Consumer Finance Monitor Podcast (Season 8, Episode 37): Do Arbitrators Follow the Law? A New Study Provides Data, But the Debate Continues

Speakers: Alan Kaplinsky, Mark Levin, and Prof. David Horton

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. And I'm your host, Alan Kaplinsky, the founder and former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr, and I'm delighted to be moderating today's program. For those of you who want information, more information either about the topic that we're covering today, or for that matter any other topic in the world of consumer finance, don't forget to consult our blog, which goes by the name of consumerfinancemonitor.com, same name as our podcast show.

We've hosted our blog since July 21, 2011, which was when the CFPB became operational. We changed the name of our blog, used to be called CFPB Monitor during the beginning of the first Trump term because of the de-emphasis at that time on activities at the CFPB. There's a lot of relevant industry content on our blog. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at BallardSpahr.com. And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or from whatever source or platform you obtain your podcasts. And also, please let us know if you have ideas for other topics that we should consider covering on our show or speakers that we should consider inviting as guests on our show.

So let me just tell our audience a little bit about what we're going to be talking about today before we delve into the program. We're going to talk about arbitration, a subject that we visit from time to time whenever we feel there is an important development in that area, and I consider the writings of our guests today to be very important developments that require a lot of attention, and that's why we're going to delve into the subject arbitration today. So let me first introduce our guest and then I'm going to introduce... Well, first of all, introduce our special guest. His name is David Horton. He's the Martin Luther King Jr. professor of law at the University of California Davis. His work on arbitration has appeared in some of the nation's top law reviews. It's been widely cited by courts. And David won the Association of American Law Schools Scholarly Paper Competition, the Association of American Law Schools Dispute Resolution Sections Best Article Award, and the Mangano Dispute Resolution Achievement Award.

And then let me mention, before I invite our other guest today, David was a guest on our podcast show March 6 of this year, and at that time he had written a very creative and thought-provoking article analyzing how courts should interpret certain key provisions that are contained in arbitration agreements, and the article is available on SSRN, and it was recently published by Washington University Law Review. It's probably also available on the law Review's website. So that was on March 6, and here we have David back today to talk about a brand new article that he's written and we'll get to that in a minute. So David, very warm welcome to you.

David Horton:

Oh, thanks so much for that really nice introduction and it's great to see you guys again. Thanks for having me.

Alan Kaplinsky:

My pleasure. And then let me introduce our other guest. I guess I should put the word special in front of your name, too, Mark, although I always consider people who are lawyers at our law firm to be just guests, but you are a special guest, at least

in my eyes. Mark is senior counsel at Ballard Spahr. He's a litigator by background and he and I over a course of two decades did a lot of pioneering work in the area of consumer arbitration agreements. We were among the first people in the country to really broaden the use of arbitration in consumer contracts, particularly consumer financial services contracts. And we also, I believe, and nobody has contested this, it came up with the idea of a class action waiver in an arbitration agreement in order to preclude consumers who filed lawsuits for prosecuting class actions in court or in arbitration. And Mark and I, for untold number of years, it's probably about 20, have co-authored an annual review of consumer financial services arbitration developments in the Business Lawyer, a periodical of the American Bar Association section of business law. So Mark, a very warm welcome to you as well.

Mark Levin:

Well, thanks Alan. It's a pleasure to be here with you and with David.

Alan Kaplinsky:

Okay, we're now going to really get into the subject of David's law review article that caught our attention. So David, you published this article. You are in the process of publishing the article. I don't think it's actually been published yet in the Columbia Law Review forum, and it's titled, Do Arbitrators Follow the Law? Evidence From Clause Construction. And let me just mention that the article is available for those of you who want to read it on SSRN and we will be linking to it on our blog. So tell us what the article is all about and why you wrote it and what does it conclude, particularly letting people know, who may not be as well versed in the area of arbitration as any of the three of us are, what you mean by clause construction. I think that's important to understand that.

David Horton:

Yeah. Sure. Sounds great. Thanks. So there's this fascinating question, at least it's been fascinating to me for a long time, which is whether or not arbitrators follow the law in the sense that they render decisions that are similar to the decisions you get in a court. And there's been this longstanding debate about whether arbitration is lawless or not. And you can kind of see why arbitrators might not have incentives to issue the same sort of rulings that judges would. Specifically, the Federal Arbitration Act makes it very difficult for anyone to overturn an arbitration award, and so arbitrators are kind of insulated from the pressures that courts have to follow the law to get cases, quote, right.

So this question about whether or not arbitration is lawless, it's a little bit like a conversation you might have with a friend about what you would do with $10 million. It's this really fun thing to talk about, but it's not going to happen. You really can't determine whether or not arbitration is lawless. There are so many problems with studying the issue for one arbitration awards are very hard to get. So arbitration is confidential and private and very few arbitration awards are published and even the ones that are published often don't contain any reasoning, so it's very hard to figure out why arbitrators decided a case the way that they did. In addition, even if you could get your hands on arbitration awards, there are systemic differences between the types of cases that are arbitrated and the types of cases that end up in court. So even if you narrowed your focus to one particular type of case, let's just say employment cases, the type of employment disputes that end up in arbitration are just going to be meaningfully different from the type of employment disputes that end up in court because certain contracts are more likely to have arbitration clauses than others. So you just can't make an apples to apples comparison.

Finally, I mean, even if you could somehow contrast arbitration awards with judicial rulings on the same subject, how could you tell which one is correct? It's incredibly subjective. So whether arbitration is lawless has been a debate that's just been entirely speculative. But there's one narrow exception. One place where it's actually possible to some degree to contrast arbitration rulings with judicial decisions and gauge how many of them are correct, and that's this issue of clause construction that you mentioned, Alan. So clause construction is what happens when some decision maker, either an arbitrator or a court has to interpret an arbitration clause that says nothing about whether class actions are allowed or banned. So it's completely silent on the issue of class actions, but somebody has to decide whether this generic arbitration clause allows class actions. It's a contract interpretation issue about the permissibility of class actions in arbitration.

The reason why clause construction is different is one, the American Arbitration Association requires arbitrators to memorialize their clause construction rulings in a published and reasoned decision, so the awards are available. Two, clause

construction focuses on the same narrow issue of contract interpretation, so the cases are comparable. And three, to some extent there is a correct answer. So in 2019, the U.S. Supreme Court decided a case called Lamps Plus versus Varela, which held that an arbitration clause that doesn't say anything about the permissibility of class actions in arbitration does not allow class actions in arbitration. So after that case came out, arguably there is a correct answer. The only way an arbitration clause allows class actions is that if it expressly does so. Anything short of that is a ban on class actions in arbitration.

So what I did in this article is I looked at two subsets of decisions that came out after this Lamps Plus case, one decided by AAA arbitrators and one decided by judges, and what I found was that zero judges interpreted a generic arbitration clause to allow class arbitration, which is what you would expect after Lamps Plus, but 27% of arbitrators allowed class arbitration even after Lamps Plus. And the reason why this is a little bit disturbing is that arbitrators have a financial incentive to rule that an arbitration clause allows class proceedings because this means that they then get to preside over a long and lucrative class action in arbitration. So I think that the article offers some evidence that arbitration lawlessness, although not rampant, is a real phenomenon.

Alan Kaplinsky:

So David, I hear what you're saying and I hear your thesis is that arbitrators don't always follow the law. So they say that arbitrators don't follow the law or you said about because of self-interest or I think the notion that arbitrators split the baby when making a decision, and you write the following. "The potential for bias raises questions about the wisdom of outsourcing and ever-expanding swath of the civil justice system to private judges." That's a quote from your article, but your research actually shows that about 75% of the arbitrators did in fact follow the law on the clause construction issue. To me, that looks like a pretty good percentage, not a hundred percent, but it's served well over a majority, and I would argue that your research paper supports the conclusion that arbitration is not lawless and that most arbitrators do follow the law. Do you agree with my argument?

David Horton:

I do in part, and in fact I think there's even a more sort of optimistic finding or a way that you could spin my findings to be more optimistic, which is there have basically been three phases of rules that govern clause construction. There was an earlier phase in the early 2000s in which basically there was sort of this default rule from the Supreme Court that an arbitration clause that doesn't say anything about what class actions are allowed or prohibited does in fact allow class arbitration. And then there was kind of this later phase in the 2010s in which it was really unclear what the governing rule was. And then there's this phase that I studied in this paper after 2019 and the Lamps Plus case where the rule is pretty clear that an arbitration clause needs to expressly allow class actions, otherwise it bans them.

And based on work that other people have done and some earlier work that I have done, you can see that the percentage of arbitrators who actually hold that a generic arbitration clause allows class arbitration has declined as the Supreme Court has made it progressively more difficult and now arguably impossible to find that an arbitration clause allows class proceedings even though it doesn't mention them. So there's I think pretty good evidence there that arbitrators are sensitive to what the legal rule is and that many of them do try to faithfully apply the law as they understand it. I think the thing that's a little bit less sunny though is the fact that now in 2019 we're in a period in which no judges have found that a generic arbitration clause allows class proceedings after Lamps Plus, but there's this admittedly small but noticeable percentage of arbitrators who go the other way. And when you read their awards, the truth is some of them go to great lengths to license class actions in arbitration and you can't help but wonder what's driving the bus. It seems like it's arguably their financial self-interest.

Alan Kaplinsky:

Yeah. Well, in the awards that you read, do they refer to Lamps Plus or did they ignore it completely? I mean, are they try to distinguish their situation from the facts of Lamps Plus?

David Horton:

That's a great question, and the truth is the arbitration awards are all over the map. There is, at least one of them is extremely high quality, just really like A+ reasoning, distinguishing Lamps Plus and making the best possible case you could make that

this particular arbitration clause is extremely unique and allows class actions in arbitration even though it doesn't say that expressly. So there are decisions like that. There are also decisions that don't engage with Lamps Plus at all. They cite Lamps Plus as though it supports their argument with no explanation. So I'm not sure if that's simply maybe an arbitrator who doesn't have a lot of time to spend on the issue or whether it really is an arbitrator who's going out of their way to allow class proceedings to feather their own nest.

Mark Levin:

Alan-

Alan Kaplinsky:

Yeah, sure.

Mark Levin:

... if I could interject something that came to mind as David was speaking, I'd like to double down for a minute on this notion that you can take your statistics and make a credible pro-arbitration argument out of them. And again, I'm talking about sort of your main finding that 75% or so of the arbitrators who you studied did follow the law. And to put that in some context, in trying to enforce arbitration clauses and convince regulators and consumer advocates that consumer arbitration is fair to consumers, we often refer to a Harris Interactive poll that was done a number of years ago, and the statistics in that poll showed that consumers who actually participated in an individual arbitration, In other words, a non-class arbitration actually enjoyed the experience.

They had an online poll of 609 individuals who actually participated in an arbitration, and 74% of those participants found that, or said that arbitration was seen as faster than court litigation. 63% said that arbitration is simpler than court litigation, and 51% said that arbitration is cheaper than litigation, and two-thirds, about 66% of the participants said that they would likely use arbitration again if a dispute arose. So to put that in context, I mean, we tout those statistics as positive statistics that support the fairness of consumer arbitration. So to me, your conclusion that 75% of arbitrators did follow the law is a pretty good statistic in terms of saying consumer arbitration is a fair and efficient way of resolving a dispute by individual arbitration.

I would also just like to mention when you say that no court since Lamps Plus has declined to follow Lamps Plus, and I know you're going to talk about this later, the Second Circuit, possibly the Third Circuit, and the Southern District of New York did find that class arbitrations were possible notwithstanding Lamps Plus, and I just wanted to throw that out. I know it's going to be something we talk about later on in this podcast, but I thought it was important to say that there are some exceptions to that.

Alan Kaplinsky:

Yeah, and well, in your article, I remember you referred to Lamps Plus as providing a bright line rule, but yet Mark has referred to a number of prestigious courts that have not viewed it as a bright line rule. So do you disagree with that, or how do you get around that, I should ask?

David Horton:

Yeah, these are great questions. So as to Mark's first point with respect to surveys about arbitration, whether consumers are happy, I think that's very possible and there are probably surveys that go the other way, at least I've seen some in the employment arena, and ultimately that doesn't say anything about whether or not arbitrators follow the law. There are also surveys of juries and judges that find that juries and judges don't always follow the law. So that also bolsters your point about how maybe arbitration isn't so sinister. The thing that really does stand out to me here is zero courts versus 27% of arbitrators found that a generic arbitration clause allows class proceedings. So you're asking about cases that maybe suggest that either courts found that generic arbitration clause allowed a class proceeding. You mentioned the Second Circuit and the Third Circuit.

If you look at these cases, what you see is something different happening. What you see is these cases arise in a different procedural posture. What I'm studying is whether or not arbitrators or judges interpret a contract that doesn't say anything about class arbitration to allow class arbitration. So it's the threshold issue of contract interpretation. The Second Circuit case you're mentioning, Jock versus Sterling Jewelers, arises in a totally different context. The question there is whether or not an arbitrator correctly decided that an arbitration clause allows class proceedings. That is an issue where, according to the U.S. Supreme Court and the Oxford Health case, the test is whether the arbitrator even tried to interpret the contract. So it's a manifestly different legal standard. It's not the clause construction ruling, it's does a court have the ability to overturn a clause construction ruling when there's a U.S. Supreme Court case on point that says emphatically no? So that actually I think does not end up in the universe of cases that I'm looking at.

With respect to dicta in other cases, like the Third Circuit case, when you look at those opinions, what you see is the Third Circuit saying Lamps Plus holds that it might still possible for a generic arbitration clause to allow class proceedings, but we strongly presume that that's not true. And then in the part of the case that actually engages in clause construction, what the court says is this is the contract. It never says that class actions are allowed, therefore it bans them. So what the court is actually doing is hedging a little bit on whether Lamps Plus is a bright line rule, but then interpreting Lamps Plus as a bright line rule.

Mark Levin:

Well, David, didn't the Second Circuit hold in the Sterling Jewelers case, or at least state in Sterling Jewelers, that Lamps Plus leaves undisturbed the proposition that an arbitration agreement may be interpreted to include implicit consent to class procedures? I mean, to me that sounds the opposite of what Lamps Plus said, and yet the Second Circuit said that and other courts have decided to follow that statement. Doesn't that show that not all courts have, and especially a prestigious court like the Second Circuit Court of Appeals, that not all courts look at Lamps Plus as a bright line rule or a line in the sand?

David Horton:

You are 100% right. That is in fact what the Second Circuit said in that case. And the reason why I don't think it's as important as you do is, one, this was a case that presented the issue of whether an arbitrator's clause construction ruling was correct, so it's not a court actually engaging in clause construction, and two, it's dicta, so the court had already held that the arbitration ruling the arbitration award allowing class actions in arbitration was correct simply because under Oxford Health the arbitrator had tried to interpret the contract, so that disposed of the issue, which is why I say that's basically a throwaway line in the Jock versus Sterling case. And then most importantly for my purposes, that statement has been widely ignored. I tried to find another court that cited it, quoted it, and the only time it's ever come up has essentially been in irrelevant cases. So it hasn't sort of been influential at all. I think courts have correctly recognized that it doesn't have a lot of authority behind it.

Mark Levin:

Well, your article acknowledges, doesn't it, that, and I'm quoting here, several arbitrators leaned into Sterling Jewelers in finding that the arbitration clause permitted class arbitration. Weren't those arbitrators trying to follow the law as they understood it? I mean, they're relying on the Second Circuit's interpretation of Lamps Plus.

David Horton:

Yeah, fair enough. I mean, sure, that's definitely one way of looking at it. I do think, again, it's notable and supports my thesis that these are arbitrators who are discovering the governing rule in clearly superfluous language from a Second Circuit decision that no court has found influential at all. So at least in my mind, that cuts both ways, if not completely my way because it's arbitrators who are sort of seizing on this slightly unguarded sloppy statement from a court to vest it with I think significance that it really doesn't have in the judicial system.

Mark Levin:

And you attribute that, don't you, to arbitrators being inclined to act out of self-interest because they get paid by the hour, so they might be inclined to stick around for a class arbitration that could be very remunerative to them personally?

David Horton:

Yeah. I mean, I don't know. That's the brute truth. I have no idea what their motivations are. There's an old saying about if it walks like a duck and it quacks like a duck, but the truth is it's just impossible for me to know or anyone to know for sure.

Mark Levin:

So it's really speculation that they were acting out of self-interest instead of trying to follow the law and may be making a mistake as you see the law.

David Horton:

Yeah, that's right. I mean it depends. You could call it speculation or you could call it an inference.

Alan Kaplinsky:

Let me ask another question. Does your finding that 27% of the arbitrators did not follow Lamps Plus undercut the argument often made by consumer advocates that arbitrators have economic incentives to cater to repeat playing companies that can hire them in the future because the arbitrators ruled against companies on this very important threshold issue? Didn't these arbitrators rule against companies on this critically important issue? And that would seem like the ones that did weren't thinking about, "Oh, well, I hope this company hires me in the future."

David Horton:

Yeah, no, that's a great point and that's part of why I find this issue so fascinating, this issue of clause construction because it's like the one place I'm aware of in arbitration where arbitrators have a financial incentive to rule in favor of plaintiffs in favor of consumers and employees. So do they follow their short-term financial interest and install themselves at the helm of a long and lucrative class arbitration, or do they play the long game and try to rule in favor of companies so they get selected again in the future? And I suppose different people have different choices when it comes down to picking a path one there, or path two. But right, you're right. So this is why I find it so interesting. It's one of these questions about arbitration that really gets at the question of what arbitrators actually do and why.

Alan Kaplinsky:

The other thing I would note, at least my recollection, and correct me if I'm wrong, Mark or David, but when the CFPB did its major study of consumer arbitration where they looked at issues pertaining to fairness and they looked at how does it compare to class actions in court, I think they concluded that there was no credit to be given to repeat player argument that was made by a lot of consumer advocates. Am I right that they gave short shrift to that argument?

Mark Levin:

That is correct, Alan, because it's something that consumer advocates have been banding about for quite a few years. But they looked at that, and in fact, although they were trying to get rid of class action waivers in consumer arbitration agreements, the final rule that eventually was overturned by Congress permitted individual arbitration to continue, and so they weren't banning arbitration altogether. It was really the class aspect of the arbitration clauses that they were concerned with. And in fact, the CFPB itself used arbitration and mediation to handle workplace disputes in their own agency. So they wouldn't have allowed arbitration to continue at least individually if there was some notion that arbitrators were acting out of self-interest or that there was a repeat player effect.

David Horton:

So I just want to point out that the CFPB study has a fairly small sample size, and I know I've conducted two large scale studies with a co-author about the repeat player effect, and I know that there's been a lot of writing on the repeat player effect by Alexander Colvin at Cornell with much larger sample sizes. And when you look at larger sample sizes and institutions that aren't just the American Arbitration Association, I think the studies are pretty clear that there is a repeat player effect for defendant companies. And then at least in my own work, I also found with my co-author a repeat player effect for plaintiff's lawyers. So I think it's pretty clear that there is in fact a repeat player effect and that it's also concentrated at the top of the repeat player pyramid. So it's the companies that arbitrate the most, but also the plaintiff's law firms that arbitrate the most, that do the best, at least in awarded arbitration matters. So that may simply prove that the more you arbitrate, the better you get at it, or it might show that arbitrators do in fact bend over backwards to rule in favor of either plaintiff's lawyers or corporate defendants who they're likely to meet again in the future. It's not clear which one it is, but there's definitely a repeat player effect.

Mark Levin:

Well, it sounds to me like you're saying that if there is a repeat player effect, it's kind of a wash because plaintiffs benefit from it, not just defense lawyers.

David Horton:

That's absolutely right, and I also cannot tell you that there is not a similar phenomenon in the court system because no one has ever studied it. So it may be that this is just what happens when you litigate a lot.

Mark Levin:

I'll tell you from personal experience, I found that the arbitrator's background before they became an arbitrator may well be a determinant factor. A lot of arbitrators come from the plaintiff's bar, a lot come from the defendant's bar, and that in itself might make an arbitrator inclined to be more or less favorable to one side or the other.

Alan Kaplinsky:

Right. So let me ask you this, David. Did any of the arbitration matters that allow class arbitration after Lamps plus involve consumer protection matters?

David Horton:

Yeah, I think that's right. So I remember, although I haven't gone back and looked back through my data recently, that there was a mix of consumer and employment cases, although I do believe that employment cases predominated. There was one particular antitrust case that really stood out to me that I ended the paper with because it actually featured the very same contract, and one case involving this contract and the same defendant, an antitrust case, was in arbitration for clause construction, and one case filed by different plaintiffs but involving the same contract and the same defendant was in the court system and the judge that decided the case held that the arbitration clause did not allow class arbitration, and the arbitrator who interpreted the same contract with the same defendant said that it did allow class arbitration. So that was the consumer aspect that stood out the most to me.

Alan Kaplinsky:

And why do you suggest that it should make a difference if it's a consumer arbitration case or business to business arbitration?

David Horton:

Right. So in consumer versus business to business arbitration, I'm not really sure that I see a huge distinction, although, I mean, I suppose there are some contract doctrines and some doctrines that involve the interpretation of contracts like the rule that you construe ambiguities against the drafter that apply with more force in the consumer setting than they do in the

business to business setting. But the reason I don't think that matters all that much here is that in Lamps Plus, the U.S. Supreme Court said that no decision maker, no court, and no arbitrator can use this against the drafter principle to hold that a generic arbitration clause allows class proceedings.

Alan Kaplinsky:

Okay. So let me go to you now, Mark. You participated in a AAA class arbitration and you defeated a class at the clause construction phase. In light of the experience that you had, what do you think of David's theories?

Mark Levin:

Well, the case you're referring to was a AAA clause construction hearing that occurred about a decade before Lamps Plus at a time when the case law on clause construction was all over the map. The arbitrator was a former state court appellate judge from New Jersey, and he paid very close attention to the various court decisions. He ultimately ruled that the arbitration clause did not permit class arbitration. But even if he had gone the other way and ruled for the plaintiffs, I wouldn't have thought that he was doing anything except trying to follow the law. It was a horribly muddled area. I think David would agree with that. And Alan and I were counsel in the Bazzle case, I mean, way back in 2003, '04, something like that, and we followed all the case law since then and it was just a complete mess. And it also got intertwined with the issue of delegation, for example, whether the court or the arbitrator should decide the clause construction issue.

So while I agree with the result in Lamps Plus, I note that there were weighty dissents by Justices Ginsburg, Breyer, Sotomayor, and Kagan in Lamps Plus. It was a five four decision. And the dissenters argued that the majority standard really did not show consent of the parties on the class arbitration issue and deprived consumers and employees of justice and strip them of their rights. They found that, again, the dissenters that the courts below were correct to turn to state law to resolve ambiguity. And Justice Kagan even wrote the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a class-wide basis. But even if the court is right to view the agreement as ambiguous as saying a plain vanilla rule of contract interpretation, applied in California as in every other state requires reading it against the drafter, and so likewise permits a class proceeding here. That's the contra proferentem rule.

So in practice, I vigorously disagree with the dissents in Lamps Plus, but the point is that for a decision maker, an arbitrator trying to decide something after Lamps Plus, Lamps Plus might not be the bright line rule that David says it is, and even some prominent courts like the Second Circuit in Sterling Jewelers continue to look for some wiggle room. Maybe the fact that there were four dissenters in Lamps Plus is enough to plant a seed of doubt in the mind of arbitrators who didn't completely agree with the majority. And let me ask you, David, would your thesis have more support if Lamps Plus had been a unanimous decision rather than a five to four decision?

David Horton:

Right. So I guess my honest answer is no. I don't think dissents matter. I don't think five four votes matter. AT&T Mobility versus Concepcion, as you well know, was highly controversial, five to four decision with a vigorous dissent, but it's the law of the land, and I don't think decision makers are supposed to see Supreme Court precedent as somehow diluted if there's a four justice dissent. The five justice majority is still the law of the land. So I guess that's my honest reaction. I also, I think you are a hundred percent right that Lamps Plus is not an indisputable bright line rule. There is wiggle room in part because, as you've alluded to, the court's clause construction jurisprudence has been so confusing for so long.

But I want to drill down just a little bit on how a decision maker in good faith is supposed to understand Lamps Plus. So in my previous survey of clause construction rulings that came out before Lamps Plus, I found that more than half of the arbitrators I studied interpreted the generic arbitration clause to allow class proceedings, and they used two tools to do this. One, they held that a broad arbitration clause allowed class proceedings. So if there's one of these sort of normally broad arbitration clauses that says something like the parties agree to arbitrate any dispute or claim they have in the future, an arbitrator would look at that and say, "Okay, the parties are arbitrating everything. That has to include class actions." That was one tool. The other tool these arbitrators used was the contra proferentem doctrine that you mentioned, construing ambiguities against the drafter.

So along comes Lamps Plus. Lamps Plus featured an arbitration clause with one of these super broad catch-all nets that said that the parties agree to arbitrate any claim. But the five justice majority said that's not good enough to allow class proceedings, so that road is now closed. In addition, Lamps Plus says you can't use contra proferentem to allow class proceedings because the FAA would preempt any such ruling. So that second path is also now closed. So even though there is sort of fuzziness about what the law actually is, I just don't see how a good faith adjudicator could find that a generic arbitration clause allows class proceedings.

Alan Kaplinsky:

Okay. Do you have anything? Do you want to respond to that, Mark? We're getting toward the end of our program, and I have one more question I want to ask David, but before I do that, did you have anything that you want to state?

Mark Levin:

No, no. My only thought as David was speaking, as I remember in the class arbitration case that I was referring to previously, the inordinate amount of briefing and argument at the arbitration parsing almost every word of the arbitration clause to argue that, from my point of view, that this showed that the parties intended for an individual arbitration and the other side pointing to other words saying, well, this shows that the parties intended to permit a class arbitration. So it was kind of a wild and wooly period of time. But I do think when you mentioned Concepcion, there are still judges, particularly on the state court level, that prefer the dissenting views in Concepcion and do everything they can to get around a class action waiver, whether by hook or by crook, and they look for every other reason to deny arbitration. So the seeds that the dissents plant are, sometimes they're buried, but they still produce some blooms in the minds of decision makers.

Alan Kaplinsky:

Yeah. Okay. Thanks, Mark. So David, I'd like to end our podcast show today with just a few questions that all relate to the same thing. And I'm wondering, could you use this study that you did as a springboard for trying to find other areas to measure whether arbitrators follow the law? Where else might you look? Is clause construction the only area you're aware of where an apples to apples comparison of judges and arbitrators is possible when it comes to following the law?

David Horton:

I would love to be able to come up with some other area where we can make this comparison and dig in a little bit deeper, but I just can't think of any, and it's the problems that I mentioned at the beginning. One, you really can't find arbitration awards. Two, the case streams that feed arbitration and litigation are just so different. And then three, I just don't know how you could find an area of law that is as clear as clause construction is that allows you to actually tell whether someone is getting a decision right or wrong. I mean, that's just so extraordinarily rare. So unfortunately, I really can't think of anywhere else to look.

Alan Kaplinsky:

Okay. Fair enough. So I want to thank you, David, very much for being on our program today and are a repeat player on our podcast show, and we're very happy to have you as a repeat player, and anytime you write an article about arbitration, Mark and I will be taking a very close look at it.

Mark Levin:

If I can just interject, I would encourage all the listeners to read David's article. It's extremely well written, very powerfully written, and analytically it is obvious that you took great care in parsing through a ton of data to come up with your conclusions. So a very interesting theory, and I don't agree with it. I think it's kind of a slim read to try to attack how arbitrators rule. But a very interesting read, and congratulations on its publication.

David Horton:

I can't tell you how much I appreciate all of that, and it's always such a thrill to talk to you guys both because of your stature in the field, but also just because you ask such great questions and you engage the work so deeply, so I really appreciate it.

Alan Kaplinsky:

Well, thank you, David. That's kind of you. So to make sure that you don't miss any of our future episodes of our podcast show, please subscribe to our show on your favorite podcasts platform, whether it's Apple Podcasts, YouTube, Spotify, or wherever you listen to your podcasts. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast, that's singular, podcast@ballardspahr.com, and stay tuned each Thursday for a new episode of our show. I want to thank all of our listeners for listening in today, and I hope everybody enjoys the rest of their day.