Often arbitration clauses not only prohibit class actions in court but also prohibit arbitration on a classwide basis. The Supreme Court has upheld such bans on class arbitration in two different cases. In *AT&T Mobility v. Concepcion*[^40] the Court overruled a challenge to the unconscionability of such a provision. Then, in *American Express Co. v. Italian Colors Restaurant*,[^41] the Court concluded that class waivers within arbitration clauses were valid even in cases in which the plaintiffs could establish that the requirement that they bring their claims individually would prevent them from effectively vindicating their federal rights.

As a result, if such a clause banning class arbitration is found in the contract, the requirement will generally be effective and classwide arbitration will not be possible. The consumer will have to either find an alternative ground to throw out the arbitration requirement (as detailed in §1.7.2.3, infra) or arbitrate the case on an individual basis.

On the other hand, if an arbitration clause does not contain a provision explicitly prohibiting class arbitration, then classwide arbitration may be possible, and the very threat of such arbitration will be treated very seriously by the defendant. Defendants typically fear classwide arbitration more than a court-based class action. The arbitration can proceed much faster than a court-based class action, with virtually no judicial review, and the arbitrator, being paid by the hour, may not view a complicated case with as much disfavor as a judge with an overwhelmingly large caseload. Further, many arbitration agreements require the defendant to pay the arbitrator’s fees, creating an additional financial disincentive to prolonged arbitration proceedings.

If an arbitration clause does not ban class arbitration, the key is to interpret the parties’ intent in drafting the arbitration agreement, based in part on the language of the contract itself. If the contract is construed as allowing class arbitration, then the next decision is whether to certify a class action to be litigated before an arbitrator.

The Supreme Court has made clear that the clause interpretation should not be based on policy considerations but on the meaning of the contract itself.[^42] In 2019, the Supreme Court ruled that, where a court finds the parties’ intent to be ambiguous, it cannot rule in favor of class arbitration on the basis that contracts are to be construed against the drafter—a policy doctrine known as *contra proferentem*.[^43] Instead, there must be some “affirmative ‘contractual basis for concluding that the parties agreed to [class arbitration].’”[^44] Although this decision makes it more difficult to interpret a contract as allowing class arbitration, it does not foreclose such an interpretation.

Courts have reached different results regarding who determines the parties’ intent as to class arbitration—the court or the arbitrator. But where the arbitration agreement delegates to the arbitrator issues of the agreement’s enforceability, it may be the arbitrator that determines the parties’ intent.[^45]

If the parties agree that an arbitrator does the interpretation and the arbitrator interprets the contract as allowing class arbitration, then the Supreme Court has ruled that a reviewing court should not overturn the ruling except in extremely unusual circumstances and that the arbitrator’s interpretation must be accorded great deference.[^46]

**Footnotes**

[^40]: AT&T Mobility, L.L.C. v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[^41]: Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).


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