

# DID THE ARBITRATOR “SNEEZE”?—DO FEDERAL COURTS HAVE JURISDICTION OVER “INTERLOCUTORY” AWARDS IN CLASS ACTION ARBITRATIONS?

Kristen M. Blankley\*

## INTRODUCTION

Judge Posner once stated that the federal courts do not have the ability to conduct judicial review every time the arbitrator “sneezes.”<sup>1</sup> Judge Posner further opined, however, that although the courts do not have jurisdiction to review every ruling made by an arbitrator, he could not articulate any more specific rule as to when the federal courts do have jurisdiction.<sup>2</sup> Of course, this concept has caused some great difficulties for parties who would like to have the ability to have additional review, particularly as class action arbitration procedures have explicitly contemplated judicial review at times other than after the final resolution of the merits of the dispute. Because the contemplated review occurs at times during the middle of the arbitration procedure, this Article refers to such appeals as “interlocutory” appeals.

The use of the class action procedure in arbitration, particularly in the consumer context, has gained significant acceptance since the United States Supreme Court, in its 2003 decision in *Green Tree Financial Corp. v. Bazzle*, did not specifically prohibit the use of the procedure.<sup>3</sup> Immediately following *Bazzle*, the dispute resolution provider American Arbitration Association (AAA)<sup>4</sup> created a complex set of rules governing class action

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1. Judge Posner first coined the phrase in the case of *Smart v. International Brotherhood of Electrical Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002). The *Smart* case involved an appeal of a labor arbitration decision in which the arbitrator determined that the employee owed some money back to the union, but the arbitrator did not determine the amount of the money owed. *Id.* at 724. *Smart* then challenged the award for lack of finality. *Id.* (“*Smart*’s suit challenges the arbitrators’ award as invalid primarily because of lack of finality . . .”). Judge Posner noted:

There can be a jurisdictional question in cases challenging or seeking enforcement of arbitration awards, for although no statute corresponding to section 1291 tells the courts when an arbitration award is ripe for judicial enforcement or review, the courts are naturally reluctant to invite a judicial proceeding every time the arbitrator sneezes. But beyond that, generalization is difficult.

*Id.* at 725.

2. *Id.*

3. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

4. Later, the dispute resolution provider Judicial Arbitration and Mediation Service (JAMS) formulated a similar set of class action arbitration rules.

arbitrations, drawing from the Federal Rules of Civil Procedure. The American Arbitration Association Rules (AAA Rules) break the arbitration process into distinct phases, not unlike the phases in class action litigation, including phases in which the arbitrator assigned determines whether a class procedure is possible and whether a class should be certified.<sup>5</sup> After both of these determinations, the AAA Rules allow the parties to seek judicial review or other relief prior to continuing the arbitration process.<sup>6</sup>

Although the AAA Rules contemplate judicial review of “interlocutory” rulings by the arbitrator, questions remain as to whether the federal courts have any jurisdiction to hear these less-than-final “awards.” These cases are now starting to work through the judicial system, and many courts are simply reviewing the “awards” without any reference to the jurisdiction of the reviewing court. Other courts have addressed the jurisdictional issue, focusing on constitutional ripeness doctrines—and these decisions across the nation are somewhat contradictory.<sup>7</sup>

Historically, cases dealing with the federal courts’ jurisdiction over interlocutory appeals held that only the final awards can be reviewed by courts.<sup>8</sup> More recent opinions, however, have allowed judicial review of interlocutory appeals under a variety of theories.<sup>9</sup> With respect to interlocutory appeals in class action arbitrations, some courts examine their jurisdiction under the “ripeness” doctrine, while most courts take jurisdiction for granted and simply hear the appeal.<sup>10</sup> This Article suggests that the federal district courts do not actually have jurisdiction to hear such interlocutory appeals because they do not constitute “awards” as that term was intended under the Federal Arbitration Act.

Part I of this Article describes the *Bazzle* decision and its impact on the class action arbitration industry, including the formulation of the class action arbitration rules. Part II of this Article describes how courts have

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5. American Arbitration Association, Supplementary Rules for Class Arbitrations, <http://www.adr.org/sp.asp?id=21936> (last visited Jan. 25, 2010) [hereinafter AAA Supplementary Rules]. Rule 3 governs construction of the arbitration clause and Rule 4 governs class certification. *Id.* at R. 3–4.

6. *Id.* at R. 3.

7. *See infra* Part II.

8. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373–74 (1981) (settling a circuit split and holding that appellate courts do not have jurisdiction to hear appeals unless there has been a “final judgment on the merits”).

9. *See, e.g.*, *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1007–08 (7th Cir. 2002) (finding jurisdiction to hear an interlocutory appeal under 28 U.S.C. § 1292(b) where the issue “presents questions of law which will control the outcome of [the] case”); *U.S. v. McVeigh*, 157 F.3d 809, 813 (10th Cir. 1998) (holding that an interlocutory appeal can nonetheless be heard by the appellate court per 28 U.S.C. § 1292(a)(1) because the order at issue “had the effect of modifying or dissolving a previously imposed injunction”).

10. *See infra* Part II.C.2.

dealt with interlocutory appeals—both in general and in the class action context in specific. Ultimately, this Article argues that such “awards” are not the type of “awards” contemplated by the Act and that federal jurisdiction does not lie until the entire class action procedure has been resolved on the merits. Although this position appears harsh, there may be an opportunity for parties to use appellate *arbitrators* to review these interlocutory decisions (under a contracted standard of review) in the absence of federal court jurisdiction. The use of appellate arbitration as an alternative form of judicial review is discussed in Part III.

I. THE UNITED STATES SUPREME COURT DOES NOT EXPRESSLY REJECT THE CLASS ACTION ARBITRATION PROCESS, AND ARBITRAL PROVIDERS BEGIN PROVIDING CLASS ARBITRATION SERVICES

The idea of class action arbitration as an alternative to traditional class action litigation gained tremendous headway in 2003 when the United States Supreme Court, in *Green Tree Financial Corp. v. Bazzle*, did not expressly prohibit the use of the procedure.<sup>11</sup> Following the *Bazzle* decision, the AAA formulated new procedures specific to class action procedures. This Part discusses the *Bazzle* decision and its implications in the class action arbitration industry.

In *Bazzle*, the Supreme Court was presented with the question of whether an arbitration clause that is silent on the issue of class arbitration forbids the use of a class action procedure: “We are faced at the outset with a problem concerning the contracts’ silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends?”<sup>12</sup> The Supreme Court of South Carolina determined that the

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11. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (holding that the question of the use of class action arbitration is both “a matter of state law” and “a matter for the arbitrator to decide”); see also Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 302 (2004) (“With its decision in *Green Tree Fin. Corp. v. Bazzle*, the United States Supreme Court implicitly reversed the course of both federal and state law prohibiting classwide arbitration and significantly expanded arbitral power to adjudicate class actions.”) (footnotes omitted); James M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 AM. REV. INT’L ARB. 1, 15–16 (2005).

In its landmark opinion in *Green Tree Financial Corp. v. Bazzle*, a plurality of the United States Supreme Court essentially validated the concept of class arbitration when it held that arbitrators, rather than the courts, are empowered to determine whether an arbitration provision that is silent on the topic of class arbitration “forbids” the assertion of classwide claims.

*Id.* (footnote omitted).

12. *Bazzle*, 539 U.S. at 447. The arbitration clause at issue in the *Bazzle* case read: ARBITRATION—All disputes, claims, or controversies arising from or relating

contracts “authorized class arbitration,” and the United States Supreme Court accepted the case to determine whether this ruling comported with the Federal Arbitration Act (FAA).<sup>13</sup>

The United States Supreme Court did not take issue with the determination by the South Carolina Supreme Court that the contracts allowed class arbitration.<sup>14</sup> Instead, the Court took issue with *who made* the determination of whether class procedures were permissible.<sup>15</sup> The Court made clear that the *arbitrator*—not the court—was required to make the determination of whether a silent arbitration clause forbid or permitted class-wide arbitration.<sup>16</sup> The Court specifically noted that an arbitrator would be “well situated” to determine whether the parties intended in the contracts to allow a class-wide procedure.<sup>17</sup> Ultimately, the Court remanded

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to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

*Id.* at 448 (citation omitted).

13. *Id.* at 450.

The South Carolina Supreme Court withdrew both cases from the Court of Appeals, assumed jurisdiction, and consolidated the proceedings. That court then held that the contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. We granted certiorari to consider whether that holding is consistent with the Federal Arbitration Act.

*Id.* (citation omitted).

14. *Id.* at 451.

15. *Id.* “At the same time, we cannot automatically accept the South Carolina Supreme Court’s resolution of this contract-interpretation question. Under the terms of the parties’ contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.” *Id.*

16. *Id.* at 451–52 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). The Court recognized that some questions, such as the kind of questions that “‘contracting parties would likely have expected a court’ to decide[,]” are properly before the courts; the question of whether a silent arbitration clause permits class procedures, however, does not fall within that exception. *Id.* at 452 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). The Court, however, did not elaborate on why this particular question is not one that parties would not have expected a court to decide.

17. *Id.* at 453. This case involved two sets of consumers—the Bazzles and the Lackeys. For the Bazzles, the Court determined whether the plaintiffs could proceed as a class. *Id.* For the Lackeys, however, the arbitrator appeared to have made the determination as to class procedure. *Id.* But the arbitrator in the Lackeys’ action had the benefit of the Court’s decision in the Bazzles’ action—especially considering that the arbitration clauses in the two actions were identical. *Id.* at 453–54. Thus,

the case so that the arbitrator could decide—in the first instance—whether the arbitration clauses, otherwise silent on the issue, permitted class-wide arbitration.<sup>18</sup>

Shortly after the *Bazzle* decision and in direct response to the decision, the AAA issued its Supplementary Rules for Class Arbitrations.<sup>19</sup> The AAA recognized that “the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.”<sup>20</sup> Accordingly, the AAA instituted procedures for administering class arbitration procedures for disputes with arbitration clauses either: (1) contemplating class procedures, or (2) silent on the issue.<sup>21</sup>

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the Supreme Court concluded that “[o]n balance, there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator’s decision reflected a court’s interpretation of the contracts rather than an arbitrator’s interpretation.” *Id.* at 454.

18. *Id.*

19. American Arbitration Association, Policy on Class Arbitrations, <http://www.adr.org/sp.asp?id=28779> (last visited Jan. 25, 2010) [hereinafter AAA Policy on Class Arbitrations]. The AAA Supplementary Rules for Class Arbitrations became effective on October 8, 2003. AAA Supplementary Rules, *supra* note 5. Dispute resolution provider JAMS also instituted class action arbitration rules, but those became effective much later than the AAA rules, on May 1, 2009. See Judicial Arbitration and Mediation Services, JAMS Class Action Procedures, <http://www.jamsadr.com/rules-class-action-procedures/> (last visited Jan. 25, 2010) [hereinafter JAMS Class Action Procedures]. The JAMS rules are similar to the AAA Supplementary Rules but not verbatim. The text of this Article will discuss the AAA Supplementary Rules, but the footnotes will cite to the corresponding JAMS rules. See also William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 335, 339 (2009). “Following the Supreme Court’s remand of the cases in *Bazzle*, the AAA had to decide how to administer such proceedings. It therefore adopted the American Arbitration Association Policy on Class Arbitrations (‘Policy’) and a set of Supplementary Rules for Class Arbitrations (‘Rules’).” *Id.* (footnotes omitted); Buckner, *supra* note 11, at 303 (“In turn, *Bazzle* spawned the promulgation of classwide arbitration procedural rules by two of the three major arbitration providers, making classwide arbitration a new, if still largely uncharted, reality.”) (footnote omitted); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 3–4 (2008).

[T]he United States Supreme Court’s recognition of class arbitration as a viable method of dispute resolution in *Green Tree Financial Corp. v. Bazzle* and the subsequent publication of two specialized arbitral rules dealing with class arbitration mean that class arbitration cannot be seen as an anomalous procedural mechanism limited to a few U.S. states.

*Id.* (footnotes omitted).

20. AAA Policy on Class Arbitrations, *supra* note 19.

21. *Id.* The AAA instituted a policy that it would not administer class procedures in situations where the arbitration contract expressly prohibited class arbitration unless and until a court ordered the AAA to administer a class arbitration in those circumstances. *Id.*

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement.

*Id.*

The Supplementary Rules for Class Arbitration apply to any dispute providing for arbitration under the AAA Rules “where a party submits a dispute to arbitration on behalf of or against a class or purported class” or when a court refers a case to AAA for class-wide arbitration.<sup>22</sup> A case proceeding under the Supplementary Rules proceeds in phases. The first phase is the “Clause Construction” phase, which is governed by Supplementary Rule 3. In the Clause Construction phase, the arbitrator is required to determine “as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”<sup>23</sup> In other words, the first phase of the proceeding is to determine whether the arbitration clause permits a class procedure. Importantly, after the arbitrator issues its Clause Construction Award, “[t]he arbitrator shall stay all proceedings . . . for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.”<sup>24</sup> If the parties seek juridical review, the arbitrator has the option to “stay further proceedings”—longer than the 30 days provided for in the rules—“until the arbitrator is informed of the ruling of the court.”<sup>25</sup> This is the first instance in which the AAA Supplementary Rules contemplate judicial review of a non-final decision.<sup>26</sup>

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22. AAA Supplementary Rules, *supra* note 5, at R. 1(a). The AAA Supplementary Rules for Class Arbitration specifically state that those rules trump other, inconsistent AAA rules. *Id.* at R. 1(b). To administer the class claims, the AAA maintains a separate roster of class arbitrators. *Id.* at R. 2.

23. *Id.* at R. 3. In Supplementary Rule 12, the AAA specifically notes that neither the AAA nor the arbitrator is “a necessary or proper party” to any procedure instituted in court challenging any award by the arbitrator. *Id.* at R. 12(b). Supplementary Rule 12(c) states: “Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.” *Id.* at R. 12(c).

24. *Id.* at R. 3; *see also* JAMS Class Action Procedures, *supra* note 19, at R. 2.

Subject to Rule 1(a), once appointed, the Arbitrator, following the law applicable to the validity of the arbitration clause as a whole, or the validity of any of its terms, or any court order applicable to the matter, shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class. In construing the applicable arbitration clause, the Arbitrator shall not consider the existence of these Supplementary Rules to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

*The Arbitrator shall set forth his or her determination with respect to the matter of clause construction in a partial final award subject to immediate court review.*

*Id.* (emphasis added).

25. AAA Supplementary Rules, *supra* note 5, at R. 3.

26. As a practical matter, a 30-day stay may not be sufficient time to resolve either a challenge at the trial court level, much less any additional appeals. This problem is demonstrated in the case of *Rollins, Inc. v. Garrett*, No. 6:05-cv-671-PCF-KRS, 2005 U.S. Dist. LEXIS 46415 (M.D. Fla. Sept. 6, 2005). Garrett filed a class action arbitration against Orkin relating to a contract for protecting her home against termites. *Id.* at \*2. The AAA issued a Partial Final Clause Construction Award finding that class

Following the class construction phase, the case moves to the certification phase. The arbitrator is required to determine whether certain criteria are met, and those criteria are similar to those found in Federal Rule of Civil Procedure 23.<sup>27</sup> The certification phase culminates in the “Class Determination Award,” which is governed by Supplementary Rule 5,<sup>28</sup> and

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action arbitration was not prohibited by the silent arbitration clause. *Id.* at \*4. The arbitrator stayed the arbitration for 30 days to allow for review of the award, but otherwise retained jurisdiction over the case. *Id.* at \*5. (“The panel retained jurisdiction of the dispute but stayed all further proceedings for a period of thirty days to allow the parties to appeal the award in a court of competent jurisdiction.”). The court initially denied Orkin’s (and Rollins’) motion to vacate the clause construction award, and they appealed to the Eleventh Circuit. *Id.* When the arbitrators would not stay the proceedings pending appeal, Orkin sought a stay with the district court. *Id.* at \*5–6. The court applied the traditional four-part test for determining whether it could issue an injunction and concluded that an injunction was not warranted because no irreparable harm existed. *Id.* at \*6–8. The traditional four-part test for injunctions is as follows:

(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

*Id.* at \*7. The court did not credit Orkin’s argument that the financial burden of class arbitration would be irreparable: “The financial burden of arbitration does not constitute irreparable injury, as injuries measured in terms of time and money spent in the absence of an injunction are not deemed irreparable.” *Id.* at \*8. Further, the court was not persuaded that Orkin was likely to succeed on the merits given Florida’s law encouraging the use of arbitration procedures. *Id.* at \*11–12. Thus, as this case demonstrates, the amount of time afforded by the AAA Supplementary Rules may not be sufficient, and the courts may not be willing to continue to stay the arbitration proceedings even if the court finds that it does have jurisdiction to hear the interlocutory appeal.

27. AAA Supplementary Rules, *supra* note 5, at R. 4(a). Under Rule 4(a), the arbitrator must determine the named class members who can represent the class. *Id.* Additionally, the arbitrator must make determinations as to: (1) numerosity; (2) commonality of law or fact; (3) typicality of claims or defenses; (4) adequacy of representation by the named party representatives; (5) adequacy of the counsel representing the class; and (6) determination that each class member is a party to an identical or substantially similar arbitration clause. *Id.* If the arbitrator determines that these requirements are met, then the arbitrator must also determine that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members[.]” *Id.* at R. 4(b); *see also* FED. R. CIV. P. 23 (listing the criteria for federal class action lawsuits); Gaitis, *supra* note 11, at 16–17 (noting that because the AAA and JAMS rules are based on the civil rules, the rules either require or permit the issuance of partial final awards); Strong, *supra* note 19, at 39. Strong also asserts:

Here, the drafters of the AAA Supplementary Rules copied the language of Rule 23 of the Federal Rule of Civil Procedure almost verbatim, with the exception of AAA Supplementary Rule 4(a)(6), which requires the arbitrator to find that “each class member has entered into an agreement containing an arbitration clause which is substantially similar” to that signed by other class members, including the class representative.

*Id.*

28. AAA Supplementary Rules, *supra* note 5, at R. 5(a) (“The arbitrator’s determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the ‘Class Determination Award’), which shall address each of the matters set forth in Rule 4.”).

which must include very specific information.<sup>29</sup> Similar to the clause construction phase, following the issuance of the “Class Determination Award,” the arbitrator is required to issue another stay of 30 days “to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award.”<sup>30</sup> Also similar is the provision allowing the arbitrator to “stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.”<sup>31</sup>

Following class certification, the arbitrator is required to give notice of the class to the class members<sup>32</sup> and proceed to hearing. For the “Final Award,” the Supplementary Rules require a “reasoned” award that defines “the class with specificity.”<sup>33</sup> The Rules further established a class arbitration docket and mandate that all “awards” issued under the rules be publicly available in a repository administered by the AAA.<sup>34</sup>

Because of the *Bazzle* decision and the proliferation of these class action arbitration rules, the use of the class action arbitration procedure is growing.<sup>35</sup> Even a cursory examination of the AAA class action arbitration docket demonstrates that the arbitrators are carefully following these procedures and issuing the contemplated “partial final” awards regarding clause construction and certification prior to a resolution on the merits.

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29. *Id.* at R. 5(b)–(c) (setting forth the requirements regarding the class and the proposed Notice of Class Determination to be disseminated to class members).

30. *Id.* at R. 5(d). Note that the Federal Rules of Civil Procedure also allow for a party to challenge either the grant or denial of class certification in traditional litigation. *See* FED. R. CIV. P. 23(f). Rule 23(f) states:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

*Id.*; *see also* JAMS Class Action Procedures, *supra* note 19, at R. 3(c) (“The Arbitrator shall set forth his or her determination with respect to the matter of Class Certification in a partial final award subject to immediate court review.”); Strong, *supra* note 19, at 40 (noting how the Supplementary Rule is similar to the Federal Rules with respect to the review procedure).

31. AAA Supplementary Rules, *supra* note 5, at R. 5(d).

32. *Id.* at R. 6.

33. *Id.* at R. 7. As an alternative to a Final Award, the Supplementary Rules contemplate procedures by which an arbitrator can approve a class-wide settlement. *Id.* at R. 8.

34. *Id.* at R. 9–10. The class arbitration docket can be found at <http://www.adr.org/sp.asp?id=25562>.

35. *See* Baker, *supra* note 19, at 335 (“As of August 2008, the American Arbitration Association (‘AAA’) has administered 246 class action arbitrations and Judicial Arbitration and Mediation Services, Inc. (‘JAMS’), another major U.S. arbitral institution, has also administered a substantial number of class arbitrations.”); Thomas E. Carbonneau, “*Arbitracide*”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT’L ARB. 233, 261 (2007) (“Moreover, class action arbitrations are becoming a fixture of arbitral administration.”); Strong, *supra* note 19, at 8 (describing a number of class action arbitration procedures occurring as of the date of the article).



Some of these non-final arbitration “awards” are being appealed to the federal courts, and those decisions are discussed below.

II. COURTS GRAPPLE WITH THE QUESTION OF WHETHER  
“INTERLOCUTORY” APPEALS MAY BE TAKEN UNDER ANY  
CIRCUMSTANCES

A. *The Federal Arbitration Act Allows Review of an “Award”*

Prior to engaging in a discussion of whether federal courts have jurisdiction to hear appeals of interlocutory “awards,” a discussion of the review provisions of the FAA should put the entire jurisdictional question into context. The FAA provides only the most limited forms of judicial review, which is provided for in section 10 of the Act. As a general matter, the judicial review provided under the FAA is only available in the event of misconduct or if the arbitrator exceeded his or her powers in rendering the award.<sup>36</sup> The Act specifically uses the term “award,” but does not define it.<sup>37</sup> The statute, in its entirety, provides:

(a) In any of the following cases the United States court in and for the district *wherein the award was made may make an order vacating the award* upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

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36. Federal Arbitration Act, 9 U.S.C. § 10 (2006).

37. *Id.*

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an *award* is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.<sup>38</sup>

In addition to providing a means for vacating an award, the FAA also provides a means by which an award may be modified or corrected.<sup>39</sup> This section does not define the word “award,” either.<sup>40</sup>

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38. *Id.* (emphasis added).

39. 9 U.S.C. § 11 provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

*Id.* § 11 (2006).

40. *See* Gaitis, *supra* note 11, at 10 (“The FAA is particularly vague with respect to the question of when an award is final.”). Interestingly, section 16 of the FAA, enacted in 1988, does refer to a “partial award.” Section 16 states that an appeal can be taken from the federal district court to the circuit court from “an order . . . confirming or denying confirmation of an award or partial award[.]” 9 U.S.C. § 16(a)(1)(D) (2006). There is no definition of the term “partial award” either in section 16 or elsewhere in the FAA, and the use of the term “partial award” in section 16—regarding appellate review from the district court to the federal circuit courts is curious if the district courts do not have jurisdiction in the first instance to hear a partial award.

This Article assumes that the disputants seeking judicial review actually participated in the arbitration proceedings as named class representatives. Named class representatives would have actually participated in the class proceedings and likely be bound by the limited judicial review provisions set

The FAA’s silence on the issue of review of interlocutory awards in sections 9 and 10 must be read in context of the FAA as a whole. In fact, under section 5 of the FAA,<sup>41</sup> if an arbitrator cannot be named or if an arbitrator vacancy exists, either party can submit an application to the court for the court to appoint an arbitrator.<sup>42</sup> Similarly, parties may bring a motion to compel the attendance of witnesses upon application to the federal courts if the witnesses refuse to obey a subpoena served by the arbitrator.<sup>43</sup> These sections indicate that, in some instances, the federal

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forth in sections 9 and 10 of the FAA. An unnamed class member, however, may be able to challenge the applicability of a class award under a different section of the FAA. Unnamed class members may be able to challenge the application of the arbitration proceeding as a whole as it applies to them under section 2 of the FAA, which deals with the applicability of agreements to arbitrate. *Id.* § 2 (2006).

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.* In other words, the unnamed class members may be able to set forth a challenge that they do not have any agreement to arbitrate at all, and that any award in arbitration does not apply to those unnamed class members. See generally Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 442–47, 461–74 (2008) (discussing legal and policy reasons why unnamed class members should have the right to challenge a class arbitration award and potential types of judicial review available under the FAA).

41. 9 U.S.C. § 5 (2006).

42. *Id.* The statute provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

*Id.*; see *WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643, 649 (7th Cir. 2009) (discussing the issue of interlocutory appeals under this subsection).

43. See 9 U.S.C. § 7 (2006):

Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

district courts do, in fact, have jurisdiction over certain non-final matters. However, because Congress indicated certain, limited judicial involvement, it did not intend for the federal courts to intervene in other circumstances.<sup>44</sup> Although times and arbitration have changed since Congress enacted the FAA in 1925, Congress's intent to create a streamlined process outside of the federal courts should be respected.

To date, the United States Supreme Court has not specifically ruled as to the meaning of "award" under the FAA, but it recently interpreted section 10 in another context.<sup>45</sup> In *Hall Street Associates v. Mattel*, the parties to a valid arbitration agreement contracted for a broader standard of review than available under the FAA.<sup>46</sup> The Court stated that the FAA does not create jurisdiction in the federal courts, but that the federal courts must have an independent jurisdictional basis for being in federal court in the first place.<sup>47</sup> The Court described the FAA as follows:

The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. [9 U.S.C. §§ 9–11]. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. [9 U.S.C. § 6]. Under the terms of § 9, a court "must"

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*Id.*

44. *Ligon Nationwide, Inc. v. Bean*, 761 F. Supp. 633, 635 (S.D. Ind. 1991). "Clearly, under this statute [9 U.S.C. § 10], district courts may only vacate 'final arbitration awards.' For this statute to apply, the contract must evidence a transaction involving commerce. Without a showing of commerce the federal arbitration law is inapplicable." *Id.*

45. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

46. *Id.* at 579. The arbitration agreement provided:

[T]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

*Id.*

47. *Id.* at 581 ("As for jurisdiction over controversies touching arbitration, the Act does nothing, being 'something of an anomaly in the field of federal-court jurisdiction' in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.") (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)); *see also* 9 U.S.C. § 4 (2006):

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.*

*Id.* (emphasis added).

confirm an arbitration award “unless” it is vacated, modified, or corrected “as prescribed” in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.<sup>48</sup>

After discussing the FAA, the Court addressed the issue of whether review other than that specifically provided for in FAA section 10 is permissible.<sup>49</sup> The Court held that FAA sections 10 and 11 provided the “exclusive grounds for expedited vacatur and modification” of arbitration awards.<sup>50</sup>

Although the Supreme Court did not address the definition of “award,” its rationale has application to the present discussion. The Court explicitly refused the argument that because arbitration is a creature of contract, courts should abide by the individually-crafted standard of review. To the contrary, the Court noted that although parties can “tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law[,]” parties cannot contract for review different from that provided by the FAA.<sup>51</sup> Allowing such practice would be contrary to the purposes of the FAA, which are intended to “maintain arbitration’s essential virtue of resolving disputes straightaway” and refrain from “cumbersome and time-consuming” procedures.<sup>52</sup>

Given the Supreme Court’s narrow reading of the review allowed under section 10 of the FAA, the Supreme Court might also interpret the word “award” in section 10 in a narrow manner to mean a final award on the merits. Such a narrow reading of the word “award” would further the Supreme Court’s stated policies of maintaining arbitration as an efficient process. This reading would also be consistent with other sections of the FAA. As noted in more detail below,<sup>53</sup> the Supreme Court is poised to address this issue soon—if it decides to hear this issue that is not technically within the issue presented for review.

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48. *Hall Street*, 552 U.S. at 582 (footnotes omitted).

49. Prior to deciding this case, the circuits had been split on the issue of whether review other than the standards set forth in section 10 were consistent with the FAA. *Id.* at 583.

50. *Id.* at 584.

51. *Id.* at 586.

52. *Id.* at 588; *see also* Baker, *supra* note 19, at 345 (“[T]he decision in *Hall Street* means that courts will not be able to use the extra interim appeals—mandated in the AAA rules and permitted under the JAMS rules—to provide any substantive guidance to arbitrators regarding Clause Construction and Class Determination Awards.”); Mark Beckett, *Beyond Agnosticism: The Policy Justifications For the Supreme Court’s Decision In Hall Street Associates*, 17 AM. REV. INT’L ARB. 525, 533 (2006) (noting how the allowance of increased judicial review would make arbitration more like litigation and would decrease the efficiency of arbitration).

53. *See infra* Part II.C.3.

*B. Review of “Interlocutory” Awards in General*

As a general matter, federal courts used to refrain from presiding over cases involving arbitration decisions while the arbitration was ongoing. In other words, in the normal course of an arbitration proceeding, courts were hesitant to accept “interlocutory” appeals of arbitrators’ non-final decisions.<sup>54</sup> The courts, when usually confronted with non-final awards, claim that they should generally refrain from intervention and allow arbitration to run its course. However, in more recent years, the courts have begun to change their position and determine whether the parties intended on having judicial review after discrete portions of the arbitration. This Part describes the traditional view and the newer approach with respect to “interlocutory” awards.

As early as 1957, the Second Circuit addressed the question of whether the district court could intervene to determine an evidentiary question arising in the arbitration.<sup>55</sup> The Second Circuit quickly held that “there should be no applications made to the District Court to review rulings of the arbitrators on the admissibility of evidence.”<sup>56</sup> To allow such intervention would be a “waste of time,” an interruption in the arbitration proceeding, and “encourage delaying tactics in a proceeding that is supposed to produce a speedy decision.”<sup>57</sup> This ruling is supported by the policy that arbitration is a proceeding that “differs radically from a litigation in court[.]”<sup>58</sup> Accordingly, the district court should have summarily dismissed the claim seeking an evidentiary ruling and allowed the arbitrator to continue presiding over the case until its completion.<sup>59</sup>

Similarly, in 1980, the Second Circuit further expressed serious concern over whether the federal courts could review non-final, or “interim” arbitral rulings.<sup>60</sup> The *Michaels* decision involved an admiralty dispute that went to arbitration. The parties agreed to bifurcate liability from damages.<sup>61</sup> After the arbitrator made a determination on liability, the non-prevailing party filed a motion with the district court to vacate the interim

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54. See *Quixtar, Inc. v. Brady*, 328 F. App’x 317, 320 (6th Cir. 2009) (“[C]ourts generally should not entertain interlocutory appeals from ongoing arbitration proceedings.”); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (noting that policy reasons and the FAA language itself indicate that courts should not review non-final decisions of arbitrators).

55. *Compania Panemena Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co.*, 244 F.2d 286 (2d Cir. 1957).

56. *Id.* at 289.

57. *Id.*

58. *Id.*

59. *Id.* at 290.

60. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411 (2d Cir. 1980).

61. *Id.* at 413.

award.<sup>62</sup> The district court dismissed the case and the Second Circuit affirmed.<sup>63</sup> The Second Circuit first noted that the interim award was not “final.”<sup>64</sup> Recognizing that the award was not final, the court then held that under the FAA, “a district court does not have the power to review an interlocutory ruling by an arbitration panel.”<sup>65</sup>

The court explicitly stated: “[p]olicy considerations, no less than the language of the Act and precedent construing it, indicate that district courts should not be called upon to review preliminary rulings of arbitrators.”<sup>66</sup> If parties are permitted to take interlocutory appeals to the district courts, then “[m]ost of the advantages inherent in the arbitration”—such as process speed—“are dissipated[.]”<sup>67</sup> The Second Circuit seemed particularly

62. *Id.*

63. *Id.* at 413, 415.

64. *Id.* at 413 (“In order to be ‘final,’ an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them.”); *see also* *Blue Tee Corp. v. Koehring Co.*, 754 F. Supp. 26, 30 (S.D.N.Y. 1990) (determining that an arbitrator’s award was “final” because it addressed both the merits of the liability determination and the damages to be awarded). The Second Circuit quickly dismissed the plaintiff’s argument that the court had jurisdiction under 9 U.S.C. § 10(d), which provides for review of an award when “the arbitrators so ‘imperfectly executed’ their powers that ‘a mutual, final, and definite award upon the subject matter submitted was not made.’” *Michaels*, 624 F.2d at 414. The court ruled that this section applies when the award purports to be final, but in fact is not. *Id.* The court noted that this section “has no application to an interim award that the arbitrators did not intend to be their final determination on the issues submitted to them.” *Id.* Similarly, in *Travelers Insurance Co. v. Davis*, an arbitrator issued a preliminary award in a complex insurance arbitration. *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 538–39 (3d Cir. 1974). Following an interim decision, the adverse party sought a declaratory judgment from the federal district court, but the court applied Pennsylvania law to determine whether the award was final. *Id.* at 540–41. Under Pennsylvania law, the arbitrator’s ruling was not final, and the court dismissed the action because the jurisdiction over the merits of the dispute was properly before the arbitrator—not the courts. *Id.* at 543. The court was concerned that allowing such judicial intervention in a pending arbitration would result in “piecemeal” litigation. *Id.* at 544.

65. *Michaels*, 624 F.2d at 414 (citing *Travelers Ins. Co.*, 490 F.2d at 541–42 & 541 n.12).

66. *Id.*

67. *Id.* (noting that allowing interlocutory appeal would “result only in a waste of time, the interruption of the arbitration proceeding, and . . . delaying tactics in a proceeding that is supposed to produce a speedy decision”) (quoting *Compania Panemena Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co.*, 244 F.2d 286, 288–89 (2d Cir. 1957)); *see also id.* at 415 (noting that “arbitration is supposed to conserve the time and resources of both the courts and the parties; thus, ‘for the court to entertain review of intermediary arbitration decisions involving procedure or any other interlocutory matter, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of conservation’”) (quoting *Mobil Oil Indonesia Inc. v. Asamera Oil Ltd.*, 372 N.E.2d 21, 23 (N.Y. 1977)); *Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 233 (1st Cir. 2001) (“The prerequisite of finality promotes the role of arbitration as an expeditious alternative to traditional litigation.”); Gaitis, *supra* note 11, at 31. Gaitis summarized *Michaels* as holding:

that (1) “the arbitrators did not intend [the interim award] to be their final determination on the issues submitted to them;” (2) the interim award was an “interlocutory ruling;” (3) an award had not been “made” by the arbitrators; (4) the interim award did “not purport to resolve finally the issues submitted to [the arbitrators];” and (5) the interim award was a “preliminary ruling[.]”

concerned about the speed of the process, noting that the case “is a good example of how not to realize the alleged advantages of arbitration; 10 hearings over two years, with more to follow, is not a display of speed, economy or simplicity.”<sup>68</sup> Accordingly, the Second Circuit dismissed the case, noting that although the court’s “holding today may result in a certain degree of duplication of effort in this particular instance [because the merits will likely be challenged again following the resolution of the entire case], it will, we hope, decrease such waste in the future.”<sup>69</sup>

The *Michaels* decision, however, appears to represent a “traditional” or “historical” method of considering jurisdiction of “interlocutory” appeals. In more recent years, the courts have found ways to find jurisdiction in the federal courts, especially if those courts determine that policy reasons exist for hearing a non-final appeal. Generally, those policy reasons include party desire for interlocutory appeal and perceived importance of hearing certain non-final matters as they are decided by the arbitrator.

For example, in a 2001 decision, the First Circuit deviated from the precedent of the Second Circuit to determine that, in certain circumstances, the courts could review decisions on liability, even if the entire arbitration proceedings had not concluded.<sup>70</sup> In *Hart Surgical*, the parties to a contract arbitrated a dispute regarding the termination of the contract and agreed to bifurcate issues of liability from damages.<sup>71</sup> The arbitrator issued an award on the liability, which the losing party sought to vacate under 9 U.S.C. § 10.<sup>72</sup> The district court dismissed the case for lack of jurisdiction because the arbitration, as a whole, was not complete.<sup>73</sup> The First Circuit acknowledged the principal that, under section 10, “[i]t is essential for the district court’s jurisdiction that the arbitrator’s decision was final, not interlocutory.”<sup>74</sup>

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*Id.* (alterations in original) (footnotes omitted).

68. *Michaels*, 624 F.2d at 415.

69. *Id.*; see also *Barlow v. Healthextras, Inc.*, No. 2:05cv00189 PGC, 2006 U.S. Dist. LEXIS 86007, at \*7 (D. Utah Nov. 13, 2006) (noting that “courts [have] unambiguously held that a district court lacks authority to rule on arbitration issues prior to the arbitration award, supporting Mr. Barlow’s claim that this court also lacks such authority”); *Ligon Nationwide, Inc. v. Bean*, 761 F. Supp. 633, 635 (S.D. Ind. 1991). “Without question, the two ‘awards’ appealed herein are not final. They do not decide either liability or damages; their nature is purely procedural and precursory to a final arbitration.” *Id.*; *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 375 (S.D.N.Y. 1983) (finding that an award was not ripe for judicial review when the arbitrator had not yet finally determined issues of either liability or damages).

70. *Hart Surgical*, 244 F.3d at 232 (“We agree with this ecumenical stance, and for the reasons set forth below, hold that under the circumstances of this case, an arbitration award on the issue of liability in a bifurcated proceeding is a final partial award reviewable by the district court.”).

71. *Id.*

72. *Id.* at 232–33.

73. *Id.* at 233.

74. *Id.* (quoting *El Mundo Broad. Corp. v. United Steel Workers of Am. AFL–CIO CLC*, 116



Instead of focusing on the issue of finality in terms of the entire arbitration, the First Circuit embraced a test in which finality is determined with respect to “discrete and distinct claims.”<sup>75</sup> After concluding that the district courts have the ability review some partial awards, the Second Circuit had to determine whether a partial award determining liability, but not damages, was subject to review.<sup>76</sup> The court noted the struggle between “the desire to effectuate the parties’ intent to divide an arbitration into distinct phases, and making sure that a losing party does not thereby forfeit an appeal by failing to object after the completion of a phase.”<sup>77</sup> The court relied heavily on the fact that the parties intended on bifurcating liability and damages, while no such party intent was present in *Michaels*.<sup>78</sup> The court then held that although “the district court can review the partial award in this case, we think it best to limit our holding to the situation in which there is a formal, agreed-to bifurcation at the arbitration stage.”<sup>79</sup> By limiting the ruling to cases in which the parties have agreed to bifurcation, the court appears to give meaning to the parties’ contracts that have explicitly contemplated additional review rather than merely final review at the end.

A number of courts have followed the *Hart Surgical* ruling, finding jurisdiction for interlocutory appeals in general cases not involving class actions.<sup>80</sup> The authority appears to be in line with this new view that allows

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F.3d 7, 9 (1st Cir. 1997).

75. *Id.* at 234 (quoting *Bull HN Info. Sys., Inc. v. Hutson*, 983 F. Supp. 284, 289 (D. Mass. 1997)).

76. *Id.* “We must next determine whether the district court may review a partial award when that award determines liability, but does not include damages.” *Id.* At the time, the Circuit had not yet addressed the issue. *Id.*; see also *Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991) (holding that “if the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement by the parties, to redetermine that issue”). At this time, it is unclear if the parties’ intent to have a district court review a partial arbitration award is permissible under *Hall Street*. As noted above, *Hall Street* essentially held that although arbitration is a matter of contract, the parties’ right to contract does not trump or change the jurisdiction of the federal courts. In other words, the parties’ intent with respect to judicial review likely will not be a factor for the courts to consider with respect to a challenge to their jurisdiction. See *supra* notes 45–52 and accompanying text.

77. *Hart Surgical*, 244 F.3d at 235.

78. *Id.*

79. *Id.* at 235–36.

80. See *Publicis Commc’n v. True N. Commc’ns Inc.*, 206 F.3d 725, 729 (7th Cir. 2000) (looking beyond the label of an international arbitration “award” to determine whether the arbitrator’s decision actually constituted an “award” and determined that an arbitrator’s decision with respect to what seemed to constitute a discovery order actually “resolved the dispute” for the parties); see also *id.* (“A ruling on a discrete, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators.”); *Int’l Shipping Agency v. Union Empleados de Muelles de Puerto Rico, AFL–CIO, Local 1901*, 547 F. Supp. 2d 116, 120–21 (D.P.R. 2008) (finding no jurisdiction to hear an interim arbitration award when the parties did not formally agree—prior to the beginning of the arbitration process—to bifurcate the arbitration process into more than one phase); *Hall*

for the reviewability of awards at times other than—and additional to—the final award on the merits.<sup>81</sup> However, the courts are not fully consistent on this point, and the opinions are considered to be “unclear and divergent.”<sup>82</sup> Given this background, it is unsurprising, then, that in the class action context—where the importance of judicial review is particularly high—the courts’ treatment of the jurisdictional issue is divergent. The next section deals with those cases in more detail.

*C. Courts Struggle With Whether a “Class Construction Award” is Reviewable Under the FAA*

1. A Handful of Courts Discuss the Issue of an “Interlocutory” Appeal

Because the class action arbitration rules are still in their infancy, unsurprisingly, only a limited number of cases have begun to wind their way through the court systems. Of those cases, few of them actually address the issue of jurisdiction. In fewer still, do the courts actually address the unique problems associated with an “interlocutory” appeal.

One of the first courts to discuss the issue of “interlocutory” appeal of non-final arbitral awards was the case of *Marron v. Snap-On Tools, Co.*, from the District of New Jersey.<sup>83</sup> Plaintiffs were franchisees of the defendant, who brought suit against Snap-On Tools alleging fraudulent, deceptive, and illegal business schemes and practices.<sup>84</sup> The court compelled arbitration, and the arbitrator issued a decision allowing plaintiffs “to pursue class treatment of their claims against Snap-On in arbitration.”<sup>85</sup> With respect to the question of “interlocutory” appeal, the

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*Steel Co. v. Metalloyd Ltd.*, 492 F. Supp. 2d 715, 717, 719 (E.D. Mich. 2007) (noting that “[w]hether enforcement of an arbitration award is sought under the FAA or the New York Convention, the courts are agreed that the award in question must be ‘final’ in order to be eligible for judicial confirmation” and holding that the court can only review interim arbitration awards when the decision involves a “separate independent” claim *and* when the party seeking confirmation can identify an “*immediate need*” for relief).

81. For an in-depth review of the history of interlocutory arbitration appeals in general, see Gaitis, *supra* note 11, at 29–52.

82. *Id.* at 52.

83. *Marron v. Snap-On Tools, Co.*, No. 03-4563, 2006 U.S. Dist. LEXIS 523 (D.N.J. Jan. 9, 2006).

84. *Id.* at \*3.

85. *Id.* at \*3–4. In a footnote, the court noted:

Plaintiffs also filed a Motion to Affirm Arbitrator Matthews’ award in the Hobby Action but subsequently withdrew that motion on the grounds that it is not required by Rule 3 of the American Arbitration Association’s Supplementary Rules for Class Arbitrations and further that it is prohibited by Section 10 of the

court noted that federal courts “commonly understand this provision of the FAA to allow review of final arbitration awards but not of interim or partial rulings.”<sup>86</sup> The court further recognized the virtue of finality in arbitration and the fact that FAA section 10 promotes finality *if* that section is read to apply only to final arbitration awards.<sup>87</sup> The court correctly recognizes that “[a]lthough [AAA] Rule 3 permits the parties in an arbitration to seek judicial review of a non-final award, it does not affect the district court’s decision whether to entertain an interlocutory appeal under Section 10 of the FAA.”<sup>88</sup>

In so deciding, the court relied on the very limited nature of the arbitrator’s decision at this stage in the proceedings.<sup>89</sup> Specifically, the

Federal Arbitration Act (“FAA”).

*Id.* at \*4 n.2. The court does not explain what a “Motion to Affirm” an arbitrator’s award is or why it immediately concluded that such motion is prohibited by section 10 of the FAA. Presumably, a “Motion to Affirm” is similar to a Confirmation Motion, which would not fall within section 10, but under section 9, regarding confirmation. The court’s note is unclear whether such motion does not fall within the FAA itself or if it does not fall within FAA section 10.

86. *Id.* at \*5–6 (citing *Nolu Plastics, Inc. v. Valu Eng’g, Inc.*, No. 04-4325, 2004 U.S. Dist. LEXIS 20416, at \*19 (E.D. Pa. Oct. 12, 2004)); *see also* *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 650 (7th Cir. 2001) (“We take ‘mutual’ and ‘final’ to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them . . . .”); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (holding that section 10(d)(4) “has no application to an interim award that the arbitrators did not intend to be their final determination on the issues submitted to them”).

87. *Marron*, 2006 U.S. Dist. LEXIS 523, at \*7 (citing *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233 (1st Cir. 2001); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136–37 (3d Cir. 1998); and *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986)).

88. *Id.* at \*8. *See infra* note 117 and accompanying text regarding additional courts holding that the Supplementary Rules do not create jurisdiction in the federal courts. Similarly, in the *In re Universal Services Fund* litigation, the court was reluctant to conduct an interlocutory appeal of the AAA administrator’s letter indicating the potential for the case to proceed under the AAA Supplementary Rules for class action arbitrations. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135, 1138–39 (D. Kan. 2005). Perhaps one of the better discussions of this issue can be found in *O’Quinn v. Wood*, 244 S.W.3d 549 (Ct. App. Tex. 2007). In *O’Quinn*, the court stated, with respect to the Texas General Arbitration Act (TGAA):

[W]e understand the “award” referred to by the statute to be the final arbitration award and not merely any arbitration panel intermediate decision labeled “award.” The fact that the arbitration panel’s class certification decision was labeled, under the AAA rules and in the document’s heading, as a “Class Determination Award” does not transform the intermediate decision of the panel into a final arbitration award. “Because the main benefits of arbitration lie in [the] expedited and less expensive disposition of a dispute,” we conclude that it is unlikely that the Texas Legislature intended for appellate courts to construe the TGAA as going beyond permitting appeals from judgments or decrees confirming or denying final arbitration awards.

*Id.* at 553 (second alteration in original) (footnote omitted).

89. *Marron*, 2006 U.S. Dist. LEXIS 523, at \*8–9. The court stated:

The arbitrators’ awards in these actions are limited in scope and preliminary in nature. The awards only address the question of whether the standard Snap-On franchise agreement precludes class treatment of claims that may otherwise be

arbitrators' decisions dealt with the issue of whether class proceedings could occur and not on the underlying merits of the dispute.<sup>90</sup> "Given the early stage of the proceedings and the breadth of issues submitted to the arbitrator that have not even been reached, this arbitral award is not ripe for review by this Court."<sup>91</sup> The court specifically rejected the argument that judicial review should lie because such review is contemplated by the AAA, noting that arbitration is meant to be an "efficient and economical dispute resolution" procedure that would be "thwarted by repeated interlocutory appeals to the district court, which lead to protracted arbitration."<sup>92</sup> The court proceeded to assume, "without deciding," that it

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appropriate for class treatment. In finding that the agreement does not preclude such claims, Arbitrator Matthews was clear that he made "no determination as to whether the claims are in fact proper for class treatment at this stage of the proceedings." Similarly, Arbitrator Slater limited his award to construction of the arbitration provision contained in the franchise agreement between Richard Fortuna and Snap-On and as to whether or not the provision permits class action arbitration by the franchisees.

*Id.* (citation omitted).

90. *Id.* at \*9.

91. *Id.* at \*9–10 (quoting *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999) ("Normally, an arbitral award is deemed 'final' provided it evidences the arbitrators' intention to resolve all claims submitted in the demand for arbitration.")). In *In re Universal Service Fund Telephone Billing Practices Litigation*, the court noted:

Nonetheless, with that being said, the FAA does not authorize the court to interfere with ongoing arbitration proceedings by making interlocutory rulings concerning the arbitration. Under the FAA, the court's role is limited to determining, first, the issue of whether arbitration should be compelled. *Id.* §§ 3–4. If so, then the court may next confirm, vacate, or modify the award. *Id.* § 9–11. The court may not, however, interfere with the ongoing arbitration proceeding. See *LaPrade*, 146 F.3d at 903 (the FAA contemplates that courts should not interfere with arbitrations by making interlocutory rulings); *Smith, Barney, Harris Upham & Co. v. Robinson*, 12 F.3d 515, 520–21 (5th Cir.1994) (as long as a valid arbitration agreement exists and the specific dispute falls within the substance and scope of that agreement, the court may not interfere with the arbitration proceedings); *Miller v. Aaacon Auto Transport, Inc.*, 545 F.2d 1019, 1020–21 (5th Cir.1977) (per curiam) (once the court is satisfied that the dispute is referable to arbitration, the court must allow the arbitration to proceed in accordance with the terms of the parties' agreement). This principle is grounded in the notion that allowing such interference would frustrate the FAA's purpose to ensure "that the arbitration procedure, when selected by the parties to a contract, [is] speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct 1801, 18 L.Ed.2d 1270 (1967); see also *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (stating that the purpose of the FAA is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

*In re Universal Serv. Fund*, 370 F. Supp. 2d at 1138–39 (alteration in original).

92. *Marron*, 2006 U.S. Dist. LEXIS 523, at \*11 (citing *Lloyd v. Hovensia, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) ("The legislative scheme of the FAA thus reflects a policy decision that, if a district

had jurisdiction, but still ruled that “[i]t is not in the interest of judicial economy for this Court to entertain repeated interlocutory appeals that further delay the arbitration that Snap-On moved this Court to compel two years ago. Snap-On won what it sought and now shall proceed with the arbitration.”<sup>93</sup> Ultimately, the *Snap-On* decision turns on a “ripeness” issue, which is discussed in more detail below.<sup>94</sup>

In contrast, in *Genus Credit Management Corp. v. Jones*, the District of Maryland, with little discussion, determined that it had jurisdiction to review a Partial Final Clause Construction Award in which the arbitrator determined that “the agreement does not preclude class arbitration.”<sup>95</sup> The defendants in the court case were consumers who initiated arbitration against Genus Credit and received a favorable award from the arbitrator.<sup>96</sup> Genus Credit filed a motion to vacate the award.

Defendants then argued that the district court had “no jurisdiction to review the Partial Final Clause Construction Award because it amounts to an interlocutory appeal.”<sup>97</sup> The *Genus Credit* court distinguished *Marron* and relied on other cases reviewing “interlocutory” appeals of arbitration awards, but those cases relied upon did not squarely decide the issue of the “interlocutory” nature of the appeal.<sup>98</sup> Ultimately, however, the court

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court determines that arbitration of a claim is called for, the judicial system’s interference with the arbitral process should end *unless and until there is a final award*.”). Further, the opinion noted that Snap-On Tools previously asked the court to exercise jurisdiction over other non-final matters ruled on by the arbitrator. *Id.* at \*11–12. Given Snap-On Tool’s propensity to request judicial review at the proverbial “drop of the hat,” the decision of the district court in this case is not surprising.

93. *Id.* In addition to the repeated requests for interlocutory appeal, the court appeared particularly concerned that Snap-On Tools moved to compel arbitration, followed by repeated requests to the court for judicial intervention. The litigation strategy by Snap-On Tools appears to be one in which it wanted the “best of both worlds” by attempting to utilize both procedures in the most aggressive way possible. Again, given Snap-On Tool’s aggressive nature in using both of these procedures, the district court’s decision is not surprising. *See also In re Universal Serv. Fund*, 370 F. Supp. 2d at 1138–39.

[T]he FAA does not authorize the court to interfere with ongoing arbitration proceedings by making interlocutory rulings concerning the arbitration. . . . [T]he court is unpersuaded that it has any authority under the FAA to grant plaintiff Cummings the type of interlocutory relief that he seeks by interfering with the AAA’s decision regarding whether the dispute should be arbitrated under the AAA’s Supplementary Rules for Class Arbitration.

*Id.*

94. *See infra* Part II.C.2 for more detail on cases involving ripeness.

95. *Genus Credit Mgmt. Corp. v. Jones*, No. JFM-05-3028, 2006 U.S. Dist. LEXIS 16933, at \*4 (D. Md. April 6, 2006).

96. *Id.* at \*3.

97. *Id.* at \*4. Defendants relied on *Marron v. Snap-On Tools, Co. Id.*; *see supra* notes 83–93 and accompanying text. However, the *Genus Credit* court found *Marron* unpersuasive because the court assumed, without deciding, that it had jurisdiction to hear the “interlocutory” appeal. *Id.* at \*4–5.

98. *Id.* The *Genus Credit* court relied on *Long John Silver’s Restaurants, Inc. v. Cole*, 409 F.

summarily determined that “it [is] prudent to render a decision on the class determination award before Green and the parties are forced to adjudicate the entire dispute.”<sup>99</sup> The court proceeded to uphold the arbitrator’s decision under the “manifest disregard” standard of review.<sup>100</sup>

Unlike the cases mentioned above relying on the parties’ intent to have a bifurcated proceeding, the *Genus Credit* case deals with the public policy of hearing important issues when they arise and not subjecting the parties to further proceedings if the arbitrator erred on an issue such as clause construction or certification. Although the policy goals are laudable, serious questions may arise because these cases do not actually address the issue of whether these types of partial final awards are final awards under the FAA.

## 2. Courts Addressing Jurisdiction Consider the Issue of Ripeness

As alluded to in the *Snap-On* decision, other courts have embraced the issue of ripeness in order to determine whether the court has jurisdiction to hear an interlocutory appeal from a class action arbitration. The ripeness determination, however, does not turn on the definition of “award,” but looks to constitutional standards separate and apart from statutory construction issues. This subsection examines the cases focusing on ripeness issues.<sup>101</sup>

Perhaps the only circuit court to date to address the issue, the Sixth Circuit, in *Dealer Computer Services, Inc. v. Dub Herring Ford*, held that a dispute was not ripe for the federal courts to review a Class Construction Award issued by an arbitrator.<sup>102</sup> In *Dealer Computer*, the plaintiff was a dealer in computer hardware and software systems, and the defendants were dealers who contracted with the plaintiff for equipment and services.<sup>103</sup> The contract between the plaintiff and the dealers included a broad arbitration clause, which incorporated the Commercial Rules of the AAA.<sup>104</sup> After a

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Supp. 2d 682 (D.S.C. 2006) (reviewing class determination partial final award) and *Sutter v. Oxford Health Plans, LLC*, No. 05-2198 (JAG), 2005 U.S. Dist. LEXIS 25792 (D.N.J. Oct. 28, 2005) (reviewing arbitrator’s decision to allow class arbitration and to certify a class).

99. *Genus Credit*, 2006 U.S. Dist. LEXIS 16933, at \*5.

100. *Id.* at \*8–10.

101. To the extent that ripeness is a jurisdictional prerequisite in every case, the cases that deal solely with ripeness and not with statutory issues are arguably only conducting the first step in the analysis and glossing over the additional statutory basis for jurisdiction under the FAA.

102. *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 559 (6th Cir. 2008) (“We conclude the district court lacked jurisdiction to consider DCS’s motion to vacate the arbitration award because the matter was not ripe for judicial review.”).

103. *Id.* It is worth noting that this case involves a commercial dispute among business entities, and it does not involve any consumers. Accordingly, this case would not turn on any of the stickier or murkier issues that relate to consumer arbitrations and consumer class action arbitrations.

104. *Id.* Because this case involves all commercial parties, this set of AAA rules appears to be the logical choice of procedural rules for disputants who are interested in taking advantage of general

dispute regarding the contracts arose, the dealers filed a Demand for Arbitration against the plaintiff “as a class rather than individually.”<sup>105</sup> The arbitration clause at issue was silent as to the ability to proceed as a class. However, “[a] three-arbitrator panel granted a ‘Clause Construction Award’ in favor of Dealers, ruling the arbitration provisions found in the various contracts did not preclude class arbitration.”<sup>106</sup> The plaintiff filed a motion to vacate the Clause Construction Award in federal court under, *inter alia*, 9 U.S.C. § 10(a)(4).<sup>107</sup> The district court ruled in favor of the dealers, and the plaintiff appealed.<sup>108</sup>

The Sixth Circuit held that the *Dealer Computer Services* case was not ripe for judicial review.<sup>109</sup> The Sixth Circuit focused solely on a ripeness test and did not conduct an additional analysis of whether the Clause Construction Award is an “award” as contemplated under the FAA. Under the ripeness test, the court first considered the “likelihood of harm” if the case was not considered at that time.<sup>110</sup> The court recognized that the Class Construction Award was not a certification award and, therefore, the case may not ultimately proceed as a class action.<sup>111</sup> In other words, the Class Construction Award “did not preclude class arbitration,”<sup>112</sup> and the “significant hurdles” put in place by the AAA Supplementary Rules made it “far from certain” that the plaintiff’s fear of class arbitration would “come

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rules already designed by the AAA, as opposed to creating a new set of rules specific to the arbitration between these parties.

105. *Id.*

106. *Id.*; see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003). “Arbitrators are well situated to answer that question [of availability of class procedures]. Given these considerations, along with the arbitration contracts’ sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.” *Id.* Under the AAA rules, the Clause Construction Award does not certify a class, but it serves the preliminary step of determining whether a class action procedure may occur under the parties’ arbitration agreement. See *supra* notes 22–34 and accompanying text.

107. *Dealer Computer Servs.*, 547 F.3d at 560. In addition to moving to vacate the award under 9 U.S.C. § 10(a)(4) on the basis that the arbitrator panel “exceeded its powers,” the plaintiff argued that the panel acted in “manifest disregard of the law.” *Id.* Although outside of the scope of this argument, the “manifest disregard” standard may no longer be a recognized standard of review, following the United States Supreme Court decision in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008).

108. *Dealer Computer Servs.*, 547 F.3d at 560.

109. *Id.* at 561 (“But, as discussed below, application of the first and second factors [of the ripeness test] compels us to conclude the matter is not yet ripe for judicial review.”).

110. *Id.*

111. *Id.* (“DCS’s motion to vacate remains unripe because the AAA panel’s ruling did not conclusively determine that Dealers’ claims *should* proceed as a class arbitration.”).

112. *Id.* “The Clause Construction Award at issue on appeal merely held that the distinct arbitration clauses in the various contracts between DCS and Dealers did not preclude class arbitration. The decision to affirmatively authorize class arbitration under the AAA rules is governed by a separate ‘Class Determination Award.’” *Id.*

to pass.”<sup>113</sup> With respect to the second prong, “hardship in withholding judicial review,” the Sixth Circuit held that no hardship existed given the fact that the AAA Supplementary Rules would allow for judicial review after an arbitrator certifies a class.<sup>114</sup> For these reasons, the Sixth Circuit found that the dispute was not ripe for review.<sup>115</sup>

In addition to ruling on the ripeness issue, the Sixth Circuit, in dicta, addressed the interplay between the AAA Supplementary Rules and the federal courts’ jurisdiction. The district court concluded that the AAA’s rules allowing for a stay pending judicial review “evinces an intent that such matters are properly reviewed by a federal district court even though a final result has not been reached [on the merits].”<sup>116</sup> The Sixth Circuit noted that while “the AAA is free to permit parties to seek judicial review for the purposes of its own proceedings, Article III ripeness requirements will not necessarily be satisfied whenever the AAA allows such review. . . . The

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113. *Id.* at 562. In similar litigation involving Dealer Computer Services in Texas, the Southern District of Texas followed this Sixth Circuit opinion, finding a dispute not ripe for review when the arbitrator, at the Class Determination Award stage, found only that a clause did *not prohibit* class arbitration. Dealer Computer Servs., Inc. v. Randall Ford, Inc., No. H-08-2033, 2009 U.S. Dist. LEXIS 8242, at \*12–13 (S.D. Tex. Feb. 4, 2009). Just as the Sixth Circuit did, the Southern District of Texas presumes that the court would have jurisdiction in the event that the arbitrator eventually certifies a class:

Thus, if the arbitrators in this case ultimately decide to certify Randall Ford’s class, which is no certainty, Rule 5(d) would nonetheless provide DCS ample opportunity to obtain judicial review of any arguments it may have against class arbitration, including those challenging the soundness of the arbitration panel’s prior Clause Construction Award, as well as the panel’s exercise of jurisdiction. Given this prospective opportunity for judicial review, it does not appear DCS will suffer any material hardship if review is withheld at this preliminary stage of arbitration.

*Id.* at \*13.

114. *Dealer Computer Servs.*, 547 F.3d at 562–63 (“The stay procedures set forth in Rule 5(d) enable a party to contest an unfavorable decision on class certification in court *before* commencement of class arbitration and resolution of the merits by the arbitration panel.”). The Sixth Circuit did not address the issue of whether the federal courts would have jurisdiction to review an arbitrator’s decision certifying a class.

115. *Id.* at 563. “The absence of hardship for DCS at this juncture renders DCS’s motion to vacate the sort of premature adjudication the ripeness doctrine seeks to avoid. Indeed, we should remain ‘reluctant to invite a judicial proceeding every time the arbitrator sneezes.’” *Id.* (quoting *Smart v. Int’l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002)); *see also id.* at 564. The court stated:

Dealers may ultimately fail to secure class certification for their claims, thus the potential harm to DCS involved in defending against a class arbitration may never occur. Furthermore, if Dealers obtain class certification, DCS will not suffer any material hardship if this Court denies review at this stage because DCS can still obtain judicial review through Rule 5(d) before actual commencement of class proceedings.

*Id.*

116. *Id.* at 563 (quoting *Dealer Computer Servs. v. Dub Herring Ford*, 489 F. Supp. 2d 772, 777 (E.D. Mich. 2007)) (alteration in original) (internal citation omitted).



AAA . . . does not have the authority to waive away Article III-based ripeness deficiencies.”<sup>117</sup> The court further noted that “[f]ederal courts should not grant judicial review of arbitration awards simply because the organization conducting arbitration would like them to do so.”<sup>118</sup>

Thus, the Sixth Circuit held that no dispute is ripe for review under Article III of the Constitution at the “Clause Construction” stage of the proceedings.<sup>119</sup> The Sixth Circuit implies, but does not rule, that jurisdiction *would lie* in the federal courts following an actual certification of a class—as opposed to a finding that an arbitration clause does not *prohibit* the class procedure.<sup>120</sup> The court implies that if a class is certified, then the ripeness test may be satisfied, particularly as it relates to the hardship prong of the ripeness test. The corollary is that if a class is never certified, then the ripeness test will never be satisfied. This ruling is somewhat unsatisfying to the extent that it creates a double standard when the Federal Rules of Civil Procedure—had the case been litigated instead of arbitrated—would have provided for judicial review following a certification ruling, no matter if the arbitrator certified the class or not.

Following this Sixth Circuit decision, the arbitration continued and issued a Partial Final Class Determination, denying the claimants’ motion for class certification.<sup>121</sup> After this award issued, the plaintiff moved to reopen the case, and the district court granted the motion.<sup>122</sup> The plaintiff then moved to confirm the Partial Final Class Determination, which the defendants opposed, again, on the basis of lack of subject matter jurisdiction.<sup>123</sup> The district court, taking cues from the Sixth Circuit decision discussed above, held that the dispute was still not ripe for judicial review because the arbitrator denied class certification to the arbitration claimants.<sup>124</sup> Again, the court’s opinion centered on the issue of harm or

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117. *Id.* In a decision that implies the contrary, the court in *Haro v. NCR Corp.*, No. 3:-04-CV-328, 2008 U.S. Dist. LEXIS 102070, at \*5 (S.D. Ohio Dec. 8, 2008) lists the AAA Supplementary rules as a potential source of authority for jurisdiction. Ultimately, the court in *Haro* confirmed the arbitrator’s “awards” regarding class construction. *Id.* at \*6; *see also* *Haro v. NCR Corp.*, No. 3:-04-CV-328, 2008 U.S. Dist. LEXIS 71532 (S.D. Ohio Sept. 22, 2008) (earlier order in the *Haro* litigation).

118. *Dealer Computer Servs.*, 547 F.3d at 563.

119. *Id.* at 564.

120. *See id.* at 563–54 (distinguishing this case from *Sutter v. Oxford Health Plans L.L.C.*, 227 F. App’x 135 (3d Cir. 2007) and *Long John Silver’s Restaurants, Inc. v. Cole*, 409 F. Supp. 2d 682 (D.S.C. 2006) on the basis that *Sutter* and *Long John Silver* both involve a review of “an arbitration award granting class certification rather than one merely interpreting a clause construction—a key distinction given the [court’s earlier] discussion”).

121. *Dealer Computer Servs., Inc. v. Dub Herring Ford*, No. 07-10263, 2009 U.S. Dist. LEXIS 45325, at \*2 (E.D. Mich. May 29, 2009).

122. *Id.* at \*3.

123. *Id.* at \*3–4.

124. *Id.* at \*9. “Applying Article III’s ripeness requirements, this Court concludes that this

hardship. The district court, picking up on the concerns noted by the Sixth Circuit, noted that the “potential harm” to the dealer “will never occur” because the dealer will not have to defend against a class action.<sup>125</sup> Again, the court remained reluctant to invoke jurisdiction “every time the arbitrator sneezes.”<sup>126</sup> The district court further reinforced the idea that the AAA Supplementary Rules do not create federal jurisdiction absent a ripe dispute.<sup>127</sup>

The district court’s opinion fell right in line with the Sixth Circuit’s opinion and the district court’s ruling was predictable. To date, no court has expressly ruled on a ripeness issue in a way that conflicts with the Sixth Circuit decision, despite the double standard that is created by its ripeness analysis. Further, no court that has addressed the ripeness issue has found that the dispute is ripe and then *further* addressed the issue of whether the final partial “awards” are, indeed, awards under the FAA. If courts were to engage in this additional step, it is difficult to predict how those cases would resolve this second issue.

### 3. Courts Addressing the Merits of the Case Without Regard to Jurisdiction

Given the importance of the jurisdictional question, surprisingly few courts deal with the question at all. In fact, a large number of cases say absolutely nothing about whether jurisdiction actually exists, but instead simply assume jurisdiction exists in order to reach a decision on the merits. This subsection discusses some of these cases.

The most important case that is silent on the issue is the 2008 decision by the Second Circuit in *Stolt–Nielsen SA v. AnimalFeeds International Corp.*<sup>128</sup> *Stolt–Nielsen* involved the review of a Clause Construction Award in an international maritime case.<sup>129</sup> The case started in litigation, but the

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matter is not yet ripe for judicial review. Accordingly, Defendants’ motion to dismiss is GRANTED, and Plaintiff’s motion to confirm AAA panel’s December 2, 2008 ‘Partial Final Class Determination Award’ is denied.” *Id.*

125. *Id.* at \*6–7 (citation omitted). Presumably, the party possessing the “hardship” argument is the arbitration claimant because the claimant will no longer be able to proceed as a class action. However, this argument is difficult to make for the reasons stated above in the Sixth Circuit *Dealer Computer* decision. *See supra* notes 102–25 and accompanying text. As a legal matter, the plaintiffs should not be deemed to have suffered a hardship because each individual plaintiff’s claim can still go forward, and the plaintiff’s alleged substantive rights can still be determined and adjudicated. However, as a practical matter, both the named claimant and the named claimant’s attorneys will suffer some sort of hardship. The arbitration claimants lose any leverage that accompanies a class certification. Similarly, the claimants’ attorneys lose on the potential for a large fee based on an award (or settlement) to an entire class, as opposed to a single disputant.

126. *Id.* at \*7 (citation omitted).

127. *Id.* at \*7–8 (citing *Dealer Computer Servs., Inc.*, 547 F.3d at 563).

128. *Stolt–Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008).

129. *Id.* at 87.

Second Circuit, in a previous appeal, found that the dispute was subject to arbitration.<sup>130</sup> In arbitration, the claimants sought class-wide arbitration and requested a Clause Construction Award from the arbitral panel.<sup>131</sup> The arbitral panel, focusing on the broad scope of the arbitration clause<sup>132</sup> and the fact that all published Clause Construction Awards analyzing a silent clause found in favor of the class procedure, determined that the clause permitted class procedures.<sup>133</sup> Stolt–Nielsen petitioned the district court to vacate the Clause Construction Award, and the district court vacated the award under the manifest disregard standard of review.<sup>134</sup> The Second Circuit reviewed the case on the merits of the “manifest disregard” standard, but did not question whether the Class Construction Award constituted an “award” for the purposes of section 10 of the FAA.<sup>135</sup>

The United States Supreme Court subsequently granted certiorari on this case,<sup>136</sup> but the question presented deals solely with the issue whether a class action procedure can proceed when the arbitration clause is silent on the issue.<sup>137</sup> Because this case, implicitly, then, involves a significant

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130. *Id.* at 87–88.

131. *Id.* at 88.

132. The arbitration clause at issue required:

Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner’s right to lien on the cargo for freight, dead freight or demurrage.

*Id.* at 89.

133. *Id.* at 89–90 (“The panel based its decision largely on the fact that in all twenty-one published clause construction awards issued under Rule 3 of the Supplementary Rules, the arbitrators had interpreted silent arbitration clauses to permit class arbitration.”).

134. *Id.* at 90, 92 (“In this light, ‘manifest disregard’ has been interpreted ‘clearly [to] mean[] more than error or misunderstanding with respect to the law.’”) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (alterations in original)).

135. The continuing viability of the “manifest disregard” standard of review is beyond the scope of this Article. The *Stolt–Nielsen* case was decided after the Supreme Court’s decision in *Hall Street*, and the *Stolt–Nielsen* court discusses *Hall Street*, but still never considered whether the arbitration “award” constitutes an “award” for the purposes of the FAA.

136. *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (U.S. June 15, 2009) (No. 08-1198).

137. The question presented to the Supreme Court is:

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties’ agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first

question of jurisdiction, the Supreme Court's decision may have a dramatic impact on the issue of jurisdiction. The Supreme Court, however, could simply decide the merits of the dispute without discussing jurisdiction. Such a ruling may have the impact of *implicitly* approving the jurisdiction by remaining silent on the issue.

Other circuit courts have considered final partial "awards" without discussing the trial court's jurisdiction. For example, in *Sutter v. Oxford Health Plans LLC*, the Third Circuit, in an unpublished decision, reviewed a "final class determination award" in an arbitration without any discussion of jurisdiction.<sup>138</sup> *Sutter* involved a class action in the medical billing context beginning first in litigation, but compelled to arbitration.<sup>139</sup> After the arbitrator "defined the class of claimants and certified the class," Oxford filed a motion to vacate the award.<sup>140</sup> Sidestepping the issue of jurisdiction, the court in *Sutter* concentrated on the standard of review of an award rendered under the AAA Supplementary Rules.<sup>141</sup> Ultimately, the *Sutter* court concluded: "Here, the arbitrator neither exceeded his authority nor evidenced manifest disregard for the law. The arbitrator individually went through each requirement for a class action set forth in Rule 4 of the AAA

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needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here - which continues to divide the lower courts - is the same one presented in *Bazzle*:

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

Petition for Writ of Certiorari, *Stolt-Nielson*, 129 S. Ct. 2793 (No. 08-1198).

138. *Sutter v. Oxford Health Plans, LLC*, 227 F. App'x 135 (3d Cir. 2007).

139. *Id.* at 136.

140. *Id.* at 137.

141. *Id.* The court noted:

In the instant case, the agreement between Sutter and Oxford specified that all disputes "shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association." The American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Rules") allow for "judicial review" within 30 days of a class determination award. The AAA Rules also require that class determinations be set forth in a "reasoned, partial final award." Oxford argues that, "[a]s a matter of logic, these rules envision *de novo* review at least as to whether proper legal standards have been applied and followed." (Appellant's Brief at 23).

Oxford's argument is not persuasive. While the AAA Rules call for judicial review, they never specify what standard of review the courts should use. Considering the silence of the AAA Rules on this issue, we are unable to conclude that the parties manifested a clear intent to opt out of the FAA rules.

*Id.* The Third Circuit's presumption that parties could opt-out of the FAA rules, however, should not be considered good law in light of the Supreme Court's pronouncement in *Hall Street* that judicial review in the federal courts is limited to the grounds specified in the FAA.

Rules.”<sup>142</sup>

Another example is found in the Fourth Circuit’s opinion in *Long John Silver’s Restaurants, Inc. v. Cole*.<sup>143</sup> *Long John Silver’s* involved the appeal of a Class Construction Award in a case involving alleged violations of the Fair Labor Standards Act.<sup>144</sup> The claimants initiated class action proceedings before the AAA, and the arbitrator initially determined that the arbitration clause “did not preclude a class arbitration proceeding.”<sup>145</sup> At this point, Long John Silver’s initiated suit to vacate the Class Construction Award, but the district court dismissed the case for lack of jurisdiction.<sup>146</sup> Next, the arbitrator issued a Class Award, determining that the class could proceed with the named representatives, proceeding on an “opt-out” basis under AAA Supplementary Rule 7.<sup>147</sup> Then Long John Silver’s initiated proceedings again in the district court to vacate the Class Award.<sup>148</sup> The district court refused to vacate the Class Award under the “manifest disregard” standard.<sup>149</sup> The Fourth Circuit affirmed, without discussing either constitutional ripeness or the question of whether the award is appealable under the FAA.<sup>150</sup>

Additionally, a sizeable number of district courts have reviewed clause construction and class awards without considering their own jurisdiction to do so.<sup>151</sup> This lack of discussion regarding jurisdiction should be troubling. Interestingly, none of the cases involving appeals of interlocutory class action arbitration awards has grasped onto the pre-*Bazzle* case law regarding interlocutory appeals in general. In other words, none of the post-*Bazzle* cases have applied a theory similar to *Hart Surgical*, in which the

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142. *Id.* at 138.

143. *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008).

144. *Id.* at 347.

145. *Id.* at 348.

146. *Id.*

147. *Id.* at 349.

148. *Id.*

149. *Id.*

150. *Id.* at 353–54. Prior to appeal, at the trial court level, the court determined that it had jurisdiction when the parties established the presence of diversity and the requisite amount in controversy. *See Sutter v. Oxford Health Plans, LLC*, No. 05-2198 (JAG), 2005 U.S. Dist. LEXIS 25792, at \*6 (D.N.J. Oct. 31, 2005) (“Because this Court determines that it has diversity jurisdiction over [the] motions, it need not reach the issues of federal question and statutory jurisdiction.”).

151. *See, e.g., Veliz v. Cintas Corp.*, No. C 03-1180 RGS (SBA), 2009 U.S. Dist. LEXIS 57695 (N.D. Cal. June 22, 2009) (reviewing clause construction awards under a “manifest disregard” standard and citing the FAA review provisions, without ever discussing whether a clause construction award is an “award” for the purposes of the FAA); *JSC Surgutneftegaz v. President & Fellows of Harvard Coll.*, No. 04 Civ. 6069 (RMB), 2007 U.S. Dist. LEXIS 79161, at \*2 (S.D.N.Y. Oct. 11, 2007) (confirming an arbitral “award” “does not preclude this arbitration from proceeding on a class basis” without any discussion of jurisdiction).

court determines that the parties—by incorporation of the AAA or JAMS class action rules—specifically contemplated a bifurcated procedure, such that the parties have adopted a “formal, agreed-to bifurcation” of portions of the class action procedure that would give rise to district court review under *Hart Surgical*. This line of reasoning could potentially unite pre- and post-*Bazzle* authority as well as bring some continuity to the issue of interlocutory appeals, in the class action context and elsewhere.

Given that neither statute nor case law exists demonstrating the authority of the federal courts to review partial final “awards,” further development of this issue would better establish the legal standards in this area. For the reasons noted above, serious questions exist with respect to whether the federal district courts have jurisdiction to review interlocutory awards in any context, and the lack of established precedent further complicates the issue in the class action context.

In addition to the legal and textual arguments noted above, public policy supports a rule that jurisdiction does not lie in the federal courts until a final determination on the merits. Postponing judicial review until a final determination on the merits will increase the efficiency of arbitration procedure.<sup>152</sup> To the extent that the parties desire judicial review at an earlier point in time (such as after a clause construction award or class certification award is issued), the parties should be able to contract for appellate arbitration under any standard of review the parties see fit. The use of appellate arbitration is discussed in the next Part.

### III. APPELLATE ARBITRATION COULD FILL THE NEED FOR JUDICIAL REVIEW

Given the inconsistent rulings from the courts, parties who are interested in obtaining judicial review of key class action arbitration decisions could try alternative methods of obtaining that review—such as the use of an appellate arbitration panel.<sup>153</sup> Disputants could contract for a

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152. See Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 256 (2006). Buckner advocates for a “pure arbitral model” of class action arbitration that would eliminate[] judicial intervention in the class arbitral process beyond that authorized under the FAA by eliminating interim reviews and voluntarily requiring arbitrators to provide due process-like protections in a manner that preserves the efficiency of the arbitral process and vests responsibility for safeguarding the interests of absent class members with arbitration providers who are in the best position to assure such protections.

*Id.*

153. Of course, in order to have effective review of an arbitration award—either by courts or by an appellate arbitration panel—the underlying arbitration decision or award must be written and reasoned. Otherwise, the appellate tribunal would have nothing to review. See Thomas J. Stipanowich,

panel of arbitrators to review key decisions in the class arbitration procedure.<sup>154</sup> The appellate arbitration panel could then review the award prior to the continuation of the class action procedure.

Appellate arbitration has been suggested by courts as a means of providing disputants with more—or different—judicial review than that provided under the FAA.<sup>155</sup> As early as 1991, the Seventh Circuit, in another opinion authored by Judge Posner, held that although parties could not contract for expanded *judicial* review, “[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award.”<sup>156</sup> Although appellate arbitration, as a practical matter, has not been

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*Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration: Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COMM. L.J. 383, 429 (2008–2009). Stipanowich states:

However, there are other less radical alternatives to expanded judicial review. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, and placing limits on awards of monetary damages (including upper and lower limits for the award, a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages).

*Id.* (footnote omitted).

154. The AAA publication *Drafting Dispute Resolution Clauses: A Practical Guide* sets forth a clause that would allow an appellate arbitrator to reverse, modify, or remand a case in the following circumstances: “1) those specified in sections 10 or 11 of the FAA; 2) if the award contains material errors of applicable law; or 3) if the award is arbitrary or capricious.” Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 115 (1997); Beckett, *supra* note 52, at 534 (describing rules of the International Chamber of Commerce allowing for appellate arbitration); Stipanowich, *supra* note 153, at 430 (“Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions, the International Institute for Conflict Prevention & Resolution and JAMS, have published appellate arbitration rules for utilization in commercial cases.”) (footnotes omitted).

155. See *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 (8th Cir. 2003) (recognizing that parties are permitted to contract for greater judicial review than that provided by the FAA); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 259–60 (1999) (discussing early cases in which courts have suggested that parties engage appellate arbitration panels to satisfy party desire for increased judicial review). *But see* *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 1000 (9th Cir. 2003) (acknowledging that “parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs—including review by one or more appellate arbitration panels[.]” but holding that “a federal court may only review an arbitral decision on the grounds set forth in the [FAA]”).

156. *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); *see also* *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001) (holding that parties who want increased judicial review should contract for review by appellate arbitrators); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (“Should parties desire more scrutiny than the [FAA] authorizes courts to apply, ‘they can contract for an appellate arbitration panel to review the arbitrator’s award[.] they cannot contract for judicial review of that award.’”) (alterations in original) (quoting *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997)); *Bargenquast v. Nakano Foods, Inc.*, 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002) (same); Eric

widely employed, case law suggests that some parties are utilizing this procedure.<sup>157</sup>

Certainly, a number of advantages and disadvantages exist regarding the use of appellate arbitration procedure. Parties to a class action procedure

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Chefetz, *The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties' Agreements According to Their Terms and Maintaining Arbitral Efficiency*, 8 CARDOZO J. CONFLICT RESOL. 1, 36 (2006) (describing Judge Posner's decision in *Chicago Typographical Union*); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, HARV. NEGOT. L. REV. 171, 179 n.58 (2003) (same).

157. See, e.g., *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1297 (11th Cir. 2000) (describing arbitration process employed, including use of appellate arbitration panel); *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184 (7th Cir. 1985) ("If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitration panels, though they rarely do."); *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059, 1063–64 (N.D. Cal. 2002) (interpreting an "appeal provision" in a contract to arbitrate as contemplating a *judicial* appeal, not an appeal to an appellate arbitration panel, such as JAMS); *Supra Telecom. & Info Sys. v. Bellsouth Telecom.*, No. 4:02cv315-RH, 2002 U.S. Dist. LEXIS 27194 (N.D. Fla. 2002) (interpreting the parties' contract as not providing for appellate arbitration review); *Shait v. Millennium Broadway Hotel*, No. 00 Civ. 5584 (GEL), 2001 U.S. Dist. LEXIS 6565, at \*21–22 (S.D.N.Y. 2001) (noting that the parties timely applied for review to the district court following their appellate arbitration proceeding); *Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613, 613 (S.D.N.Y. 1975) (reviewing an award issued by an arbitration appeals panel); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 614 (Cal. 2008) ("Nor are parties prevented from agreeing to have arbitration awards reviewed by appellate arbitration panels."); *Kenny v. N. County Ford*, No. D054017, 2009 Cal. App. Unpub. LEXIS 8644, at \*3–6 (Cal. Ct. App. 2009) (describing arbitration process, including appellate arbitration process); *Campos v. Champion Chevrolet, Inc.*, No. B202202, 2008 Cal. App. Unpub. LEXIS 5936, at \*4–6 (Cal. Ct. App. 2008) (holding that the requirement to submit a dispute to arbitration, including appellate arbitration, is not unconscionable, provided that the appellate arbitration provision does not include a certain dollar amount as a threshold); *Cummings v. Future Nissan*, 27 Cal. Rptr. 2d 10 (Cal. Ct. App. 2005) (reviewing arbitration as modified by the appellate arbitrator); *Duncan v. Nat'l Home Ins. Co.*, 36 P.3d 191, 192 (Colo. App. 2001) (noting use of appellate arbitration proceeding in the procedural history); *Witherington v. Adkins*, 610 S.E.2d 561, 564 (Ga. Ct. App. 2005) (describing arbitration history, including appellate arbitration); *Volpe Constr. Corp. v. Scherrer*, No. A-1003-07T1, 2008 N.J. Super. Unpub. LEXIS 102, at \*4–5 (N.J. Super. Ct. App. Div. July 11, 2008) (affirming confirmation of arbitration award rendered by an appellate arbitration panel); *Old Tappan Chiropractic v. Selective Ins. Co.*, No. A-5816-05T5, 2007 N.J. Super. Unpub. LEXIS 538, at \*3 (N.J. Super. Ct. App. Div. Feb. 9, 2007) (refusing to vacate or modify arbitration award that proceeded through appellate arbitration); *Hilowitz v. Hilowitz*, 432 N.Y.S.2d 344, 348 (N.Y. Sup. Ct. 1980) (finding that no judicial review could be had in the courts when the parties did not exercise their contractual obligation to first appeal the arbitrator's decision to an appellate arbitrator); *Samber v. Mullinax Ford East*, 879 N.E.2d 814, 818–19 (Ohio Ct. App. 2007) (describing an arbitration procedure involving appellate arbitration); *Gettysburg Constr. Co. v. Girffo*, 38 Pa. D. & C.4th 394 (Pa. Ct. Com. Pl. 1998) (same); *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 46 (Tex. 2002) (stating that parties cannot contract for judicial review of an arbitrator's award but may contract for an appellate arbitration panel to review the award); *In re Hospitality Employment Group, LLC*, 234 S.W.3d 832 (Tex. App. 2007) (upholding an appellate arbitration agreement); see also Beckett, *supra* note 52, at 534 (describing the rules of the International Chamber of Commerce and the AAA that provide existing procedures for appellate arbitration if the parties are interested in incorporating such procedures into their arbitration); Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages—Where is the State Action?*, 2007 J. DISP. RESOL. 417, 423 n.37 (2007) ("Some private ADR providers have created 'appellate arbitration' procedures as part of the services they offer.").



may want the opportunity for appellate review given the significance of rulings such as the certification issue. The parties could contract for a broader standard of review, too, than is available under the FAA.<sup>158</sup> Potentially, an appellate arbitration panel could review an interim award faster than a court.<sup>159</sup> The appellate arbitrators would clearly have jurisdiction, compared to the courts, who, as noted above, struggle with many of these jurisdictional questions.<sup>160</sup> Further, a specialized group of individuals with special expertise in the area of class actions could serve as appellate arbitrators, thus adding to the potential efficiency of the process.<sup>161</sup> Arbitral appeal also has the possibility of maintaining the

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158. Jonathan R. Bunch, Note, *Arbitration Clauses Should Be Enforced According to Their Terms—Except When They Shouldn’t Be: The Ninth Circuit Limits Parties’ Ability to Contract for Standards of Review of Arbitration Awards*, 2004 J. DISP. RESOL. 461, 474–75 (2004). Bunch states:

Furthermore, given the fact that, as Judge Posner concluded, parties desiring to have an arbitral award reviewed may agree to appellate arbitration, it should not be said that parties have no recourse if presented with an undesirable arbitral award. Until the Supreme Court is faced with the issue, parties should look to Congress to amend the FAA rather than continue to contravene the limited standards of review set forth therein.

*Id.*; Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 124 (1997) (providing an example clause providing for appellate arbitration); Cynthia A. Murray, Note, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 ST. JOHN’S L. REV. 633, 645 n.90 (2002) (same).

159. Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 260 (2005). “Appellate arbitrators, however appointed and empowered, could eliminate abhorrent departures from accepted practice and could, more readily than courts, impose exacting professional standards on arbitrators. Assessments of debatable substantive matters, however, should escape even their purview. Their mission ought to be to provide an essential professional quality control.” *Id.*; Stipanowich, *supra* note 153, at 429–30. Stipanowich states:

Appellate arbitration procedures afford parties the opportunity of a “second look” at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review. Since properly constituted agreements for “second-tier” arbitration are as enforceable as any other arbitration agreements, so are the resulting awards.

*Id.* (footnote omitted); Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, DISP. RESOL. J., Aug.–Oct. 2005, at 12 (commenting that arbitral appeals are “[c]onsistent with the philosophical underpinnings of arbitration, [and] the approach extends the flexibility afforded contracting parties seeking to resolve disputes through arbitration”).

160. Marrow, *supra* note 159, at 12 (noting that arbitral appeal “eliminates the uncertainty of trying to involve the judiciary in a manner not otherwise provided for by arbitration statutes”).

161. The use of specialized appellate arbitrators has gained some momentum in other areas of the law. For instance, in the area of intellectual property and domain name disputes, the Internet Corporation for Assigned Names and Numbers (ICANN) developed a multi-level arbitration procedure for the resolution of disputes. See Patrick D. Kelley, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy*, 17 BERKELEY TECH. L.J. 181, 181 (2002) (discussing the Uniform Domain-Name Dispute-Resolution Policy as a “mechanism for resolving disputes between domain name owners”). Kelley states:

confidentiality present in the arbitration procedure, where such confidentiality could be lost by appealing the award to a judicial tribunal.<sup>162</sup>

However, increased judicial review—even in an appellate arbitration—would decrease the efficiency of the arbitration process and add increased time and cost to the procedure.<sup>163</sup> Further, parties may simply not be attracted to a procedure whereby another arbitrator—as opposed to a judge (Article III or otherwise)—acts as the primary source of judicial review.<sup>164</sup> If the parties eventually seek to confirm or vacate an award in the federal courts under FAA sections 9 and 10, a question may arise regarding *which* award the parties are seeking to vacate. In other words, the courts may be asked by the parties to review certain aspects of both the primary

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The preliminary appellate review process would be handled by a separate group of nine arbitrators selected by ICANN, working in groups of three. The nineteen arbitrators participating in the appellate process would primarily be retired judges, academics, and practitioners, creating a staff of arbitrators at the appellate level with similar qualifications to those serving on the panels.

*Id.* at 202 (footnote omitted); see also Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275, 287 (1997) (noting that, in the labor context, parties to the National Bituminous Coal Wage Agreement “established a national arbitration board with appellate review over certain decisions made by local arbitrators”); Hans Smit, *Contractual Modifications of the Arbitral Process*, 113 PENN. ST. L. REV. 995, 1005 (2009). Smit states:

But much can be said in favor of selecting appellate arbitrators from groups of persons who have experience in arbitration, possess significant special qualifications, and are appointed by a neutral party. I would favor institutional initiatives toward forming pools of prospective appellate arbitrators whose names and qualifications are published and from which the institution will select a panel for each particular case.

*Id.*

162. Marrow, *supra* note 159, at 12 (stating that arbitral appeal “eliminates concerns about confidentiality presented by an appeal through the judicial system”).

163. See James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT’L. ARB. 9, 14 (2004) (noting that appellate arbitration panels have the potential to “unduly prolong the pre-confirmation process”); Symposium, *The Fifth Annual Emory Bankruptcy Developments Journal Symposium: Panel Three*, 24 EMORY BANKR. DEV. J. 309, 318 (2008). A speaker states:

In some cases now, parties who want to have the right of an appeal, because they enjoy that in court, can provide in the arbitration clause for an appellate step to an appellate panel of arbitrators, former federal judge, however they structure it. And generally what happens though is the party seeking that appeal pays the entire cost of the appellant stat. We don’t encourage that. It just drains the process out, but if the parties have a \$20,000,000 thing at stake, they may want to have the right to appeal. It’s done in a very limited number of cases.

*Id.*; Stipanowich, *supra* note 153, at 430 (noting that, as a practical matter, the only cases that would likely contract for appellate arbitration involve disputes between those in “long-term relationships” or disputes involving “large-scale business transactions”).

164. See Anthony J. Longo, *Agreeing to Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA*, 36 J. MARSHALL L. REV. 1005, 1018 (2003) (“[I]t is difficult to believe that parties to arbitration, who desire the proper legal outcome, will place the legal error review in the hands of non-judges.”).

arbitrator’s decision as well as the appellate arbitrator’s decision, again creating complications regarding the term “award” under the FAA.

As this Article demonstrates, judicial review under the FAA remains unsettled, and questions persist regarding interlocutory appeal of arbitration decisions in the class action setting and in general. Given this uncertainty, parties who desire additional judicial review—presumably understanding the inefficiencies associated with the additional procedures—could contract for such review by appellate arbitrators. Appellate arbitrators would clearly have jurisdiction to hear the appeal by contract, and the parties could designate a more meaningful (or more searching) standard of review than is available under the FAA.

