From Class to Collective: The De-Americanization of Class Arbitration

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From Class to Collective: The De-Americanization of Class Arbitration

by S.I. STRONG*

ABSTRACT

Opponents to international class arbitration (also known as ‘class action arbitration’ or ‘classwide arbitration’) frequently characterize the procedure as a ‘“uniquely American” device’ and take the view that the procedure never could or never should expand beyond the United States. However, a growing number of commentators believe that large-scale group arbitration can or will spread beyond US borders, although that does not necessarily mean that the procedures adopted will or should be the same as those used in US-style class arbitrations. This article considers what these new forms of group arbitration – described herein as ‘collective arbitration’ – will look like in terms of procedure. The discussion also includes analysis of certain potential problem areas, using analogies to the American Arbitration Association (AAA) Supplementary Rules for Class Arbitration as a guide, and addresses the likely enforceability of awards arising out of such actions under the New York Convention.

I. INTRODUCTION

OPPONENTS TO international class arbitration (also known as ‘class action arbitration’) frequently characterize the procedure as a ‘“uniquely American” device’.1 Certainly, class arbitration, as currently practised and envisaged,2

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1 The President and Fellows of Harvard College Against JSC Surgutneftegaz (2008) 770 PLI/Lit 127 at p. 155 (‘Harvard Award’).
explicitly imports elements of US-style class actions (i.e. large-scale lawsuits seeking representative relief on behalf of hundreds to hundreds of thousands of injured parties) into the arbitral context. As such, the procedure reflects a strong bias toward US conceptions of collective justice.

The perceived exceptional nature of the mechanism may lead some people to think that the procedure never could or never should expand beyond the United States. Furthermore, class arbitration has had its share of growing pains over the last 20 years, as an ever-increasing body of domestic US case law and commentary suggests, and the US Supreme Court’s recent decision in Stolt-Nielsen SA v. AnimalFeeds International Corp. has done little to clarify the already muddy waters. As it turns out, however, a growing number of commentators believe that large-scale group arbitration can or will spread beyond US borders. Three facts also support this conclusion.

First, the global legal community is seeing an unprecedented amount of interest in issues involving large-scale group injuries. At one time, discussions regarding redress for collective injury focused solely on the dichotomy between private representative relief offered by US-style class actions and the paradigmatic form of public regulatory relief used in Europe. The situation has changed, however, as entirely new methods of addressing large-scale collective injuries in national courts have developed. No longer can the discussion of potential solutions to group injury focus on a simple either/or analysis; a multiplicity of innovative alternatives now exists.

Secondly, class arbitrations already involve non-US parties. For example, at least three different types of international class arbitrations have already been brought in the commercial realm. Collective relief has been sought in other countries, and this trend is likely to continue.


3 Stolt-Nielsen, 130 S.Ct. at 1776 n. 10. Although, Stolt-Nielsen purports to limit the availability of class arbitration in cases where the arbitration agreement is silent as to group treatment, closer reading of the decision demonstrates the narrowness of the opinion and the likelihood of further litigation on a variety of outstanding issues. See S.I. Strong, ‘Opening More Doors than it Closes: Stolt-Nielsen SA v. AnimalFeeds International Corp.’ in (2010) Lloyd’s Maritime and Commercial LQ (forthcoming) (Strong, ‘Stolt-Nielsen’).


6 These include: (1) class arbitrations that name at least one defendant from a country other than the seat of the arbitration; (2) class arbitrations that involve defendants that may be based in the arbitral forum but that also hold significant foreign assets which may be relied upon at the enforcement stage; and (3) class arbitrations that include claimants from outside the arbitral seat.
specialised arbitral contexts as well, including an international investment class arbitration filed by 195,000 Italian parties against Argentina under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (‘ICSID Arbitration Rules’) and a mass arbitration valued at US$100 billion filed by shareholders of Russian oil company Yukos under the 1994 Energy Charter Treaty.

Thirdly, courts, legislatures and public officials in a variety of jurisdictions have already begun to discuss the possible development of collective arbitration within their own national borders. Although some of these discussions have focused exclusively on domestic proceedings, others have contemplated cross-border relief as well.

Although it therefore appears likely that class or class-type arbitration will spread beyond US borders, that does not necessarily mean that the procedures adopted will or should be the same as those used in US-style class arbitrations. Indeed, existing laws regarding class arbitration are continually in flux, even in the United States, where the Supreme Court’s opinion in Stolt-Nielsen has made

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11 But see Nater-Bass, infra n. 4 at p. 683 (suggesting collective arbitration may not develop in Europe because new laws on collective redress do not pose the same threats to corporate defendants as US class actions do).
the issue even more of a moving target. Therefore, the first question addressed in this article is what these new forms of group arbitration – described herein as ‘collective arbitration’ to mirror terminology used to describe collective redress in national courts13 – will look like in terms of procedure. This issue is covered in section II below.

Those who become involved in developing new forms of collective arbitration14 will likely be influenced heavily by the principles and policies of their home states. Since each nation has its own unique laws and policies, the debate regarding collective arbitration will be different in every jurisdiction and will not be in any way contingent on the extra-territorial application of US laws, policies or procedures regarding class arbitration.15 Nevertheless, there is much that can be learned from the US class arbitration experience. Section III therefore discusses how the leading rule set on class arbitration, the American Arbitration Association (AAA) Supplementary Rules for Class Arbitration (‘AAA Supplementary Rules’),16 handles certain areas of concern so as to provide food for thought for those developing new collective procedures.

12 For example, although the majority in Stolt-Nielsen held that ‘[a]n implicit agreement to authorize class-action arbitration … is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate’, the decision also stated that ‘[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration’. Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., 130 S.Ct. 1758, 1776 n. 10 (2010). This language will create numerous controversies. The opinion leaves open several other significant issues that will also lead to litigation. Indeed, the Supreme Court has already remanded one case to the Second Circuit for proceedings consistent with its decision in Stolt-Nielsen. See In re American Express Merchants’ Litigation, 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub nom. American Express Co. v. Italian Colors Restaurant, 130 S.Ct. 2401 (2010). Some of these questions could be resolved through legislative means, but none of the proposed reforms have yet been adopted. See e.g., Arbitration Fairness Act, HR 2010, 111st Cong. (2009) (proposed).

13 Christopher Hodges, ‘What are People Trying to Do in Resolving Mass Issues, How is it Going, and Where are We Headed’ in The Annals, supra n. 5 at pp. 330, 335–338; Strong, ‘Tea Leaves’, supra n. 4.

14 This group includes courts, legislatures, commentators, arbitral institutions, arbitrators and potential parties to collective disputes.

15 See e.g., Nater-Bass, supra n. 4 at pp. 680–689; Strong, ‘Tea Leaves’, supra n. 4; see infra nn. 32–36 and accompanying text.

16 American Arbitration Association, Supplementary Rules for Class Arbitrations, available at www.adr.org/sp.asp?id=21936 (‘AAA Supplementary Rules’). Another specialised rule set on class arbitration has been promulgated by Judicial Arbitration and Mediation Services (‘JAMS’). See JAMS Class Action Procedures, available at www.jamsadr.com/rules/class_action.asp. Notably, one or both of these rule sets may be amended in the wake of Stolt-Nielsen. Stolt-Nielsen, 130 S.Ct. at 1758. Indeed, the AAA had contemplated the possibility of doing so even prior to the US Supreme Court’s decision in that case. Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, Stolt-Nielsen, 130 S.Ct. at 1758 (No. 08-1198), at 16 (‘AAA Brief’). The National Arbitration Forum (NAF) at one time also had a set of procedures for class arbitration, but these provisions only apply to proceedings filed prior to August 2009, which is when the NAF ceased to administer consumer arbitrations. See NAF Arbitration Class Procedures, available at www.adrforum.com/users/naf/resources/Arbitration%20Class%20Procedures%202007.pdf; The Associated Press, ‘Firm Agrees to End Role in Arbitrating Card Debt’, New York Times, 19 July 2009. The DIS-German Institution for Arbitration has also recently enacted rules regarding arbitration in shareholder disputes that include some very interesting provisions on collective disputes. See DIS-German Institution for Arbitration, Supplementary Rules for Corporate Law Disputes, effective 15 September 2009, available at www.dis-arbe.de/erges/srcold09.html.
Class arbitration in the United States developed initially as a domestic dispute resolution device, and it is possible that collective arbitration will evolve in the same way. However, collective arbitration may be particularly suitable for resolving large-scale cross-border disputes, since arbitration can provide a single, neutral forum with jurisdiction over the entire dispute and a form of relief that is easily enforceable in more than one state. Furthermore, arbitration’s inherent flexibility can allow parties to utilise procedural forms and practices that may be agreeable to them, even if those procedures have not yet been adopted by the public justice systems of the relevant states.

Although the ever-increasing number of large-scale cross-border disputes suggests that collective arbitration will evolve into an international mechanism relatively early in its development (unlike class arbitration, which took 20 years to expand into the international sphere), the distinctive nature of collective arbitration will likely result in a number of objections at the international enforcement stage, similar to those that are expected to be raised in response to class awards. Since parties and arbitrators can, to some extent, avoid difficulties with enforcement by taking appropriate action early in the proceedings, section IV considers a number of possible objections to enforcement of collective awards under the United Nations 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) so as to help those involved in developing new forms of collective arbitration create mechanisms that avoid foreseeable problems.

Section V concludes the article by drawing together the diverse strands of law and policy and offering some final observations. However, the discussion begins by analysing possible forms of collective arbitration that may arise in the near future.

17 For more on the history of US class arbitration, including its evolution as a business-driven response to judicial class actions, see Jean R. Sternlight, ‘As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?’ in (2000) 42 Wm and Mary L Rev. 1 at pp. 5–12; Maureen A. Weston, ‘Universes Colliding: the Constitutional Implications of Arbitral Class Actions’ in (2006) 47 Wm and Mary L Rev. 1711 at pp. 1732–1734.


19 Born, supra n. 4 at p. 1232 n. 442.


21 Sternlight, supra n. 17 at pp. 5–12; Weston, supra n. 17 at pp. 1732–1741.


23 See e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 (‘New York Convention’). For reasons of space, the discussion is limited to the New York Convention, but the analysis would be similar in many respects under both the Inter-American Convention on International Commercial Arbitration, 30 June 1975, OASTS No. 42, (1975) 14 ILM 336 (the ‘Panama Convention’), and the European Convention on International Commercial Arbitration, 21 April 1961, 481 UNTS 349.
II. COLLECTIVE RELIEF IN LITIGATION AND ARBITRATION

(a) The Evolution of Class and Collective Arbitration

When considering what collective arbitration might look like outside the United States, it is useful to recall how class arbitration arose inside the United States, since the manner in which a new procedure develops often affects its final shape. Though the two forms of relief need not follow similar evolutionary paths, some parallels are likely.

Class arbitration arose when US corporations began including arbitration agreements in their standard contracts as a means of avoiding class actions in the judicial context. The rationale was that the arbitration provisions would force potential class plaintiffs to resolve their disputes individually, thus cutting down on both the number of likely claims and the defendant’s likely financial exposure.

Gradually, however, courts and arbitrators began to recognise the potentially abusive nature of this sort of practice and began ordering parties into class arbitration, with procedures reflecting the individual preferences and concerns of different arbitral tribunals and state courts. No attempt at creating a single uniform procedure was made during the first 20 years of class arbitration’s existence, and many people believed that the device was geographically limited to a few individual US states (primarily California and Pennsylvania).

In 2003, however, the US Supreme Court gave its implicit consent to at least some forms of class arbitration in the seminal case of Green Tree Financial Corp. v. Bazzle, which led to the creation of several sets of special class arbitration rules. The most well-known of these rule sets, the AAA Supplementary Rules, was explicitly based on rule 23 of the Federal Rules of Civil Procedure, which outlines the procedures used in US federal class actions.

In 2010, Bazzle was called into question (but not explicitly overruled or modified) in Stolt-Nielsen SA v. AnimalFeeds International Corp. This case, which involved a potential class arbitration in the international maritime realm, purports to limit the availability of class proceedings in cases where the arbitration agreement is silent as to group treatment, although a close reading of the decision demonstrates the narrowness of the opinion and the likelihood of

24 AAA Brief, supra n. 16 at p. 10; Weston, supra n. 17 at pp. 1733–1742.
26 A second rule set on class arbitration (the JAMS Class Action Procedures) is nearly identical to the AAA Supplementary Rules. See supra n. 16. This is predictable, since JAMS and the AAA both looked to the Federal Rules of Civil Procedure for inspiration. Meredith W. Nissen, ‘Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept’ in (2005) 11 Disp. Resol. Mag. 39; W. Mark C. Weidemaier, ‘Arbitration and the Individuation Critique’ in (2007) 49 Ariz. L Rev. 69 at pp. 94–95. A third set of specialised rules promulgated in the wake of Bazzle (the NAF Class Arbitration Procedures, which are no longer available for new proceedings) was not based on the Federal Rules and was much simpler than either the JAMS or AAA rules. See supra n. 16.
further litigation on a variety of outstanding issues.\textsuperscript{28} Indeed, mere days after handing down the decision in \textit{Stolt-Nielsen}, the Supreme Court vacated and remanded a case for proceedings consistent with its holding in \textit{Stolt-Nielsen}.\textsuperscript{29}

Although \textit{Stolt-Nielsen} will doubtless affect the future development of class arbitration in the United States, the history of class arbitration in the United States suggests two possible methods by which novel forms of collective arbitration may develop. First, parties, courts and arbitrators could proceed on an ad hoc basis, as occurred in the early days of US class arbitration, developing group procedures in response to individual disputes. Secondly, states or arbitral institutions could develop dedicated rules to address the special needs of collective arbitration.\textsuperscript{30}

Regardless of which approach is used, it is anticipated that those who are looking to develop new forms of collective arbitration will adopt procedures that resemble the kind of collective relief available in their national courts, just as the originators of US-style class arbitration did.\textsuperscript{31} Indeed, that process may have already begun.

For example, in \textit{Valencia v. Bancolombia}, a tribunal based in Bogotá, Colombia, was faced with a class suit initiated by shareholders following the merger of two financial entities.\textsuperscript{32} The plaintiffs argued that class claims in Colombia are subject to the exclusive jurisdiction of the court, based on Colombian legislation on class actions, but the Supreme Court of Justice rejected that argument on the grounds that the arbitration agreement (which was found in the by-laws of one of the financial entities) did not limit the types of claims that could be submitted to arbitration and thus did not exclude class arbitration as a matter of law. Furthermore, the Colombian Supreme Court held that arbitrators have the same duties and powers as a court and thus have the competence to resolve class claims.\textsuperscript{33}

\textsuperscript{28} See Strong, ‘Stolt-Nielsen’, supra n. 3.
\textsuperscript{29} In re American Express Merchants’ Litigation, 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub nom. American Express Co. v. Italian Colors Restaurant, 130 S.Ct. 2401 (2010).
\textsuperscript{30} Reform efforts could involve entirely new sets of rules, as occurred with the AAA Supplementary Rules, or amendments to existing general rule sets, as occurred with respect to the naming of arbitrators in multiparty proceedings in the wake of \textit{Duto}. See e.g., BKMI Industrieanlagen GmbH v. Dutco Construction Co. Ltd (1990) XV YB Com. Arb. 124; Emmanuel Gaillard and John Savage, \textit{Fouchard, Gaillard, Goldman on International Commercial Arbitration} (1999), paras. 792–793, 986–989.
\textsuperscript{31} However, collective arbitrations could also arise in jurisdictions where mass claims cannot be pursued in court. Born, supra n. 4 at p. 1232.
\textsuperscript{33} This brings up an interesting question regarding \textit{Kompetenz-Kompetenz} (competence-competence) and who – the court or the arbitral panel – has the right to order collective arbitral proceedings. The arbitral panel is commonly believed to hold that power in the United States, absent party agreement to the contrary, although \textit{Stolt-Nielsen} has cast some doubt on that interpretation. See Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., 130 S.Ct. 1758, 1772 (2010); \textit{Green Tree Fin. Corp. v. Bazzle}, 539 U.S. 444, 451–453 (2003) (plurality decision).

that the arbitrator could find that the existence of an arbitration agreement in a common shareholder agreement could give rise to a collective claim.

Canada is another jurisdiction that has dealt with the possibility of class arbitration, although the array of Supreme Court and provincial rulings have left ‘the present legal landscape … chaotic’. However, the Canadian experience reflects the way in which the intricacies of domestic legislation and policies influence the development of collective arbitration, in that the courts have struggled with the letter and purpose of the legislation regarding both class relief and the availability of arbitration. To some extent, the outcome will depend on whether the courts decide that ‘the right at issue is … a right to sue on a class-wide basis before the courts’ or whether ‘the right conferred by class action legislation is simply a right to proceed on a class-wide basis’, regardless of venue. Nevertheless, the method of analysis used by Canadian courts demonstrates that development of collective arbitration outside the United States will not require reliance on the existence or use of specialised rules on class arbitration or on analogies to US arbitral or judicial procedures. Instead, the analysis will rely entirely on a review of domestic legislation and policies, as was true in Valencia v. Bancolombia.

Although none of these courts ordered the parties into class arbitration, the decisions are important for three reasons. First, they demonstrate that jurisdictions other than the United States are considering the use of class or collective arbitration to resolve domestic disputes. This reinforces the notion that collective arbitration may spread beyond the United States.

Secondly, the cases underscore the relevance of recent empirical research into the global incidence of class actions and other forms of collective relief. This research shows that numerous countries from both the civil law and common law traditions have adopted or are considering adopting methods of judicial redress for group injuries. For years, US-based class actions and class arbitrations have been vilified because of the widespread belief that the procedures were in some way exceptional and limited only to the United States. Now that collective relief is becoming increasingly available outside the United States, it is impossible to claim that the US approach stands alone, outside the mainstream of international legal opinion.

34 Saumier, supra n. 33 at p. 1221; see also McCarthy Tétrault, Defending Class Actions in Canada (2007), pp. 107–113; Leon et al., supra n. 4; Claude Marseille, ‘Arbitration and Class Actions in Canada: Where Do We Stand?’ in (2007) 28 Class Action Rep. 5 (April). Interestingly, the decision that is considered most in favour of Canadian class arbitration has been said to ‘reflect[] a view of arbitration that is largely consistent with the position adopted by the US Supreme Court since its landmark Mitsubishi judgment in 1985’ Saumier, supra n. 33 at pp. 1208–1209 (discussing the Canadian Supreme Court case of Dell Computer Corp. v. Union des consommateurs, 2 SCR 801, 2007 SCC 34 (SCC 2007), writing prior to Stolt-Nielsen, 130 S.Ct. at 1758).

35 Saumier, supra n. 33 at p. 1215.


37 See The Annals, supra n. 5; see also Global Class Actions Exchange, available at www.law.stanford.edu/library/globalclassactions/index.html.
Thirdly, the decisions show that development of collective arbitration outside the United States will likely (but not necessarily) be tied to the availability of collective relief in the national systems of the relevant states. The rise of collective arbitration will therefore be entirely independent of the form or availability of class arbitration in the United States. (Notably, both Canada and Colombia provide for a form of judicial class action, which is why the discussions there focused on class-type arbitration.) This observation suggests that those who want to anticipate how collective arbitration will evolve should look to new forms of collective relief in national courts to identify possible models for arbitral procedure. Of course, this is not to say that the two procedures should be identical in all respects, as discussed below.

Although this article cannot discuss all potential procedures in detail, certain broad-brush observations can be made and used as a basis for analysing how collective arbitration might develop outside the United States.

(b) Alternate Forms of Collective Arbitration

Recent empirical research on collective redress in national courts has identified three basic types of relief for group injuries: representative, aggregate and settlement-only. Each category of claim is discussed below in both judicial and arbitral contexts.

(i) Representative relief

Numerous states have decided to address collective injuries by creating mechanisms that allow claims to be brought for representative relief. In some cases, the procedures resemble those used in US class actions. In other cases, states have consciously avoided mirroring US procedures, particularly those elements that are believed to motivate plaintiffs to bring unmeritorious collective claims.

New forms of representative relief vary a great deal. However, they can be categorised by reference to their approach to three different issues: the nature of the claim, the nature of the claimant and the nature of the relief sought.

NATURE OF THE CLAIM

Claims for representative relief can take one of two forms. First, claims can be made on a trans-substantive basis, meaning that the state has created a purely procedural device that is available regardless of the type of substantive law at

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38 Born, supra n. 4 at pp. 1231–1232.

39 See supra nn. 69–82 and accompanying text. However, it is not unusual for the arbitral community to look to litigation practices for inspiration. Indeed, other commentators have suggested doing so in other contexts. See e.g., Fritz Nicklisch, ‘Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects’ in (2004) 11 J Int’l Arb. 57 at pp. 66–67.

40 See The Annals, supra n. 5; see also Global Class Actions Exchange, available at www.law.stanford.edu/library/globalelassaction/index.html.
issue. Approximately half of the legal systems that provide for representative relief, including the United States, use this approach.41

Secondly, states can allow representative claims to be brought only in certain limited subject matter areas, such as securities, antitrust (competition) or consumer law.42 In these jurisdictions, the right to collective action is typically reflected in the provisions of the substantive law in question rather than in the code of civil procedure, as is the case with trans-substantive models.43

Both types of representative relief can be translated into the arbitral realm. However, certain conditions must first be met. Experience suggests that class or collective arbitration will develop when (1) a valid agreement to arbitrate exists between the parties to a collective dispute; (2) arbitration is considered a competent forum for resolving complex questions of law, including, in some instances, public law claims; and (3) other forms of possible relief (such as individual arbitration or state-controlled regulatory measures) cannot provide an adequate remedy to the substantive harm.44 Lack of need for collective relief in some jurisdictions (due to the presence of adequate regulatory remedies) may forestall the development of collective arbitration in those states.

This focus on the substantive claim at issue and the actual need for collective redress to remedy the legal injury is consistent not only with the US approach to class arbitrations in the domestic and international realm, but also with analyses being conducted by commentators and courts in other jurisdictions.45 It is also reflected in the AAA Supplementary Rules, which state that the arbitral tribunal ‘shall consider … any law … the arbitrator determines applies to the arbitration’ (including, presumably, both substantive and necessary procedural laws) when deciding whether a class arbitration shall proceed.46

If need is a central factor in deciding whether an arbitration should proceed as a collective, then having the right to collective relief appear in the substantive law makes the task of deciding whether collective arbitration is proper much easier, since, by choosing to have that law govern the dispute, the parties can be said to have also agreed, either explicitly or implicitly, to have any necessary procedural

41 Hensler, supra n. 20 at p. 14.
42 Interestingly, some states consider these same areas of law non-arbitrable, which would of course forestall the development of collective arbitration in these fields in these jurisdictions. For example, several national courts have held that pre-dispute arbitration clauses in consumer contracts violate the European Union’s Directive on unfair terms in consumer contracts. Council Directive 93/13/EEC of 5 Apr 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Hill, supra n. 20 at p. 215. Collective arbitration of consumer claims would therefore be presumptively improper in these states.
43 Hensler, supra n. 20 at p. 14.
44 See e.g., Dale v. Comcast Corp., 498 F.3d 1216, 1221–1224 (11th Cir. 2007); Strong, ‘Tea Leaves’, supra n. 4.
45 See e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S.Ct. 1758, 1768 (2010) (referring to various types of relevant law); Dale, 498 F.3d at 1221–1224; Nater-Bass, supra n. 4 at pp. 687–689; Saumier, supra n. 33 at pp. 1208–1209.
46 AAA Supplementary Rules, supra n. 16, rule 4(a). Interestingly, the Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber (‘Vienna Rules’) also focus on the requirements of the substantive law when considering the possibility of multiparty proceedings. Vienna Rules, art. 15(1)(a), effective 1 July 2006, available at http://portal.wko.at/wk/format_detail.wk?AngID=1&SrlID=523813&DIdID=8459#multi.
elements apply to the arbitration. Interestingly, this approach may lead to the more rapid development of collective arbitration in those jurisdictions that are relatively hesitant about the availability of collective relief, i.e. those states that only permit collective suits in certain narrow categories of substantive disputes.

However, to the extent that collective arbitration would only be available in those substantive areas of law that were already considered legislatively amenable to group relief, that result does not seem unduly problematic.

This is not to say that collective arbitration cannot develop in states with trans-substantive forms of representative relief. Indeed, courts and arbitral tribunals may interpret the easy and broad availability of representative relief in national courts as indicating that similar relief should be available in arbitration, regardless of the type of substantive claim at issue, so long as the requisite need exists. Furthermore, states or arbitral tribunals may decide collective redress is proper in arbitration even if state law does not yet provide for such relief in the national courts, since arbitration is capable of adopting procedures (such as document-only or fast-track relief) that are not found in the state’s judicial systems.

The various forms of representative relief currently available in national courts around the world envision at least two different types of claimant. First, representative relief may be sought by private named individuals on behalf of large groups of unnamed others who take little or no part in the actual conduct of the matter. This is the approach used in US-style class actions and arbitrations, although the procedure is not confined solely to the United States.

Secondly, representative relief may be sought by an approved intermediary entity, such as a trade association, governmental agency or public interest group, that is entitled to seek collective relief in court on behalf of all injured individuals. This approach to collective redress has been receiving a great deal of attention in Europe, although the technique is by no means limited to that region.

Interestingly, allowing intermediate entities to bring collective claims in arbitration would avoid some of the problems commonly associated with US-style class arbitration. For example, questions regarding notice to the group, confidentiality of proceedings, naming of arbitrators, opting in versus opting out of the action,

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47 Saumier, supra n. 33 at pp. 1210–1211; Strong, ‘Sounds of Silence’, supra n. 2 at p. 1062.

48 A state that adopts a trans-substantive approach to representative relief is indicating a relatively high comfort level with the legitimacy of collective redress. A state that adopts a more restricted form of representative relief, i.e. a form of relief that is tied explicitly to a limited number of substantive claims, is not exhibiting the same amount of ease with the concept of collective action.

49 Born, supra n. 4 at p. 1232 n. 442.

50 Hensler, supra n. 20 at pp. 13–14.

and the *res judicata* effect of an award would be lessened or eliminated if the claim were brought by single entity on behalf of a group, rather than by a large group of private individuals.52

**NATURE OF THE RELIEF**

Finally, states that offer representative relief in their national courts can differ on the nature of the relief that may be sought. One approach allows class claimants to pursue individual damages as well as other types of relief. This technique, which is common in the United States, has met with a great deal of criticism internationally, since the provision of individual damages in a representative suit is seen in many (but not all) civil law systems as violating the defendant's right to defend against individualised, as opposed to generalised, claims, as well as the rights of the individual members of the collective to conduct their own individualised cases.53

The second approach avoids this jurisprudential problem by allowing representative relief only in cases where the collective limits its claims to declaratory or injunctive redress, since relief as to one claimant is the same as relief to all.54 Extending this form of redress to collective arbitration would appear largely unproblematic, since it is already the case that 'arbitral awards frequently – even routinely – make awards of declaratory or injunctive relief'.55

(ii) Aggregate relief

Although representative relief is perhaps the best known form of collective redress in state courts, it is also possible to address large-scale group harms through judicial aggregation of claims. The two most widely discussed examples of aggregate mechanisms are found in England and the United States.56

England's procedure involves what is known as a group litigation order (GLO), which results in the creation of a judicial registry of individual claims that arise out of the same fact pattern. These claims are then assigned to the same judge for management purposes. The approach used in the United States is slightly different, in that related claims from different federal districts are consolidated in a single federal venue to ensure efficiencies of scale during the pre-trial period. Once that phase is completed, the cases are separated and heard individually regarding issues of liability and/or damages.

52 See *infra* nn. 107–120, 208–243 and accompanying text.


54 See Hodges, supra n. 13 at p. 332.

55 Born, supra n. 4 at p. 2482.

56 Hensler, supra n. 20 at pp. 10, 13, 16–17.
Judicial aggregation of claims is a relatively uncontroversial affair, even in the context of mass injuries, since courts can simply apply pre-existing rules of court regarding joinder, intervention or consolidation to create the necessary procedure. However, the concepts of consolidation, joinder and intervention in arbitration are nowhere near as straightforward. A variety of problems can arise, including issues involving consent, naming of arbitrators and confidentiality. Although a number of these logistical issues have been addressed in the context of what might now be considered ‘traditional’ multiparty and multicontract arbitrations (typically involving from three to five parties), other problems remain, particularly with respect to whether the parties can be said to have consented to this particular procedure.

Certain aggregation techniques could be very useful in collective arbitration. For example, collective arbitrations that used a voluntary system of registration similar to that used in the English GLO procedure would avoid any dilemmas regarding consent, since all parties would – by virtue of the act of registration – be providing explicit consent to the procedure to be used. In many ways, this sort of aggregation is reminiscent of long-standing mass dispute mechanisms available through the Permanent Court of Arbitration at The Hague.

(iii) Settlement-only relief

Some jurisdictions have avoided difficult jurisprudential questions regarding the legitimacy and form of representative and aggregate procedures by focusing instead on facilitating settlement. In many ways, this makes a great deal of sense, since settlement is often the preferred means of resolving collective claims.

Perhaps the most innovative solution in this area comes from the Netherlands via the Act on Collective Settlements 2005, which permits parties to a mass dispute to create a collective for settlement purposes only. Any such settlement is subject to court approval, which provides some comfort, both to parties and society as a whole, that the settlement meets the necessary standards of procedural fairness. The process has been successfully used in several

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60 See e.g., Holtzmann and Kristjánsdóttir, supra n. 7; Heiskanen, supra n. 8 at pp. 315–316.

61 Hensler, supra n. 20 at pp. 19–20; Hodges, supra n. 13 at p. 342.

62 Ianika Tzankova and Daan Lunsingh Scheurleer, ‘The Netherlands’ in The Annals, supra n. 5 at pp. 153–155; see also Hodges, supra n. 13 at p. 342.

63 See infra nn. 121–127 and accompanying text.
high-profile cases and has been said to place the Netherlands in the forefront of developments on mass disputes. Indeed, the Netherlands may become the forum of choice for certain types of claims, including ‘foreign cubed’ securities actions that may not be justiciable elsewhere, including the United States.

Interestingly, the Dutch legislation provides for opt-out procedures to determine the members of the class, an approach that has met with criticism in the context of US class actions and class arbitrations. Although out-opt procedures can be controversial from a jurisprudential perspective, they can also increase a defendant’s inclination to sign onto a settlement agreement, since it is often in a defendant’s interest to have the broadest class possible for settlement purposes in order to obtain finality and so-called ‘global peace’.

This type of settlement-only procedure could be adapted for use in arbitration, subject to at least one proviso. Although one set of arbitral rules appears to allow parties to transform a settlement agreement into an arbitral award, and numerous arbitral rules and arbitration laws permit the entry of a consent award in situations where the parties settle their dispute during the pendancy of an arbitration, there are concerns about whether an arbitral award based on a settlement agreement is internationally enforceable if the parties do not have a pre-existing arbitration agreement. Given the uncertainties in this area, parties should likely not attempt to create a collective for settlement purposes without having a pre-existing arbitration agreement, which, of course, could be executed either before or after the dispute has arisen.

(c) Reliance on Judicial Forms of Collective Relief

As the preceding section demonstrates, collective relief in national courts is becoming both more common and more diverse. Some of these judicial innovations may provide inspiration for new forms of collective arbitration, just as US class actions provided the model for class arbitration. However, the question remains whether it is a good idea to encourage collective arbitration to mirror judicial forms of group relief.

64 Tzankova and Scheurleer, supra n. 62 at p. 149.
67 See e.g., Rules of the Mediation Institute of the Stockholm Chamber of Commerce adopted 1 April 1999, art. 12, available at www.sccinstitute.com/?id=23721.
69 The similarity between class actions and class arbitrations in the United States has been criticised. See Hans Smit, ‘Class Actions and their Waiver in Arbitration’ in (2004) 15 Am. Rev. Int’l Arb. 199 at p. 211; Weidemaier, supra n. 26 at pp. 95–98.
Although innovations in collective arbitration do not have to parallel judicial developments, some coordination between the two may be either useful or desirable. There are two reasons why this is so. First, arbitration is sometimes considered ‘a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends’. Given this fundamental similarity of purpose, creating a private dispute resolution mechanism that deviates too significantly from public forms of justice could be seen to violate national or international norms regarding procedural fairness. Furthermore, too much variation between the type or scope of relief available in litigation versus arbitration could upset a state’s established regulatory scheme, to the extent that the legislature has decided what type and proportion of public ills should be addressed through private means (arbitration or litigation) versus public means (action by regulatory agencies). States that do not permit collective redress in their courts may also experience structural difficulties in that their legal system may not have the mechanisms necessary to give res judicata effect to collective awards. Requiring arbitration to conform to judicial norms, at least in broad, conceptual terms, avoids all of these potential problems.

Secondly, tying arbitral procedure to judicial procedures increases predictability regarding both the process and the outcome of the new form of arbitration, since arbitrators and parties can rely on judicial opinions and existing commentary to construe difficult questions of arbitral procedure. Indeed, this was one of the reasons why the AAA chose to track the US Federal Rules of Civil Procedure so closely when developing the AAA Supplementary Rules for Class Arbitrations. Obviously, it will be easier to look to national judicial procedures to help guide arbitral procedure when the dispute is domestic rather than international, since parties to domestic matters share similar understandings and expectations regarding the scope and nature of procedural fairness, the availability of collective relief, etc. Furthermore, domestic arbitrations typically do not involve the kind of

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70 Born, supra n. 4 at p. 1232 n. 442.
71 Certainly the need for and desirability of some coordination between judicial and arbitral forms of dispute resolution is being debated with increasing urgency in Europe, where the overlap between European procedural law and arbitration law has caused some concern. See West Tankers Inc. v. Allianz SpA (formerly RAS Riunione Adriatica di Sicurtà SpA) [2009] 1 AC 1138; see also, Conflict of Laws.net (associated with Journal of Private International Law), available at http://conflictoflaws.net/ (containing debate between Burkhard Hess and Alexis Mourre). Although a detailed discussion of these matters is outside the scope of this article, the scope and effect of the Brussels I Regulation will undoubtedly influence the development of collective arbitration in Europe, particularly to the extent that any future collective arbitrations in Europe deal with cross-border disputes and/or matters (such as consumer claims) that fall within the ambit of European regulatory law. See Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1; see also, European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), paras 8-11.
thorny choice of law questions that arise frequently in cross-border disputes.  

However, it is anticipated that collective arbitrations will nevertheless look to provisions of national law for guidance in procedural matters, even in the international sphere, at least to the extent that national law governs the substance of the dispute and a particular procedure is necessary to give effect to that substantive right.

Although there are good reasons for those who are developing new forms of collective arbitration to look to judicial procedures regarding large-scale relief for inspiration, there are also good reasons not to do so. First, the international arbitral community has worked long and hard to disabuse parties of the notion that they are entitled to the same procedures in arbitration that are available in litigation. Furthermore, explicit reliance on judicial forms of collective relief might limit the development of collective arbitration an unproductive manner.

Secondly, many in the arbitral community have bemoaned the increasing legalism of arbitration. Certainly, any form of collective arbitration that bases itself on judicial procedures would be subject to criticism that it is too legalistic. However, there is evidence to suggest that increased formality in some types of arbitration is necessary to handle increasingly complex legal disputes. This may be particularly true in the area of collective redress, where public and private interests overlap significantly, requiring a heightened regard for procedural safeguards.

The concern about increased legalism often comes down to a concern about the amount of time and money spent in arbitration. Interestingly, the view that collective arbitration is or will be too time-consuming and costly may depend on what is being compared. As it turns out, empirical evidence suggests that although US class arbitrations tend to take more time than bilateral arbitrations, class arbitration takes less time than class action litigation. Thus, to the extent that a dispute must be resolved on a collective basis, defendants may be better off in arbitration rather than in court.

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75 Born, supra n. 4 at p. 524. Choice of law determinations hold particular significance in collective arbitration, given that collective relief often affects matters of fundamental social, economic and regulatory importance. See infra nn. 254–257 and accompanying text.
77 See Smit, supra n. 69 at p. 211; Weidemaier, supra n. 26 at pp. 95–98.
80 Hodges, supra n. 13 at pp. 335–339; Strong, ‘Sounds of Silence’, supra n. 2 at pp. 1049–1053.
81 AAA Brief, supra n. 16 at p. 24.
82 There may be other benefits to arbitrating collective claims, although that issue is outside the scope of this article. See e.g., Dana H. Freyer and Gregory A. Litt, ‘Desirability of International Class Arbitration’ in Arthur W. Rovine (ed.), Contemporary Issues in International Commercial Arbitration and Mediation: The Fordham Papers (2008), vol. 2, p. 171.
III. ISSUES TO CONSIDER WHEN DEVELOPING NEW FORMS OF COLLECTIVE ARBITRATION

The preceding section discussed what collective arbitration might look like should it expand beyond US borders. However, those who are involved in developing these new forms of relief must also consider whether the fact that the claims are being brought in arbitration requires certain additional procedures or protections to be put in place. To some extent, it makes sense to discuss whether any of the unique procedures developed by the AAA for use in US-style class arbitrations can or should be used in other forms of collective arbitration.

Although the AAA Supplementary Rules reflect a distinct bias toward US forms of collective relief, the Rules were compiled by a working group of experts in both arbitration and US class actions and, as such, reflect some of the arbitral community’s best thinking on the types of matters that should be considered when creating procedures for collective arbitration.83 Of course, not all of these issues will necessarily affect all prospective forms of collective arbitration, since the new procedures will likely differ from class arbitration in several significant ways. Nevertheless, the AAA Supplementary Rules provide a good starting point for discussion.

(a) Partial Final Awards

One of the AAA Supplementary Rules’ most interesting innovations is its use of partial final awards to allow parties to seek judicial oversight of early procedural decisions.84 Although the AAA may decide to reconsider its use of this device in light of Stolt-Nielsen, this procedure may nevertheless be useful to those developing new forms of collective arbitral relief outside the United States.85

The first partial final award (known as the ‘clause construction award’) focuses on whether the arbitration agreement allows class treatment as a matter of contract construction. Review at this stage can be useful because very few arbitration agreements explicitly permit class or multiparty proceedings. Furthermore, although some agreements purport to prohibit class treatment, those provisions are not always upheld, which leads to the need to determine whether group treatment is possible under the remaining terms of the agreement.86

The second partial final award (known as the ‘class determination award’) states whether the facts in the dispute at hand merit class treatment, as

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83 AAA Brief, supra n. 16 at p. 11.
84 AAA Supplementary Rules, supra n. 16, rules 3, 5.
86 Under US law, explicit waivers of class treatment may be overturned and severed from the arbitration agreement for a variety of reasons, including unconscionability or duress. See Smit, supra n. 69 at p. 201; Sternlight, supra n. 17 at pp. 45–53; Jean R. Sternlight and Elizabeth J. Jensen, ‘Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?’ in (2004) 67 Law and Contemp. Probs 75 at pp. 75–76; Weidemaier, supra n. 26 at pp. 85, 90, 100. This issue may be addressed in a case that was recently remanded in light of Stolt-Nielsen. See In re American Express Merchants’ Litigation, 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub nom. American Express Co. v. Italian Colors Restaurant, 130 S.Ct. 2401 (2010).
determined by the guidelines laid out in the AAA Supplementary Rules.\textsuperscript{87} This award must also include the terms of the notice to be sent to the members of the class, if class treatment is ordered.

The most remarkable aspect of these awards is that they can be brought by a party to a court of competent jurisdiction for immediate review without waiting for a decision on the merits. Although future revisions to the AAA Supplementary Rules could combine the two awards into one (so as to increase the speed with which class arbitrations progress) or eliminate such awards altogether, having a built-in early review mechanism serves several purposes.

First, partial final awards ensure a degree of independent judicial oversight to avoid possible breaches of due process and procedural fairness regarding the decision to proceed as a collective.\textsuperscript{88} Not everyone agrees this step is either necessary or wise. For example, sceptics have argued that 'a system that requires continuous judicial intervention, even for the well-intentioned purpose of providing due process, runs afoot of the parties’ agreement and therefore violates' state arbitration statutes.\textsuperscript{89}

Secondly, allowing immediate review of partial final awards regarding these threshold matters reflects the recognition that collective procedures are expensive and time-consuming affairs. Requiring the parties to obtain a final award on the merits before permitting judicial consideration of important procedural determinations can be problematic from a public policy standpoint, since many defendants could be forced to settle the claims simply to avoid the expense of defending the case.\textsuperscript{90} Alternatively, denial of collective proceedings could sound the 'death knell' of the claim.\textsuperscript{91}

Interestingly, the possibility of early interim review of jurisdictional decisions has been considered and rejected in at least one other type of international arbitration. Proceedings under the ICSID Arbitration Rules (which may sometimes include class-type claims)\textsuperscript{92} also permit early determination of the tribunal's jurisdiction over the dispute, but those decisions may not be immediately challenged.\textsuperscript{93} Instead, parties must wait until the award on the merits has been issued before challenging the matter of jurisdiction. In this context, the desire for

\textsuperscript{87} AAA Supplementary Rules, supra n. 16, rules 4–5.
\textsuperscript{88} Sternlight, supra n. 17 at pp. 32–53; Weston, supra n. 17 at p. 1714.
\textsuperscript{90} Weston, supra n. 17 at p. 1728. The majority in \textit{Stolt-Nielsen} exhibited some concern about the hardships associated with a lack of early review, but did not reach the issue of whether such a review is required or permitted under US law. \textit{Stolt-Nielsen S.A v. AnimalFeeds Int’l Corp.}, 130 S.Ct. 1758, 1767 n.2 (2010) (noting the issue had been waived in this case).
\textsuperscript{91} \textit{Ibid.} p. 1730; see also Grant Hanesian and Christopher Chinn, ‘The US Model for International Class-Action Arbitration’ in (2009) 75 Arb. 400 at p. 407 (noting how failure to certify a class led to abandonment of claim in Canadian action).
\textsuperscript{93} ICSID Arbitration Rules, supra n. 8, rule 41; Lew \textit{et al.}, supra n. 76 at paras. 28-70–28-73 (noting decisions regarding jurisdiction do not constitute an ‘award’ for the purposes of ICSID Arbitration Rules, rules 50 or 52). Furthermore, under the ICSID Arbitration Rules, the challenge would take the form of an internal annulment proceeding rather than a motion to a national court. ICSID Arbitration Rules, rules 50, 52; Lew \textit{et al.}, supra n. 76 at paras. 28-72–28-74, 28-92.
speed and finality overrides other concerns, even though significant sums of money and important public interests are at stake.

Notably, however, the immediate review of final interim awards need not suspend arbitral proceedings. For example, although the AAA Supplementary Rules automatically stay the arbitration for 30 days following the issuance of a final partial award to allow recourse to a competent court, proceedings may resume after that period has passed. Allowing the arbitration to move forward might perhaps address the parties’ desire for speed and finality, although such an approach of course raises the spectre of parallel procedures. Nevertheless, parties can always seek a mandatory stay of the arbitration from the court if they wish to halt proceedings. The arbitral tribunal also has discretion under the AAA Supplementary Rules to stay proceedings after the completion of the 30-day mandatory stay.

Partial final awards therefore cannot be considered entirely good or entirely bad. Instead, those who are involved in developing new forms of collective arbitration must consider a variety of issues before deciding whether and to what extent to incorporate partial final awards into new procedures.

First and most simply, it is possible that interim review may not be necessary in some situations. Class arbitrations arguably need partial final awards to address specific concerns relating to possible violations of procedural fairness similar to those that can arise in US class proceedings. Other methods of collective relief may not raise the same kind of practical or jurisprudential concerns. For example, jurisdictions that only allow intermediary entities to seek collective redress might not see the need for immediate or heightened judicial involvement, since the costs associated with defending such a suit are not significantly higher than in traditional bilateral disputes and few (or no) special concerns exist about the possible abuse of rights. Furthermore, states may take the view that approved intermediary entities have presumably ‘filtered out’ illegitimate claims, leading to a high degree of confidence about the presumptive merit of the cause of action.

Secondly, creating new forms of collective arbitration that include built-in interim review procedures can run afoul of existing arbitral laws and policies regarding the definition of a partial final award and the extent to which such an award can be subject to court consideration. These issues become particularly pressing in the context of cross-border disputes.

For example, different states take different views as to what constitutes a final partial award, which could lead to problems should the award need to be

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95 AAA Supplementary Rules, supra n. 16, rules 3, 5(d).
97 Buckner, supra n. 89 at pp. 195–205, 225–235; Weston, supra n. 17 at pp. 1731–1745.
98 Hensler, supra n. 20 at p. 14.
Conflicts could also arise regarding the definition of a ‘competent court’ for purposes of reviewing a partial final award. Forum shopping could easily result in inconsistent judgments, since courts in one state do not have to follow other state courts’ rulings regarding the enforceability of foreign arbitral awards. Furthermore, inviting courts to involve themselves in arbitration can be seen as both theoretically unsound (in that shared jurisdiction is not required or permitted in other forms of arbitration) as well as practically problematic (in that it increases the time and expense of resolving the dispute). Such measures might also be forbidden as a matter of law, particularly in those states (such as France) that embrace a strong version of negative compétence-compétence or that take the view that any jurisdiction-sharing arrangement between the courts and the arbitral tribunal would lead to an internationally unenforceable award.

Thirdly, the acceptability of an interim review procedure might turn on how the requirement arises. In the United States, the courts initially took or accepted such duties upon themselves based on assumptions about their inherent powers to ensure procedural fairness in matters involving class disputes. The majority in *Stolt-Nielsen* seems to take the view that early review is proper, given the risk of hardship to the parties if they are forced to wait until after an award on the merits has been issued. However, Ginsburg J notes the impropriety of parties or arbitrators ‘gain[ing] instant review by slicing off a preliminary decision or a procedural order and declaring its resolution a “partial award”’. Although those who are involved with the development of new forms of collective arbitration can and will adopt the approach that they believe is most appropriate to the legal system and dispute at hand, they should be aware that international reception of the concept of heightened judicial review is more akin to that of Ginsburg J in *Stolt-Nielsen* than to that of the majority.

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100 To the extent that clause construction awards and class determination awards under the AAA Supplementary Rules constitute final disposition of a certain aspect of the dispute, they could be considered final and enforceable in some jurisdictions, so long as they are in accordance with the procedures agreed to by the parties or appropriately imposed by the arbitral tribunal. See Fouchard, Gaillard, Goldman, *supra* n. 30 at paras. 1359–1362; Lew et al., *supra* n. 76 at paras. 24–24–23. However, other authorities or states may take a different view of the matter. See Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2007), para. 731; Jennifer M. Rhodes, ‘Judicial Review of Partial Final Awards under Section 10(A)(4) of the Federal Arbitration Act’ in (2003) 70 U Chic. L Rev. 663 at p. 664; see also Born, *supra* n. 4 at pp. 2815–2826 (discussing the New York Convention’s requirement that an award be ‘binding’ to be enforceable).

101 New York Convention, Art. V(1)(e); Born, *supra* n. 4 at p. 2826.


103 Buckner, *supra* n. 89 at pp. 226–239.


From Class to Collective: The De-Americanization of Class Arbitration

(b) Privacy and Confidentiality

Another issue of importance for collective arbitration involves the related principles of privacy and confidentiality, often said to be two of the central hallmarks of arbitration. Difficulties can arise because collective proceedings typically involve more than two parties (except in cases where the group claim is brought by an intermediary entity). Thus, multiple parties may need to be privy to information about the proceedings and participate in any hearings. Because arbitration is traditionally viewed as a bilateral process, collective proceedings can result in concerns about ‘strangers’ having access to confidential material and private procedures.\footnote{See Hanotiau, supra n. 2 at pp. 372, 389–390; Platte, supra n. 58 at nn.5–8; Strong, ‘Sounds of Silence’, supra n. 2 at pp. 1046–1047, 1057, 1086–1089.}

To some extent, these concerns seem misplaced. Parties to a collective proceeding have all signed identical (or nearly identical) arbitration agreements and are thus bound to respect the same principles of privacy and confidentiality vis-à-vis third parties. Furthermore, collective proceedings (which usually involve a claimant group with identical or nearly identical interests) typically do not require parties to share among themselves the kind of ‘competitively sensitive information’ that can create problems when claimants attempt to join market competitors as co-defendants in consolidated arbitrations.\footnote{Joseph T. McLaughlin et al., Recent Developments in Domestic and International Arbitration Involving Issues of Arbitrability, Consolidation of Claims and Discovery of Non-parties, SM909 ALI-ABA (2007), pp. 757, 763–764 nn. 56–85 (describing the first case brought under NAFTA’s consolidation provision).} Thus, some concerns about diminished privacy and confidentiality in collective proceedings appear somewhat overblown.

Other practices are more problematic, however. For example, some disclosures about the proceeding must be made to persons who are not yet or indeed may never become parties. While some publicity about the existence and nature of a collective claim is often considered necessary at the initiation of proceedings, both to provide potential parties with notice that a dispute exists and is in the process of being resolved, and to ensure that the members of the collective are properly identified, such statements technically violate the principle of arbitral confidentiality. The need for adequate initial disclosures is highest when opt-out procedures are used, since the consequences of failing to opt out of a collective proceeding are more burdensome than the consequences of failing to opt in.\footnote{Failure to opt out leads to the extinguishment of a claim, whereas failure to opt in allows an individual claim to survive, even if the party cannot take advantage of a positive result arising out of the initial proceeding.} Although the need for public disclosure may be highest at the initiation of a collective proceeding, in some cases the need for disclosure arises after the arbitration has concluded. For example, the state may decide that the public at large needs to have some knowledge of the outcome of any proceedings or settlements, either as a deterrent to other potential defendants or even as a soft form of precedent.\footnote{Failure to opt out leads to the extinguishment of a claim, whereas failure to opt in allows an individual claim to survive, even if the party cannot take advantage of a positive result arising out of the initial proceeding.} The need exists here because of the public interest in avoiding and remedying mass injuries of this type.
Therefore, to be effective, collective arbitration must deviate from strict application of the principles of privacy and confidentiality, at least to some extent. This is not fatal to the development of collective arbitration, however. Despite common perceptions about the rigour of privacy and confidentiality in arbitration, neither principle has ever enjoyed absolute protection as a matter of national or international law. Instead, parties who are concerned about disclosures have traditionally been advised to contract expressly for the desired protections in their arbitration agreements.

Furthermore, recent court decisions suggest that the principles of privacy and confidentiality can be overcome in situations where there is some public interest at stake. The question, therefore, is whether the public interests typically associated with collective arbitration justify any derogation of arbitral privacy or confidentiality.

The public interest in collective arbitration can be described in two different ways. First, the public interest could be defined as the interests of a large number of individuals who share common interests and/or claims but who may be unknown to one another, despite the existence of each individual’s relationship with the defendant, as reflected by the existence of a binding arbitration agreement. The precise number of individual claimants needed to invoke this type of public interest will vary by jurisdiction.

Secondly, the public interest could be defined as a common societal interest in the outcome of the dispute. Here, the redress sought by the claimants may seem particular to them but actually benefits society as a whole. In this view of collective relief, private claims in arbitration and/or litigation operate as independent but vitally important components of a larger regulatory scheme that includes both public (i.e. state initiated and controlled) and private measures of

110 Burch, supra n. 73 at pp. 114–120. Settlements and awards in arbitration typically do not have any precedential effect, although this may be changing in the area of international investment arbitration. Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ in (2007) 23 Arb. Int’l 357 at pp. 361–378.

111 Born, supra n. 4 at pp. 2249–2250, 2253. However, ‘recent revisions of institutional arbitration rules have enhanced the confidentiality obligations on both parties and arbitrators’. Ibid. p. 2281.


Systematic failure of the private means of collective relief (as would occur if collective claims were barred in arbitration and forced to proceed individually) upsets the global effectiveness of the agreed-upon public aims and regulatory structure.

Once the decision to derogate from the principles of privacy and confidentiality in arbitration has been made, it is necessary to decide the parameters of the necessary disclosures. One model can be found in US-style class arbitrations, which permit written submissions, including the demand for arbitration, and other information, such as the names of parties and counsel, to be made public on a special class arbitration docket maintained on the AAA’s website (subject to the arbitral tribunal’s order otherwise). The AAA Supplementary Rules also give all parties to a class arbitration (both named and unnamed) unfettered access to any hearings, along with their counsel.

A slightly more circumspect model exists in ICSID arbitrations. Although only a few collective arbitrations have been filed in the investment context to date, ICSID’s pre-existing rules regarding public disclosures have made it relatively easy for arbitral panels to handle the kind of disclosures that are necessary in group proceedings.

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115 Burch, supra n. 73 at pp. 74–75.
116 Ibid. p. 76.
117 AAA Supplementary Rules, supra n. 16, rule 9. The AAA Supplementary Rules require publication of a list of the awards rendered in the arbitration, but in many cases copies of the awards themselves are made available on the AAA website. AAA Searchable Class Arbitration Docket, available at www.adr.org/sp.asp?id=25362.
118 AAA Supplementary Rules, supra n. 16, rule 9(b). Hearings may also be opened to the public, subject to the arbitrators’ decision otherwise. Ibid. rule 9(a).
119 For example:

The Secretary-General is required by ICSID Administrative and Financial Regulation 22 to make public information on the registration of all requests for conciliation or arbitration and to indicate in due course the date and method of the termination of each proceeding.

The Secretary-General is also required to publish, with the consent of both disputing parties, reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings.

As provided by the ICSID Arbitration Rules, excerpts of the legal reasoning of the Tribunal shall be published by ICSID if such consent is not given.

Publishing such information is aimed at furthering the development of international law in relation to investments.


120 For an example of disclosures in investment class arbitration, see Bocans v. Argentine Republic, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C95&actionVal=viewCase.
Those who are involved in the development of new forms of collective arbitration will need to determine whether either of these models are appropriate in the circumstances at hand. To some extent, the decision will depend on the type of procedures being adopted and the public policies at issue.

(c) Approval of Settlements, Voluntary Dismissals or Compromises

Resolution of a collective dispute often has a significant impact not only on the members of the claimant group (which may include hundreds to hundreds of thousands of individuals) but also on society more generally. Those involved in developing new forms of collective arbitration may therefore wish to consider whether any proposed procedures need to incorporate any safeguards relating to settlements, voluntary dismissals or compromises of a collective claim so as to help promote procedural fairness for the parties and ensure compliance with the state’s overall regulatory aims.

To some extent, the need for procedural safeguards in this area depends on the likelihood that claims will be brought in collective arbitration for illegitimate ‘strike suit’ purposes (i.e. simply to force settlement and not to obtain relief on the merits), as is often presumed to be the case in US-style class proceedings. If there is no motivation to bring an improper claim to obtain an early non-merits-based resolution, then there may be no need to impose special measures regarding the early resolution of the dispute.

Similarly, certain protections are needed if there is a chance a suit will be settled on terms that are not equally beneficial to all parties, particularly parties (such as unnamed members of a group represented by a few named individuals) who may have little opportunity to participate actively in the conduct of the case. In those situations, it may be necessary to require independent or heightened review of the settlement by an arbitral tribunal, as is the case in US class arbitrations.

As it turns out, several of the possible forms of collective arbitration discussed in this article already include significant safeguards to avoid creating any improper motivations for bringing or settling a collective claim. For example, limiting the right to bring a collective suit to intermediary entities or providing only for injunctive relief minimises the risk that some claimants will be benefited more than others. Similarly, prohibiting contingency fees and treble damages or imposing loser-pays rules for costs and fees (discussed below) discourages any ‘entrepreneurial’ inclinations on behalf of those bringing suit. In cases such as

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121 Interestingly, empirical studies suggest that there are far fewer of these kinds of frivolous suits than commonly believed. See e.g. Burch, supra n. 73 at p. 85; Tiana Leia Russell, ‘Exporting Class Actions to the European Union’ in (2010) 28 BU Int’l LJ 141 at pp. 150–152.

122 Sternlight, supra n. 17 at pp. 6–7, 33; Weston, supra n. 17 at pp. 1776–1777.

123 This, indeed, was the aim of many states in shaping their rules on judicial forms of collective relief. Hensler, supra n. 20 at pp. 22–26.

these, it may be unnecessary to impose any additional procedural safeguards regarding the voluntary disposition of disputes.\textsuperscript{125}

The only proceedings that appear in need of safeguards are those that resemble US-style class suits, which involve broad representative relief encompassing individual damages and including claimant-friendly rules on fees and costs.\textsuperscript{126} These types of procedures might nevertheless be salvaged by a requirement that parties seek heightened or independent review of any attempt to resolve a claim prior to disposition on the merits. For example, parties to class arbitrations proceeding under the AAA Supplementary Rules may only settle, compromise or voluntarily dismiss a class claim after the arbitral panel has held a special hearing that results in a finding that the requested disposition is 'fair, reasonable, and adequate'.\textsuperscript{127} This sort of heightened review is meant to eliminate the possibility that class representatives and/or counsel will agree to dispose of a mass claim on terms that are beneficial to them but not to those members of the class who are not actively involved in the conduct of the matter.\textsuperscript{128} Similar protections might be built into any type of collective arbitration that raises similar concerns.

\textbf{(d) Costs and Attorneys' Fees}

One of the most complex issues in the area of collective relief involves costs and attorneys' fees. In many ways, the development of class actions and arbitrations in the United States can be traced back to the unique combination of the easy availability of contingency fees and punitive damages in class suits along with the absence of a rule on fee shifting.\textsuperscript{129} The lack of similar mechanisms in other jurisdictions has traditionally acted as a de facto bar to the development of collective redress in those nations.\textsuperscript{130}

The situation is changing, however. As states have begun to develop new forms of collective relief in their national courts, some have also begun to amend their laws regarding fees and costs so as to make it possible for plaintiffs to bring collective claims. The question is whether these funding mechanisms can or should be available in collective arbitration as well.\textsuperscript{131}

\textsuperscript{125} Jurisdictions that permit creation of a collective for settlement purposes only already include a built-in safeguard, to the extent that settlements cannot be approved without a hearing before a neutral adjudicator.

\textsuperscript{126} A number of jurisdictions permit US-style class relief in their national courts, so this is a live issue even outside the United States. See \textit{e.g.}, \textit{ibid.} p. 10.

\textsuperscript{127} AAA Supplementary Rules, \textit{supra} n. 16, rule 8.

\textsuperscript{128} Sternlight, \textit{supra} n. 17 at pp. 6–7, 33; Weston, \textit{supra} n. 17 at pp. 1776–1777.

\textsuperscript{129} Hensler, \textit{supra} n. 20 at pp. 22–25.

\textsuperscript{130} \textit{Ibid.} p. 23.

\textsuperscript{131} \textit{See Born}, \textit{supra} n. 4 at pp. 2311–2313 (discussing contingent and other fee structures in international arbitration; noting some jurisdictions have extended laws against champerty to the arbitral context). Notably, the AAA Supplementary Rules do not provide any independent solutions to the problems associated with fees and costs in collective arbitration, since the Rules reflect the assumptions of the US legal community regarding the easy availability of contingency fees and the absence of the 'loser pays' rule for fees and costs. \textit{See e.g.}, AAA Supplementary Rules, \textit{supra} n. 16, rule 11 (containing some unremarkable provisions regarding administrative fees and suspension of proceedings for non-payment).
Funding innovations take a variety of forms. For example, some states have limited the applicability of traditional rules on fee shifting in cases involving the public interest, which could include disputes involving collective relief. Other nations have established conditional fee mechanisms that serve ends similar to US-style contingent fee arrangements while avoiding any improper financial incentives to bring borderline cases. Still other jurisdictions have permitted the development of third party funding schemes to provide plaintiff groups with the finances necessary to bring mass claims. Other states avoid the issue by only allowing collective claims to be brought by intermediary associations who can be trusted to undertake responsible cost-benefit analyses regarding the possibility of recovery and to bear the burden of any costs and fees that might ensue. These procedures are relatively straightforward and can be easily transferred to the arbitral context, at least in theory. However, implementing these types of funding mechanisms may give rise to two different problems, one involving both domestic and international disputes and the other relating solely to cross-border matters.

(i) Location of the right to alternative funding and financing

First, questions may arise regarding the availability of these more liberal funding mechanisms depending on where the right to such relief is found. These issues can surface in both domestic and international proceedings. For example, it seems relatively straightforward to conclude that an arbitration involving a substantive law that includes within its provisions the right to set aside the normal rules regarding attorneys' fees and imposition of costs could apply those special funding rules in the arbitral proceedings. However, a different result might ensue if the provisions regarding the unusual allocation of fees and costs were not found in the governing substantive law but were instead located in trans-substantive procedural rules.

On the one hand, claimants could argue that the right to proceed as a collective should be considered a substantive right, regardless of the location of the relevant provision giving relief from traditional rules regarding the financing of legal actions, and the non-application of special arrangement regarding attorneys' fees or cost shifting in a collective proceeding (be it in litigation or arbitration) violates their substantive rights to relief. In so doing, the collective

133 Hensler, supra n. 20 at p. 22.
135 Ibid. pp. 14, 23 (but noting that intermediary entities may nevertheless find funding issues 'daunting'); Hodges, supra n. 13 at p. 332.
136 See e.g., Dietmar Baetge, 'Germany' in The Annals, supra n. 5 at pp. 125, 132 (discussing the Capital Markets Model Case Act).
could draw analogies to US decisions indicating that the right to proceed as a class in arbitration is substantive in nature, at least to the extent that proceeding as a group is necessary to give effect to important statutory rights.138 It is significant that this line of cases takes economic issues specifically into account and considers whether it is likely that claimants can or will proceed individually in arbitration if the request to proceed as a group is denied.139 Although US courts often speak of the issue in terms of ‘unconscionability’, the underlying rationale of these decisions involves access to justice, which is how the concept is often described in other jurisdictions.140

On the other hand, defendants who are not allowed to recover the full amount of their expected costs could claim that their substantive right to recover quantifiable sums spent defending against an unsuccessful claim has been violated.141 In so doing, defendants would argue that the claimants’ ability to proceed collectively is only a procedural right, a perspective bolstered by certain Canadian decisions involving the interplay between class relief and arbitration.142 However, the situation in Canada is still very much in flux, and it may be that other rights, including the substantive right to choose arbitration as the appropriate forum for resolution of disputes as well as the right to access to justice, may ultimately provide grounds for establishing class arbitration in Canada and for viewing the right to proceed as a collective as substantive in nature.143

When considering issues relating to fees and costs, it is important to remember that arbitrators are traditionally given a significant amount of discretion with respect to cost awards. Therefore some people involved in developing new forms of collective arbitration may decide it is not necessary to create or refer to specific provisions of law regarding the allocation of fees and costs, since an arbitral tribunal might consider it proper to provide a smaller costs award in collective disputes that involve some sort of public interest.144


139 Ibid. pp. 490–492.

140 See Leon et al., supra n. 4.

141 Notably, this argument also only relates to fee shifting arrangements; the availability of contingency fees has no detrimental effect on the defendant, since a prevailing defendant has no interest in what the claimants have paid their attorneys. Even in cases where the defendant loses on the merits, it is not harmed economically by the use of a contingent or other non-traditional fee structure, since contingency fee arrangements often lead to the disallowance of a party’s claim for legal costs. Born, supra n. 4 at pp. 2311–2313. The importance of contingency or similar fees lies in their ability to allow claimants to bring the claim in the first place. Hensler, supra n. 20 at p. 23.

142 See e.g., Bisaillon v. Universite Concordia [2006] 1 SCR 666; Marseille, supra n. 34.

143 See e.g., Mackinnon v. National Money Mart Co., 89 BCLR (4th) 1, 304 DLR (4th) 331, paras. 70–72 (2009); LCIA Factum, supra n. 36 at paras. 51–52 (questioning whether the right to collective relief is ‘a right to sue on a class-wide basis before the courts’ or ‘a right to proceed on a class-wide basis regardless of venue’); Leon et al., supra n. 4; Saumier, supra n. 33 at p. 1221.

144 See Rowe, supra n. 132 at p. 147 (limiting the applicability of loser-pay rules in ‘public interest’ type cases, which might include cases involving collective redress).
(ii) Issues with hiring an acceptable lawyer

A second problem can arise regarding fees and costs in collective arbitration. Claimants in collective disputes often find it difficult to bring a claim without any special funding arrangements because no single individual has enough at stake to justify paying attorneys’ fees, even if there is no risk of an adverse award on costs. States have addressed this need in judicial forms of collective relief by creating a variety of alternative funding arrangements, including but not limited to contingency fees. The question is whether parties to a collective arbitration can also rely on these funding mechanisms.

Interestingly, parties may be able to allege an infringement of an important substantive right should the request for access to alternative funding be denied. Rather than focusing on the location of the provisions regarding non-traditional funding arrangements (i.e., whether that right is located in a substantive or trans-substantive provision of law) or on the nature of the right to proceed as a collective (i.e., whether that right is substantive or procedural), claimants might instead raise the argument that, absent the application of special rules regarding attorneys’ fees and costs, the collective will have lost its right to effective legal representation due to its inability to hire the lawyer of its choice.\(^\text{145}\) Notably, this argument will be most persuasive in cross-border collective claims.

The issue is somewhat similar to problems that can arise elsewhere in international commercial arbitration regarding effective use of counsel. These problems often stem from differences in national rules of professional conduct. For example, US advocates in international arbitration are freely able to interview and prepare potential witnesses in advance of any arbitral hearing while advocates from other countries may be forbidden from doing so pursuant to ethical rules binding on practitioners from those states.\(^\text{146}\) The International Bar Association (IBA) has attempted to minimise conflicts and confusion by providing in the most recent iteration of the IBA Rules on the Taking of Evidence in International Arbitration that ‘[i]t shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.’\(^\text{147}\)

Nevertheless, questions regarding the application of laws regarding professional...
ethics in cross-border disputes have not yet been universally and satisfactorily resolved, either in the realm of bilateral or multilateral arbitration.148

The situation relating to witness preparation suggests that no difficulties exist when all of the lawyers in the dispute are operating under similar ethical rules. Equality of arms, as defined by the scope of counsel’s permissible conduct, is fully respected. However, problems can arise if the lawyers for one party are permitted to behave in a way that their counterparts cannot. For example, collectives seeking legal counsel could find themselves forced, for economic reasons, to hire lawyers from jurisdictions that permit contingent or other alternative types of funding and fee structures. This could lead to several problems.

First, individual claimants could be injured if they can only realistically hire lawyers who come from jurisdictions that allow contingency fees or similar types of alternative funding procedures. The problem here is that the only lawyers that are affordable may not always be experts in the governing substantive or procedural law, thus perhaps diminishing the collective’s chances of prevailing on the merits. While there is no absolute right in international commercial arbitration to hire one’s first choice of counsel, any practice or procedure that categorically eliminates a wide spectrum of advocates is suspect and could lead to problems under the New York Convention.149

Secondly, the field of international commercial arbitration as a whole could suffer injury. Already there are concerns that class arbitration is a “uniquely American” device,150 and allowing new forms of collective arbitration to reflect a similarly singular perspective (either exclusively US or from a small group of jurisdictions that permit contingent-type fees) could easily result in an ‘impoverished view’151 of what collective arbitration can be. Allowing lawyers from a small number of legal systems to obtain a real or perceived operational advantage due to differences in the type of practices permitted by their national bars would lead to those lawyers gaining an unfair market advantage over advocates from other jurisdictions.152 It would instead be preferable to develop mechanisms that allow and encourage the participation of advocates and arbitrators from a wide range of legal systems, since that is more in keeping with international commercial arbitration’s multijurisdictional traditions.

Admittedly, there are likely numerous people who will find the absence of special funding rules in collective arbitration to be unproblematic, since liberal

148 Born, supra n. 4 at pp. 2317–2320. Lawyers acting in an international commercial arbitration that is seated in a state other than that in which they are licensed are typically not subject to restrictions on the unauthorized practice of law in a foreign jurisdiction. Ibid. pp. 2294–2296, 2300–2302. However, lawyers are still subject to the extra-territorial application of the rules of ethics promulgated by their national Bars. Ibid. pp. 2306–2308. Furthermore, ‘the ethical or other rules of the arbitral seat may, either directly or indirectly, purport to apply to the conduct of counsel in a locally-seated international arbitration’. Ibid. p. 2307.
149 Ibid. pp. 2301–2302; see supra nn. 244–253 and accompanying text.
150 Harvard Award, supra n. 1.
151 Weidemaier, supra n. 26 at pp. 94–95.
approaches to funding can operate to expand the number of collective claims brought.\textsuperscript{153} Other people, however, will find restrictive provisions troubling because such rules can limit access to justice in cases involving the collective public interest. These sorts of issues will, of course, need to be considered by those who are involved in developing new forms of collective arbitration in light of the relevant national laws and policies.

\textbf{(e) Punitive Damages}

Although punitive damages are not a necessary element of collective arbitration, they are closely associated with US-style class actions and therefore deserve brief mention because of likely concerns about whether and to what extent non-compensatory damages could be claimed in any new form of collective arbitration. To some extent, fears may be assuaged by the fact that punitive damages will most likely be sought in situations where US law applies, since the remedy is uncommon (though not unheard-of) in other legal systems.\textsuperscript{154} In such cases, it is expected that claimants will typically argue that US-style class arbitration procedures can and should apply as well, creating a situation where arbitrators will not have to decide whether to allow punitive damages claims in non-class collective arbitrations.

Nevertheless, it is possible that the unique confluence of choice of law principles could lead to a situation where a collective seeks punitive or similar non-compensatory damages in a non-US-style proceeding. In those situations, arbitrators must consider several issues.

First, questions exist about the extent to which an arbitral award that includes punitive damages is internationally enforceable.\textsuperscript{155} Since arbitrators are under at least an arguable duty to create an enforceable award,\textsuperscript{156} punitive damages should be awarded only with caution. Secondly, allowing punitive damages claims to be brought in proceedings where the arbitrators’ or administrative fees are calculated by reference to the amount in dispute could be seen as an illegitimate means of increasing pressure on the defendant to settle, even in cases where the underlying legal claim is weak.

Neither of these issues are unique to collective arbitration, however. Thus, those who are involved in developing new forms of collective arbitration can look to bilateral arbitration for guidance in how to deal with these questions in collective proceedings.\textsuperscript{157} Furthermore, it is important to realise that punitive

\textsuperscript{153} Hensler, \textit{supra} n. 20 at p. 23.

\textsuperscript{154} Born, \textit{supra} n. 4 at pp. 2483–2484. Of course, choice of law disputes are common in international arbitration, and it may be that the claimant group argues that US law applies, which would support a claim of punitive damages, whereas the defendant argues that another state law (presumably without punitive damages provisions) controls. The amount in dispute could vary significantly according to which law is determined to govern.

\textsuperscript{155} \textit{Ibid.} pp. 2483–2487; Lew \textit{et al.}, \textit{supra} n. 76 at para. 24–75.

\textsuperscript{156} Günther J. Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ in \textit{(2001) 18 J Int’l Arb.} 135; Platte, \textit{supra} n. 38 at p. 307.

\textsuperscript{157} See e.g., Born, \textit{supra} n. 4 at pp. 2483–2488 (discussing punitive damages generally).
damages claims will not arise in several of the forms of collective arbitration discussed in this article. For example, claims that are limited to injunctive or declaratory relief will not require consideration of punitive damages issues. Collective arbitrations based on settlement agreements will also likely avoid any problems relating to punitive damages, since the scope and nature of any damages awards are agreed between the parties.

IV. INTERNATIONAL ENFORCEABILITY OF COLLECTIVE ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

The preceding sections have discussed issues of concern common to both domestic and international disputes. However, collective arbitration may be most useful for matters involving cross-border claims, since arbitration can bring geographically diverse parties into a single, neutral forum and provide an award that is relatively easy to enforce internationally.

Some commentators who have considered the enforceability of arbitral awards arising out of US-style class arbitration have taken the view that such awards should be granted the same presumption of international enforceability that is accorded bilateral awards under the New York Convention. However, the question remains open as to whether new forms of collective arbitration will or should be considered in the same light.

To a large extent, the answer will depend on the specific procedures used. However, those who are involved in developing new forms of collective arbitration can and should anticipate several potential areas of concern so that any procedures that are ultimately adopted are likely to produce an internationally enforceable award. This section considers a number of these issues, including preliminary matters, procedural matters and public policy concerns.

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158 See ibid. p. 2703; Favalli and Matthews, supra n. 4 at pp. 25–26; Strong, ‘Due Process’, supra n. 22 at p. 100; Strong, ‘Sounds of Silence’, supra n. 2 at p. 1094. But see Blumrosen, supra n. 22 at p. 373.

159 Some possible areas of debate are not covered in this article. For example, objections to collective arbitration could be raised at the initiation of the proceedings under Article II of the New York Convention, which requires a national court to ‘refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed’. A related argument could be made at the enforcement stage under Article V(2)(a), which allows non-enforcement if ‘[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country’. Alternatively, parties could oppose recognition or enforcement on the grounds that the agreement was not valid under the law to which the parties have subjected it or under the law of the country where the award was made. New York Convention, Art. V(1)(a). Though these potential arguments are both interesting and important, they will not be addressed herein because they relate to specific provisions of law and procedural postures that are too difficult to discuss in the abstract. However, courts that are asked to address these issues will have to consider both the letter of the applicable laws as well as their underlying policies, which could be challenging if the simultaneous application of the various provisions leads to conflict. See supra nn. 34–36 and accompanying text. However, recourse to the principle of effective interpretation could be used to harmonise many procedures and policies, and to allow the arbitral tribunal to fulfil the parties’ expressed desire to arbitrate their dispute. Fouchard, Guillard, Goldman, supra n. 30 at para. 478.
(a) Applicability of the New York Convention

Before considering specific objections under the New York Convention, it is necessary to confirm whether the New York Convention even applies to collective arbitration.160 Two preliminary arguments might be raised by parties intent on blocking enforcement of a collective award under the Convention.

First, a losing party might claim that collective arbitration is not, in fact, ‘arbitration’, as the term is commonly understood.161 Though inventive, such arguments would likely be unavailing, since, ‘as a practical matter, if the parties’ agreement provides for something labelled “arbitration”, it is a rare case where this will be categorized as something other than an arbitration agreement’.162

Secondly, a losing party might try to avoid international enforcement of a collective award by looking to Article I(3) of the New York Convention, which indicates that state signatories can limit the application of the Convention to those proceedings that are ‘commercial’ in nature. Although the vast majority of signatories have not adopted that particular reservation, a significant number (44 of 144) currently have.

As it turns out, potential problems regarding the New York Convention’s commercial exception are extremely limited. For example, the term ‘commercial’ has typically been interpreted broadly so as to encourage enforceability of awards under the Convention.163 Indeed, Gary Born has stated that the term should be given ‘a liberal, expansive definition that includes all manner of business, financial, consulting, investment, technical and other enterprise’, including consumer and employment matters.164 To the extent that states wish to exclude certain types of transactions (such as those involving consumers), the legislature can adopt specific substantive rules regarding non-arbitrability of those disputes.165

Furthermore, arguments can be made that collective arbitrations affect commercial interests in a way that individual arbitrations do not, even in the context of certain questionable types of arbitrations (such as those involving consumers or employment).166 For example, the relative power of the parties in

160 Notably, the New York Convention will not apply to pecuniary awards resulting from collective arbitrations under the ICSID Convention, since that instrument contain its own internal enforcement mechanism. ICSID Arbitration Rules, supra n. 8, rules 53–55; Lew et al., supra n. 76 at para. 29-111. Collective arbitrations under the ICSID Additional Facility Rules, however, are potentially enforceable under the New York Convention, as are collective arbitrations under other international instruments such as the Energy Charter Treaty. Ibid. paras. 28-117–28-118.


162 Born, supra n. 4 at p. 216.

163 Ibid. pp. 260–264 (but noting problems could arise with regard to ‘public law’ statutory rights (such as those involving antitrust claims) and consumer or employment law).

164 Ibid. p. 266.


166 See e.g., Born, supra n. 4 at pp. 260–264.
collective arbitration could be seen as more akin to that exhibited in commercial arbitration than it is to that in traditional (i.e. individual) consumer arbitration, in that parties are equally able to hire competent, sophisticated counsel and undertake vigorous defence or prosecution of their positions in arbitration.\(^\text{167}\) Similar arguments could be made in other areas of law (such as employment law) involving allegedly vulnerable parties. Thus, there may be sufficient grounds to conclude that even those types of collective arbitration that may initially appear suspect as being ‘non-commercial’ could fall outside the New York Convention’s commercial exception.

Finally, concerns about the commercial reservation simply will not arise in many instances. For example, some potentially problematic claims (such as those involving consumers) may not even be arbitrable, individually or collectively, as a matter of state law.\(^\text{168}\) Even more to the point, class arbitration embraces a variety of disputes that are indisputably commercial, including those involving financial services, insurance, manufacturing, maritime and electronic commerce, and it is likely that collective arbitration will involve a similarly broad range of claims.\(^\text{169}\) Collective awards resulting from these other types of suits will be entirely ‘commercial’ and thus outside any reservations made under Article I(3) of the New York Convention.

(b) Problems Regarding Provision of the Original Arbitration Agreement

Once the New York Convention is found to apply to collective arbitrations, additional issues arise. The first involves a procedural requirement that is often considered a mere formality in bilateral arbitration.

According to Article IV(1)(b) of the New York Convention, the party applying for recognition and enforcement of an award must provide the enforcing court with ‘[t]he original agreement referred to in article II or a duly certified copy thereof’. Article II identifies the type of agreement that will be enforced under the New York Convention as an ‘agreement in writing’, which is subsequently defined as ‘an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams’.

The difficulty in class and collective arbitration is that the agreement in writing will often be reflected in hundreds or even hundreds of thousands of documents. While this is not always the case (for example, a collective action brought by shareholders of a corporation could proceed under a single arbitration clause

\(^{167}\) This, of course, assumes adequate funding mechanisms are in place for the collective.


found in the organisation’s by-laws\textsuperscript{170} there will often be instances where the arbitration agreement for each of the individual claimants exists in a separate document.

Those who are involved in developing new forms of collective arbitration would be well advised to consider this matter early on, since the parties themselves may overlook this particular problem until very late in the proceedings. The reason why the issue is often missed is because less stringent requirements regarding the production of the arbitration agreement apply at the initiation of the arbitration than at the enforcement stage.

For example, parties can set an arbitration in motion with papers that simply refer to the arbitration agreement in question.\textsuperscript{171} In a collective arbitration, this requirement might be satisfied through the production of a single model (representative) clause.\textsuperscript{172} When the dispute reaches the enforcement stage, however, the situation changes. At this point, the prevailing party must apparently produce the original or a certified copy of each and every individual arbitration agreement. While this burden can be satisfied through ‘the award-debtor’s correspondence, pleadings in the arbitration, or similar materials, evidencing either affirmative acceptance of, or acquiescence to, an agreement to arbitrate’, parties still must comply with this formality in one way or another.\textsuperscript{173}

In cases where the members of a collective number in the hundreds to hundreds of thousands, such production will be difficult if not impossible, either because individual claimants (many of whom may not have actively participated

\textsuperscript{170} See e.g., Valencia v. Bancolombia (Colombia v. Colombia), Zuleta Digest for Institute for Transnational Arbitration (ITA) (Arb. Trib. Bogotá Chamber Comm. 2003), available at www.kluwerarbitration.com. However, the question could arise as to whether each of the individual claimants had signed onto the shareholder agreement, thus possibly requiring production of each individual share purchase agreement.

\textsuperscript{171} See e.g., International Chamber of Commerce (ICC), Rules of Arbitration, art. 4(3), effective 1 January 1988, available at www.iccwbo.org/court/arbitration/id4199/index.html. In fact, Article 3(3) of the UNCITRAL Arbitration Rules has recently been amended to make it even easier to commence an arbitration. See UNCITRAL Arbitration Rules, supra n. 119, art. 3(3) (requiring the ‘identification of any contract or other legal instrument out of or in relation to which the dispute arises’). The ICC Rules do not even explicitly require a written arbitration agreement to be in place to initiate an arbitration. Yves Derains and Eric A. Schwartz, A Guide to the New ICC Rules of Arbitration (1998), p. 64. Though there must be some evidence (either at the time the arbitration is initiated or subsequently) that an arbitration agreement exists, Fouchard, Guillard, Goldman, supra n. 30 at para. 1213, there is apparently no requirement that the evidence used at the initiation of an arbitration conform with the New York Convention’s requirement that the original document or certified copies be produced at the time of enforcement.

\textsuperscript{172} See e.g., AAA Supplementary Rules, supra n. 16, rule 4(a)(b)(6) (requiring each class member to have ‘entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members’ but not appearing to require production of each of those agreements at any point in time’; see also, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 448 (2003) (plurality opinion) (involving two sets of nearly identical consumer arbitration agreements). In one class arbitration involving a purported class of 400,000 members, claimants produced 2,500 randomly selected arbitration agreements to the arbitral tribunal to demonstrate the existence and specific language of the agreement to arbitration. Bagpeddler.com v. US Bancorp, Opinion and Order Regarding Class Certification (4 May 2007), pp. 9–20, available at www.cade.org/sdaosp/id=4867 (noting difficulties arising out of lack of identical language).

\textsuperscript{173} Born, supra n. 4 at pp. 2702, 2706–2707. The fact that the agreement may be reflected entirely in electronic form is not necessarily fatal. See e.g., UNCITRAL Model Arbitration Law 2006, Art. 7(4) (option one), available at www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
in the conduct of the action) are not willing or able to produce the requisite documents, or because losing defendants (who presumably hold an equally valid original of each agreement) cannot be compelled to produce such documents under the relaxed rules of disclosure in arbitration (assuming that counsel for claimants even thought to request such items during any exchange of documents).\(^{174}\) Even if production of the individual agreements were possible under either set of circumstances, it would be an expensive endeavour.

As it turns out, the New York Convention may not demand such a strict reading of the production requirement. For example, national courts dealing with bilateral arbitrations have generally rejected efforts to complicate the proof requirements under article IV, taking a practical and relatively flexible approach towards proof requirements’, consistent with the New York Convention’s objective of reducing (to the extent possible) the obligations placed on a party seeking enforcement.\(^{175}\)

A second option also exists. Non-production of anything other than a single model agreement could be justified under the recommendation made by the United Nations Commission on International Trade Law (UNCITRAL) in 2006 regarding the interpretation of Article II(2) of the New York Convention.\(^{176}\) In that document, UNCITRAL indicates that the writing requirement of the New York Convention should be construed broadly and non-exhaustively, suggesting, perhaps, that provision of a single original agreement in a collective arbitration would be sufficient for enforcement purposes.

Finally, parties to collective arbitrations could attempt to escape a strict reading of Article IV of the New York Convention by drawing analogies to enforcement actions against non-signatories. Obviously, a non-signatory that has been made party to an arbitration has not signed an arbitration agreement that can be produced at the enforcement stage. Although some theories (such as assignment) relating to the ability to bind non-signatories lend themselves to the production of some series of documents that would comply with the requirements of Article IV, other theories (such as estoppel) do not suggest the easy production of any documents reflecting an arbitration agreement in writing.\(^{177}\)

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174 Defendants in US courts can be ordered to produce this information in judicial class actions, although plaintiffs may be required to pay any costs incurred by the defendant. See e.g., Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358–360 (1978).
175 Born, supra n. 4 at p. 2703. For example, Article 614(2) of the Austrian Arbitration Act indicates that the production of an original arbitration agreement or certified copy of the agreement under Article IV of the New York Convention need only be complied with at the request of the court. See also, Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards in ICC International Court of Arbitration Bulletin, 2008 Special Supplement (discussing numerous countries that have relaxed evidentiary rules in recognition proceedings).
177 Born, supra n. 4 at pp. 1210–1212.
Interestingly, ‘[t]here has been surprisingly little attention [paid] to issues of form in non-signatory cases’, although ‘those authorities who have addressed the issue have adopted a variety of means of avoiding or satisfying applicable form requirements in non-signatory contexts’. This suggests that a court could fashion a satisfactory remedy to the problem of production of individual arbitration agreements in collective actions if it wished to do so. Nevertheless, those who are developing new forms of collective arbitration might consider whether there is anything that they can do to avoid any potential problems in this regard.

(c) Problems Regarding Arbitral Procedure

Though interesting, these preliminary objections can be dealt with relatively easily. More interesting objections to enforcement of collective awards will be made under Article V(1) of the New York Convention. This provision focuses on the procedures used during the arbitration and ensures that the parties’ procedural rights have been respected. Five different arguments are likely. Three fall under Article V(1)(d) and involve arbitral procedure generally; privacy and confidentiality; and composition of the arbitral tribunal. Two fall under Article V(1)(b) and include lack of proper notice and the inability to present one’s case. Each will be considered in turn.

(i) Arbitral procedure generally

Perhaps the single most likely objection to new forms of collective arbitration will arise under Article V(1)(d) of the New York Convention. This provision allows a national court to refuse enforcement of a foreign award upon proof that ‘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’. This argument would most likely be made in situations where the arbitration agreement is silent or ambiguous as to collective treatment or where the arbitration agreement prohibits collective treatment but the prohibition has been struck and severed on the grounds of unconscionability or some other contract-based defence.

Courts might find objections based on the lack of consent to collective arbitral procedures particularly persuasive when the awards come from states that have not adopted collective relief in the judicial context, but it is important to

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178 Ibid. p. 1210.
179 Arbitrators faced with an arbitration agreement that is silent or ambiguous as to the possibility of collective treatment can nevertheless decide to proceed collectively by applying interpretive methods similar to those used in cases involving pathological clauses. See Strong, ‘Sounds of Silence’, supra n. 2 at p. 1049, n. 145; see also Foucard, Gaillard, Goldman, supra n. 30 at para. 476 (describing basic principles of interpretation). This approach, which involves inquiries into the underlying laws in cases where the parties’ intent as to the proper procedure is not apparent on the face of the arbitration agreement, was noted with approval by the US Supreme Court in Stolt-Nielsen. Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp., 130 S.Ct. 1758, 1768 (2010). Whether one views the reliance on state law as a means of determining party intent (as suggested in Stolt-Nielsen) or as a separate default mechanism under the second clause of Article V(1)(d) regarding ‘the law of the country where the arbitration took place’, the analysis is the same under the New York Convention.
remember that conflict of laws analyses need not rely wholly on the ‘automatic application of the public policies of the arbitral seat’.180 This may be especially true when the substantive law governing the dispute permits or requires collective relief.181

Experience in the United States suggests that general objections to collective procedures will include several different elements.182 First, parties will likely claim that they were surprised by the imposition of collective arbitration, since few (if any) such procedures have ever been used outside the United States. Because the parties did not and indeed could not have contemplated the possibility of collective arbitration at the time the arbitration agreement was drafted, they could not have come to a meeting of minds regarding such procedures. Thus, the arbitral panel acted improperly in imposing such a process.

This approach seems somewhat disingenuous. For years, the international business, legal and arbitral communities have been discussing class arbitration and the likelihood of the device’s expansion outside the United States. At this point, parties around the world can be said to be on notice that class or collective proceedings may arise in suitable circumstances and have had sufficient opportunity to amend any pre-existing agreements so as to forestall the possibility of a collective arbitration outside the United States. Claims of surprise or unforeseeability therefore do not appear particularly persuasive.

Secondly, parties will likely argue that collective proceedings are improper in cases where the parties have agreed to proceed under a particular set of arbitral rules that does not specifically contemplate class or collective proceedings. Certainly it is true that no set of general arbitral rules currently addresses collective arbitration per se. However, a number of the leading international arbitral rule sets arguably give arbitrators the discretion to order collective proceedings through certain references to multiparty proceedings.183 Although most of these provisions arose in response to challenges associated with consolidated arbitrations, in some cases the language is general enough that it might be applicable to collective proceedings. This is true even though collective arbitration is different from consolidated arbitration in several significant ways.184

180 Born, supra n. 4 at p. 2487. Thus, the absence of collective proceedings under national law may not necessarily be fatal. Ibid. p. 1232, n. 442.
181 See infra nn. 279–287 and accompanying text (regarding public policy and choice of law analyses).
182 See e.g., Stolt-Nielsen, 130 S.Ct. at 1758; Harvard Award, supra n. 1.
183 The inclusion of provisions on multiparty proceedings is not universal. For example, two of the most-often used AAA rules (those concerning international matters and those concerning commercial matters, including large, complex disputes) do not mention consolidation or multiparty proceedings. See AAA Rules, available at www.adr.org/sp.asp?id=28730. Furthermore, some rules contain restrictions on multiparty proceedings that proponents of class or collective arbitration would find difficult to overcome. See e.g., Construction Industry Model Arbitration Rules, rule 3, available at www.jctld.co.uk/assets/JCT_CIMAR%2005.pdf (permitting consolidation of disputes between the same parties even over the objection of a party, but not permitting the consolidation of related disputes between different parties, absent consent). Of course, arbitrators can and should take restrictions of this nature into account when considering whether collective proceedings are appropriate under any particular rule set.
For example, the Swiss Rules of Arbitration allow consolidation of proceedings even in cases where the parties are not identical.\textsuperscript{185} Though consultation with the parties is required, the decision to consolidate can be made even over the objections of one or more parties after taking all ‘relevant and applicable’ circumstances into account. Joinder of third parties is also possible, subject to similar conditions.\textsuperscript{186} The breadth of these provisions suggests that they could be applied to collective arbitration as a form of consolidated or third party arbitration.

The Arbitration Rules of the Belgian Centre for Arbitration and Mediation also indicate that joinder of arbitral proceedings are proper ‘[w]hen several contracts containing a CEPANI arbitration clause give rise to disputes that are closely related or indivisible’.\textsuperscript{187} The request for joinder may be made by the arbitrators at any time or by one or more of the parties, and is referred to the Appointments Committee or chair of the arbitral tribunal. The decision is made ‘after having summoned the parties, and, if need be, the arbitrators who have already been appointed’.\textsuperscript{188} Again, the generality of the language used in these provisions, referring simply to ‘multiparty proceedings’, suggests that they would apply equally to collective arbitration.

The Rules of Arbitration promulgated by the London Court of International Arbitration (‘LCIA Rules’) give arbitrators the power to consolidate proceedings ‘unless the parties at any time agree otherwise in writing’.\textsuperscript{189} The LCIA Rules also give arbitrators ‘the widest discretion to discharge’ their obligations and impose the duty ‘to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute’.\textsuperscript{190} Parties are simultaneously charged to ‘do everything necessary for the fair, efficient and expeditious conduct of the arbitration’.\textsuperscript{191} These provisions suggest that arbitrators operating under the LCIA Rules could order collective proceedings even over the objection of one of the parties.\textsuperscript{192} This reading of the LCIA Rules appears consistent with that of the LCIA itself, based on a position taken by the LCIA in intervener papers submitted to the Supreme Court of Canada in \textit{Dell Computer Corp. v. Union des Consommateurs}.\textsuperscript{193}

\textsuperscript{186} Ibid. art. 4(2).
\textsuperscript{188} Ibid.
\textsuperscript{189} London Court of International Arbitration (LCIA) Arbitration Rules, rule 22.1, effective 1 January 1998, available at www.lcia.org/ARB_folder/arb_english_main.htm. The LCIA Rules are currently undergoing reconsideration and possible revision, although no decisions are expected in the near future.
\textsuperscript{190} Ibid. rule 14.
\textsuperscript{191} Ibid.
\textsuperscript{192} Lew et al., supra n. 76 at para. 16-44. \textit{But see} ibid. paras. 16-84–16-99.
\textsuperscript{193} SCC 34 (2007); LCIA Factum, supra n. 36 at para. 8 (stating ‘arbitration clauses should not \textit{ipso facto} be held unenforceable when invoked in the context of class actions’); \textit{see also} Hanessian and Chinn, supra n. 91 at p. 406; Saumier, supra n. 33 at p. 1222.
Article 17(1) of the UNCITRAL Arbitration Rules also permits some flexibility in the structure of the proceedings, even over the objection of the parties, stating that:

 subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a reasonable opportunity of presenting his case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.194

The UNCITRAL Arbitration Rules contain another provision that might facilitate the imposition of collective arbitration. Article 17(5) permits the arbitral tribunal, upon the request of any party, to:

 allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.195

Articles 17(1) and 17(5) thus suggest that an arbitral tribunal has the power to order collective arbitration under the revised UNCITRAL Arbitration Rules, even over the objection of one of the parties. However, this does not mean that an arbitration proceeding under the original UNCITRAL Arbitration Rules cannot support a collective proceeding. Indeed, some commentators have taken the view that group treatment in investment arbitrations under the original UNCITRAL Arbitration Rules is entirely proper, particularly in situations that resemble collective arbitration (i.e., where there is only one common party).196

The ICC Rules raise an interesting challenge, in that they do not currently discuss consolidation, although they do include provisions concerning the naming of arbitrators in multiparty situations (one of the major problems associated with

194 UNCITRAL Arbitration Rules, supra n. 119, art. 17(1) (replacing Article 15(1) in the original version of the rules). The reference to a ‘reasonable opportunity’ to present one’s case rather than the original provision’s ‘full opportunity’ to do so appears to make it even easier for arbitrators to order a multiparty arbitration, although such a reading was possible even under the original rules. The addition of the second sentence (which is entirely new) also suggests an increased willingness to permit multiparty proceedings over the objection of one party.

195 Ibid. art. 17(5). This language is entirely new. However, case law arising under the original version of the UNCITRAL Arbitration Rules suggests that collective arbitration procedures could be adopted under those provisions, even if the parties do not explicitly agree to such treatment. See e.g., Karaha Bodas Co, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 295–96 (5th Cir. 2004) (denying objection to enforcement of an award arising out of a consolidated arbitration under Article V(1)(d) of the New York Convention, based on Article 15(1) of the original UNCITRAL Arbitration Rules).

class, collective and consolidated arbitrations). However, the absence of any explicit provisions regarding consolidation in the current ICC Rules may be offset by the ‘group of companies’ doctrine, which allows arbitrators to bring a non-signatory to the arbitration agreement into the proceedings in cases where (1) the contractual language can be construed as linking the companies, and (2) the parties can be said to have demonstrated an intention to create an ‘integrated contractual relationship subject to one single arbitration’. Although the ‘group of companies’ doctrine (which remains controversial) currently focuses on bringing related commercial entities into an arbitration, it might also be an appropriate vehicle for bringing related individuals into a collective arbitration in situations involving a mass injury.

It will take some time before the strength of these arguments can be tested. However, commentary concerning the propriety of arbitral consolidation suggests a probable split will arise regarding liberal use of these provisions in the context of collective arbitration.

On the one hand, Gary Born states that if a group proceeding is ‘based on the parties’ consent – either express or implied – then Article V(1)(d) would not be implicated: on the contrary, ordering consolidation, intervention, or joinder based on the parties’ express or implied agreement should not provide grounds for denying recognition to an award’. Although Born was writing in the context of consolidated proceedings, his conclusions would appear to apply equally to collective arbitration. Therefore, arbitrators who order collective procedures based on the parties’ express or implied consent can likely produce awards that enjoy the same presumption of international enforceability that is granted to awards arising out of bilateral arbitrations.

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197 ICC Rules, supra n. 171, art. 10. The ICC Rules are in the process of reconsideration and possible revision, so change might occur in the near future.


201 Born, supra n. 4 at p. 2074. Born also discusses the relevance of national laws regarding consolidation, stating “[s]ome commentators have suggested that the parties’ agreement to arbitrate in a state whose law permits mandatory consolidation, even absent the parties’ consent, constitutes acceptance of such consolidation for purposes of Article V(1)(d). Ibid.; see also, Strong, ‘Sounds of Silence’, supra n. 2 at pp. 1063–1072 (discussing laws on mandatory consolidation in light of class arbitration). However, Born goes on to note that state rules on consolidation should not overcome explicit exclusion of group proceedings ‘because of the overriding status of the parties’ agreement under Article V(1)(d) and because the specific terms of the parties’ agreement should prevail over the more general selection of the arbitral seat’. Born, supra n. 4 at p. 2074. This conclusion appears correct in situations involving class and collective arbitration as well. Nevertheless, it must be remembered that exclusions of group treatment can be legitimately struck from an arbitration agreement for reasons such as unconscionability or duress, which (assuming the severability of the offending language) would result in an agreement that is considered silent or ambiguous as to group treatment.

202 Born, supra n. 4 at p. 1232 n. 442, p. 2711.
On the other hand, Julian Lew, along with others, has said that ‘[i]t is doubtful whether an award arising out of consolidated arbitration proceedings would be enforceable under the New York Convention’; even in cases where the relevant law or arbitral rules give the necessary authority to a court, arbitrator or appointing authority.203 Again, Lew is focusing on consolidated rather than collective proceedings, but his view appears to be based on a strict reading of party autonomy.204 Although overly strict construction of arbitration agreements has been criticised by other commentators,205 this type of approach is strongly embedded within the arbitral community206 and will remain for some time in both multiparty and bilateral proceedings.

The split of opinion between Born and Lew regarding the international enforceability of consolidated awards suggests that collective awards will receive a similarly divided reception at the enforcement stage. To some extent, this may be unavoidable, due to intractable differences of opinion about the theory (or theories) underlying arbitration.207 Nevertheless, those who are involved in developing new forms of collective arbitration should keep these different theories in mind and attempt to find solutions that take all concerns into account.

(ii) Privacy and confidentiality

Proponents of international commercial arbitration have long praised its private and confidential nature. However, neither principle is independently protected under the New York Convention. Instead, breaches of privacy or confidentiality may only provide grounds for objection to enforcement under the Convention to the extent that such requirements are reflected in the parties’ arbitration agreement and do not violate any mandatory provisions of law or policy.208 Indeed, that is why courts, counsel and commentators often advise parties to provide explicitly for confidentiality in their arbitration agreements.209 However, even an explicit reference to the principles of privacy and confidentiality will not necessarily avoid all disclosures, for courts and arbitrators have long recognised that parties cannot dictate every aspect of arbitral procedure. For example, party autonomy can be overcome in cases where parties

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203 Lew et al., supra n. 76 at paras. 16-96–16-97.
204 Ibid. paras. 16-97–16-98.
207 Born, supra n. 4 at pp. 185–187; Lew et al., supra n. 76 paras. 5-1–5-33; Lynch, supra n. 206 at pp. 72–74. The author has previously addressed these issues in the context of collective arbitration. Strong, ‘Tea Leaves’, supra n. 4.
208 New York Convention, Art. V(1)(d); Born, supra n. 4 at pp. 2256–2257, 2265–2259.
209 Born, supra n. 4 at p. 2256.
attempt to evade mandatory provisions of law or fundamental principles of procedural fairness. Recently, courts have also overcome expectations of privacy and confidentiality in arbitrations involving matters of public interest.210

Given the number of people involved in collective disputes and the importance of the economic and social policies underlying many collective claims, courts or arbitrators may conclude that the public interest in collective arbitration permits some necessary deviations from the strict application of the principles of privacy and confidentiality. If so, then enforcement of an award may result even in situations where an arbitral tribunal permits some departure from an explicit contractual provision regarding arbitral privacy and confidentiality.211 Of course, the presence of an explicit limitation on disclosures can and should be considered by the arbitrators. Indeed, the AAA Supplementary Rules, which include a default rule on reduced confidentiality in class arbitrations, explicitly permit the arbitral tribunal to provide for increased privacy and confidentiality in appropriate cases.212

An interesting dilemma arises in situations where the disclosures are considered improper in whole or in part. In those circumstances, it is to some extent unclear as to what the proper means and method of addressing that injury are. First, difficulties may arise due to the timing of the disclosure. If the information was divulged during the pendency of the arbitration, questions exist as to whether the arbitral tribunal or the enforcing court can or should address the issue.213 Different problems arise if the disclosure does not occur until after the award has been paid in full. In those cases, enforcement proceedings cannot be the best or only place for addressing injuries relating to breaches of confidentiality, since the court no longer has jurisdiction over the matter.214 Recourse typically cannot be had to the original tribunal either, since it is typically functus officio as of the time that the award was rendered.215 In cases involving late disclosures, it therefore may be necessary to form a second tribunal to consider the matter.

Secondly, questions exist as to the most appropriate remedy for a breach of confidentiality or privacy. Although injunctive relief has sometimes been used to address prospective breaches,216 there will be times when the disclosure has already occurred, creating speculation as to whether the injured party is entitled

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210 See supra n. 112.
211 See supra nn. 107–119 and accompanying text.
212 AAA Supplementary Rules, supra n. 16, rule 9(a).
213 See Born, supra n. 4 at p. 2256; Simon Crookenden, “Who Should Decide Arbitration Confidentiality Issues?” in (2009) 25 Arb. Int’l 603 at pp. 606, 608–609, 611. In some cases, the arbitral tribunal has done so. See Born, supra n. 4 at p. 2256; see also Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, paras. 5–6, 12–18, 115, 163, available at http://icsid.worldbank.org (providing declaratory order regarding confidentiality). In other instances, the court has been asked to provide relief, even in cases where the arbitral tribunal has initially addressed the matter. Born, supra n. 4 at p. 2263; see also Bulgarian Foreign Trade Bank Ltd v. Al Trade Fin. Inc., Judgment of 27 October 2000, supra n. 213 at p. 298 (Swedish Supreme Court).
214 But see Bulgarian Foreign Trade Bank Ltd., Judgment of 27 October 2000, supra n. 213 at p. 298 (discussing the possible revocation of the arbitral award).
215 Born, supra n. 4 at pp. 2513–2520.
to money damages or non-enforcement (or revocation) of the award. To some extent, the answer may turn on the extent and type of disclosure made. Indeed, at least one court has noted that breaches of privacy or confidentiality that are ‘of a general procedural nature’ might ‘not mandate the far-reaching consequences of the cancellation of an arbitration agreement’. These are all issues that those who are involved in developing new forms of collective arbitration may wish to consider from the outset and deal with explicitly.

(iii) Composition of the arbitral tribunal

A third area of concern involves the parties’ ability to choose their own arbitrators, which is often considered a fundamental right in arbitration. The sanctity of this principle is reflected in Article V(1)(d) of the New York Convention, which explicitly protects the parties’ agreements concerning the composition of the arbitral tribunal.

Naming arbitrators is typically a straightforward affair in bilateral disputes. Difficulties can arise, however, when the matter involves more than two parties. Numerous solutions have been proposed to resolve the problems associated with naming arbitrators in a multiparty dispute, although the most popular has been to allow the appointing authority to name the entire panel, either immediately or once it is clear that the parties cannot agree on the procedure to be used. This method, which is considered to protect the equality of the parties, applies equally well to collective arbitrations. Moreover, several sets of arbitral rules refer to ‘multiparty proceedings’ when describing these procedures, language that can comfortably be read to include collective arbitration. Therefore, enforcing courts will likely be able to rely on existing practice and authority when considering objections to a collective award arising out of the appointment of arbitrators. As a result, experts involved in creating new forms of collective arbitration will likely not need to spend too much time contemplating this issue.

217 Bulgarian Foreign Trade Bank Ltd, Judgment of 27 October 2000, supra n. 213 at p. 292 (discussing the analysis by the intermediate court); see also ibid. p. 298.
218 See e.g., Born, supra n. 4 at pp. 1367, 1378.
222 See e.g., CEPANI Rules, supra n. 187, art. 9(3); ICC Rules, supra n. 171, art. 10; LCIA Rules, supra n. 189, rule 8; Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 13(4), effective ? January 2007, available at www.scssinstitute.com/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf; Swiss Rules, supra n. 185, art. 4(1).
Furthermore, some types of collective arbitration will avoid these difficulties altogether. For example, collective proceedings involving group claims brought by a single intermediary entity can follow the same appointment procedures that are traditionally used in bilateral arbitration. Similarly, arbitrations brought for settlement purposes should result in few, if any, controversies regarding the naming of the tribunal, since the procedure is already highly consensual and is unlikely to lead to objections at the international enforcement stage.

(iv) Lack of proper notice

Notice of any procedure that purports to affect a party’s legal entitlements is another fundamental right in arbitration, and the New York Convention explicitly reflects that principle in Article V(1)(b). That provision states that ‘[r]ecognition and enforcement of the award may be refused’ on proof that ‘[t]he party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings’.

‘Proper notice’ in the context of international arbitration consists of ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections … and it must afford a reasonable time for those interested to make their appearance’. The standard for notice in an international arbitration is thus relatively clear. The problem in collective arbitration is that concerns about notice in arbitration typically focus on notice to the defendant, whereas the distinctive concerns about notice in collective proceedings usually relate to notice to the claimant group.

This creates a bit of a dilemma in actions to enforce awards arising out of collective arbitration. Purported members of the collective might be able to claim that they did not receive proper notice of the proceedings and thus might be able to oppose recognition of a foreign arbitral award in favour of the defendant under the New York Convention. This analysis, though ‘tinged’ with the special considerations associated with notice in the context of collective relief, is relatively straightforward.

The more interesting issue is whether the defendant can rely on Article V(1)(b) to avoid enforcement of an award based on inadequate notice to some or all of the members of the claimant group, even though the language of the Convention speaks explicitly of notice to ‘the party against whom the award is invoked’. In so doing, the defendant would have to claim that improper notice has opened the defendant up to a situation where it will have to pay a claimant twice: once as a part of the immediate proceeding and again in a future proceeding that is not barred by the principle of res judicata.

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224 Buckner, supra n. 89 at pp. 196–197, 252–253; Sternlight, supra n. 17 at pp. 50–53; Weston, supra n. 17 at pp. 1722–1723, 1730.
This argument is not without merit. In the past, some civil law courts have refused to enforce foreign judgments involving large-scale representative relief (i.e. those arising out of US class actions) on the grounds that the foreign judgment either was not or might not be binding on unnamed members of the collective.225 Those courts took the view that because the unnamed members of the collective still had a right to sue the defendant under national law, notwithstanding the earlier foreign judgment, it was unfair to enforce the judgment against the defendant. Although these cases had less to do with notice and more to do with the nature of fundamental rights in litigation in those countries (rights that could not be asserted in representative litigation), the concern about double liability can be transferred to the arbitral context and raised in the context of Article V(1)(b).

Thus, both claimants and defendants may have grounds for an objection to the lack of proper notice under the New York Convention. This is not necessarily fatal to the development of collective arbitration, however. Some forms of collective arbitration, i.e. those involving either (1) the aggregation of claims or (2) the use of intermediary associations, should raise few or no concerns regarding notice, since the procedure is either opt-in (in the case of aggregate claims)226 or akin to bilateral arbitration (in the case of arbitrations brought by intermediary associations). All claimants will always have proper notice of the proceedings, and neither they nor any defendants will be able to assert a fear of future litigation or arbitration as grounds for objecting to enforcement of the arbitral award. Relief that is injunctive or declaratory in nature also poses few or no problems, since the remedy as to one claimant is the same as to all.

The situation is similar but not identical for collective arbitrations providing settlement-only relief, particularly in arbitrations that adopt the kind of opt-out approach used in the national courts of the Netherlands. This is because opt-out procedures affect the rights of group members in a way that opt-in procedures do not.227 Interestingly, the Dutch legislature has provided for certain heightened protections to ensure that claimants receive adequate notice of the proceedings, including the provision of two separate notices, one regarding the initiation of the matter and the other regarding the settlement provisions themselves.228 Furthermore, under Dutch law, notice to known members of the collective must be by mail, which provides yet another level of assurance that notice has been properly given to claimants.229 Arbitrations based on this procedure might adopt

225 See Gidi, supra n. 53 at pp. 385–387; Taruffo, supra n. 66 at pp. 416–417. Questions about the res judicata effect of newly developed forms of collective judicial relief are still open. Hensler, supra n. 20 at p. 21.
226 Although a potential claimant to an aggregated arbitration could ‘miss out’ by not being part of the collective action, there is no legally cognisable injury, since the claimant’s right to proceed individually (or subsequently, as part of another collective arbitration) has not been affected. The only time where this might not be the case is if the aggregate arbitration disposes of a discrete sum of money that is exhausted as a result of the first proceeding. In those situations, the notice issues are similar to those in representative actions.
227 See Gidi, supra n. 53 at pp. 337–339 (discussing opt-in versus opt-out procedures).
228 Tzankova and Scheurleer, supra n. 62 at p. 154.
229 Ibid. (noting, however, that the first of the two necessary notices may be by advertisement if the court so orders).
similar precautions so as to avoid problems at the recognition or enforcement stage.

Since settlement-only awards are entirely consensual, one might think that a court would never be given the opportunity to deny enforcement or recognition under Article V(1)(b) of the New York Convention, given that objections under Article V(1) may only be raised by the party against whom enforcement is sought. However, it is possible that an enforcing court could find a way to challenge the award *sua sponte*, either by identifying a need for independent review of settlements or voluntary dispositions of claims involving collective interests, or by concluding that the recognition or enforcement proceeding affects the public policy of the enforcing state under Article V(2)(b) of the New York Convention, which would allow the court to address the matter on its own initiative and under its own laws.

Representative claims are much more problematic than these other types of collective proceedings because states have very different notions as to what constitutes proper notice in collective actions, at least in the judicial context. For example, some jurisdictions (most notably the United States) require individual notice to identifiable members of a collective in a judicial proceeding involving individual damages. Individual notice in a collective arbitration would likely always constitute ‘proper notice’ under the New York Convention, assuming, of course, that the content of the notice was acceptable.

Notice regarding representative proceedings is nowhere near as strict in Australian courts. Here, notice of a class proceeding typically occurs through publication, with individual personal notice only being used as a last resort and in circumstances where it is reasonably practicable and not unduly expensive. It is unclear whether publication notice would ever be considered ‘proper’ under the New York Convention, given the risk that an individual claimant might not receive or understand notice of a collective arbitral proceeding.

Other states take intermediate positions. For example, when courts in Ontario, Canada, determine how notice must be given in a representative proceeding, they consider a variety of matters, including the cost of notice and the size of the
In practice, individual notice is typically ordered in conjunction with other types of notice so as to give effect to opt-out provisions. It is likely that Canadian notice provisions would be acceptable under the New York Convention (again depending on the content of the notice), since individual notice is likely in all but the most extreme cases.

Although these notice standards relate to actions brought in state court, those who are considering the development of collective arbitration should consider whether it is necessary or desirable to track these provisions in new forms of collective arbitration so as to increase the likelihood of creating an internationally enforceable collective award. In particular, it must be considered whether individual notice – which is virtually always possible in collective arbitration, since all the members of the claimant group have entered into arbitration agreements with the defendant and are therefore individually known – should always be required. In many ways, that would seem the best option, even if the cost is high. Only if all of the parties on both the claimant and defendant side are from countries that permit a lower standard (such as publication or Internet notice) should less rigorous notice even be contemplated. However, concluding that anything other than individual notice is adequate carries some risk.

According to Article V(1)(d) of the New York Convention, matters regarding the sufficiency of notice are to be decided by reference to the law of the arbitral forum or the procedural law of the arbitration, which can include any institutional rules chosen by the parties. However, some enforcing courts have elevated concerns about notice to the level of public policy, which allows consideration of the notice procedures under the law of the state of enforcement. This can create problems if an arbitral tribunal allows parties to use a lower standard regarding notice, only to find later than an enforcing or recognising court requires a more rigorous approach. Accordingly, it may be best if arbitrators require actual notice to all parties, including any unnamed claimants, in all instances.

Although this section has suggested that those involved in developing new forms of collective arbitration should look to national codes of civil procedure for guidance regarding notice requirements, that is not to say that arbitrators and parties should adhere slavishly to litigation practices. ‘Proper notice’ in bilateral arbitration looks at the totality of the facts rather than a strict application of periods or procedures that may be specified in court rules, and the same should

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237 Mulheron, supra n. 114 at p. 346.

238 Ibid pp. 346, 352.

239 Again, an interesting dilemma exists here. All members of the claimant group would be individually known to the defendant but not necessarily to the claimants intent on bringing the case. Whether the claimants are or should be entitled to require the defendant to divulge information regarding the identity of other potential claimants is unclear, given the limited scope of disclosure in arbitration.


be true in collective arbitration. Furthermore, objections to enforcement based on notice issues can only apply to violations at the most fundamental level; parties can approve minor variations in procedure. Again, this principle should apply equally to both collective and bilateral arbitration.

(v) Inability to present one’s case

The fifth possible objection to enforcement of collective awards under Article V(1) of the New York Convention falls under that portion of subsection (b) that indicates that ‘[r]ecognition and enforcement of the award may be refused’ on proof that ‘[t]he party against whom the award is invoked was … unable to present his case’. This language can be interpreted in two ways, either requiring a ‘full opportunity’ to present one’s case or possibly only a ‘reasonable opportunity’ to do so. Regardless of which definition is used, problems can arise in collective arbitrations.

It has been said that ‘if a party has been denied his right to retain legal counsel of his choice to represent him, this may constitute “unability” under the [New York] Convention’. There are two ways that a party to a collective arbitration might claim that it has been denied this right. First, unnamed claimants in large-scale representative actions might argue that they have not had sufficient opportunity either to choose the lawyer who will act as class counsel or to affect tactical decisions about the conduct of the case. Secondly, claimants from jurisdictions that do not allow contingent or other alternative fee structures might argue that they were forced, for financial reasons, to retain second-rate counsel and that this constituted ‘inability’ under the New York Convention.

Notably, both of these problems arise only with respect to certain types of representative claims. Other types of collective arbitration, such as those involving aggregate relief or claims brought by intermediary entities, would not result in these sorts of difficulties. For example, if parties dislike the choice of aggregate counsel, they can choose not to participate in those proceedings. In the case of an intermediary entity, individual claimants’ rights are deemed to be protected adequately by the intermediary’s independent and informed choices regarding appropriate counsel. Indeed, that is why only approved intermediaries can bring collective claims in systems that adopt this approach: the intermediaries must be considered legally sophisticated enough to take on the responsibility of a collective action.

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243 Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937, 942 (7th Cir. 1999).
244 Lew et al., supra n. 76 at para. 26-87.
245 Kurkela and Snellman, supra n. 225 at p. 17.
246 Buckner, supra n. 89 at pp. 197–200.
247 See infra nn. 145–153 and accompanying text.
248 See Hensler, supra n. 20 at pp. 14, 23.
Collectives formed for settlement purposes might seem to experience similar concerns about the competence of counsel, but the tactical decisions involved in settlement agreements are far less involved than those relating to the ongoing conduct of an arbitration and therefore do not raise the same level or types of problems. Furthermore, parties who disagree with the terms of the settlement can simply opt out, at least under the Dutch model. Independent judicial or arbitral review of any voluntary disposition of the dispute would also help ensure that the collective’s interests were adequately protected.

However, objections under Article V(1)(b) need not be fatal, even in representative actions. A possible solution to the first dilemma – the ability to choose counsel and affect tactical choices in the case – might be found in the AAA Supplementary Rules, which expressly provide that non-named parties in representative proceedings may engage their own counsel and be present with counsel at any hearings. Those who are considering the development of new forms of collective arbitration could integrate similar provisions into their procedures so as to avoid problems under the New York Convention.

The second issue, regarding a collective’s ability to engage the attorney of its choice in the absence of any special provisions regarding fees or costs, is a bit more complex. Certainly it is true that mere inability to engage one’s first choice of counsel (due to, for example, scheduling issues) will not rise to the level of a remediable injury. However, situations where ‘a party is arbitrarily subject to procedural requirements that effectively deny it the counsel of its preference, or that exclude counsel on the basis of discrimination with regard to nationality, religion, or place of qualifications’, have been said to implicate ‘the guarantee of freedom to select legal representation’ in arbitration. Whether the inability to hire certain categories of lawyers because of national rules on contingency fees will or should rise to that level remains to be seen. Nevertheless, those who are involved in the development of new forms of collective arbitration should be aware of the role that funding plays in mass claimants’ access to justice.

(d) Problems Regarding Public Policy

The preceding sections discussed possible objections to enforcement or recognition of a collective award under Article V(1) of the New York Convention. However, parties can also lodge objections to a collective award under Article V(2), including Article V(2)(b), which states that ‘[r]ecognition and enforcement of the award may . . . be refused if the competent authority in the country where

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249 See supra nn. 62–66 and accompanying text.
250 See supra nn. 121–128 and accompanying text.
251 AAA Supplementary Rules, supra n. 16, rules 8(a)(3), 9(a).
252 Born, supra n. 4 at p. 2301.
recognition and enforcement is sought finds that … [t]he recognition or enforcement of the award would be contrary to the public policy of that country’.

‘Public policy’ is not defined in the New York Convention, but it is clear that the only relevant public policy is that of the state where enforcement is to take place. Foreign public policy has no place in the enforcement analysis. Although this proposition seems straightforward enough, it could have a significant impact on collective arbitration, particularly in cases where the public policy of the procedural or substantive law used by the arbitrators favours collective relief (and perhaps forms the basis of the arbitral tribunal’s decision whether to permit collective proceedings) and the public policy of the enforcing state discourages or even prohibits collective relief.

Objections based on public policy may be procedural or substantive, though both are to be construed narrowly under the New York Convention. The two types of public policies differ in several ways and are discussed separately below. When considering either type of public policy, it is important to remember that domestic public policy concerns are not enough to justify non-enforcement of the award. ‘[O]nly violations of the enforcement state’s public policy with respect to … international public policy … is a valid defense.’

(i) Procedural public policy

Objections based on procedural public policy may be based on ‘fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration’. Parties involved in collective arbitration must also be aware of the extent to which objections based on procedural public policy may overlap with notice and the inability to present one’s case, since some courts have allowed parties to ‘elevate’ such Article V(1) claims to the level of public policy under Article V(2)(b). Such moves allow the

255 Lew et al., supra n. 76 at para. 26-82.
256 Mistelis, supra n. 254 at para. 253.
257 Lew et al., supra n. 76 at para. 26-114.
259 Lew et al., supra n. 76 at para. 26-114.
260 Ibid. para. 26-117.
enforcing court to look to its own law to decide these sorts of procedural matters rather than to the law of the arbitral seat.\footnote{262}

Some people may find the overlap between the procedural protections of Article V(1)(b) and the public policy provisions of Article V(2)(b) unproblematic.\footnote{263} However, in light of the narrow reading of the grounds for objection under the New York Convention, it seems inappropriate to allow an objection that is explicitly permitted under Article V(1) to fall also under Article V(2). Limiting objections regarding notice and the inability to bring one’s claim to Article V(1)(b) would appear to (1) better reflect the parties’ presumed expectations regarding the standards that apply to the proceedings; (2) help ensure creation of an enforceable award by avoiding any surprises regarding the public policy concerns applicable to the dispute;\footnote{264} and (3) limit the use of the public policy exception to truly exceptional cases, as appears to have been contemplated by the drafters of the New York Convention.\footnote{265}

Although objections under Article V(2)(b) may be easily brought,\footnote{266} the enforcing court’s scope of review is actually extremely limited. Commentators and courts are ‘unanimous’ on this point, stating that the analysis by:

> the national judge excludes review of the substance of the arbitration decision. It must relate not to the evaluation made by the arbitrators of the rights of the parties, but rather to the solution given to the dispute, with the award being annulled only insofar as this solution runs counter to public policy.\footnote{267}

The question, of course, is whether the right to proceed as a collective should be considered a ‘solution given to the dispute’ rather than an ‘evaluation made by the arbitrators of the rights of the parties’. The answer may depend on whether the right to relief may only be realistically obtained via collective action.\footnote{268}

\footnote{262} See New York Convention, Art. V(2)(b); see also, Brulard and Quintin, supra n. 236 at p. 546; Günther J. Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ in (2001) 18 J Int’l Arb. 135 at p. 143.


\footnote{264} There has been a great deal of discussion about the extent to which an arbitral tribunal can or should consider foreign public policy when issuing an award. Born, supra n. 4 at pp. 2180–2184; Platte, supra n. 58 at p. 312. The issue has become even more pressing as states have become more amenable to arbitration of matters involving public law. See Born, supra n. 4 at p. 2177. Collective arbitration faces additional problems, since it is unclear (1) whether the right to proceed as a group should be considered substantive or procedural in nature, and (2) which state’s law controls the issue of the availability of collective redress. It may very well be that the law of different states affect different aspects of arbitral procedure. See ibid., pp. 1311–1313 (suggesting “the procedural law of the arbitration” can best be seen as an application of the principle of dépeçage); see also infra nn. 279–287 and accompanying text (regarding question of choice of law).

\footnote{265} Born, supra n. 4 at p. 2828.

\footnote{266} Ibid. p. 2827; Lew et al., supra n. 76 at para. 26-144; Karl-Heinz Bockstiegel, ‘Public Policy and Arbitrability’ in Pieter Sanders (ed.), Comparative Arbitration Practice and Public Policy in Arbitration (1986), pp. 177, 179.


\footnote{268} If the need to proceed as a group is considered substantive in nature, then the decision to order collective arbitration would seem to constitute an evaluation of the parties’ rights. Alternatively, if the need to proceed as a group is considered ‘merely’ procedural, then the arbitrators’ decision would appear to be more of a solution given to the dispute.
However, even if the decision is considered ripe for an enforcing court’s review, that does not necessarily mean that collective procedures can or should be determined to be counter to public policy, for two reasons.

First, recent developments regarding the increased availability of collective relief in national courts suggest that collective redress cannot be said to be contrary to international public policy, even if some individual states still view such actions with suspicion. Since the only public policy that can be considered at the enforcement stage is international in scope, courts cannot hear blanket objections to collective arbitration based on domestic public policy concerns. Indeed, several commentators have concluded that the mere fact that collective relief is not available in the enforcing state’s domestic legal system does not mean that allowing such relief in arbitration would violate that state’s public policy.

Secondly, permitting a broad, general public policy argument to prevail over the detailed procedural provisions of Article V(1) seems to fly in the face of the purpose of the New York Convention, which was intended to increase, rather than decrease, the ease with which awards are enforced. Furthermore, commentators have typically read the procedural objections outlined in Article V(1) as conclusively defining the corpus of international procedural public policy, or (even more generally) have defined international procedural public policy as simply constituting equal treatment, fair notice and the right to present one’s case. Those criteria will likely be met by any of the potential forms of collective arbitration discussed in this article, though of course individual procedures must be considered as they arise.

Denying blanket policy-based objections to collective arbitration also appears correct as a matter of common sense. Collective arbitration will likely develop if and to the extent it is needed to provide adequate relief for the claimants’ injuries in the arbitral context, based on the provisions and purposes of the relevant substantive law. To the extent that a conflict between public policies ensues, it seems most appropriate that the policy that was implicitly or explicitly chosen by the parties should prevail. However, those who are developing new forms of collective arbitration should be aware that this position may be contested.

(ii) Substantive public policy

Procedural public policy is not the only possible ground for non-enforcement of a collective award under Article V(2)(b). Objections may also be based on substantive public policy concerns, which typically include violations of the principle of good faith and *pacta sunt servanda*, the abuse of rights, activities that are

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269 Born, supra n. 4 at p. 1232, n. 442; Nater-Bass, supra n. 4 at p. 683 (discussing Swiss law).

270 Born, supra n. 4 at p. 2655.


273 See Saumier, supra n. 33 at pp. 1210–11; see also Born, supra n. 4 at pp. 1326–1338.
contra bonos mores\textsuperscript{274}, punitive damages and breaches of competition law.\textsuperscript{275} Article V(2)(b) of the New York Convention explicitly states that these objections are viewed from the perspective of the enforcing state, but questions often arise as to whether and to what extent the public policy of other potentially interested states can or should be taken into account during an enforcement proceeding.\textsuperscript{276}

Most substantive grounds for objection – violations of the principle of good faith and \textit{pacta sunt servanda}, activities that are \textit{contra bonos mores} and breaches of competition law – do not appear to be implicated by any of the potential forms of collective arbitration discussed in this article. Furthermore, punitive damages, which are often mistakenly assumed to be a necessary part of US-style class actions and class arbitrations, will likely not be requested in many of the newer forms of collective arbitration.\textsuperscript{277}

The only substantive public policy that might be at issue in collective arbitration involves abuse of rights, since certain civil law jurisdictions take the view that representative relief is jurisprudentially suspect. For years, critics in civil law jurisdictions have claimed that large-scale representative relief violates (1) the defendant’s fundamental right to face individualised claims, and (2) the rights of the individual members of the collective to conduct their own individualised cases.\textsuperscript{278}

However, most of the types of collective arbitration discussed in this article do not involve this type of representative relief. Instead, they provide collective redress through intermediate entities, injunctive or declaratory relief, aggregate claims or settlement-only measures. In these forms of collective action, defendants are not facing generalised claims for individual damages and claimants are not ceding individual control of their cases in any objectionable way. Therefore, collective arbitrations based on these procedural forms should be free from objections to enforcement based on substantive public policy.

Furthermore, the rise and variety of types of collective relief in national courts around the world suggests that collective redress is gaining acceptance in a wide variety of jurisdictions, including those within the civil law tradition. These newer forms of relief cannot be stigmatised (as US class actions and arbitrations were and occasionally still are) as being exceptional dispute resolution devices. This does not mean that all problems have disappeared, since the variety of types of collective relief now available means that the number of conflicts between jurisdictions regarding which form of relief is allowed may have increased, but it does rebut the claim that collective relief is only available in one state.

Nevertheless, it may very well be that policy arguments will be asserted whenever the state of enforcement takes a different view of collective rights than

\textsuperscript{274} ILA Final Report, supra n. 254 at para. 28.

\textsuperscript{275} Lew \textit{et al.}, supra n. 76 at para. 26-118.

\textsuperscript{276} ILA Final Report, supra n. 254 at paras. 20, 39.

\textsuperscript{277} See Gidi, supra n. 53 at pp. 322–323 (noting lack of punitive damages in Brazilian class actions); supra nn. 154–157 and accompanying text.

\textsuperscript{278} See Baumgartner, supra n. 53 at pp. 310–311; Cappalli and Consolo, supra n. 53 at p. 233; Gidi, supra n. 53 at pp. 383–386.
the state whose law was applied in the arbitral proceedings. Courts that are faced with these kinds of policy conflicts must decide whether the enforcing state’s own views on the policies underlying collective relief have any role to play in the enforcement proceedings. In so doing, courts must consider (1) whether the interest affected is sufficiently fundamental to the enforcing state’s legal system to justify non-enforcement; (2) the international nature of the dispute and the connection of the dispute to the legal system of the forum; (3) the possible existence (or absence) of an international consensus regarding the principle in issue; and (4) the extent of the connections between the parties and the subject matter of the dispute to the enforcing state. Only if the enforcement of the award would ‘manifestly disrupt the essential political, social or economic interests’ of the enforcing state should the enforcing court consider giving effect to the enforcing court’s national policy.

In the past, the issue of competing public policies has been seen most often in the context of antitrust/competition law or similar laws with a particular economic purpose. The issue is often framed as one of arbitrability of claims, with a growing presumption in favour of arbitrability. Collective arbitrations also involve fundamental public policies involving matters of economic or social importance. Interestingly, Gary Born has noted that:

it is difficult to see what public policy or non-arbitrability objections could be raised to class arbitrations. The fact that class actions are not recognized or available in many national litigation systems should not preclude the use of class action arbitrations (just as the unavailability of documents only, fast-track, or similar dispute resolution mechanisms in litigation does not invalidate arbitration agreements requiring such procedures). There may be requirements regarding procedural regularity and an opportunity to be heard, imposed by national law, but these would involve the implementation of the class action arbitration, not its basic enforceability.

All of this suggests that enforcing courts should be particularly cautious about upholding an objection based on public policy in cases where the parties have chosen to have the dispute governed by the law of another state. Indeed, ‘rather than considering what the procedural law of the arbitration is, in the abstract, the tribunal (and national courts) should ordinarily consider what law governs particular issues’.

Those who are involved in developing new forms of collective arbitration must also be aware of how these choice of law questions may play out. On the one hand, it may be difficult, as a political matter, for some courts to enforce an award

279 ILA Final Report, supra n. 254 at recital 2(b); ibid. para. 40.
280 Ibid. recital 3(b).
281 Ibid. para. 50.
283 Born, supra n. 4 at p. 1232, n. 442.
arising out of a collective arbitration when the enforcing state views its policy against collective redress as a non-violable fundamental right similar to a mandatory provision of law. On the other hand, it may be difficult, as a practical matter, for certain groups to obtain relief absent collective arbitration, either because individual relief in arbitration is not an adequate means of addressing the injury in question, or because collective relief in a single national court is difficult or impossible, given the cross-border context. Failure to enforce foreign collective awards in these circumstances could leave claimants without the means of vindicating important substantive rights, thus immunising corporate wrongdoers from liability and/or upsetting one or more state’s regulatory regimes.

Those who are involved in considering the creation of new forms of collective arbitration may be unable to resolve these issues in the abstract. Instead, arbitrators and parties may simply have to do the best they can with the facts and laws that present themselves in any particular dispute. However, serious thought must be given to the issues relating to clashes of public policy lest the parties be faced with the unenviable (and unsupportable) position of having only one form of recourse – collective arbitration – for giving effect to their substantive rights but later finding that the procedure chosen results in an unenforceable award.

V. CONCLUSION

Use of collective arbitration, either following US class procedures or otherwise, appears to be on the rise, both domestically and internationally. While large-scale multiparty proceedings will never arise with the same frequency as bilateral arbitration, they often implicate national policies of fundamental importance and resolve disputes involving large numbers of people and massive amounts of money. As such, collective arbitration deserves serious attention from the international arbitral community.

This article has focused on three separate issues that will become increasingly important in coming years. First, what form will collective arbitration take as it spreads beyond US borders? This article has taken the view that those proceedings will not necessarily resemble US class arbitrations, but will instead resemble collective dispute mechanisms in the national courts of either the forum state or the state whose law governs the substance of the dispute. Recent

286 Kurkela and Snellman, supra n. 223 at p. 11; Böckstiegel, supra n. 266 at p. 183.
287 Of course, a determination of unenforceability in one state will not affect enforceability elsewhere.
288 Growth is nevertheless significant. For example, 283 class arbitrations were filed with the AAA in the period 2003 to 2009. AAA Brief, supra n. 16 at pp. 22–24. In contrast, just over 300 investment treaty cases have been brought in the nearly 40 years since ICSID arbitration came into being. See ICSID Cases, available at http://icsid.worldbank.org/ICSID/FromServlet?requestType=CasesRH&actionVal=ListCases [listing 129 as currently pending and 183 as having concluded]; see also ICSID Caseload Statistics, available at http://icsid.worldbank.org/ICSID/FromServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics; UNCITRAL, ‘Latest Developments in Investor-State Dispute Settlement’ in (2009) 1 II Alternative Dispute Resolution in International Economic and Commercial Law 1, available at www.unctad.org/en/docs/webdiaeia20096_en.pdf.
innovations in judicial forms of collective redress suggest the likely development of a similarly diverse array of collective proceedings in arbitration.

Secondly, what issues of particular concern should those who are involved in developing new forms of collective arbitration keep in mind as they consider new procedures? Although the answer to this question will depend largely on the laws and policies of the national systems at issue, much can be learned from the AAA Supplementary Rules for Class Arbitrations. Although these rules reflect a US bias regarding the nature and form of collective relief, they provide a good starting point for analysis.

Thirdly, what special issues are expected to arise when a party seeks to enforce a collective award internationally? Although objections to recognition and enforcement are always to be narrowly construed under the New York Convention, the novelty of collective arbitration will doubtless result in a variety of arguments being made at the enforcement stage. Those who are involved with the development of new forms of collective arbitration would be well served to consider these issues at the earliest possible opportunity so as to avoid adopting procedures that could lead to unenforceable awards.

Although this article has taken the view that the expansion of class and collective arbitration is to some extent inevitable, it has not addressed the question of whether and to what extent private collective relief, be it in court or in arbitration, is preferable to public regulation. This article has also purposefully avoided the question of whether and to what extent collective relief in arbitration is superior to that in litigation. However, both issues are critically important to the development of collective arbitration, and future empirical research in these areas would be useful.

Nevertheless, this article has taken the view that there is nothing per se objectionable about class or collective arbitration. Indeed, there may be times, particularly in international disputes, when class or collective arbitration is the best or indeed only means of resolving the parties’ dispute in arbitration. As Gary Born has noted, “[p]roperly administered, permitting arbitration of … class claims could enhance, not detract from, the rights of consumers, employees and others in international disputes”. The task, therefore, for the international arbitral community is to ensure that proper procedures are in place for those who find it necessary to seek collective arbitral relief.

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289 See e.g., Hodges, supra n. 13 at p. 345.
290 Born, supra n. 4 at p. 1232.