

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 US, 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 OF DUB HERRING FORD
LINCOLN-MERCURY, INC. AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE *AMICUS CURIAE*¹

Dub Herring Ford Lincoln Mercury, Inc. is part of a group of one hundred and six (106) automobile dealers from across the United States now participating in class arbitrations referenced in briefs currently before this Court and is part of one potential class of two thousand four hundred (2,400) auto dealers and another potential class of four hundred and fifty (450) dealers. American automobile dealers have knowledge of or experience with arbitration, which is why they pursued and obtained passage of special 2002 legislation by Congress extricating them from FAA arbitration with auto manufacturers, unless the arbitration is agreed after any disputes arise. See Motor Vehicle Suits Against Manufacturers Act, 15 U.S.C. Section 1226 (a)(2) (2002). They are broadly representative of American small businesses routinely required to participate in arbitrations and have experience with both class arbitration and the exorbitant expenses of individual American Arbitration Association (“AAA”) arbitrations. Unlike the \$ 50,000.00 median cost of a domestic arbitration documented by the recently released 6th Annual Litigation Trends Survey Report from Fulbright & Jaworski, their experience has been that the cost of an

¹ Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondent have submitted letters reflecting blanket consent to the filing of *amicus* briefs and such letters have been filed with the Clerk.

individual arbitration often exceeds \$100,600.00 in arbitrators' fees and AAA administrative fees. See Fulbright and Jaworski, L.L.P, *Fulbright's 6th Annual Litigation Trends Survey* (2009), <http://www.fulbright.com/litigationtrends06>; see also *Dealer Computer Servs., Inc. v. Hammonasset Ford Lincoln-Mercury, Inc.*, Civil Action H-08-1865, 2008 U.S. Dist. LEXIS 103683 (S.D. Tex. Dec. 22, 2008); *Kemp Ford, Inc. v. Dealer Computer Servs., Inc.*, Civil Action No. 4:09-cv-01315 (S.D. Tex., May 25, 2009). The concrete threat of being forced to pay the AAA \$120,000,000 to arbitrate the same issue 2,400 times before 7,200 arbitrators and another \$45,300,000 to arbitrate a different set of common issues 450 times before another 1,350 arbitrators, demonstrates the astronomically excessive cost and inefficiency of individual AAA arbitrations. Worse, the burden of those expenses is in addition to the risks posed by 8,550 arbitrators issuing 2,850 potentially inconsistent awards. These superfluous risks have sensitized auto dealers to the critical importance of being heard on arbitration issues in this Court as well as in Congress. Preserving access to class arbitration is essential for all small businesses to be able to effectively vindicate their rights.

INTRODUCTION AND SUMMARY

Parties agree to use arbitration because it can have great utility in resolving disputes and is especially effective in facilitating international commerce. The arbitration clauses used in international and maritime transactions are negotiated between the most sophisticated and economically equal parties in the commercial world. The parties to these agreements most nearly approximate the theoretical contract ideal

of the coldly calculating corporate party knowledgeable of its interests, able to effectively analyze the risk - benefit ratio of including or excluding any particular clause in contracts it may choose to agree to and capable of maximizing value by aggressively asserting those interests. No parties to any other type of arbitration agreement have a more comprehensive capability of asserting their interests in a contract. If they choose not to do so, they should not be rescued by the courts for not exercising due diligence in the drafting of their arbitration clauses. They certainly should not be saved in any manner that adversely affects arbitration in general such as by limiting the authority of arbitrators to employ class arbitration procedures. The classic policy rationale for “filling the gap” with efficient contract provisions the parties could have expressly adopted, such as recognizing the availability of class arbitration procedures, is “reasonable in the circumstances” and consistent with the policies articulated in RESTATEMENT (SECOND) OF CONTRACTS §204 (1981). Any purported adverse effects on international commerce are unfounded as the parties to those contracts can craft their clauses as they choose and presumably the potential victims of any antitrust conspiracies will also seek to obtain the benefits of class arbitration. The adoption of class arbitration procedures by arbitrators delegated to determine the parties’ disputes is within their authority and complies with the economic efficiencies and benefits parties expect when agreeing to arbitrate any disputes.

The powers and options available to parties to international and maritime contracts stand in stark contrast to the position of domestic parties typically subject to arbitration provisions which have been

imposed on the economically weaker parties, such as small businesses. Whether arbitration is used in domestic or international contracts, it is typically agreed with the expectation of achieving greater cost effectiveness and efficiency than court litigation. The courts must enforce the liberal federal policy favoring arbitration even though they do not actually require arbitration to be efficient. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). However inaccurate, the traditional assertion remains that parties agree to arbitrate because it is cheaper, faster and more efficient than litigating in federal court. Yet, if those goals have any hope of approaching actuality or meeting the jurisprudential aspiration of arbitration hypothesized as an adequate forum for the effective vindication of parties' rights, this court must hold the FAA does not prohibit class arbitration and that due deference must be accorded the award of arbitrators making a purely procedural decision. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).

The decision of the arbitrators to proceed in a class arbitration process is well within their authority to determine the procedures to be used in arbitration where the parties do not elect any particular set of arbitration rules. It is consistent with the unquestioned authority of arbitrators, especially international arbitrators, to devise the procedures for and to interpret any rules under which they conduct arbitration. It is also compliant with the longstanding federal policy interpreting any ambiguity concerning the subjects of arbitration in favor of the broad application of arbitration. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983). The decision of the

arbitrators before this court is a classic decision of procedural arbitrability expressly reserved to the arbitrators. See *Howsam*, 537 U.S. at 84-85. The award of the arbitrators constitutes neither manifest disregard of the law, nor any other violation of FAA Section 10 capable of review. Indeed, the decision of the arbitrators is not a final decision of anything creating jurisdiction in this court because it is not a final award of any issue concerning the merits of the parties' dispute and the present appeal is based on the parties' contractual creation of federal jurisdiction for review inconsistent with the decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The decision demonstrates that the arbitrators properly perceived the dispute before them as effectively a common disagreement between two sets of parties arguing over whether the same facts and law constitute a violation of the antitrust laws. Those common issues are unquestionably subject to arbitration. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Access to class arbitration in "silent" arbitration clauses is essential for all small businesses to cost effectively vindicate their rights. Large businesses today routinely avoid arbitrating with other businesses of similar size and reserve arbitration provisions for use against consumers, employees and small business. See Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, *Mandatory Arbitration for Customers But Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118 (2008); see also Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer*

Contracts, 41 U. MICH. J.L. REFORM 871 (2008). Those two studies confirm that small businesses are as regularly victimized by the excessive expenses, inefficiencies and disadvantages of arbitration as consumers, employees and franchisees. That fact is being brought to the attention of Congress, though it remains unacknowledged by the large business associations purporting to speak for “business.” Arbitration’s notorious ability to accomplish “do it yourself law reform” for those seeking to immunize themselves from inconvenient laws and unprofitable contract obligations is well known and has drawn the hostile attention of Congress. See *Eisenberg, Miller and Sherwin*, 92 JUDICATURE 118. However, that nefarious ability rests on a foundation of individual arbitrations. The expensive administered arbitrations now imposed on small business in many contracts consistently deprive them of any real individual ability to efficiently and effectively protect their rights. Class arbitration restores balance to international and domestic commerce and advances the policies of the antitrust laws.

Nothing in the FAA states that when arbitration clauses are silent on the issue of class arbitration it should be prohibited. Class arbitration is one of the few mechanisms available to small businesses that attempts to make arbitration fair, functional and affordable by offsetting the routine manipulations of many modern arbitration clauses. Small businesses are frequently deterred from pursuing legitimate grievances or asserting counterclaims in arbitration by the excessive expenses of AAA arbitrations, which today often exceed a small business’s annual profits. Confidentiality rules and orders frequently operate to conceal unfavorable awards, which together with the

refusal of arbitrators to accept estoppel, makes arbitrations expensive and inefficient. That harms small businesses in single arbitrations, but unduly benefits those “repeat players” able to afford to repeatedly arbitrate the same contracts and issues and obtain advantage from any inconsistent awards. When the unfair knowledge of unfavorable potential arbitrators by “repeat player” large businesses is factored into the analysis, small businesses are seriously disadvantaged in individual arbitrations. Preserving access to class arbitration, especially when the arbitration clause is silent on the issue of class arbitration, will help to restore some claim by arbitration to offer a fundamentally fair forum and is critical to small business’s ability to afford to protect its rights and remain in business. The authority of arbitrators to decide that the procedures to be followed in arbitration, where the clause is silent on the issue of class arbitration, should be affirmed and accorded the deference due any decision of procedural arbitrability. See *Howsam*, 537 U.S. at 85.

ARGUMENT

I. SILENCE IN ARBITRATION AGREEMENTS IS UNREMARKABLE AND THE FAA RECOGNIZES THE AUTHORITY OF ARBITRATORS TO DETERMINE THE PROCEDURES TO BE USED IN INTERNATIONAL AND DOMESTIC ARBITRATIONS.

The failure of contracting parties to provide for every potentiality is a pedestrian problem of contract law. Only a naive view of contracts would contend that all contractual relations are controlled by the parties’

express intentions and those alone. Contracting parties often fail to foresee contingencies that may or may not arise during performance. Perhaps more frequently, parties evade express negotiations or agreement on issues that are completely foreseeable because it would be costly to expressly provide for them. The arbitration clauses at issue here were negotiated between some of the most sophisticated and economically equal parties in the commercial world. They are the theoretical ideal of the coldly calculating corporate party. It is undisputed that they are extremely knowledgeable of their interests and well able to effectively analyze the risk - benefit ratio of including or excluding any particular clause in their contracts. No parties to any other type of arbitration agreement have a more comprehensive capability of asserting their interests in a contract.

These parties knew that their contract was “incomplete,” as is almost every contract. Therefore, they also recognized that “it falls to public institutions - courts and legislatures - to create background or ‘default rules’ to govern private relationships when such unaddressed contingencies arise and private ordering has thus failed.” See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 609 (1998). They declined to make express a provision for their now asserted interests and entrusted their fate to the arbitrators to act rationally and efficiently.

The commentary of the contract ‘default rules’ arena has long been dominated by a law and economics approach primarily focused on the view that ‘default rules’ are particularly appropriate for efficiency analysis. The basis of an economic analysis of ‘default

rules' is centered on transaction costs. With perfect information, perfect foresight and in the absence of transaction costs, parties would contract in complete detail and would achieve maximum contract efficiency. That is not reality and parties often fail to create efficient contract terms and remain silent regarding potential contingencies because the transaction costs, or their cost benefit calculations, counsel silence. In that event, the law via courts and arbitrators must supply efficient terms which minimize the transaction costs to the parties by providing "off the rack" provisions that are efficient and avoid the cost of creating them. *See id.* at 613 - 615. If contracts are a scheme of rational cooperation for mutual advantage, then omissions should be completed by reasonable terms. "Where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy ..." See RESTATEMENT (SECOND) OF CONTRACTS, §204. Courts and arbitrators have recognized that the completion of incomplete contracts is inevitable and have addressed that task with a view to justice, fairness and efficiency. Fairness and justice aside, even a cursory review of the inefficiencies and astronomical costs that would be imposed by precluding class arbitration compel the conclusion that the FAA does not prevent the use of class arbitration when parties' arbitration agreements are silent.

The newly released 6th Annual Litigation Trends Survey Report from Fulbright & Jaworski, L.L.P., reveals that \$ 50,000.00 is now the median cost of a domestic arbitration. See Fulbright and Jaworski, L.L.P, *Fulbright's 6th Annual Litigation Trends Survey* (2009), available at <http://www.fulbright.com/litigation>

trends06. That study was not available to former Chief Justice Rhenquist when he suggested in his dissent in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003), that in the face of a silent arbitration clause, 3,734 separate arbitrations were appropriate. Had the Chief Justice known that it would cost an estimated \$186,700,000.00 to conduct those arbitrations, he may have reconsidered his view. All too often the cost of an individual arbitration exceeds \$100,600.00 in arbitrators' fees and AAA administrative fees and incurs a total cost of prosecution of about \$ 247,000.00. See *Dealer Computer Servs., Inc. v. Hammonasset Ford Lincoln-Mercury, Inc.*, Civil Action H-08-1865, 2008 U.S. Dist. LEXIS 103683 (S.D. Tex. Dec. 22, 2008); *Kemp Ford, Inc. v. Dealer Computer Servs., Inc.*, Civil Action No. 4:09-cv-01315 (S.D. Tex., May 25, 2009). If class arbitration becomes unavailable because it is not expressly allowed by an arbitration clause, those small businesses would be facing the prospect of having to pay the AAA \$120,000,000 to arbitrate the same issue 2,400 times before 7,200 arbitrators and another \$45,300,000 to arbitrate a different set of common issues 450 times before another 1,350 arbitrators. No clearer demonstration of the irrational and astronomically excessive cost and inefficiency of individual AAA arbitrations in place of a single class arbitration is possible. Furthermore, prohibiting class arbitration poses additional risks from the inevitability that those 8,550 arbitrators will issue 2,850 potentially inconsistent awards. President Barak Obama, in his weekly radio address on October 24, 2009, observed that "Small businesses have always been the engine of our economy -- creating 65 percent of all new jobs over the past decade and a half -- and they must be at the forefront of our recovery." Barak Obama, U.S. President, Weekly Address: Working

with Small Business to Drive Recovery (October 24, 2009), *available at* <http://www.whitehouse.gov/photos-and-video/video/weekly-address-working-with-small-business-drive-recovery-0>. If small business is compelled to spend hundreds of millions of dollars on duplicative and superfluous arbitrations, they will not be able to survive, much less thrive and revive the American economy. Preserving access to class arbitration is essential for all small businesses to be able to effectively and efficiently vindicate their rights.

Access to class arbitration in “silent” arbitration clauses is essential for all small businesses to cost effectively vindicate their rights. Contemporary research discloses that large businesses routinely avoid arbitrating with other businesses of similar size. They now reserve arbitration for use against consumers, employees and small business. *See Eisenberg, Miller and Sherwin*, 92 JUDICATURE 118 (2008). Small businesses are as regularly victimized by the excessive expenses, inefficiencies and disadvantages of individual administered arbitration as consumers, employees and franchisees. They are making that fact known to Congress and providing information in support of the Class Action Fairness Act of 2005. *See* Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d), 1453, and 1711-1715. The unfortunate use of arbitration as a “do it yourself law reform” for those seeking to immunize themselves from inconvenient laws and unprofitable contract obligations has also drawn the hostile attention of Congress. *See Eisenberg, Miller and Sherwin*, 92 JUDICATURE 118 (2008); *see also Eisenberg, Miller and Sherwin*, 41 U. MICH. J.L. REFORM 871 (2008). The expensive administered arbitrations now imposed on small business in many contracts deprive them of

any real individual ability to efficiently and effectively protect their rights. Class arbitration restores balance to international and domestic commerce and advances the policies of the antitrust laws.

The FAA is a minimalist statute that makes no prescriptions regarding class arbitration. It leaves the conduct and procedures of arbitration to the parties or the arbitrators. Nothing in the FAA requires that when arbitration clauses are silent on the issue of class arbitration it should be prohibited. Class arbitration attempts to make arbitration fair, functional and affordable by offsetting the routine manipulations of many modern arbitration clauses. It alleviates the cost deterrence encountered by small businesses when they consider pursuing grievances or asserting counterclaims in arbitration due to the excessive expenses of AAA arbitrations. As those costs often exceed a small business's annual profits, efficient and cost effective arbitration is essential. Class arbitration also remedies the negative aspect of arbitration confidentiality rules and orders which frequently operate to conceal unfavorable awards. That along with the refusal of arbitrators to accept estoppel makes individual arbitrations too expensive and inefficient. Class arbitration also addresses and corrects the unfair benefits to those "repeat players" able to afford to regularly re-arbitrate the same contracts and issues obtained from any inconsistent awards. Preserving access to class arbitration, especially when the arbitration clause is silent on the issue of class arbitration, will help to restore some claim by arbitration to offer a fundamentally fair forum and is critical to small business. The authority of arbitrators to decide the procedures to be followed in arbitration where the clause is silent on the issue of

class arbitration should be affirmed and accorded the deference due any decision of procedural arbitrability. See *Howsam*, 537 U.S. at 84-85.

II. THE FAA IS A MINIMALIST STATUTE FOCUSED ON GIVING EFFECT TO ARBITRATION AGREEMENTS AND AWARDS WITHOUT MANDATING ANY PARTICULAR PROCEDURES. THE FAA RECOGNIZES THE AUTHORITY OF THE ARBITRATORS TO DETERMINE THE PROCEDURES TO BE USED IN INTERNATIONAL AND DOMESTIC ARBITRATIONS.

The FAA is an economical statute governing both domestic and international arbitrations. It is focused on giving effect to parties' arbitration agreements and awards, but it neither mandates nor prohibits the use of any particular arbitration procedures. As arbitration is a dynamic creature of contract, those procedures can and do evolve to meet the contemporary needs of business. Sections 201 *et seq.* and 301 *et seq.* of the FAA specifically relate to international arbitrations, but rely on the general provisions of 9 U.S.C. Section 1 *et seq.* to establish the foundation for all domestic and international arbitration in the United States. In a classic concession to federalism, FAA Section 2, in turn, makes contracts to arbitrate irrevocable and enforceable, except where general state contract law provides otherwise. While the case before the court is classically international and maritime, the issue to be decided will have an extraordinary impact on every business and consumer in America. This case implicates two of the most fundamental aspects of arbitration, 1) what procedures may arbitrators use in

the face of contract silence, and 2) who ultimately determines what the arbitrators may decide. Professor Alan Rau elegantly summarized the issues in posts responding to Philip Loree's incisive observations on the Disputing blog and noted that this case really presents two 'default rule' questions. "What is the 'default rule' regarding class or consolidated arbitration? Class or consolidated arbitration, or not?" "What is the 'default rule' as to who decides the class or consolidation issue? Who is the ultimate decision-maker, the court or the arbitrators?"

Neither of these issues would need to be addressed, if the parties chose to elect and incorporate express contract terms on these points. Where arbitrators are faced with silence, they look to the rules of law relating to contract interpretation and supplementation. When the silence relates to procedural issues, such as the availability of class arbitration, it is a truism that the parties grant the arbitrators the authority to determine "the procedure to be used." See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

Commentators long ago observed that sophisticated parties in particular know that no uniform body of procedural rules control international arbitrations. The very multiplicity and variety of the potential procedures counsels careful drafting because the law of the place of the arbitration rarely prescribes or prohibits any particular arbitration procedures. The absence of any statutorily mandated procedures and the fact that arbitration is a private contractual process inevitably means that the procedures for conducting the arbitration are determined by the arbitrators. Where parties elect no institutional rules in the arbitration clause, the orders and rulings of the

arbitrators prescribe the arbitration procedures. Judge Howard Holtzmann best articulated the situation when he noted:

“U.S. arbitration statutes and decisions contain few specific requirements regulating the conduct of the arbitration and leave such matters to the agreement of the parties or to the arbitration rules that the parties have agreed shall be followed. **In the absence of agreement of the parties or applicable rules, matters of procedure are left largely to the discretion of the arbitrators.**” (emphasis supplied)
3 INTERNATIONAL HANDBOOK ON
COMMERCIAL ARBITRATION 19 (Pieter Sanders &
Albert Jan Van Den Berg eds., 1984 & Supp. 13, 1992).

Sophisticated parties have known for decades that the complexities of contemporary commerce inevitably mean that any transaction can engender a multiplicity of interested parties. The failure of the parties to expressly address this issue is surprising considering that class arbitration has been widely known in the United States for decades and was referenced in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). That makes the silence of the arbitration provisions at issue more of a “choice” than at first appears. The parties “silence,” whether by inadvertence or calculation has created a classic “gap” in their agreement. The arbitrators were entitled to consider that the parties should have an obvious interest in avoiding multiple exceedingly expensive, inefficient and inconsistent individual arbitration proceedings potentially requiring decades to complete. The true, legitimate comparison for consideration by the arbitrators was between class arbitration and innumerable individual arbitrations, not between class arbitration and class

actions in the courts. Thus, the usual and expected understanding of the parties is that they have entrusted to the arbitrators the discretion to prescribe the procedures to be followed in the arbitration. The arbitrators are correctly empowered to “fill the gap” so as to advance the expected objective of rational parties to obtain efficient, cost effective arbitrations in a reasonable time frame.

Parties know that often the existence of an arbitration agreement may offer a sword or a shield to interested nonsignatories and the cases are legion articulating the various bases for nonsignatories’ use of arbitration clauses. The fact remains that the parties are in the best position to provide or prohibit any particular arbitration provisions to be used or excluded. Where they have adopted broad arbitration provisions providing, in the Vegoilvoy charter-party for the arbitration of “any dispute arising from the making, performance or termination of this Charter Party ...” or in the Asbatankvoy charter-party providing for the arbitration of “any and all differences and disputes of whatsoever nature arising out of this Charter ...” they commit the determination of the arbitration procedures to the arbitrators. See VEGOILVOY form, JA 9a, @JA 30 a; ASBATANKVOY form JA 32a, @JA 50a – 51a. That decision, like any other award regarding arbitration procedures must be deferred to and subjected to only limited review. See *Howsam*, 537 U.S. at 84-85.

The decision of the arbitrators to proceed in a class arbitration process is well within their authority to determine the procedures to be used in this arbitration where the parties did not specify or select any particular set of arbitration rules. Their decision is

consistent with the unquestioned authority of arbitrators, especially international arbitrators, to devise the procedures for and to interpret any rules under which they conduct arbitration. It is also compliant with the longstanding federal policy interpreting any ambiguity concerning the subjects of arbitration in favor of the broad application of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The decision of the arbitrators before this court is a classic decision of procedural arbitrability expressly reserved to the arbitrators. *See Howsam*, 537 U.S. at 84-85. The award of the arbitrators does not violate any provision of FAA Section 10, nor is it in manifest disregard of the law. In fact, it is hardly surprising that given the expertise of the arbitral tribunal selected they should feel perfectly entitled to determine the procedural issue of class arbitration contrary to the opinions of the hired maritime law “experts.” Their decision demonstrates that the arbitrators properly perceived the dispute before them effectively as a common disagreement between two sets of parties arguing over whether the same facts and law constitute a violation of the antitrust laws. *See Mitsubishi*, 473 U.S. at 614. Those common issues are unquestionably subject to arbitration and the arbitrators were well within their authority to decide that class arbitration is the most cost effective and efficient mechanism for determining that dispute.

Consequently, the two questions which began this argument must be answered consistent with the FAA as follows:

“What is the ‘default rule’ regarding class or consolidated arbitration? Class or consolidated arbitration, or not?”

The answer under the FAA is that the ‘default rule’ permits class or consolidated arbitration.

“What is the ‘default rule’ as to who decides the class or consolidation issue? Who is the ultimate decision-maker, the court or the arbitrators?”

The answer under the FAA is that the ‘default rule’ must be that the ultimate decision-maker for all issues of procedure is the arbitration tribunal.

Finally, it should be noted that the decision of the arbitrators is not a final decision of anything, and is a questionable basis for creating jurisdiction in this Court. The award at issue is a purely procedural determination that does not constitute a final award of any issue concerning the merits of the parties’ dispute. Indeed, the present appeal could easily be viewed as based on the parties contractual creation of federal jurisdiction for review inconsistent with the decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

III. NO REAL ISSUE EXISTS CONCERNING ARBITRATOR SELECTION AND THE PROVISIONS OF THE TWO CHARTER PARTIES ARE EASILY HARMONIZED.

At first appearance the arbitrator selection process seems to present an issue. However, when the language of the arbitration provisions are carefully reviewed, that issue evaporates. Respondent is

seeking class arbitration, so it will presumably agree to use whichever contractual arbitrator selection standards that Petitioner demands. Whether the more or the less restrictive methods are elected by Petitioner, Respondent can agree to preserve its right to class arbitration. Such acquiescence would eliminate any potential problem and would be consistent with the parties' ability to jointly modify their agreement to arbitrate at any time. The remainder of the differences in the contracts are irrelevant because all of the Respondent's contracts and many of the contracts of the members of the putative class have identical arbitration provisions. This is analogous to the situation in *Bazzle* where the various contract provisions were similar, but not precisely identical. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

IV. THE JURISPRUDENCE OF THE FAA REQUIRES ACCORDING THE AWARD OF THE ARBITRATORS THE DEFFERENCE DUE EVERY OTHER DECISION DETERMINING ARBITRAL PROCEDURE AND CONTRACT INTERPRETATION.

The court should conclude that the award of the arbitrators was a legitimate exercise of their authority to interpret the contract, albeit by reasonably filling a gap in a silent agreement with logical and rational "default" procedural provisions. In that event the deferential standard of review due to such awards is well known to the court and will not be repeated here.

* * * *

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeal should be affirmed.

Respectfully Submitted,

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