit agreement or a common tacit assumption or where a term can be supplied by logical deduction from agreed terms and the circumstances”); MURRAY, *supra* note 22, at 467 (“Numerous cases indicate that all the different parts of the agreement must be viewed together . . . and each part interpreted in light of all the other parts.”).

26. RESTATEMENT (SECOND) OF CONTRACTS §§ 202(4)–(5), 203(b) (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 472–73; MURRAY, *supra* note 22, at 469, 475–76, 478–79.

27. RESTATEMENT (SECOND) OF CONTRACTS §§ 202(5), 203(b) (AM. LAW INST. 1981) FARNSWORTH, *supra* note 22, at 470; MURRAY, *supra* note 22, at 475–76, 477–78; see also BARNETT, *supra* note 23, at 93–94 (identifying course of performance and course of dealing as sources of evidence regarding the parties’ subjective intent).

of trade.<sup>28</sup> In rare cases, even this broad range of tools does not permit discernment of the parties' intent.<sup>29</sup> This marks the place where interpretation ends and gap-filling begins. According to Section 204 of the Restatement (Second) of Contracts, which the Supreme Court quoted in *Stolt-Nielsen*,<sup>30</sup> gap-filling has virtually nothing to do with intent.<sup>31</sup> Gap-filling aims neither to identify the parties' intent, which cannot be discerned by any of the usual sources, nor even to speculate what the parties *would have* intended in a hypothetical bargain.<sup>32</sup> To the contrary, when gap-filling, courts take the wheel from the parties and supply reasonable terms based on "community standards of fairness and policy."<sup>33</sup>

The point is that gap-filling turns its face from the emphasis on intent and towards the imposition of standards based on external

28. RESTATEMENT (SECOND) OF CONTRACTS §§ 202(5), 203(b) (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 470–72; MURRAY, *supra* note 22, at 475–77; *see also* FARNSWORTH, *supra* note 22, at 453 (explaining that interpretation requires consideration of all relevant circumstances, including "any applicable course of dealing, course of performance, or usage").

29. Most observers recognize that interpretive tools generally provide the guidance required in the absence of express terms. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 46–47 (5th ed. 2003) [hereinafter CALAMARI & PERILLO] (indicating that where contracts are silent as to express terms, "there is a strong possibility that a term may either be implied from the surrounding circumstances," including "trade or local usages, a course of dealing between the parties, prior to the agreement, and a course of performance after it"); FARNSWORTH, *supra* note 22, at 204 (affirming that "an agreement may be fleshed out by usages to which the parties are subject, by a course of dealing between the parties prior to their agreement, or by a course of performance between them after their agreement").

It should be evident that this Article addresses only situations involving gaps with respect to *material* terms. Gaps with respect to *immaterial* terms do not raise significant problems for the application and enforcement of contracts. *See* MURRAY, *supra* note 22, at 95 ("Courts have never experienced much difficulty enforcing agreements . . . though the parties have . . . left relatively insignificant matters for future determination."); *see also* CALAMARI & PERILLO, *supra*, at 29, at 51–52 ("The traditional rule is that if the contract is not *reasonably* certain as to its *material* terms there is a fatal indefiniteness and the agreement is void. . . . Indefiniteness as to an *immaterial* term is not fatal.") (emphasis in original); FARNSWORTH, *supra* note 22, at 212 (recognizing that "a court may be more willing to supply a term if the court regards the term as relatively unimportant").

30. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

31. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (AM. LAW INST. 1981) ("The parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute; then they can have *no expectations* with respect to that situation, and a search for their meaning with respect to it is *fruitless*.") (emphasis added).

32. *See id.* § 204 cmt. d (admonishing courts not to "analyze a hypothetical model of the bargaining process").

33. *Id.*

yardsticks. It should be obvious that the divergence in perspectives is significant, entrenched in doctrine, involves different tasks, and will produce different outcomes.<sup>34</sup>

As suggested above, genuine gaps on material terms may not occur frequently.<sup>35</sup> But they do occur, and perhaps with greater frequency in the modern economy.<sup>36</sup> According to leading sources, three reasons lie at the heart of the gaps that do arise. First, parties may foresee a situation, but resolve to deal with it in a subsequent agreement.<sup>37</sup> This represents the paradigmatic “agreement to agree.” Second, the parties may foresee a situation, but fail to address it in their agreement,<sup>38</sup> because the issue seems insignificant,<sup>39</sup> discussion of the topic seems unpleasant,<sup>40</sup> or negotiations may delay implementation of the transaction.<sup>41</sup> Third, the parties simply may not foresee a situation.<sup>42</sup> For transactions characterized by complex, long-term relationships among parties who operate in increasingly global and unstable markets, the probabilities of such lapses increase.<sup>43</sup>

34. See *id.* § 204 cmt. c (emphasizing that “the supplying of an omitted term is not within the definition of interpretation”).

35. See *supra* note 29 and accompanying text.

36. See Giorgio Bernini, *Report: Adaptation of Contracts*, in *NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS* 193, 193 (Pieter Sanders ed., 1983) (observing that the “context of contemporary business and economic reality” makes “unavoidable” the circumstances that give “birth to contracts which are affected by gaps and contractual omissions”).

37. CALAMARI & PERILLO, *supra* note 29, at 45; see also FARNSWORTH, *supra* note 22, at 119–20.

38. See CALAMARI & PERILLO, *supra* note 29, at 44–45 (describing the situation where the “parties are silent as to a material term”).

39. *Nat’l Educ. Ass’n Coffeyville v. Unified Sch. Dist. No. 445*, 996 P.2d 821, 829–30 (Kan. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 482; MURRAY, *supra* note 22, at 484.

40. *Nat’l Educ. Ass’n Coffeyville*, 996 P.2d at 829–30; RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 481.

41. *Nat’l Educ. Ass’n Coffeyville*, 996 P.2d at 829–30; RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (AM. LAW INST. 1981); MURRAY, *supra* note 22, at 484.

42. *Nat’l Educ. Ass’n Coffeyville*, 996 P.2d at 830; RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (AM. LAW INST. 1981); FARNSWORTH, *supra* note 22, at 480; MURRAY, *supra* note 22, at 484.

43. See FARNSWORTH, *supra* note 22, at 482 (emphasizing that “the risk of unforeseen and unforeseeable developments grows as the lifetime of the contract increases”); Bernini, *supra* note 36, at 193 (emphasizing “that the relevance of the problem at issue is strictly related to the growing importance of long-term business transactions, with particular reference



This last observation holds particular relevance for international commercial arbitration, because that mechanism represents the leading means of dispute-settlement for the complex, cross-border transactions that seem likely to produce gaps.<sup>44</sup> The question then becomes whether arbitrators possess the tools to perform the task of gap-filling in ways that protect the legal interests of contracting parties. As a corollary, it also seems relevant to determine whether arbitrators possess the same, better, or worse tools than national courts. To begin that inquiry, Part II surveys the evolution of U.S. judicial doctrine with respect to omitted material terms, as well as international developments regarding the powers of arbitrators to deal with problems caused by the omission of material terms.

## II. WHO MINDS THE GAPS?

As just suggested, the correlations among (1) complex, long-term, cross-border transactions, (2) prevalence of genuine contractual gaps, and (3) agreements on international commercial arbitration raise questions about the relative capacities of courts and arbitrators to fill gaps in ways that protect the legal interests of contacting parties. In other words, who minds the gaps: courts or arbitrators? Do they have similarly effective tools at their disposal? To answer these questions, Section II(A) reviews the development of judicial doctrine on gap-filling in the United States, and Section

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to the field of international trade and economic cooperation”). The probability of lapses seems particularly strong in fields likely to witness rapid technological change. See FARNSWORTH, *supra* note 22, at 482 n.14 (noting that “[p]articularly troublesome problems” may arise in contexts likely to witness rapid and significant technological breakthroughs); see also Bernini, *supra* note 36, at 193 (explaining that technological developments “may occur during the life of the contract, which substantially alter the original contractual equilibrium”).

44. See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1–2 (5th ed. 2009) [hereinafter REDFERN & HUNTER] (explaining that “[i]nternational arbitration has become the principal means of resolving disputes . . . in international trade, commerce and investment,” where “millions or even hundreds of millions of dollars are [often] at stake”); see also 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1 (2009) (“As international commerce has expanded and become more complex, so too has the primary dispute resolution mechanism—international arbitration.”); ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES 39, 62 (2005) (noting that arbitration represents “the preferred method of dispute resolution for international commercial disputes” and has experienced “exponential growth” as a result of “globalization of commerce and development in instantaneous communications”); cf. LEW ET AL., *supra* note 1, at 652 (“Often arbitrators have an ultimate task to fill gaps or revise the contract which the parties have entered into long before the dispute has arisen.”) (emphasis added).

II(B) reviews the trajectory of gap-filling in international commercial arbitration.

### *A. Do Courts Mind the Gaps?*

For U.S. lawyers, *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.* provides a classic introduction to judicial practice regarding omitted material terms, due to the range of issues canvassed and the quality of the judges who penned the majority and dissenting opinions.<sup>45</sup> In that case, Sun Printing agreed to purchase over thirty-two million pounds of newsprint from Remington Paper over the course of sixteen months, with express terms on quality, size, rate of delivery and dates for payments.<sup>46</sup> In addition, the parties agreed on price for the first four months of performance.<sup>47</sup> For the remaining twelve months, they stipulated that:

the *price* of the paper *and* the *length of terms* for which such price shall apply *shall be agreed upon* by and between *the parties* . . . said price . . . to be no higher than the contract price for newsprint charged by the Canadian Export Paper Company to . . . large consumers.<sup>48</sup>

Confronted by unanticipated market conditions,<sup>49</sup> Remington Paper performed only for the first four months, but then refused to tender any more newsprint on the ground that the contract was indefinite and, thus, unenforceable due to the omission of an

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45. 139 N.E. 470 (N.Y. 1923); *see also* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 402 (2009) (describing *Sun Printing* as a “classic case”). Observers often describe Judge Benjamin Cardozo, the author of the majority opinion, as one of the greatest U.S. jurists of all time, and compare his reputation to those of Justice Oliver Wendell Holmes, Jr. and Judge Learned Hand. *See, e.g.*, Michael C. Dorf, *Spendrel or Frankenstein’s Monster? The Vices and Virtues of Retrofitting in American Law*, 54 WM. & MARY L. REV. 339, 342 (2012). The author of the dissenting opinion, Judge Frederick Crane, ascended to the New York Court of Appeals in 1920, succeeded Cardozo as a Chief Judge of that court in 1934, served as President of New York’s Constitutional Convention of 1938, and enjoyed a distinguished reputation in the state’s legal community. Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341, 1363 (2012).

46. *Sun Printing*, 139 N.E. at 470.

47. *Id.*

48. *Id.* (emphasis added).

49. *See id.* at 471 (“Market prices in 1920 happened to rise.”).

agreement on price for the remaining term.<sup>50</sup> During each of the following twelve months, Sun Printing demanded delivery of two million pounds of paper at the price charged by the Canadian Export Paper Company, the maximum price that Remington Paper could have demanded.<sup>51</sup> After Remington Paper refused to perform even under those terms, Sun Printing sued for breach of contract.<sup>52</sup>

Writing for a majority of the New York Court of Appeals, Judge Benjamin Cardozo recognized that the price ceiling arguably supplied the price term in the event that the parties could not agree.<sup>53</sup> However, that still left open the *time period* for which any price might remain in effect.<sup>54</sup> Given the presence of a rising market throughout 1920, this “time element” became a material consideration.<sup>55</sup> Because the parties had not supplied any means for bridging that gap, Judge Cardozo held that the agreement remained “inchoate.”<sup>56</sup> Although Sun Printing invited him to select a “reasonable” time period, Cardozo wrote that Sun Printing’s proposal would require the court “to make the contract over.”<sup>57</sup> Alternatively, Sun Printing proposed the adoption of monthly time periods, to which Cardozo replied, “We are not at liberty to revise while professing to construe.”<sup>58</sup>

Writing for the dissent, Judge Frederick Crane began by observing that the parties clearly thought they were making a contract involving substantial quantities and time periods, set forth in a writing that specified a wide range of material terms in detail.<sup>59</sup> Given these circumstances, and the presence of “intelligent parties,” Judge Crane wrote that “the court should spell out a binding contract, if it be possible.”<sup>60</sup> With respect to the open time period, Judge Crane identified “many answers” to the problem.<sup>61</sup> For

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50. *Id.* at 470.

51. *Id.*

52. *Id.*

53. *Id.* at 470–71.

54. *Id.* at 471.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 472 (Crane, J., dissenting).

60. *Id.* at 473.

61. *Id.*

example, the court might adopt a constant price for the duration of the contract based on the Canadian Export Paper Company price in effect as of December 15, 1919, the day on which the parties should have reached agreement on open terms.<sup>62</sup> Alternatively, the court might adopt a month-to-month pricing term based on the Canadian Export Paper Company price in force on the fifteenth day of each preceding month.<sup>63</sup> As a third possibility, the court might adopt a variable pricing term tied to whatever time periods the Canadian Export Paper Company used in setting its own prices.<sup>64</sup>

While appealing in some respects, the menu of options presented by Judge Crane simply reinforced Cardozo's main point.<sup>65</sup> In the absence of any contractual basis, the court had no disciplined basis on which to supply the omitted term. Although the court might choose any number of solutions, each one might produce vastly different economic consequences in a rising market,<sup>66</sup> none of which may have laid within the contemplation of the parties. In other words, the court would be pulling numbers out of thin air, and that did not constitute a judicial act.<sup>67</sup>

When comparing the two opinions in *Sun Printing*, Randy Barnett has opined that each reflects a different conception of the parties' legal interest in freedom of contract.<sup>68</sup> According to Barnett, Judge Cardozo's opinion rests on the idea of "freedom from contract," meaning that contracting involves a consensual process and the imposition of terms by judicial fiat represents the greatest threat to the interests of the contracting parties.<sup>69</sup> By contrast, Judge

62. *Id.*

63. *Id.*

64. *Id.*

65. See BARNETT, *supra* note 23, at 98 ("Crane's ability to articulate numerous different ways of filling in the gap unintentionally supported Cardozo's conclusion that this contract was too indefinite to be enforced.").

66. See *id.* (observing that "[e]ach of Crane's suggestions would yield a different result").

67. See MURRAY, *supra* note 22, at 96 ("It is important to emphasize the underlying assumption of the traditional view, i.e., since the parties may subsequently fail to agree on the postponed material term, the court would have no basis for supplying the missing term and enforcing the contract.").

68. BARNETT, *supra* note 23, at 98–99; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 871 (1992).

69. BARNETT, *supra* note 23, at 99; Barnett, *supra* note 68, at 871; see also *Lo Cascio v. James V. Aquavella, M.D., P.C.*, 619 N.Y.S.2d 430, 432 (N.Y. App. Div. 1994) ("[W]ithout [definiteness as to material terms] a court could not intervene without imposing its own

Crane's opinion exemplifies the principle of "freedom to contract," meaning that the process of contracting creates expectations, and the strategic disturbance of those expectations by one party based on a technicality represents the greatest threat to the interests of contracting parties.<sup>70</sup> Therefore, courts should preserve the integrity of bargains by supplying reasonable terms to fill gaps. Although the two visions expounded by Cardozo and Crane may not seem compatible, Barnett observes that default rules seem consistent with both approaches because they permit courts to maintain contractual equilibrium by filling gaps with terms likely to fall within the contemplation of the parties.<sup>71</sup>

Perhaps for the reasons outlined by Barnett, U.S. doctrine has evolved along the lines suggested by Judge Crane. Thus, the Restatement (Second) of Contracts provides a general rule that judges may fill gaps by supplying reasonable terms: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."<sup>72</sup> In selecting reasonable terms, courts should not conduct speculative inquiries into what the parties would have agreed to had the issue occurred to them.<sup>73</sup> To

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conception of what the parties should or might have undertaken, rather than confining itself to a bargain to which they have mutually committed themselves."). *But see* CALAMARI & PERILLO, *supra* note 29, at 51 ("But, even if the parties intend to contract, if the content of their agreement is unduly uncertain no contract is formed. This rule must be understood as a necessary limitation on freedom of contract . . .").

70. BARNETT, *supra* note 23, at 99; Barnett, *supra* note 68, at 871; *see also* CALAMARI & PERILLO, *supra* note 29, at 55 (discussing the UCC's general provision on indefiniteness and opining that it "is designed to prevent . . . a contracting party who is dissatisfied with a bargain from taking refuge in the doctrine [of indefiniteness] to wriggle out of an agreement").

71. BARNETT, *supra* note 23, at 99–100; Barnett, *supra* note 68, at 872–73, 906; *see also* FARNSWORTH, *supra* note 22, at 486 ("If the situation is a recurring one, the term that a court will imply may be well known and, because it accords with their expectations, the parties may rely on it by remaining silent on the matter when making their agreement.").

72. RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981).

73. *Id.*, § 204 cmt. d; *see also* FARNSWORTH, *supra* note 22 at 485–86 (opining that "it is often naïve to assume that a court can determine how the parties would have dealt with [a material issue] had they foreseen it"). However, "the probability that a particular term would have been used if the question had been raised may be [a] factor[] in determining what term is reasonable under the circumstances." RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981); *see also* Lerner v. Lerner Corp., 750 A.2d 709, 716 (Md. App. 2000) (indicating that the likely expectations of the parties may represent one of the circumstances taken into account when judging reasonableness).

the contrary, courts “should supply . . . term[s] which comport[] with community standards of fairness and policy.”<sup>74</sup> While the Uniform Commercial Code (UCC) seems somewhat more restrained in its general provision on open terms,<sup>75</sup> individual sections follow the Restatement on discrete topics, such as open price terms and the time for shipment or delivery.<sup>76</sup>

In short, while U.S. courts traditionally refused to fill omitted terms on the ground that the process did not constitute a judicial act, modern trends favor judicial gap-filling based on reasonable terms likely to fall within the contemplation of the parties.<sup>77</sup> However, this assessment requires four qualifications. First, not all jurisdictions have embraced the Restatement’s position on gap-filling. For example, in one large case involving two sophisticated parties, the Texas Court of Appeals seemed to indicate that courts cannot supply exogenous terms, but must derive all terms from the agreement itself. Thus, the court stated:

For a contract to be enforceable, the terms of the agreement must be ascertainable to a *reasonable degree of certainty*. . . . The facts of the individual case are decisively important. . . . “The agreement need not be so definite that all possibilities that might occur to a

74. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981); *see also* Nat’l Educ. Ass’n Coffeyville v. Unified Sch. Dist. No. 445, 996 P.2d 821, 831 (Kan. 2000) (“Thus, it is left to this court to decide, as a matter of community standards of fairness and policy, which of the parties is entitled to the divisible surplus.”); FARNSWORTH, *supra* note 22, at 486 (asserting that “it should not be hypothetical expectations or fictitious intentions, but basic principles of justice that guide a court”).

75. *See* U.C.C. § 2-204(3) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a *reasonably certain basis* for giving an appropriate remedy.”) (emphasis added). In the view of this author, the UCC’s general provision on open terms seems more closely aligned with Judge Cardozo’s views than with Judge Crane’s views because the emphasis on reasonable certainty seems hard to square with the open-ended menu of solutions offered by Judge Crane. *Cf.* CALAMARI & PERILLO, *supra* note 29, at 55 (observing that it “is not clear when a court will find that ‘there is a reasonably certain basis for giving an appropriate remedy’”) (quoting U.C.C. § 2-204(3)).

76. *See* U.C.C. § 2-305(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery . . . .”); *see also* U.C.C. § 2-309(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“The time of shipment or delivery . . . if not . . . agreed upon shall be a reasonable time.”); MURRAY, *supra* note 22, at 100 (“The UCC makes provision for numerous ‘gap-filling’ terms beyond the price term where the parties have omitted such terms and still intend to be bound by their agreement.”).

77. *See also* MURRAY, *supra* note 22, at 93 (“Modern courts are much less willing than their predecessors to regard indefiniteness as fatal.”).

party in bad faith are explicitly provided for, but it must be sufficiently complete so that parties in good faith can find *in the agreement* words that will fairly define their respective duties and liabilities.<sup>78</sup>

Second, even in jurisdictions that have embraced the Restatement, courts may find themselves unable to formulate *any* reasonable, objective basis on which to supply particular omitted terms. Thus, where parties have failed to specify “the kind or quantity of goods or the specifications [for] a building contract,” courts have refused to supply those terms because “no objective standard can ordinarily be found in such cases.”<sup>79</sup>

Third, many courts would still follow the particular outcome in *Sun Printing*. In that case, the strongest factors supporting Judge Cardozo’s position included the parties’ explicit consideration of pricing terms and their conscious decision to relegate the issue to subsequent agreements “by and between the parties.”<sup>80</sup> Thus, the case involved a classic “agreement to agree.”<sup>81</sup> Even today, many courts would not regard gap-fillers as sufficient to overcome the lack of a present agreement.<sup>82</sup>

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78. *Texaco, Inc., v. Pennzoil, Co.*, 729 S.W.2d 768, 796 (Tex. Ct. App. 1987) (emphasis added) (quoting *Mason v. Rose*, 85 F. Supp. 300, 311 (S.D.N.Y. 1948), *aff’d*, 176 F.2d 486 (2d Cir. 1949)).

79. *CALAMARI & PERILLO*, *supra* note 29, at 56; *see also* *Wright v. Mark C. Smith & Sons*, 283 So.2d 85, 93 (La. 1973) (“A court cannot enforce a contract to construct ‘sanitary sewers’ with no further explanation.”); *Varney v. Ditmars*, 111 N.E. 822, 824 (N.Y. 1916) (involving an agreement to pay an employee his salary plus a “fair share” of profits, and concluding that the term did not lend itself to judicial enforcement because it required an exercise in pure, subjective “conjecture”); *see also* *FARNSWORTH*, *supra* note 22, at 201 (indicating that contracts fail for indefiniteness when “the description of the subject matter is inadequate, as where the description or quantity of goods to be sold is lacking”).

80. *See* *MURRAY*, *supra* note 22, at 97 (“Where . . . the parties contemplated agreeing on a specific process for determining the price, i.e., *their* future agreement as to price, . . . a court should not imply a ‘reasonable price’ since the parties have insisted upon a particular process for determining a material term.”).

81. *Sun Printing & Publishing Ass’n v. Remington Paper & Power Co.*, 139 N.E. 470, 471 (N.Y. 1923).

82. *See* *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1425 (5th Cir. 1995) (“[T]he record demonstrates that there was only an ‘agreement to agree’ . . . upon substantial additional negotiation. Such agreements to agree, particularly absent material terms . . . are unenforceable under Texas law . . . .”); *Currituck Assoc. Residential P’ship v. Hollowell*, 601 S.E.2d 256, 263 (N.C. Ct. App. 2004) (holding that a “contract is ‘nugatory and void for indefiniteness’ if it leaves any ‘material portions open for future agreement’”), *aff’d*, 622 S.E.2d 493 (N.C. 2005); *Fort Worth Indep. Sch. Dist. v. City of Forth Worth*, 22 S.W.3d 831, 846 (Tex. 2000) (“It is well settled law that when an agreement leaves material matters

Fourth, one should not assume that the latitude for gap-filling runs equally wide for all types of agreements. Just as Professor Rau sees no difference between interpretation and gap-filling, his recent papers proceed on the assumption that exactly the same rules apply to gap-filling in contracts and arbitration agreements.<sup>83</sup> However, the doctrine of separability means that contracts and arbitration clauses may be subject to regulation by sources of law that do not completely overlap,<sup>84</sup> and this may produce some variations in the gap-filling process. For example, in *Stolt-Nielsen*, the Supreme Court recognized that while state contract law generally governs the interpretation of arbitration agreements, “the [Federal Arbitration Act (FAA)] imposes certain *rules of fundamental importance*,” which apply only to the construction of arbitration agreements, which channel the analysis, and which cannot be ignored.<sup>85</sup> As explained below, this statutory overlay may limit the discretion of both courts and arbitrators in the context of gap-filling for arbitration agreements.<sup>86</sup>

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open for future adjustment and agreement that never occur, it is not binding upon the parties and merely constitutes an agreement to agree.”); *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 543 (N.Y. 1981) (“Dictated by these principles, it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. This is especially true of the amount to be paid for the sale or lease of real property.”); *Four Eights LLC v. Salem*, 194 S.W.3d 484, 486 (Tenn. Ct. App. 2005) (holding that “the parties basically made an ‘agreement to agree’ to something in the future, and such agreements have generally been held unenforceable, both in this jurisdiction and others”); *CALAMARI & PERILLO*, *supra* note 29, at 53 (“The traditional rule is that an agreement to agree prevents the formation of a contract [because] it shows the lack of present agreement.”); *FARNSWORTH*, *supra* note 22, at 120 (indicating that “[c]ourts have generally resisted” calls to supply material terms under agreements to agree where the parties have not, in fact, reached agreement); *MURRAY*, *supra* note 22, at 96 (“The cases are legion in which courts have held that such an ‘agreement to agree’ upon a *material* term is not enforceable.”).

Some modern courts have held that an agreement to agree includes an implied promise to negotiate in good faith. *CALAMARI & PERILLO*, *supra* note 29, at 53. By contrast, where parties have not agreed to agree, but have simply forgotten to include a material term, modern courts seem much more inclined to supply the missing terms. *MURRAY*, *supra* note 22, at 96; *FARNSWORTH*, *supra* note 22, at 120.

83. Rau, *supra* note 10, at 977–78; Rau, *supra* note 3, at 463–67.

84. BORN, *supra* note 4, at 411–12; LEW ET AL., *supra* note 1, at 107; DAVID ST. JOHN SUTTON & JUDITH GILL, *RUSSELL ON ARBITRATION* 68 (22d ed. 2003); TWEEDDALE & TWEEDDALE, *supra* note 44, at 217.

85. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010) (emphasis added).

86. See *infra* notes 167–93 and accompanying text.



*B. Do Arbitrators Mind the Gaps?*

For international commercial arbitration, historical practice traverses much of the terrain covered by the New York Court of Appeals in *Sun Printing*.<sup>87</sup> Thus, according to a leading French text on arbitration, traditional views clustered around the proposition that the appointment of a third person to supply an omitted term: (1) did not involve a “dispute” about the parties’ obligations; (2) did not encompass a “judicial act”; and (3) therefore, did not constitute arbitration within the meaning of applicable statutes and treaties.<sup>88</sup> To the contrary, the process of gap-filling had an exclusively contractual nature with the result that the decision of the third party only had the same legal status as the underlying contract.<sup>89</sup> Given these perceptions, the International Chamber of Commerce adopted a dispute-settlement process specifically designed for gap-filling and adaptation of contracts during the late 1970s.<sup>90</sup> Consistent with then-prevailing views, the process explicitly did not qualify as “arbitration.”<sup>91</sup>

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87. 139 N.E. 470 (N.Y. 1923); *see also supra* notes 45–67 and accompanying text.

88. FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 25–26 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD]; *see also* Bernini, *supra* note 36, at 196 (“The borderline between the award stemming from . . . arbitration and the determination by a third . . . person touching upon issues which are not justiciable in nature . . . becomes hard to trace. It is fair to submit that . . . no definitive answer can be put forward . . . with the ensuing . . . uncertainty when . . . parties are faced with . . . enforcement.”); R. Doak Bishop, *A Practical Guide for Drafting International Arbitration Clauses* 57, <http://www.kslaw.com/library/pdf/bishop9.pdf> (indicating that gap-filling and adaptation of contracts represent tasks that are “distinct from the typical powers of an arbitrator”).

89. FOUCHARD, *supra* note 88, at 24.

90. FOUCHARD, *supra* note 88, at 27; *see also* International Chamber of Commerce, Rules for Adaptation of Contracts (1978), ICC Publication No. 326; REDFERN & HUNTER, *supra* note 44, at 539. According to one source, those rules enabled parties to “provide in their contract that any gaps be filled, or the agreement adapted to changed circumstances, by the procedure provided in the ICC Rules for Adaptation of Contracts.” Bishop, *supra* note 88, at 57.

91. FOUCHARD, *supra* note 88, at 27; *see also* REDFERN & HUNTER, *supra* note 44, at 539 (“The ICC has drawn up special rules for the adaptation of contracts, but also takes the view that the role is not one best fulfilled by a conventional arbitral tribunal . . . .”); Bishop, *supra* note 88, at 57 (“Those rules were distinct from the ICC Arbitration Rules; the procedure provided by those rules was not an arbitral proceeding, and any resulting decision was not an arbitral award and could not be enforced under the auspices of the New York Convention.”). The ICC withdrew the rules in 1994, due to a complete lack of use for over fifteen years. FOUCHARD, *supra* note 88, at 27; Bishop, *supra* note 88, at 57.

Not surprisingly, proponents of international commercial arbitration asserted that the exclusion of gap-filling from arbitration did not meet the needs of modern international commerce.<sup>92</sup> Consistent with such observations, certain European jurisdictions adopted statutes recognizing that parties could agree to empower arbitrators to fill gaps and even render awards on the adaptation of contracts.<sup>93</sup> While some observers imply such agreements must take the form of express contractual provisions,<sup>94</sup> the better view holds that they may take the form of agreements to apply the proper law of a jurisdiction that supports gap-filling.<sup>95</sup>

As Klaus Peter Berger observes, however, most countries have not adopted statutes expressly permitting agreements to include gap-filling within the scope of arbitration.<sup>96</sup> For arbitrations conducted in such venues, one must refer back to the procedural and substantive

92. See FOUCHARD, *supra* note 88, at 25 (opining that “this narrow interpretation of the arbitrator’s role does not reflect the practice or indeed the current needs of international trade”).

93. See Bulgarian Law on International Commercial Arbitration, Art. 1(2) (1993), <http://www.bcci.bg/arbitration/lawofarbitr.htm> (providing that “[i]nternational commercial arbitration shall resolve civil property disputes resulting from international trade relations as well as disputes for filling gaps in contracts . . . when the domicile or seat of at least one of the parties is not in the Republic of Bulgaria”); Netherlands Arbitration Act, Art. 1020(4)(c) (1986), <http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1020.html> (providing that parties may agree to arbitrate questions involving the “filling of gaps in . . . the legal relationship between the parties”); Swedish Arbitration Act, § 1 (1999), <http://www.sccinstitute.com/?id=23746> (providing that, “[i]n addition to interpreting agreements, the filling of gaps in contracts can also be referred to arbitrators”).

94. See Berger, *supra* note 1, at 8 (indicating that “the perceived contractual and creative nature of the arbitrator’s decision [on filling omitted terms] is said to require a specific contract clause that contains an express authorization by the parties *in addition* to the usual arbitration agreement”).

95. Cf. REDFERN & HUNTER, *supra* note 44, at 537 (asserting that a “tribunal’s ability to adapt a contract may derive from the law applicable to the substance of the dispute”); JEFF WAICYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1056 (2012) (opining that “if the parties select a substantive law that does allow for rectification in appropriate circumstances, such a right flows as a matter of course”); Bernini, *supra* note 36, at 194 (observing that adaptation of contracts “can be achieved” when “[t]here exists under the applicable laws a system whereby a judge or arbitrator can be requested to give the necessary directions even in the absence of contractual clauses to this effect”). According to one leading source, the difference between gap-filling and adaptation “may only be a matter of degree,” but tribunals should be more enthusiastic about gap-filling because “adding an additional term” based on the presumed intent of the parties entails “a less speculative undertaking than actually *changing* the contract to meet new circumstances.” REDFERN & HUNTER, *supra* note 44, at 537.

96. Berger, *supra* note 1, at 10.

rules applied by local courts on the topic of gap-filling.<sup>97</sup> Based on the principle of “synchronized competences,”<sup>98</sup> where courts at the seat of arbitration have the capacity to fill contractual gaps, the underlying controversies logically involve “disputes,” their resolution involves “judicial acts,” and, therefore, gap-filling may also fall within the scope of arbitration. This now seems to characterize the legal position in jurisdictions like England,<sup>99</sup> France,<sup>100</sup> and Germany.<sup>101</sup>

Returning to the questions posed at the outset of Part II, neither courts nor arbitrators historically had the authority to fill gaps because gap-filling did not constitute a judicial, or justiciable, act. However, as markets and transactions evolved along patterns more likely to produce gaps, courts in the United States have taken on the power to fill them. Based either on enabling statutes or the principle of synchronized competence, arbitrators have followed a similar course in cross-border disputes.

Thus, as a generalization, one may say that both courts and arbitrators have the capacity for gap-filling, and they appear comparably well-suited for the task, subject to a pair of qualifications. First, at the level of competence, the gap-filling power of arbitrators depends on a two-step analysis, in which one must find authorization under both the *lex causae* and the *lex arbitri* to determine that (1) the arbitrators have a substantive basis for gap-filling, and (2) the process qualifies as arbitration under the governing procedural law.<sup>102</sup> Second, at the level of proficiency, to the extent that gap-filling requires the identification of terms that “comport[] with community standards of fairness and policy,”<sup>103</sup> it seems possible that judges from within the community may possess

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97. *Id.* at 10–11.

98. *Id.* at 10.

99. LEW ET AL., *supra* note 1, at 652 n.143.

100. FOUCHARD, *supra* note 88, at 29.

101. LEW ET AL., *supra* note 1, at 652 n.143; Berger, *supra* note 1, at 11.

102. *See* Berger, *supra* note 1, at 12. It is possible that analysis may require a third step to determine whether courts at the likely place(s) of enforcement regard gap-filling as a subject capable of settlement by arbitration. *See* Bishop, *supra* note 88, at 57 (opining that parties may wish to “determine whether the arbitrators possess this power under . . . the law of the likely country of enforcement”).

103. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981).

greater familiarity with those standards than arbitrators drawn from other jurisdictions.<sup>104</sup>

Despite the qualifications just mentioned, international trends seem to favor a rough parity between courts and arbitrators when it comes to the legal capacity for gap-filling. This should come as welcome news to parties engaged in complex, long-term, cross-border transactions, who should be no worse off in arbitration than if they went to court. At least, that was the theory until *Stolt-Nielsen*, in which the United States Supreme Court rendered a decision widely believed to trim the gap-filling powers of arbitrators.

### III. MINDING THE GAPS

Assuming that the gap-filling powers of arbitrators have remained one of the most important and controversial topics in international commercial arbitration for over a generation, the process of specifying those powers requires a full measure of attention to nuance. With that in mind, Part III uses *Stolt-Nielsen* to illustrate the Supreme Court's clumsy framing of certain points, as well as the tendency of critics to gloss over parts of the opinion that show greater respect for nuance and the gap-filling powers of arbitrators. Thus, Section III(A) reviews the Supreme Court's decision in *Stolt-Nielsen*. Section III(B) surveys criticisms of the way that decision frames the gap-filling powers of arbitrators. Finally, Section III(C) argues that the critics of *Stolt-Nielsen* themselves have overlooked important context and passages, both of which suggest that the Supreme Court did not seriously trim the powers of arbitrators to fill gaps in arbitration agreements and contracts.

#### A. *Stolt-Nielsen*

Based in New Jersey, AnimalFeeds International Corp. manufactures and ships raw ingredients to animal-feed producers around the world.<sup>105</sup> To that end, AnimalFeeds engages the services

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104. See Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law: The 2000 Freshfields Lecture*, 17 *ARB. INT'L* 234, 238 (2001) (observing that an international arbitrator may often "have to apply a law other than that of the legal system in which he himself is qualified," that such laws "will represent a model with which he is hardly familiar," and that the temptation will be to "revert—as a result of a subconscious process—to what his own law provides").

105. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 (2010); Brief for Respondent at 3, *Stolt-Nielsen*, 559 U.S. at 662.

of large, foreign shipping companies like Stolt-Nielsen, which operate parcel tankers, or sea-going vessels with separate compartments for customers that ship small quantities of liquid products.<sup>106</sup> After the Department of Justice launched a criminal investigation into a price-fixing conspiracy by parcel tanker operators, AnimalFeeds brought a class action lawsuit against Stolt-Nielsen and other operators in the United States District Court for the Eastern District of Pennsylvania.<sup>107</sup> During the course of litigation, however, respondents successfully obtained dismissal based on the arbitration agreements contained in charter parties.<sup>108</sup>

Subsequently, AnimalFeeds served Stolt-Nielsen and other parcel tanker operators with a demand for class arbitration in New York.<sup>109</sup> In due course, the parties agreed to submit the permissibility of class arbitration to a panel of three experienced, international arbitrators in accordance with the American Arbitration Association's Supplementary Rules for Class Arbitration.<sup>110</sup> At that stage, the parties also stipulated that the arbitration clause was "silent" on the topic of class arbitration.<sup>111</sup> AnimalFeeds clarified that this did not simply mean the absence of an express contractual provision; to the contrary, it meant that the parties had reached "no agreement" on the topic of class arbitration.<sup>112</sup> Consistent with those representations, the undisputed evidence showed that the particular charter party form used by AnimalFeeds had never been used as the foundation for class arbitration.<sup>113</sup> In addition, expert testimony indicated that sophisticated, multinational companies like the parcel tanker operators would never intend to subject themselves to class arbitration.<sup>114</sup> Under these circumstances, course of performance, course of dealing, and usage of trade provided no tools to fill the

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106. *Stolt-Nielsen*, 559 U.S. at 666.

107. *Id.* at 667.

108. *Id.* at 668.

109. *Id.*

110. *Id.* at 668 (describing the procedural steps); *id.* at 688 & n.1 (Ginsburg, J., dissenting) (describing the panel as consisting of "experienced arbitrators," all "leaders in the international-dispute-resolution bar").

111. *Id.* at 668.

112. *Id.* at 668-69.

113. *Id.* at 674.

114. *Id.* at 674 & n.6.

silence. In other words, the arbitration clause contained a genuine gap on the topic of class arbitration.<sup>115</sup>

At this point, one must pause to emphasize that *Stolt-Nielsen* did not involve a gap in the substantive terms of the contract, but in the arbitration clause.<sup>116</sup> In this context, the normal rules on gap-filling should apply,<sup>117</sup> with two qualifications. First, under the doctrine of separability, the underlying contract and the arbitration clause represent distinct agreements, each possibly having a different legal status, and each possibly subject to regulation by different sources of law.<sup>118</sup> Second, unlike the substantive provisions of the underlying contract, the particular arbitration clause was regulated by the Federal Arbitration Act (FAA),<sup>119</sup> for at least three reasons: (1) the arbitration clause expressly called for application of the FAA;<sup>120</sup> (2) the arbitration had its seat in New York;<sup>121</sup> and (3) in the application of gap-filling rules, the FAA would likely reflect “community

115. See *supra* notes 22–34 and accompanying text (identifying the differences between interpretation and gap-filling).

116. See *Stolt-Nielsen*, 559 U.S. at 666 (“We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the Federal Arbitration Act.”).

117. Cf. *id.* at 681 (indicating that the interpretation of arbitration agreements generally falls under the normal state-law rules that govern the interpretation of contracts).

118. See *supra* note 84 and accompanying text.

119. See *Stolt-Nielsen*, 559 U.S. at 681 (while recognizing that state law generally governed the interpretation of the arbitration clause, the Court emphasized that “the FAA imposes certain rules of fundamental importance”).

120. See *id.* at 667 (quoting the arbitration clause, which stipulated that the arbitration would be “conducted in conformity with the provisions and procedure of the United States Arbitration Act,” which the Court understood to mean the FAA).

121. The arbitration clause provided for arbitration in New York. *Id.* AnimalFeeds demanded arbitration in New York. *Id.* at 668. Thus the FAA applied because New York represented the seat of arbitration. See BORN, *supra* note 44, at 306 (asserting that “the arbitral seat plays an essential role in determining the legal framework for international arbitral proceedings” because it “provides a mandatory legal framework applicable to the conduct of the arbitral proceedings”); LEW ET AL., *supra* note 1, at 172 (opining that selection of the seat of arbitration represents “one of the key issues” because it determines the procedural law governing the arbitration, as well as the courts that can supervise the arbitration); REDFERN & HUNTER, *supra* note 44, at 181 (explaining that the “seat of the arbitration is not merely a matter of geography[;] [i]t is the territorial link between the arbitration itself and the law of the place in which the arbitration is legally situated”) SUTTON & GILL, *supra* note 84, at 70 (emphasizing that the seat of arbitration “prescribes the procedural law of the arbitration”).

standards of fairness and policy” within the meaning of Restatement Section 204.<sup>122</sup>

AnimalFeeds invited the tribunal to rule that the arbitration clause, while silent on the topic, permitted class arbitration “as a matter of public policy.”<sup>123</sup> Consistent with that request, the tribunal reviewed a corpus of arbitral awards, drawn largely from consumer arbitration, which demonstrated that other arbitrators “had construed ‘a wide variety of clauses in a wide variety of settings as allowing for class arbitration.’”<sup>124</sup> While it considered a line of federal jurisprudence holding that the FAA prohibits *consolidation* of arbitrations without the consent of the disputing parties,<sup>125</sup> the tribunal concluded that extension of that jurisprudence to class arbitration would eliminate the possibility of class arbitration barring an express agreement among all parties and class members.<sup>126</sup> Apparently finding that conclusion to be distasteful, the tribunal found no reason for departing from the prevailing “arbitral consensus” and held that AnimalFeeds could proceed with class arbitration against the parcel tanker operators.<sup>127</sup>

After the tribunal rendered its award authorizing class arbitration, the parcel tanker operators petitioned the United States District Court for the Southern District of New York to vacate the award on the ground that the arbitrators had exceeded their powers.<sup>128</sup> While the district court granted the petition, the United States Court of Appeals for the Second Circuit reversed.<sup>129</sup> On further review, the Supreme Court began by describing the “high hurdle” that one must clear to secure vacatur based on the theory

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122. See RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981) (indicating that courts should fill gaps using terms that reflect “community standards of fairness and policy”).

123. See *Stolt-Nielsen*, 559 U.S. at 672 (quoting AnimalFeed’s submission to the arbitral tribunal).

124. See *id.* at 669 (quoting the tribunal’s decision on class arbitration); see also *id.* at 675 n.7 (recounting an arbitrator’s statement that “the body of . . . arbitration awards on which AnimalFeeds relied involved ‘essentially consumer non-value cases’”).

125. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Gov’t of United Kingdom v. Boeing Co.*, 998 F.2d 71, 74 (2d Cir. 1993).

126. See *Stolt-Nielsen*, 559 U.S. at 675 n.7 (quoting the tribunal’s decision on class arbitration).

127. *Id.* at 675.

128. *Id.* at 669; see also 9 U.S.C. § 10(a)(4).

129. *Stolt-Nielsen*, 559 U.S. at 669–70.

that the arbitrators exceeded their powers.<sup>130</sup> Consistent with prevailing international norms, the Court held that even serious legal errors would not justify vacatur.<sup>131</sup> In the Court's view, vacatur becomes appropriate "only when [an] arbitrator strays from *interpretation* and *application* of the agreement and effectively 'dispense[s] his *own* brand of industrial justice.'"<sup>132</sup> Put in slightly different terms, the "arbitrator's task is to *interpret* and *enforce* a contract, not to *make* public policy."<sup>133</sup>

Applying the standards set forth above, the Court concluded "that what the arbitration panel did was simply to *impose* its *own* view of sound policy regarding class arbitration."<sup>134</sup> When faced with the agreement's absolute silence on the topic,<sup>135</sup> as well as the absence of any relevant usage of trade,<sup>136</sup> the arbitrators should have consulted the FAA, federal maritime law, or New York law to determine whether any of those sources authorized "class arbitration in the absence of express consent."<sup>137</sup> Instead, the tribunal "proceeded as if it had the authority of a *common-law court* to develop what *it* viewed as the best rule to be applied *in such a situation*."<sup>138</sup>

Turning to the FAA, which should have controlled the gap-filling exercise,<sup>139</sup> the Court recognized that while state law generally governs the interpretation of arbitration agreements, "the FAA imposes certain *rules of fundamental importance*, including the basic precept that arbitration 'is a matter of consent, not coercion.'"<sup>140</sup> As a corollary, parties have the right to "specify *with whom* they choose to arbitrate their disputes."<sup>141</sup> Emphasizing the parity between courts and arbitrators on this point, the Court stated: "It falls to *courts* and

130. *Id.* at 671.

131. *Id.*

132. *Id.* at 671–72 (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)) (emphasis added).

133. *Stolt-Nielsen*, 559 U.S. at 672 (emphasis added).

134. *Id.* (emphasis added).

135. *Id.* at 668–69, 673.

136. *Id.* at 674 n.6.

137. *Id.* at 673.

138. *Id.* at 673–74 (emphasis added).

139. *Id.* at 673.

140. *Id.* at 681 (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (emphasis added).

141. *Stolt-Nielsen*, 559 U.S. at 683.



*arbitrators* to give effect to these contractual limitations, and when doing so, *courts* and *arbitrators* must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.”<sup>142</sup>

Concluding its analysis, the Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”<sup>143</sup> Given that the parties stipulated to the absence of any such agreement, and given the absence of any relevant trade usage, the tribunal’s authorization of class arbitration was “fundamentally *at war* with the foundational FAA principle that arbitration is a matter of consent.”<sup>144</sup>

In perhaps the most important passage on gap-filling, the Court recognized that, “[i]n certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement.”<sup>145</sup> Quoting Restatement (Second) of Contracts Section 204, the Court grounded its views “in the background principle that ‘[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.’”<sup>146</sup> However, the Court implied that it would not be reasonable to supply class arbitration as a term because (1) that term would be “at war” with the foundational principles of the FAA,<sup>147</sup> and (2) class arbitration would draw in hundreds or thousands of parties, thereby altering the basic nature of the proceedings contemplated by bilateral arbitration agreements between two contracting parties.<sup>148</sup>

### *B. Criticisms of Stolt-Nielsen*

In recent articles, leading U.S. academics have criticized *Stolt-Nielsen* for expressing “crabbed,”<sup>149</sup> “heavy-handed[ ],”<sup>150</sup>

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142. *Id.* at 684 (emphasis added).

143. *Id.*

144. *Id.* (emphasis added).

145. *Id.* at 684–85.

146. *Id.* at 685.

147. *Id.* at 684.

148. *Id.* at 685–87.

149. Drahozal & Rutledge, *supra* note 6, at 1110.

“troubling,”<sup>151</sup> “mystifying,”<sup>152</sup> “and even “startling”<sup>153</sup> views regarding the gap-filling powers of arbitrators. For example, Christopher Drahozal and Peter B. Rutledge draw attention to the Court’s broad rhetoric, which depicts the powers of arbitrators (1) as including the “interpretation,” “application,” and enforcement of agreements, but (2) as excluding an arbitrator’s formulation of his or her “own brand of industrial justice.”<sup>154</sup> In addition, Drahozal and Rutledge repeatedly emphasize the Court’s statement that arbitrators lack “the authority of a common-law court” to formulate what they view as “the best rule” for permissibility of class arbitration.<sup>155</sup>

For Drahozal and Rutledge, the clear implication is that *Stolt-Nielsen* “trimmed” the capacity of arbitrators to fill gaps in arbitration agreements,<sup>156</sup> because gap-filling would draw arbitrators beyond the permissible scope of *interpretation* and into the forbidden zone of *articulating policy*.<sup>157</sup> Although *Stolt-Nielsen* recognized this taxonomy only in the context of arbitration agreements, the Court’s broad rhetoric easily supports application of identical principles to arbitral gap-filling in the underlying contracts.<sup>158</sup> As a consequence, arbitrators logically possess substantially more limited gap-filling powers than their judicial counterparts.<sup>159</sup> This reading of *Stolt-Nielsen* spells trouble for complex, long-term, cross-border transactions, in which contracts seem both vulnerable to gaps and likely to provide for arbitration.<sup>160</sup>

In a pair of thoughtful critiques, Alan Rau scolds the Court for preventing arbitrators from using the full range of gap-filling rules

150. *Id.* at 1165.

151. Rau, *supra* note 3, at 454.

152. *Id.* at 469.

153. *Id.* at 473.

154. Drahozal & Rutledge, *supra* note 6, at 1145 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 (2010)).

155. *Id.* at 1143, 1145–48.

156. *Id.* at 1109.

157. *See id.* at 1147 (“Apparently arbitrators can interpret contracts . . . , but lack the same authority to develop common-law default rules as judges.”).

158. *See id.* at 1148 n.159 (“Although *Stolt-Nielsen* did not deal with a decision by the arbitrators on the merits of the case, its rationale—that arbitrators lack the authority of common law courts to make decisions on the basis of public policy—raises questions about arbitrators’ authority to fill gaps in contracts . . . on substantive issues.”).

159. *See id.*

160. *See supra* notes 36, 43–44 and accompanying text.

available under state contract law, leaving them with fewer gap-filling tools than their judicial counterparts. Focusing on what he describes as “the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration,”<sup>161</sup> Rau directs particular scorn at the Court’s indication that arbitrators lack “the authority of a common-law court.”<sup>162</sup> In his view, this means that arbitrators must “stop well short of the usual judicial work of construction.”<sup>163</sup> Likewise, he chides the Court for directing arbitrators to consult the FAA and other sources for default rules when faced with “silence” on the topic of class arbitration.<sup>164</sup> In his view, this passage stands for the “startling” implication that arbitrators must be “powerless to spin out . . . their *own*” gap-fillers.<sup>165</sup> Finally, he accuses the Court of ignoring a “meta-default rule” to the effect that the parties entrust their arbitrators with wide-ranging powers to determine the form that the proceedings should take.<sup>166</sup>

Offered by some of the country’s most thoughtful arbitration scholars, the foregoing criticisms of *Stolt-Nielsen* demonstrate the need for courts to be attentive when framing rules on the gap-filling powers of arbitrators. The criticisms also reveal the Supreme Court’s failure to meet that standard of attentiveness in *Stolt-Nielsen*, the Court’s clumsy framing of arbitrators’ powers, and consequent perceptions that the decision may transform arbitration into an inferior dispute-settlement process.

### C. Context and Nuance

After several readings of *Stolt-Nielsen*, however, it seems evident that scholarly criticisms gloss over context and passages that support more generous views regarding the gap-filling powers of arbitrators. These include the facts that (1) the particular case involved an arbitration clause regulated by the FAA, (2) the Supreme Court did *not* in fact draw a distinction between the gap-filling capacities of

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161. Rau, *supra* note 3, at 469; Rau, *supra* note 10, at 978.

162. Rau, *supra* note 3, at 469 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 673 (2010)); Rau, *supra* note 10, at 978, 981.

163. Rau, *supra* note 3, at 469; Rau, *supra* note 10, at 978.

164. See Rau, *supra* note 3, at 472; Rau, *supra* note 10, at 981.

165. Rau, *supra* note 3, at 473 (emphasis added); Rau, *supra* note 10, at 981 (emphasis added).

166. Rau, *supra* note 3, at 473; Rau, *supra* note 10, at 982.

courts and arbitrators, and (3) the Supreme Court *did* in fact recognize that arbitrators may exercise gap-filling powers as provided in the Restatement.

### 1. *Relevance of statutes*

Despite Professor Rau's criticism of the Supreme Court's insistence that the arbitrators should have referred to the FAA as part of the gap-filling exercise in *Stolt-Nielsen*, the fact is that statutes often provide definitive instructions on gap-filling. As Rau points out, the Uniform Commercial Code contains numerous gap-fillers for omitted terms,<sup>167</sup> including default rules on price and location of delivery.<sup>168</sup> When confronted with those sorts of gaps in sales transactions governed by the UCC, both courts and arbitrators presumably have obligations to apply the relevant statutory provision.<sup>169</sup> In other words, when statutes control the parameters of gap-filling, courts and arbitrators simply must follow the law.<sup>170</sup>

Applying the principles just mentioned, it seems crucial to recall that *Stolt-Nielsen* involved gap-filling in the context of an arbitration agreement regulated by the FAA in three separate ways: (1) the clause itself expressly called for application of the FAA; (2) the arbitration had its seat in New York; and (3) the FAA would likely reflect "community standards of fairness and policy" in any gap-filling exercise under Section 204 of the Restatement.<sup>171</sup> Against this

167. See Rau, *supra* note 3, at 463 (noting that "much of the UCC in fact consists of presumptions to which we necessarily default in reading an agreement"); Rau, *supra* note 10, at 972.

168. U.C.C. §§ 2-305, 2-308 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

169. Cf. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 NYU L. REV. 1, 8, 18–19 (1995) (observing that "'common law judging' now takes places in a 'world of statutes,'" and that "statutory interpretation is [now] likely the principal task engaged in by state courts."). At the time she wrote the article, Kaye was Chief Judge of the New York Court of Appeals. *Id.* at 1.

170. See BORN, *supra* note 44, at 2139 (insisting that "arbitrators are mandated to apply and uphold the law"); Mayer, *supra* note 104, at 235, 247 ("A new kind of arbitration, based on law, has emerged, as part of which the arbitrator is supposed to apply the rules of law laid down by the legislator. . . . [A]n arbitrator should consider it his duty . . . to comply with the law . . ."); see also Mayer, *supra* note 104, at 236 ("The duty of a judge is also to uphold the law."); cf. Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 OHIO ST. L.J. 285, 289 (2013) ("A common law court operating within a common law world differs markedly from a common law court acting in a legal landscape characterized by regulatory law and aggregate harms.").

171. See *supra* notes 120–22 and accompanying text.

background, the Supreme Court recognized that state law generally governs the interpretation of arbitration agreements, but that the process still requires application of “certain rules of fundamental importance” imposed by the FAA, including the principle that “arbitration ‘is a matter of consent, not coercion.’”<sup>172</sup> Identification of the parties *with whom* one agrees to arbitrate represents a central aspect of that consent.<sup>173</sup>

Because the parties to the bilateral arbitration agreement in *Stolt-Nielsen* had “no agreement” on class arbitration,<sup>174</sup> and because class arbitration would vastly and involuntarily expand the range of parties involved in a single proceeding,<sup>175</sup> the Supreme Court concluded that the tribunal’s authorization of class arbitration both lacked a “contractual basis” and was “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”<sup>176</sup> One may interpret this holding in two ways. First, the Supreme Court arguably held that the tribunal’s ruling on class arbitration ignored and violated a mandatory norm limiting the tribunal’s jurisdiction.<sup>177</sup> On this view, the precedential scope of *Stolt-Nielsen* might extend only to gap-filling of jurisdictional terms in arbitration agreements, and not the substantive terms of contracts.<sup>178</sup>

Second, in *Stolt-Nielsen*, the Supreme Court arguably held that the tribunal ignored *all relevant sources of law* and simply imposed its *own* view of the best resolution of a particular issue,<sup>179</sup> which would

172. See *supra* notes 85, 140 and accompanying text.

173. See *supra* notes 141, 148 and accompanying text.

174. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 669 (2010).

175. See *id.* at 683–84, 686–87.

176. *Id.* at 664–65, 684.

177. See Drahozal & Rutledge, *supra* note 6, at 1145 (“Given the Court’s emphasis on ensuring that parties not be required to arbitrate if they have not agreed to do so, the *Stolt-Nielsen* opinion might be limited to class arbitration and comparable, *essentially jurisdictional*, issues.”) (emphasis added). But see Rau, *supra* note 3, at 450 (deeming it only “marginally conceivable that the question [of class arbitration] could be taken to implicate to some degree the very existence or validity of consent to the arbitration process”).

178. Under this view, the holding of *Stolt-Nielsen* would not even extend to the gap-filling powers of arbitrators for non-jurisdictional procedural questions, such as dispositive motions and confidentiality. See Drahozal & Rutledge, *supra* note 6, at 1164 (supporting a reading of *Stolt-Nielsen* that limits the Court’s decision to “class arbitration and not . . . the procedural gap-filling powers of arbitrators more generally.”).

179. See *supra* notes 134–44 and accompanying text; see also *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (“Only if ‘the arbitrator act[s] outside the scope of his contractually delegated authority’—issuing an award that ‘simply reflect[s] [his] *own notions of [economic] justice*’ rather than [drawing on sources of law]—may a court overturn his

not even constitute a law-based decision, but *amiable composition* performed without the consent of the parties.<sup>180</sup> Importantly, that situation would justify vacatur of the tainted decision, whether involving jurisdictional or substantive issues, because in either case the tribunal would have exceeded its powers by adopting “a fundamentally different arbitral procedure than that agreed by the parties.”<sup>181</sup> Understood from that perspective, the precedential scope of *Stolt-Nielsen* would extend to unprincipled gap-filling both in the context of arbitration agreements and the substantive terms of contracts.

It is possible that the facts of *Stolt-Nielsen* support both of the interpretations proposed above. This seems consistent with the Supreme Court’s more recent observation in *Oxford Health Plans LLC v. Sutter* that *Stolt-Nielsen* left open the question of whether the availability of class arbitration represents a “gateway” issue sounding in jurisdiction, subject to *de novo* judicial review.<sup>182</sup> Evidently, the Court felt that it could leave the question open because the facts in *Stolt-Nielsen* supported vacatur whether one viewed class arbitration as raising jurisdictional or non-jurisdictional issues.<sup>183</sup> In either case,

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determination.”) (emphasis added) (quoting *Eastern Associated Coal Corp. v. Mineworkers*, 531 U.S. 57, 62 (2000)).

180. See BORN, *supra* note 44, at 2238 (defining service as “*amiable compositeur*” and arbitration “*ex aequo et bono*” to reflect the “essential principle . . . that arbitrators are not obliged to decide . . . in accordance with a strict application of legal rules; rather, the arbitrators are expected to decide in light of general notions of fairness, equity and justice”); LEW ET AL., *supra* note 1, at 471 (indicating that when parties authorize tribunals to act as *amiables compositeurs* or to decide cases *ex aequo et bono*, the arbitrators must “decide according to fairness and common sense principles” and may “ignore any applicable law rules”). According to one observer, it may not be all that unusual for arbitrators to feel the temptation to “render an award that meets their personal standard of justice rather than the letter of the law.” MARGARET M. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 82 (2d ed. 2012); see also Mayer, *supra* note 104, at 247 (recognizing that arbitrators must often deal “with the temptation to rule in equity”).

181. See BORN, *supra* note 44, at 2600 (explaining that when “an arbitral tribunal which is not granted *amiable compositeur* authority nonetheless renders an award not based on legal principles,” courts may vacate the awards for excess of jurisdiction because the tribunal has “adopted a fundamentally different arbitral procedure than that agreed by the parties”); see also WAENCYMER, *supra* note 95, at 1045 (“The ICSID Convention expressly indicates that a tribunal acting *ex aequo et bono* without authority would be subject to annulment.”).

182. *Oxford Health Plans*, 133 S. Ct. at 2068 n.2.

183. In *Stolt-Nielsen*, the Supreme Court concluded only that the arbitrators “exceeded [their] powers” within the meaning of 9 U.S.C. § 10(a)(4). *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672 (2010). As explained by two noted observers, an excess of

the point is that when statutes regulate a particular issue, arbitrators exceed their powers by saying “‘to hell with’ the applicable law” and applying contrary principles based solely on their own views of the proper outcome.<sup>184</sup> The point hardly seems controversial.<sup>185</sup>

## 2. Courts and tribunals

While critics argue that *Stolt-Nielsen* draws a distinction between the gap-filling powers of courts and arbitrators,<sup>186</sup> such assertions seem demonstrably inaccurate. To the contrary, when discussing the need to respect the FAA’s “fundamental” emphasis on “consent,”<sup>187</sup> including the question of “*with whom*” the parties have chosen to arbitrate,<sup>188</sup> the Court emphasized the parity of restrictions imposed on courts and arbitrators: “It falls to *courts and arbitrators* to give effect to these contractual limitations, and when doing so, *courts and arbitrators* must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.”<sup>189</sup> Quoting this language, a federal court in California recently emphasized that *Stolt-Nielsen* imposes the *same* requirements on “*both* courts and arbitrators, without distinguishing their respective roles.”<sup>190</sup>

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powers “is of a different nature” than “lack of substantive jurisdiction.” SUTTON & GILL, *supra* note 84, at 387. In particular, “[j]urisdiction goes to the tribunal’s mandate whereas an excess of powers need not.” *Id.* Thus, a tribunal with jurisdiction over a matter may exceed its powers by taking certain procedural steps, such as appointing experts or consulting lawyers, contrary to the agreement of the parties. *Id.*

184. Rau, *supra* note 3, at 472; Rau, *supra* note 10, at 981; *see also* Transcript of Oral Argument, *infra* note 215, at 26 (Breyer, J.) (indicating that “totally ignoring plain law is a ground for reversing an arbitrator, even an arbitrator”). In *Stolt-Nielsen*, the Court assumed for the sake of argument that “manifest disregard” of the law (1) survived as ground for vacatur, and (2) required a showing that the tribunal “knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.” *Stolt-Nielsen*, 559 U.S. at 672 n.3. (alteration in original). Tellingly, the Court found that the facts satisfied the threshold for relief under that standard. *Id.*

185. *See supra* note 181 and accompanying text.

186. *See supra* notes 155, 159, 162–63 and accompanying text.

187. *Stolt-Nielsen*, 559 U.S. at 681–84.

188. *Id.* at 683.

189. *Id.* at 684 (emphasis added).

190. *Lee v. JPMorgan Chase & Co.*, 982 F. Supp. 2d 1109, 1113 (C.D. Cal. 2013); *see also* *Sonic Auto., Inc. v. Price*, No. 3:10-CV-382, 2011 WL 3564884, at \*13 (W.D.N.C. Aug. 12, 2011) (“It follows that those involved in the administration of arbitration proceedings, both courts and arbitrators, must strive to, ‘give effect to the contractual rights and

Likewise, in *Stolt-Nielsen*, the Court did not state that arbitrators lack the gap-filling powers of courts, or even common-law courts, *in general*. In this regard, one should bear two points in mind. First, the Supreme Court chose its words carefully: it referred to the “authority of a *common-law court*,”<sup>191</sup> which historically meant the authority to exercise a leading role in social governance through judicial development of legal principles without having to take statutes into account.<sup>192</sup> Second, and more importantly, the Court criticized the arbitral tribunal for acting as if it had the “authority of a common-law court” in a *particular context*. Thus, having just held that the tribunal should have consulted the FAA, federal maritime law, or possibly New York law to fill the gap on class arbitration, the Court noted that the tribunal failed to do so and, instead, acted “as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied *in such a situation*.”<sup>193</sup>

In other words, the Court held that where a federal statute controls the process of gap-filling, arbitrators lack the traditional, open-ended capacity of common-law courts to make up rules based

expectations of the parties.”) (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

191. *Stolt-Nielsen*, 559 U.S. at 673–74 (emphasis added).

192. As one writer explains, English common law developed in the early seventeenth-century as part of an effort to counteract the “claims of increasingly powerful monarchs.” KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900* 28 (2011). In the process, common-law principles concentrated the power to declare law in the hands of judges, and identified that law more directly with “the people.” *Id.* at 29. Over time, English common law judges came to assert that their decisions might also “limit the reach of statutes.” *Id.* at 32. Thus, in one case, Coke wrote that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.” *Id.* at 32–33 (quoting *Bonham’s Case*, 77 Eng. Rep. 646, 652 (C.P. 1610)).

With respect to the historical development of the common law in the United States, the same writer asserts that “the common law was considered an integral mode of governance and public discourse” from the time of “the American Revolution until the very end of the nineteenth century.” *Id.* at 1; *see also* Zipkin, *supra* note 170, at 292 (“Historians have shown that in the pre-Civil War period the common law instantiated a framework of governance.”).

During that period, before the proliferation of statutes and the consolidation of state structures, U.S. common-law courts had wide-ranging powers to “shape regulation in nineteenth-century America through a distinctly judicial form.” Zipkin, *supra* note 170, at 293; *see also* PARKER, *supra*, at 3, 18 (referring to the absence of “extensive state structure” as a condition that supported development of the common law during the nineteenth century, and recording the decline of the common law as a mode of governance following shifts towards “state-generated law” during the twentieth century).

193. *Stolt-Nielsen*, 559 U.S. at 673–74 (emphasis added).



on their own policy preferences. In analogous circumstances, federal courts would also lack the authority of common-law courts.<sup>194</sup> Likewise, even state courts, which retain a broader range of common-law powers, lack the capacity to ignore controlling statutes and to make up contrary rules based on their own perceptions of right and wrong.<sup>195</sup> Again, the point hardly seems controversial.

In short, the point is that the Supreme Court did not establish a general distinction between the gap-filling powers of courts and arbitrators in *Stolt-Nielsen*. To the contrary, it emphasized the parity of requirements imposed on courts and arbitrators to respect the FAA's emphasis on consent when addressing the range of parties to be joined in a single proceeding.<sup>196</sup> Furthermore, when criticizing the tribunal for "proceed[ing] as if it had the authority of a common-law court,"<sup>197</sup> the Supreme Court did so in a context where the tribunal

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194. Cf. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals [interpreting federal statutes].") (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)). The Supreme Court made this absolutely clear in *Stolt-Nielsen* when it emphasized that "courts and arbitrators" have identical obligations to respect contractual limitations on consent, and to honor the FAA's purpose to give effect to the intent of the parties. *Stolt-Nielsen*, 559 U.S. at 684.

195. In a modern "statutory world," common-law courts must respect and apply constitutionally-enacted legislation. See *Kaye*, *supra* note 169, at 18–19 (indicating that "statutory interpretation is likely the principal task engaged in by state courts"); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 996 (1982) (reporting that a mere ten percent of recent cases decided by the Connecticut Supreme Court qualified as "purely common law cases") [hereinafter *Peters*, *Common Law Judging*].

Even in traditional common-law fields, such as contracts and torts, legislatures have adopted statutes that control the process of judicial decision-making. See *Kaye*, *supra* note 169, at 8 (indicating that "even in traditional common-law fields like torts, contracts, and property we often confront statutes that affect our decisionmaking"); *Peters*, *supra*, at 996 (reporting that "the role of statutes is just as crucial in litigation involving so-called common law subjects, such as torts, contracts, property, and procedure, as elsewhere").

As a result, even common-law courts have become reluctant to develop the common law in ways that would result in major policy shifts, preferring to leave such undertakings to the legislative process. *Kaye*, *supra* note 169, at 9. In other words, "[a] common law court operating within a common law world differs markedly from a common law court acting in a . . . landscape characterized by regulatory law . . ." *Zipkin*, *supra* note 170, at 289. Again, the Supreme Court made this absolutely clear in *Stolt-Nielsen* when it emphasized that "courts and arbitrators" have identical obligations to respect contractual limitations on consent and to honor the FAA's purpose to give effect to the intent of the parties. *Stolt-Nielsen*, 559 U.S. at 684. Presumably, the Court's assessment applies to all courts, state and federal, in controversies regulated by the FAA.

196. See *supra* notes 142, 189–90 and accompanying text.

197. *Stolt-Nielsen*, 559 U.S. at 673–74.

had ignored controlling statutes and had formulated contrary rules based on its own policy preferences.<sup>198</sup> In analogous circumstances, the same criticisms would apply to federal and state courts.<sup>199</sup> Thus, when viewed with a full measure of attention to nuance, the Supreme Court recognized no general distinction between the gap-filling capacities of courts and arbitrators.

### *3. Explicit recognition of gap-filling powers*

In a passage not mentioned by Professors Drahozal, Rutledge, or Rau, the Supreme Court opinion in *Stolt-Nielsen* (1) explicitly recognized the gap-filling powers of arbitrators and (2) tied them back to the standards that appear in Section 204 of the Restatement. Towards the end of its opinion, the Supreme Court observed that the tribunal's ruling on class arbitration lacked a "contractual basis" and was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."<sup>200</sup> Immediately following that passage, however, the Supreme Court initiated a discourse that recognizes the gap-filling powers of arbitrators in terms that echo Professor Rau's "meta-default rule" on the subject.<sup>201</sup> Thus, the Court stated, "In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement."<sup>202</sup>

Further clarifying the gap-filling powers possessed by arbitrators, the Court identified Section 204 of the Restatement as the relevant source:

This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential

198. See *supra* notes 134–44, 171–81 and accompanying text.

199. See *supra* notes 189–90, 194–95 and accompanying text.

200. *Stolt-Nielsen*, 559 U.S. at 684.

201. See *supra* note 166 and accompanying text.

202. *Stolt-Nielsen*, 559 U.S. at 684–85. Compare Rau, *supra* note 3, at 473 (referring to "a 'meta-default rule' [that] informs every feature of our law of arbitration— . . . a background rule to the effect that by submitting to the process, the parties in cases of 'silence' have presumptively entrusted to *their arbitrators* a wide-ranging power to determine just what form their proceeding will take").

to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”<sup>203</sup>

In other words, when the Court spoke most clearly and directly about the capacity of arbitrators to supply omitted terms, it invoked the same basic standards applied by U.S. judges for over a generation.

Despite the Court’s recognition that arbitrators may apply the sorts of gap-filling rules set forth in the Restatement, it should be evident that those principles could not sustain the tribunal’s ruling in *Stolt-Nielsen*. To begin with, there was no indication that the tribunal even purported to apply the Restatement, or anything like it, in filling the contract’s silence on class arbitration. Furthermore, the tribunal’s endorsement of class arbitration clearly did not satisfy the Restatement’s requirement that judicially supplied terms be “reasonable in the circumstances.”<sup>204</sup> To begin with, the Supreme Court expressly declared the non-consensual imposition of class arbitration to be “at war” with controlling requirements of the FAA,<sup>205</sup> meaning that the tribunal’s decision did not “comport[] with community standards of fairness and policy.”<sup>206</sup> Furthermore, class arbitration would not fall within the reasonable expectations of the parties because (1) the relevant charter-party form had never been used to sustain class arbitration,<sup>207</sup> (2) the parcel tanker industry had no usage or custom supporting class arbitration,<sup>208</sup> and (3) the extension of a bilateral arbitration clause to encompass hundreds or thousands of parties fundamentally changed the “nature” of the arbitral process.<sup>209</sup>

Simply put, *Stolt-Nielsen* does not restrict, but expressly endorses, gap-filling by arbitrators along the lines set forth in the Restatement, subject to outer limits imposed by the FAA on courts and tribunals alike. Although the Court’s explicit discussion of the Restatement’s standards may seem limited, the Court had little

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203. *Stolt-Nielsen*, 559 U.S. at 685 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981)).

204. RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981).

205. *Stolt-Nielsen*, 559 U.S. at 684.

206. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981).

207. *Stolt-Nielsen*, 559 U.S. at 674.

208. *Id.* at 674 & n.6.

209. *Id.* at 685–87.

occasion to say more because the tribunal did not purport to apply the gap-filling powers set forth in the Restatement and, in any event, adopted conclusions not reconcilable with the exercise of those powers.

#### IV. EPILOGUE: ARBITRATORS AT LARGE?

Having raised the alarm about *Stolt-Nielsen*, the strict limits supposedly placed on arbitral gap-filling, and the correspondingly enhanced likelihood of vacatur of awards by reviewing courts, Alan Rau now claims that the Supreme Court quickly liberated arbitrators from those constraints in *Oxford Health Plans, LLC v. Sutter*.<sup>210</sup> In Rau's view, the Court's decision in *Oxford Health Plans* sets arbitrators "at large" by vesting them with interpretive powers simultaneously wide enough to pull agreements on class-wide arbitration out of thin air, and vigorous enough to resist judicial review.<sup>211</sup> Thus, he sees *Stolt-Nielsen* as a "hill" that the Court briskly climbed then descended,<sup>212</sup> though by a needlessly confusing and circuitous route.<sup>213</sup>

While discussion of *Oxford Health Plans* draws this Article beyond the topic of arbitral gap-filling and more into the specificities of debates associated with class arbitration, assessment of that case represents a useful step, both to address claims regarding the demise of *Stolt-Nielsen* and to illustrate the continuing tendencies of observers to gloss over nuances in Supreme Court pronouncements regarding the powers of arbitrators to interpret or to fill gaps in arbitration agreements. Developing both of these points, it seems evident that Professor Rau overestimates the extent to which the Supreme Court has retreated from *Stolt-Nielsen*, and the degree to which arbitrators possess unrestricted licenses to interpret arbitration agreements to permit class-wide arbitration following *Oxford Health Plans*.

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210. See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013); Rau, *supra* note 10, at 1000.

211. See Rau, *supra* note 10, at 989–97, 999–1000.

212. *Id.* at 1000.

213. See *id.* at 1000–01 (describing the Supreme Court's jurisprudence as a "dizzying series of twists and turns" that ultimately establishes a wide remit for arbitrators to make determinations about the availability of class arbitration, but that also create "obvious incentives for [arbitrators] to be . . . less than candid with respect to the true rationale of their awards").

To lay the foundation for analysis, one must begin with the facts of the dispute in *Oxford Health Plans*. In that case, a physician agreed to charge prescribed rates when treating participants in a managed-care network.<sup>214</sup> Following several years of performance, the physician brought a class action lawsuit in New Jersey state courts, alleging that the health insurance company failed to make timely and full payments to him and roughly 20,000 class members.<sup>215</sup> Instead of answering the complaint, the health insurance company moved to compel arbitration in accordance with the following clause of its agreement with the physician: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.”<sup>216</sup>

Based on its understanding of Supreme Court precedent in 2003, the health insurance company asserted that the state court should allow the arbitrator to make a decision on the availability of class-wide arbitration “in the first instance.”<sup>217</sup> Agreeing with the health insurance company, the state court referred the matter to arbitration, including the question of whether the particular arbitration clause authorized class arbitration.<sup>218</sup>

During the arbitration proceedings, the health insurance company filed an application requesting the arbitrator to decide that the arbitration clause did not provide for class-wide proceedings.<sup>219</sup> Despite the absence of any language expressly mentioning the

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214. *Oxford Health Plans*, 133 S. Ct. at 2067.

215. *Id.*; see also Transcript of Oral Argument at 35, *Oxford Health Plans*, 133 S. Ct. 2064 (No. 12-135), 2013 WL 2337933, at \*35 [hereinafter Transcript of Oral Argument] (indicating that the class might include all “20,000 physicians who had signed the same agreement” with Oxford Health Plans); Brief for Petitioner at \*2–3, \*6, *Oxford Health Plans*, 133 S. Ct. 2064 (2013) (No. 12-135), 2013 WL 244026, at \*2–\*3, \*6 [hereinafter Brief for Petitioner] (setting forth the chronology of the relationship and indicating that the class might include as many as 20,000 New Jersey physicians).

216. See *Oxford Health Plans*, 133 S. Ct. at 2067.

217. See Brief for Petitioner, *supra* note 215, at \*4; Transcript of Oral Argument, *supra* note 215, at \*4–5.

218. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 217 (3d Cir. 2012); see also Brief for Respondent at 6, 27, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) (No. 12-135), 2013 WL 662696, at \*6, \*27 [hereinafter Brief for Respondent].

219. Brief for Respondent, *supra* note 218, at \*27.

possibility of class arbitration,<sup>220</sup> the arbitrator used the following interpretive moves to conclude that the arbitration clause endorsed class-wide proceedings. First, the arbitration clause excluded the parties from commencing civil actions relating to their agreement before any state or federal court.<sup>221</sup> Second, with a pleasing symmetry, the clause also provided for arbitration of any civil action excluded from litigation.<sup>222</sup> Third, because class actions represent “one of the possible forms of civil action that could be brought in a court,” the arbitration clause on its face provided for class arbitration.<sup>223</sup>

Several years later, after *Stolt-Nielsen* came down but while class arbitration proceedings dragged on in *Oxford Health Plans*, the health insurance company filed a second application asking the arbitrator to rule that the arbitration clause did not authorize class-wide proceedings.<sup>224</sup> The arbitrator confirmed his original decision, after which the health insurance company requested the United States District Court for the District of New Jersey to vacate the award on the grounds that the arbitrator exceeded his powers under 9 U.S.C. § 10(a)(4).<sup>225</sup> The district court denied the motion, and the United States Court of Appeals for the Third Circuit affirmed on the grounds that the arbitrator made a good-faith effort to interpret the arbitration agreement.<sup>226</sup> Once the arbitrator used interpretive tools to locate a contractual basis for class-wide arbitration, courts lacked the power to second-guess that decision, even if based on serious errors of law.<sup>227</sup>

On further review before the Supreme Court, the health insurance company described the arbitrator’s decision as “irrational” and, thus, not capable of withstanding scrutiny “under any standard of review.”<sup>228</sup> By contrast, the physician argued that the only question under 9 U.S.C. § 10(a)(4) was whether the arbitrator had

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220. See Brief for Petitioner, *supra* note 215, at \*21 (“Nothing in the text of the parties’ arbitration clause refers in any way to class proceedings . . .”).

221. *Oxford Health Plans*, 133 S. Ct. at 2067; *Sutter*, 675 F.3d at 223.

222. *Oxford Health Plans*, 133 S. Ct. at 2067; *Sutter*, 675 F.3d at 223.

223. *Oxford Health Plans*, 133 S. Ct. at 2067.

224. *Id.*; *Sutter*, 675 F.3d at 218; Brief for Respondent, *supra* note 218, at 28.

225. *Oxford Health Plans*, 133 S. Ct. at 2067–68; *Sutter*, 675 F.3d at 218, 223.

226. *Oxford Health Plans*, 133 S. Ct. at 2068; *Sutter*, 675 F.3d at 218, 220, 224–25.

227. *Oxford Health Plans*, 133 S. Ct. at 2068; *Sutter*, 675 F.3d at 220, 224–25.

228. Brief for Petitioner, *supra* note 215, at \*12, \*14, \*26, \*39.

exceeded his powers.<sup>229</sup> Viewed from that perspective, it seemed dispositive that the health insurance company asked the arbitrator to interpret the arbitration clause twice and that the arbitrator rendered a decision based on his interpretation of the clause.<sup>230</sup> While the arbitrator might have decided rightly or wrongly, the physician emphasized that the arbitrator acted within his powers.<sup>231</sup>

In weighing the parties' arguments, the Supreme Court indicated that it viewed the substance of the arbitrator's decision as indefensible.

The remainder of Oxford's argument addresses merely the merits: [t]he arbitrator, Oxford contends at length, badly misunderstood the contract's arbitration clause. . . . The arbitrator thought that clause sent to arbitration all "civil action[s]" barred from court, and viewed class actions as falling within that category . . . . But Oxford points out that . . . a class action is not a form of "civil action," as the arbitrator thought, but merely a procedural device that may be available in a court. At bottom, Oxford maintains, this is a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures. . . . Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading.<sup>232</sup>

However, the Court concluded that arbitrators have the power to interpret contracts, that the parties in *Oxford Health Plans* had in fact requested the arbitrator to interpret the arbitration agreement, and that the arbitrator arguably performed the task conferred on him.<sup>233</sup> Therefore, the arbitrator did not exceed his powers for purposes of 9 U.S.C. § 10(a)(4).<sup>234</sup> With that threshold issue resolved in favor of the arbitrator, his decision prevailed, even if it included grave errors.<sup>235</sup>

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229. Transcript of Oral Argument, *supra* note 215, at \*23; Brief for Respondent, *supra* note 218, at \*18.

230. Transcript of Oral Argument, *supra* note 215, at \*24, \*26–27, \*30–31; Brief for Respondent, *supra* note 218, at \*14, \*30.

231. Brief for Respondent, *supra* note 218, at \*18–19, \*33.

232. *Oxford Health Plans*, 133 S. Ct. at 2070.

233. *Id.* at 2069–71.

234. *Id.*

235. *Id.* at 2070–71.

Writing some nine months after the Court released its decision in *Oxford Health Plans*, Alan Rau opined that the Court had set arbitrators back “at large.”<sup>236</sup> So long as the parties did not stipulate to the complete absence of any agreement whatsoever on class arbitration, arbitrators could use *interpretive* tools to identify contractual bases for class procedures. In so doing, they could use reasons that seemed “facially preposterous” and that would “make a first-year law student blush,” all without exposing the substance of their decisions to judicial review.<sup>237</sup> In other words, arbitrators could return to the business of pulling justifications for class arbitration out of thin air.

To emphasize the logical implications of *Oxford Health Plans*, Rau notes that in thirteen of fourteen recent proceedings administered by the American Arbitration Association, arbitrators have found a contractual basis for class-wide arbitration.<sup>238</sup> In most of those decisions, Rau describes the arbitrators’ reasoning as “wacky,” if not “truly disingenuous.”<sup>239</sup> Perhaps with a sense of vindication, however, Rau describes this series of arbitral decisions as “perfectly in line” with his “expansive” views regarding the gap-filling authority of arbitrators.<sup>240</sup> In addition, he asserts that *Oxford Health Plans* left arbitrators with considerably broader powers than common law courts,<sup>241</sup> at least in the sense that arbitrators may pull justifications for class-wide arbitration out of thin air without fear of judicial second-guessing, provided they do so under the color of interpreting the parties’ arbitration clause. In Rau’s view, this means that all but “the most unwary, clumsy or naive” arbitrators will find some way around *Stolt-Nielsen*.<sup>242</sup>

While sensible up to a point, Rau’s most recent analysis seems open to familiar lines of criticism. To begin with, its exclusive reliance on an emerging “arbitral jurisprudence” resembles an approach that the Supreme Court spurned in *Stolt-Nielsen*.<sup>243</sup> As

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236. Rau, *supra* note 10, at 990–1000.

237. *See id.* at 992–94, 997–60, 63.

238. *Id.* at 996.

239. *Id.* at 997.

240. *Id.* at 1000.

241. *Id.*

242. *Id.* at 1001.

243. *See id.* at 1001 (drawing conclusions about *Oxford Health Plans* based on “the current state of arbitral jurisprudence”).



discussed above, the parties in *Stolt-Nielsen* concluded an arbitration agreement, but reached no agreement on the availability of class-wide proceedings.<sup>244</sup> Despite a stipulation that the parties' arbitration clause was "silent" on the class arbitration issue,<sup>245</sup> the arbitral tribunal held that it possessed the authority to order class arbitration.<sup>246</sup> In justifying its decision, the tribunal relied on the fact that other arbitrators had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration."<sup>247</sup> While the tribunal also recognized the existence of "court cases denying consolidation of arbitrations," it did not regard those precedents as a basis for departing from the emerging "arbitral consensus" regarding the availability class arbitration.<sup>248</sup>

However, when the award made its way to the Supreme Court in *Stolt-Nielsen*, the majority strongly implied that the tribunal placed too much emphasis on a perceived "arbitral consensus" and improperly glossed over unfavorable judicial precedents, and that this pair of miscalculations played a role the Court's decision to vacate the tribunal's award on class arbitration.<sup>249</sup> Likewise, Rau's near-total reliance on a series of arbitral rulings seems troubling, particularly when combined with a tendency to gloss over unfavorable judicial pronouncements reflected both in *Oxford Health Plans* and in subsequent decisions by United States Courts of Appeals.

Turning to the question of unfavorable judicial pronouncements, Rau pays scant attention to a nuance that renders *Oxford Health Plans* an unlikely basis for sweeping conclusions about the Supreme Court setting arbitrators "at large" to make decisions about the availability of class arbitration. Students of the Court's arbitration jurisprudence will know about the existence of "gateway" questions, which involve disputes about whether, how, or with whom an arbitration will proceed.<sup>250</sup> They will also know that the Court has divided gateway questions into two categories: "questions of

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244. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 667–69 (2010).

245. *Id.* at 668–69.

246. *Id.* at 669.

247. *Id.*

248. *Id.* at 674–75.

249. *See id.* at 673–75.

250. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002) (discussing various categories of "potentially dispositive gateway question[s]" relating to the institution and continuation of arbitration proceedings).

arbitrability” and “procedural questions,”<sup>251</sup> the latter of which some lower courts have come to call “subsidiary questions.”<sup>252</sup> The distinction becomes important because questions of arbitrability are presumptively for courts to decide,<sup>253</sup> either in the first instance,<sup>254</sup> or on de novo review absent “clear[] and unmistakabl[e]” evidence that the parties wanted an arbitrator to resolve the issue.<sup>255</sup> Importantly, merely submitting a question of arbitrability to the arbitrator does not cross the required threshold; to the contrary, there must be clear and unmistakable evidence that the parties wanted the arbitrator to make a *conclusive* determination, and did not intend to preserve their entitlement to de novo review.<sup>256</sup>

By contrast, “procedural” or “subsidiary” questions are presumptively for arbitrators to decide,<sup>257</sup> subject only to the limited and highly deferential review that normally applies to arbitral awards and that focuses on upholding the integrity of the arbitral process.<sup>258</sup> For example, courts may generally inquire if tribunals have exceeded their powers, whether tribunals have committed gross violations of fundamental procedural norms, or whether their decisions have been

251. See *id.* at 83–84; see also RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-7 reporters’ note (b)(i) (AM. LAW INST., Council Draft No. 4, 2014) (describing the distinction between “substantive” and “procedural” questions of arbitrability in Supreme Court jurisprudence).

252. See, e.g., *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 597 (6th Cir. 2013).

253. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068–69 n.2 (2013); *Howsam*, 537 U.S. at 83.

254. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) (indicating that parties who resist arbitration based on questions of arbitrability may apply to courts for injunctive relief at an early stage in the proceedings); *Reed Elsevier*, 734 F.3d at 596 (involving a claim seeking declaratory relief in order to prevent an arbitrator from making decisions on questions of arbitrability).

255. *Oxford Health Plans*, 133 S. Ct. at 2068–69 n.2 (quoting *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986)).

256. See *First Options of Chicago, Inc.*, 514 U.S. at 946 (“But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator’s decision on that point.”).

257. *Howsam*, 537 U.S. at 84; *Reed Elsevier*, 734 F.3d at 597.

258. See *MOSES*, *supra* note 180, at 205–07 (explaining that most jurisdictions limit the grounds for challenging arbitral awards to questions of jurisdiction and procedural integrity); *REDFERN & HUNTER*, *supra* note 44, at 616 (indicating that “most States are broadly content to restrict the challenge of arbitral awards to excess of jurisdiction and lack of due process”); see also *LEW ET AL.*, *supra* note 1, at 665 (describing the availability of proceedings to challenge awards as a “guarantee” that “inspires the confidence of the parties in the arbitration *process*”) (emphasis added).

affected by corruption or bias.<sup>259</sup> However, this narrow and deferential standard of judicial review leaves virtually no room for consideration of the merits.<sup>260</sup>

Students of the Court's arbitration jurisprudence will also recall the dividing lines generally drawn between questions of arbitrability and procedural questions. Questions of arbitrability embrace a narrow range of issues associated with consent:<sup>261</sup> whether a party has consented to arbitration at all,<sup>262</sup> whether it has consented to arbitration of a particular dispute,<sup>263</sup> or whether it has consented to arbitration with a particular counterparty.<sup>264</sup> By contrast, procedural or subsidiary questions typically embrace issues that "grow out of the dispute and bear on its final disposition."<sup>265</sup> Such issues may include controversies about notice, waiver, and time limits, all of which may affect whether and how the proceedings will go forward.<sup>266</sup>

Returning to the topic of class arbitration, everyone seems to agree that the availability of class-wide proceedings represents a key, threshold issue that should be decided at an early stage and seems likely to shape the character of the proceedings. They disagree, however, on whether the availability of class-wide arbitration raises a

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259. See 9 U.S.C. § 10(a)(1)–(4); see also Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 1, 15 (1985) (describing proceedings to challenge the award as a "bulwark against corruption, arbitrariness, [and] bias").

260. See *MOSES*, *supra* note 180, at 205, 207–08 (indicating that "in most jurisdictions there is no right to appeal if the arbitrators made a mistake of law or of fact," but identifying a small number of narrow and controversial exceptions); see also *LEW ET AL.*, *supra* note 1, at 665 (explaining that a proceeding to challenge an award "cannot and should not amount to a review of the merits").

261. RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 2-7 reporters' note (b)(i) (AM. LAW INST., Council Draft No. 4, 2014).

262. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068–69 n.2 (2013); *Reed Elsevier*, 734 F.3d at 597.

263. *Oxford Health Plans*, 133 S. Ct. at 2068–69 n.2; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

264. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes."); *Howsam*, 537 U.S. at 84 (explaining that "a gateway dispute about whether *the parties* are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide") (emphasis added); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–46 (1995) (involving an argument that individuals were not parties to an arbitration agreement between two corporate entities, and treating the issue as a question of arbitrability).

265. *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

266. *Id.* at 84–85.

question of arbitrability, or a procedural question. Proponents of the first view argue that it represents a question of arbitrability because it raises the question of “with whom” the parties have consented to arbitrate: a single opponent or thousands of adversaries.<sup>267</sup> Proponents of the second view assert that it represents a subsidiary question because the parties typically stipulate that they have consented to arbitration and the only question is whether the arbitration will proceed in the form of a class action, which represents a procedural device.<sup>268</sup>

Given the outcome in *Oxford Health Plans*, one might possibly conclude that the Supreme Court either explicitly or implicitly identified the availability of class arbitration as a procedural question, which would in fact have set arbitrators “at large” to interpret arbitration agreements. However, *Oxford Health Plans* involved a nuance that the parties and the Court ventilated almost entirely in footnotes, that prevented the Court from addressing the proper designation of class arbitration, and that makes it premature to render sweeping pronouncements regarding the freedom of arbitrators to interpret arbitration clauses to permit class-wide proceedings.

In its opening brief for *Oxford Health Plans*, the health insurance company observed that the Court’s reasoning in *Stolt-Nielsen* seemed consistent with the proposition that the availability of class arbitration involves a question of arbitrability presumptively for courts to resolve either in the first instance, or on de novo review of arbitration awards.<sup>269</sup> However, the health insurance company also disclosed that *Oxford Health Plans* would not present an opportunity for the Court to develop its jurisprudence on gateway issues.<sup>270</sup> Based

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267. *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326, 332–33 (3d Cir. 2014); *Reed Elsevier*, 734 F.3d at 598–99.

268. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (plurality opinion) (indicating that the availability of class arbitration “concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties”; explaining that “the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*”; emphasizing that “the relevant question here is what *kind of arbitration proceeding* the parties agreed to”; and concluding that the question “concerns contract interpretation and arbitration procedures”). *But see Stolt-Nielsen*, 559 U.S. at 680, 687 (emphasizing that the views stated in *Bazzle* only constituted a plurality opinion, and doubting whether the fundamental differences between bilateral arbitration and class arbitration simply encompass different “procedural mode[s]”).

269. Brief for Petitioner, *supra* note 215, at \*38 n.9.

270. *Id.*

on its understanding of case law in 2003, the health insurance company had not submitted the question of arbitrability to a court for determination in the first instance.<sup>271</sup> Subsequently, the health insurance company had not argued for de novo review of the arbitrator's decision in the lower courts.<sup>272</sup> Therefore, it had waived the opportunity to build on helpful concepts articulated in *Stolt-Nielsen*,<sup>273</sup> including dicta to the effect that class-wide arbitration represents something more than a procedural tool, that it vastly expands the universe of potential counterparties and, therefore, that it raises the question of "with whom" one consents to arbitrate.<sup>274</sup>

Given the posture of the case, the health insurance company had no choice but to argue that the arbitrator's interpretation of the arbitration agreement to permit class arbitration was so poorly reasoned, and so fundamentally wrong, that it could not survive under any standard of review.<sup>275</sup> As already noted, the physician replied that the only question was whether the arbitrator had exceeded his powers.<sup>276</sup> Viewed from that angle of appreciation, it seemed dispositive that the parties had asked that arbitrator to interpret the arbitration agreement, and that the arbitrator had done so.<sup>277</sup> Under these circumstances, the Court accepted that the arbitrator had acted within the powers conferred on him.<sup>278</sup> The Court could not go on to evaluate the substance of the arbitrator's interpretation, as that issue lay completely outside the scope of review established by 9 U.S.C. § 10(a)(4).<sup>279</sup>

Although the Court accepted the physician's arguments for the purposes of the case, it immediately laid down a footnote emphasizing that it "would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.'"<sup>280</sup> In such a case, the Court would have more options at its disposal, including the possibility of reserving

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271. *Id.*; see also *supra* note 217 and accompanying text.

272. Brief for Petitioner, *supra* note 215, at \*38 n.9.

273. *Id.*

274. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010).

275. See *supra* note 228 and accompanying text.

276. See *supra* note 229 and accompanying text.

277. See *supra* note 230 and accompanying text.

278. See *supra* notes 233–34 and accompanying text.

279. See *supra* note 235 and accompanying text.

280. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068–69 n.2 (2013).

such determinations presumptively for judges,<sup>281</sup> which would not mean setting arbitrators “at large,” but curtailing their role either by cutting them out of the picture entirely,<sup>282</sup> or by subjecting their decisions to de novo review.<sup>283</sup> In other words, the Court recognized that *Oxford Health Plans* arose in an unusual posture, which severely limited the range issues and, perhaps, the value of the decision as a predictor of what the Court might do given full range of motion. Under these circumstances, it seems premature to declare that the Court has set arbitrators “at large” to make their own decisions regarding the availability of class arbitration.

Assuming that the Court has not set arbitrators “at large,” but has expressly reserved judgment on the presumptive distribution of power between courts and arbitrators, the question becomes how lower courts are shaping the state of play. Again, Rau glosses over unfavorable judicial pronouncements, including the fact that the only United States Courts of Appeals squarely to address the issue have held that the availability of class arbitration represents a question of arbitrability presumptively reserved for judicial determination. Tellingly, this includes the United States Court of Appeals for the Third Circuit, which consciously switched positions in the wake of *Oxford Health Plans*.

Months before Rau expressed his assessment of *Oxford Health Plans*, the United States Court of Appeals for the Sixth Circuit declared that the Supreme Court had not set arbitrators at large to make determinations about the availability of class arbitration. In *Reed Elsevier, Inc. v. Crockett*, a lawyer concluded a subscription agreement with LexisNexis, which contained an arbitration clause.<sup>284</sup> Believing that LexisNexis had unjustifiably overcharged him, the lawyer filed a demand for class arbitration and sought \$500 million in damages.<sup>285</sup> Instead of responding to the demand, LexisNexis commenced a lawsuit in federal court, seeking a judicial determination that the arbitration clause in the subscription agreement did not permit class-wide arbitration proceedings.<sup>286</sup> In

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281. See *supra* note 253 and accompanying text.

282. See *supra* note 254 and accompanying text.

283. See *Oxford Health Plans*, 133 S. Ct. at 2068–69 n.2; see also *supra* note 255 and accompanying text.

284. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 596 (6th Cir. 2013).

285. *Id.*

286. *Id.*

the judicial proceedings, the lawyer asserted that the arbitrator possessed the right to determine the availability of class arbitration.<sup>287</sup> Thus, resolution of the judicial proceedings depended on whether the availability of class arbitration represents a question of arbitrability to be decided by judges, or a subsidiary question to be decided by arbitrators.<sup>288</sup>

When the issue reached the Sixth Circuit, the panel recognized that “the Supreme Court’s puzzle of cases on this issue is not yet complete,” but opined that “the Court has sorted the border pieces and filled in much of the background.”<sup>289</sup> In its assessment of Supreme Court jurisprudence, the Sixth Circuit explained that “the Court has given every indication, short of an outright holding,” that the availability of class-wide arbitration represents a question of arbitrability “rather than a subsidiary one.”<sup>290</sup> As evidence of that trend, the Sixth Circuit noted the Court had recently emphasized the “fundamental” differences between bilateral and class-wide arbitration, including the vastly increased time and cost of class-wide proceedings, the loss of confidentiality in class-wide proceedings, and exposure to bet-the-company damages in class-wide proceedings without the prospect of judicial review.<sup>291</sup> Contributing its own gloss to the division between questions of arbitrability and subsidiary questions, the Sixth Circuit explained that the former encompass questions that “are fundamental to the manner in which the parties will resolve their dispute,” whereas the latter “concern details.”<sup>292</sup> Applying that distinction, the Sixth Circuit emphasized that “whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail.”<sup>293</sup> In fact, the availability of class arbitration seemed “vastly more consequential” than the question of whether the parties ever agreed to bilateral arbitration in the first place because “[a]n incorrect answer in favor of classwide arbitration would ‘forc[e] parties to arbitrate’ not merely a single ‘matter that they may well not have agreed to arbitrate[,]’ but thousands of

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287. *Id.* at 597.

288. *Id.*

289. *Id.* at 597–98.

290. *Id.* at 598.

291. *Id.*

292. *Id.*

293. *Id.*

them.”<sup>294</sup> Viewed from this perspective, designation as a question of arbitrability became inevitable.<sup>295</sup>

Turning to the United States Court of Appeals which produced *Oxford Health Plans*, in the years leading up to the Supreme Court’s decision in that case, panels of the Third Circuit stated in published and unpublished opinions that the availability of class-wide arbitration entailed “a question of interpretation and procedure for the arbitrator.”<sup>296</sup> While these assertions temporarily supplied cover to district courts inclined to take the same position in other jurisdictions,<sup>297</sup> the Third Circuit repudiated them as unsupported dicta during the second half of 2014.

In *Opalinski v. Robert Half Int’l, Inc.*, two employees commenced a class-action lawsuit against the defendant corporation on the grounds that it had improperly failed to pay them overtime wages.<sup>298</sup> Instead of answering, the corporation moved to compel arbitration of the employees’ claims on an individual basis.<sup>299</sup> Consistent with the published and unpublished Third Circuit opinions on the topic, the district court referred the parties to arbitration, but held that the propriety of bilateral or class-wide arbitration represented an issue for the arbitrator to decide.<sup>300</sup> On appeal, a panel of the Third Circuit held that the court’s previous statements on the topic were not supported by reasons, were mere dictum, and were not even reconcilable with Supreme Court decisions on which they relied.<sup>301</sup>

Approaching the issue with fresh eyes, the Third Circuit recognized that questions of arbitrability fall into two categories: (1) disputes regarding the identity of parties covered by arbitration agreements, and (2) disputes regarding the categories of claims

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294. *Id.* at 599 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).

295. *Reed Elsevier*, 734 F.3d at 599.

296. *See Quilloin v. Tenet HealthSys. Phila., Inc.*, 673 F.3d 221, 232 (3d Cir. 2012); *see also Vilches v. Travelers Cos.*, 413 F. Appx. 487, 491–92 (3d Cir. 2011).

297. *See infra* notes 311–13 and accompanying text (discussing the reliance of some district courts on Third Circuit precedent to justify the conclusion that the availability of class arbitration involves a procedural question for determination by arbitrators as opposed to courts).

298. *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326, 329 (3d Cir. 2014).

299. *Id.*

300. *Id.*

301. *Id.* at 331–32.



covered by arbitration agreements.<sup>302</sup> In the Third Circuit's view, the availability of class-wide arbitration falls into both categories, because it determines (1) the range of parties covered by the arbitration clause, and (2) the range of controversies encompassed by the arbitration clause.<sup>303</sup>

While the employees asserted that class arbitration simply reflects a procedural tool, the Third Circuit emphasized that the Supreme Court definitively rejected that logic in *Stolt-Nielsen*, where the Court opined that class-wide arbitration did not merely alter the range of procedural tools, but transformed the entire character of the dispute-settlement process.<sup>304</sup> For all these reasons, the Third Circuit reversed the trial court's order,<sup>305</sup> which had refused to vacate the arbitrator's award authorizing class-wide arbitration.<sup>306</sup> Again, this seems hardly consistent with the assertion that arbitrators have been set "at large" to make such determinations in the wake of *Oxford Health Plans*.

Looking beneath the apparent uniformity of views among United States Courts of Appeal, a more complicated picture emerges. In recent published and unpublished opinions, a United States District Court and a state appellate court in California have concluded that the availability of class arbitration represents a question of arbitrability presumptively for courts to decide.<sup>307</sup> In reaching that conclusion, the United States Court for the Central District of California emphasized that its decision fell perfectly in line with the conclusions reached by the "only two circuits to squarely address the question."<sup>308</sup> In a very recent unpublished opinion, Ohio's Court of Appeals also chose to fall in line with *Opalinski* and *Reed Elsevier*, emphasizing the latter case in apparent recognition of the Sixth Circuit's geographical scope.<sup>309</sup>

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302. *Id.* at 332.

303. *Id.* at 332-33.

304. *Id.* at 333-34.

305. *Id.* at 335-36.

306. *Id.* at 329.

307. See *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW, 2014 WL 5088240, at \*11 (C.D. Cal. Oct. 7, 2014); *Garden Fresh Rest. Corp. v. Super. Ct.*, 180 Cal. Rptr. 3d 89, 95 (Cal. Dist. Ct. App. 2014).

308. *Chico*, 2014 WL 5088240, at \*11.

309. *Bachrach v. Cornwell Quality Tools Co.*, No. 27117, 2014 WL 7454687, at \*3-4 (Ohio Ct. App. Dec. 31, 2014).

In published and unpublished opinions, United States District Courts in California, Illinois, Minnesota, and New York reached the opposite conclusion, holding that the availability of class-wide arbitration represents a subsidiary question for arbitrators to decide.<sup>310</sup> Three of those four cases, however, came down before the Third Circuit reversed course in *Opalinski*.<sup>311</sup> Two of the district courts emphasized the existence of a split between the Third and Sixth Circuits,<sup>312</sup> which allowed the district courts to portray their own decisions as reasonable conclusions falling within the parameters of a debate among circuit courts. While a fourth case came down after *Opalinski*, the district court inexplicably attributed the Third Circuit's older decisions to the Tenth Circuit,<sup>313</sup> which permitted the district court to imply that its own views still fell in line with one branch of an active circuit split. That misattribution and the failure to recognize the disappearance of a circuit split represents an astonishing lapse that does not inspire confidence in the district court's reasoning, or its conclusions.

Perhaps more importantly, even while a circuit split existed, many district courts did not express unalloyed confidence when deciding to treat the availability of class arbitration as a subsidiary question for arbitrators to decide. For example, judges from the

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310. See *Lee v. JPMorgan Chase & Co.*, 982 F. Supp. 2d 1109, 1113–14 (C.D. Cal. 2013); see also *Harrison v. Legal Helpers Debt Resolution, LLC*, Civil No. 12-2145 ADM/TNL, 2014 WL 4185814, at \*3–4 (D. Minn. Aug. 22, 2014); *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656(AJN), 2014 WL 2445756, at \*10–12 (S.D.N.Y. May 29, 2014); *Williams-Bell v. Perry Johnson Registrars, Inc.*, Case No. 14 C 1002, 2014 WL 7499398, at \*5–6 (N.D. Ill. Jan. 8, 2014).

311. See *Lee*, 982 F. Supp. 2d at 1113–14; see also *In re A2P SMS Antitrust Litig.*, 2014 WL 2445756, at \*10–12; *Williams-Bell*, 2014 WL 7499398, at \*5–6.

312. See *Lee*, 982 F. Supp. 2d at 1113–14; see also *In re A2P SMS Antitrust Litig.*, 2014 WL 2445756, at \*9–11. In the third case, the court cited almost no decisions other than opinions of the United States Supreme Court, the United States Court of Appeals for the Seventh Circuit, and United States District Courts for the Northern District of Illinois. See *Williams-Bell*, 2014 WL 7499398, at \*5–8 (citing decisions from the courts just mentioned, as well as one decision each from United States District Courts for the Eastern District of New York and the Southern District of New York).

313. See *Harrison*, 2014 WL 4185814, at \*3–4 (recognizing the unification of Third Circuit and Sixth Circuit precedent following *Opalinski*, but opining that the “Tenth Circuit Court of Appeals has held arbitrators should decide the availability of class arbitration,” and citing the case as *Quilloin v. Tenet HealthSys., Phila., Inc.*, 673 F.3d 221, 232 (10th Cir. 2012)) (emphasis added). As noted above, *Quilloin* was decided by the Third Circuit and should have been cited as *Quilloin v. Tenet HealthSys., Phila., Inc.*, 673 F.3d 221, 232 (3d Cir. 2012). See *supra* note 296 and accompanying text.

Northern District of Illinois recognized that the issue had “divided judges in this district,”<sup>314</sup> emphasized the absence even of a district-wide “judicial consensus,”<sup>315</sup> and gently implored the Seventh Circuit to “provide more clarity about who decides if class claims are arbitrable.”<sup>316</sup> In another case, a judge in the Southern District of New York described the issue as a “close one,” recognized that “the availability of class arbitration is plausibly an issue that contracting parties might expect a court to resolve,” and admitted that the arguments supporting that view gave her “some pause.”<sup>317</sup> These qualified statements show that the district court judges harbored at least a margin of doubt regarding the accuracy of their conclusions. Now that the split between the Third and the Sixth Circuits has disappeared in a manner that emphatically designates class arbitration as a question of arbitrability, one suspects that district courts would feel an even keener sense of doubt in adopting the contrary view.

Returning to Alan Rau’s assessment of *Oxford Health Plans*, one may conclude that he greatly exaggerated the demise of *Stolt-Nielsen* and the extent to which arbitrators should feel themselves “at large” to order class arbitration based on creative interpretations of arbitration agreements.<sup>318</sup> A proper reading of *Oxford Health Plans* does not support his conclusions.<sup>319</sup> The only decisions on point by United States Courts of Appeals positively refute his conclusions.<sup>320</sup> While the state of play among United States District Courts seems more fluid,<sup>321</sup> the decisions that support Rau’s views contain astonishing errors,<sup>322</sup> express doubts,<sup>323</sup> and may have been overtaken by the disappearance of a circuit split.<sup>324</sup> While all of this may still leave a degree of uncertainty regarding the trajectory of

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314. *Williams-Bell*, 2014 WL 7499398, at \*5.

315. *Price v. NCR Corp.*, 908 F. Supp. 2d 935, 944 (N.D. Ill. 2012).

316. *Williams-Bell*, 2014 WL 7499398, at \*8.

317. *In re A2P SMS Antitrust Litigation*, 2014 WL 2445756, at \*11–12. In its most recent decision on the topic, even the United States District Court for the District of Minnesota recognized that “there is room arguing class arbitration is a ‘gateway’ matter” presumptively for judicial resolution. *Harrison*, 2014 WL 4185814, at \*5.

318. See Rau, *supra* note 10, at 992–1004.

319. See *supra* notes 250–83 and accompanying text.

320. See *supra* notes 284–306 and accompanying text.

321. See *supra* notes 307–17 and accompanying text.

322. See *supra* note 313 and accompanying text.

323. See *supra* notes 314–17 and accompanying text.

324. See *supra* notes 296–306, 311–13 and accompanying text.

jurisprudence, that is the idea: arbitrators cannot assume that they have a wide remit to pull class-wide arbitration out of thin air, whether one frames the exercise as filling gaps or interpreting arbitration agreements.

In the final analysis, the point is not that the Supreme Court has unjustifiably trimmed the gap-filling powers of arbitrators, either with respect to arbitration agreements or the underlying contracts.<sup>325</sup> As explained above, a nuanced reading of *Stolt-Nielsen* does not support that view.<sup>326</sup> The point is also not whether the Supreme Court has become indulgent in allowing arbitrators to pull class arbitration out of thin air under the color of interpreting arbitration clauses.<sup>327</sup> A thorough reading of *Oxford Health Plans* does not support that view,<sup>328</sup> and lower court decisions substantially refute it.<sup>329</sup>

The point is, when it comes to arbitration agreements, gap-filling and interpretation take place in the context of a statutory overlay,<sup>330</sup> in which the FAA imposes certain rules of fundamental importance.<sup>331</sup> These include the principles that arbitration is a matter of consent,<sup>332</sup> that the parties expect judges to make final decisions with respect to consent,<sup>333</sup> and that judges will presumptively decide (either in the first instance or on de novo review) whether the parties consented to arbitration,<sup>334</sup> with whom they consented to arbitrate,<sup>335</sup> and the range of disputes they consented to arbitrate.<sup>336</sup> This modest exercise in gatekeeping ensures that the parties receive the arbitration—and only the arbitration—to which they have agreed. On this narrow range of issues, judicial control seems desirable particularly in the field of class proceedings, where arbitrators have self-serving incentives to

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325. See *supra* notes 156–66 and accompanying text.

326. See *supra* notes 168–209 and accompanying text.

327. See *supra* notes 210–13, 236–42 and accompanying text.

328. See *supra* notes 250–83 and accompanying text.

329. See *supra* notes 284–309 and accompanying text.

330. See *supra* notes 85–86, 140, 172 and accompanying text.

331. See *id.*

332. See *supra* notes 140, 172 and accompanying text.

333. See *supra* notes 253, 261 and accompanying text.

334. See *supra* notes 253–55, 262 and accompanying text.

335. See *supra* note 264 and accompanying text.

336. See *supra* note 263 and accompanying text.

maximize the size, complexity and significance of the matters before them.<sup>337</sup> As Michael Reisman observed, too much autonomy in this context leads to abuse, discourages parties from submitting important disputes to capricious decision-making, and ultimately threatens the judicial commitment to summary enforcement proceedings for arbitration awards.<sup>338</sup> Given these perils, disputes about the scope of consent to arbitration represent a zone where no one should aspire to set arbitrators “at large.”

### CONCLUSION

Coming full circle, contractual gap-filling by arbitrators remains an important and controversial topic. As discussed above, gap-filling controversies may arise with particular frequency in international commercial arbitration for the simple reason that long-term, complex, cross-border transactions seem prone both to lapses in foresight and to incorporation of arbitration clauses. On this subject, as on other thorny topics, the general trajectory of the law seems clear, but the details remain confounding and poorly understood.<sup>339</sup> Viewed at a high level of generality, gap-filling increasingly has become recognized as a respectable tool for arbitrators, both as a matter of substantive law on contracts and procedural law on arbitration. Moving to the level of detail, and focusing on the United States, it remains a confounding task to define where the gap-filling

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337. See Transcript of Oral Argument, *supra* note 215, at \*42 (quoting Justice Kennedy, expressing concerns about the conflict of interest for arbitrators who could choose either to arbitrate a single matter bilaterally for \$10,000 or to authorize class arbitration, draw the proceedings out for eleven years, and collect a million dollars in fees). In *Oxford Health Plans*, the health insurance company made the same point in its brief:

Moreover, class arbitration determinations are ones that even the best-intentioned arbitrator may find it difficult to approach with complete impartiality . . . [A]rbitrators—unlike judges—are compensated by the parties before them, typically based on the time devoted to resolving a particular matter. They thus have a direct, inevitable, and significant financial interest in decisions concerning the availability of class arbitration because any determination to proceed on a class basis will substantially increase the length and scope of the proceedings. Brief for Petitioner, *supra* note 215, at \*37–38.

338. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113 (1992).

339. See Charles H. Brower, II, *International Decision: Republic of Austria v. Altmann*, 99 AM. J. INT'L L. 236, 239 (2005) (“Also, while states may understand the broad outlines of state immunity at any given time, they can have little confidence in the details that control the outcome of specific cases.”).

powers of arbitrators begin, and where they end. A trip to the Supreme Court in *Stolt-Nielsen* and the ensuing commentary only seem to have complicated the matter by suggesting that U.S. courts have abandoned a desirable, globally-recognized trajectory. However, a properly attentive reading of the Court's judgment reveals a more generous view of gap-filling by arbitrators, and confirms that legal developments in the United States remain on course.

