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Sumario

Due process and public policy in the international enforcement of class arbitration awards[1]

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1. Introduction

Courts, commentators and commercial actors have long touted arbitration as the best means of resolving international commercial disputes, largely because arbitration – with its many international and regional treaties on enforcement of awards – is a much more efficient and reliable means of recovering against a foreign entity than litigation is. However, the international arbitral regime will soon face a new challenge as class arbitration – a US-initiated dispute resolution mechanism that has been in existence domestically since the early 1980s[2] – becomes increasingly international. Indeed, a number of international class arbitrations seated in the United States already exist. For example, *Harvard College v JSC Surgutneftegaz* involves a defendant based in the Russian Federation; *CBR Enterprises, LLC v Blimpie International, Inc* involves several US defendants with significant international holdings that could be subject to international enforcement orders; and *Bagpeddler.com v US Bancorp* could include non-US plaintiffs as part of its class of up to 400,000 internet vendors.[3]

Although international class arbitration raises many issues,[4] this Article focuses on fundamental conceptual objections that can and will likely be raised at the enforcement stage. The two most compelling arguments against international enforcement of a foreign class award are likely to be based on due process and public policy. Although they will not be discussed separately as such, these two arguments could also be made in many countries in a motion to set aside a class award, particularly if the nation in question has, like Spain, modelled its arbitration laws on the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law").[5]

These two areas of concern – due process and public policy – indicate that the debate about the legitimacy of international class arbitration will take place at a fundamental level, possibly requiring a radical reconceptualization of both (1) acceptable procedure in international arbitration and (2) the nature of individual rights in arbitration. First, due process concerns reflect the manner in which class arbitration

1 This paper was short listed for the 1st International Arbitration Prize, organised by the International Centre for Arbitration, Mediation and Negotiation (CIAMEN) of the University Institute for European Studies of the CEU San Pablo University (Madrid).

2 *See* Keating v Superior Court, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp v Keating, 465 U.S. 1 (1984). Class arbitration received the implicit approval of the US Supreme Court in *Green Tree Financial Corp v Bazzle,* 539 U.S. 444 (2003).

3 See http://www.adr.org/sp.asp?id=25562 (searching under party name).

4 For example, class arbitration might be considered analogous to consolidated proceedings. See Strong (forthcoming).

5 See, e.g., UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I, and A/61/17, annex I (21 June 1985, amended 7 July 2006), art. 34(2)(a)(ii), 34(2)(b)(ii); 2003 Arbitration Act (Spain), art. 41; Cairns, p. 592.

challenges established norms about the arbitral process itself. International commercial arbitration developed primarily as a means of enforcing bilateral contracts, and the vast majority of its policies and procedures reflect that tradition. Even multiparty (non-class) arbitration is typically viewed through the lens of a two-party procedure. Class arbitrations challenge these norms due to both the size of the classes (which can include hundreds or even hundreds of thousands of parties) and their representative nature.

Although further details of class procedure will be discussed below, at its core, class arbitration is a representative (class) action gone private. Class actions (which currently exist in a number of different legal systems) have been defined as "a procedural joinder device that permits one or more persons to initiate a lawsuit as a representative of all those similarly situated."[6] By analogy, therefore, a class arbitration involves "an arbitrator selected and paid by the parties, rather than an elected or appointed judge, [who] presides over a class action" and thus "decides whether to certify a class, determines the form and manner of notice to class members, resolves all issues of law and fact, and enters an award that might bind many hundreds or thousands of class members."[7] A class arbitration can result when a group of individuals (1) suffers the same or similar injury and (2) has the same or similar arbitration agreement with the defendant(s). Several named claimants then bring an action, on behalf of themselves and others who are similarly situated, for damages and/or for injunctive or declaratory relief.

Class arbitrations are an accepted procedure within the United States, with over 120 such actions pending in front of one arbitration provider – the American Arbitration Association ("AAA") – as of early 2007.[8] They have also been seen in other countries, both common and civil law, as discussed below. Although many class arbitrations will – like class actions – involve only domestic parties, the realities of the global economy mean that international class disputes are on the rise. Insurance companies, financial institutions and manufacturers are only some of the types of corporate defendants who will find themselves subject to demands for class arbitration.

As class arbitrations develop internationally, questions will arise about how these proceedings should be structured. Disputes about the arbitral procedure will be raised in international enforcement proceedings as due process objections, as discussed below.

The second major objection to enforcement – public policy – reflects the tension between how different countries conceptualize individual rights. Unlike common law countries (which often permit representative actions, albeit to varying degrees), civil law jurisdictions tend to limit or prohibit such actions based on concerns about individual rights. These concerns are twofold. First, plaintiffs have the right to choose the time and manner of bringing a cause of action. Second, defendants have the right to mount a full defence of all legal and factual claims brought against them. Representative actions – in court or in arbitration – jeopardize both these principles. Under civil law jurisprudence, absent class members are not always considered to be effectively choosing to exercise their right to a cause of action. Similarly, defendants are considered unable to defend themselves adequately against the generalized claims of absent class members.

Class arbitration is currently set up to reflect the common law bias in favour of representative proceedings. As class arbitration becomes more international, 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.

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6 Weston, p. 1726.

7 Weidemaier, p. 70.

8 *Ibid.*

All of these concepts are discussed in more detail below, and the Article proceeds as follows. Section II discusses the nature of representative actions, identifying the rationales for such actions and describing how different conceptions of rights affect the form, shape and availability of a nation's representative actions. This discussion begins to identify potential arguments for and against the enforcement of class arbitral awards based on public policy, since the public policies regarding representative actions in national courts may also be used to oppose or enforce international class awards.

Section III discusses how class arbitrations typically proceed. The focus here is on the procedural rules recently published by two arbitration providers, the AAA and JAMS, since those rules will likely form the procedural foundation of class arbitration in the coming years. This section also discusses the extent to which the arbitral rules mirror the class action provisions of the US Federal Rules of Civil Procedure. These similarities are important because the Federal Rules are known to comply with US notions of due process, and due process will be a likely area of concern in international enforcement proceedings.

Section IV brings class arbitration into the international realm. The section begins with a discussion of class arbitrations in countries other than United States, which gives some guidance on the acceptability of the procedure beyond US borders. The section then describes the standards which must be met to lodge a successful objection to international enforcement of an award based on due process and public policy concerns. Because the United Nations' 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[9] is the primary means by which international awards are enforced, this Article focuses on the due process and public policy provisions in the New York Convention as illustrative of the type of arguments that will arise in an enforcement proceeding.

Section V concludes the Article with a discussion of the future of international class arbitrations as a matter of procedure and enforcement. The section also provides recommendations on how parties and arbitrators might structure class arbitrations to maximize the likelihood of an internationally enforceable award.

2. Representative and Collective Actions Around the World

Although the United States class action is the perhaps the best known means of providing representative relief to large groups of plaintiffs, most countries have considered their own forms of representative or collective relief. For example, the European Directive on Injunctions for the Protection of Consumers' Interests ("European Directive")[10] required all Member States of the European Union to assign rights of action to "qualified entities," defined either as organizations (including consumer associations) or independent public bodies, that allowed those entities to file a group litigation on behalf of a specifically defined group of people who had been injured by the defendant's conduct. However, these actions are not analogous to US-style class actions, since the European Directive explicitly noted that "collective interests mean interests which do not include the cumulation of interests of individuals which have been harmed by an infringement."[11]

In fact, the issue of group rights and injuries is becoming increasingly urgent throughout the world.[12] The common objectives of any class or representative action include principled predictability; proportionality of

9 330 U.N.T.S. 3.

10 Council Directive 98/27, 1998 O.J. (L 166) 51.

11 *Ibid.* (preserving, without prejudice, "individual actions brought by individuals who have been harmed by an infringement").

12 In the last 30 years, there have been four international congresses dedicated to comparative studies of class actions, with the most recent in July 2000. Gidi, pp. 324 n.22, 402.

treatment (all class members receive some good, potentially smaller than if they had proceeded individually, in return for increased efficiency); access to justice; judicial economy; and balancing judicial activism and personal autonomy. Though individual compensation may be a goal, participants in group litigation may also seek to bring about social or legal change.[13]

Because the US has the largest known number of currently pending class arbitrations, and the only published class arbitration rules (the Supplementary Rules on Class Arbitration adopted by the AAA on October 8, 2003 ("AAA Supplementary Rules")[14] and the Class Action Procedures adopted by JAMS in February 2005 ("JAMS Class Arbitration Rules")[15] are based on the US Federal Rules of Civil Procedure, it will be useful to consider the public policies behind US class actions to anticipate the arguments that will be made in motions to enforce international class awards. Although Hans Smit has criticized the decision to mirror the US Federal Rules as "an uninspired and superficial effort to introduce into arbitration a form of action that, on the whole, has not worked properly in litigation and . . . will exacerbate the problems it has encountered in court litigation,"[16] the choice was likely made because the US Federal Rules are a known commodity that would ease the transition to a new form of action. For example, Carole Buckner has said that "[t]he scope of due process in class action litigation defines the possible scope of due process protection that arbitration providers should consider providing in class arbitration."[17]

Although space limitations prohibit a detailed comparative analysis, it is useful to know how other systems – particularly civil law systems – view representative actions, since objections to international class arbitration are likely to arise from outside the United States. Therefore, a short discussion of other systems' views of representative actions follows the section on US class actions.

2.1. Class Actions in US Federal Courts

Class actions are both praised and excoriated in the United States. Some consider such actions a lawyer-driven form of "legalized blackmail" while others have characterized them as a "powerful and pervasive instrument[] of social change."[18] US class actions can arise in a variety of contexts, though "the majority . . . are damages class actions against business defendants."[19] Banks, insurance companies and manufacturers are typical defendants in class actions, and claimants can seek injunctive relief in addition to (or instead of) money damages. Although class actions began as a domestic procedural device, they have become increasingly transnational.

US Federal Judge Jack Weinstein, one of the foremost experts on class actions in the United States, has identified the following advantages to class actions, many of which also apply to class arbitration:

1. They reduce duplication of discovery, motion practice, and pretrial procedures.

2. They allow a single judge to familiarize himself or herself with the legal and factual issues.

3. They provide consistency of results for all the injured and for the defendants.

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13 Mulheron, pp. 47-63; Taruffo, pp. 407-09.

14 *See* http://www.adr.org/sp.asp?id=21936 [hereinafter "AAA Supplementary Rules"].

15 *See* http://www.jamsadr.com/rules/class_action.asp [hereinafter "JAMS Class Arbitration Rules"].

16 Smit, p. 211.

17 Buckner 2, p. 195.

18 Weston, p. 1726.

19 Buckner 1, p. 301.

4. They enhance the possibility of a single action resolving the entire problem, hence preventing the need for repetitive litigation of similar issues. Those who opt out of the class (as is often possible) will generally represent but a small percentage of possible claimants.

5. They permit plaintiffs' attorneys to generate enough capital to conduct the litigation on a playing field level for both sides.[20]

6. They enhance the possibility of a global settlement, which can provide reasonable relief for prospective claimants while limiting the costs for both parties and providing closure to the dispute for defendants.

7. They provide the possibility of a single fair punitive damage amount instead of repetitive and overlapping punishment. . . .

8. They give the court power to control legal fees which may otherwise be much greater than warranted.

9. They allow a single appellate panel to review the case.

10. Perhaps most important, they permit recoveries for small claims by those who may not even know they were injured and almost certainly would not bother to sue even if they had known. By, in theory, requiring a defendant to pay the entire social cost of its delicts they should avoid much of the reason for high punitive damages.[21]

Julian Lew has identified similar benefits to multiparty arbitration (albeit outside the class context), suggesting multiparty arbitration should proceed when it would encourage procedural economy; avoid inconsistent awards; increase fairness by facilitating fact-finding and presenting legal and factual arguments; address any confidentiality concerns; and uphold the equal ability to choose arbitrators.[22] Class actions (or arbitrations) also allow defendants to bring complex disputes to a close relatively quickly, thus allowing defendants to "get on with their affairs" and avoid large transactional costs.[23]

However, there are also a number of disadvantages associated with class actions. For example:

1. The judge may lack familiarity with the law if more than one jurisdiction's substantive law must be applied.

2. They increase the complexity of the litigation.

3. They place a significant burden on individual courts, since they are time consuming, containing more factual and legal issues than any individual case.

4. They remove local issues from their normal venue. Forum shopping problems are compounded.

5. They supersede the local jury's role and replace it with a jury that may be unfamiliar with local conditions.

6. They often require the application of many different substantive laws, some of which are still in a state of uncertainty.

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20 US class actions typically proceed on a contingency fee basis that proves very lucrative for plaintiffs' counsel should plaintiffs prevail. Few, if any, class actions are filed without a contingency fee arrangement in place.

21 Weinstein, pp. 172-74.

22 Lew, et al., ¶ 16-92.

23 Weinstein, pp. 174-75.

7. They attenuate the usual individual client-attorney relationship, creating new ethical pressures.

8. They are often in significant tension with federalism assumptions. One elected state county judge may bind the nation.

9. They may force defendants to settle because of the threat of huge awards.

10. Finally, there is the fundamental problem that the Supreme Court has been dealing with – protecting the rights of those class members with little knowledge of the suit, virtually no ability to monitor their attorneys, and potential conflicts with other members of the class.[24]

Although most of the advantages of class actions apply equally to class arbitration, the disadvantages of judicial class actions do not track class arbitration quite as closely, due to the privatized nature of arbitration. For example, the courts are not clogged by large cases, since arbitrators work independently, nor are there choice of forum, choice of law or jury issues, since the parties have chosen arbitration precisely to avoid such concerns. The only real concerns involve ethical issues; pressure to settle; and, most importantly, due process issues. Thus class arbitrations would seem at least as socially beneficial, and possibly more so, than class actions.

However, class actions force judges play a unique and difficult role. The Federal Judicial Center, which is the national research and training agency for US judges, notes that judges not only must "anticipate[] the consequences of poorly equipped class representatives or attorneys, inadequate class settlement provisions, and overly generous fee stipulations," they also "cannot rely on adversaries to shape the issues that [the judge] must resolve in the class context."[25] In particular, judges need assistance from their peers "to determine when class representatives are 'adequate' and whether a settlement's terms are 'fair' to the class as a whole, 'reasonable' in relation to the class's legitimate claims, and 'adequate' to redress class members' actual losses."[26] Judges in class actions can also expect to "determine[] when and how to decide class certification motions" and "review[] notice plans and notices to the class to ensure the best notice practicable."[27]

Indeed, the reason why the court plays this unusually active role in administering class actions is "to ensure fairness and to protect the due process rights of those class members not participating in the case. The elaborate procedural steps in such representative litigation – fairness oversight, notice, adequacy of representation and judicial involvement in class certification – reflect important constitutional due process protections."[28] In this context, due process "protection includes, at a minimum: notice, a meaningful opportunity to participate, and adequate representation. Rule 23 provisions reflect these constitutional requirements, and the court's role is critical in safeguarding the due process rights of absent class members."[29] Of course, notice and the opportunity to participate have also received heightened protection in international arbitration.

Interestingly, a number of the procedures that the Federal Judicial Center has found to be a "best practice" in class actions – for example, using objectors to provide additional information to the court, either through written submissions or through attendance at a class settlement fairness hearing – may not be permitted in an arbitral setting due to issues about confidentiality.[30] Furthermore, US courts handling class actions

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24 *Ibid.*, pp. 172-74.

25 Rothstein & Willging, p. 2.

26 *Ibid.*

27 *Ibid.*

28 Buckner 2, pp. 188-89.

29 Weston, p. 1728.

30 *Compare* Rothstein & Willging, pp. 11, 21 *with* Lew, et al., ¶¶ 16-75 (noting issues concerning confidentiality in multiparty arbitrations), 24-99 (discussing the centrality of confidentiality to arbitration).

often work in tandem with other government actors, either on regulatory issues or when coordinating class actions that are proceeding in different fora, something which may be difficult in arbitration. Finally, the Federal Judicial Center recognizes that some judges must deal with '[t]ruly global settlements [that] will include class members whose language is not English and who may not be citizens of an English-speaking country."[31] In these situations, effective notice becomes even more difficult. The problem is compounded by the fact that notice and adequacy of representation typically serve as proxy for due process, allowing the court to bind absent class members in a court-administered class action. The relationship between US class action procedures and due process will be discussed in more detail in Section III.B.2 below.

2.2. Representative Actions Outside the US

Despite the predominance of the US class action procedure in discussions regarding representative actions, a growing number of jurisdictions have considered implementing their own versions of collective and representative actions.[32] However, these other models do not necessarily resemble that found in the US Indeed, many states – particularly civil law systems – have deep-seated concerns about the US model due to fundamental conceptual differences about how individual rights operate.[33] Indeed, Antonio Gidi has said that if "major legal innovation" is to occur in the area of representative actions, "civil law jurists must first arrive at a consensus to change the 'science'" upon which the civil law is built.[34]

Although a detailed jurisprudential discussion is outside the scope of this Article, the differences in mindset are pronounced. First and foremost, civil law jurisdictions emphasize the individual nature of legal claims, a notion that would be violated by a representative mechanism that disposes of the rights of absent class members. This is because civil law nations interpret a class action – even with an opt-out provision – as an infringement of a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action. Because the right to an individual cause of action is inviolate and cannot be overcome by arguments of social or judicial efficiency, civil law nations resist a wide rule allowing representative actions.

Furthermore, to the extent that some civil law systems have instituted group or collective actions, they have typically not done so to redress individual harm; instead, such causes of action typically address general commercial practices deemed to be illegal. This approach not only maintains respect for individual rights – since the right at issue is a collective or social right – it also reflects the civil law's preference for having the legislature, rather than the judiciary, constitute the means of addressing mass injuries.

In addition to the jurisprudential concerns, there are pragmatic issues. Lawyers in civil law countries are suspicious of any procedure that requires a great deal of judicial intervention, since judges typically do not wield that kind of power in civil law systems.[35] Furthermore, many civil law lawyers are suspicious of US-style class actions because they believe (mistakenly) that certain litigation practices that they see as highly problematic – including contingency fees, punitive damages and massive discovery – are a necessary part of the class action mechanism.

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31 Rothstein & Willging, p. 19.

32 *See generally* Chase, et al., pp. 390-434 (describing collective or representative actions in different jurisdictions).

33 Baumgartner 1, pp. 320-21 (basing the Swiss emphasis on individual causes of action on nineteenth century German Pandectism and Kantian concepts of free will); Cappalli & Consolo, p. 264 (noting US class actions are legally "inconceivable" in the civilian mindset); Gidi, pp. 344-45 (discussing the concept of "subjective right" that is prevalent in the civil law and identifying Hans Kelsen as one of the few writers in English who has discussed "subjective rights").

34 Gidi, p. 346.

35 However, international arbitration permits a great deal of procedural flexibility, so an activist arbitrator in a class arbitration might be more acceptable to a civil law lawyer than an activist judge.

Thus, it is not surprising that representative actions are found primarily in common law jurisdictions, with countries such as Canada[36] and Australia[37] recognising a broad form of such actions, similar to that found in the United States. England permits representative relief, but on a limited basis.[38] Instead, England has adopted a group litigation procedure in compliance with the European Directive, and therefore is closer to the continental system in its manner of addressing collective harms than it is to common law models.[39] Other than the Canadian civil law province of Quebec, few civil law jurisdictions permit representative relief, although Brazil[40] and Colombia[41] have apparently taken strides in that direction. Switzerland permits an association action (similar to that mandated by the European Directive) at civil law, though the right to relief is expanded somewhat for administrative law matters, allowing some individuals to initiate a representative proceeding.[42]

3. Class Arbitrations

3.1. Roots of Class Arbitration

Procedurally, most class arbitrations will be similar to judicial class proceedings in the state in which the arbitration is seated, though US procedural approaches could come to predominate, due to both the prevalence of class arbitrations seated in the US and the US bias of the class arbitration rules promulgated by the AAA and JAMS, as discussed below. Despite the anticipated similarities to court proceedings, class arbitrations are nevertheless subject to arbitration's unique policy and procedural distinctions. For example, arbitration is typically considered a purely contractual construct first and foremost, a dispute resolution mechanism that has no form or validity outside the four corners of the parties' arbitration agreement. Although arbitration has its supporters, it also has critics, who claim it is "an inferior system of justice, structure without due process, rules of evidence, accountability of judgment and rules of law."[43] Any determinations made in an arbitration are "not intended to serve the public interest, but only that of the parties who have paid for the arbitration,"[44] which could arguably conflict with the espoused public interest aspects of judicial class actions.

Although many of the issues concerning international arbitration have been refined over the years, international class arbitration creates a whole new set of concerns. Public policy-based objections to international class arbitration will likely reflect concerns about the propriety of representative actions, as outlined in the preceding section. Due process-based objections to international class arbitration will likely focus on the procedures adopted by the arbitrator.

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36 Ontario Class Proceedings Act, 1992, SO, ch. 6 (1992); British Columbia Class Proceedings Act, R SBC, ch. 21 (1996); Saskatchewan Class Actions Act, SS 2001, ch. 12.01; Manitoba Class Proceedings Act, CCSM c. C130; Newfoundland and Labrador Class Actions Act, SN 2001 c. 18.1; Alberta Class Proceedings Act, SA 2003, c. G 16.5; Quebec Code of Civil Procedure, Art. 999-1051; *Western Canadian Shopping Centres Inc v Dutton*, (2001), 201 DLR (4th) 385, [2001] SCR 534.

37 Federal Court of Australia Act 1976, pt. IVA.

38 English Civil Procedure Rules 19.6.

39 English Civil Procedure Rules 19.10.

40 Gidi, pp. 312-13 (discussing the Public Civil Action Act (1985) and Consumer Code).

41 *See* Valencia (Colombia) v Bancolombia (Colombia), 24 April 2003 – Arbitral Tribunal from the Bogotá Chamber of Commerce, digest by Eduardo Zuleta for Institute for Transnational Arbitration (ITA), *available on kluwerarbitration.com* (referencing legislation regarding class actions in Colombia).

42 Baumgartner 1, p. 332 (discussing the civil law *Verbandsklage* and the administrative law *Verbandsbeschwerde*).

43 Stroh Container Co v Delphi Indus., Inc, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

44 Carbonneau, p. 1958.

Arguments have been made that class arbitrations improperly infringe upon the due process rights of unnamed, non-participating class members.[45] Certainly class arbitrations raise the same kinds of heightened due process concerns as class actions do. However, the issue is exacerbated in domestic arbitrations because arbitrators are not considered "state actors," which means that parties in arbitration are not entitled to the full panoply of constitutional due process protections. By agreeing to participate in an arbitration, parties are often considered to have waived some of their due process rights.[46] This does not appear to be a universal rule: for example, the Spanish Constitutional Court has held that certain fundamental rights – particularly the procedural right of defence – that are guaranteed by the constitution are inviolate, even in arbitration.[47] However, the "state actor" problem does not arise in international arbitration, because article V(1)(b) of the New York Convention explicitly protects certain key rights by allowing objections to enforcement based on violations of due process. The question, therefore, is how the special due process concerns associated with class arbitration measure up to the due process requirements protected under the New York Convention.

3.2. Procedures in Class Arbitration

3.2.1. Introduction

"No statute, state or federal, prescribes the rules or procedures for class arbitrations to ensure that the process is uniform, fair, or efficient. Moreover, whether any level of court involvement is required – or even permissible – is an open question."[48] It is clear under US law that the arbitrator determines whether class arbitration is appropriate, as well as the proper procedure for a class arbitration, which suggests the courts either will not, need not or should not participate in the class arbitration proceedings, absent an invitation by the arbitrator.[49] Furthermore, international arbitrators have long held the power (and indeed, the duty) to establish the necessary procedures and determine any procedural issues. Typically, arbitrators respect party autonomy to the greatest degree possible, not only because arbitration is considered a contractual construct but also because enforcement of an international arbitral award may be denied if the procedure is not in accordance with the agreement of the parties.[50] Thus, an arbitrator may shape procedure however he or she wishes, subject only to permissible party autonomy and certain fundamental due process concerns, as explained further below.

When considering due process in class arbitration, two areas of inquiry arise: the extent to which the courts will be involved in the process and the shape of the process itself. Non-class arbitration considers the second question to some degree, since certain due process standards must be met even if the entire panoply of constitutional protections do not apply. However, the first question is unique to class arbitrations and relates to the court's possible role in protecting the rights of absent class members in class arbitrations.

In the twenty years of class arbitration prior to the Supreme Court's decision legitimizing class arbitration in *Green Tree Financial Corp v Bazzle,*[51] at least two different models arose regarding the court's role in a class

45 Weston, pp. 1719-20.

46 Fuentes v Shevin, 407 U.S. 67, 94-96 (1972); Jaksic, p. 165 (arguing that some fundamental procedural rights may not be waived); O'Hare, p. 185 (noting international arbitrations in Hong Kong are not entitled to the "whole panoply of constitutional due process requirements that govern domestic litigation"); Samuel, pp. 416-19, 426-47 (2004) (regarding application of article 6(1) of the European Convention on Human Rights); Tweeddale, pp. 67-68 (same). *But see Choice v Option One Mortgage*, No. Civ. A. 02-6626, 2003 WL 22097455, at *8 (E.D. Pa. 2003) (stating parties to arbitration do not necessarily consent to forgo due process rights – arbitration "merely provides an alternative forum for the adjudication of such rights.").

47 Cairns, p. 593 (citing Sentencia Tribunal Constitucional de 15 de abril de 1986 (RTC 1986, 43)).

48 Weston, p. 1723.

49 Green Tree Financial Corp v Bazzle, 539 U.S. 444, 453-54 (2003).

50 New York Convention, 330 U.N.T.S. 3., art. V(1)(d).

51 539 U.S. 444 (2003).

arbitration. First, some state courts – primarily California, Pennsylvania and, in at least one instance, South Carolina – promoted a hybrid method, wherein the court retained responsibility for certification, notice and fairness approvals of the final arbitral award, while the arbitrator retained responsibility for evaluating the merits of the case.[52] In this model, "courts remain[ed] involved in the class action-related aspects of the arbitration, to assure that due process protection of absent class members [was] provided."[53] Courts adopting the hybrid approach seemed to take the view that class arbitration is qualitatively different than bilateral arbitration, at least with respect to due process, and that arbitrators were "ill-equipped to assure due process."[54]

However, "[t]he concept that the court is an effective watchdog overseeing due process under the hybrid model of class arbitration sounds nice; but it may be more a vestige of the historic mistrust of arbitration than practical reality."[55] Indeed, sceptics have argued that "[a] system that requires continuous judicial intervention, even for the well-intentioned purpose of providing due process, runs afoul of the parties' agreement and therefore violates" state arbitration statutes.[56] Hybrid models thus could lead to non-enforcement under the New York Convention to the extent they contravene the parties' agreed procedure.[57] Furthermore, the additional cost and delay associated with a back-and-forth system of split competence militates against the use of a hybrid model.

The second pre-*Bazzle* model of class arbitration was basically a "court-free" approach, wherein the arbitrator conducted all aspects of the proceedings, including certification, notice and fairness approvals.[58] The Supreme Court decision in *Bazzle* seems to contemplate the future use of the "court-free" method, although Maureen Weston has argued that "practical and policy concerns compel thought on the wisdom of entrusting arbitrators with protecting all class members, considering varying levels of arbitral expertise, a complicated procedural process, and the lack of judicial supervision or opportunity for meaningful appeal."[59]

Thus, even prior to *Bazzle* there was no consensus on the procedure that must be adopted in a class arbitration. Since then, the issue of court involvement in class arbitration has shifted from a question to be decided by the courts to one to be decided by the parties as a result of the innovations of two US-based arbitration providers: the AAA and JAMS. Since *Bazzle* was handed down, both organizations have published class arbitration rules that address not only what procedures the arbitrators are to follow, but what involvement courts are to have in the process.

3.2.2. Class arbitration – institutional rules

Both the AAA and JAMS based their class arbitration rules on Rule 23 of the Federal Rules of Civil Procedure, leading at least one commentator to claim that the two rule sets "fail to engage with the possibilities of class arbitration" and take an "impoverished view" of the procedure by not taking advantage of the possibility of individually tailored procedures and remedies that are the hallmark of arbitration.[60] However, because "[t]he scope of due process in class action litigation defines the possible scope of due process protection

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52 *See, e.g.*, Blue Cross of Cal. v Superior Court, 78 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1998); Dickler v Shearson Lehman Hutton, Inc, 596 A.2d 860, 8766 (Pa. Super. Ct. 1991); Bazzle v Green Tree Financial Corp, 569 S.E. 2d 349, 360-61 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

53 Buckner 2, p. 226.

54 *Ibid.*, p. 230.

55 *Ibid.*, p. 238.

56 *Ibid.*, p. 236.

57 *See* New York Convention, 330 U.N.T.S. 3., art. V(1)(d).

58 Green Tree Financial Corp v Bazzle, 569 S.E. 2d 349, 352-54 (S.C. 2002), *vacated*, 539 U.S. 444 (2003) (describing the process used in one of two class arbitrations at issue in the case).

59 Weston, p. 1740.

60 Weidemaier, pp. 94-95.

that arbitration providers should consider providing in class arbitration," the AAA and JAMS were well advised to base their procedures on the established rules of procedure, at least initially, to minimize any potential violations of critical due process protections.[61] Both sets of rules create a semi-hybrid approach to class arbitration, where "judicial involvement is subject to the discretion . . . of the parties."[62] Although neither the AAA nor JAMS claims to ensure that the constitutional or substantive rights of parties proceeding under their rules will be upheld, the AAA's policy statement on class arbitrations states that, "[i]n fidelity to [the AAA's] Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols."[63] The JAMS Class Arbitration Rules do not currently include a similar statement.

Rather than address the two rule sets in *toto*, the following discussion focuses on those aspects of the rules that could result in objections to international enforcement.

a. Certification of the class, class counsel and class representatives

In judicial class actions, the court's approval or denial of a request to certify a class under Rule 23(c)(1) is critical, since that decision often determines whether the litigation proceeds. Either way, the judge's decision imparts serious pressure – if certification is denied, plaintiffs may abandon their numerous, but individually small, claims; conversely, if certification is approved, the defendant(s) will be inclined to settle, no matter what the merits of the case may be, in order to avoid the heavy transactional costs of defending a class action.

Furthermore, when deciding to certify a class, the court must consider the adequacy of both class counsel and the lead (named) plaintiff(s). Indeed, adequacy of representation has been identified as "[t]he touchstone of due process in the class action setting."[64] It has been termed thusly because absent class members remain in the class (and thus will be bound to the terms of the judgment of settlement) unless they opt out, so the court's determination about adequacy of representation (of both counsel and the lead plaintiff) "is a proxy for absent members' due process."[65]

Because certification of a judicial class is one of the areas where due process concerns are at their highest, it should come as no surprise that certification is a complex process under the AAA Supplementary Rules. AAA policy is to administer class arbitrations only when "the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules" or "the agreement is silent with respect to class claims, consolidation or joinder of claims."[66] Even so, there may be instances where one of the parties does not want to proceed with a class arbitration and would dispute certification of a class, regardless of the party's views on how well the class boundaries were drawn. The AAA Supplementary Rules address this issue by requiring arbitrators to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class" and then issue a written "Clause Construction Award" which may be immediately brought to "a court of competent jurisdiction" to be confirmed or vacated.[67] Proceedings are automatically stayed 30 days to allow a court

61 Buckner 2, p. 195.

62 *Ibid.*, pp. 239, 247.

63 *See* http://www.adr.org/Classarbitrationpolicy. The AAA has promulgated due process protocols in the area of health care, consumer disputes and employment. *See* http://www.adr.org/about (search "due process protocol").

64 Buckner 2, pp. 197-98.

65 Weston, p. 1729.

66 See http://www.adr.org/Classarbitrationpolicy. The AAA will also administer a class arbitration upon court order, such as when a court has ruled a waiver provision invalid. Id.

67 AAA Supplementary Rules, rule 3.

action to be brought, unless the parties advise the arbitrator that they do not intend to seek judicial review.[68] If court proceedings are initiated, the arbitrator may stay some or all of the arbitration, pending the outcome of the judicial action.[69] This allows any arguments about contract construction to proceed before the parties and arbitrator have incurred the cost and effort involved in defining an appropriate class.

Once the initial threshold has been passed, the arbitrator considers whether class arbitration is proper under the circumstances of the case. Here, the drafters of the AAA Supplementary Rules copied the language of Rule 23(a) of the Federal Rule of Civil Procedure almost verbatim, with the exception of AAA Supplementary Rule 4(a)(6), which requires the arbitrator to find that "each class member has entered into an agreement containing an arbitration clause which is substantially similar" to that signed by other class members, including the class representative.

Once the arbitrator decides whether the arbitration should proceed as a class, the arbitrator issues the "Class Determination Award" as a "reasoned, partial final award."[70] If class arbitration is to proceed, the Class Determination Award "shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses."[71] The Class Determination Award also must include the proposed "Notice of Class Determination" and describe the mode of delivery to class members. Furthermore, the Class Determination Award describes "when and how members of the class may be excluded."[72]

Regardless of whether the class is confirmed or denied, the Class Determination Award may be immediately brought to "a court of competent jurisdiction" to be confirmed or vacated.[73] Proceedings are automatically stayed 30 days to allow the court to hear the claim, unless the parties advise the arbitrator that they do not intend to seek judicial review. Again, if proceedings are brought, the arbitrator may stay the arbitration pending the court's decision. This approach echoes the US Federal Rules of Civil Procedure, which explicitly provide for an interlocutory appeal of the class certification question, based on the recognition that (non)certification can sound the "death knell" of a cause of action.[74] Thus, the possibility of a "second look" on the propriety of the process and the decision exists in both a judicial class action and a class arbitration.

These procedures create a hybrid approach similar to that used prior to *Bazzle*, wherein the court retained responsibility for certification, notice and fairness approvals of the final award, while the arbitrator retained responsibility for evaluating the merits of the case. Although the AAA Supplementary Rules entitle the arbitrator to make the initial class determinations, allowing the parties to seek immediate judicial review of the partial final awards provides the court with some oversight capacity. Such a procedure might overcome the type of practical and policy concerns that an entirely court-free system might raise concerning the wisdom of entrusting arbitrators with protecting the due process rights of absent class members. However, foreign courts that are already suspicious of legal procedures that dispose of absent members' rights may exhibit heightened concern if courts may only become involved upon the request of a party, since non-named class members will not usually be sophisticated enough to take that step of their own accord.

Certification of a class is a multi-step process under the JAMS Class Arbitration Rules as well. The procedure is virtually identical to that under the AAA Supplementary Rules, except there is no requirement that any of the interim awards be issued, nor is there an explicit period for court review.[75] Thus, the JAMS Class

68 *Ibid.*

69 *Ibid.*, rule 4.

70 *Ibid.*, rule 5.

71 *Ibid.*, rule 5(b).

72 *Ibid.*, rule 5(c).

73 *Ibid.*, rule 5.

74 Fed. R. Civ. P. 23(e); Weston, p. 1730.

75 JAMS Class Arbitration Rules, rules 2-4.

Arbitration Rules have created a very weak hybrid approach. Though parties can likely request written awards on which to base a court proceeding, the arbitrator holds a great deal of discretion concerning these partial final awards and could conceivably refuse the request. Thus, the JAMS model is closer to the type of court-free system that has raised concerns among commentators.

Because the AAA Supplementary Rules and JAMS Class Arbitration Rules track the US Federal Rules of Civil Procedure so closely, they appear to uphold US notions of due process. Certainly the absence of any court involvement does not appear problematic in the US post-*Bazzle*. Nevertheless, the AAA Supplementary Rules has created a useful quasi-hybrid model that accomplishes two things at once. First, it creates a useful record and procedural guideline should court involvement be requested. Second, it minimizes the likelihood of challenge after the hearing, not only because the parties are given the opportunity to object as an interlocutory matter, but because any failure to object at an interim stage could be construed by an enforcing court as a waiver of that particular objection under the New York Convention after the completion of the proceedings.

b. Notice and settlements

Notice is a fundamental element of procedural due process in US class actions, with courts scrutinizing not only the content of the notice, but also the manner of notice.[76] Under actions certified under US Federal Rule 23(b)(3), parties must give the "best notice practicable, including individual notice to all members who can be identified through reasonable effort," whereas under Rule 23(b)(1) or (2), notice is simply permissive or discretionary, in that the court need only "direct appropriate notice to the class."[77] Notice sent by first-class mail to each putative class member, explaining the right to opt out of the litigation, satisfies due process concerns. Notice may be required at different times, such as prior to class certification and prior to settlement.

Although notice is not, by itself, enough to satisfy constitutional concerns, it is central to both domestic and international notions of due process in both litigation and arbitration. Under the AAA Supplementary Rules, the arbitrator shall "direct that class members be provided the best notice practicable under the circumstances."[78] The notice regarding class determination "shall be given to all members who can be identified through reasonable effort."[79] The notice must clearly state the nature of the action; the scope of the class; the class claims, issues, or defences; and various procedural factors, such as appearance through counsel, exclusion and the binding effect of the action; biographical information about class counsel and representatives; and how to communicate with the AAA regarding the arbitration.

Notice not only affects whether a putative class member knows that a class arbitration is proceeding, but also affects that person's ability to opt out (which affects future rights to initiate an individual claim) as well as the ability to participate in the class proceedings themselves. Thus, the notice requirement is closely linked to the opportunity to be heard. While issues regarding opting out and approval of class counsel and class representatives are not often discussed in the arbitral context, since they typically arise as a due process concern in judicial class actions, the international arbitral community has always been highly protective of a party's ability to participate in arbitration proceedings. Furthermore, the notice provisions protect the

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76 *See, e.g.,* Mullane v Central Hanover Bank & Trust Co, 339 U.S. 306, 314 (1950).

77 Actions under Rule (b)(1) and (b)(2) generally do not involve a claim of damages (as actions under Rule 23(b)(3) do) and typically result in compulsory or mandatory class membership. Mulheron, p. 31.

78 AAA Supplementary Rules, rule 6(a).

79 *Ibid.*, rule 5(a).

individual's ability to choose the arbitrator (though that choice in class arbitration would be limited to opting out), which is another right that has been closely guarded in international arbitration.

The AAA Supplementary Rules also require notice regarding settlement, voluntary dismissal or compromise. Again, the notice must "be provided in a reasonable manner to all class members who would be bound" by such a disposition.[80] Notice at this stage also protects important due process rights, since, under the AAA Supplementary Rules, the arbitrator must hold a fairness hearing and can only approve the disposition of a matter "on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."[81] A class member may object to the proposed disposition and the arbitrator may refuse to approve the disposition of the matter unless it allows class members another opportunity to opt out.

Notice requirements under the JAMS Class Arbitration Rules are very similar to those under the AAA Supplementary Rules.[82] Fairness hearings are also required under JAMS Class Arbitration Rule 6(a)(3).

Thus, to the extent that the US Federal Rules of Civil Procedure protect due process, so, too, do the AAA Supplementary Rules and the JAMS Class Arbitration Rules, though the JAMS Class Arbitration Rules do so to a slightly lesser degree than the AAA Supplementary Rules, due to their failure to require reasoned partial awards during the clause construction and class certification phases. However, neither set of class arbitral rules creates procedures that necessarily address civil law concerns about representative actions, though actual notice – combined with a failure to opt out – could arguably be said to reflect a decision by an absent party to exercise his or her individual rights to sue at this time and in this way.

c. Confidentiality

The third area of concern involves confidentiality, one of the long-enunciated benefits of arbitration. However, AAA Supplementary Rule 9(a) explicitly states that class arbitrations shall not be subject to the principle of privacy and confidentiality, although the arbitrator can provide otherwise if he or she deems it appropriate. This shift from accepted norms may be due to concerns about due process. For example, if proceedings were private, some question might arise as to whether non-representative plaintiffs could attend hearings. The AAA Supplementary Rules avoid that problem by stating that "in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings," thus protecting the individual right to be heard in an arbitration.[83] Furthermore, allowing open proceedings permits arbitrators to invite government entities and other potential objectors to any fairness hearings, which complies with the "best practices" in class actions advocated by the Federal Judicial Center.

In addition to reversing the presumption of confidentiality, the AAA Supplementary Rules indicate that the AAA shall maintain a website – similar to the online dockets of many courts[84] as well as the online list of pending and concluded cases maintained by the International Centre for Settlement of Investment Disputes ("ICSID")[85] – containing certain information about the arbitration, including the demand for arbitration, the names of the parties and counsel, a list of the awards made to date and details regarding any scheduled hearings.[86]

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80 *Ibid.*, rule 8(a)(2).

81 *Ibid.*, rule 8(a)(3).

82 JAMS Class Arbitration Rules, rule 4.

83 AAA Supplementary Rules, rule 9(a).

84 *See, e.g.*, http://pacer.psc.uscourts.gov/ (US federal courts); English Civil Procedure Rules 5.4C, 5.4D, Practice Direction 5. *See also* Öberg, *passim*.

85 Available at http://www.worldbank.org/icsid/cases/cases.htm.

86 AAA Supplementary Rules, rule 9(b).

Notably, this is one area where JAMS and the AAA differ. The JAMS Class Arbitration Rules contain no language regarding any deviations from the usual presumption about privacy and confidentiality in arbitration, and JAMS does not provide an online docket of class arbitrations.

Although the AAA Supplementary Rules appear to protect certain due process rights by reversing the common assumption about confidentiality in arbitration, proceedings under these rules could be subject to objections under article V(1)(d) of the New York Convention if open proceedings appear to contravene the parties' agreement about the arbitral procedure. However, any such objection would likely lead to an analysis of the extent to which parties can deviate from explicit arbitral rules, which is beyond the scope of this Article. Furthermore, the arbitrator has the discretion to set aside this aspect of the AAA Supplementary Rules.

The JAMS Class Arbitration Rules appear to avoid this issue by remaining silent on the issue of confidentiality. However, the reverse problem may arise, wherein objectors and non-named parties could object if they are barred from the hearings.

4. Class Arbitration in the International Context

Objections to international enforcement of class awards are virtually assured given how US class actions are viewed abroad. For example, there is evidence that "foreign courts routinely refuse to enforce US judgments, particularly those arising from class litigation." [87] Indeed, practitioners from five European nations went on record with affidavits in *Bersch v Drexel Firestone, Inc*, stating that the courts of their country would not enforce a judgment in a class action suit.[88] Since most class arbitrations will mimic US class actions, at least in the near future, class arbitral awards are likely to be subject to international challenges early on in their development. However, the case for international class arbitration may be assisted by the existence of domestic class arbitrations outside the United States.

4.1. Class Arbitrations Outside the United States

Though rare, there have been reports of class arbitrations outside the United States, albeit in the domestic rather than international realm. First, in *Valencia v Bancolombia*, a tribunal based in Bogotá, Colombia, heard a class suit initiated by shareholders following the merger of two financial entities.[89] Although the claim was initially filed in court, both the civil circuit judge and the District Superior Court held that they had no jurisdiction over the matter, given the existence of an arbitration agreement in the by-laws of one of the financial entities. The plaintiffs argued that class actions in Colombia are subject to the exclusive jurisdiction of the court, but the Supreme Court of Justice rejected that argument on the grounds that the arbitration agreement did not limit the types of claims that could be submitted to arbitration and thus did not exclude class arbitrations as a matter of law. Furthermore, the Supreme Court held that arbitrators have the same duties and powers as a court and thus have the competence to resolve class claims.

The Supreme Court did not go so far as to say that class arbitrations are permitted in Colombia in all circumstances, however. Instead, it stated that:

87 Buschkin, p. 1566.

88 519 F.2d 974, 996 (2d Cir. 1975).

89 Valencia (Colombia) v Bancolombia (Colombia), 24 April 2003 – Arbitral Tribunal from the Bogotá Chamber of Commerce, digest by Eduardo Zuleta for Institute for Transnational Arbitration (ITA), *available on kluwerarbitration.com.*

> Arbitral Tribunals have no jurisdiction in principle to rule upon class actions, since the pertinent decision would involve or affect every individual that finds himself/herself under the same causal link which caused individual damages. . . . However, a different conclusion may arise regarding the shareholders of a Corporation, since these have accepted the inclusion of an arbitration agreement in the bylaws.[90]

The matter was then sent to arbitration so that the tribunal could decide whether the plaintiffs met the threshold requirements (twenty or more people who have suffered damages out of the same cause of action) to proceed as a class. Given the ruling by the Supreme Court, the broad availability of class arbitrations in Colombia appears uncertain, though class proceedings apparently can arise in shareholder actions where arbitration of disputes is contemplated. Furthermore, the decision seems to confirm the civil law suspicion of representative actions that would affect the rights of absent class members except in special cases.

Class arbitrations have also arisen in Canada. *Kanitz v Rogers Cable Inc* involved the interplay between the Ontario Arbitration Act and the Ontario Class Proceedings Act, and arose after the plaintiffs filed a class action in court for breach of contract arising out of the provision of cable and high speed internet services.[91] In this case, the Ontario Superior Court of Justice had to construe a clause providing for arbitration and forbidding class proceedings in light of a claim of unconscionability. The court considered the argument that, if such a clause were upheld, individual plaintiffs would be dissuaded from proceeding in arbitration due to the expense in relation to the prospective award, but found the argument unpersuasive given the lack of evidence showing that plaintiffs had, in fact, been dissuaded from proceeding individually in arbitration. The court was also unpersuaded by the argument that plaintiffs would be more likely to proceed as a class, since, by so doing, they would be protected from adverse costs awards in the case of loss. Furthermore, the plaintiffs claimed that giving effect to the arbitration/no class action clause would defeat the public policies inherent in the Class Proceedings Act. Again, the court found this position not compelling.

Instead, the court focused on the mutuality of the arbitration agreement to hold that there was no unconscionability. Furthermore, the court stated that although the Arbitration Act and the Class Proceedings Act could be said to have competing public policies, there was no reason to give precedence to one piece of legislation over the other. Instead, the court claimed that it was possible to interpret both enactments in a consistent manner by disallowing the class action in court and instead requiring individual arbitrations. However, a type of class arbitration could be permitted under the consolidation provisions contained in section 20(1) of the Arbitration Act. In particular, the court stated:

> Without deciding the point, it would appear that section 20(1) would permit an arbitrator, at the very least, to consolidate a number of arbitrations which raise the same issue. Therefore, it appears at least arguable that if each of the five named representative plaintiffs here chose to seek arbitrations of their claims, an arbitrator might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the plaintiffs that the arbitration clause operates so as to erect an economic wall barring customers of the defendant from effectively seeking relief.[92]

Thus, class arbitrations have not yet reached full maturity in Ontario, but an intermediary step – mass consolidations – appears to have arisen.

However, other provinces in Canada appear open to the concept of class arbitration. For example, the Quebec Court of Appeal noted in *Dell Computer Corp v Union des consommateurs* that, although arbitration was improper in this instance (since the arbitration clause had not been properly brought to the consumers'

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90 *Id.* (translating and quoting Supreme Court Ruling of May 11, 2001 (Jaramillo, J.)).

91 Kanitz (Canada) v Rogers Cable Inc (Canada), 22 April 2002, Ontario Superior Court of Justice, digest by Henri Alvarez for Institute for Transnational Arbitration (ITA), *available on kluwerarbitration.com.*

92 *Id.* ¶ 55.

attention), consumer protection claims could, under some circumstances, be arbitrated.[93] Since that case involved a class action, it would appear that the court was leaving the door open for a class arbitration.

Despite the pro-class arbitration stance of these jurisdictions, there are other indications that some states or arbitrators believe representative actions are improper in international arbitration. For example, a number of claimants came to the Iran-United States Claims Tribunal in 2003 seeking to bring an action "on [their] own behalf and by proxy and representation on behalf of all Iranian citizens."[94] However, the rules of the Tribunal require claimants to "own" their claims, which means that any representative action must fail, since the party bringing it does not have the requisite degree of ownership. As the Tribunal stated, "[b]ecause ownership of a claim is a *sine qua non* of a party's standing in a private claim, and because the Claimants have not pleaded such injury or ownership . . . they have no standing to bring this Claim."[95] Since group actions are not permitted under the Claims Settlement Declaration or tribunal precedent, class arbitrations would appear to be barred in any action in front of the Iran-United States Claims Tribunal. This would also appear to be the case in other disputes brought pursuant to specialized arbitral rules or instruments.[96]

4.2. International Enforcement of Class Arbitral Awards

Obtaining an enforceable award is the ultimate goal of arbitration. Nevertheless, parties to class arbitrations will likely find enforcement under the New York Convention problematic on two grounds: due process and public policy.

4.2.1. Due Process Under the New York Convention

When considering international class awards, one must consider not only the usual notions of international due process, but also the procedures that are required to assure due process in a representative proceeding. Due process in the context of representative proceedings has been said to be a "flexible concept," though it:

> requires 'fundamental fairness.' Courts have construed this provision to require that an individual be given notice and an opportunity for a hearing prior to any deprivation of life, liberty, or property interest. Notice is a fundamental component of due process. In the judicial class action context, due process is the source for many requirements including the right of class members to opt out of the proceedings, the adequacy of representation, judicial oversight, and case disposition fairness approval.[97]

Due process in the context of the New York Convention is also an inherently difficult concept to define, and "[w]hat constitutes due process is not uniform across all the Contracting States."[98] The possibility of

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93 Dell Computer Corp (not indicated) v Union des consommateurs (Canada), 30 May 2005, Quebec Court of Appeal, digest by Henri Alvarez for Institute for Transnational Arbitration (ITA), *available on kluwerarbitration.com, reversed,* 2007 S.C.C. 34 (without discussion of the class arbitration points).

94 Sheibani v United States, Chamber One Decision No. DEC 131-946-1 of 11 June 2003 in Case No. 946, ¶ 2, Iran-United States Claims Tribunal: Selected Awards, *available on* Kluwer Law International.

95 *Id.* ¶ 14.

96 *See, e.g.,* Spence, p. 316 (describing arbitrations under various international instruments and involving the Bank for International Settlements, and noting that the tribunal formed to resolve those disputes indicated that the instruments "did not contemplate class action proceedings nor allow[ed] it to certify a class").

97 Weston, pp. 1768-69 (citing *Cafeteria & Rest. Workers Union, Local 473 v McElroy*, 367 U.S. 886, 895 (1961) and *Lassiter v Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981)). *See also* Reuben, p. 1038 (citing *Goldberg v Kelly*, 397 U.S. 254, 268-71 (1970), as enunciating the relevant due process concerns, including the right to notice, the opportunity to be heard, the right to present evidence, the right to retain counsel, the right to a reasoned, written decision and the right to an impartial decision maker).

98 Harris, pp. 11, 16.

variations in the concepts of due process may have "significant consequences for arbitrations which are conducted in forums where the notions of due process differ substantially" from those of other nations.[99]

Nevertheless, when considering whether to recognize a foreign arbitral award under the New York Convention, the court must:

> determine whether the parties received the process for which they bargained. For international cases, this implicates a number of special questions. Was there an arbitration agreement? Were the arbitrators honest? Did the loser have the opportunity to present its case? Does the award violate some fundamental public policy?[100]

A court's duty to recognize and enforce foreign awards under the New York Convention is subject to the possible objections set forth in article V. "Article V provides the exclusive procedural and substantive grounds for challenging the enforcement of an award."[101] "[T]hese protections against abusive arbitration allow courts to avoid lending their power to support proceedings that lack integrity or awards inimical to basic public interests."[102] The protections found in article V(1) "safeguard the parties against private injustice," whereas those found in article V(2) "serve[] as an explicit catchall for the enforcement of a country's own vital interests."[103] The procedural bases for objection found in article V(1) may be raised by the parties, while the substantive bases for objection in article V(2) may be raised by the parties or by the court *ex officio*.[104] "All grounds for refusal of enforcement must be construed *narrowly*; they are exceptions to the general rule that foreign awards must be recognised and enforced. The Convention sets *maximum* standards so that Contracting States cannot adopt legislation which adds grounds for resisting recognition and enforcement."[105]

Due process "is often understood as a 'hard' rule of law, a kind of core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given."[106] At the very centre of due process issues, "the rules cannot be contracted out and they may be applied *ex officio*. In many national laws this core is described as *ordre public* or public policy."[107] As Gabrielle Kaufmann-Kohler states:

> The term 'due process' here refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principle de la contradiction* and equal treatment. More recently, procedural efficiency has been increasingly advocated by scholarly writers and taken into account in practice by arbitral tribunals and courts. However, it has not achieved the same recognition as [due process and the principle of party autonomy in matters of procedure].[108]

Even within the realm of due process concerns, there appear to be "a hierarchy and various degrees of legal strength and significance," based, apparently, on "how fundamental the rule of due process is considered to be and how serious its violation or disregard is deemed to be."[109] Nevertheless, at a minimum, due process requires "that parties be provided with (1) reasonable notice and (2) an opportunity to be heard,"

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99 O'Hare, p. 184.

100 Park & Yanos, pp. 273-74.

101 Harris, p. 10.

102 Park & Yanos, p. 258.

103 *Ibid.*, p. 259.

104 Harris, p. 10.

105 Lew, et al., ¶ 26-66.

106 Kurkela & Snellman, p. 1.

107 *Ibid.* pp. 1-2.

108 Kaufmann-Kohler, p. 1321.

109 Kurkela & Snellman, p. 5 (italics omitted).

two concepts that are echoed explicitly in article V(1)(b) of the New York Convention.[110] Together, these principles form a "so-called due process defense [that] has been interpreted to 'essentially sanction[] the application of the forum state's standards of due process,'" where the "forum" in question is typically the seat of arbitration.[111] Some have asked whether "the tribunal has to take into account the laws of all the possible places of enforcement," but typically "[t]he answer is 'no,'" since the arbitrator may not be in the position to know where enforcement will be sought.[112] Julian Lew summarises the various possibilities, stating:

> observance of standards set by the law chosen by the parties to govern the arbitration, or alternatively by the law at the place of arbitration, would suffice. However the view that Article 1(b) is a genuinely international rule is also convincing. Ultimately the question of violation of due process is a matter of fact which the parties will have to prove.[113]

The fact that the propriety of due process is most likely evaluated in light of the due process standards of the state where the arbitration was seated is encouraging to supporters of class arbitration, at least to the extent that most class arbitrations are currently seated in the United States. As discussed above, US courts will likely find the types of due process protections contained in the AAA Supplementary Rules and, to a potentially lesser extent, the JAMS Class Arbitration Rules to comply with US notions of due process. Therefore, class arbitrations seated in the US are likely to be internationally enforceable as a matter of due process, at least on first blush. However, each of the two core due process principles need to be discussed in more detail.

a. Lack of proper notice

Article V(1)(b) of the New York Convention indicates that "[r]ecognition and enforcement of the award may be refused" on proof that "[t]he party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings." The term "proper notice" in international arbitration means that:

> a party must be informed about the initiation of the proceedings in order to give him an opportunity to organize his defence and other action. . . . Whether the notice is "proper" must be assessed on the basis of the arbitration agreement and other applicable procedural rules including the law of the seat of arbitration. If what constitutes proper notice is not well defined by the rules or law referred to in the arbitration agreement, the issue may become problematic as to the choice of applicable procedural rules. Proper notice is required in order to allow a party to "present his case." Thus the proper notice requirement is part of "presenting one's case," a condition precedent required absolutely to constitute due process and to make the rendering of an enforceable award possible. In the absence of other more specific rules, proper notice must at the minimum contain information that legal proceedings are pending, the reference to the grounds for the jurisdiction and the identity of the parties.[114]

The question, therefore, is whether JAMS's and the AAA's "best notice practicable" constitutes "proper notice." "Proper notice" has been construed as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested in make their appearance."[115] Thus, the two standards appear consistent. Furthermore, both the AAA and JAMS contemplate notice to putative class members who can be "identified through reasonable means," which would correlate with the totality-of-the-circumstances approach of the New York Convention.

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110 Weston, pp. 1768-69.

111 Inoue, p. 247.

112 Platte, p. 312.

113 Lew, et al., ¶26-81.

114 Kurkela & Snellman, pp. 17-18 (italics omitted).

115 Guang Dong Light Headgear Factory Co, Ltd (China) v ACI Int'l, Inc (US), *reprinted in* Kluwer Law Int'l, 31 Yearbook Commercial Arbitration 1105, 1118 (2005).

Additionally, the magnitude and efficacy of the potential notice efforts will be taken into account in enforcement proceedings under the New York Convention, which should assist claimants in class arbitration. For example, in *Employers Ins. of Wausau v Banco de Seguros del Estado*, the Seventh Circuit noted in the context of an arbitration instituted against more than 100 underwriters at Lloyd's that "[n]o reasonable person could be expected to serve more than 100 copies (that is, one copy for each retrocessionaire) of the same motion" on the registered agent for service of process and the Commissioner of Insurance.[116]

As stated above, sufficiency of notice typically is to be determined by the law of the arbitral forum or the procedural law of the arbitration, supplemented by any relevant institutional rules. However, in some cases notice is evaluated under the standards of the enforcing state, albeit not with detailed reference to the rules and procedures applicable to court proceedings. For example, in *Seller (Russian Federation) v Buyer (Germany)*, the Court of Appeal of Bavaria relied on article V(1)(b) of the New York Convention when refusing to enforce a Russian arbitral award.[117] Under Russian law, dispatch of notice constituted due process, even if the respondent did not actually receive that notice. However, because "the legal fiction of receipt is not sufficient for valid notice" under German law, the Bavarian Court of Appeal refused enforcement.[118] Although this case and others like it appear to be decided on the basis of article V(1)(b) alone, they seem to implicitly invoke the public policy exception under article V(2)(b) as well, which would explain the references to German standards regarding proper notice (as discussed below, objections based on article V(2)(b) of the New York Convention are analyzed under the law of the enforcing state). This conclusion is supported by cases that have indicated that the violation of the right to a fair arbitral procedure – which would, by necessity, require proper notice – can constitute a violation of German public order. [119] Other nations have also viewed notice issues through the lens of their own particular constitutional norms, again possibly because of the public policy implications.[120] Indeed, commentators have explicitly recognized that there is overlap between violation of due process guarantees of article V(1)(b) and the public policy provisions of article V(2)(b).[121] Thus, a party contesting notice will likely attempt to rely on both the standards of the forum state (via article V(1)(b) of the New York Convention) and the enforcing state (via article V(2)(b)).

When parties to class arbitrations attempt to enforce their awards, they must remember that "proper notice" is a factual determination involving an investigation into the circumstance of the case rather than the strict application of periods that may be specified in, for example, court rules.[122] Furthermore, the form and content of the notice is as important as the giving of notice itself. However, the due process review only seems to apply to significant violations; minor variations in procedure can easily be dictated by the parties.

The propriety of notice in class arbitration will doubtless be affected by what is considered proper notice in judicial class or representative actions. Thus, to create an internationally enforceable class award, the arbitrator should comply to the greatest degree possible with the notice provisions of the state in which the

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116 199 F.3d 937, 945 (7th Cir. 1999) (construing the Panama Convention but noting similarities to the New York Convention).

117 CLOUT Case 402: Bayerisches Oberstes Landesgericht, *reprinted in* Kluwer Law Int'l, 27 Yearbook Commercial Arbitration 445 (2002) and 263 (2002). For a similar outcome under US law, see *Jiangsu Changlong Chem. Co, Inc v Burlington Bio-Med. & Sci. Corp*, 399 F.Supp. 2d 165, 168 (E.D.N.Y. 2005) (noting successful reliance on article V(1)(b) of the New York Convention "requires a showing that the arbitration was conducted in violation of this country's standards of due process of law").

118 CLOUT Case 402, p. 264.

119 Buyer (Danish) v Seller (German), *reprinted in* Kluwer Law Int'l, 4 Yearbook Commercial Arbitration 258 (1979) (dealing with failure to give notice of the name of the arbitrator and noting that, "As the right of the parties to challenge has a fundamental meaning for a fair arbitral procedure, the exclusion of this right constitutes a violation of the German public order").

120 *See, e.g.,* Unión de Cooperatives Agrícolas Epis-Centre (France) v La Palentina SA (Spain), *reprinted in* Kluwer Law Int'l, 27 Yearbook Commercial Arbitration 533, 538-39 (2002) (noting procedural safeguards must be examined "in accordance with the criteria established by the [Spanish] Constitutional Court, which is the highest interpreter of the fundamental provisions in whose principles, rights and liberties international public policy is embodied"); Italian Party v Swiss Company, *reprinted in* Kluwer Law Int'l, 29 Yearbook Commercial Arbitration 819, 829 (2004) ("Denial of due process is in principle a violation of procedural public policy."); Guang Dong Light Headgear Factory Co, Ltd (China) v ACI Int'l, Inc (US), *reprinted in* Kluwer Law Int'l, 31 Yearbook Commercial Arbitration 1105 (2005).

121 Harris, pp. 10, 17. *See supra* notes 105-06 and accompanying text.

122 Abati Legnami (Italy) v Fritz Häpl (not indicated), Corte di Cassazione [Italian Supreme Court], 3 April 1987, *reprinted in* Kluwer Law Int'l, 17 Yearbook Commercial Arbitration 529 (1993).

arbitration is seated or the procedural law that otherwise controls. While it can be useful to consider also the notice provisions of the enforcing state – since lack of notice can sometimes rise to the level of a public policy concern – it is not required. Class arbitrations that follow the AAA Supplementary Rules and JAMS Class Arbitration Rules will typically comply with US notions of due process. Thus, class arbitrations that follow one of these rule sets and are seated in the US should avoid most objections based on problems regarding notice. Furthermore, US notions of notice in class proceedings compare favourably with notions of notice in other states' representative proceedings,[123] suggesting that compliance with the AAA Supplementary Rules or JAMS Class Arbitration Rules will meet due process standards for class arbitrations seated in common law countries. However, civil law concerns about representative actions may mean that actual notice – as opposed to JAMS's and the AAA's "best notice practicable" – is required to bind non-representative class members in civil law states. This difference in approach is not based on the language of the New York Convention – since article V(1)(b) only requires "proper notice" – but on civil law systems' anticipated public policy concerns. Though cases and commentary concerning notice requirements under article V(1)(b) of the New York Convention indicate that compliance with the notice provisions of the applicable procedural rules (such as the AAA Supplementary Rules or the JAMS Class Arbitration Rules) would be enough to make an award enforceable, the fact that a notice/due process issue can result in a public policy violation under article V(b)(2) of the New York Convention suggests that parties would be well advised to consider also the notice requirements in any possible enforcing states.

b. Inability to present one's case

Notice is not the only due process concern implicated by the international enforcement of a class award. Article V(1)(b) of the New York Convention also indicates that "[r]ecognition and enforcement of the award may be refused" on proof that "[t]he party against whom the award is invoked was . . . otherwise unable to present his case." To some, "[t]he ability to present one's case appears to be the most fundamental due process rule."[124] Some national laws require a "full opportunity" to present one's case, whereas others only require a "reasonable opportunity" to do so.[125]

Interestingly, "if a party has been denied his right to retain legal counsel of his choice to represent him, this may constitute 'unability' under the Convention."[126] This is of course problematic in a situation where absent class arbitration members are given little opportunity to "shop around" for class counsel. However, the AAA Supplementary Rules expressly contemplate the possibility of non-named parties having their own counsel.[127]

The primary problem for class arbitration, of course, is that non-representative parties have very few real opportunities to influence the shape of the case. However, the AAA Supplementary Rules do provide that all parties, including non-representatives and their counsel, have the right to be present at the hearing, which attempts to alleviate this concern.[128] Furthermore, the arbitrator's duty to undertake a fairness hearing upon disposition of the claim under both the AAA Supplementary Rules and the JAMS Class Arbitration Rules would suggest that absent class members' concerns are not disposed of without independent and objective analysis.[129]

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123 *See* Mulheron, pp. 344-52 (comparing class notice provisions in the US, Canada and Australia).

124 Kurkela & Snellman, p. 18 (italics omitted).

125 Lew, et al., ¶ 26-87.

126 Kurkela & Snellman, p. 17.

127 AAA Supplementary Rules, rule 9(a).

128 *Ibid.* The JAMS Class Arbitration Rules are silent on this point.

129 *Ibid.*, rule 8(a)(3); JAMS Class Arbitration Rules, rule 6(3).

Since the AAA and JAMS both modelled their rules on the US Federal Rules of Civil Procedure, arbitrations seated in the United States should pass scrutiny so long as the enforcing state does not consider the nature of representative actions to be a fundamental violation of the right to be heard such that it rises to the level of a public policy concern, thus shifting the focus from the standards of the arbitral forum to the standards of the enforcing state. Arbitrations seated outside the US will likely stand or fall depending on the extent to which the jurisdiction permits representative actions in the national courts. Nevertheless, a class arbitration seated in an otherwise hostile jurisdiction might be permissible if parties can successfully argue (1) the primacy of the selected arbitral rules (in this case, the AAA Supplementary Rules or JAMS Class Arbitration Rules) over national provisions of procedural law and/or (2) waiver of a timely objection (if a motion to set aside is made after the conclusion of the hearing rather than after the issuance of one of the partial final orders concerning clause construction or class certification). The issues involving the opportunity to present one's case in a class proceeding have not yet been discussed in the international sphere, so it will be interesting to see how the principle develops.

4.2.2. Public Policy Under the New York Convention

The second major area of concern for those who wish to enforce class awards under the New York Convention is the public policy exception in article V(2)(b). As suggested above, representative or collective actions are not well received in many legal systems, and many nations have refused to adopt representative procedures into their national systems and/or enforce US judgments arising out of a class proceeding, suggesting that there could be some hostility to the enforcement of international class awards.

However, even states with a longstanding opposition to representative actions in the courts may enforce class awards nonetheless because arbitration is a mechanism that welcomes flexibility, informality and innovation. Furthermore, states might be willing to enforce class arbitral awards because it can be said that absent class members have affirmatively chosen to exercise their individual rights at this time and in this way, thus overriding the civil law concern about forcing absent members to relinquish control over valid causes of action. This choice is demonstrated either through the initial agreement to arbitrate (since that agreement can be construed to bind the signatories to whatever procedure the arbitrator deems proper in his or her discretion) or through absent class members' failure to opt out of the proceedings.

Article V(2)(b) of the New York Convention indicates that "[r]ecognition and enforcement of the award may . . . be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."[130] Public policy concerns may be raised by the parties or by the court *ex officio*. "Public policy" is not defined in the New York Convention, but the underlying rationale of this objection is "the right of the State and its courts to exercise ultimate control over the arbitral process."[131] Although there is some variation in the definition of public policy, "[i]t appears that there is one universally accepted definition of public policy. 'It is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community.'"[132]

Article V(2)(b) of the New York Convention indicates that the only relevant public policy is that of the state where enforcement is to take place. Foreign public policy is not typically considered in enforcement proceedings, "notwithstanding the fact that private international lawyers increasingly discuss the issue of

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130 New York Convention, 330 U.N.T.S. 3, art. V(2)(b).

131 Lew, et al., ¶ 26-114 (quoting *Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974)).

132 Kurkela & Snellman, p. 11.

application (or taking into account) of foreign public policy in a favourable manner" in other contexts.[133] Objections based on public policy may be procedural (primarily involving due process issues) or substantive. Each will be discussed separately.

a. Procedural public policy

Julian Lew has written that:

> possible procedural public policy grounds include fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration.[134]

This is generally in accordance with other views, although the International Law Association's Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards ("ILA Final Report"), issued in 2002, indicates that "[i]t is widely accepted that procedural public policy should not include manifest disregard of the law or the facts."[135] The ILA Final Report also states that procedural public grounds "overlap with the requirements of due process, prescribed in Article V.1(b) of the New York Convention."[136]

Regardless of whether they are substantive or procedural, public policy objections under the New York Convention must be construed narrowly. Critically, "only violations of the enforcement state's public policy with respect to international relations (international public policy or *ordre public international*) is a valid defense."[137] Domestic public policy concerns are not enough to bar enforcement. An interesting – and apparently open – question is "whether the existence of a large number of procedural defects constitutes a violation of due process or the principles of public policy."[138]

The form and scope of any court review is limited. Commentators and courts are "unanimous" on this point, stating:

> the national judge excludes review of the substance of the arbitration decision. It must relate not to the *evaluation* made by the arbitrators of the rights of the parties, but rather to the *solution* given to the dispute, with the award being annulled only insofar as this solution runs counter to public policy.[139]

As encouraging as this position is generally as a principle supportive of arbitration, class arbitration would appear to be reviewable as a "solution given to the dispute" rather than the "evaluation made by the arbitrators of the rights of the parties." However, the distinction can be argued either way.

Only rarely have awards been successfully opposed at the enforcement stage as a result of a violation of international public policy. For example, England did not refuse enforcement of an arbitral award on the grounds of public policy until 1998.[140] Korea and Switzerland both use a narrow interpretation of public policy, but retain some focus on the interests and beliefs of the enforcing state.[141] In the United States, the

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133 Mistelis 2, p. 253.

134 Lew, et al., ¶ 26-117.

135 ILA Final Report, ¶ 29. The ILA Final Report was issued in 2002 at the New Delhi conference, following an Interim Report issued in July 2000. The two reports are to be read together.

136 *Ibid.*

137 Lew, et al., ¶ 26-114.

138 C (not indicated) v Z (not indicated), *reprinted in* Kluwer Law Int'l, 31 Yearbook Commercial Arbitration 583, 585 (2006) (decision of the Supreme Court of Austria, noting the argument had not been made out factually under the circumstances).

139 Brulard & Quintin, p. 544 (emphasis added) (quoting Judgment of the French Cour de Cassation, Applix, Paris, Oct. 14, 1993, Rev. Arb. 1994).

140 Soleimany v Soleimany [1998] QB 785 (involving an illegal contract to smuggle).

141 Lew, et al., ¶¶ 26-127 to 26-129 (citing cases).

prevailing pro-arbitration policy also results in few challenges succeeding on the basis of the public policy exception.[142] Other jurisdictions that have reportedly taken a narrow view of the public policy exception include Germany, Luxembourg, The Netherlands, Switzerland, Russia, Italy and India.[143] However, some states – including Turkey, Japan, Vietnam and China – have been criticized for their broad use of the public policy exception.[144]

When deciding whether the New York Convention's public policy exception to enforcement applies, courts look to their own law – i.e., the law of the enforcing state.[145] Traditionally, the only time the public policy of the *lex arbitri* would be considered is when a party has brought a motion to vacate or set aside the arbitral award, since motions to set aside or vacate an arbitral award are typically made in the state where the arbitration was seated.[146] However, the same narrow international standard should apply in both circumstances according to the ILA Final Report, which claims that "[t]he same test should apply to all international arbitral awards, irrespective of whether the award is made in the same jurisdiction as the enforcement court (and enforceable pursuant to domestic legislation) or made abroad and enforceable pursuant to the New York or other Conventions."[147]

The question exists whether there can be any procedural errors that rise to the level of a public policy violation under article V(2) of the New York Convention that are not covered by the grounds for objection under article V(1). Certainly "if the form and the underlying process by which an arbitral award was created do not meet all potentially applicable domestic procedural requirements, there will be confusion over where and to what extent the award will be enforceable, particularly if it involves transnational commerce," but that does not answer the deeper question of what procedural public policy concerns might exist other than those enumerated in article V(1) of the New York Convention.[148] However, commentators have typically taken the procedural objections outlined in article V(1) as conclusively defining the corpus of international procedural public policy, or – even more generally – have defined international procedural public policy as simply constituting equal treatment, fair notice and the right to present one's case.[149]

Objections to class awards based on procedural public policy will likely mirror those made under article V(1)(b) of the New York Convention, although, to be considered legitimate grounds for non-enforcement by the international arbitral community, they must rise to the level of a gross violation of due process, judged by international, rather than domestic, standards. Although there should be few such rulings in theory, courts have been willing to invoke their own due process standards in practice.[150]

b. Substantive public policy

Objections to enforcement of a foreign arbitral award may also be based on substantive public policy concerns such as "mandatory rules/*lois de police*; fundamental principles of law; actions contrary to good morals, and national interests/foreign relations."[151] Substantive objections may also be made based on violations of the

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142 Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2nd Cir. 1974).

143 Harris, pp. 14-15.

144 Redfern & Hunter, ¶ 10-54.

145 New York Convention, 330 U.N.T.S. 3., art. V(2)(b).

146 *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I, and A/61/17, annex I (21 June 1985, amended 7 July 2006), art. 34.

147 ILA Final Report, ¶ 8.

148 Schwebel & Lahne, p. 206.

149 *Ibid.*, p. 216.

150 *See, e.g.*, Seller (Russian Federation) v Buyer (Germany), CLOUT Case 402: Bayerisches Oberstes Landesgericht, *reprinted in* Kluwer Law Int'l, 27 Yearbook Commercial Arbitration 445 (2002) and 263 (2002).

151 ILA Final Report, ¶ 6-7.

principle of good faith and *pacta sunt servanda*, prohibition of abuse of rights and prohibition of activities that are *contra bonos mores*,[152] as well as awards involving punitive damages and breaches of competition law.[153] Some commentators distinguish mandatory provisions of law from public policy, even though that may be difficult to do as a practical matter.[154]

Interpretation of substantive public policy is the same as with procedural public policy, in that objections under the New York Convention must be construed narrowly, applying international rather than domestic standards. Though objections based on substantive public policy are, like objections based on procedural public policy, viewed from the perspective of the enforcing state, some question has arisen as to whether the public policy of other potentially interested states can or should be taken into account. The issue arises most often in the context of competition law or similar laws with a particular economic purpose. The question in the context of class arbitrations will likely be whether class arbitration impedes or advances laws intended to "protect parties presumed to be in an inferior bargaining position, such as wage-earners or commercial agents"[155] as well as consumers or shareholders.

Interestingly, this has been one of the areas where civil law systems seem inclined to permit representative actions, albeit usually as a result of legislative authority.[156] Although some states might wish to keep these sorts of economic concerns in the public realm, it could be said that recognizing a form of representative action opens the door to class arbitration in these areas of law.[157] Certainly precedent suggests that matters involving substantive public policy may properly be resolved in the arbitral realm. For example, in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, the US Supreme Court indicated that arbitrators had the right and the ability to consider matters that had a significant impact on American public policy – in this case, US antitrust laws.[158] However, the European Court of Justice ("ECJ") came to a slightly different conclusion in *Eco Swiss China Time Ltd v Benetton Int'l NV*, which involved a preliminary question issued by the Dutch Supreme Court as to whether an arbitrator had to apply European competition law to a dispute, particularly in instances where the European principles conflicted with national provisions of law.[159] The ECJ held that arbitrators must take European Community law, including public policies regarding anticompetitive behaviour, into account when deciding a case, even if they must do so *ex officio*.[160] However, the *Eco Swiss* case involved a choice of Dutch law; the question remains open about the extent of:

> the arbitrator's duty to apply Community public policy rules *ex officio* when the contract is not governed by the law of a Member state. . . . Those authors who consider that the arbitrator must respect the will of the parties insist that the parties' freedom to choose the law of the contract must prevail, as the arbitrator's role is not to defend the public interest but, rather the interests of the litigants. Other authors draw a different conclusion: an arbitration clause that sets aside the application of Community competition law can be nullified and the agreement containing such a clause can itself be void if the avoidance of Community competition law was a determining factor of the consent of the parties.[161]

However:

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152 *Ibid.*, ¶ 28.

153 Lew, et al., ¶ 26-118.

154 Kurkela & Snellman, p. 11; Böcksteigel, p. 183.

155 ILM Interim Report, ¶ 17.

156 *See, e.g.*, Council Directive 98/27, 1998 O.J. (L 166) 51.

157 *Cf.* Valencia (Colombia) v Bancolombia (Colombia), 24 April 2003 – Arbitral Tribunal from the Bogotá Chamber of Commerce, digest by Eduardo Zuleta for Institute for Transnational Arbitration (ITA), *available on kluwerarbitration.com* (suggesting existence of judicial class action in Colombia).

158 473 U.S. 614 (1985).

159 1 June 1999, C-126-97, [1999] ECR I-3055.

160 *Ibid.*

161 Brulard & Quintin, p. 539.

> more radical authors reject the application of public policy rules external to the *lex contractus*, because they see no justification for an obligation to apply such public policy rules *ex officio*. . . . The hostility . . . may be explained by the fact that the mandatory character of public policy rules fades away as a result of the international character of the dispute. Indeed, even if the contract is international, rules of public policy apply only where there is a link between the dispute and the State that is the author of such rules.[162]

Thus, the question of whether one nation's public policy may be applied in situations where that law has not been chosen appears open.

Some difficulty may arise when considering "whether a principle forming part of [an enforcing state's] legal system must be considered sufficiently fundamental to justify a refusal to recognize or enforce an award."[163] In those circumstances, the ILA Final Report indicates that "a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration," with international conventions possibly evidencing the existence of such a consensus.[164] Only if the enforcement of the award would "manifestly disrupt the essential political, social or economic interests" protected by the rule of public policy, should the policy be given effect.[165] Failure to raise a fundamental principle of public policy in the arbitration itself can lead to waiver.

Because class arbitration is an entirely new mechanism in the international arbitral realm, it does not fit easily into the standard commentary regarding appropriate grounds for non-enforcement based on substantive public policy. It is most likely that objectors will focus their arguments on how class arbitration violates fundamental principles of law concerning the exercise of individual rights in the enforcing state. Objections could also be based on any punitive damages elements (though those could be severable)[166] or on the claim that matters involving substantive public policy, especially economic policy, exist outside the realm of arbitration (though that argument is questionable in many jurisdictions). Interestingly, states that would otherwise be hostile to class arbitration may find consumer actions less objectionable, since that is an area where national or regional legislation has often created a form of representative action.

c. Public policy objections to class action judgments

Although there are no cases yet addressing the international enforcement of class awards, it can be useful to see how non-US states deal with requests to enforce US judgments in class actions against non-US corporate defendants. In actions to enforce judgments, courts typically look to see whether the judgment violates the enforcing state's notions of substantive or procedural public policy, which is similar to the procedure used for objections under article V(2)(b) of the New York Convention. In particular, the procedural peculiarities of US-style class actions (and thus, by extension, class arbitrations) "might lead a foreign court to look more closely at the procedure to determine whether it satisfies the foreign country's public policy concerns."[167]

While commentators have indicated that it might be inappropriate to undertake a wholesale transplantation of US-style class actions into non-US legal systems, they have acknowledged that the US system has some

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162 *Ibid.*, p. 540.

163 ILA Final Report, rec. 2(b).

164 *Ibid.*

165 *Ibid.*, rec. 3(b).

166 *See, e.g.*, New York Convention, 330 U.N.T.S. 3, art. V(1)(c). *See also* Protection of Trading Interests Act 1980 (United Kingdom), ch. 11, §§ 5-6 (refusing to recognize foreign judgments that include punitive damages).

167 Dreyfuss, p. 7.

merits, such as acting as a deterrent and increasing access to justice for consumers.[168] However, concerns about the nature of individual rights in litigation still exist, and it appears that objections to enforcement could be raised by a corporate defendant even in arbitrations where the plaintiffs are satisfied with the way the action progressed and would not assert any objections on their own behalf. These procedural objections might be based on essential rights of defence protected by domestic constitutions. For example, Italian courts have determined in the context of actions to enforce foreign judgments that the "right of defence" – such as the right to oppose an action for the protection of one's interests – is an expression of Italian procedural policy and one of the "supreme principles of the constitutional system."[169] The same view exists as a matter of Spanish constitutional law.[170] In Italy, the adversary process principle (*principio del contraddittorio*) requires that the parties have a real opportunity to advocate their positions at every stage of the proceedings. Defendants, in particular, have the right to challenge the legal and factual claims asserted against them. When considering whether to enforce foreign judgments, Italian courts do not look to see if the procedures of the foreign court are the same as those used in Italy; instead, the Italian courts look at "the concepts that inspire the [Italian] legal system and, more precisely, . . . the fundamental principles recognized by the legislature to be necessary conditions for the very existence of society."[171] To be upheld, the foreign judgment must have been issued by a proceeding that "substantially guaranteed the parties an adequate opportunity to be heard" and "honored the essential rights of defense of all the parties . . . throughout the duration of the proceeding."[172]

This reading of Italian courts' predilections regarding enforcement of foreign judgments could signal trouble for those who might want to enforce a class arbitration award in Italy or in any jurisdiction that adopts a similar approach to the rights of defence. For example, a class arbitration – like a class action – "might impair the defendant's ability to ascertain necessary information and might deprive the defendant of the opportunity to develop essential elements of defense with which to confront the claimants," particularly if the class arbitration procedure "treats discrete claims as fungible claims," which might offend the principle both of defence and of the opportunity present evidence.[173] Because a class action and a class arbitration "might hold an Italian defendant liable for damages to unknown or unidentified plaintiffs despite the defendant's inability to challenge their individual claims," an Italian court might refuse to enforce a judgment or arbitral award.[174] Interestingly, the same problem might not exist in actions to enforce a class award providing injunctive or declarative relief only.

The Italian view is not universal. Other state courts have found US class proceedings inoffensive to the enforcing state's public policies. In particular, England – which does not have a particularly robust view of representative actions and resembles civil law systems to some extent – has found that US class actions do not violate principles of natural justice (procedural public policy) and will thus enforce class judgments.[175] The issue will therefore likely come down to how each state views the legitimacy of representative proceedings and the type of relief requested.

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168 *Ibid.*, p. 8; Taruffo, pp. 412-13.

169 Dreyfuss, p. 17 (quoting a 1982 Italian Constitutional Court decision).

170 Cairns, p. 593 (citing Sentencia Tribunal Constitucional de 15 de abril de 1986 (RTC 1986, 43)).

171 Dreyfuss, pp. 25-26 (translating and quoting a 1980 Italian decision).

172 *Ibid.* p. 26 (translating and quoting Italian commentary).

173 *Ibid.* p. 27.

174 *Ibid.*

175 Campos v Kentucky & Ind. Terminal Rly, [1962] 2 Lloyd's Rep. 459, 473.

5. Conclusions and Recommendations

5.1. Current Status of International Class Arbitration

Three factors indicate that international class arbitration will become an increasingly common occurrence. First, the United States Supreme Court's recognition of class arbitration as a legitimate dispute resolution device in *Green Tree Financial Corp v Bazzle*[176] and the publication of the AAA Supplementary Rules and the JAMS Class Arbitration Rules mean that class arbitration has matured to the point where it is no longer seen as an anomalous procedural mechanism limited to a few US states. Indeed, the AAA has been asked to administer over 120 class arbitrations to date, and many other class arbitrations may be proceeding on an *ad hoc* basis or under the administration of JAMS, which does not publish its class arbitration docket. Second, class arbitration has been considered a potentially acceptable process outside of the US, with states such as Canada and Colombia discussing class arbitration in the domestic realm. This demonstrates that class arbitration is not limited to the United States. Third, international class arbitrations already exist in three different forms: (1) situations where a defendant resides outside the country where the arbitration is seated; (2) situations where a defendant resides in the country where the arbitration is seated, but has significant assets in other countries; and (3) situations where the claimant class includes individuals resident outside the country where the arbitration is seated.[177]

This Article has focused primarily on issues raised by the first two types of international class arbitration, looking at enforcement concerns that do not arise in traditional forms of international arbitration. Two of the most likely problem areas involve due process and public policy, since states that do not embrace representative actions may refuse to enforce class awards under the New York Convention on both grounds. Because the United States is the jurisdiction with (1) the most practical experience in class arbitration and (2) the most pro-class arbitration viewpoint (in terms of legal and social philosophy), it is likely that most international class arbitrations will be seated in the United States, at least in the near future. Challenges to a US-seated proceeding are thus likely to come at the enforcement stage. However, class arbitrations may be seated anywhere, and some challenges based on due process or public policy could come about through motions to vacate or set aside a class award issued in a non-US class arbitration. Regardless of whether an objection to an international class award arises in an action to enforce the award or set it aside, the form of the due process and public policy analyses will likely be similar.

When objecting to enforcement on due process grounds under article V(1)(b) of the New York Convention, the matter is considered from the perspective of the seat of the arbitration or the state whose laws govern the arbitral procedure. The two primary objections will be based on notice and the ability to present one's case. However, gross violations of due process can rise to a procedural public policy concern, which might result in the application of the enforcing state's due process standards.

Unlike challenges based on due process, challenges based on either procedural or substantive public policy are considered from the perspective of the state of enforcement in an action under article V(2)(b) of the New York Convention. Procedural public policy concerns include due process issues as well as other matters, such as biased arbitrators or irregularities in the arbitration procedure, that are not unique to class arbitration. Several possible objections to class awards based on substantive public policy concerns exist. For example, challenges might be based on conflicts with fundamental principles of law, including those regarding prohibitions on the abuse of rights, or on awards involving punitive damages and economic policy. Each of

[176] 539 U.S. 444 (2003).

[177] *See* note 2 and accompanying text.

these potential objections will be discussed below in the context of recommendations on how to increase the enforceability of an international class award.

5.2. International Class Arbitration Going Forward

Although there do not appear to be any reported cases concerning the enforcement of a foreign class award under the New York Convention, several recommendations can be made about how to increase the likelihood of creating an internationally enforceable class award. Parties and arbitrators should keep these recommendations in mind when (a) drafting the arbitration agreement and (b) making decisions about the arbitral procedure.

First, parties and arbitrators should consider adopting a specialized procedural rule set such as the AAA Supplementary Rules or the JAMS Class Arbitration Rules. Whether the rules are used on a binding basis or merely as procedural guidelines, they will help structure the arbitration in a way that will increase the likelihood that due process concerns will be met. For the reasons described above, the AAA Supplementary Rules seem slightly preferable to the JAMS Class Arbitration Rules, except in cases where the parties have a high need for confidentiality.

Second, parties should consider carefully where the arbitration will be seated. Because due process is considered from the perspective of the seat of arbitration or the state whose laws govern arbitral procedure, those who wish to increase the enforceability of an international class award should seat the arbitration in a jurisdiction that is amenable to class or representative proceedings. While it is arguably possible for parties to seat an arbitration in one state and indicate that the arbitral procedure is to be governed by the law of a different (pro-class arbitration) state, the seat will always retain some control over the procedure of the arbitration.[178] Thus it is safer to seat the arbitration in a jurisdiction that has been proven to support representative actions in its courts or, even better, in arbitration. The safest jurisdiction is the United States, since class arbitration is widespread and relatively mature in the US and the only two procedural rule sets for class arbitration (the AAA Supplementary Rules and the JAMS Class Arbitration Rules) are based on the US Federal Rules of Civil Procedure. Even if parties choose to use one of the two class arbitration rule sets, they still should seat their proceedings in the US or another pro-class arbitration state, since the seat will always retain an interest in the protection of parties' due process rights, regardless of the parties' attempt to override state law through the choice of procedural rules.

Although the US is undoubtedly the best jurisdiction in which to seat an international class arbitration, other states may also prove able to produce enforceable class awards. At this point, parties would be well advised to choose common law jurisdictions, such as Canada and Australia, that permit broad, US-style representative actions. Civil law nations are less likely to be amenable to class arbitrations, though the most forceful objections from those jurisdictions will likely arise as a matter of public policy rather than due process. If the arbitral cause of action fell into an area that civil law legislatures have considered particularly amenable to collective action – such as consumer protection in the European Union and its Member States – a class arbitration might be appropriately seated in a civil law jurisdiction, particularly if injunctive or declaratory relief were sought, as opposed to individual damages. However, it is not recommended that class arbitrations be seated in a civil law jurisdiction until it has been established that such awards are enforceable in that country as a foreign award under the New York Convention. By doing so, parties can avoid motions to set aside an award.

[178] *See* Union of India v McDonnell Douglas Corp [1993] 2 Lloyd's Rep. 48, 50-51.

Third, parties should consider where to enforce an international class award. Enforcement issues are troublesome for two reasons. First, parties have less of an ability to "forum shop" to avoid countries whose public policies prohibit or limit representative relief. Enforcement decisions are typically based on pragmatic considerations involving the location of assets, and it may be that assets are simply not available in a country that has proven itself amenable to class arbitration. Thus, parties will have to take their enforcement actions as they find them. While some claimants will be able to rank the likelihood of success in different states and file their enforcement actions accordingly (just as claimants in non-class arbitrations do), other claimants will have no choice but to proceed in jurisdictions that are likely to oppose class arbitration as a matter of principle.

Second, the public policy concerns enunciated by civil law countries regarding the propriety of representative actions (be they judicial or arbitral) exist at a fundamental level, and it is unclear whether even the most pro-arbitration policy will be sufficient to offset them. Many civil law nations have demonstrated a disinclination to enforce US judicial class actions based on a fundamental jurisprudential opposition to representative actions, and it may be that this hostility will also extend to class arbitrations. Conversely, it may be that some of the special features of arbitration will allow civil law nations to enforce foreign class awards despite concerns about the protection of the rights of absent class members and of defendants faced with generalized legal and factual claims. For example, it could be said that the choice to arbitrate one's disputes leads inexorably to a decision to allow class arbitration, or that the choice not to opt out of proceedings means that the party has agreed to exercise its right to dispute resolution now and in this type of procedure. The latter argument – that failure to opt out constitutes an affirmative choice – does not seem to have been persuasive in actions to enforce judgments arising out of judicial class actions, but the former argument, regarding the choice to arbitrate, may be persuasive, both with respect to concerns about claimants' rights and defendants' rights.

Furthermore, a strong pro-arbitration policy could lead states that are normally hostile to representative relief to view the enforcement of a foreign class award as not injurious to domestic public policy. Indeed, as the Queen's Bench Commercial Court stated when ruling to enforce an award based on a contract that would be unenforceable in English courts under English law: "the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced." [179] The court went on, "[i]t is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view."[180] While England is a common law nation, the view that courts ought not go behind an arbitral award in an action under the New York Convention is shared equally by many civil law nations.

There is no doubt that representative proceedings can be problematic from both a practical and jurisprudential standpoint. Nevertheless, the advantages of class arbitrations seem to outweigh the disadvantages, particularly when claimants would be unlikely to arbitrate to recover very small sums. However, the international arbitral community does not need to rely solely on efficiency arguments when considering how to treat international class awards on a going forward basis. Instead, class arbitration can be upheld – even by states that have traditionally resisted the incorporation of representative actions into their own national systems or that have refused to enforce judgments in foreign class actions – for several reasons that are consistent with existing law and policy concerning international arbitration.

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179 Omnium de Traitement et de Valorisation SA v Hilmarton Ltd [1999] 2 Lloyd's Rep. 222, 224.

180 *Ibid.*, pp. 224-25.

First, arbitration is a dispute resolution procedure that is known for its innovation and informality. Thus, procedures that might not be adopted for court use can form the basis of a binding arbitration. Furthermore, international arbitration is known for its amalgamation of civil law and common law procedures. Although class arbitration currently reflects its common law origins, civil law lawyers can and should help shape its future development. If civil law jurisdictions reject the procedure on a wholesale basis, they will not be able to play a role in its evolution.

Second, class arbitration meets the necessary criteria for due process under the New York Convention. Article V(1)(b) only requires "proper notice," and the notice required under both the AAA Supplementary Rules and the JAMS Class Arbitration Rules (i.e., the "best notice practicable") meets that standard. According to US jurisprudence (which forms the basis for both sets of arbitral rules), "the best notice practicable" often requires actual notice to parties that can be reasonably identified. Furthermore, arbitrators will, as a matter of good practice, ensure that any necessary notice complies with the requirements of the forum state. If the arbitrators do not do so, then non-enforcement is permitted, just as it would be in any non-class arbitration. The issue of notice should thus be treated the same as it is in any other arbitration.

Similarly, concerns about the opportunity to present or defend one's case ought not create a *per se* obstacle to enforcement. The economies of scale described by Judge Weinstein in judicial class actions are even more apparent in class arbitration, where few claimants will seek to enforce their rights when a very low reward is offset by high arbitration costs. While procedural efficiency has not yet been given equal weight with notice and the right to present one's case in a due process analysis, Gabrielle Kaufmann-Kohler has argued that it is becoming a factor that can and should be considered.[181] Furthermore, experienced arbitrators – like judges – can determine whether class counsel and the party representatives are pursuing the case adequately, thus adding an additional layer of protection for absent class members. It is unlikely that unsophisticated, non-named parties would be able to make superior arguments, and if the parties think that they can do so, they are entitled to bring their own counsel to any hearings (under the AAA Supplementary Rules), enter an objection at a fairness hearing or opt out of the procedure entirely.

Third, due process concerns ought not be permitted to rise to the level of public policy concerns so as to allow imposition of standards of a state other than the arbitral seat. While there are limits to party autonomy, class arbitration, properly executed, does not violate narrowly construed international notions of due process norms.

Fourth – and perhaps most controversially – civil law conceptions of individual rights should not act as a *per se* policy bar to international class arbitration. As important as public policy is, the only public policy that should be considered a proper ground for non-enforcement is international public policy, not domestic public policy. While civil law jurisdictions have weighed up the policy considerations for and against representative actions differently than common law jurisdictions have, at least in the context of litigation, it cannot be disputed that there are legitimate arguments in favour of allowing representative actions. In fact, there are fewer disadvantages to representative actions in arbitration than there are in litigation. Furthermore, the public policy concerns might be lessened when one considers that parties can be said to have agreed to representative proceedings (either through the initial agreement to arbitrate or through the failure to opt out). Since parties to arbitration are deemed to have bargained for a dispute resolution procedure with fewer due process protections and/or different procedures than litigation, civil law jurisdictions should not intervene in the parties' agreed dispute resolution process based on domestic formulations of rights. This is particularly true when the award results from an arbitration that is governed by different procedural and substantive laws and is consistent with the public policy of that state or states.

181 *See* note 107 and accompanying text.

International class arbitrations have the potential to address civil wrongs that would otherwise go unremedied and provide relief to individuals who would otherwise be unwilling or unable to enforce their rights. Though courts and commentators will have to monitor the development of this procedure, the international arbitral community should encourage enforcement of class awards on the same terms as other arbitral awards.

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Resumen: Este artículo analiza por primera vez aquellas cuestiones relacionadas con lo que se conoce como *International Class Arbitration,* un procedimiento de carácter colectivo que se ha utilizado en los Estados Unidos desde principios de los años 80. Con un gran número de *International Class Arbitrations* en marcha, es probable que surjan problemas relacionados con la legitimidad transnacional del proceso de *Class Arbitration* y la capacidad de ejecutar laudos colectivos internacionalmente. El presente artículo apoya la idea de que la Convención de Nueva York deberá ser la norma aplicable a los laudos colectivos del mismo modo que sucede con los laudos bilaterales.

Palabras clave: *International Class Arbitration,* Ejecución, Convención de Nueva York.

Abstract: This Article appears to be the first to address the unique issues relating to International Class Arbitration, a representative group proceeding that has been in use domestically in the United States since the early 1980s. With a number of known International Class Arbitrations in progress, questions concerning the transnational legitimacy of the Class Arbitration process and the ability to enforce class awards internationally will soon arise. This Article argues that the presumption of enforceability under the New York Convention should be applied to class awards to the same extent as it is applied to bilateral awards.

Keywords: International Class Arbitration, Enforceability, New York Convention.

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