30

INTERNATIONAL CLASS ARBITRATION

Lea Haber Kuck and Gregory A. Litt[1]

30.1 Introduction

Class arbitration, by and large, has been a peculiarly American experiment. As discussed elsewhere in this book,[2] plaintiffs and their lawyers in the United States are accustomed to using the class action mechanism in the state and federal court systems to aggregate claims that are too small to bring on an individual basis, and comprehensive procedural rules and extensive case law have developed to address the unique issues raised by this method of resolving disputes. Arbitration is also a widely used method of dispute resolution in the United States and one favored as a matter of public policy.

For more than thirty years, U.S. courts have grappled with whether and in what circumstances these two dispute resolution methods can be combined in the form of a class arbitration. This law has developed mainly in the context of domestic disputes, and the U.S. case law in this area seldom distinguishes between domestic and international cases. Only very recently has the viability of international class arbitrations been seriously debated, and there are very few reported instances of cases involving class arbitration venued outside the United States.

---

[1] The authors are partner and counsel, respectively, in the international litigation and arbitration group at Skadden, Arps, Slate, Meagher & Flom LLP. The views expressed are those of the authors and not necessarily those of the firm or its clients. The authors would like to thank William Barksdale, Sarah Samuels, and Silvia Scandar for their valuable assistance in preparing this chapter.

[2] *See* chapter 1 in this book.

This chapter begins with an overview of the development of the case law relating to class arbitration in the United States. A long-running debate in the U.S. courts, recently resolved by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[3] is whether an arbitration can proceed as a class action over the objection of one of the parties if the parties' arbitration clause is silent as to whether class arbitration is permitted. Courts have also debated the related issue of whether and in what circumstances a waiver of the right to pursue a class action is enforceable.[4]

Before the Supreme Court effectively put the brakes on class arbitration with its 2010 decision in *Stolt-Nielsen*, class arbitration appeared to be gaining traction in the United States, with two leading U.S.-based organizations that administer arbitrations, the American Arbitration Association (AAA) and JAMS, establishing specific procedures for class arbitrations. These rules, promulgated less than ten years ago, were used to facilitate hundreds of arbitrations that were brought on behalf of classes of plaintiffs. While these arbitrations were mainly domestic, the trend spilled over into the international context, and debate began about the viability of class arbitration venued outside the United States and the enforceability of U.S-venued class arbitration awards in other countries.

After reviewing the U.S. case law in this area, this chapter reviews the various positions taken by international tribunals and non-U.S. courts in the debate over the viability of international class arbitration, which are notable primarily for their scarcity.

The chapter concludes by discussing what conditions would have to exist to facilitate class arbitration, beginning with considerations in drafting an arbitration clause providing for class arbitration; followed by an assessment of the challenges of administrating an international class arbitration; and finally, discussing whether an international class arbitration award would be enforceable.

30.2 The History of Class Arbitration in the United States

30.2.1 CALIFORNIA AUTHORIZES CLASS ARBITRATION IN THE EARLY 1980S

The story of class arbitration in the United States begins thirty years ago with *Keating v. Superior Court*,[5] when the California Supreme Court authorized a California trial court to certify a class of plaintiffs to proceed in arbitration. In *Keating*, the California Supreme Court considered a group of cases brought by franchise operators of certain convenience stores against the franchisor and related parties. Two of the plaintiffs sought to bring claims on behalf of a class of approximately eight hundred similarly situated franchise operators.[6] They attempted to sidestep an arbitration clause in the franchise agreements, but the intermediate appellate court rejected their arguments, including their contention

[3] 130 S. Ct. 1758 (2010).

[4] *See infra* at sections 30.2.5.4 and 30.2.7.

[5] 645 P.2d 1192 (Cal. 1982), *rev'd in part sub nom. Southland Corp. v. Keating*, 46 U.S. 1 (1984).

[6] *See* Keating v. Superior Court, 167 Cal. Rptr. 481, 483–84, 490 (Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

that the arbitration clause need not be enforced because the agreements were contracts of adhesion.[7] Instead, the intermediate appellate court ruled that the trial court should determine whether to certify the case as a class action before sending it to arbitration, and if certification were granted, the plaintiffs could proceed in arbitration on behalf of a class.[8]

When the parties cross-appealed to the California Supreme Court, the plaintiffs again claimed that the court should not have ordered arbitration in any form, and the defendants argued that the arbitrations should proceed on an individual basis, not on behalf of a class.[9] The court found that the franchise agreements were contracts of adhesion, but ruled that "the fact that provision for arbitration is contained in a contract of adhesion will not, of itself, render the provision unenforceable."[10] The court also found, however, that the adhesive nature of the contracts required it to examine what it called "the special problems of unfair advantage which may appear in an adhesion setting when individual arbitration agreements are invoked to block an otherwise appropriate class action."[11]

The court expressed its view of the importance of class actions and the danger of allowing parties to avoid them by including arbitration clauses in adhesive contracts. The court explained:

> [T]he class suit "both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to "retain[] the benefits of its wrongful conduct." ...
>
> If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial.[12]

The court acknowledged that "arbitration clauses frequently appear in standardized contracts of adhesion," and that courts nevertheless enforce the clauses upon "the belief that arbitration is not oppressive and does not defeat the reasonable expectations of the parties."[13] But the court explained that if "an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing

---

[7] *See id.* at 486–87.

[8] *See id.* at 490–92.

[9] *See Keating*, 645 P.2d at 1194–95.

[10] *Id.* at 1196–98.

[11] *Id.* at 1206.

[12] *Id.* at 1206–207 (second alteration in original; citation omitted).

[13] *Id.* at 1207.

many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party."[14]

The court recognized two possible solutions to its "dilemma." The first "would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions."[15] The court recognized that "[t]he statutes and public policy supportive of arbitration require, however, that this result be avoided if means are available to give expression to the basic arbitration commitment of the parties."[16] Instead, the court turned to the other possibility—"that the arbitration itself proceed on a classwide basis."[17]

The court emphasized the procedural complexity that class arbitration would entail, including class certification and protections for absent class members, and assumed that the burden would largely rest on the trial court, which would remain involved throughout the process.[18] It explained the weight of this burden:

> The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay.[19]

Nevertheless, the court was persuaded that class arbitration was worth the difficulty: "[W]hat is at stake is not some abstract institutional interest but the interests of the affected parties.... If the alternative in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with [the franchisor] in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution."[20]

---

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at 1209–10. The intermediate appellate court had similarly assumed, without evident consideration, that these matters would be addressed by the trial court, rather than the arbitrator. *See Keating*, 167 Cal. Rptr. at 490–92.

[19] *Keating*, 645 P.2d at 1209. Justice Richardson, concurring in part and dissenting in part, took the opposite view, observing that "class procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal." *Id.* at 1215. Justice Richardson also objected to the court's involvement in the arbitration process, explaining that arbitration "'is supposed to be a complete proceeding, without resort to court facilities... It would be generally incompatible with the nature and scope of arbitration to allow a shift to the court forum....'" *Id.* at 1216 (ellipses in original; citations omitted).

[20] *Id.* at 1210.

The court considered whether the parties had consented to class arbitration and brushed aside any possible claim that the absent class members had not consented to join the arbitration. It explained:

> The members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so.[21]

The court was far more concerned with the defendants' rights and expectations and allowed the defendants a moderate safeguard. After ruling that the trial court must consider both the usual class certification factors and arbitration-specific issues when determining whether to order class arbitration, the court also mandated that "[w]hether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to classwide arbitration."[22]

The U.S. Supreme Court granted certiorari to consider certain rulings by the California Supreme Court, but it declined to address the ruling on class arbitration,[23] and the California Supreme Court's view was established as the law in California.[24]

30.2.2 A DECADE LATER, PENNSYLVANIA FOLLOWS CALIFORNIA

Nearly ten years later, a Pennsylvania state appellate court followed the *Keating* decision and took an even stronger position in favor of class arbitration, dispensing with the safety valve the California court provided for the defendant to opt out of arbitration. In 1990,

---

[21] *Id.*

[22] *Id.* at 1209–10. Dissenting from the court's ruling on class arbitration, Justice Richardson (joined by Justice Mosk) would have enforced the arbitration agreement and forsaken the plaintiff's right to bring class claims. The dissent explained that "[i]n the absence of a statute authorizing class arbitration or agreement of the parties, it is inappropriate in my view for us, judicially, to superimpose such a procedure on the arbitration process over the objections of a party to the contract." *Id.* at 1216. The dissent's view was informed, in part, by the fact that the franchisees' claims were large enough that they could be brought on an individual basis. As the dissent explained, this was not a case "where an arbitration clause would effectively deny relief to the weaker party in an adhesion contract." *Id.* at 1217.

[23] *See* Southland Corp. v. Keating, 465 U.S. 1, 3, 17 (1984). The California courts excluded one group of California statutory claims from arbitration, on the basis that the legislature had not intended the claims to be arbitrable. *See Keating*, 645 P.2d at 1200–04. The U.S. Supreme Court reversed the California Supreme Court's decision and held that the Federal Arbitration Act required the state courts to honor the parties' arbitration agreement and compel arbitration of the statutory claims. *See Southland Corp.*, 465 U.S. at 10, 16–17.

[24] *See* Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 320–22 (Ct. App. 1986); Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 75–76 (Ct. App. 1986).

clients of Shearson Lehman Hutton (Shearson) sued the brokerage firm on behalf of a purported class.[25] The Pennsylvania trial court denied Shearson's motion to compel arbitration, ruling that the claims presented were outside the scope of the parties' arbitration agreement.[26] The appellate court disagreed, finding that the plaintiffs' claims were arbitrable.[27] However, it also found that "'[t]he relatively small amount of monetary relief to which each class member would be entitled'"[28] suggested that "few, if any" arbitrations would occur, "thereby allowing Shearson to discount the burdens of these infrequent arbitrations and continue its allegedly improper policy."[29] Rather than view this as an obstacle to arbitration, the court expressly adopted the view of the California courts that "'there is no insurmountable obstacle to conducting an arbitration on a class-wide basis.'"[30]

The court acknowledged that "[t]he Shearson client agreement contain[ed] no explicit language . . . which would dispositively answer whether class action was intended or considered,"[31] but the court did not view this as a lack of consent to arbitrate a class claim. Rather, the court stated that by ordering class arbitration, it was "merely giving full weight to the wording of the Shearson client agreement," which required arbitration of "'any controversy'" arising between the parties in connection with the agreement.[32] The court did not consider or address the California Supreme Court's concern that this might prejudice the rights of the defendant.

The Pennsylvania court did follow the California courts' approach that the trial court would retain jurisdiction over class certification and notice to absent class members.[33] The court acknowledged, however, that some procedural factors could hamstring the process, including the potential for the appointment of numerous class representatives—also a possibility in class action litigation—who could disagree on issues such as arbitrator selection. The court acknowledged that "to the extent that management of the class becomes too complicated or potentially destructive of the arbitration process, the [trial] court may then be justified in not granting certification."[34]

30.2.3 THE FEDERAL COURTS OF APPEALS REJECT CLASS ARBITRATION

In the 1990s, the U.S. federal courts took up the question of class arbitration, and they diverged sharply from the state court decisions in California and Pennsylvania,

---

[25] Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 861 (Pa. Super. Ct. 1991).

[26] *Id.*

[27] *Id.* at 864.

[28] *Id.* (citation omitted).

[29] *Id.*

[30] *Id.* at 864–65 (quoting *Keating*, 167 Cal. Rptr. at 492).

[31] *Id.* at 865.

[32] *Id.* at 866.

[33] *See id.*

[34] *Id.*

disallowing class arbitration unless it was expressly permitted by the parties' arbitration agreement.

The Seventh Circuit's 1995 decision in *Champ v. Siegel Trading Co.*[35] was the first federal appeals court decision to address the issue, and it took the lead in rejecting class arbitration. In *Champ*, the district court compelled a plaintiff to arbitrate in accordance with the defendant's form arbitration agreement signed by the plaintiff, but the court ultimately refused to certify a class for the arbitration.[36] The court "held that it lacked authority to certify a class arbitration where the parties had not agreed to such a procedure in their arbitration agreement."[37] On appeal, the Seventh Circuit noted that no federal appellate court had previously ruled on the viability of class arbitration, but it relied heavily on decisions that addressed the consolidation of related arbitrations. When arbitrations are consolidated, multiple plaintiffs and defendants can be required to join together in a single proceeding despite having separate contracts, but the cases generally do not involve absent, or "unrepresented," parties. The *Champ* court observed that several other circuits had ruled that the courts could not order consolidated arbitration "absent an express provision in the parties' arbitration agreement... even where consolidation would promote the expeditious resolution of related claims."[38] Reviewing those decisions, the Seventh Circuit cited the Second Circuit's reasoning that "a district court's chief concern under the [Federal Arbitration Act] is to enforce the parties' arbitration [agreement] as they wrote it, '*despite* possible inefficiencies created by enforcement.'"[39]

In sharp contrast to the California Supreme Court's decision in *Keating*, which viewed class actions as a virtually unwaivable right in certain contexts, the Seventh Circuit equated them to a mere "procedural nicet[y]" of the courts, like the right to fulsome pretrial discovery.[40] The court also noted that the arbitration was to be governed by the AAA's Commercial Arbitration Rules, which at that time made no provision for class arbitration, and found there was no basis for the district court to impose the class action procedures in Rule 23 of the Federal Rules of Civil Procedure upon the AAA procedures to which the parties had agreed. Affirming the district court, the Seventh Circuit explained:

> The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt[] the negotiated risk/benefit allocation and [direct] the parties to proceed with a different sort of arbitration."[41]

---

[35] 55 F.3d 269 (7th Cir. 1995).

[36] *See id.* at 271.

[37] *Id.*

[38] *Id.* at 274.

[39] *Id. at 275* (quoting *United Kingdom v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993)).

[40] *See id.* at 276.

[41] *Id.* at 275 (alterations in original; citation omitted). The court did not contemplate the secondary question of whether the arbitrator, once appointed, could independently craft a class action procedure and certify a class in arbitration.

Though the California state courts subsequently expressly rejected the Seventh Circuit's reasoning,[42] the federal circuits began to fall in line with the Seventh Circuit's view.[43]

30.2.4 THE U.S. SUPREME COURT OPENS THE FLOODGATES: *GREEN TREE FINANCIAL CORP. V. BAZZLE*

The case that finally drew the U.S. Supreme Court into the debate over class arbitration concerned a pair of South Carolina class actions brought by homeowners against their mortgage lender, Green Tree Financial. The plaintiffs alleged consumer protection violations in connection with loans for home improvements or the purchase of mobile homes.[44] Both cases proceeded to arbitration and resulted in final awards of class damages and attorneys' fees in excess of USD 10 million. The South Carolina trial courts confirmed the awards.[45]

On appeal, the South Carolina Supreme Court consolidated the two cases and found, in a 2002 decision, that the arbitration clauses, which did not expressly mention class arbitration, were silent on the issue.[46] The court rejected the lender's argument that the language of the clause—which referred to claims arising under or related to "this contract"—limited arbitration to individual claims.[47] The court ruled that, at best, the language of the clause created ambiguity, which should be construed against the drafting party—the lender.[48] Thus the issue before the court was "whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions."[49]

With no direct South Carolina precedent, the court noted that the rest of the country was split between the view of the California courts in *Keating* and its progeny, and the view of the federal courts epitomized by the Seventh Circuit's decision in *Champ*.[50] While the decision to prohibit class arbitration in *Champ* was grounded "almost entirely on the precedent of other courts prohibiting *consolidation* of arbitration absent an explicit right to consolidate within the written agreement,"[51] the court observed that "[a]pplying this precedent in South Carolina results in the opposite outcome," because South Carolina

---

[42] *See, e.g.*, Blue Cross of Cal. v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998).

[43] *See, e.g.*, Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728–29 (8th Cir. 2001); Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000). Some state courts also refused to order class arbitration. *See* Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (citing *Champ*, 55 F.3d at 275, and declining to compel class arbitration in the absence of express consent in the parties' arbitration agreement).

[44] *See* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 352–53 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

[45] *Id.* at 352–54.

[46] *Id.* at 359.

[47] *See id.*

[48] *Id.*

[49] *Id.* at 351.

[50] *See id.* at 356–58 and nn. 10–12.

[51] *Id.* at 360 (emphasis added).

"permits consolidation of appropriate claims where the arbitration agreement is silent."[52] Expressly adopting the reasoning and approach of the California courts, the court held "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."[53]

The U.S. Supreme Court granted certiorari to determine whether the South Carolina decision was consistent with the Federal Arbitration Act (FAA).[54] On June 23, 2003, the Supreme Court issued four different opinions, none of which achieved the required five-vote majority. Justice Breyer's opinion garnered the most support, with four votes, including Justices Scalia, Souter, and Ginsburg. He found that the decision whether the arbitration clause was silent or—as the lender urged—forbade class arbitration should have been reserved for the arbitrator.[55] Accordingly, the four Justices found that the South Carolina Supreme Court erred by deciding for itself that the clause was silent and that the decision had to be vacated to allow the arbitrator to rule on the proper interpretation of the arbitration agreement.[56]

Justice Stevens, writing only for himself, believed that the decision to conduct class arbitration was ultimately correct and would simply have affirmed,[57] but he concurred in the judgment to vacate for the express purpose of avoiding a situation where there would be no majority judgment of the Court.[58] Justice Thomas wrote, in dissent, that he also would have affirmed, upon his singular view that the FAA does not apply to proceedings in state courts.[59]

Justices Rehnquist, O'Connor, and Kennedy dissented on the grounds that, while the arbitration clause did not expressly forbid class arbitration, class proceedings would necessarily violate the arbitrator selection clause in the parties' agreement.[60] The dissenters interpreted the clause to require each plaintiff and the defendant to consent to the selection of an arbitrator for the individual dispute between them.[61] The dissenters acknowledged that "the FAA does not prohibit parties from choosing" class arbitration, but found that the parties in the case before them "simply did not so choose."[62]

---

[52] *Id.*

[53] *Id.* The court also ruled Green Tree had not properly preserved for appeal an argument that the class arbitration process had violated the due process rights of absent class members. *Id.* at 362. Nevertheless, the court noted that "the class members' rights appear to have been properly protected by the notice given to all of them." *Id.*

[54] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

[55] *Id.* at 452–53 (Breyer, J., announcing the judgment of the Court).

[56] *Id.* at 453–54.

[57] *Id.* at 454–55 (Stevens, J., concurring in judgment and dissenting in part).

[58] *Id.* at 455.

[59] *Id.* at 460 (Thomas, J., dissenting).

[60] *Id.* at 459–60 (Rehnquist, C.J., dissenting).

[61] *Id.* at 459.

[62] *Id.*

30.2.5 THE POST-*BAZZLE* RUSH TO CLASS ARBITRATION

The reasoning of *Bazzle* opened the floodgates for class arbitration. Courts that had previously allowed class arbitration did so by taking the view that an arbitration clause silent on class arbitrations permitted them as one of various procedural forms an arbitration could take; courts that had barred class arbitration took the opposite view—that silence on class arbitration indicated a lack of consent. The *Bazzle* plurality opinion removed the question of consent from the courts, however, and left it to the arbitrators to decide on a case-by-case basis whether the terms of an arbitration agreement could accommodate class actions. Organizations that administer arbitrations rushed to fill the void.

30.2.5.1 The AAA and JAMS Establish Class Arbitration Procedures

In the United States and many other countries, private parties are generally free to select the arbitrators and arbitration procedures of their choosing, and many parties agree that arbitrations between them will be administered by private institutions that specialize in providing arbitration and other dispute resolution services. Less than four months after the Supreme Court's *Bazzle* decision, the AAA—one of the leading arbitration providers in the United States—promulgated a detailed set of procedures for class arbitrations.[63] Another leading U.S. arbitral institution, JAMS, initially struggled with its approach to the administration of class arbitrations,[64] but in February 2005, it adopted class arbitration procedures similar to the AAA procedures.[65] Notably, each institution's class arbitration rules, by their own terms, apply to any arbitration agreement that calls for application of the institution's arbitration rules, even if the arbitration agreement was formed years before the adoption of the class action procedures.[66]

Embracing the *Bazzle* plurality opinion, the procedures of both institutions provide for an initial "clause construction" phase for any case filed on behalf of a class of claimants, during which the arbitrators are required to determine whether the arbitration clause permits class arbitrations. Beyond this threshold determination, the AAA and JAMS procedures also make the arbitrators responsible for administering all the procedural complexities of class proceedings—class certification, notice to the absent class members,

---

[63] AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2007) (AAA CLASS ARB. R.), *available at* http://www.adr.org/sp.asp?id=21936.

[64] For instance, JAMS announced on November 12, 2004, that it would not enforce clauses in consumer contracts that purported to exclude class arbitrations. *See JAMS Issues New Policy on Class Arbitration, Says It Will Not Enforce Preclusion Clauses*, 5 CLASS ACTION LITIG. REP. (BNA) 816 (2004). After an uproar, JAMS withdrew the policy on March 10, 2005, and reaffirmed that it would allow its arbitrators to consider the applicable law on a case-by-case basis. *See* David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 65–56 n. 48 (2007).

[65] JAMS, JAMS CLASS ACTION PROCEDURES (2005), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS_Class_Action_Procedures-2005.pdf, *superseded by* JAMS, JAMS CLASS ACTION PROCEDURES (2009) (JAMS CLASS ARB. R.), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

[66] AAA CLASS ARB. R. 1(a); JAMS CLASS ARB. R. 1(b).

and fairness of settlement—thereby cutting the courts out of the process entirely.[67] This approach is in striking contrast to the approach taken by the courts in California and Pennsylvania, which anticipated that the courts would play a significant role in the class arbitration process. To facilitate the process, both the AAA and JAMS adopted procedures for class certification and notice that mimic—and at times explicitly reference—Rule 23 of the Federal Rules of Civil Procedure, the rule that sets out procedures for the conduct of class actions in the U.S. federal courts.

Both the AAA and JAMS procedures also provide for immediate court review of the arbitrators' interim decisions on clause construction and class certification,[68] but that review is circumscribed by the limited nature of court review of arbitral awards under the FAA.[69] In one case, *Jock v. Sterling Jewelers, Inc.*,[70] a federal court sitting in New York observed that there were only two narrow grounds on which to overturn a Clause Construction Award issued by the AAA. First, the award could be overturned "if it exceeded the arbitrator's powers, in violation of Section 10(a)(4) of the [FAA]," a section that "'focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.'"[71] Second, it could be overturned "if it was made in 'manifest disregard of the law,' a doctrine that . . . is 'severely limited' to cases where there is not even a '*barely colorable justification* for the outcome reached.'"[72]

30.2.5.2 The AAA Class Arbitration Experience

Although there are no official statistics on how many class arbitrations have taken place, before or after *Bazzle*, the AAA created substantial transparency for its own class arbitration docket by maintaining a public website listing all the class arbitration demands that have been made under the AAA rules and publishing essential information and arbitral awards for each case online.[73] In addition to providing information to absent class members, the AAA website made it possible to monitor what is most likely the largest class arbitration practice in the world.

---

[67] *See* AAA Class Arb. R. 3, 4–6, 8; JAMS Class Arb. R. 2, 4, 6.

[68] *See* AAA Class Arb. R. 3, 5(d); JAMS Class Arb. R. 2, 3(c).

[69] In her dissent in *Stolt-Nielsen*, Justice Ginsburg expressed significant doubt about the Court's decision that Clause Construction Awards are sufficiently final to be ripe for *any* judicial review. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1777–79 (2010) (Ginsburg, J., dissenting); *see also* Dealer Computer Servs., Inc. v. Dub Herring Ford, 623 F.3d 348, 349, 352–59 (6th Cir. 2010) (post-*Stolt-Nielsen* decision affirming district court's holding that motion to confirm arbitration panel's interim award denying class certification was not ripe for judicial review).

[70] 677 F. Supp. 2d 661, 665 (S.D.N.Y. 2009). *Jock*'s unusual subsequent history is discussed below in section 30.2.8.

[71] *Id.* at 665 (citation omitted).

[72] *Id.* (citations omitted).

[73] AAA Class Arb. R. 9(b), 10(b); *see also* AAA Searchable Class Arbitration Case Docket, http://www.adr.org/sp.asp?id=25562.

In an amicus curiae brief filed with the Supreme Court in *Stolt-Nielson*—the class arbitration case the Court decided in 2010—the AAA noted that from the time it adopted class arbitration procedures in 2003 until the time it filed its amicus brief in September 2009, it had administered 283 cases that were filed as class arbitrations, 121 of which remained active in 2009.[74]

Of the 283 cases, 135 had already resulted in Clause Construction Awards—the first major step in the AAA process toward determining whether a case will proceed as a class arbitration.[75] Arbitrators held in 70 percent of those 135 cases that the arbitration clause permitted the arbitration to proceed on behalf of a class; 24 percent of the cases involved stipulations among the claimants and the respondents that the underlying arbitration agreement permitted the arbitration to proceed on behalf of a class; and arbitrators held in only 5 percent of the cases that the arbitration clause did not permit the arbitration to proceed on behalf of a class.[76] Significantly, the vast majority of the arbitration clauses that had been considered did not contain any express language regarding class arbitration.[77]

Of the cases that proceeded beyond the Clause Construction Award, forty-eight resulted in Class Determination Awards—the next major step—with twenty-four granting class certification; eighteen denying certification; and six that were resolved by stipulations among the parties to certify a class.[78] When the AAA submitted its brief in *Stolt-Nielson* in 2009, none of its class arbitrations had yet reached a final award.[79]

30.2.5.3 International Class Arbitrations in the United States

The rise of class arbitrations in the United States included a few cases that were international in scope. For example, one well-publicized case involved a dispute between Harvard College and Russian oil and gas company JSC Surgutneftegaz (Surgut) relating to American Depository Receipts (ADRs)—securities traded in the United States that represent ownership of shares traded on non-U.S. stock exchanges.[80] Harvard commenced an arbitration against Surgut pursuant to a 1998 deposit agreement governing Surgut ADRs. The parties to the deposit agreement were Surgut Bank of New York as

---

[74] Brief of American Arbitration Association as Amicus Curiae In Support of Neither Party at 22, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198, 2009 WL 2896309 (AAA Amicus Curiae Brief).

[75] *Id.*

[76] *Id.*

[77] *See* Brief of CTIA—The Wireless Association as Amicus Curiae In Support of Petitioners at 10 and Appendix, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198, 2009 WL 28775373, at *10 ("A review of the [AAA] class-arbitration docket... reveals that, in the overwhelming majority of class arbitrations in which a Clause Construction Award is reported, the applicable arbitration provision was silent as to the availability of class arbitration.... Of the 111 reported Clause Construction Awards, only four—or about 3.6 percent—are known to have involved arbitration agreements that expressly authorized that procedure." (citations omitted; footnote omitted); *see also* AAA, Searchable Class Arbitration Docket, *supra* note 73.

[78] *See* AAA Amicus Curiae Brief, 2009 WL 2896309, at 22.

[79] *Id.* at 23.

[80] *See* Demand for Class Arbitration, *President & Fellows of Harvard College v. JSC Surgutneftegaz*, Case No. 11 168 T 01654 04 (AAA, filed July 9, 2004), *available at* http://www.adr.org/si.asp?id=3544.

depository and the owners and beneficial owners of the Surgut ADRs. Harvard brought claims on behalf of all owners of the ADRs, alleging that Surgut had violated U.S. securities laws and the deposit agreement.

After Surgut's various challenges to arbitrability were denied,[81] the AAA panel issued a Clause Construction Award, ruling 2–1 that the arbitration clause in the deposit agreement—which did not mention class actions—permitted the arbitration to proceed on behalf of a class.[82] In reaching the decision, the majority emphasized that all members of the proposed class were parties to a single deposit agreement and that the arbitration clause permitted the parties to submit claims arising under U.S. securities laws either to arbitration or to U.S. courts, in effect implicitly agreeing to class proceedings.

The panel also addressed the respondent's argument that class arbitrations were so inherently "incompatible with the 'nature' or 'principles' or 'norms' of international arbitration" that the panel should not allow class proceedings to go forward.[83] Noting that the respondent did not "identify any 'norm' that explicitly bars the class action in the context of international arbitration,"[84] the majority rejected this challenge:

> That reasonable people will inevitably have different views about the merits of the use of the class action device in international arbitration is distinct from the conclusion that the class action device is so incompatible or at odds with the process that an arbitration clause, properly construed in accordance with its governing law and the procedure of the situs of the arbitration, is invalid to the extent it permits a case to proceed on a class basis.[85]

The Russian respondent challenged the Clause Construction Award in federal court, but the court ruled that the scope of its review of an arbitral award is "'very narrowly limited'" and that, in any event, the panel had correctly determined that the agreement permitted class arbitration.[86]

30.2.5.4 Class Action Waivers and the Backlash against *Bazzle*

In the years following *Bazzle* and the AAA's decision to allow class arbitrations in nearly all cases, many companies attempted to avoid class arbitrations by including class arbitration "waivers" in their standard contractual arbitration clauses. The intent of these

---

[81] *See* JSC Surgutneftegaz v. President & Fellows of Harvard Coll., 167 F. App'x 266, 267–68 (2d Cir. 2006).

[82] Partial Final Award on Clause Construction at 20, *President & Fellows of Harvard Coll. v. JSC Surgutneftegaz*, No. 11 168 T 01654 04, (AAA Class Action Trib. Aug. 1, 2007), *available at* http://www.adr.org/si.asp?id=5031.

[83] *Id.* at 28.

[84] *Id.*

[85] *Id.* at 30.

[86] JSC Surgutneftegaz v. President & Fellows of Harvard Coll., No. 04 Civ. 6069 (RMB), 2007 WL 3019234, at *2 (S.D.N.Y. Oct. 11, 2007) (citations omitted).

waivers was to end the analysis called for in *Bazzle* before it began, conclusively establishing in the parties' agreement that class arbitrations would be impermissible. While merchants and consumer finance companies frequently inserted class arbitration waivers in their form contracts, some courts were unwilling to enforce them.[87]

In one prominent antitrust case, *In re American Express Merchants' Litigation*,[88] the Second Circuit struck down the class action waiver in an arbitration clause "preclud[ing] the signatory from having any claim arbitrated on anything other than an individual basis."[89] The court noted that, as a general matter, *Bazzle* plainly permitted arbitration clauses that prohibit class arbitration. The court stated:

> The Supreme Court has at least implicitly held that a provision in an arbitration agreement barring class procedures is not per se unenforceable because, as noted above, it held in *Bazzle* that the question of whether or not an ambiguous arbitration clause contained a class action ban was a matter for the arbitrator, not the court, to decide.[90]

The Second Circuit found, however, that due to the small size of the individual claims and the high cost of bringing the claims, "the size of the recovery [potentially] received by *any* individual plaintiff will be too small to justify the expenditure of bringing an individual action."[91] The court noted that the Supreme Court had stated, almost twenty-five years earlier, that if the terms of an arbitration agreement operated as "'a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.'"[92] The Second Circuit thus held that, by denying parties the right to pursue small claims as part of a larger class, the arbitration clause created a procedure that was prohibitively expensive, and thus the class action waiver was unconscionable and invalid.[93]

---

[87] Under the AAA's rules, a party seeking to bring a class arbitration under an agreement that contains a waiver of class actions must first seek court guidance on the question whether a class arbitration may be brought under the agreement. The AAA policy explains that its "determination not to administer class arbitrations where the underlying arbitration agreement explicitly preludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable." AAA, *Commentary to the American Arbitration Association's Policy on Class Arbitrations* at ¶ 1 (Feb. 18, 2005), *available at* http://www.adr.org/Classarbitrationpolicy.

[88] 554 F.3d 300 (2d Cir. 2009), *vacated sub nom. Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

[89] *Id.* at 307.

[90] *Id.* at 313.

[91] *Id.* at 320.

[92] *Id.* at 319 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

[93] *Id.* at 321. The court remanded to the district court to allow the defendant an opportunity to withdraw its motion to compel arbitration. *Id.*

30.2.6 THE SUPREME COURT ATTEMPTS TO SEAL THE DAM: *STOLT-NIELSEN S.A. V. ANIMALFEEDS INTERNATIONAL CORP.*

With the fragmented decision in *Bazzle* and the flood of class arbitrations that followed, it was not long before the issue of class arbitration made its way back to the U.S. Supreme Court. This time, due to a different factual and procedural posture and, perhaps, a change in the composition of the Court, the Court ruled decisively against class arbitration. Addressing the question of "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act," the Supreme Court held in *Stolt-Nielsen*—itself an international class action—that a class arbitration was not permitted.[94]

The *Stolt-Nielsen* litigation began in February 2003, four months before the Supreme Court's *Bazzle* decision, when a group of plaintiffs, purporting to represent certain buyers of parcel-tanker shipping services, attempted to bring an international antitrust class action in U.S. federal court against a group of shipping companies, accusing them of price-fixing. In 2004, the Second Circuit held that these claims should be referred to AAA arbitration pursuant to the arbitration clauses in the parties' contracts. The claimants then applied to bring all their antitrust claims together as one class arbitration under the AAA's recently enacted Supplemental Rules for Class Action Arbitration. Over the shipping companies' objections, the claimants obtained a Clause Construction Award from the AAA arbitration panel, which held that the arbitration clause permitted the matter to proceed as a class arbitration.

The respondents sought immediate review of the Clause Construction Award in federal district court. Vacating the award, the district court observed that *Bazzle*, relied upon by the arbitrators, held only that the issue of clause construction "was for the arbitrator in the first instance," and did not dictate the substantive outcome of the decision.[95] The court held that the arbitrators manifestly disregarded the law by failing to do a choice of law analysis, which would have led it to apply federal maritime law and—based on maritime custom and usage—refuse to allow class arbitration.[96]

On appeal, the Second Circuit reversed, holding that courts can vacate awards for manifest disregard of the law "only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent,'" and that the errors the district court identified did not rise to that level.[97] The court noted, among other things, that the Seventh Circuit's decision in *Champ* and other similar decisions were instructive in their view that a silent clause is incompatible with class arbitration, but held that "they do not represent a governing rule of contract interpretation under federal maritime law or the

---

[94] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1764, 1775–77 (2010).

[95] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006), *rev'd*, 548 F.3d 85 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1758 (2010).

[96] *See id.* at 385–87.

[97] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 91–92 (2d Cir. 2008) (citation omitted), *rev'd*, 130 S. Ct. 1758 (2010).

law of New York."[98] The court also rejected the plaintiffs' argument that the "'the arbitrators exceeded their powers'" in violation of the FAA.[99] The court held that "[b]ecause the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration, the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly."[100]

The Supreme Court granted certiorari and reversed the Second Circuit's decision. In a 5–3 decision,[101] the Supreme Court took a much more expansive view of the FAA and held that the AAA arbitral panel's decision should be vacated because, in the Court's view, the AAA panel had not sought to give effect to the parties' contractual agreement but instead had simply "imposed its own policy choice" as to whether class arbitration was desirable "and thus exceeded its powers."[102]

The Supreme Court then proceeded to "decide the question that was originally referred to the panel," that is, whether a class action could proceed in arbitration where the arbitration clause was silent on this issue.[103] The Court began its analysis by clarifying that its prior decision in *Bazzle* was not intended to establish a rule favoring class arbitration; it merely held that parties could validly *agree* to class arbitration.[104] Proceeding from the premise that the "FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion,'" and that the "'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms,'"[105] the Court held that no agreement to submit to class arbitration could be inferred, given that the parties had expressly stipulated that they had not reached an agreement on this issue.

The Supreme Court observed that to infer—in the absence of express language or any other contractual basis—that parties had agreed to class arbitration was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[106] Indeed, the Court held:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to

---

[98] *Id.* at 101.

[99] *Id.* at 101.

[100] *Id.*

[101] Justice Alito authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg filed a dissent, in which Justices Stevens and Breyer joined. Justice Sotomayor took no part in the decision.

[102] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1770 (2010).

[103] *Id.* In her dissent, Justice Ginsburg sharply criticized the majority's decision to adjudicate the underlying issue of class action arbitrability. In her view, based on a strict reading of the FAA, this issue should have been resubmitted for "rehearing by the arbitrators." *See id.* at 1782 (Ginsburg, J., dissenting) (quoting FAA § 10(b)). Indeed, the dissent questioned whether the AAA's determination regarding the construction of the arbitration clause even qualified as a "partial, final award" capable of being reviewed by the courts under the FAA. *See id.* at 1779.

[104] *See id.* at 1770–72.

[105] *Id.* at 1773 (citations omitted).

[106] *Id.* at 1775.

> arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.[107]

In the Court's view, the "shift from bilateral arbitration to class action arbitration" has radical consequences in numerous respects, including: (1) the number of parties; (2) the loss of "'the presumption of privacy and confidentiality'"; (3) the impact on absent parties; and (4) the "commercial stakes" of multiple party liability.[108] Accordingly, the Court held, consent to class arbitration could not be "presume[d]" from "the parties' mere silence on the issue," given the fundamental differences between class arbitration and bilateral arbitration.[109]

The dramatic shift from the result in *Bazzle* may largely be explained by differences in the details of the case and changes in the composition of the Court. Notably, Justice Thomas had refused to disturb the decision of the South Carolina Supreme Court in *Bazzle* based on his view that the FAA did not apply to state court actions,[110] but *Stolt-Nielsen* came to the Supreme Court through the federal courts, so he was free to join in the reversal of the Second Circuit. Also, Justice Sotomayor had replaced Justice Souter—a member of the *Bazzle* plurality—and took no part in the decision of the case, having decided an issue in the case while sitting as a Second Circuit judge.

Most significantly, Justice Scalia sided with the plurality in *Bazzle* that vacated the decision to allow the arbitrator to decide whether the contract permitted class arbitration, but he sided with the majority in *Stolt-Nielsen*. That apparent switch may explain why the *Stolt-Nielsen* decision relied so carefully on the parties' concession that they had not reached agreement on whether to permit class arbitrations. In other words, there was no question of fact for the arbitral tribunal to determine, which allowed the Court to find that the issue was a pure legal question and one the majority believed the arbitrators had answered so improperly as to have exceeded their powers.

Although the Supreme Court stopped short of stating categorically that class arbitration can never be inferred where a contract is facially silent on the point, it made clear that an arbitration agreement must, when interpreted according to ordinary contract principles, evince some form of consent to class arbitration. As a practical matter, therefore, the Supreme Court may have closed the door to class arbitration in a wide variety of circumstances.

Justice Ginsburg, however, interpreted the Court's ruling as narrow in scope. Specifically, in her dissent, Justice Ginsburg suggested some purported "stopping points in the Court's decision," including (1) that the Court did "not insist on express consent to

---

[107] *Id.*

[108] *Id.* at 1776 (citation omitted).

[109] *Id.*

[110] *See supra* note 59 and accompanying text.

class arbitration," but rather just the existence of a "'contractual basis'" for agreeing to such a procedure; and (2) the Court's observation that the parties were sophisticated entities in an industry with established customs "apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis."[111]

30.2.7 CLASS ARBITRATION WAIVERS AFTER *STOLT-NIELSEN*

In the year following the *Stolt-Nielsen* decision, class arbitration waivers took center stage in the courts. Under *Stolt-Nielsen*, class arbitration waivers arguably become unnecessary because, if class arbitration is only permissible where the contract expressly manifests an intention to permit such procedures, a "waiver" arguably is redundant—a point that Justice Ginsburg made in her dissent.[112] Notably, six days after it decided *Stolt-Nielsen*, the Court granted certiorari in the *American Express* case discussed above—in which the Second Circuit had invalidated a class arbitration waiver—in order to vacate and remand the case for consideration in light of the *Stolt-Nielsen* decision.[113]

Two months later, the Second Circuit issued a decision in *Fensterstock v. Education Finance Partners*,[114] one of the first decisions to interpret and apply *Stolt-Nielsen*. In *Fensterstock*, the Second Circuit affirmed the district court's order denying the defendants' motion to compel arbitration of a dispute arising out of a loan agreement, which contained an arbitration clause with a class action waiver and which was governed by California law. The Second Circuit found that the agreement was a contract of adhesion and concluded that, under California law, the class action waiver was unconscionable.[115]

The arbitration clause also contained a severability provision, which expressly permitted enforcement of the clause if one of its provisions was stricken, and the defendants argued that even if the class action waiver was unconscionable, the court still should compel arbitration. Rejecting this argument, the Second Circuit observed that in light of *Stolt-Nielsen*, striking down the class action waiver alone would have no real effect—the arbitration clause would become silent, and the court lacked the power to compel class arbitration in the face of a silent clause.[116] Indeed, the court explained:

> [T]he parties plainly did not agree that arbitration may be conducted on a classwide basis, and we do not see that an order for classwide arbitration can be premised on the Note's severability provision: Our conclusion that a given agreement is invalid

---

[111] *Stolt-Nielsen*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting).

[112] *See id.* at 1782 n. 10.

[113] *See* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401, 2401 (2010).

[114] 611 F.3d 124 (2d Cir. 2010), *vacated sub nom Affiliated Computer Servs., Inc. v. Fensterstock*, No. 10-987, 2011 WL 338870 (U.S.).

[115] *See id.* at 140.

[116] *Id.* at 140–41.

> and unenforceable does not mean that the parties in fact reached the opposite agreement. Thus, excising the Note's class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under *Stolt-Nielsen* we have no authority to order class-based arbitration.[117]

The Second Circuit went on to affirm the district court's refusal to compel arbitration "[b]ecause the agreement forbidding Fensterstock to pursue his present claims on a class-wide basis is unconscionable under California law, and because the parties did not agree that arbitration could proceed on such a basis."[118]

Nearly thirty years after *Keating*, the doctrine appeared to have come full circle. In *Keating*, determined to preserve the plaintiffs' class action rights and faced with a choice between allowing class arbitration and ordering that the case proceed in litigation, the California courts opted to permit class arbitration. Thirty years later, faced with the same choice, the Second Circuit ruled that it was constrained by *Stolt-Nielsen* to strike the arbitration clause and return the parties to the courts. In the months that followed, other federal and state courts reached the same conclusion under the unconscionability doctrines of Missouri, North Carolina, and Washington law.[119]

On March 8, 2011, the Second Circuit also extended the reasoning of *Fensterstock* to *In re American Express Merchants' Litigation*,[120] where it previously had stricken a class action waiver that operated as "'a prospective waiver of a party's right to pursue statutory remedies for antitrust violations.'"[121] Reconsidering the case after its prior decision had been vacated by the Supreme Court, the Second Circuit found that because its prior decision had not ordered classwide arbitration—a decision which would have been at odds with *Stolt-Nielsen*—but had instead remanded to the district court to allow the defendant the opportunity to withdraw its motion to compel arbitration, its prior ruling was valid and could be reinstated.[122]

But the Supreme Court saw it differently, at least with respect to the application of unconscionability doctrines to strike down arbitration clauses. On April 27, 2011, the Supreme Court finally considered the debate over class arbitration waivers in *AT&T Mobility LLC v. Concepcion*.[123] In a 5-4 decision, the Court held that "California's *Discover*

---

[117] *Id.* at 141.

[118] *Id.*

[119] *See* In re Checking Account Overdraft Litig., No. 09-MD-02036, 2010 WL 3361127, *2–3 (S.D. Fla. Aug. 23, 2010) (North Carolina law); Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18, 22–24 (Mo. 2010), *cert. granted, judgment vacated by* 131 S. Ct. 2875 (2011) (Missouri law); Ruhl v. Lee's Summit Honda, 322 S.W.3d 136, 139–40 (Mo. 2010), *cert. denied*, 131 S. Ct. 1848 (2011) (Missouri law); Mansker v. Farmers Ins. Co. of Wash., No. C10-0511JLR, 2010 WL 3699847, *2–3 (W.D. Wash. Sept. 14, 2010) (Washington law).

[120] 634 F.3d 187, 197 (2d Cir. 2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n. 19 (1985)).

[121] 554 F.3d at 319.

[122] 634 F.3d at 200.

[123] 131 S. Ct. 1740 (2011).

Bank rule," which bars class action waivers as unconscionable in some arbitration agreements, is preempted by the FAA.[124] The Court rejected the plaintiff's argument that this rule—the same one applied by the Second Circuit in *Fensterstock*—is permitted by section 2 of the FAA as a "ground[] [that] exist[s] at law or in equity for the revocation of any contract." In the Court's view, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[125] Indeed, the Court found that the California rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" to promote arbitration, a primary purpose of which, the Court reasoned, is "efficient and speedy dispute resolution."[126]

It remains to be seen whether *AT&T Mobility* will be applied broadly or be limited to cases with similar facts, such as where the arbitration clause has numerous built-in consumer protections, and whether courts will extend the reasoning of *AT&T Mobility* to cases, such as *In re American Express Merchants' Litigation*, involving statutory claims.[127]

30.2.8 *JOCK V. STERLING JEWELERS*: THE CLASS ARBITRATION DEBATE CONTINUES

In July 2011, a divided panel of the Second Circuit issued another decision in favor of class arbitrations in *Jock v. Sterling Jewelers, Inc.*, distinguishing *Stolt-Nielsen* and allowing a class arbitration to proceed even though the arbitration clause in dispute was silent as to class actions.[128]

The AAA arbitrator in *Jock* issued a Clause Construction Award finding that the arbitration clause in an employment agreement did not prohibit class arbitration.[129] When the respondent moved to vacate the arbitrator's award, the district court refused to do so, relying heavily on the Second Circuit's decision in *Stolt-Nielsen*.[130] After the Supreme

---

[124] *Id.* at 1742

[125] *Id.* at 1748. The Court also found that the limitations of *Discover Bank* rule were little help. For instance, the *Discover Bank* rule applied only to contracts of adhesion, but the Court observed that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750.

[126] *Id.* (citation omitted).

[127] Six weeks after issuing its decision in *AT&T Mobility*, the Supreme Court vacated the Second Circuit's decision in *Fensterstock* and remanded it to the Second Circuit for further consideration in light of *AT&T Mobility*. *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S.Ct. 2989 (2011). The Second Circuit subsequently remanded the case to the District Court. *Fensterstock v. Education Finance Partners*, 426 Fed. Appx. 14 (2d Cir. 2011). On February 1, 2012, the Second Circuit issued a further opinion in *In re American Express Merchants' Litigation*, adhering to its prior decision despite the Supreme Court's decision in *AT&T Mobility*, because it reasoned that the American Express class action waiver would preclude the plaintiffs from enforcing their federal statutory rights. *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012).

[128] 646 F.3d 113 (2d Cir. July 1, 2011).

[129] *Id.* at *2.

[130] 677 F. Supp. 2d at 664–68.

Court reversed the Second Circuit's *Stolt-Nielsen* decision five months later, the district court in *Jock* issued an indicative ruling under Rule 62.1 of the Federal Rules of Civil Procedure stating that it would reconsider its 2009 Order and vacate the arbitrator's ruling permitting class arbitration.[131]

On appeal, the Second Circuit reversed and reinstated the arbitrator's ruling. The court observed that "*Stolt-Nielsen* did not hold that the intent to agree to arbitration must be stated expressly in an arbitration agreement."[132] Unlike *Stolt-Nielsen*, where the parties stipulated that they had not reached agreement with respect to class arbitration, the clause in *Jock* was merely silent *on its face* with respect to class actions; the parties disagreed as to whether it embodied an agreement to permit class arbitration.[133] The court also noted that the *Jock* tribunal had "relied solely on the terms of the agreement and Ohio law,"[134] unlike the tribunal in *Stolt-Nielsen*, which the Supreme Court found to have exceeded its powers by imposing "'its own policy choice'" rather than applying the law.[135] Ultimately, the court ruled that "whether the arbitrator was right or wrong in her analysis, she had the authority to make the decision, and the parties to the arbitration are bound by it."[136]

The courts will continue to debate these issues, and the final chapter on class arbitration in the United States has not yet been written.

30.3 Class Arbitration outside the United States

With proliferation of class arbitration in the United States over the past decade, and collective actions on the rise in other national courts, practitioners and commentators have increasingly contemplated the possibility of class arbitrations outside the United States and in international arbitration settings. But the evidence of class arbitrations occurring outside the United States is scant—one case in Colombia that went to class arbitration, and court decisions in other countries, notably Canada, that have been read to express openness to the process. Meanwhile, some international tribunals and organizations have taken a firm stance against class arbitration.[137] Despite the interest of scholars, the international community to date generally has not embraced class arbitrations.[138]

---

[131] Jock v. Sterling Jewelers, Inc., No. 08 Civ. 2875, 2010 WL 2898294, *1 (S.D.N.Y. July 26, 2010).

[132] *Id.* at *11.

[133] *Id.*

[134] *Id.* at *12.

[135] *Id.* at *5.

[136] *Id.* at *13.

[137] *See infra* section 30.3.2.

[138] *See* S. I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1035 (2009) ("At this point, class arbitration outside the United States appears to be relatively uncommon."). The apparent dearth of international class arbitrations could be due in part to principles of confidentiality that make it difficult to discern the existence of all arbitrations and the processes they employ. However, while the

30.3.1 NATIONAL COURTS AND THE POTENTIAL FOR CLASS ARBITRATION

One potential spawning ground for class arbitration outside the United States is the courts of other countries, which could permit class arbitrations to go forward for the same reasons adopted by certain courts in the United States, particularly in California. One class arbitration has been reported from Colombia, where the Colombian courts authorized the process, and commentators have cited decisions from the Canadian courts suggesting a potential willingness to consider class arbitration. Whether these decisions are harbingers of the future or merely aberrations remains to be seen.

30.3.1.1 Class Arbitration in Colombia: A Surprising Exception

The Colombian arbitration in *Valencia v. Bancolombia S.A.*, which was commenced in 2001 and proceeded all the way to a class arbitration award and beyond, is frequently cited as evidence that class arbitration may spread beyond the United States.[139]

In *Valencia*, minority shareholders of Banco de Colombia sued Bancolombia in Colombian civil court following the merger of Banco de Colombia and Bancolombia.[140] Both the trial court and the intermediate appellate court held that the courts had no jurisdiction over the matter because of an arbitration agreement in the by-laws of one of the financial entities. Plaintiffs filed a writ of protection of fundamental rights (*acción de tutela*) before the Supreme Court of Justice, claiming that class actions are subject to the exclusive jurisdiction of national courts. The Supreme Court of Justice—Colombia's highest available court[141]—rejected this argument, finding that the case was a "specific and exceptional case" because the class was made up of shareholders of a corporation.[142]

---

details of arbitrations are frequently not publicly available due to confidentiality agreements, the practicalities of class arbitrations likely would render them much more transparent and observable than ordinary arbitration. *See, e.g.*, AAA CLASS ARB. R. 9(a) ("The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations."); *see also* Meredith W. Nissen, *Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept*, 11 NO. 4 DISP. RESOL. MAG. 19, 21 (2005). *But see* S. I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 48 (2008) ("It is difficult to ascertain how prevalent class arbitrations are outside the United States due to (1) the often confidential nature of arbitration; (2) the decreased likelihood that details regarding arbitral procedure will make it into official reports; and (3) language issues.").

[139] *See, e.g.*, Eduardo Zuleta Jaramillo, *Class Action Claims May Be Reviewed by Arbitral Tribunal*, Aug. 17, 2006, http://www.internationallawoffice.com/newsletters/detail.aspx?g=67026281-b323-db11-8a10-00065-bfd3168; *Bancolombia S.A. Announces That the Superior Court of Bogota Dismisses the Annulment Action Filed by the Bank*, Mar. 6, 2008, http://news.findlaw.com/prnewswire/20080306/06mar20082120.html.

[140] *See* S. I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 498 (2010) (citing *Valencia (Colombia) v. Bancolombia (Colombia)*, (24 April 2003)—Arbitral Tribunal from the Bogotá Chamber of Commerce, digest by Eduardo Zuleta for Institute of Transnational Arbitration (ITA)).

[141] Colombia also has a constitutional court that is the highest court only for certain matters.

[142] Valencia v. Bancolombia, Supreme Court of Justice, Civil Division, Case no. 11001220300020001-0183-01, Carlos Ignacio Jaramillo, J., May 11, 2001.

The Supreme Court agreed with plaintiffs that arbitral tribunals are generally not competent to hear class actions, "not because [class actions] are constitutionally protected, but because the sentence in a class action, at least in Colombia, applies to all people in uniform conditions with respect to the [cause of] the individual damage," and the effects of an arbitration agreement should not be imposed on parties who have not consented to the agreement.[143] The court reasoned, however, that a group of people bound by an arbitration clause can be required to submit to arbitration because "[i]f one of these people tried to realize his rights outside of the group, he, too, would have to go before an arbitrator."[144] Thus, because the shareholders were all bound by the arbitration agreement in the corporation's bylaws, the class action could be heard by an arbitral tribunal.[145]

The case went to an arbitral tribunal, which examined whether plaintiffs met the legal requirements to file a class action. Under Colombian law, "a class action requires a group of at least 20 persons who have suffered damage based on the same cause of action."[146] One individual, Luis Alberto Durán Valencia, brought the original claim, but the tribunal opened the matter to additional Banco de Colombia shareholders, and more than forty additional plaintiffs joined the case.[147]

The tribunal thus found that plaintiffs had met the necessary threshold. Ultimately, the tribunal found the bank liable for damages, which it assessed at approximately USD 8 million, including interest.[148] After subtracting certain fees and expenses awarded to Bancolombia by the tribunal, Bancolombia was ordered to pay USD 6.9 million to the shareholders.[149] Subsequently, Bancolombia initiated proceedings in the Superior Court of Bogotá to annul the tribunal's award on the grounds that the ruling was not decided "according to current Colombian procedure and regulations," but the Superior Court rejected the application and ratified the award.[150]

---

[143] *Id.* (internal quotation marks omitted).

[144] *Id.*

[145] *Id.*

[146] Eduardo Zuleta Jaramillo, *supra* note 140 (quoting Ruling of May 11, 2001 by Supreme Court of Justice, Carlos Ignacio Jaramillo, J.).

[147] *See id.*

[148] Bancolombia S.A. (BIC), Annual Report (Form 20-F) "Other Legal Proceedings," 106–107 (March 26, 2004). One arbitrator, Rafael H. Gamboa, dissented from the majority decision. He concluded that the conduct of Bancolombia was entirely in accordance with the applicable laws and Bancolombia owed no compensation to the shareholders.

[149] Bancolombia S.A. (BIC), Annual Report (Form 6-K) "Background of the Proceedings" (March 5, 2008).

[150] Bancolombia paid USD 1.2 million to 113 shareholders, under the theory that the individual shareholders had twenty days from the time of the decision to register their interests within the term established by law and those failing to register could not claim damages after the twenty days. Counsel for the shareholders argued that the norm of twenty days did not apply because the minority shareholders were "perfectly identifiable." In response, the Colombian 15th Civil Circuit Court of Bogotá issued a preliminary injunction seizing USD 20 million held in one of Bancolombia's accounts with the Colombia Central Bank as well as certain furniture, fixtures, and one real estate property. Bancolombia stated in a press release that it was considering taking penal actions for abuse of law and all the irregularities that had occurred during the ten-year process. *See Pelea sin fin*, Semana.com, *available at* http://www.semana.com/wf_ImprimirArticulo.aspx?IdArt=118432.

Although the *Valencia* case demonstrates that class arbitration is possible outside the United States, it appears to be the single instance of class arbitration in Colombia, and it remains unclear whether class arbitrations will gain any enduring measure of acceptance in Colombia or elsewhere.[151]

30.3.1.2 The Possibility of Class Arbitration in Canada

Scholars have pointed to Canada as a likely place for class arbitration to develop due to Canada's growing class action litigation practice and its support for arbitration as an alternative means of dispute resolution.[152] However, while Canadian courts have wrestled with the interplay between class actions and arbitration, they have not yet specifically authorized class arbitration.[153]

In *Kanitz v. Rogers Cable Inc.*,[154] five Internet service subscribers in Ontario brought a class action lawsuit against their Canadian Internet service provider. The defendant sought to stay the class action pursuant to service agreements that provided for arbitration and also contained class action waivers.[155] Hoping to avoid arbitration, the plaintiffs argued that the arbitration clause was unconscionable because it would have the practical effect of preventing plaintiffs from obtaining any remedy due to the prohibitive cost of proceeding in bilateral arbitrations.[156]

In a 2002 decision, the Ontario Supreme Court of Justice rejected the claim of unconscionability, finding that there was no evidence that any of the plaintiffs had been dissuaded from proceeding with bilateral arbitration despite the fact that their individual claims were likely no more than several hundred dollars.[157] To this end, the court emphasized that costs routinely are shifted in favor of the prevailing party and noted that the named plaintiffs would be at risk to pay the defendant's costs whether or not they represented a class.[158] The plaintiff also argued that a conflict existed between the Class Proceedings Act, 1992, and the Arbitration Act, 1991, and that the Class Proceedings Act

---

[151] Strong, *supra* note 138, at 49–50 (2008) (discussing *Valencia* and noting that "[g]iven 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"); Eduardo Zuleta Jaramillo, *supra* note 140 ("[T]he question of whether arbitral agreements can serve as an instrument for filing class actions... remains unanswered within the Columbian legal system.").

[152] *See, e.g.*, J. Brian Casey, *Commentary: Class Action Arbitration Should Be Available*, LAWYER WEEKLY, Vol. 25, No. 44 (Mar. 31, 2006); *see also* Strong, *supra* note 138, at 50–52.

[153] Randy A. Pepper, *When Will Online Arbitration Agreements Be Enforced in a Class Action Context? "It Depends," Says the Quebec Court of Appeal in Dell Computers*, 21 BANKING & FIN. L. REV. 323, 328 (2006).

[154] 2002 CarswellOnt 628 (Can. Ont. Sup. Ct. J.).

[155] *See id.* ¶ 1.

[156] Plaintiffs had offered to proceed with class arbitration, but the defendant refused. *See id.* ¶ 41.

[157] *See id.* ¶¶ 41–42.

[158] *See id.* ¶ 44.

should prevail. The court disagreed, finding that arbitration was an acceptable alternative method of redress under the Class Proceedings Act.[159]

The court also noted the language of section 20(1) of the Arbitration Act, which states that "'[t]he arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.'"[160] The court expressed the view that, at a minimum, this language appeared to permit consolidation of arbitrations brought by the five plaintiffs, stating:

> 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.[161]

The court did not comment on whether this same reasoning might permit the arbitral tribunal to craft a class action procedure in the arbitration where the claims to be arbitrated would not be consolidated claims, but rather, claims of absent class members who had never commenced an arbitration.

Commentators have argued that the Quebec Court of Appeals also left open the possibility of class arbitration in its 2005 decision in *Union des Consommateurs v. Dell Computer Corp.*,[162] although the court did not specifically address the issue. When the Supreme Court of Canada considered the case on a subsequent appeal in 2007,[163] it rejected the consumers' contention that because they brought their claims as a class action, "the dispute is of a public order and therefore cannot be submitted to arbitration"; the court found that "[t]he class action is a procedure, and its purpose its not to create a new right."[164] However, the court did not explicitly consider whether the claimants could raise their class claims in arbitration.

---

[159] *See id.* ¶ 53.

[160] *Id.* ¶ 54 (quoting section 20(1) of the Arbitration Act, 1991).

[161] *Id.* ¶ 55.

[162] 2005 CarswellQue 3270 (Can. Quebec C.A.), *rev'd*, [2007] 2 S.C.R. 801 (S.C.C.); *see* Strong, *supra* note 138, at 51–52 (discussing *Dell Computer*); *see also* Henri C. Alvarez, *Supreme Court of Canada*, July 13, 2007, http://www.kluwerarbitration.com/document.aspx?id=ipn80955&query=AND(content%3A%22dell%22,content%3A%22computer%22).

[163] Union des Consommateurs v. Dell Computer Corp., [2007] 2 S.C.R. 801 (S.C.C.).

[164] *Id.* at ¶ 105.

Both Quebec and Ontario have now banned arbitration of consumer class claims,[165] which likely will reduce the potential for class claims in arbitration in Canada, and Alberta "subjects consumer arbitration clauses to ministerial approval,"[166] but the British Columbia legislature adopted a hybrid approach, ensuring "only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties."[167]

In 2011, the Supreme Court held, in *Seidel v. TELUS Communications Inc.*,[168] that the British Columbia legislature intended that certain types of consumer claims be brought in court and that the respondent could not compel arbitration of those claims under a predispute arbitration clause. The court also noted that arbitration of those claims would be inadequate because, among other things, "arbitrators, who derive their jurisdiction by virtue of the parties' contract, cannot order relief that would bind third parties."[169] This statement may ultimately be raised in opposition to class actions in arbitration, though the Supreme Court did not explicitly address whether the "third parties" at issue would include absent class members if they had entered into identical consumer contracts with the defendant.

If class actions in their various forms continue to grow in use and frequency around the world, it is likely that courts and arbitrators in Canada and elsewhere will confront requests for class arbitration in increasing numbers. If the U.S. experience is any guide, the outcome may depend largely on which set of concerns are paramount to the relevant decision-makers, either judicial or legislative. If the courts or policymakers are concerned with facilitating the aggregation of small claims without eliminating arbitration entirely, they may authorize class arbitration in some circumstances. If, on the other hand, they take the view of the U.S. Supreme Court in *Stolt-Nielsen*—that class proceedings are a fundamental shift in the parties' expectations in arbitration and should not be permitted without express consent—the availability of class arbitration will be far more limited.

30.3.2 INTERNATIONAL TRIBUNALS AND INSTITUTIONS HAVE PERMITTED LARGE, CONSOLIDATED ARBITRATIONS, BUT HAVE NOT EMBRACED CLASS ARBITRATION

Unlike the AAA and JAMS in the United States, international arbitration providers based in other countries have not promulgated rules for class arbitrations. Major international arbitration institutions, including the Paris-based International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International

---

[165] *See* Seidel v. TELUS Communications Inc., 2011 SCC 15 at ¶ 40; McCarthy Tétrault, Defending Class Actions in Canada 109–113 (2d ed. 2007).

[166] *See* Seidel v. TELUS Communications Inc., 2011 SCC 15 at ¶ 40.

[167] *See id.*

[168] 2011 SCC 15 (Can. March 18, 2011).

[169] *Id.* at ¶ 39.

Arbitration, allow for the joinder of parties and consolidation of pending arbitrations in some instances. Moreover, multiparty arbitrations are quite common, including some with more than a hundred thousand parties.[170] Nevertheless, institutions outside the United States have not officially embraced the practice of class arbitration. Indeed, at least two public international tribunals have explicitly *rejected* class arbitrations with language that—if representative of views in the international arbitration community—suggest substantial hostility to U.S.-style class procedures in international arbitration.

In 2003, the Iran–United States Claims Tribunal—an international arbitral body established in 1981 in the wake of the Iran hostage crisis to resolve disputes among Iran, the United States, and their nationals—rejected a claim brought by an Iranian citizen against the United States on behalf of the citizens of Iran.[171] The claim sought redress on behalf of "a large number of Iranian nationals" for "damages arising from the Respondent's alleged involvement in the *coup d'état* of August 19, 1953 in Iran."[172] The tribunal dismissed the claims because, inter alia, "the Claimants do not even purport to 'own' the instant Claim; they profess to have brought it on behalf of others."[173] The tribunal explained that "[s]uch a 'group action,' as the Respondent has styled this Claim, is not permitted by the Claims Settlement Declaration or Tribunal Precedent."[174]

Similarly, a tribunal constituted to resolve certain disputes relating to the Bank of International Settlements—an organization of central banks from more than fifty nations—held, in a 2001 shareholder arbitration against the bank, that although it had authority to consolidate arbitrations, it lacked the authority to allow class proceedings,

---

[170] *See* S. I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARBITRATION INTERNATIONAL: THE JOURNAL OF THE LONDON COURT OF INTERNATIONAL ARBITRATION 493, 494–95 (2010) (discussing examples of large multiparty arbitrations); International Inst. for Sustainable Dev., *Second Group of Italian Bondholders Sue Argentina at ICSID*, INVESTMENT TREATY NEWS, Apr. 27, 2007 (discussing *Beccara v. Argentine Republic*, ICSID Case No. ARB/07/05, and *Alemanni v. Argentine Republic*, ICSID Case No. ARB/07/8), *available at* http://www.iisd.org/pdf/2007/itn_april27_2007.pdf; *Italian Bondholders' Arbitration Against Argentina Advances*, TDM NEWS DIGEST, May 16, 2007, http://www.transnational-dispute-management.com/news/tdmnews-2007-08.htm (noting with respect to the *Beccara* arbitration that: "[a] tribunal of three arbitrators will consider the Request for Arbitration filed by almost 195,000 Italian natural persons and juridical entities who invested almost US$ 4.4 billion in Argentine sovereign bonds"); *see generally*, Anne Marie Whitesell, *Multiparty Arbitration: The ICC International Court of Arbitration Perspective*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATIONS: CONSENT, PROCEDURE AND ENFORCEMENT (MULTIPLE PARTY ACTIONS) 203 (2009); Adrian Winstanley, *Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration*, *in* MULTIPLE PARTY ACTIONS 213 (2009); R. Doak Bishop, *Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders*, *in* MULTIPLE PARTY ACTIONS 239 (2009).

[171] Sheibani v. United States, 1 Iran-U.S. Cl. Trib. Rep. 946, ¶ 17 (2003), *available at* 2003 WL 21663253. The court held that Claims Settlement Declaration that required private claimants to "own" their claims precluded the bringing of a claim by one national on behalf of others. *Id.* ¶ 13.

[172] *Id.* ¶¶ 1, 8 (alteration in original).

[173] *Id.* ¶ 13.

[174] *Id.*

which it described as "an essentially American phenomenon."[175] Though the bank had announced that it would voluntarily pay all similarly situated shareholders any additional compensation that the tribunal might determine to be due in the case before it, this did not create a de facto class arbitration, and the tribunal did not permit a nonclaimant shareholder to participate in the action as a member of the class.[176] Like the Iran–United States Claims Tribunal, the Tribunal Regarding the Bank for International Settlements refused to allow class actions to expand into this international sphere.

The tribunals that decided these cases did so with reference to the specific international treaties that established their authority.[177] Accordingly, it is uncertain whether these decisions are indicative of the likely outcome in international commercial arbitration, which generally is authorized by private agreements and supported by local laws. International commercial arbitration proceedings and awards ordinarily are confidential, so if any parties have sought unsuccessfully to raise class claims in non-U.S. arbitrations, the decisions may never be publicly available.[178] Moreover, international arbitration providers generally have not issued official pronouncements regarding their willingness to facilitate class arbitrations.

Furthermore, the ICC has taken a firmly negative stance against class actions in litigation, claiming that "it is impossible to try numerous claims in a single case without sacrificing the right of defense" and that class actions create a "major risk" of "'legal blackmail.'"[179] The opinion is not surprising—the ICC is an organization of business interests that generally tend to oppose class actions—but it is significant to the arbitration world, because the ICC's International Court of Arbitration is one of the most prominent providers of international arbitration services. Although the ICC policy statement is directed at class actions, it appears equally applicable to class arbitrations. It states, in summary:

> ICC believes that implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to society. The spread of class action lawsuits risks an increase in speculative lawsuits needlessly costing global business time, resources and exposure to "legal blackmail." Such litigation

---

[175] *Howe v. Bank of Int'l Settlements, Order on the Request of Reginald H. Howe for Exceptional Remedies*, ¶¶ B3-B4 (Perm. Ct. Arb. 2001) (Howe Order), *available at* http://www.pca-cpa.org/upload/files/bisorder.pdf; *see also* Scott Armstrong Spence, *Organizing an Arbitration Involving an International Organization and Multiple Private Parties*, 21 J. INT'L ARB. 309, 314–15 (2004).

[176] Howe Order, at ¶¶ B1–B3.

[177] One commentator argues that the impact of these two decisions is mitigated by the fact that they resulted from the interpretation of unique arbitration rules. Strong, *supra* note 139, at 52–53. While this may be the case, particularly with regards to the Iran-United States Claims Tribunal, the decision still indicates an inclination on the part of international arbitrators to interpret rules to *preclude* class arbitration.

[178] It is much less likely that an arbitration would escape publicity if it allowed class arbitration to proceed, because of the notice that would be required to absent class members.

[179] International Chamber of Commerce, Commission on Commercial Law & Practice, Policy Statement, *Class Action Litigation*, Doc. No. 460/585, at 2 (2005), *available at* http://www.iccwbo.org/uploadedFiles/ICC/policy/clp/Statements/ Class_action_litigation.pdf.

> results in higher costs for companies and ultimately higher prices for consumers. Regulators have a number of other policy options that could attain the desired benefits without these adverse effects including for example joinder of claims and the use of pilot cases. Since some countries currently consider the adoption of class action systems based on that of the United States, ICC is of the view that both the costs and desired benefits of multi-party disputes should be examined.[180]

The ICC's strong views cast doubt on whether the International Court of Arbitration would agree to administer class arbitrations, at least without the consent of all affected parties.

Nevertheless, the growth of consolidated and large multiparty proceedings in international arbitration reflects the reality of increasingly large and complex disputes in the international sphere that practitioners of international arbitration and their institutions must address. This same reality may increase the pressure over time for international tribunals and institutions to consider some form of class arbitration, and their experience with these multiparty cases may mitigate some of the concerns over the unwieldy nature of large collective arbitrations. Indeed, some commentators believe that the future lies in some form of collective action, rather than in the representative class action form as it is practiced in the United States.[181]

30.4 The Path to International Class Arbitration

Although the future of class arbitration remains uncertain, we conclude by considering some of the challenges facing parties that seek to resolve disputes through class arbitration. In doing so, we again stress that by "class arbitration," we mean a proceeding whereby a representative of a particular group brings an action, the outcome of which would bind all members of the defined group (i.e., a "class") who either opted in or failed to opt out of the proceeding, rather than a mass or collective action where a large group of claimants determine, among themselves, to band together and bring a single action.

In the current environment, parties seeking to resolve disputes through international class arbitration should be mindful of the development of the law governing class arbitration in the United States and the commentary on international class arbitration. Both of these sources indicate that for a party to have any hope of successfully proceeding with class arbitration, it must have an arbitration agreement that evidences some intent by all parties that arbitration could proceed on a class basis. In addition, appropriate class action procedures must exist for resolving the dispute on a class basis. Parties seeking to

---

[180] *Id.* at 1.

[181] *See* Strong, *supra* note 140; S. I. Strong, *Class Arbitration Outside the United States: Reading the Tea Leaves, in* MULTIPARTY ARBITRATION 183 (Bernard Hanotiau & Eric A. Schwartz eds., 2010).

pursue arbitration in the international context should also consider whether it will be possible to enforce the resulting international arbitral award.

30.4.1 DRAFTING AN ARBITRATION CLAUSE TO EVINCE CONSENT

In *Stolt-Nielsen*, the U.S. Supreme Court made clear that class arbitration under the FAA is only possible where the parties contemplated it at the time they formed the arbitration agreement.[182] A fortiori, it is unlikely that courts and tribunals in countries without the same long history of class action litigation would infer consent to class arbitration from an arbitration clause that is silent on the subject. Consent and party autonomy are bedrock principles of international arbitration, so the question of intent is likely to be a threshold for international class arbitration whether or not venued in the United States, and it should be a primary concern for any party attempting to draft an agreement that would permit class arbitration.

Aspects of U.S.-style class actions are alien to many jurisdictions. Class arbitration opponents can readily argue that courts and tribunals should not infer consent to procedures that are novel and unestablished in the particular venue and in the broader international community.[183] Moreover, as the U.S. Supreme Court expressed in *Stolt-Nielsen*, class arbitration arguably alters traditional arbitration to such an extent that parties can hardly be assumed to consent to it without express consideration.[184]

For example, in order to protect the due process rights of absent class members, confidentiality must, to some extent, be sacrificed in class arbitration.[185] However, many parties may have initially agreed to arbitrate precisely because arbitration afforded a means by which disputes could be settled in a private and confidential manner. Similarly, a class arbitration will be lengthier and more expensive than a bilateral arbitration,[186] upsetting an expectation of many parties that arbitration will streamline and expedite the dispute resolution process.

While class arbitration may be permitted where the parties have explicitly agreed to the procedure, clauses that explicitly provide for the use of class arbitration are a rarity,[187] and most businesses that prepare the sort of form contracts that result in the types of

---

[182] *See supra* section 30.2.6.

[183] *See* Alexander Blumrosen, *The Globalization of American Class Actions: International Enforcement of Class Action Arbitral Awards*, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION ¶ 15.46 (2009).

[184] *See Stolt-Nielsen*, 130 S. Ct. at 1775–76.

[185] *See id.* at 1776; Brief for Respondent at 47, *Stolt-Nielson*, 130 S. Ct. 1758, 2009 WL 3404244, at *47 ("Class arbitration does require some public disclosure, at least to give potential class members notice and an opportunity to opt out.").

[186] *See* Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 24, *Stolt-Nielson*, 130 S. Ct. 1758, 2009 WL 2896309, at *24 (discussing statistics that "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court").

[187] *See* Bernard Hanotiau, *A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, 20 ARB. INT'L 39, 46 (2004).

disputes that lend themselves to class action treatment have historically been opposed to class arbitration.[188] For the willing, however, they are certainly possible.

30.4.2 DEVELOPING A SUITABLE CLASS ARBITRATION PROCEDURE

Beyond the issue of consent, the most persistent—and unresolved—question in U.S. court decisions concerning class arbitration is how to overlay necessarily complex class action procedures on arbitration's streamlined dispute resolution procedures. The California and Pennsylvania courts reserved major procedural class action issues for the courts, which would ensure judicial protection of absent class members' rights and allow the arbitrators to focus largely on the merits of the dispute. The *Bazzle* decision and the subsequent rules promulgated by the AAA and JAMS, however, assign procedural class action issues to the arbitrators with rules that mimic the procedures in U.S. federal courts, and limit the courts to an appellate review function, at most.[189] And even with respect to the AAA and JAMS procedures, significant questions about class action practice have never been conclusively answered. We highlight below several of the procedural questions that would need to be resolved for international class arbitration to proceed.

30.4.2.1 Notice to Absent Class Members

First and foremost, standards for the notification of absent class members in the arbitration must be adopted. In U.S. class actions, notice to prospective class members is generally required both at the time the class is certified and at the time of any settlement, allowing prospective class members to opt out of the class or object to settlement. In an international setting, where class actions are far from the norm and cross-border notice may be less reliable, opt-in class actions, where claimants are included in the class only if they affirmatively request inclusion, such as by returning a form evidencing their consent, may be more feasible. Indeed, enforcement of any resulting award may be more likely if members of the class are given notice and must affirmatively choose to have their claims adjudicated by opting in, rather than being bound by the result of a proceeding because they failed to opt out.[190] At the same time, however, an opt-in mechanism will make it more difficult for respondents to achieve a final resolution, as they could face serial opt-in class actions.

There also are various details regarding notices that must be settled. If notice is to be required, who pays for the notice? If an opt-out procedure is used, what form of notice is required? Should actual notice be required, or should the tribunal deem a certain notice

---

[188] *See id.*

[189] *See supra* sections 30.2.4 and 30.2.5.

[190] *See infra* section 30.4.3.1.

procedure constructive notice? Parties should give careful thought to these questions at the outset.[191]

30.4.2.2 Early Resolution and Pleading Standards

In certain types of U.S. class action litigation, defendants rely heavily on early dispositive motions to cut off untenable and defective class actions and avoid both the costs of discovery and the risks inherent in proceeding to the merits of allegedly massive aggregate claims. In the streamlined process of arbitration, early dispositive motions are unusual. Any class arbitration procedure should be crafted with an eye toward the proper role of dispositive motions to avoid creating a process even more burdensome than U.S. class litigation.[192]

30.4.2.3 Settlement Fairness and Administration

In U.S. class action practice, cases are more often settled than tried to a final verdict, and class action settlements raise complicated questions of administration and fairness. Courts in the United States have a duty to scrutinize class settlements for fairness to absent class members, reasonableness, and adequacy.[193] Judges often contend with poorly equipped class representatives and attorneys, inadequate class settlement provisions, and overly generous fee applications. Under the AAA and JAMS rules, the arbitrators have a similar duty in class arbitrations. Even if that process is applied or replicated in international class arbitrations, it is unclear whether it will be effective in practice among arbitrators who may not be willing or prepared to assume this role in international class arbitrations.[194]

Settlement administration also requires compiling and maintaining mailing lists of class members and providing adequate notice, collecting and evaluating individual proofs of claim from each class member who wishes to participate in the settlement, and managing the investment and distribution of settlement funds. In the United States, there is a well-developed industry specializing in settlement administration.

---

[191] For more on class notice in international class action disputes, *see* chapter 28 in this book.

[192] In the United States, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), which, among other things, sets heightened pleading requirements for federal securities class actions, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.), which ensures that certain types of securities actions are brought in federal court where the PSLRA's standards apply, rather than in state court where they might be avoided. These statutes were enacted in response to perceived abuses of the class action mechanism in securities cases.

[193] *See* Fed. R. Civ. P. 23(e)(2).

[194] Commentators have pointed to another area even more fraught for arbitrators, the class certification stage, during which the arbitrators' decision will substantially impact their likely compensation going forward. *See* David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 73 (2007).

30.4.2.4 Costs and Fees

Arbitrator fees will likely be much higher in class arbitration than in bilateral arbitration, due to the greatly expanded commitment of time and attention required from the arbitrators. The process can also involve disputes among various claimants and various claimants' counsel, objections to settlement, and a variety of issues not present in traditional arbitration.[195] With respect to attorneys' fees, the U.S. system of contingency payments for plaintiffs' lawyers, which has played a critical role in the proliferation of U.S. class actions, is anathema to the legal systems in some countries. Furthermore, in arbitration, the losing party often is required to pay the prevailing party's costs. If the respondent prevails, it is unclear who on the claimant's side would pay its costs. Respondents may therefore need to request that the class representatives post a bond for costs at the start of a class arbitration, but the named claimant may have a minimal stake and few resources.

30.4.3 THE CHALLENGE OF INTERNATIONAL ENFORCEMENT

If national courts in the United States, Colombia, Canada, or elsewhere permit class arbitrations to proceed in significant numbers, prevailing parties in international class arbitrations may face an additional hurdle when it comes time to seek recognition and enforcement abroad of their class arbitration awards.[196] Any challenge to recognition and enforcement of a foreign class arbitration award will rise and fall largely on the ability of the party making the challenge to satisfy any of the grounds for avoiding enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[197]

With over 133 signatories,[198] the New York Convention has been instrumental in promoting a strong policy favoring the enforcement of arbitral awards over the past fifty years. Indeed, under the New York Convention and other conventions and laws, courts enforce awards in the vast majority of instances where enforcement is sought.[199]

---

[195] It has been noted that class arbitration may actually be more burdensome on the parties than class litigation. Among other things, the clause construction phase is unique to arbitration, as is the need to pay arbitrators, which can impose a substantial or even prohibitive burden on the parties. *See id.* at 63–64, 73.

[196] Although inconsequential for the present discussion, recognition and enforcement are technically distinct. Recognition occurs before or at the same time as enforcement. It is the "formal confirmation that the award is authentic and that it has the legal consequences provided by the law." CHRISTOPHER H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1128 (2d ed. 2001). Aside from a predicate to enforcement, the recognition of the award may act as a res judicata bar to other proceedings that concern matters already decided by the award. *Id.*; *see also* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 26-10 and 26-11 (2003). Enforcement is the process whereby a successful party seeks the assistance of a court to exercise its power to give effect to an award. *Id.* ¶ 26-12.

[197] June 10, 1958, 575 U.N.T.S. 159.

[198] A list of all current signatories can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[199] LEW ET AL., *supra* note 196, ¶ 26-2.

This relative ease of enforcement is due, in part, to the limited and exclusive list of grounds for avoiding enforcement set forth in the New York Convention. These grounds are divided into two categories: public policy and jurisdictional challenges that may be raised by a party or the court, and challenges that can only be raised by a party, which include procedural issues.[200] The application of these grounds by national courts is far from uniform, particularly where an objection to enforcement is grounded in the public policy of the enforcing state. Nonetheless, most nations' courts have generally applied these grounds in a narrow fashion to limit the instances where enforcement of arbitral awards can be avoided.[201]

To date, there do not appear to have been any reported instances where a class arbitration award has been enforced (or enforcement has been denied). If class arbitrations continue in meaningful numbers, the need for international enforcement is likely inevitable, and it is by no means certain that class arbitration awards will receive the same favorable treatment that national courts have given other awards. Indeed, there appears to be a consensus in scholarly opinion that the New York Convention would permit substantial challenges to the enforcement of class arbitration awards, although opinion is divided over whether or not the challenges would ultimately be successful.[202]

Location matters, particularly with respect to public policy challenges, which are based on the public policy of the country where recognition and enforcement are sought. The New York Convention permits a court to decline to enforce an award where "[t]he recognition or enforcement of the award would be contrary to the public policy of *that country*."[203] It has been said that "[t]he public policy exception to enforcement is an acknowledgment of the right of the State and its courts to exercise ultimate control over the arbitral process."[204] Numerous legislatures, courts, and commentators have opined that to avoid the enforcement of an award on this ground, the award must violate the state's *international* public policy, which refers to "that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment

---

[200] *See* New York Convention, *supra* note 198, art. V.

[201] *See* Int'l Law Ass'n, Comm. on Int'l Commercial Arbitration, London Conference, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 11–14 (2000) (discussing nations' treatment of the public policy exception); *see also* Lew et al., *supra* note 196, ¶¶ 26–66 ("All grounds for refusal of enforcement must be construed *narrowly*; they are exceptions to the general rule that foreign awards must be recognized and enforced."); Strong, *supra* note 138, at 55.

[202] Blumrosen, *supra* note 183, ¶ 15.40 (predicting a "litany of defenses raised in connection with the enforcement of class action awards"); Strong, *supra* note 138, at 1019–20 (anticipating that "vigorous opposition to international class arbitration will arise at the international enforcement stage").

[203] New York Convention, *supra* note 198, art. V(2)(b) (emphasis added).

[204] Int'l Law Ass'n, London Conference Report, *supra* note 201, at 2. Though most countries take a fairly restrictive approach to the concept of public policy in this area, some countries such as Japan, Turkey, Vietnam, and China are known to employ relative broad interpretations of the public policy exception. *See* Strong, *supra* note 138, at 69.

or foreign award."[205] International public policy is understood to be narrower in scope than domestic public policy and is thought to be implicated "'only where enforcement would violate the forum state's most basic notions of morality and justice.'"[206]

Discussed below are a few of the most likely challenges to international recognition and enforcement of class arbitration awards.

30.4.3.1 Lack of Actual Notice of the Proceedings

The limited forms of notice given to absent class members in U.S. class actions, which generally fall far short of ordinary requirements for service of process, expose class arbitrations to public policy challenges.[207] Many countries consider it a fundamental right that parties receive *actual* notice of a proceeding, a requirement that is particularly strong in civil law countries.[208] In France, for example, the high court for constitutional issues—the *Conseil Constitutionnel*—has ruled that even in a collective action brought by a union on behalf of its members, actual notice to each of the members is mandatory.[209]

In U.S. class actions, notice often is achieved through mass mailings and publications that inevitably fail to reach each and every class member, even though all class members will eventually be bound by the outcome, possibly offending the public policy of states where actual notice is sacrosanct. The lack of actual notice may give rise to an additional challenge by any absent class members who argue that they were deprived of the opportunity to participate in the selection of arbitrators or present arguments to the tribunal.[210]

---

[205] Int'l Law Ass'n, Comm. on Int'l Commercial Arbitration, New Delhi Conference, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, ¶¶ 10–11 (2002). In this sense, the term "international public policy" is somewhat of a misnomer in that it does not refer to public policies that have been universally or widely adopted among many countries. *Id.* While some commentators and courts have referred to this type of transnational public policy, courts have not directly embraced and applied transnational public policy in the context of enforcement of awards. Int'l Law Ass'n, London Conference Report, *supra* note 201, at 6–7.

[206] Int'l Law Ass'n, New Delhi Conference Report, *supra* note 205, at ¶¶ 11–12 (quoting *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

[207] New York Convention, *supra* note 198, art. V(2)(b). Challenges for lack of notice and violation of the right to defense (discussed below) may also be brought under Article V(1)(b), which allows objections to enforcement where "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case." However, most parties will likely rely on the public policy objection under Article V(2)(b) because courts and commentators generally agree that the standards for determining whether a party received "proper notice" or was "otherwise unable to present his case" are those of the country where the arbitration was seated or the law of the country chosen by the parties. *See* Strong, *supra* note 138, at 58–59; Lew et al., *supra* note 196, ¶¶ 26-10 and 26-81.

[208] Blumrosen, *supra* note 183, ¶ 15.49.

[209] *Id.* ¶ 15.52.

[210] States may regard the right to prosecute a lawsuit and participate in private actions that directly affect their interests as a fundamental component of their judicial systems, a breach of which may form the basis for a nonenforcement claim. *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 Tul. J. Int'l & Comp. L. 5 (2002) (discussing the rights to prosecute and defend an action in the context of enforcement of class actions). *See also* Blumrosen, *supra* note 183,

There will be no basis for these challenges, of course, if an arbitral award binds only those parties who received actual notice. Accordingly, the best way to avoid these problems may be for a class arbitration to operate on an opt-in basis—with a class consisting of only those potential class members who received notice and responded by indicating their willingness to be included.

30.4.3.2 The Right to Defense

Class arbitration awards may also be susceptible to public policy challenges in certain countries based upon a respondent's "right to defense" against the claims of the absent class members. In Italy, for example, the right to defense is "one of the 'supreme principles of the constitutional system'" that "together with the guarantee of adversary process... are principles of a procedural nature that express inalienable values of the Italian legal system."[211] Class arbitrations, like class actions, could result in a respondent being held liable to unidentified claimants whom the respondent has not had an opportunity to confront or examine.[212] In a system that highly values a party's right to defense, courts may decline to enforce a class award if it finds that class arbitration procedures offend this right.

30.4.3.3 Challenges for Lack of Consent

As discussed above, given the importance of consent and party autonomy in international arbitration, enforcement of class arbitration awards may also be challenged if the parties did not explicitly agree to class arbitration proceedings.

Under the New York Convention, enforcement of an award may be denied where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[213] Faced with a challenge on this ground, a court will have to interpret the arbitration clause to determine whether the parties consented to class proceedings, unless it determines that the issue is reserved for the arbitrator. Courts may find that consent was implied with respect to minor deviations in arbitral procedure, but they are far more likely to react negatively to substantial

---

¶¶ 15.54–15.55; INT'L LAW ASS'N, LONDON CONFERENCE REPORT, *supra* note 201, at 26 (discussing the 1992 French *Dutco* decision where enforcement was denied because a failure to respect equality of the parties in appointing arbitrators constituted a breach of French international public policy).

[211] Dreyfuss, *supra* note 210, at 17; *see also* Strong, *supra* note 138, at 73–75 (discussing same).

[212] *See* Dreyfuss, *supra* note 210, at 27–28.

[213] New York Convention, *supra* note 198, art. V(1)(d). Objections grounded in consent and party autonomy might also be brought under Article V(1)(c), which provides, among other things, that enforcement may be refused where "[t]he award...contains decisions on matters beyond the scope of the submission to arbitration."

procedural changes, as did the Supreme Court in *Stolt-Nielsen*.[214] Moreover, courts may be particularly reluctant to enforce class arbitration *settlements* against absent class members who had no role in the negotiations and did not have the benefit of a decision on the merits by a neutral arbitrator.

While legislation allowing for group and/or representative actions is taking hold in a growing number of countries, none of these countries has gone as far as the United States.[215] Aspects of U.S.-style class actions are simply unknown to many jurisdictions, and a party resisting enforcement can forcefully argue that parties should not be held to have impliedly consented to arbitration procedures that are novel and unestablished within the international community and substantially alter traditional expectations regarding arbitration.[216]

30.5 Conclusion

Courts in the United States have grappled with the interplay between class actions and arbitration for nearly three decades, allowing the practice to expand slowly, at first, upon the concern of certain courts that arbitration could unfairly deny plaintiffs the ability to bring their claims collectively, and then rapidly, following the 2003 U.S. Supreme Court decision in *Bazzle*. Hundreds of class arbitrations were filed in the United States from 2003 to 2010, but the Supreme Court's subsequent decision in *Stolt-Nielsen* in 2010 limited class arbitration to those cases where the parties are found to have agreed upon class proceedings at the time they formed their arbitration agreement, a ruling that is expected to sharply curtail the practice. Courts in the United States are now contemplating whether, and under what circumstances, to allow class arbitrations to proceed, to order individual arbitration, or to simply void arbitration agreements that would effectively strip the parties of their right to initiate class actions.

Courts outside the United States have had little opportunity to consider the viability of class actions in arbitration, largely because of the limited use of the class action mechanism outside the United States and the outright rejection of this practice by many countries. If countries increasingly adopt class action procedures in their local courts, it may also lead to increased acceptance of class actions in arbitration. If class arbitration does gain acceptance, it likely will be subject to the same concerns about party consent and autonomy that have shaped the debate in the United States. Parties to international class arbitrations—arbitrations affecting parties or property in multiple countries—may face additional hurdles when attempting to enforce an arbitral award.

---

[214] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1175–76 (2010); Strong, *supra* note 138, at 1061–62.

[215] *See* Blumrosen, *supra* note 183, ¶ 15.46.

[216] *See id.*; *see also supra* section 30.4.2.1.

If party consent continues to be the cornerstone of class arbitration, the once burgeoning field of class arbitration may be limited to the rare situation where contracting parties agree to submit to class arbitration rather than be subject to either individual arbitration or class actions in the courts. Only time will tell whether the growing number of large, multiparty proceedings in litigation and arbitration around the globe will lead to increased acceptance and creative adaptation of class arbitration practice.