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Class Actions in International Commercial Arbitration

Francisco Blavi*

Gonzalo Vial†

*Pellegrini & Cia

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Francisco Blavi and Gonzalo Vial

Abstract

This Article attempts to contribute to the study of international class arbitrations by providing a clear framework for discussion, an explanation of the current status, and a description of the challenges facing the development of class actions in the field of international commercial arbitration. As international arbitration is a system praised for offering a predictable and efficient mechanism to resolve transnational business disputes, it is submitted that the international commercial arbitration community should promptly implement a specific regulatory framework for class arbitrations that avoids uncertainties and addresses its special features.

KEYWORDS: Class Action, Class Arbitration, AAA, JAMS, International Class Arbitration

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* Francisco Blavi is a Professor of Law and Partner at Pellegrini & Cia, specializing in international arbitration. He obtained his LL.M. from Columbia Law School, and was awarded the Fulbright Scholarship and the Parker School Certificate in International and Comparative Law.

** Gonzalo Vial is a Professor of Law and Arbitration practitioner from Chile. He obtained his LL.M. from Stanford Law School, and was awarded the Fulbright Scholarship.

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INTRODUCTION

Determining whether class actions should be admissible in the context of international commercial arbitration is a highly contentious issue, both in theory and practice. As a dispute resolution mechanism created by the parties' consent and characterized by their direct involvement in appointing the arbitrators and defining the procedure, it is not clear how these essential features shall interplay in the context of class arbitrations where the members of the class are bound by the award regardless of their participation in the course of the proceedings.¹ The academic community has been unable to provide a uniform understanding about the convenience of permitting class arbitrations, and most international regulations are silent in regards to its applicability. Accordingly, this Article attempts to contribute to the study of international class arbitrations by providing a clear framework for discussion, a description of the current status, and an analysis of the specific challenges facing the development of class actions in the field of international commercial arbitration.

I. DEFINITION OF CLASS ACTION AND CLASS ARBITRATION

Class actions have been described as a procedural device allowing plaintiffs to file a claim not only for themselves, but also on behalf of other persons with the same interests.² Although only the representative is involved in the proceeding, the class members are equally bound by the outcome.³

Class arbitration may be defined as a form of arbitration that enables one or a number of parties to bring a claim before an arbitral tribunal on behalf of others in a similar position. As it has generally followed an analogous model to class action litigation, the party

1. JEFF WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 581 (2012).

2. BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 260 (2006).

3. NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 154 (5th ed. 2009). Gary Born explains the concept of class actions in the United States in the following terms: "Under the U.S. litigation system, a class action is a civil suit, often a mass torts or consumer litigation, in which one or more named plaintiffs represent a large, sometimes indeterminate, number of similarly-situated individuals in pursuing related claims against one or more defendants." Gary Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, *KLUWER ARB. BLOG* (July 1, 2011), <http://kluwerarbitrationblog.com/2011/07/01/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/>.

initiating the proceeding asserts to represent a group of claimants.⁴ Class arbitration, while being a relatively recent phenomenon, is most commonly viewed as a procedural mechanism mixing arbitration with the class action procedures applicable under US litigation law.⁵ Although it can be described as a hybrid between judicial class actions and traditional arbitration, international class arbitration presents some differences with both of them. It is different from litigation because class arbitration applies the typical hallmarks of arbitration, and in addition the class members are limited only to those governed by similar arbitration agreements.⁶ In turn, class arbitration differs from traditional arbitration mainly because the class representative seeks relief on behalf of other class members, and therefore “issues that generally do not arise in arbitration, such as certification of a class, issues of notice, [or] opting in/opting out” actually do manifest themselves in class arbitration.⁷ Since international class arbitration could be administered by an arbitral

4. WAINCYMER, *supra* note 1, at 581.

5. Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. OF DISP. RESOL. 1, 21 (2012), <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1122&context=jdr>.

6. Michael Schafler & Amer Pasalic, *Is Canada Ready for Class Arbitration?*, ADRIC, 2, 3 (2013), <http://www.dentons.com/en/~media/B2160274017E49CCBE32401178504FB9.as> hx. As stated by another author: “Arbitration is a matter of contract between the parties in that one cannot be required to submit to arbitration unless he has agreed to do so.” Martin Saunders, *Class Arbitrations – Who Decides?*, THE NAT’L L. REV. (Sept. 2, 2014), <http://www.natlawreview.com/article/class-arbitration-who-decides>.

7. Schafler & Pasalic, *supra* note 6, at 2, 3. The authors explain the aforementioned with these words:

It is different from a class action because it involves a type of representative proceeding injected into the arbitral realm, and many of the classic hallmarks of arbitration, including choice of decision-maker, customized procedures, and confidentiality, would characterize class arbitration as well. Further, the arbitral class in a class arbitration is restricted to parties governed by similar arbitration agreements as the class arbitration representative. In other words, the claims advanced in a class arbitration are limited by the nature of the contract in which the arbitration agreement is found. On the other hand, class arbitration is different from traditional arbitration because it can involve up to hundreds of thousands of parties in a single proceeding, while most arbitrations are either bilateral in nature, or involve relatively few parties at most. Whereas a traditional arbitration involves claims advanced on behalf of a single party, a class arbitration involves a party seeking relief on a representative basis. As a result, issues that generally do not arise in arbitration, such as certification of a class, issues of notice, opting in/opting out, etc. do manifest themselves in class arbitration.

institution or proceed on an *ad hoc* basis,⁸ it is uniquely placed to efficiently provide a large number of individuals with the opportunity to resolve their claims at a single time and in a neutral venue, before an arbitral tribunal rather than domestic courts.⁹

II. *CLASS ARBITRATION AS A FORM OF COLLECTIVE REDRESS*

The concept of collective redress encompasses “any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.”¹⁰ It may pursue an injunctive or compensatory purpose and can take a variety of forms.¹¹ A highly popular form of collective redress is US-style class actions, and the most well-known example in the field of alternative dispute resolution is US domestic class arbitration.¹² As the international legal community has shown an increasing interest in procedures that allow resolving collective disputes, international commercial class arbitration is a promising but yet-to-be-developed form of collective redress.¹³

It is important to note that international class arbitration should be distinguished from other types of multiparty proceedings, which in general terms may be described as any dispute involving more than two parties in the same arbitration.¹⁴ As a matter of fact, class

8. S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 207 (2012) [hereinafter *Does Class Arbitration “Change the Nature” of Arbitration?*].

9. S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 INT’L L. & COMM. REG. 921, 942 (2012) [hereinafter *Resolving Mass Legal Disputes Through Class Arbitration*].

10. *What is Collective Redress*, BRITISH INST. OF INT’L & COMP. L., <http://www.collectiveredress.org/collective-redress/what-is-collective-redress> (last visited Apr. 6, 2016).

11. *Id.*

12. S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?*, 29 ASA BULLETIN 145, 145 (2011) [hereinafter *A European Form of Class Arbitration?*].

13. S.I. Strong, *Class Arbitration Outside the United-States: Reading the Tea Leaves*, in 7 MULTIPARTY ARBITRATION, DOSSIERS OF THE ICC INST. OF WORLD BUS. L. 189 (Eric A. Schwartz & Bernard Hanotiau eds., 2010) [hereinafter *Class Arbitration Outside the United-States: Reading the Tea Leaves*].

14. Ferdinando Emanuele & Milo Molfa, *Multiparty Arbitrations: The Italian Perspective*, CLEARY GOTTlieb STEEN & HAMILTON LLP: THE EUR. AND MIDDLE EASTERN ARB. REV. 64 (2012), <http://www.cgsh.com/files/Publication/3ffa7c24-e013-440a-9c9a->

arbitration usually determines the rights of a large numbers of parties in a single process, the amounts at stake are very high, and the nature of the claims involve parties who seek relief on a representative basis.¹⁵ Class arbitration differs from consolidated arbitrations¹⁶ because the first is “contemplated when stakes in any individual case remain small enough to make [individual] arbitration impractical from a cost standpoint,”¹⁷ while consolidation involves different cases that would proceed by themselves, but present “related parties as well as common issues of law and fact, making it more economical for the claims to be heard together by a single tribunal.”¹⁸ Additionally, in class arbitrations the claimant asserts to represent other stakeholders entitled to a similar recovery under analogous arbitration agreements, while consolidations involve independent but related claims where no individual is acting on behalf of the others.¹⁹ Similarly, class arbitrations need to be distinguished from the joinder of parties, which implies the addition of a third party to the arbitration based on a reference to the applicable rules or principles, such as implied agency, piercing the corporate veil or the alter ego doctrine.²⁰ Either by adding a claimant or a respondent, the joinder does not change the fact that traditional arbitration is unable to deal with cases of great magnitude where the members of the class are so numerous that the joinder of all of them is deemed impracticable.²¹

III. *IS CLASS ARBITRATION DESIRABLE?*

Class arbitration has been praised for increasing the efficiency and reducing the costs of having to arbitrate numerous single claims.

2d8a32706de3/Presentation/PublicationAttachment/2e7939f0-865f-44b6-beac-30724bd41a41/Multiparty%20Arbitrations_The%20Italian%20Perspective_2012.pdf.

15. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 212-13.

16. Consolidation of arbitrations has been defined in the following terms: “[c]onsolidation is a procedural mechanism allowing for two or more claims to be united into one single procedure concerning all related parties and disputes.” Lara Pair, *Efficiency at All Cost – Arbitration and Consolidation?*, KLUWER ARB. BLOG (Mar. 14, 2014), <http://kluwerarbitrationblog.com/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation/>.

17. WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 103 (2012).

18. *Id.*

19. *Id.*

20. *Id.* at 104.

21. Gabrielle Nater-Bass, *Class Action Arbitration: A New Challenge?*, 27 *ASA BULLETIN* 671, 671 (2009).

Ultimately, it guarantees that all claimants are treated equally and avoids the danger of conflicting decisions when different tribunals are confronted with the same set of facts. Moreover, class arbitration secures access to justice, as it provides claimants with the opportunity to bring a claim when the individual amounts do not justify initiating a proceeding.²² Finally, it also enables claimants to command more resources by combining their cases, giving them “greater leverage by compounding the defendant’s risk of loss.”²³

Opponents of international class arbitrations have explained that such procedures cannot maintain the informality, cost-efficiency, speed, confidentiality and business-oriented methodology of traditional arbitration,²⁴ and that they would require excessive interference from domestic courts. In other words, that class arbitrations would change the nature of arbitration.²⁵ Additionally, it has been argued that class arbitration is bad for business,²⁶ faces enforcement uncertainties, and is unlikely to guarantee the validity of the class members’ consent.²⁷ Finally, some authors have mentioned that class arbitration might not be admissible in civil law jurisdictions where the idea of developing collective forms of actions is generally rejected.²⁸

The criticism towards international class arbitration is not entirely accurate or admissible. Although class arbitration certainly presents unique features, such circumstances do not change its arbitral nature or the fact that international class arbitration is just another type of arbitration proceeding within the arbitral realm.²⁹ Indeed, the areas “in which class arbitration differs most significantly from other forms of multiparty arbitration—the provision of representative relief and the underlying policy rationales—meet the standards” to be truly considered as arbitration.³⁰

22. *Id.* at 672.

23. HANOTIAU, *supra* note 2, at 260.

24. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, *supra* note 13, at 188.

25. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 202 (referencing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010)).

26. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, *supra* note 13, at 186.

27. WAINCYMER, *supra* note 1, at 583.

28. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, *supra* note 13, at 187.

29. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 268.

30. *Id.* at 269.

Furthermore, arguments in the sense that international class arbitration includes excessive formalities and judicial involvement are also unpersuasive as a means of supporting the argument that class arbitration changes the fundamental nature of arbitration.³¹ It has been explained that “arbitration is, and has long been, a highly diverse form of dispute resolution, routinely including very formal, very large and very complicated multi-party proceedings.”³² Additionally, it is not certain that class arbitration would be bad for business, as empirical studies have shown that corporations’ biggest criticism to the procedure—that claimants file frivolous claims to force high settlements—is demonstrably incorrect and based more on perception than reality.³³ Ultimately, the benefits that class arbitration can offer to the development of international arbitration seem to outweigh any potential risks, thus being desirable if applied under a proper procedure. In any case, the study of international class arbitration is extremely important because a growing number of commentators and practitioners believe that it will spread beyond US borders without necessarily adopting the same procedures as those used in US-style class arbitrations.³⁴

IV. *DEVELOPMENT OF CLASS ARBITRATIONS*

A. *United States*

Class arbitrations have been broadly considered by the legal community as a procedure distinctly used in the United States. Their courts were pioneers in developing a regulatory framework applicable to domestic class arbitrations. Arbitral institutions contributed to further develop the applicable rules as well.³⁵

31. *Id.*

32. Born & Salas, *supra* note 5, at 22.

33. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, *supra* note 13, at 186.

34. S.I. Strong, *From Class to Collective: The De-Americanization of Class Actions*, 26 *ARB. INT’L* 493, 494 (2010) [hereinafter *From Class to Collective: The De-Americanization of Class Actions*].

35. Schaffler & Pasalic, *supra* note 6, at 2 (citing *Resolving Mass Legal Disputes Through Class Arbitration*, *supra* note 9, at 936).

1. US Supreme Court and Class Arbitration

The development of class arbitrations in the United States can be traced to the 1980s, when corporations started including arbitration agreements in their standard forms of contracts, as a mechanism to avoid class actions in the judicial context and force potential class plaintiffs to individually resolve their disputes. This was a clear attempt to limit the number of claims as well as the financial exposure of the companies.³⁶ As this situation was certainly abusive, US courts began to compel arbitrations on a class basis, allowing a party to bring a claim on behalf of a number of claimants (usually consumers) similarly situated, against the same defendant and based on identical arbitration agreements.³⁷ Domestic courts and arbitrators “began ordering parties into class arbitration, with procedures reflecting the individual preferences and concerns of different arbitral tribunals and state courts.”³⁸

However, class arbitration only became popular in 2003 after the US Supreme Court decision in *Green Tree Financial Corp. v. Bazzle*.³⁹ The Court explained that it was for the arbitrator to decide whether class arbitration was allowed or not,⁴⁰ that is to say “whether an arbitration agreement permitted class arbitration was an issue that arbitrators, not courts, were to decide.”⁴¹ Additionally, *Bazzle* ruled that class arbitration could be available even if the arbitration agreement was silent about when class arbitration was implicitly contemplated by the parties.⁴² The commented decision led to the creation of special class arbitration rules by two well-known arbitral institutions: (i) the Supplementary Rules for Class Arbitrations of the American Arbitration Association (“AAA”); and (ii) the Judicial Arbitration and Mediation Services (“JAMS”)⁴³ Class Actions

36. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 497.

37. Born & Salas, *supra* note 5, at 21-22.

38. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 498.

39. 539 U.S. 444 (2003).

40. Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 430-31 (2013).

41. Born & Salas, *supra* note 5, at 22.

42. Born, *supra* note 3.

43. JAMS Inc. (formerly known as Judicial Arbitration and Mediation Service Inc.).

Procedures.⁴⁴ The importance of the *Green Tree* decision for the development of class arbitration has been illustrated as follows:

While there is evidence to suggest that class arbitration has been in existence in the U.S. since at least the early 1980s, the device gained significant traction across the United States only in 2003, when the United States Supreme Court implicitly approved the procedure in *Green Tree Financial Corp. v. Bazzle*.⁴⁵

In 2010, the US Supreme Court took a different approach to class arbitration in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*⁴⁶ The context of this case was that the arbitrators had concluded that class arbitration was permissible even though the parties had agreed that the arbitration agreement was silent as to the availability of such a procedure. After granting certiorari, the US Supreme Court analyzed whether imposing class arbitration was consistent with the Federal Arbitration Act (“FAA”),⁴⁷ deciding that the arbitrators exceeded their authority by allowing class arbitration because “the arbitrators could not have interpreted the parties’ contract to allow class arbitration” when they had accepted that the arbitration clause was silent in this regard.⁴⁸ In other words, where an arbitration agreement is undoubtedly silent about class arbitration, that procedure shall not be permissible because there are no contractual grounds for concluding that the parties agreed to arbitrate on a class-wide basis.⁴⁹ Finally, while some commentators consider that the US Supreme Court reversed the *Bazzle* ruling that the arbitrators should determine whether the parties had consented to class arbitration,⁵⁰ others have argued that the decision only narrowed the possibility to conclude that the parties contemplated class arbitration, but that such determination “remains one for the arbitral tribunal to make in the first

44. Rachael Kent & Marik String, *Availability of Class Arbitration Under US Law*, in 18 ICCA CONGRESS SERIES, 853, 856 (2015).

45. Schafner & Pasalic, *supra* note 6, at 2. Or as stated by another author: “Through a quick analysis of the USA’s experience, it is possible to see that in the wake of *Bazzle v. Green Tree*, in 2003, hundreds of class arbitrations were administered before the main Arbitration Centres, such as AAA and JAMS.” Romulo Greff Mariani, *Class Arbitrations in Brazil?*. KLUWER ARB. BLOG (May 14, 2014), <http://kluwerarbitrationblog.com/2014/05/14/class-arbitrations-in-brazil/>.

46. 559 U.S. 662 (2010).

47. Kent & String, *supra* note 44, at 859.

48. *Id.*

49. *Id.*

50. Born, *supra* note 3.

instance.”⁵¹ Subsequently in 2011, in *AT&T Mobility LLC v. Concepción*, the US Supreme Court addressed the validity of class arbitration waivers.⁵² The case involved an arbitration arising from a federal court action brought by consumers against the manufacturer of mobile phones, where the standard form contract provided for arbitration but prohibited class proceedings.⁵³ The US Supreme Court ruled that the FAA preempts state laws invalidating class arbitration waivers⁵⁴ freely agreed by the parties.⁵⁵

The impact of the US Supreme Court decisions in *Stolt-Nielsen SA v. AnimalFeeds International Corp* and in *AT&T Mobility LLC v. Concepción* for the development of class arbitrations has been explained as follows:

A decade later [after the decision in *Green Tree Financial Corp. v. Bazzle*], however, the Supreme Court issued two decisions that performed a fairly complete about-face, effectively overruling its earlier holding in *Bazzle* and largely closing the door on class arbitration under the FAA. In *StoltNielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court held that class arbitration was only permissible in contracts that affirmatively provided for this procedure. That holding substantially undercut both the Court's earlier decision in *Bazzle* and the burgeoning growth of class arbitrations. More recently, in *AT&T Mobility LLC v. Concepción*, the Court upheld class waiver provisions in arbitration agreements against unconscionability challenges.⁵⁶

In 2013, the US Supreme Court decided the *Oxford Health Plans LLC v. Sutter* case, where it upheld the decision of an arbitrator stating that class arbitration was permitted by the parties' arbitration clause, even though the arbitration agreement did not expressly allow class arbitration.⁵⁷ The Court differentiated this case from *Stolt-Nielsen*, explaining that on that occasion, the parties accepted that they never reached an agreement on class arbitration, making it impossible for the panel to allow class arbitration based on the

51. George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. OF INT'L L. 1, 45 (2012).

52. 563 U.S. 333 (2011); see Kent & String, *supra* note 44, at 860.

53. PARK, *supra* note 17, at 98.

54. Abigail Rubenstein, *Arbitration Contracts Can Ban Class Actions: High Court*, LAW 360 (Apr. 27, 2011), <http://www.law360.com/articles/241700/arbitration-contracts-can-ban-class-actions-high-court>.

55. Mariani, *supra* note 45.

56. Born & Salas, *supra* note 5, at 22.

57. 133 S.Ct. 2064 (2013); Kent & String, *supra* note 44.

parties' intent. On the contrary, in *Oxford Health* that issue was in dispute and the parties assigned the arbitrator the task of interpreting the arbitration agreement.⁵⁸ Accordingly, the US Supreme Court was deferential to the arbitrator's decision that the agreement permitted class arbitration.⁵⁹ That decision "preserves the role of arbitrators in determining whether the parties have agreed to class arbitration, and ensures that such decisions survive the limited judicial review" allowed by the FAA.⁶⁰ Only ten days after *Oxford Health*, in the *American Express Co. v. Italian Colors Restaurant* case, the US Supreme Court issued another decision revisiting the validity of waiving the possibility of class arbitration proceedings, rejecting the challenge against a class arbitration waiver.⁶¹

Finally, regarding the judicial history of class arbitration in the United States, it is worth noticing that a number of procedures with international scope already exist in that country,⁶² namely, the *Harvard College v. Surgutneftegaz* case involving a defendant based in Russia, the *CBR Enterprises LLC v. Blimpie International Inc.* case concerning several US defendants with international holdings that might be subject to enforcement orders, and the *Bagpeddler.com v. US Bancorp* case also involving non-US claimants as part of a class of more than 400,000 Internet vendors.⁶³

Ultimately, what the future of class arbitration will be in the United States is not clear among the legal community. The US Supreme Court decisions have somehow limited the applicability of

58. *Id.*

59. Ted Howes & Hannah Banks, *A Tale of Two Arbitration Clauses: The Lessons of Oxford Health Plans LLC v. Sutter for the Future of Class-Action Arbitration in the United States*, 30 J. OF INT'L ARB. 727, 732 (2013).

60. Matthew A. Lee & Lucas Bento, *Class Arbitration In The United States Survives Another Battle, But Will It Survive The War?*, KLUWER ARB. BLOG (June 21, 2013), <http://kluwarbitrationblog.com/2013/06/21/class-arbitration-in-the-united-states-survives-another-battle-but-will-it-survive-the-war/>.

61. Kent & String, *supra* note 44.

62. Lea Haber Kuck & Gregory A. Litt, *International Class Arbitration*, in *WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* 711 (Paul G. Karlsgodt ed., 2012), <https://www.skadden.com/sites/default/files/publications/Chapter%2030%20%20International%20Class%20Arbitration.pdf>.

63. S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. OF INT'L L. 4, 5 (2008) [hereinafter *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*]; *Surgutneftegaz v. President and Fellows of Harv. Coll.*, No. 04 Civ. 6069, 2007 WL 3019234 (S.D.N.Y. 2007); *CBR Enter., LLC v. Blimpie Int'l, Inc.* (Am. Arbitration Ass'n, Apr. 19, 2006); *Bagpeddler.com v. U.S. Bancorp*, Case No. 11 181 0032204 (Am. Arbitration Ass'n, May 4, 2007).

class arbitration. Some have even argued that the FAA should be construed as not allowing class arbitration at all.⁶⁴

2. Institutional Procedures on Class Arbitrations: The AAA and JAMS

As stated before, the US Supreme Court ruling in *Green Tree Financial Corp. v. Bazzle* lead institutions such as AAA and JAMS to create special class arbitration rules.⁶⁵ In 2004, the AAA issued a plan explaining that it would administer class arbitrations according to Supplementary Rules for Class Arbitration if the arbitration agreement is silent with respect to class claims but specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with the AAA Rules.⁶⁶ The AAA procedure adapts the requirements of class actions to the nature of traditional arbitration, including special decisions regarding the applicability of class arbitrations under the arbitration clause, the suitability for the arbitration to proceed as class arbitration and the practice of notices to the potential members of the class, among several other issues. Rule 3 of the Supplementary Rules for Class Arbitrations establishes that “[u]pon appointment, the arbitrator shall 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.”⁶⁷ The decision is known as the Clause Construction Award.⁶⁸ Following the Clause Construction Award, the arbitrator shall stay all proceedings “for a period of at least thirty days to permit any party to move a court of competent jurisdiction to confirm or to vacate” the decision.⁶⁹ Once all parties inform in writing that they are not seeking judicial review of such award or the time period expires, “the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award.”⁷⁰

65. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

66. HANOTIAU, *supra* note 2, at 277.

67. *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N, INC. (2011), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf[hereinafter *Supplementary Rules for Class Arbitrations of the AAA*].

68. HANOTIAU, *supra* note 2, at 277.

69. *Supplementary Rules for Class Arbitrations of the AAA*, *supra* note 67.

70. HANOTIAU, *supra* note 2, at 277.

In accordance with Rule 4 of the said norms, if the arbitrator considers that

the arbitration clause permits the arbitration to proceed as a class arbitration . . . or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. . . . In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described.⁷¹

According to Rule 5, that determination has to “be set forth in a reasoned, partial final award,” known as the “Class Determination Award.” The same rule establishes that the arbitrator “shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award.”⁷² If all parties inform the arbitrator in writing that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award.

According to Rule 6 of the commented norms, “the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances.” That decision is called “Notice of Class Determination,” and “shall be given to all members who can be identified through reasonable effort.”⁷³ Rule 8 regulates issues related to settlements, voluntary dismissals and compromise. Regarding confidentiality, Rule 10 establishes that the “presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations,” making public all class arbitration hearings and filings. Moreover, the AAA maintains on its web site a “Class Arbitration Docket of arbitrations filed as class arbitrations,” providing some information related to the proceeding.⁷⁴

71. *Supplementary Rules for Class Arbitrations of the AAA*, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.*

The JAMS Class Actions Procedures is similar to the AAA Supplementary Rules for Class Arbitrations and provides a further attempt to adapt the practice of judicial class actions to the special features of arbitration.⁷⁵ Similar to the AAA procedure, under the JAMS rules, the arbitrator has to determine whether the arbitration is allowed to proceed as a class action.⁷⁶ As stated, the arbitrator “shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class” and “shall set forth his or her determination with respect to the matter of clause construction in a partial final award subject to immediate court review.”⁷⁷

The main difference between the JAMS and the AAA rules is that the AAA rules “mandat[e] that an arbitrator write separate awards embodying the arbitrator’s decisions on clause construction and class certification and then wait after each award for a period of at least thirty days to permit any party to apply to a court to confirm or to vacate the award,” while the JAMS procedure leaves the arbitrator “to decide whether to embody his or her decisions on clause construction and class certification in partial final awards subject to immediate judicial review.”⁷⁸ Another relevant difference is that the rules adopted by JAMS do not contain an explicit provision regarding the confidentiality of the class arbitration proceeding. The applicability of these domestic proceedings is limited. As a matter of fact, it has been noted that the AAA and the JAMS class arbitration rules are only applicable to domestic class arbitrations. These rules are not available for international class arbitration proceedings.⁷⁹

B. *Situation in Countries Other than the United States*

Numerous civil and common law jurisdictions in Europe and America have adopted or are considering adopting mechanisms of collective redress for group injuries under their domestic regulations.⁸⁰ In recent years various European countries have established specific regulations in their legal systems to “allow a

75. Nater-Bass, *supra* note 21.

76. *Id.*

77. *JAMS Class Actions*, JAMS, 2 (May 1, 2009), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

78. HANOTIAU, *supra* note 2, at 279.

79. Nater-Bass, *supra* note 21.

80. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 500.

group of plaintiffs to litigate similar claims in one action.”⁸¹ For instance, in Sweden the so-called group actions are admissible since 2003 under the Group Proceedings Act. This norm considers an opt-in mechanism, as “group actions may be asserted by any class member or specially appointed organization where the action is based on circumstances that are common or similar to the claims of the members of the group and where the applicant is in a financial position to pursue the claims.”⁸² In an empirical research conducted in 2008, a professor concluded that although it was too soon to adequately analyze the impacts of the commented law, no information showed that the fears of business were justified.⁸³

Another example is the United Kingdom, where group litigations regarding claims giving rise to common issues of fact or law have been allowed since 2000. Courts in the UK may issue a group litigation order “establishing a register on which the relevant claims will be entered and specifying which court will manage the claims.”⁸⁴ Subsequently, additional claimants may opt-in by filing an individual claim and existing parties are entitled to opt-out, as the final decision is binding only regarding those registered.⁸⁵ Other countries that have adopted rules allowing groups of plaintiffs to litigate similar claims in the same proceeding are Denmark, Norway, Finland, Germany, Spain, and Italy.⁸⁶

In addition to the United States, class arbitrations have been developing in other parts of the Americas. The evidence shows one case in Colombia as well as court decisions in other countries, such as Canada.⁸⁷ Under the Colombian case, *Valencia v. Bancolombia*, a tribunal in Bogotá faced a class action initiated by shareholders due to the merger of two financial institutions.⁸⁸ The claimants argued that class actions in Colombia were subject to the exclusive jurisdiction of the domestic courts, but the Colombian Supreme Court rejected that

81. Nater-Bass, *supra* note 21.

82. *Id.* (citing GROUP PROCEEDING ACT §§ 4-6).

83. See Per Henrik Lindblom, *Global Class Actions: National Report: Group Litigation in Sweden, Update Paper Sections 2.5 and 3*, 20 (2008), http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20-08.pdf.

84. Nater-Bass, *supra* note 21.

85. *Id.*

86. *Id.*

87. Haber Kuck & Litt, *supra* note 62.

88. *Valencia (Colombia) v. Bancolombia (Colombia)*, (Apr. 24, 2003) - Arbitral Tribunal from the Bogotá Chamber of Commerce, digest by Eduardo Zuleta for Institute of Transnational Arbitration (“ITA”).

argument on the grounds that the arbitration agreement (contained in the by-laws of one of the financial institutions) did not limit the types of claims that could be submitted to arbitration, and accordingly, it also included class arbitration. Although the Colombian Supreme Court did not go as far as affirming that class arbitrations are broadly permitted in Colombia, it allowed the arbitrators to decide whether “the existence of an arbitration agreement in a common shareholder agreement could give rise to a collective claim.”⁸⁹

Canada has also dealt with class arbitrations. The Canadian experience is a clear reflection of the way domestic regulations influence the development of class arbitration, as the courts have struggled with the letter and purpose of the legislation regarding both class relief and the availability of arbitration. As explained, to some extent the outcome depends “on whether the courts decide that ‘the right at issue is . . . a right to sue on a class-wide basis before the courts’ or whether ‘the right conferred by class action legislation is simply a right to proceed on a class-wide basis,’ regardless of the venue.”⁹⁰

Commentators from other countries where class arbitrations have not yet been developed are showing openness towards these kinds of procedures as well. For instance, an author stated the following:

Despite the peculiarities of the USA’s experience, if compared to Brazilian law, it suggests that such a discussion is definitely interesting and can lead to solutions for the issues that, at first, seem to make the practice of class arbitration almost impossible. This might indeed be the new frontier for the Brazilian arbitration to explore.⁹¹

Ultimately, other forms of collective redress sharing some similarities with US-style class arbitrations may be observed under the Supplementary Rules for Corporate Law Disputes drafted by the German Institution of Arbitration,⁹² or in the consumer-related Law 231/2008 in Spain.⁹³ Nevertheless, the method of analysis used by

89. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 498.

90. *Id.*

91. Mariani, *supra* note 45.

92. *A European Form of Class Arbitration?*, *supra* note 12.

93. S.I. Strong, *Collective Consumer Arbitration in Spain: A Civil Law Response to US-Style Class Arbitration?*, 30 *J. OF INT’L ARB.* 493, 495-510 (2013) [hereinafter *Collective Consumer Arbitration in Spain*].

Canadian or Colombian courts, as well as in other jurisdictions, demonstrates that the development of class arbitration will not necessarily rely on analogies to the United States approach.⁹⁴

C. *International Framework*

The rules of arbitration of the most renowned arbitral institutions are silent in regards to class arbitration. In many crucial points current regulations—such as the International Chamber of Commerce (“ICC”) Rules of Arbitration or the London Court of International Arbitration (“LCIA”) Rules—cannot serve the purpose of providing an effective framework for international class arbitration proceedings because there are no guidelines governing class certification, class representative, notices, confidentiality or advances for costs, among other issues.⁹⁵ International treaties are equally silent.

As a matter of fact, arbitral tribunals and institutions acting in the field of transnational disputes “have permitted large, consolidated arbitrations, but have not embraced class arbitration.”⁹⁶ In 2005, the ICC even issued a statement taking the position that class action litigation has “adverse consequences for business and consumers, outweighing the perceived benefits to society.”⁹⁷ If this is the opinion of the ICC regarding class action litigation, it is highly likely that the arbitral institution might not support international class arbitrations.

Several problems may arise because of the lack of an appropriate regulatory regime. Delays, challenges and the potential unenforceability of class arbitration awards would negatively affect the development of class arbitration within the field of international commercial arbitration.⁹⁸ However, some type of collective relief has been observed in the field of international investment arbitration, for instance, in an International Centre for Settlement of Investment Disputes (“ICSID”) case filed by more than 190,000 Italian parties against Argentina.⁹⁹ As explained in the *Abaclat v. Argentine Republic* ICSID award, “collective proceedings emerged where they

94. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 498.

95. Nater-Bass, *supra* note 21.

96. Haber Kuck & Litt, *supra* note 62.

97. Nater-Bass, *supra* note 21.

98. *Id.*

99. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 495.

constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law.”¹⁰⁰ The *Abaclat* decision acknowledged that each individual claimant consented to ICSID arbitration and was fully identified, differentiating the proceedings from US-style class actions in which a representative “initiates a proceeding in the name of a class composed of an undetermined number of unidentified claimants” and concluding that the case seemed “to be a sort of a hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of claimants involved.”¹⁰¹ Another mass arbitration was conducted under the 1994 Energy Charter Treaty by the shareholders of a Russian oil company.¹⁰²

V. *CHALLENGES OF INTERNATIONAL CLASS ARBITRATION*

International class arbitration must address significant challenges in order to become a predictable and fair mechanism to resolve transnational business disputes.¹⁰³ This section identifies some of those hazards by classifying them into four different categories: (a) conceptual challenges; (b) issues related to the arbitration agreement; (c) procedural concerns that should be solved; and (d) problems that could appear in the enforcement stage of a class arbitration award.¹⁰⁴

A. *Conceptual Challenges*

1. Representative Relief

The arbitration community has discussed whether representative relief constitutes a neutral procedure providing the parties with an opportunity to be heard,¹⁰⁵ which is expected in any arbitration proceeding. As a matter of fact, one of the most important

100. *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 190 (Aug. 4, 2011).

101. *Id.* at 191.

102. *From Class to Collective: The De-Americanization of Class Actions*, *supra* note 34, at 495.

103. Roman Khodykin, *Class Arbitration: Is There an Appetite for It in Europe?*, LEXOLOGY (May 14, 2015), <http://www.lexology.com/library/detail.aspx?g=45971385-112d-47dd-b6b4-40863e0128ca>

104. Several of the challenges that will be identified in the following lines are interrelated between them, even if classified in different categories.

105. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 266.

requirements for any international commercial arbitration is that both parties must be treated fairly and equally, providing them with the opportunity to argue their positions and present their case.¹⁰⁶ Indeed, Article 18 of the UNCITRAL Model Law—which has been adopted in seventy States in a total of 100 jurisdictions—¹⁰⁷ confirms that the parties shall be treated with equality, giving them a full opportunity to adequately present their case.

Class arbitration raises several challenges in connection with consent and the involvement of the class members in the proceedings. Moreover, it is important to acknowledge that some States with strong regulatory regimes have traditionally taken a position against representative relief because—they claim—US class actions and similar procedures “are an abuse of individual rights.”¹⁰⁸ It would certainly be impracticable that the members of the class should be expected to agree on the appointment of the arbitrators and the applicable procedure, especially in cases where class actions are structured under opting-out mechanisms rather than opting in. As an active involvement from all class members would be inefficient, it is submitted that allowing intermediaries to bring claims for representative relief could solve some of the problems in connection with the appointment of the arbitrator, opt-in versus opt-out, notice requirements or even the *res judicata* effect of class arbitration awards.

2. Privacy and Confidentiality

Confidentiality is an important feature of international commercial arbitration.¹⁰⁹ According to a survey that ranked eleven perceived benefits of international arbitration, confidentiality obtained the third place.¹¹⁰ Meanwhile, a clear majority of in-house counsels

106. Alan Redfern, *The Practical Distinction Between the Burden of Proof and the Taking of Evidence*, in 10 *THE STANDARDS AND BURDEN OF PROOF IN INTERNATIONAL ARBITRATION* 321 (1994).

107. *Status of the UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL (as amended, 2006), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

108. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, *supra* note 13, at 201.

109. WAINCYMER, *supra* note 1, at 103

110. *2013 International Arbitration Survey: Corporate Choices in International Arbitration Industry Perspectives*, PRICEWATERHOUSE COOPERS (2013), <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>.

(eighty-four percent) recognized choosing international arbitration in part because of that characteristic of the procedure.¹¹¹ Class arbitration might pose a problem in this regard, as confidentiality would be undermined due to the need of providing information to the public.¹¹² The fact that class arbitrations are aimed to affect a broad number of parties implies that it “must deviate from strict application of the principles of privacy and confidentiality, at least to some extent.”¹¹³ Indeed, relevant information ought to be disclosed to potential parties, especially if the procedure considers an opt-out mechanism because “the consequences of failing to opt out of a collective proceeding are more burdensome than the consequences of failing to opt in.”¹¹⁴ As the US Supreme Court explained in the *Stolt-Nielsen* case, “the presumption of privacy and confidentiality that applies in many bilateral arbitrations shall not apply in class arbitrations, thus potentially frustrating the parties’ assumptions when they agreed to arbitrate.”¹¹⁵

However, it is important to note that confidentiality is not universally considered an essential or characteristic feature of arbitration.¹¹⁶ Privacy and confidentiality are not deemed an “absolute protection as a matter of national or international law.”¹¹⁷ Moreover, court decisions have suggested that “the principles of privacy and confidentiality can be overcome in situations where there is some public interest at stake.”¹¹⁸

111. *Id.*

112. Nater-Bass, *supra* note 21.

113. *From Class to Collective: The De-Americanization of Class Arbitration*, *supra* note 34, at 514.

114. *Id.* at 513. As explained by the author, the “[f]ailure to opt out leads to the extinguishment of a claim, whereas failure to opt in allows an individual claim to survive, even if the party cannot take advantage of a positive result arising out of the initial proceeding.” *Id.* at n.109.

115. *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010).

116. WAINCYMER, *supra* note 1, at 583.

117. *From Class to Collective: The De-Americanization of Class Arbitration*, *supra* note 34, at 514.

118. *Id.* (citing Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 ARB. INT’L 211, 211–12 (2005); Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 ARB. INT’L 59, 59–60 (2005); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 708–20 (2007).

3. Efficiency and Informality

Concerns have also been raised in connection with the efficiency of class arbitration when compared with judicial class actions, particularly in relation with hearings or notice to class members, all of which will require an important amount of time for the proceeding to be conducted properly. This is not a minor issue, as noted from the words of an author stating that most “arbitration lawyers and users of arbitration services would probably agree that efficiency is a key issue in international arbitration, or that efficiency of arbitration is a key issue.”¹¹⁹ Some have explained that efficiency problems may be easily solved by allowing only the representative together with a class counsel to participate in the proceedings, rather than “each individual party for himself, with his own lawyer.”¹²⁰

In addition, class arbitration faces the challenge of requiring a higher number of formalities,¹²¹ such as those required to give proper notice to the potential members of a class. The concern that class arbitration might jeopardize the informality of the arbitration procedure can be observed in the US Supreme Court decision of *AT&T Mobility v. Concepción*, where the court held that “[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹²² However, as previously explained in this Article, arguments in the sense that international class arbitration includes excessive formalities are “unpersuasive as a means of supporting the claim that class arbitration affects the fundamental nature of arbitration.”¹²³

Besides acknowledging that class arbitration has unique features that should be addressed when organizing the proceeding, it is important to note that informality has not been universally considered an essential or characteristic feature of arbitration.¹²⁴ Moreover, traditional arbitrations are sometimes conducted under a complex frame that can be even more formal than a class arbitration procedure.

119. Veijo Heiskanen, *Key to Efficiency in International Arbitration*, KLUWER ARB. BLOG (May 29, 2015), <http://kluwerarbitrationblog.com/2015/05/29/key-to-efficiency-in-international-arbitration/>.

120. Nater-Bass, *supra* note 21.

121. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 255.

122. Kent & String, *supra* note 44.

123. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 269.

124. WAINCYMER, *supra* note 1, at 583.

As stated, “arbitration is, and has long been, a highly diverse form of dispute resolution, routinely including very formal, very large and very complicated multi-party proceedings.”¹²⁵

B. *Challenges Related to the Arbitration Agreement*

1. Consent and Validity of the Arbitration Agreement

An essential requirement of a valid and effective arbitration proceeding is the existence of an agreement between the parties to submit their disputes to arbitration rather than litigation before domestic courts. Accordingly, the first condition that any class arbitration needs to comply with is showing that the arbitration agreement is valid and enforceable.¹²⁶

The applicable laws at the seat of arbitration will generally have different rules regarding the formal requirements of the arbitration agreement. However, all jurisdictions accept that “only parties that have actually agreed to arbitrate their disputes can be compelled to arbitration proceedings.”¹²⁷ For instance, the French Supreme Court supported the position that “the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties.”¹²⁸ Therefore, the key challenge to class arbitrations does not lie in the formal validity requirements of the arbitration agreement—which might not vary with respect to a traditional arbitration. Rather, it lies in determining whether the class members actually consented to submit their disputes to arbitration and to the particular type of procedure that is class arbitration.¹²⁹ This might be a problem in opt-out systems, where the members of the class “may not have actual notice of the arbitration, and are thus unable to raise their objections to the arbitration clause, but will nevertheless be bound by any award rendered in the arbitration.”¹³⁰

125. Born & Salas, *supra* note 5, at 21.

126. Nater-Bass, *supra* note 21.

127. *Id.* at 681.

128. Christophe Von Krause, *Agreement: The French Supreme Court Confirms that the Validity of an Arbitration Agreement Depends Primarily on the Common Intent of the Parties*, KLUWER ARB. BLOG (Jan. 27, 2010), <http://kluwerarbitrationblog.com/2010/01/27/existence-and-validity-of-an-arbitration-agreement-the-french-supreme-court-confirms-that-the-validity-of-an-arbitration-agreement-depends-primarily-on-the-common-intent-of-the-parties/>.

129. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 252-53.

130. Nater-Bass, *supra* note 21.

2. Who Decides Whether an Arbitration Agreement Allows Class Arbitration?

As previously noted in this Article, the academic community in the United States has different opinions on whether it is for the courts or the arbitrators to decide if a particular arbitration agreement allows class arbitration.¹³¹ The existence of the referred discussion suggests that a similar one could occur in the context of international class arbitrations. In this regard, the better view seems to suggest that arbitrators should make that decision, in line with the principle of *kompetenz-kompetenz*,¹³² which provides that arbitrators have the power to decide on their own jurisdiction.¹³³ Accordingly, it is submitted that they should have the authority to decide whether an arbitration clause allows class arbitration or not. Moreover, this approach is confirmed by the fact that the party resisting class arbitration—at least in US procedures—usually contends that such a mechanism was not contemplated in the arbitration agreement, but generally “do not contest the authority of the arbitral tribunal to make that determination.”¹³⁴

131. *See Should Class Arbitration Be Decided by a Court or an Arbitrator?*, MUNGER, TOLLES & OLSON LLP (2015), <http://www.mto.com/news/headlines/2015/should-class-arbitration-be-decided-by-a-court-or-an-arbitrator>. Another author explains the case of California in the following terms:

Two districts of the California Court of Appeal recently issued significant decisions on arbitration agreements. In a published case, the Fourth Appellate District of the California Court of Appeal held that if the arbitration agreement is silent on whether the agreement allows for class or representative arbitration, then courts should decide the gateway issue of whether class arbitration is allowed. In the second unpublished decision, the Second Appellate District of the California Court of Appeal held that the issue of class arbitration was for the arbitrator to decide.

Spencer C. Skeen & Ameneh K. Ernst, *Who Decides the Issue of Class Arbitration?*, LEXOLOGY (Nov. 24, 2014), <http://www.lexology.com/library/detail.aspx?g=559cd79f-ecdb-4f74-9448-e1e7285165fb>.

132. João Bosco Lee, *Is the Competence-Competence Principle Threatened in Brazil?*, KLUWER ARB. BLOG (Mar. 19, 2014), <http://kluwerarbitrationblog.com/2014/03/19/is-the-competence-competence-principle-threatened-in-brazil/>.

133. Regarding this principle, it has been stated the following: “As a theoretical principle, it is widely accepted to have a dual effect. While its positive effect confers upon an arbitral tribunal the power to rule on its jurisdiction, the negative effect establishes a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions.” Pratyush Panjwani & Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention*, INDIAN J. FOR ARB. L. 1, 1 (2013), <http://ijal.in/sites/default/files/Harshad.pdf>.

134. Bermann, *supra* note 51, at 47.

3. Silent Arbitration Clauses: Do They Prohibit or Authorize Class Arbitrations?

The United States experience shows a potential problem arising from initiating a class action under an arbitration agreement that is silent about class arbitration proceedings. This discussion—whether silent arbitration clauses prohibit or authorize class arbitration—is a highly sensitive challenge for the development of international class arbitration because most arbitration agreements are silent in regards to such type of proceedings. Domestic courts in different jurisdictions might interpret the issue dissimilarly. Although it is possible to submit that the legal community should address the issue with a pro-arbitration approach, so far it is advisable for those interested in allowing class arbitrations to expressly consider that possibility in their arbitration agreements.¹³⁵

4. Are Class Arbitration Waivers Admissible?

The parties could also exclude the possibility of class arbitration in the arbitration agreement. However, these waivers should be analyzed to prevent abuses from companies that intend to avoid class actions by inserting arbitration agreements in their contracts while at the same time excluding any form of class or group arbitration. As a matter of fact, some courts in the United States have overridden class action waivers as violative of substantive rights.¹³⁶ Furthermore, the US Court of Appeals for the First Circuit held that at least regarding antitrust issues, contractual waivers of class action arbitration were unenforceable because they prevented potential claimants from enforcing their rights.¹³⁷ While it is questionable whether the decision of the US Court of Appeals may be transferred to other areas of the law,¹³⁸ it is important to consider that the US Supreme Court already recognized the general validity of class arbitration waivers in the *AT&T Mobility LLC* and the *American Express Co.* cases.¹³⁹

135. Nater-Bass, *supra* note 21.

136. Ramona L. Lampley, *Is Arbitration Under Attack? Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J. L. & PUB. POL'Y 477, 492-500 (2009).

137. Nater-Bass, *supra* note 21.

138. *Id.*

139. Kent & String, *supra* note 44. As concluded by the authors from US Supreme Court decisions: “express waivers of class arbitrations are permissible, even in contracts of adhesion.”

However, the legal community seems to agree that if a corporation tries to impose a clause that would “preclude the use of class actions in any forum,” such a clause is deemed to be “unenforceable by the courts in most cases, either on the basis of the unconscionability theory, or because it contravenes the terms, legislative history or purpose of a specific statute.”¹⁴⁰

5. Arbitrability of the Dispute

Most international treaties and regulations allow States to determine whether a dispute is arbitrable or not; in other words, to decide if “specific classes of disputes are barred from arbitration.”¹⁴¹ The issue of arbitrability is aimed to examine whether specific claims are capable of settlement by arbitration or if they must be decided by a domestic court under the laws of the seat of arbitration or where the enforcement of the award is being sought.¹⁴²

Article II(1) of the New York Convention establishes that contracting States shall recognize an arbitration agreement “concerning a subject matter capable of settlement by arbitration,”¹⁴³ while Article V(2)(a) of the same convention provides that recognition and enforcement of an arbitral award may be refused if the “subject matter of the difference is not capable of settlement.”¹⁴⁴ On the other hand, Article 1(5) of the UNCITRAL Model Law leaves matters of arbitrability to the decision of each jurisdiction, as States take different views on the subject and may “fill in the arbitrability provision” as they deem appropriate.¹⁴⁵

Accordingly, the development of international arbitration as a mechanism to resolve class disputes faces the challenge of not being supported under the applicable laws, as domestic regulations are fully capable of limiting the scope of class arbitration to certain substantive matters or declaring that class arbitrations are non-arbitrable at all. As explained by an author addressing the validity of the arbitration agreement in class actions: “Another requirement of substantive

140. HANOTIAU, *supra* note 2, at 270.

141. Laurence Shore, *Defining Arbitrability: The United States vs. the Rest of the World*, N.Y. L. J. (June 15, 2009), <http://www.gibsondunn.com/publications/documents/shore-definingarbitrability.pdf> (referring to the concept of “arbitrability” outside the United States).

142. *Id.*

143. *Id.*

144. *Id.*

145. Stavros L. Brekoulakis, John Ribeiro & Laurence Shore, *UNCITRAL Model Law*, in *CONCISE INTERNATIONAL ARBITRATION* 836, 842 (Loukas A. Mistelis ed., 2d ed. 2015).

validity of the arbitration agreement that may create obstacles for class arbitrations is arbitrability. Applicable provisions limiting the scope of potential arbitrations may cause problems as well.”¹⁴⁶

Generally, it is submitted that any doubt on the scope of arbitrable issues should be resolved in favor of arbitration.¹⁴⁷ For instance, in Switzerland, it is contested whether a dispute regarding consumer law is arbitrable and also whether state courts have exclusive jurisdiction over such types of disputes.¹⁴⁸ Such enquiries should be analyzed with a pro-arbitration approach.

C. *Procedural Challenges*

1. Due Process and Public Policy Concerns

Due process is an essential element in international arbitration, and its importance for the arbitral process has been widely acknowledged by the legal community.¹⁴⁹ Class arbitration raises several due process concerns in connection with the appointment of arbitrators and the notice requirements, among others. To address these issues some authors have proposed that the proceedings should be subject to court supervision for guaranteeing that the parties’ procedural rights are adequately taken into consideration. This approach reflects some lack of confidence in arbitration, especially because arbitrators and arbitral institutions are adequately prepared to address any procedural challenge to ensure a reliable and efficient proceeding.¹⁵⁰

Experienced arbitrators are well prepared to guarantee the protection of the parties’ due process rights in all types of arbitrations. Accordingly, the role of domestic courts in class arbitrations should be limited in accordance with the principle of minimum intervention, just like in any other international arbitration conducted on an individual basis. As stated, it is “beyond doubt that class actions are complex procedures but arbitrations in general tend to be more and more intricate without this increasing complexity raising

146. Nater-Bass, *supra* note 21, at 25.

147. HANOTIAU, *supra* note 2, at 266.

148. Nater-Bass, *supra* note 21, at 25.

149. See Matti S. Kurkela, *Due Process in Arbitration: A Finnish Perspective*, 21 J. OF INT’L ARB. 221, 224 (2004).

150. Nater-Bass, *supra* note 21, at 27-28.

insurmountable problems for arbitration experts.”¹⁵¹ This is why some authors have explained that “no particular due process concerns against class action arbitration should be raised and no particular measures such as the possibility for court intervention/supervision should be taken.”¹⁵²

2. Selection of Arbitrators

The possibility to select the arbitrator has long been considered a fundamental right in international arbitration.¹⁵³ Originally, many multiparty proceedings failed to materialize when there were more than two parties to the dispute, as the rules for appointing arbitrators only contemplated bilateral proceedings in which each party was entitled to select its own arbitrator, with the chair to be nominated by the two party appointments or by the arbitral institution. As a result, many domestic laws and international rules now provide that a neutral institution or domestic court “can appoint the entire tribunal in cases where the parties cannot themselves agree on individual panelists or selection procedures.”¹⁵⁴

The appointment can certainly be difficult in class arbitrations or other multi-party proceedings where there are several persons involved as claimants or defendants.¹⁵⁵ Unnamed class members “do not officially become parties to the proceeding unless and until they have each been given the option of joining the action.”¹⁵⁶ The challenge is to accept that absent class members do not have the possibility to select their arbitrator as usually the class representatives make the appointment on behalf of all the members and, similarly, that the defendant is deprived of the possibility to appoint its arbitrator for each individual dispute.¹⁵⁷

However, it is submitted that class arbitration protects the parties’ fundamental right to select the arbitrators, at least in opt-in procedures. Unnamed class members who choose to participate in the proceedings will somehow ratify the choice of arbitrators made by the class representative, and potential class members who choose not to

151. HANOTIAU, *supra* note 2, at 276.

152. Nater-Bass, *supra* note 21, at 28.

153. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 231.

154. *Id.* at 232.

155. *A European Form of Class Arbitration?*, *supra* note 12, at 59.

156. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 233.

157. Nater-Bass, *supra* note 21, at 27.

join the proceedings will not be affected by the award and consequently by the appointment.¹⁵⁸ The fact that a respondent would not be able to select an arbitrator for each individual dispute does not change this conclusion, as it can be argued that by consenting to class arbitration the respondent also accepted the dispute to be resolved in a unique proceeding before a single arbitral tribunal.

3. Notice Requirements and Certification Process: Opt-in or Opt-out?

As a decision rendered in a class arbitration is binding on all members of the class,¹⁵⁹ international class arbitration may be structured under an opt-in or an opt-out system. The opt-in system is applied whenever the party “must affirmatively signal that he or she wishes to join the class,” while the opt-out approach refers to the mechanism in which “the party is assumed to be part of the class unless he or she indicates otherwise.”¹⁶⁰ As collective proceedings are designed to resolve mass disputes, it is important that the effectiveness of the award is not hindered by arguments about who is bound by the proceeding.¹⁶¹

One of the challenges facing class arbitration is that the class members might not be aware that a claim is pending or that they are allowed to opt-out of the class action and file a claim individually. In an attempt to address these concerns, the tribunal should generally order “the best notice that is practicable under the circumstances,” which may include “individual notice to all identifiable members” and/or “the publication or broadcasting of notices in newspapers, on television or via other forms of media.”¹⁶² Certainly, general standards for the notification of absent class members should be adopted for international class arbitrations.¹⁶³

Another unresolved issue is determining if the arbitrator or the domestic court should decide whether and to what extent a class should be certified. While there are rulings holding that the arbitrator should decide and others explaining that such determination lies

158. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 234-35.

159. Nater-Bass, *supra* note 21, at 5.

160. *Does Class Arbitration “Change the Nature” of Arbitration?*, *supra* note 8, at 233.

161. *A European Form of Class Arbitration?*, *supra* note 12, at 63.

162. FED. R. CIV. P. (23)(c)(2); Nater-Bass, *supra* note 21, at 5.

163. Haber Kuck & Litt, *supra* note 62, at 730.

within the courts competence,¹⁶⁴ it is submitted that the arbitral tribunal has broad powers to conduct the proceedings and that domestic courts should only assist the arbitrator when needed.

4. Early Resolution

Some types of domestic class actions provide defendants with the opportunity to file a motion for dismissing a defective class action. Although such motions might be more unusual in the field of arbitration, an efficient international class arbitration procedure should be structured considering the potential importance of dispositive motions to avoid creating a time- and cost-consuming process for adjudicating massive disputes when the claims are clearly flawed.¹⁶⁵

5. Cost and Fees

It is logical that the fees of the arbitrators will likely be higher in class arbitrations than in other international arbitration disputes and proportionate to the additional commitment of time. For instance, the arbitrators would be required to address additional procedural issues not present in traditional arbitration, such as whether the arbitration agreement allows class arbitration, certification of the class and notice requirements. The process can also involve disputes between various claimants and the claimants with their counsels, objections to settlement, among several other issues at each stage of the proceedings. Similarly, the lawyers' fees might require an adjustment, especially in those countries where contingency is not allowed.¹⁶⁶ If a decision on costs is favorable to the defendant, collecting the fees will be a challenge as well.¹⁶⁷

The discussion regarding costs and fees illustrates how useful the involvement of institutional arbitration centers could be for developing international class arbitration procedures. For instance, the arbitral institution could determine a system to fix the fees of the arbitrators. Such a system would not have to leave such decisions to the discretion of arbitrators.

164. Nater-Bass, *supra* note 21, at 17-18.

165. Haber Kuck & Litt, *supra* note 62, at 731.

166. *Id.*

167. See Dana H. Freyer & Gregory Litt, *Desirability of International Class Arbitration*, 2 CONTEMP. ISSUES IN INT'L ARB. AND MEDIATION: THE FORDHAM PAPERS, 171, 179-180 (2008), https://www.skadden.com/sites/default/files/publications/Publications2487_0.pdf.

6. Scope of Court Assistance: Hybrid Procedure?

While international commercial arbitration has been characterized as an autonomous dispute resolution mechanism in which the arbitral tribunal is empowered to render a final decision, class arbitration has showed a higher involvement from domestic courts than traditional arbitration, mainly as a result of practical concerns. Certification of the class members and notice requirements are some of the issues over which domestic courts might exercise supervisory powers in order to guarantee the procedural rights of all class members.¹⁶⁸

It is submitted that arbitrators are as well-equipped as courts to protect the integrity of the arbitral process in international class arbitrations. This is why domestic courts should show deference and a favorable attitude towards the powers of the arbitral tribunal to conduct class arbitrations, just as in any traditional international arbitration proceeding.¹⁶⁹ Applying the principle of minimum intervention and neutrality, domestic courts should assist arbitral tribunals only if needed, acknowledging their powers and the independence of the arbitral system.

7. Pleading Standards

Pleading requirements are usually not required in arbitration. Accordingly, some authors have explained that class arbitration faces the challenge of determining whether these or other similar standards should be inserted into class arbitration as a protection for defendants. An example is provided by the 1995 US Private Securities Litigation Reform Act, which sets heightened requirements for federal securities class actions pleadings.¹⁷⁰ It is submitted that no additional pleading requirements should be applied to international class arbitrations.

8. Discovery

An essential concern regarding international class arbitration is determining how the arbitral process will address discovery. As in securities or product liability, claimants might have little or no relevant knowledge other than what is publicly available, which makes discovery extremely important to the claimants and also puts

168. *Does Class Arbitration "Change the Nature" of Arbitration?*, *supra* note 8, at 257.

169. HANOTIAU, *supra* note 2, at 276.

170. Freyer & Litt, *supra* note 167, at 173.

an uneven burden on the defendant to settle. It has been explained that if discovery is “sharply limited, as it often is in international arbitration, this could substantially alter the balance of power in class actions.”¹⁷¹

D. *Enforcement Challenges*

1. Challenges to International Enforcement

International arbitration rules and principles recognize that arbitral awards are binding and that the parties must comply with the decision without any delay. While there is a high level of voluntary compliance,¹⁷² recognition and enforcement before domestic courts is still necessary in several cases.¹⁷³

Enforcement raises a number of concerns with respect to awards issued in class arbitration proceedings. As provided in Article V(1)(a) of the New York Convention, recognition and enforcement of class arbitration awards could be refused when “the award was rendered on the basis of an invalid arbitration agreement.”¹⁷⁴ Similarly, Article V(1)(b) of the New York Convention could be used by a non-present class member under an opt-out system to claim that it was not given proper notice. Furthermore, Articles V(1)(d) and V(2)(a), which refer to the appointment of the arbitrators, the procedure, and arbitrability, could also be brought against the recognition and enforcement of class arbitration awards.¹⁷⁵

The most likely objection to recognition and enforcement of international class awards will be based on notions of *individual procedural rights*, a central principle of constitutional law in many jurisdictions.¹⁷⁶ As explained by an author, “state courts, particularly those in civil-law countries, will have to consider whether and to what extent they should permit foreign conceptions of rights to be enforced in arbitration” because even where a jurisdiction “domestically prohibits the use of representative actions in its own courts, that may

171. *Id.* at 179.

172. *International Arbitration: Corporate Attitudes and Practices*, PRICEWATERHOUSE COOPERS 1, 8 (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf>.

173. REDFERN & HUNTER, *supra* note 3, at 624.

174. Nater-Bass, *supra* note 21, at 29.

175. *Id.* at 29-30.

176. *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, *supra* note 63, at 7.

not be an adequate reason rising to the level of international public policy for the state's courts to refuse enforcement on a wholesale basis."¹⁷⁷ Accordingly, all these issues should be addressed by the parties and the arbitral tribunal from the outset of the proceedings, taking into consideration that arbitrators have a *duty to render an enforceable award* according to "national laws, institutional rules, ethical codes and scholarly writing."¹⁷⁸ It is submitted that domestic courts should follow a firm pro-arbitration policy, generally permitting the enforcement of international class awards.

2. Risk of Review

International class arbitration faces several obstacles in jurisdictions providing the parties with the possibility to review the class arbitration award before domestic courts. The basis for review might open the door to unsatisfied class members or defendants challenging the award, for instance, on the grounds of an alleged violation of the right to be heard (especially in opt-out systems) or based on the fact that the arbitrators lacked jurisdiction under the relevant arbitration agreement (especially regarding validity and arbitrability issues).¹⁷⁹ For instance, the Swiss Private International Law Statute allows the parties to challenge the award based on allegations of lack of jurisdiction and for violation of the right to be heard as well.¹⁸⁰ An arbitration award could be appealed under German law for similar reasons.¹⁸¹

3. Punitive Damages

Punitive damages are those awarded not only to compensate a party, but also with the purpose of punishing and deterring the wrongdoer as well as others from pursuing similar conduct. Although typically present in class actions, these last two functions—punishment and deterrence—could be a problem in the international arena because they are not accepted in all jurisdictions, especially in civil law countries. This might lead domestic courts to refuse recognition and

177. Freyer & Litt, *supra* note 167.

178. Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205, 215 (2005).

179. Nater-Bass, *supra* note 21, at 28-29.

180. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LOI DE DIP] [Swiss Private International Law Statute] Dec. 18, 1987, SR 291.435.1, arts. 190(2)(b), (d) (Switz.).

181. Nater-Bass, *supra* note 21, at 29.

enforcement of the class award under the public policy exception established in Article V(2) of the New York Convention.¹⁸²

Some authors have argued that awarding punitive damages should not necessarily be considered as a valid ground for refusing enforcement. Accordingly, domestic courts “should construe the public policy defense in a very constrained manner,” only applying it in extreme instances.¹⁸³ This is the only way that international arbitration may function as an efficient mechanism to resolve transnational business disputes. They explain that otherwise “the entire regime of international arbitration that is largely based on the certainty of enforcement created by the New York Convention [would] be severely undermined.”¹⁸⁴

4. Settlement, Voluntary Dismissals, and Compromise

Class action proceedings bring several challenges of administration and fairness in connection with potential settlements. This is why US courts have incorporated the duty to analyze the fairness, reasonableness and adequacy of settlements as an element of due process.¹⁸⁵ Arbitral tribunals will certainly have a similar duty, although it has been explained that arbitrators should be prepared—just as judges—to anticipate “poorly equipped class representatives and attorneys, inadequate class settlement provisions, and overly generous fee stipulations.”¹⁸⁶

Similarly, the administration of settlements requires “compiling and maintaining mailing lists of class members and providing adequate notice, collecting and evaluating individual proofs of claim from each class member who wishes to benefit from the settlement, and managing the investment and distribution of settlement funds.”¹⁸⁷ As explained, arbitral tribunals “ordinarily become *functus officio* after they render an award, whereas courts are available to resolve disputes about class award distribution long after a judgment is

182. See Jessica Jia Fei, *Awards of Punitive Damages*, JONES DAY 28-29 (2003), http://www.jonesday.com/files/Publication/75b937bb-b41b-4971-b7a0-49c4bff2ec21/Presentation/PublicationAttachment/905d1ac6-50ba-4695-87c0-718ef9772f4a/JiaFei_Punitive_Damages.pdf (last visited Nov. 24, 2015).

183. *Id.* at 34.

184. *Id.*

185. Freyer & Litt, *supra* note 167, at 178.

186. *Id.* at 179.

187. Haber Kuck & Litt, *supra* note 62, at 731.

rendered.”¹⁸⁸ It is submitted that these issues should be addressed from the outset of the proceedings. However, arbitrators are well-equipped to assume a preeminent role in international class arbitrations, with the appropriate assistance of arbitral institutions and specialized companies that have professionalized the settlement administration industry.

CONCLUSION

The future of international class arbitration remains uncertain. However, it is expected that these procedures will become more popular in the coming years as the use of different mechanisms for collective redress has increased in several jurisdictions and some class action disputes have already been observed in a transnational level. Accordingly, the international arbitration community should implement a uniform regulatory framework addressing the particular challenges of international class arbitration.

It is submitted that an international class arbitration procedure should be crafted to guarantee an efficient and informal process, recognizing the full authority of the arbitral tribunal, and with minimum intervention from domestic courts. An express agreement to arbitrate should always be required. While there should not be a problem when the parties explicitly consent to class arbitrations, the arbitral tribunal should be deemed empowered to decide whether a class action is admissible when the arbitration agreement is silent. Similarly, the arbitrators should have the authority to determine whether class arbitration waivers are valid and effective under the applicable law.

Allowing representative relief under an opt-in or opt-out system is of the essence. However, at the moment, opt-out procedures seem to present too many problems for international class arbitrations. Opt-in systems guarantee that all participants are made aware of and have fully consented to class arbitration, considerably reducing the risks of class member claims that they had no possibility of participating in selecting the arbitrators, presenting their case, or being actively involved in the proceedings. Unnamed class members choosing to participate in the arbitration will be deemed to have ratified the choice of arbitrators made by the class representative as well as the subsequent positions and actions adopted during the course of the

188. Freyer & Litt, *supra* note 167, at 179.

proceeding. Therefore, adopting an opt-in system enhances the chances of enforcing the award.

Bifurcating the proceeding between a class certification stage and the hearing on the merits is also advisable. Certainly an efficient international class arbitration process should also encompass the opportunity to file dispositive motions in order to avoid a time- and cost-consuming process when the claims are clearly defective. Confidentiality in international class arbitrations must also be protected to the extent possible, although it should be acknowledged that disclosing relevant information to potential parties is essential, especially in opt-in systems. Thus, almost certainly some confidential aspects of the dispute shall be disclosed to implement an effective international class arbitration procedure.

The international arbitration community should support the enforcement of class awards under the New York Convention, showing that the presumption of enforceability that is usually granted to international awards also includes these special types of collective proceedings. The arbitrators should carefully consider the applicable law in light of their duty to render an enforceable award, as issues of arbitrability or punitive damages could compromise the effectiveness of the international class arbitration process.

An international class arbitration procedure could be established under soft or hard law provisions. For the moment, arbitral institutions should play a key role by providing arbitration rules specifically dealing with international class arbitrations, because the complexity of these procedures advises that they should be crafted and supervised by highly competent experts. This would offer an opportunity to discuss relevant issues by experts and stakeholders worldwide. If the procedure proves to be suitable for transnational business disputes, most institutional arbitration centers shall join the trend and jurisdictions could implement these procedures under their own domestic laws.

As class arbitration has been criticized by some renowned international institutions and most companies are not supportive of widespread class arbitrations, the international arbitration community should support the development of international class arbitration and show the advantages of adopting specific rules of procedure. International class arbitration increases the efficiency and reduces the costs of the proceeding, as companies can avoid having to arbitrate numerous single disputes and claimants are offered the opportunity to

bring a claim when the individual amounts do not justify initiating an individual proceeding. In addition, international class arbitration secures access to justice, guarantees that all the parties are treated equally and prevents different tribunals issuing conflicting decisions when confronted with the same set of facts.

While the international legal community discusses a basis for a common regulation of international class arbitrations, it is submitted that any regulatory framework should aim to secure an efficient and fair procedure inclined towards rendering an enforceable award and acknowledging the procedural rights of all the parties involved. Ultimately, as international commercial arbitration is a system praised for offering a predictable and efficient mechanism to resolve transnational business disputes, the legal community should promptly implement a specific set of rules for international class arbitrations that avoids uncertainties and addresses its special features.

