No. 08-1198

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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*.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals. KP Chemical Corp. appears in the court of appeals caption, but it was not a party in that court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

Petitioner Stolt-Nielsen Transportation Group Ltd. is a wholly owned subsidiary of petitioner Stolt-Nielsen S.A., a publicly traded corporation. Stolt-Nielsen S.A. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Petitioners Odfjell Seachem AS and Odfjell USA, Inc. are wholly owned subsidiaries of petitioner Odfjell ASA, a publicly traded corporation. Odfjell ASA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. (Since this case commenced, Odfjell Seachem AS has changed its name to Odfjell Tankers AS, and Odfjell ASA has changed its legal status from an ASA to an SE.)

Petitioner Jo Tankers, Inc. is a wholly owned subsidiary of Jo Tankers B.V., which is not a publicly traded corporation. Petitioner Jo Tankers B.V. has one parent corporation, Jo Tankers (Bermuda) Limited, and no publicly held corporation owns 10 percent or more of the stock of Jo Tankers B.V. or Jo Tankers (Bermuda) Limited.

Mitsui O.S.K. Lines Ltd., a publicly traded corporation, owns 10 percent or more of the stock of petitioner Tokyo Marine Co., Ltd.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 548 F.3d 85. The opinion of the district court (Pet. App. 35a-44a) vacating the arbitrators' award is reported at 435 F. Supp. 2d 382. The arbitrators' award (Pet. App. 45a-53a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2008. A timely petition for rehearing en banc was denied on January 12, 2009. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on March 26, 2009, and granted on June 15, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1 *et seq.*), is set forth in full in the appendix to this brief. App. 1a-15a.

STATEMENT

This case presents the question whether the Federal Arbitration Act (FAA) permits the imposition of class arbitration on sophisticated commercial parties engaged in international maritime commerce whose arbitration agreement is silent on the issue.

A. The Parties' Arbitration Agreements

The case arises from a number of disputes subject to international maritime arbitration agreements among multinational corporations involved in oceanic shipping. Petitioners are predominately foreign corporations that operate parcel tankers carrying bulk chemical and other specialty liquids in individual tanks that can be separately chartered. Respondent Animalfeeds International is a multinational corporation headquartered in the United States with foreign affiliates headquartered in Panama and incorporated in both Panama and the British Virgin Islands. CAJA A2346 ¶¶ 10-11.

Petitioners and Animalfeeds entered into several independent bilateral shipping contracts providing for international oceanic transportation of Animalfeeds' cargo. For each shipment at issue, Animalfeeds negotiated a separate "spot" contract with one of the petitioners—*i.e.*, a contract providing for a single shipment in the course of a single voyage. JA66a & n.2, 152a ¶ 8. In keeping with industry usage, these agreements were memorialized in written "charter parties" reflecting the terms negotiated by the charterer (or the shipbroker representing it) and the shipping company. JA152a ¶ 8.[1]

To promote certainty and clarity as to the terms of their agreement, charterers (or their shipbrokers) and shipping companies routinely agree to use form charter parties that are generally appropriate for specified trades and routes. JA152a-153a ¶ 9. These forms employ standard terms and clauses that are known and recognized within the maritime industry and may be

[1] "The term 'charter party' derives from the Latin, *charta partita* (a divided document), which shows the ancient origin of this arrangement. In the middle ages a contract technique was as follows: An agreement was written out twice on the same piece of parchment, then cut in half on a jagged line (compare the term 'indenture'). Each party would retain a half, and comparing the two halves would prove the agreement's authenticity." T. Schoenbaum, 2 *Admiralty and Maritime Law* § 11-1, at 2 & n.1 (4th ed. 2004); *see also* 8 *Benedict on Admiralty* § 18.01, at 18-2 (7th ed. 2008) (similar). The FAA specifically includes charter parties within its definition of the "maritime transactions" (9 U.S.C. § 1) in which written agreements to arbitrate are to be enforced (*id.* § 2).

readily tailored by further agreement of the parties. *Id.*; *see* JA156a ¶ 16.[2]

All the contracts between Animalfeeds and petitioners were based on the "Vegoilvoy" charter party, which has been in common use for more than 50 years. Pet. App. 5a & n.3, 67a-69a.[3] The Vegoilvoy form was designed for use in international shipping transactions, by parties who are commonly located outside the United States. JA121a ¶ 9, JA124a ¶ 15. Its standard terms include the following arbitration clause:

> 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

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[2] *See also* R. Force, *Admiralty and Maritime Law* 44 (2004) ("Charter parties typically are negotiated contracts and … are often marked up—that is, provisions are added, deleted, or modified. These changes reflect the market and the relative financial strength of the owner and charterer.").

[3] The proceedings below initially included some claimants whose disputes were governed by the arbitration provisions in the "Asbatankvoy" charter party. JA66a & n.2. Those claimants are no longer parties to this case. Animalfeeds, however, seeks to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally[.]" JA67a ¶ 2. Any such class necessarily seeks to include charterers using the Asbatankvoy or other forms or individually negotiated arbitration provisions.

> of the Court shall be entered upon any award made by said arbitrator.

Pet. App. 69a.[4]

Contracting parties of many nationalities—both charterers and shipping companies—may not know or trust the laws or procedures of the various jurisdictions in which they might otherwise be forced to litigate. *See, e.g.*, JA121a ¶ 9, JA124a ¶ 15, JA130a-131a ¶¶ 6-7. They choose instead to resolve disputes through neutral and familiar mechanisms of private international commercial arbitration. JA121a ¶¶ 8-9. The charterer or its shipbroker—not the shipping company—typically selects the charter party form for the transaction. *See, e.g.*, JA144a ¶ 6.[5]

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[4] The United States Arbitration Act was the popular name prescribed by Congress in 1925 when it enacted the precursors to the provisions now commonly known as the FAA. *See* Act of Feb. 12, 1925, Pub. L. No. 68-401, ch. 213, § 14, 43 Stat. 883, 886.

[5] Likewise, the drafting of charter party forms for parcel tanker shipping, such as the Asbatankvoy and Vegoilvoy forms, has historically been the province of charterers, particularly large oil companies seeking to favor their own interests. *See* J. Cooke et al., *Voyage Charters* 589 (1993) ("The draftsmen of the Essovoy (subsequently Exxonvoy and Asbatankvoy) intended to protect oil company charterers from certain risks arising in this trade."); L. Gorton et al., *Shipbroking and Chartering Practice* 106 (5th ed. 1999) ("charter-party forms are dominated by the large oil companies" and "Asbatankvoy corresponds to the previous 'Exxonvoy'") *see also* Gram, *Chartering Problems From An International Point of View*, 49 Tul. L. Rev. 1076, 1084 & n.24 (1974) (Vegoilvoy was "largely … modeled on Intertankvoy"); 1 D. Yates et al., *Contracts for the Carriage of Goods* 1–24 (1993) ("[T]he Intertankvoy … was based largely on other oil forms, "especially Exxonvoy 69 (now renamed Asbatankvoy, but identical to the old Exxonvoy 69) and Shellvoy 3 (which predated Shellvoy 5)[.]").

B. Arbitration Proceedings

In 2003, Animalfeeds filed a putative class action against petitioners in federal district court, alleging that the defendants had violated U.S. antitrust laws. Pet. App. 3a. That suit and others were transferred to the District of Connecticut for coordinated proceedings under the multi-district litigation statute, 28 U.S.C. § 1407. In an appeal from those proceedings, the Second Circuit held that the plaintiffs' claims fell within the scope of the parties' agreements to arbitrate. It therefore compelled arbitration pursuant to Section 4 of the FAA, 9 U.S.C. § 4. Pet. App. 3a & n.1 (citing *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004)).

Animalfeeds then sought to arbitrate not only its own claims against petitioners, but also the claims of a putative worldwide class of commercial shippers of chemicals, edible oils, acids, and other specialty liquids. Pet. App. 36a. As framed by the demand, the putative class potentially involves thousands of different contracts covering ocean transportation of hundreds of different specialty liquids between scores of ports in dozens of countries.[6] Petitioners opposed Animalfeeds' demand on the ground that they had never consented to class arbitration. *Id.*

Three months before Animalfeeds sued petitioners, this Court decided *Green Tree Financial Corp.* v. *Baz-*

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[6] The demand seeks arbitration on behalf of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] and their co-conspirators (the 'Class') at any time during the period from August 1, 1998 to November 30, 2002 (the 'Class Period')." JA67a ¶ 2.

zle, 539 U.S. 444 (2003). In that case, the Court had granted certiorari to decide the same question presented here: Whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent on that question. *Id.* at 447 (plurality opinion). The Court did not reach that question, however, because a plurality concluded that arbitrators, rather than courts, should have determined in the first instance whether the parties' contracts were "in fact silent" regarding class arbitration, or whether instead the contracts "forb[ade] class arbitration" by their terms, as the petitioner contended. *Id.* at 447, 452-454.

In light of *Bazzle*, after the Second Circuit held that the charterers' antitrust claims were subject to arbitration and Animalfeeds and others made class demands, the parties here reached a supplemental agreement. Pet. App. 55a-66a. Among other things, they agreed to select a three-arbitrator panel that would initially construe the parties' arbitration clause on the disputed question of class arbitrability, using procedures incorporated from the American Arbitration Association's (AAA) Supplementary Rules for Class Arbitrations. *Id.* at 56a-59a.

Rule 3 of the AAA Supplementary Rules provides that, where a class demand has been made, an arbitrator shall first "determine, as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." JA56a; *see also* Pet. App. 4a (quoting rule). The arbitrator is then to stay the arbitration to permit judicial review of the partial final award. *Id.* Echoing a provision in Rule 3 itself (JA57a), the parties' supplemental

agreement provides that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration … and may not be relied upon by the Parties, any arbitration panel, any court, or any other tribunal for such purposes." Pet. App. 62a-63a ¶ 15.

In presenting the class issue to the arbitrators, all of the parties agreed that the Vegoilvoy clause was "silent" on the question of class arbitration. Pet. App. 49a. In the face of that silence, petitioners cited federal case law prohibiting class or other consolidated arbitration without all parties' consent. *See* JA101a; Pet. App. 6a, 50a. Petitioners also established that the maritime arbitration clauses at issue had never been the basis for a class arbitration. CAJA A599; *see also* JA126a ¶ 21, JA139a ¶ 24. And they provided, as subsequently noted by the arbitrators, undisputed "declarations and testimony from two experts … to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." Pet. App. 51a; *see also* JA119a-141a (reprinting declarations).

Animalfeeds, on the other hand, relied principally on a number of domestic consumer, wage, and franchise arbitration awards in which other arbitrators had permitted class proceedings under "silent" clauses. *See* JA79a-80a; CAJA A1579-A1956; Pet. App. 49a-50a. On that basis, Animalfeeds argued that "public policy favored class arbitration." Pet. App. 6a; *see also* CAJA A308-A309.

The arbitrators accepted Animalfeeds' position, ruling that, by its silence, the Vegoilvoy clause permitted class arbitration. Pet. App. 7a-8a, 52a. Petitioners, the

panel concluded, had failed to "establish that the parties to the charter agreements intended to preclude class arbitration." *Id.* at 51a.

C. Judicial Proceedings

In accordance with Rule 3 of the AAA Supplementary Rules, the panel stayed its award to permit judicial review. Pet. App. 52a. Petitioners sought review in the United States District Court for the Southern District of New York, moving to vacate the panel's award on the grounds that the arbitrators had exceeded their powers and manifestly disregarded the law. CAJA A13-A20.

The district court vacated the award, holding that the arbitrators had "manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration." Pet. App. 41a. Alternatively, it held that "the result would be the same even if there was no established maritime rule and [New York] law then governed." *Id.* The court did not reach petitioners' argument that the arbitrators had exceeded their powers because the FAA does not permit the imposition of class arbitration on parties whose contract is silent on that question. *See id.* at 44a & n.4, 27a-28a.

The Second Circuit reversed. Pet. App. 1a-32a. The court concluded that, although it "might well find [the district court's] analysis persuasive" as an original matter, "the errors it identified" in the arbitrators' award did not "rise to the level of manifest disregard of the law." *Id.* at 21a; *see also id.* at 19a-31a.

The court of appeals also addressed petitioners' argument that the FAA "prohibit[s] class arbitration unless expressly provided for in an arbitration agreement." Pet. App. 28a. That argument relied on the

Second Circuit's previous decisions in *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), which held that arbitrations could not be consolidated without the consent of all parties to the relevant agreements, and *Glencore, Ltd.* v. *Schnitzer Steel Products Co.*, 189 F.3d 264, 266-268 (2d Cir. 1999), which confirmed that district courts had no power "to order either consolidation or joint hearings of two separate arbitrations" where the relevant arbitration agreements did not authorize joint proceedings. Petitioners also pointed to *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which relied on *Boeing* and cases from other circuits and squarely held that "section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275 (relying on *Boeing*, 998 F.2d at 74; *American Centennial Ins.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984)).

The Second Circuit recognized that these decisions had been "grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause." Pet. App. 29a. It held, however, that *Bazzle* "abrogated those decisions to the extent that they read the FAA to prohibit such proceedings." *Id.* (citing *Bazzle*, 539 U.S. at 454-455 (Stevens, J., concurring in the judgment and dissenting in part)).

The court concluded that, after *Bazzle*, arbitrators were to approach issues of consolidation, joint hearings, or class arbitration as "issues of contract interpretation to be decided under the relevant substantive contract law." Pet. App. 29a-30a. It then recharacterized *Boeing*, *Glencore*, and *Champ* as "instructive insofar as they may view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties' intent not to permit such proceedings," but not the source of "a governing rule of contract interpretation under federal maritime law or the law of New York." *Id.* at 30a. On that basis, the court concluded that "[t]he arbitration panel's decision to construe the contract language at issue here to permit class arbitration was … not in manifest disregard of the law." *Id.* at 30a-31a.

Finally, the court rejected (Pet. App. 31a-32a) petitioners' argument that the arbitrators had "exceeded their powers" within the meaning of Section 10 of FAA, 9 U.S.C. § 10(a)(4). In doing so, the court gave dispositive weight to the parties' supplemental agreement to submit to the arbitrators, in the first instance, the threshold question identified by the plurality in *Bazzle—i.e.*, whether their arbitration clause by its terms permitted, precluded, or was silent as to class arbitration. By making that submission, the court held, petitioners had effectively forfeited any right to a judicial determination of a related but distinct legal question: whether an arbitral decision to permit class arbitration *on the basis of a silent contract* exceeded the proper limits of their power under the contract and the FAA. Pet. App. 32a.

SUMMARY OF ARGUMENT

The FAA's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Act does not mandate arbitration according to any particular set of procedures. It leaves it to the parties to decide, by written agreement, the nature and scope of their arbitration and the rules under which it will be conducted. Arbitrators derive their power only from the parties' agreement, and the Court has made clear that the metes and bounds of such agreements must be "rigorously enforce[d]." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Neither statutory nor efficiency concerns may "color the lens through which the arbitration clause is read" to reach a result inconsistent with the parties' agreement. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In this case, the parties stipulated that because their arbitration agreements were silent on the question of class arbitration, there had been no agreement on that issue. They differed on the legal implications of that lack of agreement. The arbitration panel effectively adopted Animalfeeds' position that class arbitration should be imposed as a matter of public policy, even in the absence of any agreement by the parties to allow it. In doing so, the panel did not base its clause construction award on the actual intent of the parties, but rather on what it selected as a background rule of law to govern *in the absence* of party agreement.

Imposing class arbitration where the parties have not agreed to it cannot be reconciled with this Court's mandate that arbitration under the FAA "is a matter of consent, not coercion," *Volt*, 489 U.S. at 479. Unexpected and involuntary class arbitration fundamentally alters the risks and benefits of the original arbitral bargain. It transforms bilateral, inherently limited commercial disputes into sprawling, high-stakes matters that the parties never agreed to resolve without the safeguards afforded by actual litigation (such as full appellate review). It substantially alters many of the expected benefits of arbitration, such as flexibility, expedition, confidentiality, the parties' right to select different arbitrators to resolve particular disputes, and the promise of reliable, mutual repose once a dispute has been resolved. Uncertainty as to enforcement and finality is particularly acute in the context of international arbitration, because many other countries do not allow class proceedings and may refuse to recognize the binding effect of involuntary class awards. And imposing class arbitration in an international maritime case would be particularly at odds with established practice in the rest of the world. The point is not that class arbitration is necessarily unworkable in all circumstances, but that it is so different from traditional, bilateral arbitration that it may not properly be imposed under the guise of enforcing a conventional arbitration agreement that is silent on the issue.

This case presents no occasion for departing from the FAA's central mandate that arbitration agreements be enforced only in accordance with their terms. First, the Court has made clear that efficiency or similar policy considerations provide no basis for going beyond the agreement of the parties. Second, class proceedings (in arbitration or litigation) are not necessary

to vindicate Animalfeeds' rights under the Sherman Act. On the contrary, Animalfeeds specifically told the arbitrators that "if a class is not certified here Claimants nonetheless will proceed individually to seek a damages award and injunctive relief[.]" CAJA A2366-A2367.

Finally, this case presents none of the issues that might arise in the context of consumer contracts of adhesion. All contracts are construed based on their own terms and context, and some consumer contracts may be properly construed, using conventional intent-based tools, to contemplate class arbitration—for example, by construing an ambiguous contract against a more sophisticated or economically dominant drafter. Alternatively, if true contractual silence results in the unavailability of class arbitration, traditional principles such as fraud, duress, or unconscionability could lead a court to void an arbitration provision entirely under Section 2 of the FAA. Here, however, the parties are sophisticated multinational corporations that negotiated international commercial shipping charters using industry forms that are typically designed and selected by charterers or their brokers (not by shipping companies), that can be and are tailored to reflect individual negotiations between the parties, and that have been in use for decades without any history of class arbitration. Particularly, under these circumstances, arbitrators may not impose class arbitration on the basis of a contract that all agree reflects no agreement to permit it.

The FAA forbids forcing parties into a class arbitration to which they never consented. Arbitrators who, as here, permit class arbitration without party consent have exceeded the powers conferred on them by the parties' agreement, and federal courts must vacate their award. *See* 9 U.S.C. § 10(a)(4).

ARGUMENT

I. THE FAA DOES NOT AUTHORIZE THE IMPOSITION OF CLASS ARBITRATION WHERE, AS HERE, THE PARTIES NEVER AGREED TO CLASS PROCEEDINGS

A. The FAA Authorizes Courts To Enforce Arbitration Agreements Only In Accordance With Their Terms

Section 2 of the FAA directs courts to enforce arbitration agreements:

> 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 in law or in equity for the revocation of any contract.

9 U.S.C. § 2. To effectuate the general mandate of Section 2 that written arbitration agreements (including in "any maritime transaction") be treated as "valid, irrevocable, and enforceable," Section 4 authorizes parties to petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement," and authorizes courts to compel arbitration "in accordance with the terms of the agreement." *Id.* § 4. Section 9 authorizes the entry of a court judgment on the arbitrators' award, if the parties have so agreed and if the court has not vacated, modified, or corrected the award on one of the grounds set out in

Sections 10 and 11. *Id.* §§ 9-11. Among other things, Section 10(a)(4) authorizes courts to vacate an award where arbitrators have "exceeded their powers."

As this Court has repeatedly explained, Congress enacted the FAA to "overrule the judiciary's long-standing refusal to enforce agreements to arbitrate" and to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985); *see also Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act's legislative history demonstrates that Congress chose the inviolability of the terms of the parties' agreement as the means of overcoming judicial hostility to arbitration. *See, e.g.*, H.R. Rep. No. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.").[7] Thus, the "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced ac-

[7] *See also id.* at 1-2 (English courts "refused to enforce specific agreements to arbitrate …. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."); S. Rep. No. 68-536, 3 (1924) (recognizing "the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into."); 65 Cong. Rec. 1931 (1924) (statement of Rep. Graham, Chairman of House Judiciary Committee) ("This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate …. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court *in order to give enforcement to that which [the parties] have already agreed to*.") (emphasis added).

cording to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also, e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements").

Because arbitration "is a matter of consent, not coercion," *Volt*, 489 U.S. at 479, the Act leaves it to the parties to establish the nature and scope of their arbitration, through a "written provision" in a contract or a separate "agreement in writing." 9 U.S.C. § 2. They may identify and limit the issues to be arbitrated, and they may "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

Arbitration agreements are to be "rigorously enforce[d]." *Byrd*, 470 U.S. at 221. That includes enforcement of the scope, rules, and limitations intended by the parties. "[N]othing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered by the agreement." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *see id.* at 294. Nor may statutory goals or other policies be invoked to "color the lens through which the arbitration clause is read." *Mitsubishi*, 473 U.S. at 628; *cf. 14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1467 (2009) ("[T]he arbitrator's task is to effectuate the intent of the parties."); *Gilmer*, 500 U.S. at 34 ("The arbitrator's 'task is to effectuate the intent of the parties' and he or

she does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

The terms of an arbitration agreement also delineate the scope of the arbitrator's power. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-649 (1986). The same principle dictates that arbitrators' authority is limited to what the parties have agreed to confer. As the Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

United Steelworkers of Am. v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (citation and internal quotation marks omitted); *see also First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944-945 (1995). Arbitrators who move outside those confines, by seeking to impose arbitration to any extent greater than that consented to by the parties, exceed their authority under the FAA. *See* 9 U.S.C. § 10(a)(4).[8]

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[8] Contrary to the court of appeals' view (Pet. App. 29a), nothing in *Bazzle* suggests a departure from this Court's consistent holdings that, under the FAA, the scope of arbitrators' power is

Accordingly, there is special "significance [to] having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. While arbitrators have wide latitude to decide the issues committed to them, the Court has recognized that the question of what powers the parties have conferred on the arbitrators—for instance, what issues they agreed to submit to arbitration—is normally one for independent resolution by a court. *Id.* at 944-945; *see also* 9 U.S.C. § 4 (court will compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). As the Court has observed, the willingness to enter into agreements to arbitrate particular disputes would be "drastically reduced" if arbitrators were permitted to expand their own mandate whenever a dispute came before them. *AT&T Techs.*, 475 U.S. at 651 (internal quotation marks omitted). A construction of an arbitration agreement that expands the scope of arbitral authority beyond the bounds of the parties' agreement is thus subject to judicial correction under the FAA.

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determined solely by the parties' agreement. The *Bazzle* plurality concluded only that it was for arbitrators to determine, in the first instance, whether the contracts in question there were in fact silent on the issue of class arbitration. 539 U.S. at 447. It did not reach the question originally presented there and now at issue here—whether an agreement that is, in fact, silent on the issue nonetheless somehow authorizes arbitrators to impose class arbitration.

B. The Arbitration Proceedings Here Confirm That The Parties Never Agreed To Class Arbitration

In this case, the parties are all sophisticated businesses and repeat players in a well-established international market for the maritime transportation of commercial cargo.[9] Animalfeeds from time to time entered into bilateral spot contracts with one or another of the petitioners. Each charter party was based on the Vegoilvoy form. That standard contract allows parties to engage in shorthand specification or tailoring of key terms for each transaction, against a background of industry-recognized terms that are set out in detail in the form (*see* JA9a-31a) and informed by longstanding industry custom and usage. These include an arbitration clause that, as described above, provides that any dispute arising under the contract will be settled by arbitration in New York (a long-time center of international maritime commerce), before two individuals "experienced in the shipping business" (and, if they cannot agree, an admiralty lawyer they select), "in conformity with the provisions and procedure of the [FAA]." *See supra* pp. 4-5; JA30a.

After parallel litigation confirmed that its antitrust claims were subject to arbitration, Animalfeeds filed a demand for class arbitration. In light of the ruling in *Bazzle* that arbitrators should consider, in the first in-

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[9] *See, e.g.*, Force, *supra*, at 44 ("The rules applicable to charter party disputes derive from the terms of the charter party itself and generally do not implicate public policy concerns. These are contracts between businesspersons, negotiated at arm's length, often through intermediaries (i.e., brokers who are experts in the field).").

stance, whether an arbitration agreement was "silent" as to class arbitration, the parties entered into their supplemental agreement (Pet. App. 55a-63a), establishing procedures for testing Animalfeeds' claim that the Vegoilvoy arbitration clause permitted class arbitration and, if so, for conducting that arbitration (*id.* at 59a-63a). Under those procedures, the first issue presented for resolution would be "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." JA56a (AAA Suppl. Rule 3); Pet. App. 59a (adopting AAA Suppl. Rules 3-7); *see also* Pet. App. 48a.

In briefing and argument, the parties agreed that the Vegoilvoy arbitration clause was silent on the issue of class arbitration and that there had been no actual agreement to permit it. Pet. App. 49a; *see, e.g.*, JA77a; CAJA A605, A1567. The parties differed, however, as to the contractual and legal implications of that lack of agreement.

Petitioners submitted undisputed maritime custom-and-usage evidence that the Vegoilvoy's arbitration clause was "part of a long tradition of maritime arbitration peculiar to the international shipping industry" and that it had "never been the basis of a class action." Pet. App. 51a. In particular, petitioners submitted unrebutted expert declarations "to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clause[] would permit a class arbitration." *Id.*; *see also* JA119a-139a (reproducing declarations). In effect, petitioners argued both that, in context, the Vegoilvoy clause should be construed to prohibit class arbitration as a matter of properly inferred intent and that, in any event, as a matter of law class arbitration could not proceed without the

affirmative agreement of all parties. *See, e.g.*, CAJA A605-A608; JA89a-92a.

Animalfeeds, on the other hand, submitted no evidence from which the arbitrators could have inferred anything about the parties' actual understandings or intent. It argued only that "when a contract is silent on an issue, there has been no agreement that has been reached on that issue[.]" JA77a. Rather than any theory of actual agreement, Animalfeeds relied on arbitral awards from other panels that had allowed class arbitration based on silent clauses, in the context of consumer contracts of adhesion and other contracts between parties of unequal sophistication and bargaining power. Pet. App. 49a-50a; JA79a-83a. Where the parties' contract is silent, Animalfeeds contended, class proceedings should be permitted as a default rule of law:

> The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle*; (b) the clause should be construed to permit class arbitration as a matter of public policy; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration.

CAJA A308-A309.

The panel rejected Animalfeeds' argument that *Bazzle* required the parties to expressly preclude class arbitration (Pet. App. 49a), and did not address unconscionability. Instead, the panel effectively accepted the argument that a silent arbitration clause should be "construed" to permit class proceedings as a matter of public policy. Citing the other arbitral awards submit-

ted by Animalfeeds, the panel expressed concern that a contrary rule would leave "no basis for a class action absent express agreement among all parties and the putative class members" (*id.* at 51a), and concluded that the countervailing "concern" raised by petitioners—"that the bulk of international shippers would never intend to have their disputes decided in class arbitration"—could "better be dealt with later" through the panel's management of any class proceedings (*id.* at 52a). Specifically, the panel indicated (*id.*) that, if it certified a class, it would consider requiring putative members to "opt in" to the proceedings—in effect, giving the charterers but not the shipping companies a unilateral right to choose their preferred type of arbitration. The panel offered no contractual or other explanation for that potential asymmetrical treatment. On these policy grounds, the panel ruled that class arbitration would be permitted because petitioners had failed to convince the panel that the parties intended to preclude it. *Id.* at 51a.

In reaching that result the arbitrators exceeded the limits of their authority, and the court of appeals erred in reinstating their award. The parties submitted to the arbitrators the question suggested by the plurality in *Bazzle*: Whether their original arbitration agreement revealed an intent to permit or preclude class arbitration, or was simply silent on the question. *See* Pet. App. 59a ¶ 7, 62a ¶ 15. Having concluded that it was silent (and having rejected petitioners' position that a contractual intent to preclude could be inferred from the circumstances of the agreement, including undisputed industry custom and usage), the arbitrators decided to permit class arbitration on pure policy grounds. By imposing class arbitration without the ac-

tual consent of all parties, the arbitrators "exceeded their powers" under the FAA. 9 U.S.C. § 10(a)(4).

The court of appeals should have sustained the vacatur of the arbitrators' award on that basis. Instead, believing incorrectly that appellate precedent on the question had been "abrogated" by *Bazzle* (Pet. App. 29a), the court held that the arbitrators' decision to "construe" the Vegoilvoy arbitration clause as permitting class arbitration was "not in manifest disregard of the law" (*id.* at 31a).[10] It also refused to review the substance of the arbitrators' decision to determine whether they had "exceeded their powers" under Section 10(a)(4), on the erroneous ground that the parties' supplemental agreement committed the question of the arbitrators' authority to order class arbitration to the arbitrators themselves, "irrespective of whether [they] decided the issue correctly." Pet. App. 32a; *see id.* at 31a-32a. But arbitrators who, as here, read a silent arbitration clause to permit them to impose class arbitration based on general principles or policies, rather than on any intent revealed by the parties' agreement, have surely either manifestly disregarded the limits of their commission or otherwise "exceeded their powers." Whatever the rubric, this sort of error directly implicates the limits of the authority the parties conferred on their arbitrators to resolve a dispute. Those limits

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[10] *See, e.g.*, *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953) (recognizing "manifest disregard" standard), *overruled on other grounds by Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *First Options*, 514 U.S. at 942 (citing standard from *Wilko*); *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (citing *First Options* but noting that standard may simply be shorthand for grounds for vacatur specified in 9 U.S.C. § 10(a)(3)-(4)).

must be subject to judicial enforcement under the FAA.

II. IMPOSING CLASS ARBITRATION ON UNCONSENTING PARTIES WOULD FUNDAMENTALLY ALTER, NOT ENFORCE, ARBITRATION AGREEMENTS

The arbitral award in this case purports to construe the Vegoilvoy arbitration clause. Pet. App. 48a, 52a. Instead, the award fundamentally rewrites the parties' agreement. That is why the underlying principle of law that governs here is not a public policy in favor of permitting class arbitration, as the arbitrators concluded (*id.* at 51a-52a), but rather the FAA's fundamental requirement that arbitration agreements be enforced "in accordance with [their] terms" (9 U.S.C. § 4).

When Congress adopted that language, it could not have contemplated that any ordinary arbitration clause would authorize courts to enforce an arbitrator's decision to proceed with class arbitration—let alone *involuntary* class arbitration. Indeed, even federal courts did not entertain modern-form class actions for money damages for more than four decades after enactment of the FAA.[11] The text of the Act does not refer, directly

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[11] *See* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 1:9, at 32 (4th ed. 2002) ("It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity were merged and class suits for damages in the United States first became available ...."); *id.* § 1.10, at 34 ("By far the most controversial and dramatic innovation of [1966] amend[ments to] Rule 23 is that all class actions which the court determines to be maintainable [including money-damages actions] will result in a judgment binding on all class members ...."). Congress enacted the FAA in 1925 (*see supra* n.4), codified it into Title 9 of the U.S. Code in 1947, Pub. L. No. 80-202, 61 Stat. 669 (1947), and amended it in 1951, 1954, 1970, 1988, 1990,

or indirectly, to class arbitration. Section 2—the central provision establishing enforceability—speaks in terms of "[a] written provision" or "an agreement in writing," of "an existing controversy" or "a controversy thereafter arising," and of the dispute arising out of "such contract or transaction, or the refusal to perform the whole or any part thereof" or "such a contract, transaction, or refusal." 9 U.S.C. § 2. Likewise, Section 4—establishing a party's right to seek enforcement of an arbitration agreement and the court's power to compel compliance—speaks of "the controversy between the parties" and "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4. While this repeated use of the singular may not foreclose class proceedings if multiple related "agreement[s] in writing" actually call for it, *see* 1 U.S.C. § 1 (unless context requires otherwise, singular may include plural), it gives no hint of any legislative intention to permit courts to compel class arbitration without all parties' actual agreement.

To be sure, an arbitration agreement will seldom provide expressly for every procedural detail that might become relevant in handling a particular dispute. *See, e.g.*, Transcript of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, No. 02-634, at 25 (Apr. 22, 2003) (*avail-*

1992, and 2002—never providing for class arbitration. *See* Pub. L. No. 82-248, § 14, 65 Stat. 710, 715 (1951); Pub. L. No. 83-779, § 19, 68 Stat. 1226, 1233 (1954); Pub. L. No. 91-368, §§ 1-3, 84 Stat. 692, 693 (1970); Pub. L. No. 100-669, § 1, 102 Stat. 3969 (1988); Pub. L. No. 100-702, § 1019, 102 Stat. 4642, 4670-4671 (1988); Pub. L. No. 101-552, § 5, 104 Stat. 2736, 2745 (1990); Pub. L. No. 101-650, Title III, § 325(a), 104 Stat. 5089, 5120-5121 (1990); Pub. L. No. 102-354, § 5(b)(4), 106 Stat. 944, 946 (1992); Pub. L. No. 107-169, § 1, 116 Stat. 132 (2002).

able at 2003 WL 1989562) ("They don't consent to every jot and tittle of the means by which the arbitration will be conducted."). As a practical matter, in the absence of further agreement between the parties (such as to a specified body of arbitral rules), it will fall to arbitrators to prescribe incidental procedures that are necessary for them to discharge the responsibilities assigned to them by the parties—briefing deadlines and page limitations, for example, or the availability and nature of pre-hearing discovery. *See Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("'[P]rocedural questions which grow out of the dispute and bear on its final disposition' are presumptively … for an arbitrator[] to decide.") (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)).

Imposition of involuntary class arbitration cannot, however, be defended as falling within an arbitrator's implicit power to fill incidental procedural gaps left open by the parties' agreement. Imposing class arbitration fundamentally transforms the nature and scope of the proceeding, turning it into something to which the parties never agreed. Arbitrators are not authorized to order such a transformation, and a court applying the FAA must countermand any arbitral award that would have that effect. *See Volt*, 489 U.S. at 474-475 ("[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*.'") (quoting 9 U.S.C. § 4) (emphasis in *Volt*); *First Options*, 514 U.S. at 947 ("[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements are enforced according to their terms and according to the in-

tentions of the parties.") (citations and internal quotation marks omitted).

A. Requiring Arbitration With A Class, Rather Than An Individual Counterparty, Fundamentally Alters The Risk Involved In The Arbitration Bargain

In agreeing to bilateral arbitration, parties elect to " 'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628). Among other things, their choice necessarily reflects a determination that, if disputes arise out of the particular transaction, the added protections of litigation, such as the right to full appellate review, likely will not justify the time and expense involved. *Id.* A key factor in deciding to forgo the safeguards of litigation is, of course, the expectation that the risk of an erroneous result is limited by the likely nature and value of any bilateral dispute arising from the transaction. Unexpected imposition of *class* arbitration, effectively rewriting many individual agreements into one, retroactively alters the core economics of that bargain. It transforms a process for the resolution of bilateral, naturally circumscribed commercial disputes into sprawling, high-stakes quasi-litigation.

This case provides an apt illustration. Animalfeeds' own claims against petitioners involve transactions worth approximately $500,000. Br. of Petitioners-Appellees at 3 & n.4, *Stolt-Nielsen, SA* v. *Animalfeeds Int'l Corp.*, No. 06-3474 (2d Cir. Oct. 12, 2006). With its class claims, however, Animalfeeds purports to represent a global class whose aggregate transactions with petitioners allegedly amount to more than $6.5 billion—13,000 times more than in petitioners' disputes with

Animalfeeds alone. *See* CAJA A79 ¶ 40. Comparable increases in potential liability are likely in any number of other contexts. A party contemplating a commercial transaction might well opt for the streamlined procedures and limited review of arbitration for disputes expected to involve bilateral proceedings and manageable dollar amounts.[12] Such a choice, however, cannot possibly be viewed as an agreement to forgo the safeguards of regular litigation if the dispute may be transformed into a class proceeding involving hundreds or thousands of parties and millions or billions of dollars in potential liability.

Questions from the Court at oral argument in *Bazzle* specifically recognized the enhanced stakes for a party unexpectedly compelled to engage in class arbitration—unanticipated, potentially unreviewable, and exponentially increased liability exposure. *See Bazzle* Tr. 29 ("You might not want to put your company's entire future in the hands of one arbitrator."), 47 ("Without judicial review, would [Green Tree] have rolled the dice for $27 million on one arbitrator?"). As three Justices later noted in dissent, "it would have been reasonable for petitioner to [choose different arbitrators for some or all of the disputes that it had been compelled to defend on a class basis] in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." 539 U.S. at 459 (Rehnquist, C.J., dissenting).

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[12] *Cf. Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280-281 (1995) ("According to the American Arbitration Association … more than one-third of its claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000[.]").

Similarly, the Seventh Circuit, in holding that class arbitration may not be imposed in the absence of agreement, recognized that ordering participation in class proceedings to which a party had not agreed would "'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with *a different sort of arbitration*.'" *Champ* v. *Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995) (alterations in *Champ*) (emphasis added) (quoting *New England Energy, Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting)). And reported litigation confirms that some potential defendants will reject arbitration altogether rather than agree to arbitrate class claims. *See Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986-987 (9th Cir. 2007) (giving effect to severability provision under which entire arbitration clause became void when express waiver of class arbitration was found unenforceable); *cf. In re Am. Express Merchants' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009), *cert. pending sub nom. American Express* v. *Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009) ("[I]n light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.").[13]

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[13] Even with the protections of judicial proceedings, the massive increase in exposure in one class litigation "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) adv. comm. note (explaining adoption of rule authorizing discretionary interlocutory appeals of class certification orders); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certifi-

In short, a shift from individual to class proceedings fundamentally transforms the risk/benefit calculus of the arbitration bargain. When a contract clause is silent on the question, there is no basis for inferring that the parties contemplated, or would ever have agreed to, class arbitration. That is particularly true where, as here, the agreement to arbitrate is between sophisticated commercial parties using a base contract that has been in use for decades in international maritime commerce and has *never* before been invoked as a basis for class proceedings. In these circumstances, compelling or enforcing class arbitration under a silent contract is inconsistent with "the central purpose of the [FAA] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479).

B. The Procedural Complexity And Uncertainty Of Class Arbitration Fundamentally Alter The Benefits Of The Parties' Arbitration Bargain

An involuntary shift to class arbitration also radically alters the benefits of the parties' original arbitration bargain. Conventional, bilateral arbitration promises "simplicity, informality, and expedition," *Mitsubishi*, 473 U.S. at 628, as opposed to the "delay and expense of litigation," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *see also Circuit City*, 532 U.S. at 123 (quoting S. Rep. No. 68-536, 3 (1924)). Class proceedings, in contrast, are complex, litigious, and slow—as this case amply demonstrates. Conventional

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cation of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

arbitration also offers the opportunity to select particular decision-makers (often with subject-matter expertise), limited involvement by courts, a presumption of confidentiality, and an award that is "mutual, final, and definite" (9 U.S.C. § 10(a)(4)). In these respects, too, class proceedings are fundamentally different.

1. In judicial class actions, courts exercise considerable oversight throughout a case in order to protect both absent class members and class defendants. Rule 23 of the Federal Rules of Civil Procedure, for example, prescribes several procedures unique to class actions, including class certification, *see* Fed. R. Civ. P. 23(b)-(c); potential interlocutory appeal of certification, Rule 23(f); judicial appointment of lead plaintiffs' counsel, Rule 23(g); notice to the absent class members, Rule 23(d); and judicial review of any proposed settlement, Rule 23(e). These class procedures are designed to protect absent class members, to protect defendants against undue pressure to settle, and to ensure that, if the defendant prevails, absent class members will be bound by the judgment. *See, e.g., Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808-812 (1985).

If class arbitration could be imposed on the basis of a silent contract, parties who agreed to bilateral arbitration of individual disputes would instead face these complex procedures—or, rather, ad hoc private analogues, with no clear contractual or constitutional basis—and accompanying procedural disputes, added layers of judicial review, and inevitable resulting delays. In this case, for example, litigation over class arbitrability has already consumed well over four years. *See* JA76a (class demand filed May 19, 2005). If the arbitrators' clause-construction award stands, the case will proceed to the question of class certification—an inquiry at least as complex in arbitration as its judicial

counterpart under Rule 23—followed by a notice phase and an as-yet-undefined opportunity for absent class members to opt in or opt out. *See* JA59a-61a (AAA Suppl. Rules 5-6); *see also* Pet. App. 52a (arbitrators' recognition of opt-in/opt-out issue). Only after all that could the arbitrators begin to address the merits. And despite these added layers of complexity, it is unclear that these private analogues to litigation could even provide finality and repose without substantial judicial intervention. *See, e.g.*, *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (class arbitration requires substantial "external supervision" by courts), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984); *see also Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (discussing due process concerns involved in binding absent parties even through judicial proceedings); *infra* pp. 39-41.

The point is not that class arbitration is necessarily unworkable, if all parties have actually agreed to it. It is that parties whose agreement is silent on the matter cannot plausibly be held to have agreed to transform their bilateral disputes into a fundamentally different type of proceeding, involving other parties and other claims arising from other contracts. Coercing an unwilling party into class proceedings on the basis of such an agreement cannot remotely be characterized as enforcing the agreement in accordance with its terms.

2. Another expected benefit of the parties' arbitration bargain upended by involuntary class arbitration is the ability to choose the decision-maker. Traditionally, "adaptability and access to expertise are hallmarks of

arbitration." *Mitsubishi*, 473 U.S. at 633.[14] Moreover, as the Court has observed, "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land,'" and, accordingly, "many arbitrators are not lawyers." *McDonald* v. *City of W. Branch*, 466 U.S. 284, 290 & n.9 (1984).[15] Arbitrators are routinely selected because of specialized industry experience rather than legal training.[16]

Charterers and shipping companies adopting the Vegoilvoy charter party, for example, specify that arbitrators are to be "merchant[s], broker[s] or individual[s] experienced in the shipping business." Pet. App. 69a. The first two arbitrators need not have any legal

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[14] *See also Howsam*, 537 U.S. at 85 ("[T]he NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it."); *Litton Financial Printing Div.* v. *NLRB*, 501 U.S. 190, 213 (1991) ("[A]rbitrators typically have more expertise than courts in construing collective-bargaining agreements.").

[15] *See* F. Elkouri & E. Elkouri, *How Arbitration Works* 177 (6th ed. 2003) (noting that a study of the arbitration profession covering an eight-year period, 1987-1994, found that approximately 40 percent of arbitrators were not attorneys).

[16] *See* T. Oehmke, *Commercial Arbitration* § 70.2 (3d ed. 2009) ("Arbitration clauses may be as specific as the parties desire in describing arbitrator qualifications, or they may be altogether silent. With industry-specific cases, arbitrators are expected to be familiar with the territory and, in fact, are appointed for that very reason; indeed, parties expected them to rely on their own industry experience.") (footnote omitted); *W.K. Webster & Co.* v. *American President Lines, Ltd.*, 32 F.3d 665, 668 (2d Cir. 1994) ("Parties to an arbitration involving a particular trade frequently bind themselves to choose arbitrators who are familiar with the practices and customs of the calling.") (internal quotation marks omitted).

training; if they cannot agree and must appoint another to resolve the dispute, the third is to be "an Admiralty lawyer." *Id.* The assumptions underlying this provision change substantially, however, if the contracting parties must contemplate even the possibility of class arbitration. Presiding over and managing class proceedings (or deciding whether to entertain them) calls for a different sort of expertise—in complex litigation. *Cf. McDonald*, 466 U.S. at 290 ("An arbitrator may not … have the expertise required to resolve the complex legal questions that arise in § 1983 actions.").

Even more fundamentally, involuntary class arbitration denies defendants their core right to select different arbitrators to resolve disputes with different members of the would-be class. *See, e.g.*, *Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process."). The right to select the arbitrators for each dispute is typically a central feature of an arbitration agreement. The parties may delegate it (to two panel members to select a third, for example, or to a court to appoint an arbitrator where the parties cannot agree), but unless they do so it remains with them. 9 U.S.C. § 5; T. Oehmke, *Commercial Arbitration* § 71:1 (3d ed. 2009). In particular, no single panel of arbitrators is empowered to decide for itself to hold a class arbitration, thus stripping from all unconsenting parties their foundational right to make their own selections with respect to disputes other than the specific one the particular panel was selected to resolve.[17] Permitting such a decision on the

[17] Section 5 of the FAA provides that, "[i]f in the agreement provision be made for a method of naming or appointing an arbi-

basis of a silent arbitration agreement is a complete reworking of the agreement—not FAA enforcement of any arbitral bargain the parties ever made.

3. A related expected benefit of agreeing to traditional arbitration is the prospect of bypassing local judicial systems, thus ensuring the ability to select private adjudicators. *See, e.g.*, JA121a ¶ 9, JA124a ¶ 15, JA130a-131a ¶¶ 6-7. This factor is of particular importance for multinational actors in specialized industries, who may prefer to avoid exposure to local tribunals of varying quality, traditions, and expertise, or seek decision-makers with industry expertise. Pet. App. 69a; JA122a ¶ 10, JA130a ¶ 6.

Class arbitration seriously compromises this benefit, because due process concerns will often require substantial judicial participation. *See, e.g.*, *Keating*, 645 P.2d at 1209, 1215-1216 (authorizing involuntary class arbitration and requiring court supervision or approval of class notice process, representation by class representative and class counsel, and any proposed settle-

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trator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. In this case, involuntary class arbitration would mean that one panel, selected by a limited number of parties to manage preliminary proceedings and construe the parties' original agreement as to the availability of class arbitration (but not necessarily to preside over any individual dispute in the absence of class arbitration, *see* Pet. App. 61a), would assert jurisdiction over disputes with numerous other parties and under numerous other contracts, without observance of the procedures or arbitrator qualifications set forth in the Vegoilvoy arbitration clause. *See Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) ("[P]etitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well.").

ment); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 362 (S.C. 2002) ("Protection of the due process rights of absent class members is an essential component of all class actions, and one which may necessitate particular attention in class-wide arbitrations."); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) ("In addition to the need for a trial court to initially certify the class and to insure that notice is provided for, the trial court will probably have to have final review in order to insure that class representatives adequately provide for absent class members.") (footnotes omitted). After *Bazzle*, commentators have noted that extensive judicial supervision would be necessary to protect the parties' rights in any putative class arbitration. *See, e.g.*, Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law 55, 70-71 (Nov. 2007) (lack of meaningful judicial involvement in class arbitrations jeopardizes due process rights).

This demand for judicial oversight underscores that class arbitration is improper absent actual consent from all parties. Without such consent, extensive judicial supervision of an arbitration, with courts assuming sole responsibility for certain aspects, is entirely inconsistent with the text and purpose of the FAA. *See* 9 U.S.C. §§ 2 (enforceability of agreements to arbitrate), 4 (compelling arbitration "in the manner provided for in such agreement"), 10 (limited grounds for vacatur); H.R. Rep. No. 96, 68th Cong., 1st. Sess. 2 (1924) (FAA intended to allow arbitration "without interference by the court"). In fact, just last year this Court observed that the FAA's review provisions confirm "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway," ensuring that arbitra-

tion does not become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Hall Street Assoc., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1405-1406 (2008).

Under the FAA, parties agreeing to arbitration are entitled to expect that they, not a court, will control the procedures for resolving their dispute. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."); *Volt*, 489 U.S. at 479 (parties may "specify by contract the rules under which [their] arbitration will be conducted"). While parties may choose to specify complex, cumbersome, and in some cases hybrid procedures, more often it is "a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes." *Mitsubishi*, 473 U.S. at 633. The need for active judicial oversight confirms that an agreement to class arbitration is completely different from, and may not be inferred on the basis of, a traditional agreement to arbitrate that is silent as to the possibility of class proceedings.

4. Class arbitration also differs from traditional arbitration proceedings with respect to confidentiality. As a practical matter, it is difficult for class proceedings to be meaningfully confidential. Indeed, Rule 9 of the AAA Supplementary Rules (JA62a-63a) provides:

> The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide oth-

> erwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

This departure from the presumption of privacy and confidentiality is unproblematic where parties have agreed to it. It is a dramatic change, however, for parties who agreed to bilateral arbitration agreements on the assumption that their individual disputes would remain private. That concern is particularly acute where, as here, the putative class includes direct business competitors that may be unwilling to disclose sensitive commercial information to one another.

5. One of the most basic expected benefits of conventional arbitration is that it will lead to a "mutual, final, and definite award." 9 U.S.C. § 10(a)(4). With class arbitration, however, defendants may be left with more questions than answers as to mutuality or finality. Indeed, at least absent substantial judicial involvement, defendants face all the disadvantages of class litigation without the compensating advantage of generally assured repose.

From a defendant's perspective, the principal advantage of a class action is finality—obtaining a judgment that will bind the entire class. *E.g.*, *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) ("Respondents … were part of the plaintiff class and … they never opted out; they are bound, then, by the judgment."); *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-403 (1980) (avoiding inconsistent judgments is a princi-

pal protection that class actions afford defendants). Such finality cannot be achieved without ensuring adequate due process protections for absent plaintiffs. *E.g.*, *Shutts*, 472 U.S. at 811 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law it must provide minimal procedural due process protection.") (footnote omitted). The FAA, however, does not provide procedures adapted for that purpose, or purport to authorize arbitrators to bind absent class members under any procedure.[18] In short, whether and under what conditions a defense award from an FAA arbitration may be enforced against absent class claimants is a critical but wholly unsettled question.

The uncertainty is especially problematic in the context of international arbitration because many other countries do not allow class proceedings, even in their own courts.[19] In light of this international resistance to class actions, the ability of a prevailing party to enforce a class arbitration award outside the United States under the New York Convention remains very much in

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[18] The FAA's only provision addressing third parties is its authorization of judicially enforceable subpoenas summoning witnesses to appear at arbitral hearings. 9 U.S.C. § 7; *cf. Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

[19] *See, e.g.*, G. Born, *International Commercial Arbitration*, 1232 (2009) ("In many jurisdictions, class action claims cannot presently be pursued in national courts[.]"); Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 22 (2008) ("[C]ivil law nations interpret a class action—even with an opt-out provision—as an infringement on a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action.").

doubt. *See* United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.[20] The Convention allows jurisdictions to decline to enforce a foreign arbitration award on various grounds, including where the award "contains decisions on matters beyond the scope of the submission to arbitration," *id.* at art. V(1)(c), and where "the arbitral procedure was not in accordance with the agreement of the parties," *id.* at art. V(1)(d). It also allows signatories to refuse enforcement of an arbitral award if enforcement "would be contrary to the public policy of [the enforcing] country." *Id.* at art. V(2)(b).[21] Foreign jurisdictions may reach different conclusions on each of these issues when presented in the context of an involuntary class arbitration imposed by U.S. arbitrators on the basis of a silent arbitration clause.[22]

While parties may elect to venture into such legally uncharted waters voluntarily, forcing them there on the basis of a silent arbitration clause cannot possibly be justified as enforcement of a traditional arbitration agreement in accordance with its terms.

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[20] *See also Scherk*, 417 U.S. at 520 & n.15 (describing purpose and effect of New York Convention).

[21] Under Article V(2)(b), "public policy" standards are set according to the standards of the enforcing nation. *See* J. Lew et al., *Comparative International Commercial Arbitration* ¶ 26-112 (2003) ("There are as many shades of international public policy as there are national attitudes towards arbitration.").

[22] *See* Lew, *supra*, at ¶ 16-94 ("There is a real issue whether an arbitration award rendered in multiparty proceedings can be enforced."); *id.* ¶ 16-97 (similar).

6. Finally, imposing involuntary class arbitration on the basis of a silent arbitration agreement would be particularly inappropriate in the context of an international maritime dispute.

The shipping industry's tradition of resolving disputes through bilateral arbitration, on terms acceptable to both charterers and shipping companies, evolved as a matter of commercial necessity. JA121a-122a ¶¶ 8-11; JA130a-131a ¶¶ 5-8. The disputes involved are overwhelmingly international, involving parties from many different countries, shipments between many different ports, and voyages that may proceed through many jurisdictions. JA121a ¶ 9, JA130a ¶ 6; *see, e.g.*, T. Schoenbaum, *Admiralty and Maritime Law* § 11-2, at 4 (4th ed. 2004) ("The market for ships [for charter] is international, and charterers and shipowners customarily deal through professional ship and charter brokers who send and receive telex and other communications all over the world."). These factors, combined with a frequent commercial need for speed, certainty, and confidentiality make it impractical or undesirable to rely on ordinary litigation in national tribunals. JA122a ¶ 11, JA121a ¶ 9 (noting potential for parallel proceedings and jockeying for home-court advantage).

Under these circumstances, a reliable, familiar, mutually acceptable mechanism for private dispute resolution, before appropriate tribunals selected by the parties, with dependable enforcement, is essential to the trade. Unsurprisingly, therefore, "almost every charter party in all the ocean transportation trades provides for arbitration." Association of Ship Brokers & Agents (U.S.A.), Inc. Pet. Stage Amicus Br. at 7. And most of those agreements—including the Vegoilvoy and Asbatankvoy forms (*see* JA30a, JA33a, JA50a-51a)—provide for the arbitration to take place in one of

a handful of traditional maritime centers such as London or New York.

The rule adopted by the arbitrators here—that a silent contract permits arbitrators to impose class arbitration—is wholly at odds with established maritime practice. *See, e.g.*, Society of Maritime Arbitrators, Inc. Pet. Stage Amicus Br. at 4 (noting "total absence of a tradition for class arbitration in maritime disputes"). Indeed, the arbitrators acknowledged petitioners' uncontested proof that "sophisticated, multinational [maritime] commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses [in standard charter parties] would permit a class arbitration." Pet. App. 51a; *see* Schoenbaum, *supra*, § 11-2, at 4 ("The negotiation and conclusion of a charter party must be understood in the light of long-standing customs and business practices of the shipping industry.").[23] Against this background, there is no way to reconcile the imposition of involuntary class arbitration on the basis of a silent arbitration clause in a maritime charter party with the controlling FAA principle that "[a]rbitration under the Act is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57.

Because class arbitration of maritime disputes is wholly at odds with established maritime practice, allowing it to be imposed here, on the basis of a silent

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[23] As one expert put it in his unrebutted declaration, "I have no doubt that if disinterested owners and charterers who are parties to arbitration agreements identical to those in this matter were asked the question 'Does your arbitration agreement allow third parties to sue or be sued in arbitration as part of a class?' they would reply with a testy 'Of course not!'" JA137a ¶ 20.

maritime arbitration clause, would be inconsistent with the importance this Court has placed on principles of comity in the maritime context and on supporting uniform international application of maritime law. *See, e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741 (1961) ("[I]t seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made."); *Vimar Seguros y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (declining to interpret U.S. law on ocean bills of lading to bar foreign arbitration, which would be "contrary to every other nation to have addressed this issue").[24] The result would be that the nature of a maritime arbitration would vary fundamentally depending on whether the procedure was conducted in the United States or elsewhere in the world.

Moreover, given the maritime context here, one important consequence of the decision in this case could be a shift away from U.S.-based arbitration. If this Court sustains the decision here, then, for the first time (*see* Pet. App. 51a), New York arbitration under a conventional maritime charter party will raise the prospect of class arbitration. That result, startling to the international business community involved, may well cause

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[24] *See also Garret* v. *Moore-McCormack Co.*, 317 U.S. 239, 243 (1942) ("There is no dearth of example[s] of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice."); *cf.* Born, *supra*, at 73-74 ("Another essential feature of the neutrality of international arbitration is the use of internationally neutral procedures and rules …. [I]nternational arbitration seeks to avoid the application of domestic litigation rules and instead to apply internationally-neutral procedures tailored to the parties' expectations and dispute.").

parties that would otherwise have selected New York as the site for resolution of their disputes to opt instead for arbitration in London, Singapore, or some other maritime center. *See* JA124a-125a ¶ 16 ("Foreign shipowners and charterers would veto New York arbitration clauses outright if they believed such clauses could embroil them in class actions."); JA137a ¶ 20 ("[I]f reasonable charterers and owners were told that arbitration in New York meant exposure to class actions, they would almost always prefer another arbitral situs.").

III. THIS CASE OFFERS NO BASIS FOR DEPARTING FROM THE FAA'S MANDATE THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS

Because class arbitration is so fundamentally different from traditional bilateral arbitration, it is not surprising that the arbitrators here offered no justification for their decision based on real contractual intent. *See* Pet. App. 50a-52a. Rather, while the arbitrators' reasoning is sparse, it turned on the policy conclusion that class proceedings are a manageable and sometimes desirable method of arbitration that should be available, even though on a true contractual model "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members." *Id.* at 51a.[25]

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[25] As noted above, the arbitrators relied on decisions from other panels, addressing completely different disputes, that allowed class arbitration when the relevant agreement was silent. Pet. App. 49a-50a. Those rulings arose from contexts in which there were disparities in sophistication and bargaining power, such as disputes between consumers and businesses, franchisees and franchisors, or employees and employers. CAJA A1579-A1956. As discussed below, they are inapposite here. This case involves

Likewise, the court of appeals did not reinstate the arbitrators' decision to permit imposition of class proceedings because it thought the arbitrators had properly divined the parties' intent. Instead, it relied on an erroneous conclusion that the various opinions in *Bazzle* had "abrogated" previous decisions holding that the FAA does not authorize imposition of class proceedings absent clear contractual consent. *Id.* at 29a-30a (citing *Boeing*, 998 F.2d at 74; *Glencore*, 189 F.3d at 267; and *Champ*, 55 F.3d at 275). That was an error of law. There is no permissible basis for departing from the rule of those earlier cases that any imposition of class arbitration must be firmly grounded on the actual consent of all parties. No other result can be reconciled with the "consent, not coercion" principle of the FAA. *Mastrobuono*, 514 U.S. at 57.

1. This Court has made clear that efficiency concerns provide no basis for going beyond the parties' actual agreement. Instead, the FAA requires that arbitration agreements be "rigorously enforce[d]" as written, even when doing so may result in duplication or delay. *Byrd*, 470 U.S. at 221. As the Court explained:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not

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(i) sophisticated multi-national commercial parties and (ii) a standard industry base contract, not drafted by petitioners, that has been in use for decades and that parties can and do expressly tailor when necessary to reflect their actual agreement.

> mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.

Id. at 219. Particularly relevant here, far from permitting arbitrators or courts to consolidate claims in accordance with their own conclusions about efficient process, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

In *Byrd*, for example, the Court considered whether arbitration contracts had to be enforced as written even where doing so would result in bifurcated proceedings—there, arbitration of state-law claims and parallel litigation of federal claims. 470 U.S. at 215-216. It held that strict enforcement was required to "protect[] the contractual rights of the parties and their rights under the Arbitration Act." *Id.* at 221. Similarly, in *Moses H. Cone* the Court affirmed an order requiring arbitration of a discrete set of claims covered by an arbitration agreement, even though it would require bifurcated proceedings—there, arbitration of a liability claim against one party, and state-court litigation of an indemnity claim against another. "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." 460 U.S. at 20.

The same reasoning applies here. There is no contention that the parties ever actually agreed to class arbitration. Because the arbitrators imposed it anyway, allowing public policy to "color the lens through which the arbitration clause [was] read," *Mitsubishi*,

473 U.S. at 628, their award must be vacated. Such an award exceeds the authority conferred on the arbitrators by the parties' contracts, in manifest disregard of the applicable law. 9 U.S.C. § 10(a)(4); *see First Options*, 514 U.S. at 942. Enforcing it would likewise outstrip the authority conferred on courts by the FAA. 9 U.S.C. §§ 2, 4.

2. Similarly, there is no force to any argument that authority to impose class procedures must be inferred, in the absence of actual agreement, "to vindicate important statutory rights under the Sherman Antitrust Act." Pet. App. 32a & n.17 (court of appeals not reaching argument). On the contrary, this Court has previously rejected the argument that such considerations should be allowed to "distort the process" of applying arbitration agreements in accordance with their terms. *Mitsubishi*, 473 U.S. at 627.

In *Mitsubishi*, the Court held that where the terms of an arbitration agreement encompassed a party's Sherman Act claims and there was no general contractual ground for refusing enforcement of the agreement, the statutory claims were subject to arbitration. *Id.* at 627-628, 640; *see also* 9 U.S.C. § 2 (permitting court to refuse enforcement of arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract"). Similarly, in *Gilmer*, 500 U.S. at 32-33, the Court rejected a general argument that claims under the Age Discrimination in Employment Act could not be arbitrated because of the absence of class arbitration. The Court noted that any argument that the arbitration clause in a particular contract was unenforceable for fraud, duress, or the like were "best left for resolution in specific cases." *Id.* at 33; *cf. In re American Express Merchants Litig.*, 554 F.3d at 320 (express waiver of class arbitration unenforceable as to

antitrust claims where cost of individual proceedings would provide *de facto* immunity to defendant).

Here, the Second Circuit has already expressly rejected—in the related litigation in which it enforced the parties' arbitration agreements—an argument that the arbitration clause in the Asbatankvoy charter party was voidable on general contract grounds as an "unconscionable or oppressive term of adhesion." *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 168, 170 n.5 (2d Cir. 2004). For these purposes, there is no basis for distinguishing the Asbatankvoy clause, or the circumstances in which parties agreed to it, from the Vegoilvoy clause at issue in this case.

3. Finally, this case presents none of the issues that might arise in the context of consumer contracts of adhesion, where the question whether class proceedings should be permitted under a facially silent contract might be presented in a somewhat different light.

First, even where a contract is facially silent, some cases involving consumer contracts may be resolved by applying principles of contract construction that look to the parties' actual or properly inferable intent. Some contracts, for example, might have been entered into in a legal context—*e.g.*, expressly invoking the law of a particular State—from which an intent to permit or exclude class arbitration might be inferred. Some might be ambiguous, and properly construed against a more sophisticated or economically dominant drafter. *See, e.g.*, *Mastrobuono*, 514 U.S. at 62 ("[R]espondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted

it.").[26] In such cases, it may be appropriate for arbitrators or a court to infer and enforce the parties' contractual intent. Here, however, the clause at issue has been both stipulated and found to be completely silent, and there was no other basis on which the arbitrators could or did infer actual agreement to permit class arbitration. (Indeed, the record evidence was entirely to the contrary. *See, e.g.*, *supra* p. 21; Pet. App. 51a.) Neither Animalfeeds nor the arbitrators has ever suggested any construction of the Vegoilvoy charter party that would permit class arbitration as a matter of actual intent, either express or implied.

Second, as this Court has explained, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements[.]" *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); *see* 9 U.S.C. § 2; *Mitsubishi*, 473 U.S. at 627; *Gilmer*, 500 U.S. at 33. Courts have invalidated arbitration provisions—or, where class arbitration has generally been permitted, waivers of the right to arbitrate on a class basis—in consumer contexts where they have been deemed unconscionable or contrary to public policy. *E.g.*, *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (class-action waivers in consumer contracts of adhesion unconscionable under California law where claims involve small dollar amounts and waiver would effectively immunize

[26] Maritime charter parties, in contrast, are typically concluded on forms proposed (and originally drafted) by charterers or their shipbrokers, not by shipping companies, and in any event are only common starting points for sophisticated merchants fully capable of negotiating changes or replacements if they choose to do so. *See supra* pp. 3-5 & nn.2, 5; Pet. App. 5a & n.3, 67a-69a; JA144a ¶ 6, JA156a ¶ 16; Force, *supra*, at 44.

party with superior bargaining power from liability). As this Court instructed in *Mitsubishi*, however, the right order of analysis is to determine the scope of the parties' arbitration agreement first, and then to determine whether there is any legal impediment to enforcement. 473 U.S. at 628.

Where, as here, the agreement is truly silent, the only proper conclusion is that it does not authorize class arbitration. And even if the issue were open here (which it is not), in this case there is clearly no basis for refusing to enforce that agreement on general contractual grounds. The parties here are sophisticated multinational corporations, with amounts at issue large enough to merit individual enforcement through traditional bilateral arbitration. As Animalfeeds told the arbitration panel: "Unlike cases in which the denial of class certification may sound the 'death knell' of the action, if a class is not certified here Claimants nonetheless will proceed individually to seek a damages award and injunctive relief against [petitioners]." CAJA A2366-A2367. Indeed, similarly situated charterers have already arbitrated or otherwise resolved their claims against petitioners on a bilateral basis. *See, e.g.*, JA99a. Whether a court might properly decide not to enforce a silent arbitration clause in a different type of contract, involving different types of parties, because it did not provide for class arbitration is a question for another day.

* * *

In this case, no party, arbitrator, or court has ever claimed or held that petitioners actually agreed to participate in class arbitration. The arbitrators held that a class arbitration was nonetheless permissible, purportedly on the basis of a contract that is concededly silent

on that issue. Their only rationale appears to have been that other arbitrators had conducted class arbitrations; that it might be desirable to do so in this case; and that if they followed an actual contract theory, "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members[.]" Pet. App. 51a; *see id.* at 49a-52a. That reasoning cannot be reconciled with the FAA. Arbitrators who seek to impose class arbitration *without* "agreement among all parties" (Pet. App. 51a) disregard the law and exceed the authority committed to them by the parties, which comes only from the terms of such an agreement. Applying the FAA, courts must vacate any such award. *See* 9 U.S.C. § 10(a)(4).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2009

APPENDIX

STATUTORY APPENDIX

Federal Arbitration Act
Title 9, U.S. Code

CHAPTER 1—GENERAL PROVISIONS

§ 1—"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2—Validity, irrevocability, and enforcement of agreements to arbitrate

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.

§ 3—Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4—Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

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. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall

be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5—Appointment of arbitrators or umpire

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 agree-

ment 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.

§ 6—Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7—Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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.

§ 8—Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9—Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application

shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10—Same; vacation; grounds; rehearing

(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

(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.

§ 11—Same; modification or correction; grounds; order

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.

§ 12—Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the

adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13—Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14—Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15—Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16—Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201—Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202—Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203—Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an

action or proceeding, regardless of the amount in controversy.

§ 204—Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205 —Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206—Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such

court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207—Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208—Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

§ 301—Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 302—Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

§ 303—Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether

that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

§ 304—Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

§ 305—Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306—Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

§ 307—Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.