

**THE SOUNDS OF SILENCE:
ARE U.S. ARBITRATORS CREATING
INTERNATIONALLY ENFORCEABLE
AWARDS WHEN ORDERING CLASS
ARBITRATION IN CASES OF
CONTRACTUAL SILENCE
OR AMBIGUITY?**

*S.I. Strong**

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* Ph.D. (Law), University of Cambridge (U.K.); D.Phil., University of Oxford (U.K.); J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is Associate Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author would like to thank colleagues at the faculty colloquium at the University of Missouri School of Law for their kind assistance and comments on drafts of this Article. The author would also like to acknowledge the comments and insights provided by Frédéric Bachand, Christopher R. Drahozal, Rafael Gely, John M. Lande, Ilhyung Lee, Alan Scott Rau, Catherine A. Rogers, and Maureen Weston, as well as anonymous reviewers who considered this Article in the context of a book proposal on class arbitration. All errors of course remain the author's own.

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Although many in the national and international legal community did not take notice of class arbitration until the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle* in 2003,¹ class arbitration (also known as "class action arbitration") has actually been in existence for over twenty-five years.² First developed in the United States in the early 1980s,³ the procedure has also been considered as a domestic dispute resolution device in other countries.⁴

The most recent development in the field is the internationalization of class arbitration, as demonstrated by the filing of several different types of cross-border proceedings.⁵ Furthermore, it is anticipated that the frequency of international class arbitration will only increase as the global economy continues to expand and diversify, and as claimants who may not reside in the same country as the defendant seek to assert group or representative claims that are barred from judicial consideration by arbitration agreements.⁶ In coming years, international class arbitration is

1. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion).

2. Class arbitration involves "an arbitrator [or arbitral tribunal] selected and paid by the parties, rather than an elected or appointed judge, [who] presides over a class action" and thus "decides whether to certify a class, determines the form and manner of notice to class members, resolves all issues of law and fact, and enters an award that may bind many hundreds or thousands of class members." W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 70 (2007). Many international arbitrations consist of a panel of three arbitrators. However, for ease of discussion, this Article refers to the arbitrator in the singular.

3. *Keating v. Superior Court*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 39 (2000).

4. See *infra* notes 52–76 and accompanying text.

5. See *infra* notes 16–18 and accompanying text.

6. Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. BUS. 301, 301 (2007); see also Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 301 (2004) (describing areas where class arbitration might be on the rise) [hereinafter Buckner, *Pure Arbitral Paradigm*]; Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 250–55 (2006) (describing areas where international arbitration is likely to increase) [hereinafter Drahozal, *New Experiences*]; Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 407 (2002) (describing areas where class arbitration might be on the rise); Anne Marie Whitesell & Eduardo Silva-Romero, *Multiparty and Multicontract Arbitration: Recent ICC Experience*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, COMPLEX ARBITRATIONS—SPECIAL SUPPLEMENT 2003, at 7, 7 (2003) (describing increase in multi-party proceedings).

expected to encompass a variety of fields, including insurance, finance, manufacturing, consumer, maritime, employment, and electronic commerce law, since the nature of the claims asserted in class arbitration mirror the diversity of claims that are seen in judicial class actions.⁷

The expansion of class arbitration into the international realm has not gone unchallenged. Instead, international defendants have already shown signs of their intent to fight tooth and nail against the development of international class arbitration,⁸ just as their U.S. counterparts did in the early days of domestic class arbitration. Many of the defenses to international class arbitration are the same as those used in domestic matters, and arbitrators are able to rely on a large and growing body of existing jurisprudence when considering those issues.⁹ However, the cross-border nature of international class arbitration gives rise to unique challenges, many of which have not yet been considered in the literature.¹⁰

For reasons that will be discussed more fully below, it is anticipated that (1) most international class arbitrations will be seated in the United States, at least for the foreseeable future, and (2) vigorous opposition to

7. See Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 301 (discussing areas of law where class actions and class arbitrations are common); Drahozal, *New Experiences*, *supra* note 6, at 250–55 (describing international elements of consumer, employment, and e-commerce law); Geraint Howells & Rhoda James, *Litigation in the Consumer Interest*, 9 ILSA J. INT'L & COMP. L. 1, 48–55 (2002) (discussing globalization of consumer actions); Sherman, *supra* note 6, at 407 (discussing areas where class actions are likely). Of course, the consensual aspect of arbitration typically requires some sort of pre-existing contractual relationship between the parties.

8. See, e.g., *Harvard Coll. v. JSC Surgutneftegaz*, No. 04-6069, 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007) (confirming international class arbitration award); *The President and Fellows of Harvard College Against JSC Surgutneftegaz*, 770 P.L.I./L.I.T. 127, 155 (2008) [hereinafter *Harvard Award*] (reproducing the partial final award on clause construction of a possible international class arbitration and noting defendants' claim that class arbitration was a "uniquely American" device").

9. For example, unconscionability, waiver, and contract-based defenses such as fraud and duress, will likely be raised to the same extent in international class arbitration as they are in domestic class arbitration. See Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT'L ARB. 199, 201 (2004) (discussing ability of waiver clauses to withstand contract-based challenges); Sternlight, *supra* note 3, at 45–53, 105–08; Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75–76 (2004) (discussing attempts by corporations to avoid class proceedings through contractual prohibitions); Weidemaier, *supra* note 2, at 85, 90, 100 (2007) (discussing prohibition of class arbitrations). These issues are outside the scope of this Article.

10. Known publications on this subject are limited to Alexander Blumrosen, *The Globalization of American Class Actions: International Enforcement of Class Action Arbitral Awards*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT, PROCEDURE AND ENFORCEMENT 355, 355–73 (Belinda Macmahon ed., 2009); see also S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1 (2008).

international class arbitration will arise at the international enforcement stage.¹¹ The battle will be fought particularly fiercely in cases where the arbitration agreement is silent or ambiguous about the possibility of class treatment, with losing defendants arguing that the decision to proceed as a class was presumptively improper in the absence of the parties' explicit agreement to that particular type of procedure.¹²

This sort of challenge will most likely be asserted as a procedural objection under Article V(1)(d) of the United Nations' 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),¹³ and it is precisely these sort of arguments that will be the focus of this Article. Although the New York Convention is not in force in every jurisdiction, it is the most widely ratified international instrument of its type and demonstrates the kinds of challenges to enforcement that might be made under other international instruments.¹⁴ This Article contends that enforcing courts should consider objections made under Article V(1)(d) in the same light as objections made in cases

11. See *infra* notes 19–24 and accompanying text. This is not to say that international defendants will not mount intermediary challenges whenever possible or that settlement of cases will not be likely.

12. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 5-03 to 5-10, 6-01 (4th ed. 2004). International commentators have long considered the problem of “pathological clauses” that contain structural defects that make it difficult, if not impossible, for the clause to fulfill one of its four essential functions. See Benjamin G. Davis, *Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria*, 7 *ARB. INT’L* 365, 365–66 (1991). According to the originator of the term, Frédéric Eisemann, one of the four essential features of an arbitration clause “is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement.” *Id.* (translating Eisemann from the French). This precept would appear to include questions of whether class arbitration is procedurally proper.

13. See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(d), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] (stating that “[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”).

14. With over 140 States Parties, the New York Convention is one of the most “successful commercial treaties in history.” William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *HASTINGS L.J.* 251, 257 (2006); see also U.N. Comm’n on Int’l Trade Law (UNCITRAL), Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2008), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited June 24, 2009) (listing signatories to the New York Convention). Other international enforcement mechanisms that are similar in many ways to the New York Convention are the European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter European Convention], and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, O.A.S.T.S. No. 42 [hereinafter Panama Convention].

involving non-class awards, effectively giving international class awards the same presumption of enforceability that is granted to bilateral awards under the New York Convention.¹⁵ Although legitimate objections based on violations of agreed procedure should be permitted, courts should not entertain blanket objections to class arbitration based on the parties' hostility to or unfamiliarity with class procedures. Instead, objections to the enforcement of international class awards should be considered on an individualized, case-by-case basis, using the same pro-arbitration perspective that is adopted when considering bilateral awards. This Article demonstrates that this presumption is proper even in cases where the arbitration agreement is silent or ambiguous as to class treatment.

Before outlining the structure of this Article, it is useful to clarify two matters regarding definitions and scope. First, in the context of this Article, an "international class award" is an award resulting from an international class arbitration.¹⁶ There are three different types of international class arbitrations:

- (1) a class arbitration that includes at least one defendant from a country other than the seat of the arbitration, which means that enforcement of an award will have international implications;
- (2) a class arbitration that involves defendants that may be based in the arbitral forum but that also hold significant foreign assets that could be the subject of an international enforcement action; and
- (3) a class arbitration that includes claimants from outside the arbitral seat.¹⁷

15. GARY A. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 5 (2001).

16. "International class arbitrations" can be defined in either of two ways: (1) as class arbitrations giving rise to arbitral awards that are made "in the territory of a State other than the State where the recognition and enforcement of such awards" are sought or (2) as class arbitrations giving rise to arbitral awards "not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, *supra* note 13, art. I(1). The latter category of arbitrations typically includes disputes involving parties from different States or involving some important nexus with a foreign State. *See, e.g.*, Federal Arbitration Act (FAA), 9 U.S.C. § 202 (1970) (stating that "a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.").

17. Examples of each of these types of scenarios can already be found on the class arbitration docket published by the American Arbitration Association (AAA). *See* Harvard Coll. v. JSC Surgutneftegaz, Case No. 11 168 T 01654 04 (AAA, Aug. 1, 2007), available at <http://www.adr.org/si.asp?id=5032>; CBR Enter., L.L.C. v. Blimpie Int'l, Inc. (AAA, Apr. 19, 2006), available at <http://www.adr.org/si.asp?id=3929>; Bagpeddler.com v. U.S. Bancorp, Case No. 11 181 0032204 (AAA, May 4, 2007), available at <http://www.adr.org/si.asp?id=4667>; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp., 548 F.3d 85, 87 (2d Cir. 2008), *cert.*

This Article focuses on the enforcement of awards resulting from the first two types of proceedings, since defendants in both scenarios are likely to raise similar arguments at the enforcement stage.¹⁸

Second, this Article focuses exclusively on enforcement issues rather than considering challenges to a class award in both enforcement and set-aside proceedings.¹⁹ This approach was adopted because evidence suggests that most (although not necessarily all) international class arbitrations are currently seated in the United States.²⁰ Typically, a motion to set aside an award would be made at the seat of the arbitration. However, because the United States has already judicially approved of the class arbitration mechanism, losing defendants will not be able to argue that

granted, 77 U.S.L.W. 3678 (2009) (upholding arbitral panel's decision that silent charter agreements did not preclude class arbitration); *Harvard Coll. v. JSC Surgutneftegaz*, 2007 WL 3019234 (confirming international class arbitration award); *Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 362 n.31 (5th Cir. 2003) (concerning potential international class arbitration). In the realm of international investment arbitration, 195,000 Italian natural persons and juridical entities filed for arbitration against Argentina in *Giovanna A. Beccara and others v. Argentine Republic* (ICSID Case No. ARB/07/5), TRANSN'L DISP. MGMT. NEWS DIG., May 10, 2007, <http://www.transnational-dispute-management.com/news/tmnews-2007-08.htm> [hereinafter *Beccara Arbitration*]. This Article went to press just after the United States Supreme Court granted certiorari in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009). That decision may give further guidance regarding the interpretation of arbitration agreements that are silent or ambiguous as to class treatment.

18. The third type of proceeding is somewhat unique. Claimants to a class proceeding are unlikely to lodge blanket objections to the type of procedure used, since (1) they were the ones who chose class treatment in the first place and (2) claimants who prefer not to proceed as part of a class can typically opt out of the arbitration. *See infra* note 185 and accompanying text. Although some losing defendants might make certain objections based on the international nature of the claimant class (essentially echoing arguments that international claimants might make on their own behalf if they were to lose the case), those arguments are highly speculative and beyond the scope of this discussion. For further discussion of what those arguments might be, see Strong, *supra* note 10, at 90.

19. A dual-pronged approach might seem to make sense in the context of procedural objections, which typically can be made in both enforcement and set-aside proceedings under the same governing law. *See, e.g.*, New York Convention, *supra* note 13, art. V(1)(d); FAA, 9 U.S.C. § 10; UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION arts. 34–36, United Nations Commission on International Trade Law, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by REVISED ARTICLES OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION arts. 34–36, UNCITRAL, 39th Sess., Annex, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter UNCITRAL MODEL LAW].

20. Though arbitration is normally a private event, which would make any estimates about arbitral seats speculative, the AAA makes its class arbitration docket publicly available through an online database. AAA Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited June 24, 2009); *see also* William K. Slate & Eric P. Tuchmann, *Class Action Arbitrations*, 11 INT'L ARB. L. REV. 50, 53 (2008) (discussing empirical data on AAA class arbitrations). The AAA docket contains each dispute's demand for arbitration, which indicates the arbitral seat. To date, it appears that most class arbitrations on the AAA docket are seated in the United States. However, global statements about arbitral seats cannot be made, since *ad hoc* arbitrations are not reflected on the AAA docket and may not be mentioned in the legal press.

class arbitrations are or should be presumptively disfavored as a matter of international law or policy as part of a set-aside proceeding in the United States.²¹ Thus, defendants may instead prefer to bring their challenges at the enforcement stage, when they believe that they may be able to take advantage of any judicial hostility to class arbitration, either as a result of the enforcing courts' viewing international enforcement proceedings as analogous to litigation brought under state law²² or applying their own national law to procedural questions.²³ These sorts of judicial improprieties may be particularly likely to occur with international class arbitration, since its unique nature as a representative procedure²⁴ may cause deep-seated concern or even hostility in jurisdictions that do not permit representative proceedings in their national courts.²⁵ However,

21. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion); *Stolt-Nielsen*, 548 F.3d at 100, cert. granted, 77 U.S.L.W. 3678 (2009); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576–81 (7th Cir. 2006); *Pedcor*, 343 F.3d at 363.

22. This approach is disfavored. See, e.g., *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222, 224–25 (Q.B.) (Eng.) (noting, when ruling to enforce an award based on a contract that would be unenforceable in English courts under English law, that “the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.”).

23. This could occur even if the objection is brought under Article V(1)(d) of the New York Convention, which does not permit the invocation of the enforcing court's law absent the agreement of the parties. Compare New York Convention, *supra* note 13, art. V(1)(d), with *id.* art. V(2)(a)-(b) (referring to “the law of that country,” meaning the enforcing State). However, experience shows that some enforcing courts will try to impose their own values on questions of arbitral procedure, regardless of the precepts of the New York Convention, typically by elevating a procedural objection, explicitly or implicitly, to a public policy objection. *Rosso e Nero GaststättenbetriebsgmbH v. Almendra Industrial Catalana, S.A.* (Austria v. Spain), 32 Y.B. COM. ARB. 597, 599 (Trib. Sup. 2007); *Precious Stones Shipping Ltd. v. Querqus Alimentaria, SL* (Thail. v. Spain), 32 Y.B. COM. ARB. 540, 546 (Trib. Sup. 2007).

24. Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions?*, 34 GEO. WASH. INT'L L. REV. 711, 715 (2003); Weidemaier, *supra* note 2, at 70.

25. Although representative proceedings are permitted in some jurisdictions, they are highly disfavored in much of the world. Baumgartner, *supra* note 6, at 308–09 (discussing class or representative proceedings in a variety of common law systems); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 264 (1992) (noting U.S. class actions are legally “inconceivable” in the civilian mindset); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 312–13 (2003) (noting that although class or representative proceedings are generally disfavored in civil law jurisdictions, both Quebec and Brazil have adopted types of class action litigation); see also Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 19 (2009) (“In broad-brush terms, the United States and Europe have grown more similar rather than less as to aggregate litigation. Still, U.S.-style class actions and the constellation of rules

this Article will show that class proceedings are an acceptable form of arbitration under the New York Convention, despite their apparent novelty, and that they are deserving of the same treatment given to other types of arbitration.

Having considered these preliminary issues, it is useful to outline the structure of this Article. The Article's overall aim is to determine the international enforceability of international class awards in cases in which the arbitration agreement is silent or ambiguous as to class treatment. Part I therefore describes the current consensus on class arbitration in the United States to lay the groundwork for further discussion. This Part also describes the incidence of class arbitration in other domestic contexts, showing that class arbitration is not as "uniquely American" as opponents have claimed.²⁶ Part I continues with an overview of international class arbitration to date and identifies the likelihood of international class arbitration's expansion in the future.

Part II sharpens the debate about the propriety of class arbitration with a pointed discussion of the objections that have and will be made to this particular dispute resolution device. First, this Part outlines how those who are opposed to international class arbitration prefer to interpret arbitration agreements that are silent or ambiguous as to class treatment, concluding that most opponents rely on strict construction of the arbitration agreement, i.e., a view that class arbitration is improper in the absence of explicit agreement to such proceedings. The Part continues with a discussion of the extent to which class arbitration can be considered analogous to non-consensual consolidated arbitration, since opponents to class arbitration are likely to claim that consolidation's disfavored status in the international realm should be extended to class arbitration as well. In considering the merits of this view, the text outlines the structural differences between the two procedures as well as their differing policy rationales before concluding that class arbitration is supported by several persuasive public policies that do not apply to consolidated arbitration. Although these public policy rationales do not, by themselves, justify a presumption in favor of permitting class arbitration when the arbitration agreement is silent or ambiguous as to class treatment, they do suggest that strict constructionism may not be the best response to the challenges associated with class proceedings in arbitration.

and practices within which they operate remain significantly different from the face of aggregate litigation in Europe today.").

26. Harvard Award, *supra* note 8, at 155 (reproducing the partial final award on clause construction of a possible international class arbitration and noting defendants' claim that class arbitration was a "uniquely American" device").

Whereas Part II focuses primarily on policy issues, Part III focuses on principles of law. In particular, Part III responds directly to the views asserted by opponents to class arbitration by demonstrating that (1) reliance on analogies to consolidation is inapt because these analogies are based on legal principles that are no longer in force and (2) strict constructionism utilizes an unnecessarily restrictive reading of the doctrine of consent. This Part also evaluates the extent to which interpretive methods used by U.S. arbitrators to construe an arbitration agreement that is silent or ambiguous as to class treatment measure up to internationally accepted standards regarding contract interpretation. As it turns out, the interpretive method currently used in U.S. class arbitrations conforms to international arbitral practice and is entirely appropriate to a dispute resolution mechanism founded on consent and party autonomy.

Once the propriety of international class arbitration has been established as a matter of international law and policy, the discussion turns in Part IV to how U.S.-based class arbitrations should fare in international enforcement proceedings. In particular, this Part contemplates specific objections that might be made under Article V(1)(d) of the New York Convention to a class award rendered in the United States under an arbitration agreement that was silent or ambiguous as to class treatment and suggests how courts asked to enforce such an award should view those objections.²⁷

The Article's conclusion draws together the diverse strands of law and policy and demonstrates why class awards arising out of arbitration agreements that are silent or ambiguous as to class treatment can and should be granted the same presumption of enforceability as is given to bilateral awards under the New York Convention.²⁸ This section also sets class arbitration in the context of other multi-party proceedings, confirming that the development of international class arbitration is consistent with similar trends in other areas of international commercial arbitration.

I. CLASS ARBITRATIONS—PRESENT AND FUTURE

A. *Current Consensus on Class Arbitration in the United States*

Since its first appearance in the United States more than twenty-five years ago, class arbitration has matured greatly.²⁹ Not only has the procedure been standardized to some extent through the creation of several

27. New York Convention, *supra* note 13, art. V(1)(d).

28. BORN, *supra* note 15, at 5.

29. Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

sets of specialized arbitral rules,³⁰ but the balance between judicial and arbitral authority has been stabilized after an initial period of confusion and contradiction. These two developments will assist in the recognition of class arbitration as an internationally viable dispute resolution mechanism. Each will be discussed in turn below.

1. Balancing Judicial and Arbitral Authority

For purposes of this Article, the most important legal development in recent years is the U.S. judicial recognition that arbitrators, rather than courts, are the ones to decide whether class arbitration is permitted in situations where the arbitration agreement is silent or ambiguous regarding the possibility of class treatment.³¹ Justice Stephen Breyer, writing for a plurality of the United States Supreme Court in *Bazzle*, reasoned that because the question relates to “what kind of arbitration proceeding the parties agreed to”—i.e., the procedure to be followed—rather than “the validity of the arbitration clause . . . [or its applicability,” the issue can and should be addressed by the arbitrator, unless the arbitration agreement clearly requires these jurisdictional questions to be decided by a judge, an approach that has subsequently been adopted by various federal circuit courts.³²

This shift in approach is important to the international enforceability of class awards because it eliminates one of the primary objections to the legitimacy of class arbitration. For many years, courts were the ones who decided whether class treatment was appropriate in the United States.³³ During that period, opponents to class arbitration argued that courts lacked the power “to certify an individual plaintiff as a class representa-

30. AAA, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), available at <http://www.adr.org/sp.asp?id=21936> (last visited June 24, 2009) [hereinafter AAA SUPPLEMENTARY RULES]; JAMS, JAMS CLASS ACTION PROCEDURES (2009), http://www.jamsadr.com/rules/class_action.asp (last visited June 24, 2009) [hereinafter JAMS CLASS ARBITRATION RULES]; NATIONAL ARBITRATION FORUM, CLASS ARBITRATION PROCEDURES (2007), <http://www.adrforum.com/users/naf/resources/Arbitration%20Class%20Procedures%202007.pdf> (last visited June 24, 2009) [hereinafter NAF CLASS ARBITRATION PROCEDURES]; Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 186, 225–55 (2006) [hereinafter Buckner, *Due Process*]; Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1768–78 (2006).

31. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003) (plurality opinion); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), cert. granted, 77 U.S.L.W. 3678 (2009); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576–81 (7th Cir. 2006); *Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003).

32. See, e.g., *Bazzle*, 539 U.S. at 453 (noting that the question “concerns contract interpretation and arbitration procedures” and that “arbitrators are well situated” to address those issues); *Stolt-Nielsen*, 548 F.3d at 100, cert. granted, 77 U.S.L.W. 3678 (2009); *Employers*, 443 F.3d at 576–81; *Pedcor*, 343 F.3d at 363.

33. Buckner, *Due Process*, supra note 30, at 227–31.

tive for other parties whose claims are subject to arbitration, lack[ed] express authority to consolidate arbitration proceedings, and lack[ed] authority to apply Rule 23 of the Federal Rules of Civil Procedure in class arbitration.”³⁴ Part of the strength of this argument lay in the fact that the Federal Arbitration Act (FAA)³⁵ and many state statutes were either silent on the issue of court-ordered consolidation or indicated that consolidation of arbitrations was only possible with the unanimous consent of the parties.³⁶

Although the “lack of power” debate has been largely mooted as a matter of U.S. law, it should not be allowed to insert itself in the international sphere for two reasons. First, the argument was largely based on the fact that many U.S. states did not permit consolidation of arbitrations over the objection of the parties.³⁷ Although mandatory consolidation is by no means the norm in the United States, a number of state legislatures have revised their arbitration laws to make consolidation easier in cases where the arbitration agreement is silent, often through adoption of the liberal consolidation provisions of the Revised Uniform Arbitration Act 2000 (RUAA).³⁸ Furthermore, the leading case prohibiting the non-consensual consolidation of arbitrations—the Seventh Circuit’s holding in *Champ v. Siegel Trading Co.*³⁹—has since been discredited, with the Second Circuit recently noting that *Champ* does “not represent a governing rule of contract interpretation” in all cases, nor is it “adhered to in every jurisdiction.”⁴⁰ This liberalizing trend in favor of multi-party arbitration—which mirrors a similar movement outside the United States⁴¹—should minimize a number of concerns the international arbitral community may have about class arbitration.

Second, the “lack of power” debate reflected an unwarranted assumption that consolidated arbitrations were analogous in all relevant respects to class arbitrations. Although there are some similarities in policy and procedure, the two actions are not identical, and courts and

34. Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312. Rule 23 of the Federal Rules of Civil Procedure describes the criteria that must be met before a judicial class action can proceed and how such actions can proceed. FED. R. CIV. P. 23.

35. 9 U.S.C. § 1 *et seq.* (2002).

36. *Id.*; Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312–13 (citing *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)).

37. Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312–13.

38. *See infra* notes 227–234 and accompanying text (noting twelve adherents to the RUAA and two U.S. jurisdictions that have gone even further).

39. *Champ*, 55 F.3d 269.

40. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454–55 (2003) (Stephens, J., concurring); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100–01 n.15 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (claiming *Champ* is merely “instructive” regarding party intent).

41. *See infra* note 219 and accompanying text.

commentators should be very cautious about equating the two in all respects and without a full understanding of the differences between the two types of proceedings.⁴²

Third, there is no corresponding “lack of power” argument to be made if arbitrators are given the authority to construe silent or ambiguous arbitration agreements. The current approach used in the United States conforms with several basic principles of arbitration law. For example, arbitrators are considered competent to determine their own jurisdiction, both as a matter of U.S. and international practice, so their doing so in class arbitrations should create no novel questions of law.⁴³ Similarly, it is universally agreed that arbitrators have wide discretion to shape arbitral proceedings, subject only to the expressed and permissible wishes of the parties.⁴⁴ This is no less true in class arbitrations, although there has been some debate about the level of creativity that arbitrators

42. See *infra* notes 90–115 and accompanying text.

43. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Bernard Hanotiau, *Groups of Companies in International Arbitration*, in PERSVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 279, 292 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) [hereinafter Hanotiau, *Groups of Companies*]; Stephen Jagusch & Anthony Sinclair, *The Impact of Third Parties on International Arbitration—Issues of Assignment*, in PERSVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, *supra*, at 291, 292. An interesting question is to what extent different States interpret the concept of *Kompetenz-Kompetenz*, i.e., the ability of an arbitrator to decide his or her own jurisdiction over a dispute. See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*, 12 ARB. INT’L 137, 153–54 (1996) [hereinafter Park, *Arbitrability Dicta*] (distinguishing between separability and *Kompetenz-Kompetenz*); Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of ‘Consent’*, 24 ARB. INT’L 199, 214 (2008).

44. Karaha Bodas Co., L.L.C. v. Perusahaan Petrambangan Minyak Dan Gas Bumi Negara, [2002] 364 A.R. 272, ¶ 36 (Can.) (noticing breadth of arbitrator discretion on matters of procedure); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1238 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter GAILLARD & SAVAGE] (describing how arbitrator discretion arises); JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 21-3 (2003) (noting arbitral discretion to decide procedure); INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 15 (1998), available at <http://www.iccwbo.org/court/arbitration/id4199/index.html> (last visited June 30, 2009) [hereinafter ICC RULES]; INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL ARBITRATION RULES art. 16 (2008), available at <http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES> (last visited July 7, 2009) (formerly the AAA International Rules) [hereinafter ICDR INTERNATIONAL RULES]; LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES R. 14 (1998), available at http://www.lcia.org/ARB_folder/arb_english_main.htm (last visited June 24, 2009) [hereinafter LCIA RULES]; SWISS RULES OF INTERNATIONAL ARBITRATION art. 15 (2006), available at <https://www.sccam.org/sa/en/rules.php> (last visited June 24, 2009) [hereinafter SWISS RULES]; UNCITRAL ARBITRATION RULES, G.A. Res. 31/98, § 15 (Apr. 28, 1975), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited July 6, 2009). Nevertheless, some internationalists might question any improper “abdication” of the court’s “responsibility for determining the jurisdictional limits of arbitration clauses.” Rau, *supra* note 43, at 253. However, courts can address this issue at the enforcement stage. New York Convention, *supra* note 13, art. V(1)(c).

can and should utilize when adopting class procedures.⁴⁵ However, so long as “the procedure adopted by the tribunal conforms with the applicable arbitration rules or with the law governing the arbitration there can be no ground to refuse enforcement.”⁴⁶ Furthermore:

In order for a breach of the agreement to lead to refusal of enforceability, the breach should be material, *i.e.*, there is a *de minimis* rule and insignificant deviations do not cause unenforceability. The right test of materiality could perhaps be whether the breach could have had an effect on the outcome or not rather than whether it did have an effect.⁴⁷

In most instances, it seems unlikely that a determination that class arbitration is (or is not) proper would have an effect on the merits of the adjudicated dispute, certainly not in the same way that a limitation on a party’s right to present evidence would be, for example.⁴⁸ Therefore, any arguments that arbitrators lack the inherent power to order class treatment under an arbitration agreement that is silent or ambiguous on the issue appear unavailing.

2. Developing Standardized Rule Sets

The second recent development in the United States—the promulgation of specialized rule sets addressing class treatment⁴⁹—also bodes well for international enforcement of class awards. Although not every class proceeding will necessarily be governed by one of these rule sets, their existence has done much to legitimate class arbitration, particularly given that no court in the U.S. has yet defined what procedures must be followed once class arbitration is underway. Furthermore, because the

45. See *Yuen v. Superior Court*, 18 Cal. Rptr. 3d 127, 130 (Cal. Ct. App. 2004) (noting that “under . . . *Green Tree*, the court decides whether the matter should be referred to arbitration, but ‘once a matter has been referred to arbitration, the court’s involvement is strictly limited until the arbitration is completed’” (quoting *Finley v. Saturn of Roseville*, 117 Cal. App. 4th 1253, 1259 (Cal. Ct. App. 2004)); see also Weidemaier, *supra* note 2, at 94–95 (claiming the new class arbitration rules “fail to engage with the possibilities of class arbitration” and take an “impoverished view” of the procedure by not taking advantage of the possibility of individually tailored procedures and remedies that are the hallmark of arbitration); Michael Pryles, *Reflections on Transnational Public Policy*, 24 J. INT’L ARB. 1, 4 (2003) (noting that “[a]rbitrators have an obligation to apply internationally accepted norms of procedure”).

46. LEW ET AL., *supra* note 44, ¶ 26–97.

47. MATTI S. KURKELA & HANNES SNELLMAN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 80–81 (2005).

48. At least one commentator has argued that class certification affects the likelihood of settlement. Weston, *supra* note 30, at 1728. However, increasing the chance for settlement is not the same as altering the outcome on the merits.

49. AAA SUPPLEMENTARY RULES, *supra* note 30; JAMS CLASS ARBITRATION RULES, *supra* note 30; NAF CLASS ARBITRATION PROCEDURES, *supra* note 30.

published procedures are widely available and supported by reputable arbitral institutions, there is less opportunity for defendants to claim that a class proceeding is in some way so “alien” to the concept of arbitration that a class award should not be enforceable.⁵⁰ In light of these developments, defendants—including non-U.S. defendants—do not appear able to claim surprise at how a class arbitration proceeds, particularly if the procedure conforms to one of the published rule sets.⁵¹

B. Class Arbitration Outside the United States

Furthermore, class arbitration is not a “‘uniquely American’ device,” despite recent claims to that end.⁵² In the last several years, domestic class arbitration has been considered in countries other than the United States, although the frequency of these types of proceedings is difficult to ascertain due to the private nature of arbitration. It is also difficult to identify what procedures were adopted in these arbitrations, both because of language barriers and because details about arbitral procedure seldom make it into official reports absent some sort of challenge. However, to the extent that reports of such arbitrations are available, it is useful to see how non-U.S. courts and/or arbitrators handle issues relating to the construction of the arbitration agreement, since the legitimacy of the U.S. approach may be increased if U.S. procedures mirror those of other nations.

As the following discussion demonstrates, non-U.S. class arbitrations resemble U.S. class arbitrations in several significant ways, even though the non-U.S. class arbitrations do not base themselves—explicitly or implicitly—on U.S. norms. This supports the view that U.S.

50. See MICHAEL J. MUSTILL & STEWART C. BOYD, *COMMERCIAL ARBITRATION* 283 (1989) (noting that parties can expressly agree on a procedure, but that recognition of an award resulting from those procedures might be withheld if “the term was so alien to English concepts of the nature of an arbitration as to transform a process which the contract referred to as arbitration . . . into something fundamentally different”). One commentator has noted that a number of recent U.S. cases have imposed

arbitration with different procedural and substantive contours than is actually set forth in the arbitration clause or clauses at issue. . . . It remains to be seen if this reasoning extends into international arbitration, with the risks of imposing rules and practices on foreign parties and arbitrators—particularly regarding class actions—with which they have no or limited familiarity because those rules and practices are unknown in their home countries.

Mark Friedman et al., *International Arbitration*, 41 INT’L L. 251, 256 (2007) (discussing *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)); see also Kathleen M. Scanlon, *Class Arbitration Waivers: The “Severability” Doctrine and its Consequences*, 62 DISP. RESOL. J. 40, 42–44 (2007) (discussing *Kristian*).

51. See *infra* notes 261–269 and accompanying text.

52. Harvard Award, *supra* note 8, at 155.

class arbitrations conform with the fundamental principles of international arbitration and suggests that U.S. class awards should be given the same presumption of enforceability that is given to bilateral awards under the New York Convention. Notably, courts and arbitrators considering class arbitrations in non-U.S. contexts do not rely on U.S. class procedure when considering the propriety of class treatment; instead, the courts in the following cases relied on their own domestic legislation on class or representative action.⁵³

There are several examples of non-U.S. courts considering class arbitration. The first is *Valencia v. Bancolombia*, which involved a tribunal based in Bogotá, Colombia, that was invited to hear a class suit initiated by shareholders following the merger of two financial entities.⁵⁴ Although the claim was initially filed in court, both the civil circuit judge and the District Superior Court held that they had no jurisdiction over the matter, given the existence of an arbitration agreement in the bylaws of one of the financial entities.⁵⁵ The plaintiffs argued that class actions in Colombia are subject to the exclusive jurisdiction of the court, but the Supreme Court of Justice rejected that argument on the grounds that the arbitration agreement did not limit the types of claims that could be submitted to arbitration and thus did not exclude class arbitrations as a matter of law.⁵⁶

This approach is similar to the one taken in the United States, in that broadly drawn arbitration agreements are more likely to be construed to

53. For example, several Canadian provinces and territories have enacted statutes permitting class or representative actions. Ontario Class Proceedings Act, S.O., ch. 6 (1992) (Can.); British Columbia Class Proceedings Act, S.B.C., ch. 21 (1995) (Can.); Saskatchewan Class Actions Act, S.S., ch. C-12.01 (2001) (Can.); Manitoba Class Proceedings Act, S.M., ch. C-130 (2002) (Can.); Newfoundland and Labrador Class Actions Act, S. Nfld. ch. 18.1 (2001) (Can.); Alberta Class Proceedings Act, S.A., ch. G 16.5 (2003) (Can.); Quebec Code of Civil Procedure, R.S.Q., ch. C-25, §§ 999–1051 (2009) (Can.). Canadian plaintiffs can also rely on common law provisions regarding class or representative actions. *W. Canadian Shopping Ctrs. Inc. v. Dutton*, [2001] 201 D.L.R. 4th 385 (Can.); *see* Law Society Amendment Act (Class Proceedings Funding), S.O., 1002 ch. 7 (1992) (Can.) (providing funding for class proceedings). While language barriers have made it difficult to ascertain the content of Colombian laws regarding class or representative suits, reports indicate that the Colombian bar takes an activist, public interest approach to litigation that would permit the development of class or representative actions. Philip M. Gentry, *Overcoming Cultural Blindness in International Clinical Cooperation: The Divide Between Civil and Common Law Cultures and its Implication for Clinical Education*, 15 CLINICAL L. REV. 131, 144, n.59 (2008). Certainly the arguments in *Valencia v. Bancolombia*, which are discussed in more detail below, suggest the existence of domestic Colombian legislation regarding class actions. *Valencia v. Bancolombia* (Colom. v. Colom.), Zuleta DIGEST for Institute for Transnational Arbitration (ITA) (Arb. Trib. Bogotá Chamber Comm. 2003), available at <http://www.kluwerarbitration.com>.

54. *Valencia*, *supra* note 53.

55. *Id.*

56. *Id.*

allow class arbitration than narrowly drawn agreements are.⁵⁷ 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, again echoing the approach adopted in the United States.⁵⁸ Although the Colombian Supreme Court appeared to limit its ruling to shareholder actions where arbitration of disputes is contemplated by the terms of the shareholder agreement, the court seemed to emphasize the importance of the parties' expectations that their disputes would be arbitrated (in whatever manner) rather than litigated.⁵⁹ That, too, appears consistent with the approach taken in the United States, which also recognizes the importance of considering party expectations regarding the resolution of their disputes when interpreting arbitration agreements that are silent or ambiguous regarding class treatment.⁶⁰ In many ways, the Colombian Supreme Court's decision seems to leave the door open for the development of class arbitration in Colombia, even outside the shareholder scheme.

Canada has also considered the possibility of class arbitration.⁶¹ For example, *Kanitz v. Rogers Cable Inc.* demonstrates how the unconscionability defense can be raised in potential class arbitrations and considers several important public policy arguments.⁶² In that case, the Ontario Superior Court of Justice considered the argument that plaintiffs would be dissuaded from proceeding in individual arbitrations due to the expense of individual arbitration in relation to the prospective individual awards.⁶³ Although the court found the argument unpersuasive given the lack of evidence showing that plaintiffs in this matter had, in fact, been dis-

57. See *infra* note 207 and accompanying text.

58. *Valencia*, *supra* note 53.

59. *Id.*

60. See *infra* note 208 and accompanying text. For more on shareholder arbitration, see Perry Herzfeld, *Prudent Anticipation? The Arbitration of Public Company Shareholder Disputes*, 24 ARB. INT'L 297 (2008).

61. In addition to the Ontario Superior Court of Justice's opinion in *Kanitz v. Rogers Cable Inc.*, [2002] 58 O.R.3d 299 (Can.), the Quebec Court of Appeal has noted that consumer protection claims can, under some circumstances, be arbitrated. *Dell Computer Corp. v. Union des consommateurs*, [2005] Q.C.C.A. 570, *rev'd*, [2007] 2 S.C.R. 801 (Can.) (stating arbitration was improper in this instance because the arbitration clause was not properly brought to the consumers' attention). Since *Dell Computer* involved a class action, it would appear that the Quebec Court of Appeal was leaving the door open for a class arbitration. See *id.* Notably, Quebec—like Colombia—is a civil law jurisdiction, which negates any arguments that class arbitration is a uniquely common law device. See also Beccara Arbitration, *supra* note 17 (involving a claimant class of at least 195,000 Italian bondholders, again demonstrating that class arbitration extends to civil law jurisdictions). For more on Canadian class actions in the transnational context, see Joel P. Rochon, *The Transnational Class: A Canadian Perspective on Cross-Border Class Actions*, 1 ASSOC. TRIAL LAW. AM. ANN. CONV. REF. MAT. 453 *passim* (2006).

62. *Kanitz*, 58 O.R.3d ¶ 39.

63. *Id.*

suaed from proceeding individually in arbitration, the analysis mirrors that used by U.S. courts in similar circumstances.⁶⁴ The Ontario Superior Court also considered whether giving effect to the arbitration/no class action clause would defeat the public policies inherent in the Class Proceedings Act.⁶⁵ Again, the court found the argument unpersuasive in these circumstances, but the analytical approach is consistent with that used in the United States, which also reviews public policies associated with class proceedings when considering the propriety of a class arbitration.

The Ontario Superior Court did something else that is consistent with U.S. practice, which is to give the decision on arbitral procedure to the arbitrator. Invoking the consolidation provisions contained in section 20(1) of the Arbitration Act as well as potential efficiency concerns, the court indicated:

Without deciding the point, it would appear that section 20(1) would permit *an arbitrator*, at the very least, to consolidate a number of arbitrations which raise the same issue. Therefore, it appears at least arguable that if each of the five named representative plaintiffs here chose to seek arbitrations of their claims, *an arbitrator* might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the plaintiffs that the arbitration clause operates so as to erect an economic wall barring customers of the defendant from effectively seeking relief.⁶⁶

Thus, the Canadian courts appear to share the view taken by U.S. courts that the arbitrator is the one to decide whether class treatment is required or permitted.

Kanitz provides other useful insights. For example, the language excerpted above demonstrates that Canadian courts—like U.S. courts—tend to rely on analogies to consolidation and legislation concerning consolidation when considering the propriety of class arbitration. Canadian courts also take principles of efficiency into account, although those are not the only concerns when deciding whether class treatment is

64. *Id.* ¶ 42.

65. *Id.* ¶ 51.

66. *Id.* ¶¶ 54–55 (emphasis added). Interestingly, the Ontario Arbitration Act 1991 appears to permit consolidation of arbitrations with the consent of all parties. Ontario Arbitration Act, S.O. 1991, ch. 17, § 8(4). However, the Ontario Superior Court referred to section 20(1), which gives a general grant to the arbitrator to “determine the procedure to be followed in the arbitration.” *Id.* § 20(1). This raises the question of whether the Ontario Superior Court considers class arbitration a procedural matter that does not require recourse to the courts via section 8(4) of the Arbitration Act. At this point, the issue remains open.

proper. Although class arbitration did not result in this instance, the analysis is consistent in many ways with that taken in the United States and thus suggests that U.S. class arbitrations are in conformity with procedures accepted elsewhere in the international arbitral community.

National courts are not the only bodies to have contemplated class arbitration. Certain international tribunals have also considered the possibility of class treatment in arbitration. For example, a number of claimants came to the Iran-United States Claims Tribunal in 2003 seeking to bring an action “on [their] own behalf and by proxy and representation on behalf of all Iranian citizens.”⁶⁷ However, the rules of the Tribunal require claimants to “own” their claims, which means that any representative action must fail, since the party bringing it does not have the requisite degree of ownership.⁶⁸ As the Tribunal stated, “[b]ecause ownership of a claim is a *sine qua non* of a party’s standing in a private claim, and because the Claimants have not pleaded such injury or ownership . . . they have no standing to bring this Claim.”⁶⁹ Since group actions are not permitted under the Claims Settlement Declaration or tribunal precedent,⁷⁰ class arbitrations would appear to be barred in any action in front of the Iran-United States Claims Tribunal. This would also appear to be the case in other disputes brought pursuant to specialized arbitral rules or instruments, such as that concerning the Bank for International Settlements⁷¹ or the securities industry.⁷² Alternatively, at least one class claim appears to be proceeding under the Convention on

67. Sheibani v. United States, 37 Iran-U.S. Cl. Trib. Rep. 946, ¶ 2 (2003).

68. *Id.* ¶ 13.

69. *Id.* ¶ 14.

70. *Id.* ¶ 13.

71. See, e.g., Scott Armstrong Spence, *Organizing an Arbitration Involving an International Organization and Multiple Private Parties: The Example of the Bank for International Settlements Arbitration*, 21 J. INT’L ARB. 309, 316 (2004) (noting instruments permitting arbitration involving the Bank for International Settlements “did not contemplate class action proceedings nor allow [arbitrators] to certify a class”).

72. The Arbitration Rules of the National Association of Securities Dealers (NASD Arbitration Rules) provide that class proceedings are not allowed in NASD arbitration, even if the claims would be arbitrable on an individual basis. NASD UNIFORM CODE OF ARBITRATION R. 10301(d) (2008), available at http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4057&record_id=5135 (last visited June 24, 2009). To the extent that NASD Arbitration Rules apply to an employment dispute, a class-wide employment claim may be allowed to proceed in litigation, not arbitration. See *Clark v. First Union Sec., Inc.*, 64 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2007). But see *Suschil v. Ameriprise Fin. Serv., Inc.*, No. 07-2655, 2008 U.S. Dist. LEXIS 27903, at *13–16 (N.D. Ohio Apr. 7, 2008). The NASD Arbitration Rules were replaced by the Financial Industry Regulatory Authority (FINRA) Arbitration Rules, effective Dec. 15, 2008. See FINRA ARBITRATION RULES, RS. 12204, 13204 (2008), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096 (last visited July 2, 2009). For further discussion of NASD arbitration, see Matthew Eisler, *Difficult, Duplicative and Wasteful?: The NASD’s Prohibition of Class Action Arbitration in the Post-Bazzele Era*, 28 CARDOZO L. REV. 1891 (2007).

the Settlement of Investment Disputes between States and Nationals of Other States, commonly known as the Washington Convention or the ICSID Convention.⁷³

Although neither the Iran-United States Claims Tribunal nor the Bank for International Settlements permitted class proceedings, the analytical approach used by these bodies is consistent with that taken in the United States. First, the denial of the request for class treatment was based on the explicit consideration of both the applicable rules and the terms of the parties' arbitration agreement. That technique is also used by arbitrators sitting in the United States to decide whether the parties can be said to have implicitly agreed to this form of arbitration.⁷⁴ Second, the decision in each instance was made by the arbitrators rather than by the courts. That approach again mirrors the position now adopted in the United States that arbitrators—rather than judges—are the ones to determine whether class treatment is appropriate when an arbitration agreement is silent or ambiguous on the matter.

At this point, class arbitration outside the United States appears to be relatively uncommon. Although the increasing acceptance of class arbitration means that some States may approach the international enforcement of class awards with equanimity, it is likely that the procedure will still be met with some hostility when class awards reach the international enforcement stage, particularly from those jurisdictions that do not permit representative actions in their national courts.⁷⁵ However, to the extent that a body of law is beginning to develop, U.S. practice and procedures appear to be consistent with the practice and procedures used elsewhere. This bodes well for the international enforceability of awards arising out of U.S.-based class arbitrations, since it offsets arguments that class procedures are in some way “alien” to the fundamental definition of arbitration.⁷⁶

73. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; Beccara Arbitration, *supra* note 17.

74. See *infra* notes 200–216 and accompanying text.

75. For example, Canada and Colombia would likely exhibit little to no hostility to class awards, since class arbitration has already been considered as a domestic remedy. Similarly, those States that permit some form of representative actions in the courts would probably be more amenable to the enforcement of class awards than those that do not allow representative litigation. See Strong, *supra* note 10, at 22–29.

76. See MUSTILL & BOYD, *supra* note 50, at 283 (noting that recognition of an award may be refused if the procedure resulted in “something fundamentally different” from arbitration).

II. PRINCIPLES AND POLICIES RELATING TO CLASS ARBITRATION

Before outlining the issues to be covered in this and subsequent Parts, it is useful to identify what will not be discussed herein. For example, one of the biggest issues concerning class arbitration in the United States involves the contractual waiver of the right to proceed as a class, either in litigation and/or in arbitration, and whether such a provision is unconscionable.⁷⁷ Although arguments based on waivers and unconscionability could arise in an international enforcement action, that discussion is outside the scope of this Article.⁷⁸

Another concern that could arise in international enforcement proceedings involves questions of due process and public policy. Commentators in the United States have long debated whether class arbitration sufficiently protects parties' due process rights.⁷⁹ Although it is likely that that due process concerns will arise in international enforcement proceedings (often under the rubric of "natural justice" or "procedural fairness," since the term "due process" is not universally adopted), the author has argued elsewhere that blanket objections based on due process should not be allowed to overcome the presumption of enforceability inherent in the New York Convention and many national arbitration laws.⁸⁰ Similar questions will be raised regarding the representative nature of class arbitrations, leading to public policy objections when class awards come to be enforced outside the United States.⁸¹ Again, the author has argued previously that public policy concerns under Article V of the New York Convention should not result in a blanket ban on the enforceability of international class awards.⁸² Although these

77. See Smit, *supra* note 9, at 201 (2004) (discussing ability of waiver clauses to withstand contract-based challenges); Sternlight, *supra* note 3, at 45-53; Sternlight & Jensen, *supra* note 9, at 75-76 (discussing attempts by corporations to avoid class proceedings through contractual prohibitions); Weidemaier, *supra* note 2, at 85, 90, 100 (discussing prohibition of class arbitrations). Since most modern arbitration laws only restrict party or arbitral autonomy to the extent necessary to protect the opportunity to present one's case and defend against a claim, LEW ET AL., *supra* note 44, ¶ 21-16, one could argue that a pre-dispute waiver of class arbitration violates the right to present one's case. In international matters, "[t]he arbitration agreement may specify how the parties are to be given the necessary opportunity 'to present his case' but it cannot, at least *ex ante*, totally eliminate this right." KURKELA & SNELLMAN, *supra* note 47, at 19. Thus, waivers of class proceedings are suspect in both international and domestic arbitration.

78. For example, if a provision is ruled unconscionable and a class arbitration subsequently proceeds, the losing party could raise the contractual waiver in enforcement proceedings, claiming that the procedure did not comply with the terms of the arbitration agreement. See New York Convention, *supra* note 13, arts. II, V(1)(c).

79. Buckner, *Due Process*, *supra* note 30, *passim*; Sternlight, *supra* note 3, 110-17; Weston, *supra* note 30, at 1742-78.

80. Strong, *supra* note 10, at 47-64.

81. *Id.* at 64-75.

82. *Id.*

two arguments are significant threats to international class arbitration, neither will be covered in this Article, since they have been discussed adequately elsewhere. Instead, this Article focuses on objections to class awards that are based on one of the founding principles of arbitration: the parties' right to control arbitral procedure.

There are those who have claimed that, even in the U.S. domestic sphere, class arbitration is improper without the explicit consent of the parties, i.e., that class arbitration should not proceed if the arbitration agreement is silent or ambiguous as to class treatment.⁸³ The same argument has been made in international proceedings.⁸⁴ This Article therefore analyzes the question of implicit consent to class arbitration as both a policy issue in Part II, by weighing the different policy concerns that compete with party autonomy in international arbitration, and as a legal issue in Part III, by considering matters involving the interpretation of arbitration agreements that are silent or ambiguous. Although these policies and contract construction principles have met with approval in the United States, it remains to be seen whether the conclusions reached by U.S. courts and arbitrators can survive international scrutiny.

International challenges based on the terms of the arbitral agreement will most likely come in the form of objections to the enforcement of international class awards under Article V(1)(d) of the New York Convention.⁸⁵ This provision permits (but does not require) an enforcing court to refuse recognition and enforcement of a foreign arbitral award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties."⁸⁶ Defendants raising objections to class arbitrations will likely focus on both elements of this subsection.⁸⁷

83. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458–59 (2003) (Rehnquist, C.J., dissenting); *Yuen v. Superior Court*, 18 Cal. Rptr. 3d 127, 132 (Cal. Ct. App. 2004) (Mosk, J., concurring) (noting authority claiming "[c]ontractual silence on . . . consolidation should not be construed as consent").

84. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 89 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (describing defendants' arguments in dispute regarding international maritime dispute).

85. New York Convention, *supra* note 13, art. V(1)(d). Similar provisions exist in other international instruments on enforcement of arbitral awards. *See, e.g.*, Panama Convention, *supra* note 14, art. 5(1)(d); European Convention, *supra* note 14, art. IX(1)(d). It is possible that Article V(1)(c) of the New York Convention could be interpreted to provide an argument relating to arbitral procedure, but it seems more appropriate to consider that provision as dealing with questions of arbitrability and scope than party autonomy regarding procedure. *See* New York Convention, *supra* note 13, art. V(1)(c) (allowing refusal of enforcement if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration").

86. New York Convention, *supra* note 13, art. V(1)(d).

87. *See infra* notes 302–349 and accompanying text.

If the international arbitral community reacts to class awards the same way that the domestic U.S. arbitral community did in the early days of domestic class arbitration, then objections to class awards based on both law and policy will mimic the kind of objections that were at one time made to awards resulting from consolidated arbitrations.⁸⁸ However, while some lessons regarding class arbitration may be gleaned from discussions about arbitral consolidation, this Article argues that the two procedures are different in several significant ways.⁸⁹ First, certain structural differences between consolidated and class proceedings require a different and more robust policy analysis in the case of class arbitrations. Second, recent shifts in the law regarding the consolidation of arbitration call into question earlier precedents and analytical approaches. Each of these points will be considered individually after a brief discussion differentiating consolidated and class arbitration.

A. *Legal and Factual Limits on Analogies Between Class and Consolidated Arbitration*

In the last twenty-five years, numerous arbitrators, courts, and commentators have discussed possible analogies between class arbitrations and consolidated arbitrations.⁹⁰ If the two procedures can be equated, then an analysis of the international propriety of class arbitration would be relatively simple, since one could simply look at precedents regarding the enforceability of awards from consolidated arbitrations when considering the international enforceability of class awards. However, there are numerous distinctions between the two procedures that make blanket analogies inapt.

Unlike class arbitrations, consolidated arbitrations have long been a part of the world of international arbitration.⁹¹ However, as willing as

88. See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 111 (2006) (citing cases involving joinder of arbitrations).

89. See Sternlight, *supra* note 3, at 84–90 (arguing that consolidated arbitration is not identical to class arbitration).

90. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 89–90, 99–101 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (noting, in particular, the reasoning of the arbitral panel that “consolidation of two distinct arbitrations under two distinct arbitration clauses raises a different situation from a class action” and refusing to cite consolidation cases as precedential for class arbitrations); Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312–16; Slate & Tuchmann, *supra* note 20, at 56; Sternlight, *supra* note 3, at 84–90.

91. Commentators have claimed for at least the last twenty years that “consolidation of related proceedings is now ‘a fashion whose time has come.’” Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 *TEX. INT’L L.J.* 89, 108 (1995) (writing in 1995 and citing a publication from 1987). A great deal of commentary exists on consolidation. A brief sampling includes LEW ET AL., *supra* note 44, ¶¶ 16–39 to 16–40; REDFERN & HUNTER, *supra* note 12, ¶¶ 3–82 to 3–85; Gerald Asken, *Multi-Party Arbitrations in the United States*, in *ARBITRATION AND THE LICENSING PROCESS* 5–3, 5–14 to

courts and commentators are to enter into a debate about consolidating arbitrations, many authorities have traditionally been unwilling to require consolidation without the explicit consent of the parties.⁹² That hesitancy may, however, be changing.

As the name suggests, consolidated arbitrations are very similar to consolidated trials.⁹³ Consolidated proceedings in court or in arbitration combine legally distinct actions that share similar subject matter, involve common questions of law and fact, and determine similar issues and defenses, typically between the same or related parties.⁹⁴ Consolidated proceedings result in a number of benefits, including the unification of numerous claims that would otherwise proceed in different fora, possibly resulting in divergent or inconsistent outcomes, as discussed in more detail below.⁹⁵ Consolidation is also said to save cost and time, although that view is disputed in the arbitral realm.⁹⁶ Efficiency is a major motivating factor in consolidating proceedings in court, although it may not be determinative in arbitration because of arbitration's simultaneous need to consider matters of consent.

The need to demonstrate consent distinguishes consolidated arbitral proceedings from consolidated judicial proceedings. Arbitration is a "creature of contract," meaning that all parties to a consolidated arbitration are supposed to have signed a valid and enforceable arbitration

5–15 (Roberts Goldscheider & Michel de Haas eds., 1984); Julie C. Chiu, *Consolidation of Arbitral Proceedings and International Commercial Arbitration*, 7 J. INT'L ARB. 53 *passim* (1990); Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues—An Analysis*, 18 J. INT'L ARB. 253, 330–34 (2001) [hereinafter Hanotiau, *Problems*]; Lamm & Aqua, *supra* note 24, *passim*; Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43, 54–55 (1996); Rau & Sherman, *supra*, at 111–18; Rona G. Shamoon & Irene M. Ten Cate, *Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under U.S. Law*, 12 AM. REV. INT'L ARB. 335 (2001); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 494 (1987).

92. See, e.g., Fritz Nicklisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT'L ARB. 57, 59 (2004) (noting the need for (1) consent and (2) equal influence on naming of arbitrators in consolidated arbitrations).

93. Consolidated litigation proceedings are entirely uncontroversial, and nearly every legal system permits such actions in one form or another. Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67, nn.3–4 (2002).

94. Michael F. Hoellering, *Consolidated Arbitration: Will it Result in Increased Efficiency or an Affront to Party Autonomy?*, 52 DISP. RESOL. J., 41 (1997); Matthew D. Schwartz, Note, *Multiparty Disputes and Consolidation Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT'L L. 341, 341 n.2 (1990); Stipanowich, *supra* note 91, at 505–06.

95. JOACHIM G. FRICK, *ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS* 230 (2001); Chiu, *supra* note 91, at 55–56; Leboulanger, *supra* note 91, at 62–63; *infra* notes 146–147 and accompanying text.

96. FRICK, *supra* note 95, at 230–31; Chiu, *supra* note 91, at 55–56; Leboulanger, *supra* note 91, at 62–63.

agreement with all other participants.⁹⁷ Problems with consolidated arbitrations often revolve around the absence of a signed arbitration agreement between all the parties to the consolidated proceeding.⁹⁸ The issue is not that of bringing a non-signatory into the proceedings, although non-signatory issues can arise in the context of a consolidated arbitration.⁹⁹ Instead, the problem relates to whether the parties—who have indisputably agreed to arbitrate their disputes—can be said to have consented to this type of proceeding (i.e., a consolidated arbitration), since the arbitration agreements are silent or ambiguous regarding multi-party proceedings.

Commentators often distinguish between the consolidation of actions with multiple parties to a single contract and the consolidation of actions with multiple parties to different, but related, contracts.¹⁰⁰ The latter is more similar to class arbitration, which also involves a large number of individual, bilateral arbitration agreements with only one

97. Stipanowich, *supra* note 91, at 476; see also W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *TEX. INT'L L.J.* 1, 8 (1995).

98. Consolidated arbitrations can arise in a variety of manners, often intersecting with issues of joinder of parties. See BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* ¶¶ 358–61, 402, 428 (2005). Although the paradigmatic request to consolidate involves different proceedings between the same parties (*A-B* and *A-B*), other consolidation requests involve multiple parties that may not be in contractual privity with one another (for example, a request to consolidate an arbitration involving *A* and *B* with an arbitration involving *B* and *C*, but not relating to a single contract between *A*, *B*, and *C*). See, e.g., *Rolls-Royce Indus. Power, Inc. v. Zurn EPC Servs., Inc.*, No. 01 C-5608, 2001 WL 1397881 (N.D. Ill. Nov. 07, 2001) (distinguishing a case involving “a single agreement whereas this case . . . involved multiple agreements”).

99. For example, instead of trying to consolidate arbitrations between *A* and *B* and *B* and *C*, one might argue that *C* is really a party to the arbitration agreement between *A* and *B*, even though *C* did not technically sign the agreement. There are a number of ways to bind non-signatories to an arbitration agreement, including consent, agency, assumption, alter ego, piercing the corporate veil, estoppel, incorporation by reference, and the group of companies doctrine. See, e.g., *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (outlining means of obtaining arbitral jurisdiction over non-signatories in a U.S. proceeding); Hanotiau, *Groups of Companies*, *supra* note 43, at 281; Herzfeld, *supra* note 60, at 306–07 (discussing shareholder disputes). Some have said that the United States has the most liberal approach to extending the arbitration agreement to non-signatories. Hanotiau, *Groups of Companies*, *supra* note 43, at 287; James M. Hosking, *Non-Signatories and International Arbitration in the United States: The Quest for Consent*, 20 *ARB. INT'L* 289, 303 (2004) (concluding that “[w]hile the case law generally shows a deference to consent, especially in the United States one finds that it sometimes takes a backseat” to efficiency and the “presumption of arbitrability”); Lamm & Aqua, *supra* note 24, at 718–30 (outlining means of obtaining arbitral jurisdiction over non-signatories in an international proceeding).

100. REDFERN & HUNTER, *supra* note 12, ¶¶ 3–73; Bernard Hanotiau, *Complex Multi-contract-Multiparty Arbitration*, 14 *ARB. INT'L* 369, 371 (1998) [hereinafter Hanotiau, *Multiparty Arbitration*]; Platte, *supra* note 93, nn.18–22; see also Nicklisch, *supra* note 92, at 59–60 (describing consortia agreements and arguing that these cause “no problem” to consolidation efforts); *id.* at 71 (noting “multi-party arbitration will present no major problems” if parties can be divided into sides “with obviously concordant interests”).

party—the defendant—in common. However, the scope of the two types of joined actions varies significantly. Even when consolidation involves parties to different, but related, contracts, the number of entities that are involved is usually quite small, most often in the range of three to five.¹⁰¹ Class arbitrations, on the other hand, can include hundreds to hundreds of thousands of parties.¹⁰² Furthermore, consolidated arbitrations can involve conflicts of interest between those who are considered joint claimants or joint respondents, whereas parties to class arbitration typically do not experience these sorts of conflicts of interest among claimant or defendant groups.¹⁰³

Whether a multi-party/multi-contract proceeding is possible depends on the language found in the arbitration agreements. As a rule, “[a]rbitrators may extend their jurisdiction to connected agreements only if the intention of the parties and the language of the relevant instruments permit such an extension.”¹⁰⁴ Conceptually speaking, there are fewer problems consolidating proceedings if the different arbitration agreements contain identical language.¹⁰⁵ Indeed, “it is generally legitimate to presume that by including identical arbitration clauses in the various related contracts, the parties intended to submit the entire operation to a single arbitral tribunal.”¹⁰⁶ This is also true with class arbitrations—it is easier to justify class proceedings when all the agreements are the same. However, if the individual arbitration agreements vary in their

101. One exceptional case involved the breakup of the Andersen Organisation, with 140 different parties. LEW ET AL., *supra* note 44, ¶¶ 16-57 to 16-58; *Final Award in the Arbitration of Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, 10 AM. REV. INT’L ARB. 451 *passim* (1999); *Judgment of the Swiss Federal Court (English Translation)*, 10 AM. REV. INT’L ARB. 559 *passim* (1999); *see also* Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 375–76 (discussing umbrella agreements).

102. *See, e.g.*, *Bagpeddler.com v. U.S. Bancorp*, Case No. 11 181 0032204 (AAA, May 4, 2007), available at <http://www.adr.org/si.asp?id=4667> (concerning an arbitral class of up to 400,000 internet vendors). Numerosity is a requirement for judicial class treatment in the U.S. and elsewhere, and that requirement has been extended to class arbitration as well. FED. R. CIV. P. 23(a); AAA SUPPLEMENTARY RULES, *supra* note 30, R. 4(a)(1); JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 3(a)(1); NAF CLASS ARBITRATION PROCEDURES, *supra* note 30, proc. A(1); RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 6–8 (2004) (discussing Australian class actions); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 424–30 (2002) (discussing Australian and Canadian class actions). *But see* Gidi, *supra* note 25, at 367 n.167 (noting no numerosity requirement in Brazilian judicial group actions).

103. *See infra* notes 326–327 and accompanying text.

104. Leboulanger, *supra* note 91, at 51; *accord* Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 378.

105. Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 376; Whitesell & Silva-Romero, *supra* note 6, at 15.

106. GAILLARD & SAVAGE, *supra* note 44, ¶ 521.

requirements—for example, by choosing different seats for the arbitration or different governing rules or laws—then both consolidation and class arbitration may be less appropriate, since the parties' expressed wishes cannot be given effect.¹⁰⁷

In the context of consolidation, it has been said that consolidation of separate arbitrations is impossible with conflicting arbitration agreements, absent relevant national laws or arbitral rules permitting it.¹⁰⁸ However, the absence of such laws or rules does not prohibit the appropriate authorities from "further exploring the true intentions of the parties," which suggests that the unavailability of such laws or rules does not require a conclusion that consolidation—or, by extension, class arbitration—is improper in every case.¹⁰⁹ Nevertheless, the more similar the different agreements are, the more likely class or consolidated treatment will be allowed, and the more dissimilar the agreements, the less likely group treatment will be.

Interestingly, this is one of the areas where class and consolidated arbitrations differ significantly, which suggests that a blanket analogy between the two proceedings is inapt. As a rule, consolidated arbitrations are more likely to result in the need to reconcile conflicting contract provisions, including those regarding language, location, selection of arbitrators, applicable procedural rule sets, and/or governing law, often because those arbitration agreements were negotiated separately with an eye to individual transaction needs.¹¹⁰ Class arbitration does not raise the same issues, since the members of the class will likely all have identical (or, as in the U.S. Supreme Court case of *Bazze*,¹¹¹ functionally identical) arbitration agreements with the defendant, often because the arbitration agreements are part of a non-negotiable form contract.¹¹² However, to the extent that minor variations exist in the relevant arbitral agreements, courts and/or arbitrators can invoke the standing interpretive rule that the drafter should bear the burden of any inconsistencies, so as to avoid a situation where defendants could avoid or limit class arbitration simply by periodically making minor, insignificant changes to the arbitration provisions so that no single class would grow too large.¹¹³

107. Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 376; Platte, *supra* note 93, nn.36–41.

108. GAILLARD & SAVAGE, *supra* note 44, ¶ 521.

109. *Id.*

110. Sternlight, *supra* note 3, at 86.

111. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444 (2003) (plurality opinion).

112. Sternlight, *supra* note 3, at 86–87.

113. See Philip Allen Lacovara, *Class Action Arbitrations—The Challenge for the Business Community*, 24 *ARB. INT'L* 541, 559 (2008) (encouraging companies to create variations in arbitration agreements); see also GAILLARD & SAVAGE, *supra* note 44, ¶ 479 (noting arbitrators and courts may appropriately adopt the principle of interpretation *contra proferentem*).

Like consolidated arbitrations (at least to some degree), class arbitrations combine claims held by a group of individuals with (1) the same or similar injuries and (2) the same or similar arbitration agreements with the defendant(s).¹¹⁴ Like consolidated arbitrations, class arbitrations also require the existence of valid arbitration agreements between the parties. Although class arbitrations were at one time viewed with some distrust, they have become an accepted means of addressing both domestic and international disputes, at least within the United States.¹¹⁵ Class arbitrations have also been considered outside the United States in both common and civil law jurisdictions,¹¹⁶ although there are no known actions outside the United States to enforce a class award arising out of a U.S.-based arbitration.

B. Policy Issues Regarding Class Arbitration

The preceding subsection described some of the structural and legal differences between consolidated and class arbitrations to demonstrate why some—but not all—analogies between the two procedures are appropriate. This subsection focuses on policy considerations regarding class arbitration to evaluate whether the procedure is consistent with the aims and goals of international arbitration.

It is useful to begin by outlining the position asserted by opponents to class arbitration. The primary policy argument made by those who would restrict the availability of class arbitration is that class proceedings may not be ordered absent the clear, express, and unanimous consent of the parties.¹¹⁷ These “strict constructionists” often emphasize the role of party autonomy in arbitration and believe that the default position—i.e., the position that should be taken in cases where the arbitration agreement is silent or ambiguous as to class treatment—should be

114. See AAA SUPPLEMENTARY RULES, *supra* note 30, at R.4 (describing requirements to pursue a class arbitration); JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 3 (describing the same). Both the AAA Supplementary Rules and the JAMS Class Arbitration Rules are based on Rule 23 of the Federal Rules of Civil Procedure. Weidemaier, *supra* note 2, at 94–95. The requirements of the National Arbitration Forum are slightly less detailed. NAF CLASS ARBITRATION PROCEDURES, *supra* note 30, *passim*.

115. Over 120 such actions were filed with one arbitration provider between 2003 and early 2007. Weidemaier, *supra* note 2, at 70; see also HANOTIAU, *supra* note 98, ¶¶ 257–79.

116. See *infra* notes 52–76 and accompanying text.

117. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458–59 (2003) (Rehnquist, C.J., dissenting); *Yuen v. Superior Court*, 18 Cal. Rptr. 3d 127, 132 (Cal. Ct. App. 2004) (Grignon, J., concurring) (noting that authority claiming “[c]ontractual silence on . . . consolidation should not be construed as consent”); Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312. The discussion in this Article is limited to questions regarding consent to this type of arbitration, i.e., class proceedings; the assumption is that all parties have explicitly consented to arbitrate their disputes.

to avoid class treatment in favor of individual arbitration.¹¹⁸ Advocates for this position claim that they are protecting party autonomy, which is the most fundamental of all policies regarding arbitration.

This Article takes issue with strict constructionism as a matter of policy. Although party autonomy is and should remain important, a narrow interpretive stance is contrary to contemporary arbitration law and practice. For example, Yves Derains has stated that the consensual aspect of arbitration “should not be overestimated.”¹¹⁹ Similarly, Bernard Hanotiau has argued that it is time “to bury once and for all [the] obsolete principle of restrictive interpretation of arbitral clauses” in light of “[t]he total liberalisation of arbitration in many western countries,” which he claims is due to the recognition that arbitration is no longer “a second-class method of dispute settlement, but simply an additional one, perhaps more appropriate for certain categories of disputes, and much needed to alleviate the plight of overburdened national courts.”¹²⁰ Indeed, Emmanuel Gaillard has said that the principle of strict interpretation “is generally rejected in international arbitration,” since it is

118. *Bazze*, 539 U.S. at 458–59 (Rehnquist, C.J., dissenting); *Yuen*, 18 Cal. Rptr. 3d at 132 (Grignon, J., concurring); Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312. When considering what default rule to apply, some experts suggest that the default should “closely mimic [] the ‘hypothetical bargain’ that the parties themselves would have chosen in a completely spelled-out agreement—or, perhaps, the bargain that most similarly situated parties would have chosen, or that it would be rationale for such parties to have chosen *ex ante*.” Rau & Sherman, *supra* note 91, at 115 (discussing consolidation). However, there may be instances where the opposite may be true, and it may be preferable to choose a default provision that parties are unlikely to choose, but allow them to “opt out” if they disagree with its effect. *Id.*; see also Ian Ayres, *Ya-huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 589–90 (2006) (describing the so-called “penalty default” rule). In any event, the choice of a default rule will likely affect the bargaining positions of the parties. See Gidi, *supra* note 25, at 338; Rau & Sherman, *supra* note 91, at 115 (discussing consolidation); *id.* at 117 n.152 (noting parties may be “reluctant to opt out even of rules that are inefficient for them” if the transaction costs to alter the default rule are too high or onerous). There is a considerable body of literature concerning default rules, often considering the issue from a law and economics perspective. Although interesting, this discussion is outside the scope of the current Article. See, e.g., Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881 (2003); Ian Ayres & Robert Gernter, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Robert Gernter, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999); Ian Ayres & Robert Gernter, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

119. Yves Derains, *The Limits of the Arbitration Agreement in Contracts Involving More than Two Parties*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, COMPLEX ARBITRATIONS—SPECIAL SUPPLEMENT, 25, 33 (2003) (giving more weight to the parties’ right to choose arbitrators).

120. Hanotiau, *Problems*, *supra* note 91, at 256; accord Derains, *supra* note 119, at 27.

based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. This view is not consistent with the fact that arbitration is now unanimously considered to be a normal means of settling international disputes.¹²¹

Alan Scott Rau phrases the issue somewhat differently, looking at the issues relating to consent in concentric circles and requiring a stricter rule of interpretation in cases involving fundamental, core issues (such as the decision to arbitrate in the first place), and permitting a looser approach in which the parties have the burden to “draft in advance around any default rule” on those issues—such as procedure—that are farther out from the core.¹²²

Furthermore, party preferences have always been weighed against other concerns. For example, no matter what the parties have agreed among themselves, they are not permitted to violate basic principles of due process or public policy.¹²³ Similarly, parties cannot, as a rule, privately dispose of concerns that States have deemed non-arbitrable,¹²⁴ nor can parties completely evade principles of mandatory law.¹²⁵ There are even limits to the ability of the parties to choose arbitrators.¹²⁶ Party autonomy is, quite simply, not the only policy at issue. Instead, courts and arbitrators must take other competing interests and principles into account.¹²⁷

One of the most important—although controversial—factors that courts and arbitrators must consider is efficiency. Traditionally, parties have been said to favor arbitration over litigation because arbitration is

121. GAILLARD & SAVAGE, *supra* note 44, ¶ 480 (citations omitted) (noting “[t]his has been frequently confirmed in arbitral case law”).

122. Rau, *supra* note 43, at 247 (noting also that “an initial agreement to submit to arbitration permits us to temper somewhat the absolutism of our insistence on the usual understanding of consent”).

123. New York Convention, *supra* note 13, art. V; Strong, *supra* note 10, at 47–75.

124. New York Convention, *supra* note 13, art. II; William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT’L L. 629, 636–37 (1986) [hereinafter Park, *Private Adjudicators*]. Parties could attempt to evade this rule by seating and enforcing the arbitration in locations where the matter is arbitrable, but such efforts would be difficult and dependent on certain fortuitous factual scenarios.

125. Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. INT’L ARB. 23, 23 (1997); Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 43, at 11, 43.

126. GAILLARD & SAVAGE, *supra* note 44, ¶¶ 783–85.

127. See Park, *Private Adjudicators*, *supra* note 124, at 640 (prioritizing different competing interests in arbitration).

more efficient, but in this context, the term “efficiency” relates solely to the benefits that inure to the parties who have contracted to arbitrate their dispute and only with respect to one particular proceeding.¹²⁸ The definition of “efficiency” in multi-party arbitration is also notoriously vague, referring to everything from the avoidance of duplicative dispute resolution procedures in different fora to the prevention of inconsistent results and minimization of costs.¹²⁹ However, it has always been true that the benefits of efficiency in arbitration have never been aimed at third parties, the courts, or the public at large, nor have they extended to other, non-arbitrable disputes between the parties to a particular arbitration agreement.¹³⁰ Indeed, that is why arguments based on efficiency rationales have not always been successful when raised in the context of consolidated arbitrations. Principles of “mere” efficiency are also often overcome when the consolidated proceeding would involve a third party stranger (either as a party or an arbitrator) to the arbitration, since permitting non-parties to participate in an arbitration would violate the type of proceeding to which the original signatories to the contract agreed.¹³¹ Interestingly, concerns about third party strangers have also prevailed in situations where the “strangers” involved the same parties or arbitrators that were involved in the initial arbitration; in these cases, the fact that the parties had agreed to arbitration under different contracts or relating to different types of disputes was sufficient to block consolidation, since it was decided that each of the proceedings was meant to be individual, not combined.¹³²

As illogical as it may seem to consider known parties as strangers, this approach is consistent with decisions and commentary indicating that when parties choose arbitration, they are deemed to have chosen to relinquish certain rights, including the right to an efficient proceeding.¹³³

128. BORN, *supra* note 15, at 9–11.

129. FRICK, *supra* note 95, at 230; LEW ET AL., *supra* note 44, ¶ 16-92; Chiu, *supra* note 91, at 55–56; Leboulanger, *supra* note 91, at 62–63; Rau & Sherman, *supra* note 91, at 109 n.110; Schwartz, *supra* note 94, at 343; Stipanowich, *supra* note 91, at 502; Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 166 (1994) (discussing the “empty chair” syndrome).

130. Even the famously activist Lord Denning admitted that the English court had no power to consolidate arbitrations over the objection of the parties, no matter how desirable it might be to avoid inconsistent judgments and findings on important issues in common. *Abu Dhabi Gas Liquefaction Co. v. E. Bechtel Co.*, [1982] 2 Lloyd’s Rep. 425, 427 (Lord Denning) (Eng.).

131. Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 372, 389–90; Platte, *supra* note 93, nn.5–8.

132. Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 372, 389–90; Platte, *supra* note 93, nn.5–8; Rau, *supra* note 43, at 226–29.

133. See, e.g., *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (“[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, but to ensure that commercial arbitration agreements, like other con-

Indeed, those courts that have ordered consolidated or class arbitration on the basis of efficiency or other arguments have been criticized as failing to show the proper respect for party autonomy and for exceeding their power.¹³⁴

However, as arbitration becomes more widespread and diverse in its forms, the views about the role of efficiency considerations may be changing. Although efficiency may not carry the same weight as due process and party autonomy in international proceedings, it is being given increasing respect, particularly when complex or novel questions of procedure are involved.¹³⁵ Furthermore, efficiency can and should play a role in procedural determinations to the extent that parties are assumed to have contracted for an efficient procedure; if that is true, then an arbitrator's reliance on efficiency rationales can be said to be a legitimate means of getting to the parties' implied consent. In accordance with this principle, courts have explicitly recognized that arbitrators may take efficiency into account when they are considering the possibility of class arbitration, although the courts in those cases may be conflating a step one determination (will this clause support class arbitration) with a step two determination (do the facts in this case suggest class treatment as the best method of resolving this dispute).¹³⁶

If efficiency, of itself, is not a sufficient reason to permit consolidation, can efficiency be appropriately considered when determining whether an arbitration agreement that is silent or ambiguous as to group treatment will permit class arbitration? Deeper analysis of how efficiency concerns play out in class arbitration suggests that the purported analogy to consolidation is not quite apt, since class arbitration involves policy considerations that do not exist in consolidated actions.

The key difference is that consolidating two or more arbitrations typically benefits no one other than the parties themselves, and sometimes the benefit inures to only some of the parties. For example, a general contractor who has been sued by a client may find it efficient to bring a variety of subcontractors into the initial arbitration. The

tracts, 'are enforced according to their terms,' and according to the intentions of the parties.')

(citations omitted).

134. FRICK, *supra* note 95, at 237; Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312.

135. REDFERN & HUNTER, *supra* note 12, ¶ 3-73; Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321-22 (2003); Platte, *supra* note 93, nn.6-7. *But see* FRICK, *supra* note 95, at 231-32 (claiming "efficiency is not in itself a goal of a dispute resolution mechanism, at least in proceedings that are not publicly financed").

136. Dorinco Reins. Co. v. Ace Am. Ins. Co., No. 07-12622, 2008 WL 192270, at *10 (E.D. Mich. Jan. 23, 2008); Markel Int'l Ins. Co. v. Westchester Fire Ins. Co., 442 F. Supp. 2d 200, 204, 205 (D.N.J. 2006); *see also* AAA SUPPLEMENTARY RULES, *supra* note 30, Rs. 3, 5; JAMS CLASS ARBITRATION RULES *supra* note 30, Rs. 2-4.

individual subcontractors, however, might not find this to be an efficient method of resolving disputes associated with this particular contract, nor might the client.

However, the benefits of efficiency in class arbitration extend not only to parties who are actively involved in the proceeding—i.e., the defendant(s) and named claimants—but also to scores of others, including both the unnamed claimants and, arguably, society as a whole. For example, it is possible that certain low-value claims will not be brought, either in court or in arbitration, without the ability to share the costs associated with pursuing the claim over a large number of people.¹³⁷ The failure to certify a class (in a class action or a class arbitration) can sound the “death knell” of a cause of action, since claimants cannot justify the financial costs associated with pursuing their claims individually, no matter how meritorious those claims may be as a matter of law or social policy.¹³⁸ This is one of the reasons why Jean Sternlight has argued that the consequences of a decision to refuse class arbitration are different than a refusal to order consolidation.¹³⁹ Without consolidation of multiple claims, disputes can still go forward individually, albeit with some additional expense.¹⁴⁰ Without classwide arbitration, many small claims simply cannot or will not be heard.¹⁴¹

Class proceedings can also serve society as a whole, although again, critics would take a different view.¹⁴² Class arbitration—like its judicial equivalent, class action litigation—can be used as a means of promoting

137. These arguments can be raised in the context of discussions about efficiency or unconscionability. *See, e.g.*, *Litman v. Celco P’ship*, No. 07-CV-4886, 2008 WL 4507573, at *6 (D.N.J. Sept. 29, 2008); *Taylor v. First N. Am. Bank*, 325 F. Supp. 2d 1304, 1319 (M.D. Ala. 2004) (including a claim based on costs and a related claim based on unconscionability). The issue of unconscionability is outside the scope of this Article.

138. *Weston*, *supra* note 30, at 1728. Certification also has consequences. Often, defendants will seek to settle a case as soon as possible after a court has decided to certify a class, since the cost of defending a class action is immense. *Id.*

139. *Sternlight*, *supra* note 3, at 86.

140. *Id.*

141. *Id.*

142. Criticisms of judicial class actions are well-known and longstanding, and it is assumed that the reader is familiar with the basic parameters of that debate. Issues relevant to the current Article are discussed below. *See infra* notes 150–157 and accompanying text. However, those interested in further reading can see Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63 (2008); John C. Coffey, *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better than “Voice”*, 30 CARDOZO L. REV. 407 (2008); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27–33 (1991). Congress considered the pros and cons of class actions when enacting the Class Action Fairness Act of 2005. Pub. L. No. 109-2, § 2(a), 119 Stat. 4 (2005).

social justice.¹⁴³ Not only do class procedures properly distribute the economic costs associated with certain risky behaviors (as in tort cases), they can bring public attention and pressure to bear on corporate defendants who might otherwise be inclined to act in their own short-term self-interest (as in shareholder suits or environmental actions). Although class claimants receive the financial rewards associated with the claim, society as a whole benefits by the cessation of socially or economically detrimental behavior. Other potential defendants are also deterred from pursuing similar courses of action.

Although it is tempting to characterize class arbitration's struggle to balance public and private concerns as unique, it is not. An assessment of the relative weight of public and private interests in arbitration has been undertaken in several different contexts,¹⁴⁴ and the fact that the international arbitral community even entertains these sorts of discussions, let alone debates them at the highest levels, suggests that the view that arbitration is an entirely private matter between two individuals—although attractively and deceptively simple¹⁴⁵—is not universally held. Instead,

143. Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 172–74 (2001); see also Sternlight, *supra* note 3, at 28 (describing the nature and benefits of class actions); Weston, *supra* note 30, at 1727 (describing the same).

144. For example, several commentators have recently argued that there is, or should be, a public interest exception to arbitral confidentiality. See, e.g., Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 ARB. INT'L 211, 211–12 (2005); Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 ARB. INT'L 59, 59–60 (2005). Debates about the public versus private role of arbitration have also raged in the context of antitrust and other “public” causes of action. See, e.g., Donovan & Greenawalt, *supra* note 125, at 30–38 (discussing jurisprudence in the wake of *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985), and concluding “it would be wrong to assume there are no public rights at issue in the resolution of even purely ‘private’ disputes”); Park, *Private Adjudicators*, *supra* note 124, at 638.

145. For example, class arbitration can be said to give full effect to the parties' recognized desire to arbitrate their disputes rather than litigate them, something which would qualify as a private, rather than a public, interest. The only real question is whether the dispute should be arbitrated individually or collectively, which is essentially a question of form. However, such differences are again not unique to class arbitration, since parties often wrangle about procedural matters, both large and small. In such cases, arbitrators often utilize the “principle of effective interpretation,” which requires adoption of an approach that is most likely to “establish an effective machinery for the settlement of disputes covered by the arbitration clause.” GAILLARD & SAVAGE, *supra* note 44, ¶ 478 (quoting Preliminary Award in ICC case No. 2321 (1974), *Two Israeli Cos. v. Gov't of an African State*, 1 Y.B. COM. ARB. 133 (1976)); see also Partial Award in ICC Case No. 7920 (1993), *Distributor v. Mfr. (Spain v. Italy)*, 23 Y.B. COM. ARB. 80, 82–83 (1998) (outlining interpretive method used); Avv. Aldo Frignani, *Drafting Arbitration Agreements*, 24 ARB. INT'L 561 (2008) (noting “[p]athological clauses have formed the core of the academic debate as to whether arbitrators, in their search to discover the true intention of the parties, should refer to the principles of strict interpretation or to that of interpretation *in favorem validitatis*” and describing necessary interpretive

public interests can and should play some role in the development of the law of arbitration, particularly in the case of class arbitrations.

Before weighing the competing policy interests, they must be identified in detail. Judge Jack Weinstein, one of the foremost experts on U.S. class actions,¹⁴⁶ has described a number of advantages associated with class actions. Many of these advantages also apply to class arbitration. Some promote efficiency while others promote social justice. Thus, Weinstein favors class actions because:

- (1) They reduce duplication of discovery, motion practice, and pretrial procedures.
- (2) They allow a single judge to familiarize himself or herself with the legal and factual issues.
- (3) They provide consistency of results for all the injured and for the defendants.
- (4) They enhance the possibility of a single action resolving the entire problem, hence preventing the need for repetitive litigation of similar issues. Those who opt out of the class (as is often possible) will generally represent but a small percentage of possible claimants.
- (5) They permit plaintiffs' attorneys to generate enough capital to conduct the litigation on a playing field level for both sides.
- (6) They enhance the possibility of a global settlement, which can provide reasonable relief for prospective claimants while limiting the costs for both parties and providing closure to the dispute for defendants.
- (7) They provide the possibility of a single fair punitive damage amount instead of repetitive and overlapping punishment
- (8) They give the court power to control legal fees, which may otherwise be much greater than warranted.
- (9) They allow a single appellate panel to review the case.
- (10) Perhaps most important, they permit recoveries for small claims by those who may not even know they were injured and almost certainly would not bother to sue even if they had known. By, in theory, requiring a defendant to pay the entire

steps); Alok Jain, *Pathological Arbitration Clauses and Indian Courts*, 25 *ARB. INT'L* 433, 441–47 (2008) (describing interpretive method used in India).

146. Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 *LOY. L.A. L. REV.* 719, 735 (2006).

social cost of its delicts they should avoid much of the reason for high punitive damages.¹⁴⁷

Class actions (or arbitrations) also allow defendants to bring complex disputes to a close relatively quickly, thus allowing defendants to “get on with their affairs” and avoid large transactional costs.¹⁴⁸

Julian Lew has identified similar benefits to multi-party arbitration (albeit outside the class context), suggesting multi-party arbitration should proceed when to do so would encourage procedural economy, avoid inconsistent awards, increase fairness by facilitating fact-finding and presentation of legal and factual arguments, address any confidentiality concerns, and uphold the equal ability to choose arbitrators.¹⁴⁹

The benefits of class actions are balanced by a number of disadvantages. For example, Weinstein notes:

- (1) The judge may lack familiarity with the law if more than one jurisdiction’s substantive law must be applied.
- (2) They increase the complexity of the litigation.
- (3) They place a significant burden on individual courts, since they are time consuming, containing more factual and legal issues than any individual case.
- (4) They remove local issues from their normal venue. Forum shopping problems are compounded.
- (5) They supersede the local jury’s role and replace it with a jury that may be unfamiliar with local conditions.
- (6) They often require the application of many different substantive laws, some of which are still in a state of uncertainty.
- (7) They attenuate the usual individual client-attorney relationship, creating new ethical pressures.
- (8) They are often in significant tension with federalism assumptions. One elected state county judge may bind the nation.

147. Weinstein, *supra* note 143, at 172–74; *see also* Sternlight, *supra* note 3, at 28 (describing the nature and benefit of class actions); Weston, *supra* note 30, at 1727 (describing the same).

148. Weinstein, *supra* note 143, at 174–75.

149. LEW ET AL., *supra* note 44, ¶¶ 16–92; *accord* Platte, *supra* note 93, nn.87–96. Lew also notes that multi-party arbitration may not be appropriate in cases where the multi-party nature of the proceedings will make the award “vulnerable to challenges and anti-enforcement actions,” which could be problematic in the early years of class arbitration, when the international community will be at its most skeptical about the procedure. LEW ET AL., *supra* note 44, ¶ 16-93.

- (9) They may force defendants to settle because of the threat of huge awards.
- (10) Finally, there is the fundamental problem that the Supreme Court has been dealing with—protecting the rights of those class members with little knowledge of the suit, virtually no ability to monitor their attorneys, and potential conflicts with other members of the class.¹⁵⁰

Although most of the advantages of class actions apply equally to class arbitration, the disadvantages of judicial class actions do not track class arbitration quite as closely, due to the privatized nature of arbitration. For example, the courts are not clogged by large cases, since arbitrators work independently, nor are there choice of forum or jury issues, since the parties have chosen arbitration precisely to avoid such concerns.¹⁵¹ Furthermore, as the preceding discussion has shown, class arbitration is superior to judicial class actions as a matter of procedure, since the limitations on party disclosure in arbitration—particularly when compared to the broad ranging judicial discovery available in U.S. litigation—may make class arbitration a more palatable group dispute resolution device for corporate defendants, particularly for non-U.S. defendants who worry about the excesses of U.S. discovery.¹⁵² Furthermore, at least one internationally recognized commentator has concluded that arbitrators are “as well equipped as courts” to deal with the special procedural concerns associated with class arbitration.¹⁵³ Thus, the only remaining concerns involve ethical issues, pressure to settle, and due process. However, none of these need be insurmountable. For example, the author has argued elsewhere that due process concerns cannot result in a blanket objection to the international enforceability of class awards.¹⁵⁴ It is also true that pressure to settle will arise whether a request

150. Weinstein, *supra* note 143, at 172–74; *see also* Smit, *supra* note 9, at 210 (criticizing class actions); Sternlight, *supra* note 3, at 34–37 (same).

151. LEW ET AL., *supra* note 44, ¶¶ 1–7 to 1–30.

152. *See, e.g.*, Baumgartner, *supra* note 6, at 310–11 (discussing presumptions made regarding U.S.-style class actions); Gidi, *supra* note 25, at 322, 324 n.22, 371 (discussing the evolution of the “traditional myth” regarding U.S. class actions amongst civil law scholars); Herzfeld, *supra* note 60, at 301 (noting defendants may prefer class arbitration to avoid judicial discovery). When considering international proceedings, there is also the issue of the relative ease of international enforcement of arbitral awards versus court judgments. These factors thus contradict the claim that “[i]n actual practice, the procedure [for class arbitration] would differ very little from litigation and would therefore offer few, if any, advantages.” HANOTIAU, *supra* note 98, ¶¶ 276–77.

153. HANOTIAU, *supra* note 98, ¶ 276.

154. Strong, *supra* note 10, at 64–75.

to proceed as a class is granted or denied.¹⁵⁵ Furthermore, the concern about the attenuation of the attorney-client relationship is the same in both class arbitrations and class actions, and has not been deemed sufficient to bar class proceedings in court.¹⁵⁶

Thus, as a matter of policy, class arbitrations would seem at least as socially beneficial, and possibly more so, than class actions.¹⁵⁷ This may be particularly true with international class arbitrations, since (1) arbitral awards are almost universally easier to enforce internationally than court judgments¹⁵⁸ and (2) class action judgments are particularly disfavored outside the United States, which diminishes the likelihood of international recovery in class proceedings.¹⁵⁹ It may be that in some cases, class awards are the best or only realistic way to promote effective international recovery for certain claims.¹⁶⁰

Finally, one must consider the relevance of the increasingly pro-arbitration stance taken by countries all over the world. While the United States may sometimes be more staunchly pro-arbitration than other jurisdictions,¹⁶¹ there has been widespread adoption of enforcement

155. Weston, *supra* note 30, at 1728; *see also supra* note 138 and accompanying text (regarding the “death knell” of a cause of action).

156. See Weston, *supra* note 30, at 1776–77 (noting ethical problems relating to adequate representation in class action and class arbitration).

157. Granted, this conclusion takes Judge Weinstein’s analysis at face value. Opponents to class actions and class arbitrations would focus more heavily on the disadvantages associated with class proceedings. *See supra* notes 142, 150 and accompanying text. Critics of class arbitration would also point to the lack of appellate review as a disadvantage associated specifically with private dispute resolution. Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action* (forthcoming 2009). As is the case with many matters involving class treatment, opinions will likely be strongly held and widely varying. *Compare* 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE, § 2:14 (2006) (“As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.”), *with* 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 9:67 n.2 (2008) (“The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.”).

158. BORN, *supra* note 15, at 7–10, 19.

159. *See, e.g.,* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) (admitting practitioner affidavits from the United Kingdom, the Federal Republic of Germany, Switzerland, Italy, and France stating that courts in those jurisdictions would not enforce judgments resulting from American class actions); John C.L. Dixon, *The Res Judicata Effect in England of a U.S. Class Action Settlement*, 46 INT’L & COMP. L.Q. 134, 136, 140 (1997) (discussing how concepts of natural justice affect English courts’ treatment of class action judgments and settlements); Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural “Due Process” Requirements*, 10 TUL. J. INT’L & COMP. L. 5, 19, 25–26 (2002) (discussing Italian courts’ scrutiny of U.S. class action judgments).

160. *See, e.g.,* Howells & James, *supra* note 7, at 48–55 (concerning consumer claims).

161. Hanotiau, *Groups of Companies*, *supra* note 43, at 287.

mechanisms such as the New York Convention¹⁶² and increasing acceptance of liberalizing legislation such as the United Nations Commission on International Trade Law's (UNCITRAL) Model Arbitral Law.¹⁶³ The scope of arbitrable issues has also expanded steadily over the years, suggesting that States now put more trust in arbitrators' ability to handle complex issues, including those that may affect social rights and interests.¹⁶⁴ Given the current climate, there may be an increased receptivity to new developments regarding the various forms of arbitration.

These observations suggest that a narrow view of arbitral policy that effectively elevates party autonomy over all other concerns in cases where the arbitration agreement is silent or ambiguous as to class treatment may not be well grounded. While the parties' preferences—both expressed and implied—should be respected, there is no policy reason to support a presumption in favor of denying class arbitration in cases of contractual silence or ambiguity. Indeed, the opposite position—that class arbitration may arise through implied, rather than merely express, consent—seems to be in far better alignment with current views in the field. Of course it is conceivable that arbitrators could take the view that class arbitration is or should be disfavored in all but the most compelling cases.¹⁶⁵ While this would require arbitrators as a group to operate consistently in a manner that is contrary to their own financial interests (something that those who are cynical about the objectivity of arbitration might doubt),¹⁶⁶ it is at least equally true that arbitrators in international commercial matters operate ethically and disinterestedly.

As persuasive as they are, the policy arguments supporting class arbitration are not so compelling so as to permit arbitrators to disregard party autonomy altogether. If the search for implied consent as a matter of law is too tortuous, then the task should be discarded and the strict

162. Park & Yanos, *supra* note 14, at 257.

163. See UNCITRAL MODEL LAW, *supra* note 19.

164. Donovan & Greenawalt, *supra* note 125, at 33; Herzfeld, *supra* note 60, at 326. The United States Supreme Court has stated that if there is any doubt as to the scope of arbitrable issues, they should be resolved in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985); HANOTIAU, *supra* note 98, ¶ 266; Rau, *supra* note 43, at 243–44; see also Geneva Chamber of Commerce and Industry, Case No. 193, Interim Award of 21 Oct. 2002, 24 ASA BULL. 61, ¶ 40 (2006) (noting interpretive principle of *in favorem arbitri*).

165. It is typically for the arbitrator rather than the court to decide whether to proceed as a class. See *supra* notes 31–32 and accompanying text.

166. Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 71 (2005); see also P. Christine Deruelle & Robert Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now—Part I*, METRO. CORP. COUNSEL, Aug. 2007, at 9 (claiming “[a]s of June 15, 2007, AAA arbitrators have rendered 51 Clause Construction Awards concerning otherwise silent arbitration agreements, and in all but two of those decisions, the arbitrators have allowed class wide proceedings”).

constructionists' views should prevail in cases of contractual silence or ambiguity.¹⁶⁷ Therefore it must be seen whether, as a matter of law, it is possible to justify a finding of implied consent in agreements that are silent or ambiguous as to class treatment through reliance on internationally acknowledged principles of contract construction.¹⁶⁸ This issue is covered in the following section.

III. LEGAL ISSUES THAT ARISE WHEN THE ARBITRATION AGREEMENT IS SILENT OR AMBIGUOUS AS TO CLASS TREATMENT

A. Distinguishing Types of Implied Consent in International Arbitration

Implied consent has long played a role in international commercial arbitration, although it has occasionally been referred to under other names.¹⁶⁹ When considering implied consent in class arbitration, one must be careful not to overgeneralize to other types of implied consent. For example, the doctrine that is developing in the class context is not the same as that used to justify binding non-signatories to an arbitration agreement.¹⁷⁰ In the context of non-signatories, implied consent is used to hold strangers to the arbitration agreement to its terms. Sometimes the rationale is based on contract principles, as in cases involving agency, assumption, and incorporation by reference, and sometimes the rationale is based on equitable principles, as in the cases involving alter ego, piercing the corporate veil, and estoppel.¹⁷¹

Although these cases can be used to suggest that implied consent is an appropriate device in arbitration, they are not entirely on point. For example, there is typically no need in class arbitration to substitute

167. Hanotiau, *Groups of Companies*, *supra* note 43, at 283 (“Whatever the stretch that one is ready to give to the concept of consent . . . , one should not forget that consent is the fundamental pillar of international arbitration.”).

168. Indeed, in so doing, the problem of arbitrator partiality is diminished, since an arbitrator who acts surreptitiously in his or her own financial interest must nevertheless demonstrate a facially neutral justification for proceeding on a classwide basis.

169. See, e.g., Hanotiau, *Groups of Companies*, *supra* note 43, at 287 (noting the “group of companies” doctrine is based on the concept of implied consent). The term “implied consent” was used explicitly in a recent international investment arbitration. *Noble Energy, Inc. v. The Republic of Ecuador (U.S.A. v. Ecuador)*, Prager DIGEST for Institute for Transnational Arbitration (ITA) (ICSID 2008), available at <http://www.kluwerarbitration.com>, ¶ 19 (noting “an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration . . . [e]ven though there is no express language to this effect in the dispute resolution clauses”).

170. See, e.g., *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (outlining means of obtaining arbitral jurisdiction over non-signatories in a U.S. proceeding).

171. See, e.g., *id.*

conduct or principles of estoppel for consent because all the parties to the class arbitration have signed arbitration agreements with the defendant.¹⁷² Instead, the situation with class arbitrations is more similar—but not identical—to the type of implied consent used in consolidation cases. In both instances, the “relevant question . . . is *what kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures *It concerns contract interpretation and arbitration procedures.*”¹⁷³

However, class arbitration and consolidated arbitration are not just similar in their emphasis on using implied consent to the type of procedure that is to be adopted when explicit consent does not exist. They also have certain structural similarities that have led courts and commentators to equate the two proceedings. For example, in class arbitration, claimants typically all have signed agreements with the defendant, but not with each other. This is similar to certain types of consolidated arbitration, particularly those involving “vertical string” contracts in which each party (say, in a construction arrangement) has a binding arbitration agreement with at least one other party, but not with all others.¹⁷⁴ Consortia arrangements are another type of business relationship that creates contractual arrangements that are similar to the agreements associated with class arbitrations, in that the general contractor in a consortium has a single agreement with the hiring entity and then a web of agreements with the other parties.¹⁷⁵ However, when courts and arbitrators look for implied consent in consolidation agreements, they are not just looking for consent to a particular type of proceeding—they also must determine

172. Should a situation arise where not all parties to a class arbitration have signed an arbitration agreement, then the established modes of finding substituted consent can be used, albeit with the understanding that special difficulties may arise as a result of the representative nature of class arbitration. On the one hand, it could be said to be improper to hold unnamed claimants to a private dispute resolution mechanism to which they have not agreed; on the other hand, it could be said that it is unfair to disallow class arbitration when it is the only real route to relief. *See* Lamm & Aqua, *supra* note 24, at 717–18 (discussing situations where the commonality of facts is the sole link between members of a class, noting it is “impossible” to obtain consent to arbitrate from all parties in such circumstances and concluding any “interpretation of the law to prohibit consolidation absent the agreement of all parties effectively bars the arbitration of class actions”).

173. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (Breyer, J.) (citations omitted) (emphasis added); *see also* *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (noting certain precedents “are instructive insofar as they view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties’ intent not to permit such proceedings”).

174. Hanotiau, *Multiparty Arbitration*, *supra* note 100, at 371; Platte, *supra* note 93, at 70, nn.18–22.

175. Nicklisch, *supra* note 92, at 59–60.

whether there is an acceptably direct line of contractual privity¹⁷⁶ to assuage fears about strangers to the contract participating in the arbitration.¹⁷⁷

Thus, reliance on precedents from the world of consolidated arbitration needs to be tempered in a class arbitration analysis so as to take into account factors that are unique to consolidation. For example, parties in a consolidated arbitration often have claims or counterclaims against several parties to the proceedings, even against those who are considered to be on their “own side.”¹⁷⁸ The existence of disputes among the claimant and/or defendant group in consolidated arbitration gives rise to concerns about both procedural fairness (in that parties are forced, for example, to choose an arbitrator despite their divergent interests)¹⁷⁹ and efficiency (in that the proceedings will become increasingly complex, with an ever-expanding range of costs, issues, and claims).¹⁸⁰

Critically, these issues do not present themselves in class arbitration in the same way that they do in consolidated arbitration. Class proceedings typically involve a much higher degree of factual and legal similarity than consolidated actions do, such that members of the class (or, in some of the more complex cases, each sub-class) are identically situated as to each other and the defendant, and typically do not have cross- or counterclaims against each other.¹⁸¹ This limits the likelihood

176. Schwartz, *supra* note 94, at 343; Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 609 (1990).

177. Concerns about “strangers” to an arbitration often relate to issues involving confidentiality. However, to the extent that the principle of confidentiality and privacy in arbitration still exists, it could be overcome through reliance on the public interest exception. *See supra* note 139; *infra* notes 330–339 and accompanying text; L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT’L 131, 131, 139 (1999) (describing instances wherein the principle of confidentiality may be breached); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006) (noting state and federal law fails to respect confidentiality in arbitration, at least in instances involving discovery or admissibility of evidence at trial).

178. In multi-party arbitration, parties may be teamed up into two “sides” for purposes of naming arbitrators. This has led to disapproval of consolidation in some quarters based, in part, on the fact that parties deemed to be on the same “side” may not have identical interests. *See infra* notes 326–327 and accompanying text.

179. *See id.*

180. *See supra* notes 130–136 and accompanying text.

181. Claimants in a class arbitration will also typically share factual arguments regarding liability, though their positions may vary somewhat when it comes to the calculation of individual damages. No factual differences should arise if the relief sought is declaratory or injunctive in nature, since a remedy as to one is the same as the remedy to the others. FED. R. CIV. P. 23(b)(2). This could provide the basis of an argument that it is wrong to perceive of class arbitration as a multi-party proceeding. Instead, class arbitration could be seen as a bilateral procedure, with the named claimant on one side and the defendant on the other. However, the difference is that the named class representative is permitted to deviate from the normal rules of standing to seek remedies that will benefit similarly situated persons who are not

that the kind of procedural unfairness that arises in consolidated arbitrations will occur in class arbitrations. Efficiency concerns are also eliminated, since all members of the class are pursuing identical legal claims.¹⁸² Furthermore, members of the class may opt out of the arbitration if they have a concern about any aspect of the proceedings, be it procedural unfairness, efficiency, or anything else.¹⁸³

As it turns out, it is typically the defendant who raises an objection to the inclusion of the additional parties in class arbitrations. However, the defendant usually does not do so on the grounds of inefficiency, since a class proceeding is far more efficient and less costly from a defendant's point of view than thousands of individual arbitrations.¹⁸⁴ Instead, defendants object to the form of the proceeding for tactical reasons.¹⁸⁵

Because class arbitrations are not entirely analogous with consolidated arbitrations, an independent investigation into whether implied consent can be used to overcome a presumption against class arbitration

parties to the proceeding *per se*. The question then is whether this approach would violate international public policy (since representative actions are disfavored in many jurisdictions). See *supra* note 157 and accompanying text. The answer might very well be "no," since objections based on public policy are construed narrowly and focus more on the risk of injustice to the parties than on derogations to rules on standing. This argument is particularly persuasive in cases where claimants seek declarative or injunctive relief, since the remedy as to one is the same as to all. The author is indebted to Frédéric Bachand for identifying this particular point.

182. To the extent that certain aspects of the case may vary between claimants—such as with the calculation of damages—the proceedings can be bifurcated.

183. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 6(b)(5); JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 4(5). The NAF Class Arbitration Procedures employ an opt-in, rather than opt-out, approach, but the principle regarding claimant consent to the proceeding is the same. NAF CLASS ARBITRATION PROCEDURES, *supra* note 30, proc. B(5)(a). Class members who are unhappy with any aspect of the proceedings—class counsel, class representatives, the arbitrator(s) or the procedure chosen—can always choose to proceed individually. Sternlight, *supra* note 3, at 87.

184. Defendants to class arbitration may have a legitimate objection to the manner in which the arbitrators are named, if one views the issue from a strict constructionist viewpoint. New York Convention, *supra* note 13, art. V(1)(d); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (Breyer, J.). However, the international arbitral community has discovered a variety of ways to protect the principle underlying the right of selection of an arbitrator in multi-party situations. See *infra* notes 342–344. It is considered below whether these interpretive methods extend equally to class arbitration, even in cases where the defendant argues that it has a contractual right to select a different arbitrator in each of a series of individual arbitrations. *Id.*; see also *Bazzle*, 539 U.S. at 450–51 (Breyer, J.).

185. See also *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 321 (2d Cir. 2009), *pet. for cert. filed* (08-1473) (May 29, 2009) (noting that the defendant planned to reconsider its motion to compel arbitration after the court held a class waiver unenforceable). Defendants prefer individual arbitrations because claimants are less likely to proceed individually, particularly in low-value claims. Of course, the New York Convention does not require a party to justify its claim that the letter of the arbitration agreement be upheld; instead, the presumption is that arbitrators will and should comply with the expressed, permissible wishes of the parties concerning matters of procedure. New York Convention, *supra* note 13, art. V(1)(d).

in situations where the arbitration agreement is silent or ambiguous is necessary. This issue will be discussed in the following section.

B. Implied Consent and Interpretive Rules in Class Arbitration

According to the United States Supreme Court, the quest for implied consent in class arbitration relates to “what kind of arbitration proceeding the parties agreed to,” which “concerns contract interpretation and arbitration procedures.”¹⁸⁶ In fact, the search for implied consent in class arbitration uses the same kind of analytical approach that is used when considering whether consolidation is proper in situations where the arbitration agreement is silent or ambiguous.¹⁸⁷

Although the bulk of this discussion focuses on implied consent, it is important to remember that arbitration is a contractual construct.¹⁸⁸ Therefore, explicit consent will prevail over any implied terms, and States will uphold party agreement regarding arbitral procedure so long as the parties have not violated fundamental principles of due process, public policy, or mandatory law.¹⁸⁹ Therefore, if the parties agree to class arbitration, that agreement should be respected by enforcing courts.

An arbitration agreement may also explicitly forbid class treatment, although the manner in which this prohibition is expressed can create problems.¹⁹⁰ Because corporate defendants strongly dislike class proceedings (both arbitral and judicial), some commentators believe that class arbitration will soon disappear as a result of potential corporate defendants’ revising their arbitration agreements to include explicit

186. *Bazze*, 539 U.S. at 452–53 (Breyer, J.).

187. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (noting that certain precedents “are instructive insofar as they view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties’ intent not to permit such proceedings”).

188. See Craig, *supra* note 97, at 8; Stipanowich, *supra* note 91, at 476.

189. MUSTILL & BOYD, *supra* note 50, at 283 (noting that parties can expressly agree upon a procedure, but recognition of an award resulting from those procedures might be withheld if “the term was so alien to English concepts of the nature of an arbitration as to transform a process which the contract referred to as arbitration . . . into something fundamentally different”); Lamm & Aqua, *supra* note 24, at 716. The author has argued elsewhere that class arbitrations seated in the United States will likely comply with international due process and public policy. See, e.g., Strong, *supra* note 10, at 64–75. Although it is outside the scope of this Article, it could be said that some claims—particularly those that are of small individual value—may only be remedied through class procedures, and that any such claims that are brought to arbitration must proceed as a class as a matter of mandatory law. See Sternlight, *supra* note 3, at 80–83, 100–05.

190. Although it is entirely possible that a court will uphold a waiver of class arbitration (along with a waiver of class action), parties may contest waivers on the grounds of unconscionability or other contractual defenses such as fraud or duress. Sternlight, *supra* note 3, at 105–08. Waivers of class treatment are hotly debated in both the courts and the scholarly literature, although they are outside the scope of this Article.

prohibitions on class proceedings.¹⁹¹ Although this sort of defensive action may decrease the number of class arbitrations that arise, it will not totally eliminate such proceedings for the following reasons:

- (1) Some defendants—particularly those from outside the United States—may still be unaware of the risk of class arbitration and thus will not take the necessary steps to avoid class proceedings;
- (2) Some national laws or institutional rules may allow class arbitration even over the objection of one or more of the parties; and
- (3) Courts may strike down attempted waivers of class arbitrations as unconscionable, thus allowing arbitrators to determine whether class treatment is warranted.¹⁹²

Furthermore, at least one commentator has suggested that corporate defendants might prefer to arbitrate class claims to avoid the extensive discovery and costs that are associated with judicial class actions.¹⁹³ Other commentators believe that to the extent defendants find themselves forced into class proceedings, they would prefer to be in state courts so that, among other things, they can appeal a decision on the merits.¹⁹⁴

Although some parties will explicitly consider the possibility of class arbitration, the more common situation is that an arbitration

191. *Id.* at 117–19. *But see* Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 303 n.21 (claiming that class arbitration is increasing).

192. *See, e.g., In re Am. Express Merchs. Litig.*, 554 F.3d 300, 310 n.7 (2d Cir. 2009), *pet. for cert. filed* (08-1473) (May 29, 2009) (citing evidence that class arbitration is on the rise). Explicit prohibitions on class arbitrations may be disallowed on the grounds of unconscionability. *See, e.g., Delta Funding Corp. v. Harris*, 912 A.2d 104, 123–24 (N.J. 2006) (Zazzali, J., concurring in part and dissenting in part) (describing circumstances in which a prohibition on class arbitration might be unconscionable). Unconscionability and class waivers are hotly debated subjects right now, although they are outside the scope of this Article. *See* Buckner, *Due Process*, *supra* note 30, at 230 (discussing problems associated with dual court-arbitrator competence to decide certain issues); Smit, *supra* note 9, at 201 (discussing legal status of waivers of class proceedings); Sternlight & Jensen, *supra* note 9, 75–76 (describing methods used by corporate defendants to avoid class arbitration); Weidemaier, *supra* note 2, at 81–86 (discussing how defendants seek to avoid class proceedings in court or in arbitration). If an arbitration agreement prohibits class arbitration, it is for the court—not the arbitrator—to decide whether that prohibition is valid. *In re Am. Express Merchs. Litig.*, 554 F.3d at 310–11, *pet. for cert. filed* (08-1473) (May 29, 2009); *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1287 (M.D. Ala. 2005).

193. Herzfeld, *supra* note 60, at 301. Alternatively, some corporate defendants may attempt to draft clauses that refer any class proceedings to the court, rather than to arbitration.

194. Drahozal & Wittrock, *supra* note 157.

agreement will be silent or ambiguous regarding multi-party treatment.¹⁹⁵ Contractual silence or ambiguity creates a dilemma for a system that finds itself on party autonomy. What default rules or presumptions should apply?¹⁹⁶ What rules of construction should be used? Can class arbitration be compelled absent explicit consent?¹⁹⁷ These questions are even more compelling in the international realm, since lack of an internationally recognized form of consent can lead to lack of enforcement under the New York Convention.¹⁹⁸ Although Gary Born has explicitly argued that the New York Convention's requirement of consent to a particular type of arbitration can be adequately met through implied consent,¹⁹⁹ the issue is a novel one in the context of class arbitration.

Implied consent can be found through several means.²⁰⁰ First, it can be gleaned from the parties' arbitration agreement, either through the scope of the language used in the arbitration agreement—which might be broad and/or contemplate other types of multi-party proceedings—or through extrinsic evidence of the parties' intentions and expectations.²⁰¹ This approach is consistent with the interpretive method used within the international arbitral community to handle so-called “pathological”

195. See HANOTIAU, *supra* note 98, ¶ 271 (discussing class arbitration); LEW ET AL., *supra* note 44, ¶ 16-51 (discussing consolidation); Joseph T. McLaughlin et al., *Recent Developments in Domestic and International Arbitration Involving Issues of Arbitrability, Consolidation of Claims and Discovery of Non-Parties*, in SM909 ALI-ABA 757, 763–64 (March 2007) (discussing consolidation); Rau & Sherman, *supra* note 91, at 115 (discussing consolidation).

196. Rau, *supra* note 43, at 221 (describing how default rules are chosen); see also *supra* note 118 (regarding choice of default rules).

197. See, e.g., FRICK, *supra* note 95, at 237; Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 312. Some courts and commentators have taken the view that permitting class arbitration in cases where the arbitration agreement is silent would result in “considerably less intrusion upon the contractual aspects of the relationship” than other alternatives. Sternlight, *supra* note 3, at 86–87; Buckner, *Pure Arbitral Paradigm*, *supra* note 6, at 315; see also *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277–78 (7th Cir. 1995) (Rovner, J., concurring).

198. New York Convention, *supra* note 13, art. V(1); see also LEW ET AL., *supra* note 44, ¶¶ 16-3 to 16-4, n.4; REDFERN & HUNTER, *supra* note 12, ¶ 3-82; Hanotiau, *Problems*, *supra* note 91, at 303 (discussing consent in the context of interrelated contracts).

199. BORN, *supra* note 15, at 695 (discussing consolidation).

200. See Lamm & Aqua, *supra* note 24, at 720 (describing the analytic approach to consolidation and joinder issues).

201. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting “the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (noting certain precedents “are instructive insofar as they view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties’ intent not to permit such proceedings”); *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. Can.*, 210 F.3d 771, 774 (7th Cir. 2000) (noting courts have no power to order consolidation if the contract does not authorize it, “[b]ut in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation”).

clauses (i.e., agreements that are silent or ambiguous as to certain important points of procedure, although clear as to the existence of a desire to arbitrate any disputes between the parties).²⁰² One of the fundamental interpretive principles in such cases is to “give full effect to the parties’ intention to refer their disputes to arbitration,” which would permit minor amendments to agreed procedures to give voice to the parties’ overriding desire to resolve the dispute through arbitration rather than litigation.²⁰³

Second, implied consent can be demonstrated through the parties’ choice of procedural rules and laws, some of which may include methods of dealing with multi-party situations. Such rules and laws may be chosen explicitly or may apply as default provisions in the absence of party choice.

Each of these two analytical approaches will be discussed in turn below.

1. The Arbitration Agreement

Arbitrators are well within their powers and capabilities when they construe silent or ambiguous arbitration agreements,²⁰⁴ typically through

202. See GAILLARD & SAVAGE, *supra* note 44, ¶ 476 (describing three basic principles of interpretation in international commercial arbitration). Further discussion can be found in Klaus Peter Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*, 17 *ARB. INT’L* 1, 17 (2001) (concluding “there is good hope that doctrine, courts and arbitral tribunals alike will finally accept the international arbitrators’ power to fill gaps and revise contracts”).

203. GAILLARD & SAVAGE, *supra* note 44, ¶ 483. Alan Scott Rau has also posited an interesting theory of consent and interpretation involving concentric circles radiating out from the core concerns regarding consent. Rau, *supra* note 43, at 203. He argues that while strict construction may make sense with respect to core issues such as whether the parties agreed to arbitrate their disputes, it makes less sense the farther one moves from such fundamental questions. *Id.* at 203, 258. Instead, the farther away one is from the core issues, the more freedom and deference one should give to arbitrators’ decisions regarding their jurisdiction and the type of procedure that should be followed. *Id.* This approach appears to have been adopted by Germany in its new arbitration law. KARL-HEINZ BOCKSTIEGEL ET AL., *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 287 (2008) (noting that “[i]n contrast to the arbitration agreement . . . , the stipulation of procedural rules by the parties is not subject to a mandatory form requirement; accordingly, oral agreements or agreements by implied consent . . . are possible”).

204. *Dealer Comp. Serv., Inc. v. DUB Herring Ford*, 489 F. Supp. 2d 772, 781 (E.D. Mich. 2007); *Markel Int’l Ins. Co. v. Westchester Fire Ins. Co.*, 442 F. Supp. 2d 200, 203 (D.N.J. 2006). As discussed previously, U.S. courts have said that arbitrators are competent to decide these issues, so long as the parties have demonstrated the intent to give the issue to the arbitrator. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003) (plurality opinion); *Stolt-Nielsen*, 548 F.3d at 100, *cert. granted*, 77 U.S.L.W. 3678 (2009); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576–81 (7th Cir. 2006); *Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003). In the United States, that question is often presumed to have been granted to the arbitrator. Rau, *supra* note 43, at 225.

the application of normal principles of contract construction.²⁰⁵ When considering whether the arbitration agreement permits a class proceeding, the arbitrator takes a number of issues into account, such as whether the agreement contemplated the possibility of other sorts of multi-party proceedings and whether any applicable national laws or institutional rules permit class or consolidated proceedings.²⁰⁶ The language of the arbitration agreement itself can also be indicative. For example, broadly inclusive language requiring the arbitration of all “related disputes” can result in a determination that class arbitration falls within the scope of an arbitration agreement that is otherwise silent or ambiguous on the matter.²⁰⁷ In some cases, extrinsic evidence regarding party intention or expectation—as demonstrated by a prior course of dealing or by industry custom and practice—may be permitted to help identify whether the parties can be considered to have contemplated or agreed to class proceedings.²⁰⁸

In some instances, the arbitrator will need to do no more than consider the arbitration agreement. In other cases, however, arbitrators will also need to consider the arbitration agreement in light of the applicable national laws. The most important aspect of the national laws will be those bearing on consolidated arbitrations and—if available—class arbitration.

2. National Laws

Identifying the appropriate national laws can be a complicated matter in arbitration. Relevant laws can be implicated explicitly, through contractual provisions regarding choice of law, or implicitly, through provisions regarding the arbitral seat.²⁰⁹ Because the procedural law of

205. The precise principles used will depend on the jurisdiction whose law governs the issue. *See, e.g., Stolt-Nielsen*, 548 F.3d at 99, *cert. granted*, 77 U.S.L.W. 3678 (2009) (describing rules of construction in New York).

206. *See Platte*, *supra* note 93, nn.15–16 (suggesting similar procedure in cases involving consolidation).

207. LEW ET AL., *supra* note 44, ¶ 16-52; *see also Bazzle*, 539 U.S. at 451–52 (plurality opinion) (noting a broad arbitration clause indicates an arbitrator is to decide whether class arbitration is indicated); *Pedcor*, 343 F.3d at 359 (same).

208. *See, e.g., Stolt-Nielsen*, 548 F.3d at 97–98, *cert. granted*, 77 U.S.L.W. 3678 (2009) (discussing industry custom in international maritime arbitration); *Markel Int'l*, 442 F. Supp. 2d at 205–06 (holding that the court could not consider prior course of dealing, since the matter should be decided by the arbitrator); *Yuen v. Superior Court*, 18 Cal. Rptr 3d 127, 132 (Cal. Ct. App. 2004).

209. Although parties may select the procedural law of a State other than the seat of the arbitration, the law of the seat always retains some role in the proceedings. *See Union of India v. McDonnell Douglas Corp.*, [1993] 2 Lloyd's Rep. 48, 50–51 (Eng.) (distinguishing between “internal” and “external” issues of procedural law); REDFERN & HUNTER, *supra* note 12, ¶ 2-11. Questions involving choice of governing law can become quite complex and are beyond the scope of this Article. However, there is at least one way in which choice of law principles

the seat always retains at least some residual role in an arbitration and cannot be entirely eliminated from consideration even by the choice of another State's procedural law, U.S. law will always apply to an arbitration seated in the United States, at least to some degree.²¹⁰

When considering national laws, arbitrators must take into account the relevant statutory scheme, in addition to any relevant judicial interpretations of that scheme.²¹¹ Furthermore, arbitrators need to know whether a particular principle of law is considered mandatory or is simply a default rule, since no derogations from the former are permitted.²¹² Parties need to exercise caution when relying on national default rules, since those rules will be applied in appropriate circumstances regardless of the extent to which the default provision deviates from expected norms.²¹³ Although the primary emphasis is of course on procedural law,

can simplify the analysis of arbitration agreements that are silent or ambiguous as to class treatment. For example, if the arbitration agreement points strongly to seating the proceeding in a jurisdiction (such as the U.S.) that recognizes arbitrators' authority to order classwide proceedings, then the parties may be said to have implicitly consented to classwide proceedings. By agreeing to arbitrate their disputes in that jurisdiction, they can be said to have chosen all of that State's rules governing arbitration, even in cases where the parties did not subjectively expect to be bound by those rules. *See, e.g., infra* note 213 (regarding an unusual default provision in The Netherlands Arbitration Act). Although these types of provisions might be considered "penalty default rules" (in that they adopt a position different than that expected under "majoritarian default rules"), they are a legitimate tool in a legislator's or contracting party's toolbox. *See supra* note 118 (regarding default mechanisms).

210. The question of whether state or federal law applies to any particular procedural or substantive element of an international commercial arbitration is much debated and beyond the scope of this Article. The issue is particularly thorny in matters involving class arbitration. *See, e.g., Gay v. CreditForm*, 511 F.3d 369, 393–94, n.18 (3d Cir. 2007) (construing Pennsylvania state law to be preempted by the FAA); *Litman v. Cellco P'ship*, No. 07-CV-4886, 2008 WL 4507573 (D.N.J. Sept. 29, 2008) (holding that the FAA preempts a New Jersey state rule against class waivers in arbitration agreements); *Cable Connection, Inc. v. DIRECTV, Inc.*, 90 P.3d 586, 599 (Cal. 2008) (concluding, *inter alia*, that the FAA was not controlling in a state appellate review of an arbitration award the under California Arbitration Act). For more on this subject, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004) [hereinafter Drahozal, *Federal Arbitration*].

211. Although civil law lawyers do not rely heavily on judicial precedent as a general rule, international commercial arbitration is one area where an exception may be made, at least among French courts and practitioners. *See GAILLARD & SAVAGE, supra* note 44, ¶ 151 (stating "French international arbitration law is thus currently drawn from two sources: a brief, liberal Code of Civil Procedure, and well-established case law that is generally able to overcome the Code's shortcomings . . . and to deal with difficulties of interpretation which may yet arise").

212. Donovan & Greenawalt, *supra* note 125, ¶ 1-4.

213. Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law*, 15 AM. REV. INT'L ARB. 133, 140 n.41 (2004) (citing Sigvard Jarvin, *Issues Relating to Consolidation*, in MULTI-PARTY ARBITRATION: VIEWS FROM INTERNATIONAL ARBITRATION SPECIALISTS 201, 202 (ICC ed., 1991)); see also Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View*, 21 J. INT'L ARB. 413, 416–19, 428 (2004) (noting that by choosing to arbitrate in the Netherlands,

some attention must also be paid to any relevant substantive law, in case it contains provisions that can explicitly or implicitly be said to permit or require class or group proceedings.²¹⁴

National laws can operate in tandem with the principle of effective interpretation to permit slight deviations from party-agreed procedure so as to give full effect to the overriding desire to arbitrate disputes.²¹⁵ Thus, for example, “if the arbitration law of the place of arbitration provides for consolidation, consolidation ordered by a court of that jurisdiction is likely to prevail over the parties’ agreed method for appointing arbitrators and conducting arbitral proceedings,” at least so long as the parties chose the location of arbitration.²¹⁶

Currently, there are no known U.S. state or federal statutes that provide explicit guidelines on how or when a class arbitration is to proceed.²¹⁷ However, a number of U.S. states have recently enacted legislation concerning the consolidation of arbitration, even though the FAA

parties are deemed to have chosen the default consolidation provision unless they choose otherwise). Statutes that deviate dramatically from expected norms can create problems, particularly in international transactions. For example, Klaus Peter Berger has criticized the consolidation provision of The Netherlands Arbitration Act, even though the Act gives the parties the opportunity to contract out of the State’s default provision, because “the parties, coming from different jurisdictions and negotiating under heavy time pressure, will usually not be aware of the consolidation provision of the new Act, let alone the possibility to opt out.” See Cate, *supra*, at 140 n.41 (quoting KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 301 (1993)). There is some debate as to “the degree to which default rules can be justified on the basis of consent by the parties,” Drahozal, *Federal Arbitration*, *supra* note 210, at 414, but a detailed inquiry into that subject is beyond the scope of this discussion. This Article takes the view that the parties are bound to any default rules that appear in the national law deemed applicable by the arbitrator, if the parties have not addressed the issue themselves.

214. See, e.g., *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 311–20 (2d Cir. 2009), *pet. for cert. filed* (08-1473) (May 29, 2009) (regarding federal antitrust claims in context of other sorts of class proceedings); Sternlight, *supra* note 3, at 13–14, 63–65, 80–83 (discussing, *inter alia*, Truth in Lending Act claims).

215. GAILLARD & SAVAGE, *supra* note 44, ¶ 478; see also *supra* note 145 (describing the principle of effective interpretation).

216. Leboulanger, *supra* note 91, at 68–69.

217. To date, only three state statutes seem to contemplate class arbitration. D.C. CODE § 16-4410 (2008) (noting that “that nothing in this part is intended to prevent a party’s participation in a class action lawsuit or arbitration”); OKLA. STAT. tit. 12, § 1880 (2008) (stating that clauses that deny “the ability to consolidate arbitrations or to have arbitration for a class of persons involving substantially similar issues . . . shall be closely reviewed for unconscionability”); UTAH CODE ANN. § 31A-22-305 (West 2008) (noting arbitrators in uninsured motorist cases may not proceed on a class basis). There are calls to amend the FAA to include provisions requiring consumer, employment and franchise disputes to proceed in court, which would limit the types of class arbitrations that could arise in the future. See, e.g., Arbitration Fairness Act, H.R. 2010, 111st Cong. (2009). In the meantime, at least one commentator has claimed that because “nothing in the FAA prohibits class arbitration . . . , it is allowed unless clearly forbidden by the arbitration agreement applying governing state law.” Thomas J. Oehmke, *Cause of Action for Class Arbitration of Contract-Based Disputes*, 28 CAUSES OF ACTION 2d § 10 (2008).

is silent on the issue.²¹⁸ This increase in legislative consideration of consolidation is also reflected outside the United States, although the majority of nations still take the view that consolidation may be ordered only with the consent of both parties.²¹⁹

The recent legislative changes in individual U.S. states are of particular importance for this Article because the interpretation of arbitration agreements is typically a matter of state law in the United States.²²⁰ As will be discussed, any statutory shift toward approval of consolidation can by extension be construed as a shift toward approval of class arbitration.²²¹ This is true even if the statutes in question (which were drafted pre-*Bazzle*)²²² give courts—rather than arbitrators—the right to consolidate proceedings, since courts’ (but not arbitrators’) ability to consolidate arbitrations was traditionally suspect under the “lack of power” argument.²²³ The fact that a number of states are now willing to give this power even to judges demonstrates the growing legitimization of multi-party arbitration. However, further adoption of such provisions is not anticipated, since *Bazzle* and similar cases make it unlikely that U.S. states will need to continue to adopt provisions giving courts the power to consolidate arbitration, given that arbitrators now have the

218. Lamm & Aqua, *supra* note 24, at 721; Scanlon, *supra* note 50, nn.36–53; *see infra* notes 225–235 and accompanying text.

219. LEW ET AL., *supra* note 44, ¶¶ 16-66 to 16-68 (citing section 35 of the English Arbitration Act 1996 as an example); REDFERN & HUNTER, *supra* note 12, ¶¶ 3-82 to 3-85; Peter Yuen, *Arbitration Clauses in a Chinese Context*, 24 J. INT’L ARB. 581, 590 (2007). The broadest grant of discretion concerning consolidation appears to exist in Australia, which permits consolidation on the application of a single party on terms that would also appear to permit class proceedings. International Arbitration Act 1974 § 24 (Austl.). Other pro-consolidation jurisdictions include Hong Kong, The Netherlands, and New Zealand. Arbitration Ordinance (2000) (H.K.) art. 6B, 2L, 2M; Arbitration Act 1986 (Neth.) art. 1046; Arbitration Act 1996 (New Zealand) arts. 6–7 & sch. 2; Cate, *supra* note 213, at 149, n.49; Hoellering, *supra* note 94, at 44; Tomás Kennedy-Grant, *New Zealand*, XXII Y.B. COM. ARB. 575, 578 (1997); Samuel, *supra* note 212, at 427; Walter Sterling Surrey & Nancy J. Kellner, *International Arbitration in Hong Kong Law*, 406 PLI/COM. 173, 183–84 (1986).

220. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (Stevens, J., concurring); *Harvard Award*, *supra* note 8, at 164. *But see Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 97–99 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009) (considering the extent to which federal maritime law will affect contract interpretation); Oehmke, *supra* note 217, § 7 (noting “application of state law in determining the permissibility of class arbitration must harmonize with the preemptive effect of the FAA”).

221. Although it is true that many U.S. state statutes remain silent on the issue of consolidation, this nevertheless leaves the door for arbitrators to find implied consent through other means.

222. *Bazzle*, 539 U.S. 444 (plurality opinion).

223. *See supra* notes 31–48 and accompanying text.

power to decide whether both class and consolidated proceedings are appropriate.²²⁴

Earlier, this Article noted that class arbitration and consolidation differ in several significant ways.²²⁵ This distinction was made to avoid improper blanket analogies being drawn between the two types of procedures, although it was stated that some parallels might be appropriate. For example, it would appear permissible for arbitrators to look to statutes increasing the availability of consolidation when considering the propriety of class arbitration in situations where the agreement is silent or ambiguous as to class treatment, since both deal with the availability of multi-party arbitration. Furthermore, the expansion of a less socially beneficial arbitral device (i.e., consolidation) suggests the propriety of an equally liberal attitude toward a more socially beneficial arbitral device (i.e., class procedures).²²⁶ This is particularly true in circumstances where the statutes give the power of consolidation to judges, a less jurisprudentially sound approach than the grant to arbitrators of the power to order class arbitration.

To date, six state statutes appear to require unanimous consent among the parties to consolidation,²²⁷ which will, for reasons discussed below, limit some arguments in those jurisdictions that class arbitration is permitted over the objection of a party. However, other U.S. states allow a court to consolidate arbitrations on the request of a single party, unless the parties have agreed otherwise, effectively creating a default rule in favor of consolidation.²²⁸ The shift is primarily the result of the

224. *Bazze*, 539 U.S. 444; *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 588–89 (3d Cir. 2007); *Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003).

225. *See supra* notes 90–116 and accompanying text.

226. *See supra* notes 116–166 and accompanying text (regarding the social benefit of class arbitration).

227. *See, e.g.*, CAL. CIV. PROC. CODE § 1297.272 (West 2008) (permitting consolidation when the court deems it “just and necessary” in international commercial arbitrations); FLA. STAT. § 684.12 (2008) (permitting consolidation when it “will serve the interests of justice and the expeditious resolution of the disputes”); N.C. GEN. STAT. ANN. § 1-567.57 (West 2008) (concerning international commercial arbitration; permitting consolidation when the court deems it “just and necessary”); OHIO REV. CODE ANN. § 2712.52 (West 2008) (permitting consolidation when the court deems it “just and necessary”); OR. REV. STAT. ANN. § 36.506 (West 2008) (permitting consolidation when the court deems it “just and necessary”); TEX. CIV. PRAC. & REM. CODE ANN. § 172.173 (West 2008) (permitting consolidation in international commercial arbitrations when the court deems it “just and necessary”); *see also* LEW ET AL., *supra* note 44, ¶¶ 16-67 to 16-73 (discussing English, U.S., Australian, Dutch, Hong Kong, and Swiss provisions); Cate, *supra* note 213, at 140, n.49; Richard Jeydel, *Consolidation, Joinder and Class Actions*, 57 DISP. RES. J. 24, 24 (2002); Leboulanger, *supra* note 91, at 58; Shamoon & Cate, *supra* note 91, at 351–57.

228. *See* GA. CODE ANN. § 9-9-6 (West 2008) (requiring the same or related transactions and common issues of law or fact that would create “the possibility of conflicting rulings,” but granting such powers “unless the parties agree otherwise”).

U.S. Revised Uniform Arbitration Act 2000 (RUAA),²²⁹ which has been adopted in eleven states and the District of Columbia.²³⁰ The language used in the RUAA and in the various jurisdictions adopting it is expansive with respect to the ability to consolidate arbitrations, stating:

- (a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:
 - (1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
 - (2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
 - (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
 - (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.
- (b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

229. National Conference of Commissioners on State Law, Uniform Arbitration Act (Final Act 2000, § 10(a)), available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#uaa> (last visited June 30, 2009) [hereinafter RUAA]. Consolidation under the RUAA appears to be a “‘procedural issue’ unlikely to be preempted by the FAA.” Drahozal, *Federal Arbitration*, *supra* note 210, at 422.

230. ALASKA STAT. § 09.43.370 (2008); COLO. REV. STAT. § 13-22-210 (2008); D.C. CODE § 16-4410 (noting that “that nothing in this section is intended to prevent a party’s participation in a class action lawsuit or arbitration,” suggesting that class arbitration is legislatively contemplated); HAW. REV. STAT. 658A-10 (2008); NEV. REV. STAT. § 38.224 (West 2008); N.J. STAT. ANN. 2A:23B-10 (West 2008); N.M. STAT. ANN. § 44-7A-11 (West 2008); N.C. GEN. STAT. ANN. § 1-569-10 (West 2008) (relating only to domestic arbitrations, in that international commercial arbitrations seated in North Carolina are covered by N.C. GEN. STAT. ANN. § 1-567-57 (West 2008), which does not require consent); N.D. CENT. CODE § 32-29.3-10 (2008); OKLA. STAT. tit. 12, § 1861 (2008); UTAH CODE ANN. § 78B-11-111 (West 2008); WASH. REV. CODE § 7.04A.100 (West 2008); Uniform Law Commissioners, A Few Facts About the Uniform Arbitration Act (2000), available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited June 24, 2009).

- (c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.²³¹

Thus, under the RUAA, arbitration agreements that are silent or ambiguous as to consolidation can be construed to permit such proceedings.²³² Furthermore, courts construing the RUAA can give parties the right “to prove that consolidation would undermine their stated expectations, especially regarding arbitrator selection procedures,” and to weigh potential prejudice (such as undue delay or other hardships) to parties if consolidation is or is not ordered, which provides objecting parties with an opportunity to make a wide variety of arguments as to why multi-party proceedings should not be adopted.²³³ Notably, these types of considerations are the same as those that arbitrators consider when deciding whether class arbitration is permitted as a matter of contract construction and whether class proceedings are appropriate under the circumstances at hand.²³⁴ Thus the liberalization of consolidation seems to parallel the development of class arbitration, and vice versa.

Two U.S. jurisdictions go even further than the standards enunciated in the RUAA. Massachusetts takes the unusual approach of permitting judicial consolidation of arbitrations, even when the language in the arbitration agreement explicitly bars consolidation and even when the language in the arbitration agreement attempts to divest the court of its power to order judicial consolidation.²³⁵ Guam also grants the courts broad powers to order consolidation, even if the arbitration agreements are in some ways inconsistent, so long as the disputes are from the same or related transactions and there are common issues of law or fact that could lead to inconsistent rulings.²³⁶

231. RUAA, *supra* note 229, art. 10.

232. *Id.*, art. 10(c). *But see id.* § 10 cmts. 1-5 (claiming section 10 of the RUAA “is not intended to address the issue as to the *validity* of arbitration clauses in the context of class-wide disputes”) (emphasis added). Of course, questions of validity of an arbitration agreement are different from questions of scope.

233. *Id.* § 10 cmts. 1–5.

234. AAA SUPPLEMENTARY RULES, *supra* note 30, Rs. 3–4; JAMS CLASS ARBITRATION RULES, *supra* note 30, Rs. 2–3.

235. MASS. GEN. LAWS ch. 251, § 2A (West 2008) (permitting consolidation if the agreements have the same method of appointing arbitrators and noting “[n]o provision in any arbitration agreement shall bar or prevent action by the court under this section”).

236. GUAM CODE ANN. tit. 7, § 42A203 (2008). The Guam statute appears identical to California’s domestic arbitration statute, which also permits consolidation over the objection of a party. CAL. CIV. PROC. CODE § 1281.3 (West 2008); *cf. id.* § 1297.272 (West 2008) (regarding international commercial arbitration).

The recent legislative activity suggests a significant shift in U.S. jurisprudence over the last ten years.²³⁷ The RUAA creates a presumption in favor of consolidation in situations where the parties have not explicitly addressed multi-party arbitration. In Georgia and the twelve RUAA jurisdictions—and certainly in Massachusetts and Guam—an arbitration agreement that is silent on group treatment will support such treatment if the necessary elements exist. Although the legislation grants powers to courts, rather than arbitrators, and deals with consolidations, rather than class arbitrations, the presumption in favor of consolidating arbitrations also benefits proponents of class arbitration, since there are fewer policy reasons to restrict the incidence of class arbitrations than there are with respect to consolidated arbitrations.²³⁸ Furthermore, the fact that an arbitrator's ruling is supported by legislation that establishes a default position in favor of group treatment in cases where the arbitration agreement is silent or ambiguous adds legitimacy to a class award when it comes time to seek international enforcement.

Despite the above, over thirty U.S. state statutes remain silent on the question of arbitral consolidation. What rule should be applied in these jurisdictions?²³⁹

At one time, it was not uncommon for a U.S. court to order consolidation on the application of one of the parties, even in the absence of any enabling legislation.²⁴⁰ That trend reversed as courts began adopting the view that they lacked the authority to consolidate arbitrations absent party consent (express or implied), and a split in both federal and state authority arose.²⁴¹

237. See S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 10 VAND. J. TRANSNAT'L L. 915, 936–40 (1998) (discussing availability of consolidation in 1998).

238. See *supra* notes 116–166 and accompanying text.

239. Some of the following arguments can also be made in the six states that require unanimous consent among the parties prior to judicial consolidation, although the moving party will have to address the fact that the state legislature has taken a restrictive view of mandatory multi-party proceedings, at least when the decision to consolidate is to be made by a court. See *supra* note 227.

240. McLaughlin et al., *supra* note 195, at 767–68 (describing split in approach in U.S. states without statutory consolidation provisions); Platte, *supra* note 93, n.17. For a summary of U.S. state and federal jurisprudence, see BORN, *supra* note 15, 695–700.

241. See Cate, *supra* note 213, at 150–51; Hoellering, *supra* note 94, at 44–45; Lamm & Aqua, *supra* note 24, at 716–17 (listing cases and noting split regarding propriety of consolidation); Lecuyer-Thieffry & Thieffry, *supra* note 176, at 609–09 n. 168; McLaughlin et al., *supra* note 195, at 764 (noting federal circuits are split on the propriety of court-ordered consolidation, with a substantial majority holding that it is improper). The Seventh Circuit seems to be the exception to the rule, and instead appears to have recently adopted a form of implied consent to arbitration. *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. Can.*, 210 F.3d 771 (7th Cir. 2000) (noting that “the court has no power to order such consolidation if the parties’ contract does not authorize it. But in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation, just as courts do in interpreting other

Much of this earlier jurisprudence may no longer be applicable, for two reasons. First, some of the older case law arose in jurisdictions that had no legislative default provision permitting consolidation in situations where the arbitration agreement was silent. The recent pro-consolidation provisions will supersede the older common law rules in those jurisdictions that have enacted relevant legislation and provide a basis for parties to argue that the trend is moving away from a restrictive view of multi-party arbitration. Second, a growing number of courts have ruled that the arbitrator, rather than the court, should decide the question of consolidation.²⁴² Thus, the older precedents on consolidation may no longer be controlling or even persuasive, even in consolidation decisions, since they rely on the now discredited “lack of judicial power” argument.²⁴³

Therefore, jurisdictions that have not enacted legislation on the consolidation of arbitration should consider questions about implied consent to class arbitration as open. In these jurisdictions, arbitrators who are asked to construe whether arbitration agreements that are silent or ambiguous can support class treatment should rely on basic principles of contract construction, as is the norm in international arbitration.²⁴⁴ In so doing, arbitrators should keep the principle of effective interpretation firmly in mind, as well as the public policies in favor of class treatment.²⁴⁵ Such an approach will likely lead to results that are consistent with those from states that have consolidation statutes.²⁴⁶ Furthermore,

provisions in an arbitration clause” and concluding that “textual and practical considerations” weighed in favor of consolidation in the case at bar). *But see* *Rolls-Royce Indus. Power, Inc. v. Zurn EPC Servs., Inc.*, No. 01.C.5608, 2001 WL 1397881 (N.D. Ill. Nov. 07, 2001) (distinguishing *Connecticut General* on the grounds that that case “involved a single agreement whereas this case and the other circuit court cases cited above involved multiple agreements. Petitioner has cited to no case—and we have found none—holding that the parties impliedly consented to consolidated arbitration where there were two separate arbitration agreements with different parties signing each agreement”).

242. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003) (plurality opinion); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3678 (2009); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576–81 (7th Cir. 2006); *Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003); *Shaw’s Supermarkets Inc. v. United Food & Commercial Workers Union, Local 791*, 321 F.3d 251 (1st Cir. 2003); *McLaughlin et al.*, *supra* note 195, at 764.

243. *See supra* notes 31–48 and accompanying text.

244. *See supra* notes 186–203 and accompanying text.

245. *See supra* note 145 and accompanying text.

246. Although consistency between different jurisdictions is not a goal of U.S. law or arbitral practice, confusion and unpredictability in arbitral law can injure international commerce and lead to foreign parties’ refusal or disinclination to conduct business with U.S. parties or permit arbitrations to proceed on U.S. soil. *See infra* notes 255–260 (regarding possible anti-U.S. sentiment in international arbitration if a doctrine of implied consent is improperly developed). Therefore, courts and arbitrators should be aware of the larger ramifications of their individual decisions. *See* Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT’L ECON. L. 1297, 1379–80 (2004) (arguing that those involved in

even if an arbitrator cannot take advantage of any legislative default provisions to help guide his or her analysis in one direction or another, he or she can consider the extent to which pro-consolidation legislation is on the rise, both in the U.S. and elsewhere, since evidence that the law on consolidation is undergoing a liberalizing trend would suggest that class arbitration could be well received internationally.²⁴⁷

3. Arbitral Rules

Parties may choose to have the rules of an arbitral institution apply to their proceedings by adopting those rules in their arbitration agreement.²⁴⁸ If any such rules apply, their provisions are incorporated into the arbitration agreement and the parties are said to have demonstrated implied consent to the terms of the rules. Thus, an arbitrator who is asked to decide whether an arbitration agreement supports class treatment must consider the provisions contained in any arbitral rules that have been adopted by the parties.

a. Specialized Rules on Class Arbitration

At this point in time, three different arbitral institutions have published rules outlining how class arbitrations are to proceed.²⁴⁹ Although each of the three rule sets describes how the arbitrator is to determine the secondary issue of whether the claim in question should proceed as a class,²⁵⁰ none of the rule sets indicates how the arbitrator is to construe the arbitration clause to determine whether the agreement supports class treatment, other than to say that the existence of the specialized rules should not be used as evidence that the parties consented to class arbitration.²⁵¹ Since this Article focuses on the question of how an agreement

transnational dispute resolution should be aware of the international ramifications of their decisions).

247. Arbitrators must always take care regarding new developments in arbitral law and procedure, since some commentators have argued that arbitrators have a duty to produce an enforceable award. Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. INT'L ARB. 135, 135 (2001); Platte, *supra* note 93, at 307.

248. *C&L Enter., Inc., v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 419 n.1 (2001); *Lockman v. J.K. Harris & Co.*, No. 3:06-CV-258-H, 2007 WL 734951, at *2 (W.D. Ky. 2007).

249. AAA SUPPLEMENTARY RULES, *supra* note 30; JAMS CLASS ARBITRATION RULES, *supra* note 30; NAF CLASS ARBITRATION PROCEDURES, *supra* note 30.

250. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 4; JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 3; NAF CLASS ARBITRATION PROCEDURES, *supra* note 30, proc. A.

251. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 3; JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 2; NAF CLASS ARBITRATION PROCEDURES, *supra* note 30, preface. The NAF Class Arbitration Procedures have been construed to disallow consolidation over the objection of a party and thus, by extension, class arbitration over the objection of a party. *Lockman*, 2007 WL 734951, at *2, n.1; *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d

that is silent or ambiguous as to class treatment is to be construed, it would initially appear as if the specialized rules on class arbitration are irrelevant to this discussion.

However, two of the rule sets contain triggering mechanisms that can have some impact on the subject of this Article. Both provisions require the application of the specialized rule sets even in situations where the parties have not necessarily contemplated the possibility of class arbitration. For example, Rule 1(1) of the American Arbitration Association (AAA) Supplementary Rules states:

These Supplementary Rules . . . shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association . . . where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules.²⁵²

The JAMS Class Arbitration Rules contain a similar provision.²⁵³

In some ways, this language appears to uphold the autonomy of parties by only applying the specialty rules to those who have been deemed to accept them through their adoption of that arbitral institution's non-class arbitration rules. However, these provisions apply the concept of implied consent to allow retroactive application of the specialty rules to parties who never contemplated class arbitration.²⁵⁴ This could come as a surprise to some parties, many of whom would not expect to have subjected themselves to a mode of dispute resolution that was not even in existence when they signed their arbitration agreements or that does not have a ready analogue in many national judicial systems. It also places a significant burden on parties who want to protect themselves against the possibility of class arbitration under one of these rule sets to research older contracts to find out whether they utilized one of JAMS or the AAA's many rules of arbitration at any point in the past.²⁵⁵

1304, 1317 n.23 (M.D. Ala. 2004) (construing Rule 19(a) of the National Arbitration Forum's Code of Procedure).

252. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 1(1).

253. JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 1(a).

254. For example, if parties included a AAA arbitration clause in a contract dating back to the 1970s or 1980s, they still will be held to have agreed to class arbitration under the AAA Supplementary Rules if they have not subsequently updated their agreement to indicate otherwise. Although it is considered a "best practice" to review and update old arbitration agreements to take into account any changes in law or circumstance, few parties actively do so.

255. Since its inception in 1926, the AAA has promulgated a large number of rules for arbitration, ranging from commercial arbitration rules (including large, complex commercial disputes) and international arbitration rules to commercial finance arbitration rules, construction arbitration rules, energy arbitration rules, employment arbitration rules, healthcare

This aspect of the AAA Supplementary Rules and the JAMS Class Arbitration Rules raises one of the major pitfalls associated with implied consent: the potential for surprise to the parties. Opponents to non-consensual class arbitration will note—correctly—that international commercial arbitration developed as a means of allowing businesses to structure their dispute resolution processes in an orderly manner precisely so that they could avoid surprise.²⁵⁶ Broad and indiscriminate development of a doctrine of implied consent or an interpretive rule permitting class arbitration as a default presumption could result in surprise to the parties and diminish parties' and States' belief in and support of arbitration as a reliable, predictable, and party-controlled dispute resolution mechanism. While widespread abandonment of arbitration may be unlikely in the international realm—since the difficulties associated with international enforcement of civil judgments and concern about the bias of state courts make parties unwilling to resort to judicial means of dispute resolution—those who support putting class arbitration on an equal standing with bilateral arbitration still must be cautious about how class arbitration develops.

Furthermore, problems can arise if implied consent and any related interpretive rules are used inconsistently in different jurisdictions. One of the primary motivating factors behind recent efforts to standardize international arbitral norms has been to increase parties' ability to predict how their disputes might be decided, regardless of where the arbitration is seated or where enforcement is sought.²⁵⁷ Research suggests that those nations that conform to international standards experience an increase both in international commerce and the incidence of arbitrations seated in the jurisdiction.²⁵⁸ Encouraging or permitting the development of procedures that deviate significantly from established international norms could have the opposite effect.

For example, parties from nations that adopt a broad doctrine of implied consent or that use interpretive rules that do not conform to international practice could find it increasingly difficult or expensive to

arbitration rules, consumer arbitration rules and so on. See AAA, <http://www.adr.org/sp.asp?id=28751> (last visited June 24, 2009). JAMS offers fewer options but is nevertheless active in several different fields of law. See JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (2007), available at <http://www.jamsadr.com/rules/comprehensive.asp> (last visited June 24, 2009). It is impossible to know how many parties have adopted one of the AAA or JAMS arbitration rules over the last eighty-plus years, but the number is vast, particularly given that the AAA has recently claimed that it is “the largest international commercial arbitral institution in the world.” Drahozal, *New Experiences*, *supra* note 6, at 233.

256. See BORN, *supra* note 15, at 2 (describing the development of international commercial arbitration).

257. See Park & Yanos, *supra* note 14, at 276–77.

258. See BORN, *supra* note 15, at 29–30; Park & Yanos, *supra* note 14, at 276–77.

engage in international commerce. Foreign entities might refuse to enter into business transactions with those whose home jurisdictions take an expansive view of implied consent, based on a fear of finding themselves subject to a different type of arbitration than they had anticipated.²⁵⁹ Alternatively, foreign entities might be willing to do business with parties whose courts or arbitrators use implied consent freely, but only after imposing higher transaction costs on the parties from that jurisdiction. Neither option is attractive, particularly since international arbitration is intended to facilitate international commerce, not hinder it. While parties from nations that adopt a broad doctrine of implied consent or unusual interpretive methods might include provisions in their arbitration agreements that attempt to limit the applicability of such provisions, such efforts might not be enough to assuage the fears of foreign parties.

Furthermore, parties from nations that adopt a broad doctrine of implied consent or that use interpretive rules that do not conform to international practice could experience limitations on the way in which the parties structure their arbitrations. For example, foreign parties might refuse to seat an arbitration in a nation that resorts frequently to implied consent or whose interpretive methods are internationally suspect. Similarly, foreign parties might refuse to have the substance or procedure of an arbitration governed by the law of a State that permits the broad use of implied consent in the construction of an arbitration agreement.²⁶⁰ In both cases, the party that is from the disfavored nation loses the benefits associated with having a “home court” or home law advantage. Furthermore, the harm may not be limited to the party from the nation with the broad doctrine of implied consent. If that jurisdiction’s substantive and

259. The fear is based on the belief that the nation that utilizes implied consent freely might assert jurisdiction over the arbitration. Although the greatest danger is in cases where the law incorporating broad notions of implied consent properly influences arbitral procedure, *see supra* notes 207–214 and accompanying text, business parties might also worry that those States’ laws will mistakenly be applied by an arbitrator or court.

260. While parties could attempt to contract around problematic principles of national law through the use of carve-outs, doing so can be a complex undertaking. Furthermore, if the law is mandatory in nature—as some laws relating to the use of class mechanisms may be—the parties will be unable to prohibit the application of the law. Notably, the concern about the application of relevant law extends to both procedural and substantive choice of law. While choices of procedural law are obviously relevant—since class arbitration is considered a procedural mechanism—the choice of substantive law can also result in class arbitration, if the arbitrator determines that the aim of that substantive law cannot be effectuated in a non-class proceeding. *See, e.g., In re Am. Express Merchs. Litig.*, 554 F.3d 300, 311–20 (2d Cir. 2009), *pet. for cert. filed* (08-1473) (May 29, 2009) (regarding federal antitrust claims in the context of other sorts of class proceedings); Sternlight, *supra* note 3, at 13–14, 63–65, 80–83 (discussing, *inter alia*, Truth in Lending Act claims).

procedural law is otherwise favorable to arbitration of the dispute, both parties may suffer injury.²⁶¹

In both of these possible scenarios, the international backlash has both the intent and effect of isolating the State whose approach to arbitration deviates from the international norm, although the injury is felt by individual parties.²⁶² The impact also trickles down to consumers, who ultimately bear the burden of increased transaction costs imposed on the commercial actors. The question, therefore, is whether class arbitration constitutes an objectionable amount or type of surprise. As it turns out, it does not. Instead, the following discussion demonstrates that international actors are both (1) on notice that class arbitration is a possible form of dispute resolution, both in the United States and elsewhere; and (2) the type of implied consent and interpretive rules that are used in class arbitration cases conform with the principles and practices that have been applied in international arbitration for years.

i. The International Arbitral Community Is on Notice Regarding Class Arbitration

Although class arbitration may have only recently become an international dispute resolution device, the procedure itself has been in existence domestically for years. Class arbitration first appeared in the United States in 1982, shooting to national and international prominence in 2003 with the U.S. Supreme Court decision in *Bazzele*.²⁶³ Class arbitration was also judicially contemplated in Canada and Colombia as early as 2002, although the procedure may have existed before then and simply not been reported in international arbitral materials.²⁶⁴

Specialized rules concerning class procedure in arbitration were also published by some of the best-known arbitral institutions in the world in

261. While some may claim that parties to international arbitration have always had the option of choosing neutral substantive laws and procedural seats, the loss of an otherwise viable option still has its costs.

262. This is the reverse of liberalizing laws that are meant to bring countries into closer conformity with international standards. See BORN, *supra* note 15, at 29–30; Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L. & ECON. 371, 372–74 (2004) (presenting empirical evidence suggesting that the number of arbitrations in a given country increases on the enactment of a new or revised arbitration law); William W. Park, *The International Currency of Arbitral Awards*, 770 PLI/LIT 359, 387 (2008) (noting how nations with unusual arbitration laws can suffer a “competitive disadvantage” when compared to jurisdictions that follow international norms).

263. *Green Tree Fin. Corp. v. Bazzele*, 539 U.S. 444 (2003) (plurality opinion); *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

264. See, e.g., *Dell Computer Corp. v. Union des consommateurs*, [2005] Q.C.C.A. 570, *rev'd* 2 S.C.R. 801 (Can.); *Kanitz v. Rogers Cable Inc.*, [2002] 58 O.R.3d 299 (Can.) (originally reported in 2002); *Valencia*, *supra* note 53 (initially reported in 2003).

2003.²⁶⁵ Even if one takes the year 2003 (rather than the year 1982) as the date most realistically calculated to put the international arbitral community on notice about the possibility of this type of procedure, enough time has passed to ensure that surprise is no longer an issue. Parties who are currently drafting arbitration agreements have more than enough information on how to avoid class arbitration if they wish, and parties to older arbitration clauses have had time to research and amend existing language so as to forestall the possibility of class arbitration, if so desired.²⁶⁶

Skeptics might argue that a scarcity of jurisprudence concerning the transnational implications of class arbitration means that surprise is still a possibility outside the United States, but the procedure has been discussed by international scholars for years.²⁶⁷ Furthermore, numerous workshops and seminars on class arbitration have been offered at both the domestic and international level for some time. Finally, it has long been agreed that parties and their counsel carry the burden of taking the appropriate steps to keep current with the state of the law in the countries in which they do business.²⁶⁸ Thus, there do not seem to be sufficient grounds to argue that class proceedings give rise to a cognizable claim of surprise.

This is true even with respect to the arguably retroactive application of the AAA Supplementary Rules and the JAMS Class Arbitration Rules.²⁶⁹ Actors in the international arbitration community are or should be aware that arbitral institutions change their rules with some frequency.²⁷⁰ Furthermore, it has always been the case that if a party wishes

265. AAA SUPPLEMENTARY RULES, *supra* note 30.

266. The literature is full of guidance on how potential defendants can avoid the risk of class arbitration. *See, e.g.*, Lacovara, *supra* note 113, at 558–59 (encouraging companies to create variations in arbitration agreements); Scanlon, *supra* note 50, at 44 (advising companies on how to avoid class arbitration).

267. *See, e.g.*, HANOTIAU, *supra* note 98, at 257–310; REDFERN & HUNTER, *supra* note 12, ¶ 2-91; Bernard Hanotiau, *A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, 20 *ARB. INT'L* 39 *passim* (2004); Lacovara, *supra* note 113, *passim*.

268. Christopher William Pappas, *Comparative U.S. & EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation*, 31 *DENV. J. INT'L L. & POL.* 325, 326 (2002).

269. Again, the mere existence of the specialized rules will not affect the determination of whether class arbitration is permitted under the agreement. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 1(1); JAMS CLASS ARBITRATION RULES, *supra* note 30, R. 1(a).

270. Even if a party could have asserted surprise in 2003 or 2004, that argument no longer appears possible. Indeed, at this point, there does not seem to be any international party who is claiming surprise as a result of an international class arbitration filed soon after the major developments of 2003. Since the legitimacy of any claim of surprise diminishes as time passes, the question of whether a party could have claimed surprise in 2003 or 2004 will not be addressed herein.

to be held to rules that were in existence at the time the agreement was signed, it may do so by expressing that desire in the arbitration agreement. In the absence of any such indication, the arbitrator is entitled to decide that a reference to a particular rule set should be construed to mean the rules that are in effect at the time the dispute arises.²⁷¹

ii. Implied Consent as a Rule of Interpretation

This Article has discussed the use of implied consent in explicit terms as a means of focusing the inquiry on whether the decision to permit class arbitration in situations where the arbitration agreement is silent or ambiguous as to multi-party treatment can meet arbitration's fundamental requirement of consent. This Article has also used the term advisedly, taking care to distinguish consent to a particular procedure from consent to arbitration itself.²⁷²

However, in many ways, implied consent in the context of class arbitration refers more to an interpretive method than it does to the application of a doctrinal mechanism to supplant party autonomy.²⁷³ Thus, for example, the principle of effective interpretation can be seen as a device by which the parties give their implied consent to any procedure by which arbitration may be effectively instituted.²⁷⁴ Similarly, the interpretive method used by arbitrators to discern whether an arbitration agreement that is silent or ambiguous as to class treatment will permit a class proceeding is no more intrusive than the methods used to give meaning to more traditional pathological clauses.²⁷⁵

Therefore, the preceding discussion suggests that the principles that arbitrators in U.S.-based arbitrations rely on when construing arbitration agreements conform with longstanding and internationally accepted interpretive practices.²⁷⁶ Even if parties who object to international class arbitration can claim subjective surprise, no objective surprise exists, since the parties were on notice that arbitrators in U.S.-based proceedings will apply this type of interpretive methodology. Thus, the mechanism by which the specialized rule sets on class arbitration can be applied meets international standards.

271. Michael A. Geibelson & Bernice Conn, *Clause and Effect*, 29 L.A. LAW. 35, 40–41 (2006).

272. For example, implied consent lies at the heart of the various means of bringing non-signatories into an arbitration, a practice that has been in use for decades. *See supra* note 99 and accompanying text.

273. *See Rau, supra* note 43, at 224 (describing instances in which arbitrators cease to interpret agreements and noting that that is the point at which they exceed their authority); *id.* at 240 (noting importance of focusing inquiry on assent).

274. *See supra* note 145 and accompanying text.

275. *See id.*

276. *See supra* notes 186–216 and accompanying text.

b. General Arbitral Rules

There is no requirement that arbitrations seated in the United States must adopt the rules of a U.S.-based arbitral institution or indeed any arbitral rules whatsoever. Instead, arbitrations seated in the United States may adopt the rules of any arbitral institution that they wish or may proceed on a completely *ad hoc* basis.²⁷⁷ If parties to a purported class arbitration choose to proceed *ad hoc*, then there is no need to conduct an analysis under this heading.²⁷⁸ However, many international parties do, in fact, choose to adopt institutional rules, even if the arbitration is not formally administered by that institution.

No set of general arbitral rules indicates the circumstances in which class arbitration can be ordered, nor does any set of rules give arbitrators any detailed guidelines on how they are to construe an arbitration agreement in situations involving multiple parties. Instead, the rules leave it open for the arbitrators to decide the appropriate principles of construction through reliance on general principles of contract law, as dictated by the relevant state law.²⁷⁹ However, it appears that a number of the leading international arbitral rule sets include general language about multi-party arbitration that can be extended to class arbitration.²⁸⁰

For example, the Swiss Rules of Arbitration (Swiss Rules) allow consolidation of proceedings, both in cases where the parties are identical (i.e., multiple proceedings between the same parties) and in cases where the parties are not identical.²⁸¹ Although consultation with the parties is required, the decision to consolidate can be made even over the

277. There is no restriction on the types of rules that may be chosen, so long as the resulting procedure resembles arbitration in fundamental regards. MUSTILL & BOYD, *supra* note 50, at 283.

278. Of course, arbitrators looking for persuasive authority may consider whether any sort of international consensus or trend is reflected in various arbitral rules.

279. Choice of law issues in international arbitration can be very complex. An arbitration seated in the United States may not necessarily be governed entirely by U.S. procedural or substantive law, though U.S. law will retain some relevance. *See* Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48, 50–51 (Eng.) (distinguishing between “internal” and “external” issues of procedural law); REDFERN & HUNTER, *supra* note 11, ¶ 2-11. Further discussion of this issue is unfortunately outside the scope of this Article.

280. The inclusion of provisions on multi-party 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 multi-party proceedings. *See* AAA Home Page, <http://www.adr.org/> (last visited July 12, 2009). Furthermore, some rules contain restrictions on multi-party proceedings that proponents of class arbitration would find difficult to overcome. *See, e.g.*, JOINT CONTRACTS TRIB., CONSTRUCTION INDUSTRY MODEL ARBITRATION RULES R. 3, available at http://www.jctltd.co.uk/assets/JCT_CIMAR%2005.pdf (last visited June 24, 2009) (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).

281. SWISS RULES, *supra* note 44, art. 4.

objections of one or more parties after taking all “relevant and applicable” circumstances into account.²⁸² The Swiss Rules also allow the inclusion of a third party into the arbitration under similar terms.²⁸³ The breadth of these provisions suggests that they would likely apply to class arbitration as well, as a form of consolidated, or third party arbitration.

The Arbitration Rules of the Belgian Center for Arbitration and Mediation (CEPANI Rules) also indicate that consolidation of arbitral proceedings are proper “[w]hen several contracts containing a CEPANI arbitration clause give rise to disputes that are closely related or indivisible.”²⁸⁴ The request, which may be made by the arbitrator(s) at any time, or by one or more of the parties before any other issue is considered, is referred to the Appointments Committee or chair of the arbitral tribunal.²⁸⁵ The decision is made “after having summoned the parties, and, if need be, the arbitrators who have already been appointed.”²⁸⁶ Again, these provisions would appear applicable to class arbitration as well.

Consolidation is also liberally permitted by the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules), which hold that the Institute’s Board of Directors may, at the request of a party, consolidate proceedings involving the same parties.²⁸⁷ Although such a decision will only be made after consulting the parties and the arbitral tribunal, it too appears to be permitted even over the objection of one of the parties.²⁸⁸ Because this provision only refers to “the same parties,” it may not apply to class arbitration. However, as a liberal provision in favor of multi-party proceedings even over the objection of the party, it could conceivably be construed to include class arbitration, particularly if class arbitration were considered to be simply a non-standard type of bilateral arbitration.²⁸⁹

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

282. *Id.*

283. *Id.*

284. CEPANI RULES OF ARBITRATION art. 12, (2005) <http://www.cepani.be/EN/default.aspx?Pid=369> (last visited July 2, 2009) [hereinafter CEPANI RULES].

285. *Id.*

286. *Id.*

287. ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE art. 11 (2007) [hereinafter SCC RULES], http://www.sccinstitute.com/filearchive/2/21686/2007_arbitration_rules_eng.pdf (last visited June 30, 2009); see also Kaj Hobér & William McKechnie, *New Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 23 *ARB. INT’L* 261, 263 (2007).

288. See SCC RULES, *supra* note 286, art. 11; Hobér & McKechnie, *supra* note 287, at 263.

289. See *supra* note 181 (concerning an argument suggested by Frédéric Bachand).

in writing.”²⁹⁰ Again, this provision permits a default position in favor of group treatment in the event the parties’ arbitration agreement is silent or ambiguous on the issue. Furthermore, the LCIA Rules give arbitrators “the widest discretion to discharge” their duties, which includes 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,” while also charging the parties to “do everything necessary for the fair, efficient and expeditious conduct of the arbitration.”²⁹¹ Thus, parties to an LCIA arbitration could be subject to a consolidation or a class arbitration order even over the objection of one of the two parties,²⁹² although commentators discussing the LCIA Rules have noted that it is possible that such an award might be subject to an objection based on Article V(1)(d) of the New York Convention for violation of the parties’ agreement.²⁹³

The Rules of Arbitration promulgated by the International Chamber of Commerce (ICC Rules) are slightly less far-reaching than the other international rules.²⁹⁴ The ICC Rules do not discuss consolidation *per se*, although they do include provisions concerning the naming of arbitrators in multi-party situations, which is one of the major problems associated with class and consolidated arbitrations.²⁹⁵ However, the absence of any explicit provisions regarding consolidation in the ICC Rules is offset by the fact that ICC arbitrators have agreed to consolidate proceedings based on the “group of companies” doctrine.²⁹⁶ This doctrine allows arbitrators to join a non-signatory to the arbitration agreement into the proceedings if the contractual language can be construed as linking the companies and the parties can be said to have demonstrated an intention to create an “integrated contractual relationship subject to one single arbitration.”²⁹⁷ Because the “group of companies” doctrine is based on implied consent to a multi-party proceeding, as demonstrated through

290. LCIA RULES, *supra* note 44, R. 22.1.

291. *Id.* R. 14.1(iii).

292. LEW ET AL., *supra* note 44, ¶ 16-44.

293. *Id.* ¶ 26-66; Pryles, *supra* note 45, at 339.

294. ICC RULES, *supra* note 44.

295. *Id.* art. 10; *see infra* notes 338–349 and accompanying text.

296. I W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 99–100 (2001) (discussing ICC Case 1434, 1976 JDI 978). Nevertheless, joining additional parties to ICC arbitrations is controversial. *See* Stephen R. Bond, *Multi-Party Arbitration: The Experience of the ICC Court of Arbitration*, in 2 W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION app. VI, at 29, 32 (2001) (quoting 1987 ICC case 5625).

297. I CRAIG ET AL., *supra* note 296, at 99–100. Although the “group of companies” doctrine arose in ICC arbitrations, it has also been used elsewhere. Stephan Wilske et al., *The “Group of Companies Doctrine”—Where Is it Heading?*, 17 AM. REV. INT’L ARB. 73, 74 (2006).

the interpretation of an arbitration agreement that is silent or ambiguous regarding group proceedings, it would seem that class arbitration could also be ordered under the ICC Rules.

Finally, Article 15(1) of the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules) permits some flexibility in the structure of the proceedings, even over the objection of the parties, stating “[s]ubject 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 full opportunity of presenting his case.”²⁹⁸ Thus, it appears that consolidation may be ordered under the UNCITRAL Arbitration Rules, even if the parties do not explicitly agree to such treatment.²⁹⁹ Furthermore, a recent report concerning the possible amendment of the UNCITRAL Arbitration Rules includes an explicit provision (new Article 15.4) on consolidation.³⁰⁰ The report suggests that the arbitral tribunal, after consulting with the parties, can consolidate two or more claims involving only the same parties when the claims that are subject to separate arbitral proceedings arise out of common facts.³⁰¹ Furthermore, consolidation has been promoted in investment arbitrations that proceed under the UNCITRAL Arbitration Rules, particularly in situations that resemble class arbitration (i.e., where there is only one common party).³⁰² All of this suggests favorable treatment of class arbitration, since Article 15(1) of the UNCITRAL Arbitration Rules is drafted broadly enough to apply to class arbitration as well as consolidated arbitration, and the trend toward increasingly liberal treatment of consolidated proceedings also supports arguments that class arbitration should be ordered in appropriate circumstances.³⁰³

Overall, the liberalization of international arbitral rules on consolidation supports international acceptance of class arbitration on both a

298. UNCITRAL ARBITRATION RULES, *supra* note 44, art. 15(1).

299. Pryles, *supra* note 45, at 336; *see also* Karaha Bodas Co., L.L.C. 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 UNCITRAL Arbitration Rules).

300. JAN PAULSSON & GEORGIOS PETROCHILOS, REVISION OF THE UNCITRAL ARBITRATION RULES 68–70 (2006), *available at* http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (last visited June 24, 2009).

301. *Id.*

302. FIONA MARSHALL & HOWARD MANN, GOOD GOVERNANCE AND THE RULE OF LAW: EXPRESS RULES FOR INVESTOR-STATE ARBITRATIONS REQUIRED 10 (2006), *available at* http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf (last visited June 24, 2009) (claiming that “[t]he fact that claims may have only one common party and lack a common legal relationship should not bar consolidation”).

303. UNCITRAL ARBITRATION RULES, *supra* note 44, art. 15(1).

practical and theoretical level. In the past, consolidation of international arbitration was discouraged because there was confusion about (1) who, if anyone, had the power to compel consolidation, and (2) what procedures would be followed in the consolidated proceedings, particularly regarding the nomination of arbitrators. These pragmatic concerns have been extended to class arbitration as well. However, the international arbitral community is not only developing appropriate procedures for handling multi-party and multi-contract arbitration, but an increasing number of rules are also specifically sanctioning the consolidation of arbitrations in appropriate situations, even over the objection of the parties. As a practical matter, this eliminates questions about who, if anyone, has the power to order multi-party arbitrations and what procedures are to be followed in such proceedings.

Thus, many of the leading general arbitral rules suggest that class arbitrations should be entitled to the same sorts of presumptions at the enforcement stage as are accorded to bilateral arbitrations. Not only is the international arbitral community developing a recognition that multi-party proceedings are becoming increasingly common, it is creating the necessary support mechanisms for arbitrators to deal with novel arbitral procedures. Thus, the expansion of class arbitration into the international realm is consistent with what is happening in other areas of international arbitral law and practice.

IV. ENFORCING U.S.-BASED CLASS ARBITRATIONS UNDER THE NEW YORK CONVENTION

This Article takes the view that class awards issued out of the United States should receive the same presumption of international enforcement that is afforded to other awards under the New York Convention and national law, even in cases where the arbitration agreement is silent or ambiguous as to class treatment.³⁰⁴ Nevertheless, certain objections under Article V of the New York Convention are likely to be lodged against such awards at the time of enforcement, and the viability of such objections must be considered.³⁰⁵

Before beginning this discussion, it is important to make clear that this Article does not argue that individualized objections to class awards

304. See BORN, *supra* note 15, at 5 (discussing the presumption of enforceability under the New York Convention and national laws).

305. Article V constitutes the exclusive means of challenging the enforcement of an award under the New York Convention. Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 9, 10 (2007).

are never proper. Instead, the issue is whether blanket objections to class awards—based solely on the novelty of the procedure and the arbitrator's power or ability to construe silent or ambiguous arbitration agreements to permit class treatment—should be recognized.

As previously noted, objections to class arbitration can take several different forms.³⁰⁶ However, this Article focuses on objections based on alleged violations of party autonomy, including party agreements and expectations regarding

- (1) the length, complexity, and type of proceedings;³⁰⁷
- (2) third party strangers to the contract becoming involved in confidential proceedings;³⁰⁸ and
- (3) the process of selecting arbitrators.³⁰⁹

Objections of these kinds fall most naturally under Article V(1)(d) of the New York Convention, which deals with “[t]he composition of the arbitral authority” and “arbitral procedure [that] 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.”³¹⁰ Traditionally, objections to enforcement are to be construed narrowly, since the New York Convention presumes that, for the most part, foreign awards are to be recognized and enforced.³¹¹ Only in extreme cases are courts permitted to interfere with the arbitral process by refusing enforcement after the arbitration's conclusion on the merits.³¹²

Article V(1)(d) of the New York Convention has not yet been invoked with respect to class arbitration. However, as the following discussion indicates, there is nothing about international class arbitration that would permit a standing objection to a class award to prevail under this provision. Each of the three types of objections will be taken in turn.

306. See *supra* notes 77–82 and accompanying text.

307. FRICK, *supra* note 95, at 230–31; Chiu, *supra* note 91, at 55–56; Leboulanger, *supra* note 91, at 62–63.

308. Mistelis, *supra* note 144, at 212; Tweeddale, *supra* note 144, at 59–60.

309. Chiu, *supra* note 91, at 55–56; Leboulanger, *supra* note 91, at 63; Rau & Sherman, *supra* note 91, at 109–11; Schwartz, *supra* note 94, at 342–43.

310. New York Convention, *supra* note 13, art. V(1)(d). Since this Article focuses on class arbitrations seated in the United States and class arbitration is a recognized dispute resolution process under U.S. law, the assumption herein is that the arbitral procedure was “in accordance with the law of the country where the arbitration took place,” which means that the discussion will concentrate on issues relating to the parties' agreement. *Id.*

311. LEW ET AL., *supra* note 44, ¶ 26-66; see also REDFERN & HUNTER, *supra* note 12, ¶¶ 10-33 to 10-34 (noting the objections to enforcement under the New York Convention are exhaustive and must be construed restrictively); Park & Yanos, *supra* note 14, at 254, 259.

312. LEW ET AL., *supra* note 44, ¶¶ 26-65 to 26-70.

A. Arbitral Procedure

The first and most likely objection to class awards will challenge the form of the proceedings under Article V(1)(d) of the New York Convention, with the primary focus on whether the procedure chosen by the arbitrator was in accordance with the arbitration agreement.³¹³ To date, no blanket objections to the method of interpreting arbitration agreements under U.S. law have ever been lodged in enforcement procedures regarding bilateral arbitrations, so arbitrators who rely on U.S. law to construe an arbitration agreement that is silent or ambiguous as to class treatment should, as a matter of procedure, feel confident about rendering an internationally enforceable award. Furthermore, the interpretive method used by U.S. arbitrators in deciding whether an arbitration agreement would permit class arbitration has been shown to be consistent with international practice,³¹⁴ thus providing additional reasons why a general objection to class procedure should not prevail.

If, however, arbitrators expressly invoke the notion of implied consent without also drawing attention to the interpretive method used, the resulting awards may be on shakier ground, since the international arbitral community appears to be split on the propriety of implied consent to multi-party proceedings. On the one hand, Gary Born states that “[i]f consolidation is based on the parties’ implied consent, then Article V(1)(d) would presumably not be offended.”³¹⁵ Born continues, stating “[s]ome commentators have gone further and suggested that agreement on a curial law that permits mandatory consolidation constitutes enforceable acceptance of such consolidation for purposes of Article V(1)(d).”³¹⁶ Born’s view seems correct, particularly given the recent liberalization of legislation and arbitral rules on consolidation, and can be extended to address class arbitration as well. His approach is also consistent with other aspects of international arbitration law, including the use of implied consent to bring non-signatories to an arbitration agreement into arbitral proceedings.³¹⁷

On the other hand, Julian Lew 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,

313. New York Convention, *supra* note 13, art. V(1)(d).

314. See *supra* notes 186–216 and accompanying text.

315. BORN, *supra* note 15, at 695.

316. *Id.* (citing Alan Redfern and Martin Hunter as authority).

317. Thomson-CSE, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 776 (2nd Cir. 1995) (noting five methods of binding non-signatories to an arbitration agreement, several of which constitute the functional equivalent of implied consent).

arbitrator, or appointing authority.³¹⁸ Lew's position appears to be based on a strict reading of party autonomy, and again it would seem that his views would extend to class arbitration as well.³¹⁹ However, for the reasons stated above, a strict constructionist approach to class arbitration appears contrary to established international law and policy.³²⁰

Although Born and Lew were discussing the enforcement of consolidated arbitration rather than class arbitration, this split of opinion suggests that class awards will receive a similarly divided response at the international enforcement stage. It will be interesting to see whether international class awards receive differential treatment depending on whether the arbitrator explicitly relies on a doctrine of implied consent in finding the parties amenable to class arbitration versus an explicit reliance on established rules of contract construction. Of course, the difference is more a matter of semantics than content, since implied consent is at the core of the interpretive method used by both U.S. and international arbitrators. Because that methodology is consistent with established arbitral practice, it therefore justifies class awards being given the same presumption of enforceability that is given to bilateral awards. Furthermore, a detailed discussion of the two most important procedural objections shows why a liberal approach to the international enforcement of class awards is defensible under international law and practice. That discussion is contained in the following two subsections.

B. Confidentiality

As indicated previously, proponents of international arbitration have long touted its ability to keep proceedings private and confidential.³²¹ Indeed, the presumed protections of privacy and confidentiality were sometimes used to challenge consolidation proceedings, as seen in the English case of *Oxford Shipping Co. v. Nippon Yusen Kaisha (The Eastern Saga)*, which forbade non-consensual consolidation due, at least in part, to concerns about confidentiality and the assumption that additional parties would be strangers to the proceedings.³²² However, as oft-cited as

318. LEW ET AL., *supra* note 44, ¶¶ 16-96 to 16-97; REDFERN & HUNTER, *supra* note 12, ¶ 10-42.

319. See LEW ET AL., *supra* note 44, ¶¶ 16-97 to 16-98.

320. See *supra* notes 117-163 and accompanying text.

321. See *supra* note 177 and accompanying text.

322. *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The Eastern Saga)*, [1984] 2 Lloyd's Rep. 373 (Eng.); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 11 ARB. INT'L 321, 324 (1995). In his opinion, Mr. Justice Leggatt stated:

It seems to me that . . . arbitrators enjoy no power to order concurrent hearings, or anything of that nature, without the consent of the parties. The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is

The Eastern Saga may be in the literature, its holdings may no longer be binding or even persuasive for several reasons, even in its home jurisdiction.³²³

First, the presumption of privacy and/or confidentiality in arbitration is waning in international circles, particularly in situations where there may be a public interest in disclosure.³²⁴ This is particularly important for class arbitration, since public interest exists in both the outcome³²⁵ and the process itself.³²⁶ The AAA has taken this increased level of public interest into account in its class arbitration rules, which explicitly deviate from any presumptions of privacy and confidentiality by permitting all class members (and/or their counsel) to attend all hearings and by requiring certain pleadings to be published on the AAA's website for public viewing.³²⁷

Second, class arbitrations typically do not contain the kind of "competitively sensitive information" that can create problems for some consolidated arbitrations.³²⁸ Sensitive trade issues can arise in consolidated cases when claimants attempt to join market competitors as co-defendants, despite the fact that the proceedings may require the disclosure of competitive information.³²⁹ The situation is not as likely to arise in class arbitration, which typically involves a claimant group with

implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be. The only powers which an arbitrator enjoys relate to the reference in which he has been appointed. They cannot be extended merely because a similar dispute exists which is capable of being and is referred separately to arbitration under a different agreement.

The Eastern Saga, [1984] 2 Lloyd's Rep. at 379.

323. In 2008, the English Court of Appeal may have reversed the presumption of privacy in arbitration. *Emmott v. Michael Wilson & Partners Ltd.*, [2008] EWCA (Civ) 184 (Eng.) (concerning international arbitration).

324. See *supra* note 144 (regarding confidentiality and public interest); see also *Emmott*, [2008] E.W.C.A. Civ. at 184 (concerning international arbitration). Furthermore, there is always a public interest in proper adjudication of private disputes, even in arbitration. *Park, Arbitrability Dicta*, *supra* note 43, at 138–40.

325. For example, large awards can affect stock prices of publicly offered companies. Similarly, certain types of injunctive relief can require defendants to alter their operating procedures going forward. Both types of awards can affect people other than the claimants themselves.

326. For example, some members of the public may wish to join the class or opt out of it. Members of the public may also wish to bring related claims in the same or other proceedings.

327. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 9.

328. McLaughlin et al., *supra* note 195, n.56.

329. *Id.* nn.56–85 (describing the first case brought under the North American Free Trade Agreement's consolidation provision).

identical or nearly-identical interests. Thus, concerns about disclosures to strangers to the arbitration are diminished in class proceedings.

Third, many so-called strangers to the proceeding are quite probably not complete outsiders.³³⁰ Instead, a purported stranger may be one of the original signatories, albeit “in a different guise,” as would occur if the signatory had been acquired by another company, or an otherwise related party.³³¹ The stranger may even be an arbitrator who has been found acceptable for one proceeding between the parties but is considered objectionable for another related or unrelated arbitration.³³² However, there seems to be few reasons—other than strict constructionism—to disallow strangers of this type to participate in class proceedings. Instead, arbitrators can rely on the principle of effective interpretation in instances where the arbitration agreement is silent or ambiguous as to multi-party proceedings, allowing a slight deviation from legitimate (or possibly illegitimate) expectations regarding privacy and confidentiality so that the parties’ broader goal of arbitrating (rather than litigating) the dispute can be fulfilled.

Aside from cases such as *The Eastern Saga*, protection for arbitral confidentiality is actually quite minimal.³³³ For example, violation of the principles of privacy and/or confidentiality does not constitute an independent ground for objection under the New York Convention. Instead, privacy and confidentiality are only protected under the New York Convention to the extent such requirements are reflected in the parties’ arbitration agreement. National laws on arbitration are also not helpful when trying to discern the extent to which privacy and confidentiality should be respected.³³⁴ For example, parties to arbitrations seated in the United States cannot rely on federal law to protect them, since the FAA does not address arbitral confidentiality and no such requirement has been imposed by U.S. federal courts.³³⁵ For these reasons, commentators have advised parties in the United States and elsewhere to provide explicitly for confidentiality in their arbitration agreements if they want to keep proceedings out of the public eye.³³⁶

330. Rau, *supra* note 43, at 227.

331. *Id.*

332. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting) (claiming Green Tree had a right to a different arbitrator in every proceeding); *see also The Eastern Saga*, [1984] 2 Lloyd’s Rep. 373, 379 (Leggatt, J.).

333. *The Eastern Saga*, [1984] 2 Lloyd’s Rep. at 373.

334. *See, e.g.,* Ioanna Thoma, *Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature*, 25 J. INT’L ARB. 299 *passim* (2008) (discussing the basis of the principle of confidentiality under English law).

335. *See* Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 FORDHAM URB. L.J. 83, 102 (2008).

336. *Id.*

Given the shift toward increased transparency in bilateral arbitration, particularly in cases involving matters of public interest,³³⁷ it would be difficult to oppose class arbitration simply on the claim that the procedure violates principles of privacy or confidentiality. Of course, if the arbitration agreement includes a confidentiality provision that would seem to cover class arbitration, the arbitrator should take that provision into account lest the award be deemed unenforceable under Article V(1)(d) of the New York Convention.³³⁸ However, confidentiality provisions should not be broadly construed, particularly when the agreement as a whole is determined to be silent or ambiguous regarding class treatment, since there is (1) no consensus on the parameters of privacy or confidentiality in arbitration and (2) no policy reasons why class arbitration should be deemed to violate any principles of privacy or confidentiality that do exist.³³⁹

C. Composition of the Arbitral Tribunal

One of the most problematic aspects of consolidated arbitration involves the composition of the arbitral tribunal. Selection procedures in bilateral arbitration tend to be rather straightforward affairs wherein the parties typically designate an appointing authority or set up a procedure by which the parties themselves choose the arbitrator(s). In situations where a three-personal panel is needed, parties often agree to each select an arbitrator, with the chairperson to be chosen by the two party-appointed arbitrators.

Courts vigorously protect the right of the parties to choose their own arbitrators, often under the rubric of “the equality of the parties,” which is considered a “fundamental right” in arbitration.³⁴⁰ The ability to name one’s own arbitrator is often considered a sufficient safeguard of a party’s procedural rights. Thus, agreements concerning the composition

337. See *supra* note 144.

338. New York Convention, *supra* note 13, art. V(1)(d).

339. This is particularly true if the parties proceed under the AAA Supplementary Rules, since those rules explicitly waive certain aspects of arbitral confidentiality. AAA SUPPLEMENTARY RULES, *supra* note 30, R. 9. However, an arbitrator may derogate from the AAA Supplementary Rules’ presumption against privacy and confidentiality in appropriate circumstances and provide for increased confidentiality. *Id.* R. 9(a).

340. B.K.M.I. Industrieranlagen GmbH v. Dutco Constr. Co. Ltd., XV Y.B. COM. ARB. 124 (1990); GAILLARD & SAVAGE, *supra* note 44, ¶¶ 792–93; Nicklisch, *supra* note 92, at 63. Although commentators have noted that *Dutco* is limited in many ways to its facts, the decision resulted in the revision of several arbitral rules to address the problem of multi-party arbitration. Hanotiau, *Problems*, *supra* note 91, at 340–43. Many rules now avoid the *Dutco* problem by appointing the entire tribunal, which means that all parties are treated equally. Platte, *supra* note 93, at 75; see also YVES DERAIS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 165–73 (1998) (regarding revisions to ICC Arbitration Rules).

of the arbitral tribunal are explicitly protected under Article V(1)(d) of the New York Convention.³⁴¹

Because the appointment procedure reflected in many arbitration agreements typically contemplates bilateral arbitration, logistical and jurisprudential problems arise when it turns out that the dispute requires the participation of more than two parties.³⁴² This is true even though the parties to a class arbitration typically know that the arbitration will proceed as such from the very beginning, as compared to consolidated arbitrations, where the possibility of multi-party treatment may not arise until after the arbitrators are named.³⁴³ In both cases, there are problems if each individual party asserts its right to name an arbitrator, since the size of the panel quickly becomes unmanageable.

Numerous solutions have been proposed over the years,³⁴⁴ but the most common approach now is that the appointing authority names the entire panel, either immediately or once it is clear that the parties cannot agree among themselves as to whom to name.³⁴⁵ This method, which is

341. New York Convention, *supra* note 13, art. V(1)(d).

342. FRICK, *supra* note 95, at 233–35; Cate, *supra* note 213, at 143; Chiu, *supra* note 91, at 58–59.

343. Though additional unnamed class claimants may be added during the process, the named claimants typically include a request for class treatment in their request for relief, whether that request is initially submitted in the courts (and later referred to arbitration) or in arbitration. If the parties are aligned in such a way that they can be readily broken into opposing “sides” and are all present at the time that the arbitrator is named, then the right to name one’s own arbitrator may be said to have been respected. Even if some unnamed class members join after the arbitrator has been named, they can be deemed to have waived the right to name an individual arbitrator if they decide not to opt out of the class. The situation is not the same in consolidated and other sorts of multi-party arbitrations, since the parties may not align themselves into “sides” so easily. *See supra* notes 327–328 and accompanying text. Parties to consolidated arbitrations may not opt out of the proceedings either.

344. For example, each of the parties might appoint its own arbitrator, with additional neutrals being added to act as chairs. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *partially overruled on other grounds*, *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) (requiring three party-appointed arbitrators and two additional neutrals); FRICK, *supra* note 95, at 234. This system reflects an attempt to respect the right of a party to name its own arbitrator, although “the size of the panel cannot be increased indefinitely.” Chiu, *supra* note 91, at 60. Furthermore, this approach has been criticized on the grounds that “it would result in unequal positions of the parties since a single party can appoint only one arbitrator,” although a potentially acceptable alternative would be “give a single party the right to appoint the same number of arbitrators as the other, multiple parties.” FRICK, *supra* note 95, at 234; *see also* Nicklisch, *supra* note 92, at 61 (criticizing the procedure). However, the effect of this second alternative would be virtually the same as grouping claimants and respondents (no matter their number) into teams for the purpose of selecting an arbitrator.

345. CEPANI RULES, *supra* note 284, art. 9(3); LCIA RULES, *supra* note 44, rule 8; ICC RULES, *supra* note 44, art. 10; SCC RULES, *supra* note 286, art. 13(4); SWISS RULES, *supra* note 44, art. 8(5); *see* FRICK, *supra* note 95, at 234 (claiming arbitral institutions should appoint arbitrators for all parties if a conflict of interest might arise between groups of claimants or defendants); Hobér & McKechnie, *supra* note 287, at 263–64; Platte, *supra* note 93, nn.71–

considered to protect the equality of the parties, would apply equally well in class arbitrations, both conceptually and under the language of many arbitral rules themselves, which typically refer to “multi-party proceedings,” thus ostensibly embracing class proceedings.³⁴⁶ Of course, parties may only rely on the appointment provisions contained in an institutional rule set if they have agreed to the application of those rules.

As is always the case in arbitration, much depends on the precise language of the arbitration agreement. Experience shows that strict constructionists will parse the relevant language very carefully.³⁴⁷ Not everyone takes such a literal approach, however, and courts have been known to construe appointment provisions broadly, perhaps based on the notion that a party can waive its right to appoint an arbitrator;³⁴⁸ that no material injury was suffered in the instant case;³⁴⁹ or that arbitration imposes a duty on the parties to cooperate in good faith in the performance of the arbitration agreement and that slight adjustments to the selection scheme should be permitted.³⁵⁰ It may also be that the principle of effective interpretation plays a role.³⁵¹ Whatever the underlying rationale, however, the mechanisms are in place to permit class arbitration to overcome the problems associated with the naming of arbitrators.

75; Whitesell & Silva-Romero, *supra* note 6, at 12 (noting the ICC mechanism is used conservatively).

346. CEPANI RULES, *supra* note 284, art. 9(3); ICC RULES, *supra* note 44, art. 10; LCIA RULES, *supra* note 44, R. 8; SWISS RULES, *supra* note 44, art. 8(5); SCC RULES, *supra* note 286, art. 13(4).

347. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 539 (2003) (Rehnquist, C.J., dissenting) (stating “petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well”). The plurality in *Bazzle* held instead that “[t]he class arbitrator was ‘selected by’ Green Tree ‘with consent of’ Green Tree’s customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well.” *Id.* at 451 (Breyer, J.).

348. FRICK, *supra* note 95, at 235.

349. See, e.g., *China Nanhai Oil Joint Serv. Corp. v. Gee Tai Holdings Co. Ltd.*, XX Y.B. COM. ARB. 671 (H.K. Sup. Ct. 1995) (Hong Kong Supreme Court noting that “technically the arbitrators did not have jurisdiction to decide this dispute” because of an error in the constitution of the tribunal but refusing to deny enforcement nonetheless because the defendants’ rights were not “violated in any material way”).

350. Hanotiau, *Problems*, *supra* note 91, at 304 (noting the refusal to designate the same arbitrator in parallel arbitral panels might be considered to be in breach of the duty to cooperate); Leboulanger, *supra* note 91, at 91–92.

351. GAILLARD & SAVAGE, *supra* note 44, ¶ 478.

CONCLUSION

In the twenty-five-plus years since its first appearance in California state courts,³⁵² class arbitration has matured into a sophisticated dispute resolution mechanism. Not only have several world-class arbitral institutions promulgated specialized arbitral rules to help standardize class procedures, but courts in a variety of civil and common law jurisdictions have recognized the propriety of class arbitrations in appropriate circumstances.

Despite these advancements, class arbitration has developed primarily as a domestic phenomenon, insulated by the policy values and legal principles of the different States in which it has appeared. Only recently have class disputes moved to the international sphere. However, the expansion of class arbitration beyond national borders requires courts and commentators to take a hard look at the procedure used to ensure that it has developed in conformity with international arbitral law and policy. Class arbitration's failure to meet international standards could open a class award up to a variety of objections under cross-border enforcement instruments such as the New York Convention.³⁵³

This Article has focused on procedural objections that will likely arise as a result of the decision to permit a class arbitration to proceed when the arbitration agreement is silent or ambiguous regarding class treatment. Because it is anticipated that most international class arbitrations will be seated in the United States or proceed under U.S. law, at least for the foreseeable future, the analysis has focused on U.S. law and practice to evaluate the extent to which the interpretive methods used in the United States conform to international law and practice.

As it turns out, U.S. methods of construing arbitration agreements are in accord with international norms. First, arbitrators based in the United States use an interpretive method that seeks to identify whether the parties can be said to have impliedly consented to this particular type of arbitral proceeding. Although implied consent is used in other aspects of international arbitration, some of which are not analogous to the type of implied consent used here, the emphasis on party intent and expectations is completely appropriate in a dispute resolution mechanism that is founded on party autonomy and consent.

Second, the interpretive methodology used by arbitrators based in the United States is consistent with that used by arbitrators based elsewhere, particularly with respect to the approach used in the construction

352. Keating v. Superior Court, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

353. New York Convention, *supra* note 13, art. V(1)(d).

of pathological clauses. For example, arbitrators seeking to discover whether an arbitration agreement will support class arbitration look first to the language of the arbitration agreement itself, possibly also taking into account extrinsic evidence as to the parties' intent and expectations. Arbitrators also look to any national laws or arbitral rules that can be said to apply in case those laws or rules provide any indication of what procedures are to be followed in cases of contractual silence or ambiguity, or when there is a conflict between the procedural posture that was presumed by the parties *ex ante* (i.e., bilateral arbitration) and the actual procedural posture that has in fact arisen (i.e., multilateral arbitration). Although each arbitration agreement must be construed under its own unique terms and circumstances, the preceding analysis has demonstrated that the method of analysis is entirely appropriate. Furthermore, to the extent that arbitrators in the United States who are undertaking this inquiry permit slight deviations from the letter of the parties' agreement in order to give effect to the parties' explicit and presumably overriding intent to arbitrate their disputes, that technique is entirely proper. Commentators in the United States and elsewhere have long recognized that *de minimis* alterations to the arbitration agreement will not support objections to enforcement under the New York Convention.³⁵⁴ Although arbitrators in the United States do not use the internationally recognized term "principle of effective interpretation" when applying this technique—preferring, instead, to point to the pro-arbitration policy underlying the FAA and state statutes on arbitration—the intent, method, and outcome are the same.³⁵⁵

Third, the internationalization of class arbitration is consistent with global trends toward the facilitation of multi-party arbitration. Most of the changes to both laws and arbitral rules have been inspired by the need and desire to consolidate arbitrations in situations where the arbitration agreement is silent or ambiguous as to consolidation. However, increased acceptance of multi-party arbitration in the absence of explicit choice benefits class arbitration as well as consolidated arbitration, since it demonstrates a policy shift away from strict construction of arbitration agreements. Furthermore, arbitrators who are asked to construe arbitration agreements in the class context can often rely explicitly on statutes and rules regarding consolidated arbitration to permit a ruling in favor of class arbitration, since statutes and rules on multi-party arbitration are often drafted broadly enough to embrace questions regarding class arbitration.

354. See *supra* note 47 and accompanying text.

355. See *supra* note 145 and accompanying text.

Although the legal analysis is sufficient to demonstrate the international enforceability of class awards, there are also numerous policy reasons to support such an outcome. First, class arbitrations carry numerous public benefits that do not exist in other types of arbitration. The unique nature of class claims often requires class treatment, either in arbitration or in litigation, if the claimants are to exercise their rights fully. If the parties have demonstrated an intent to arbitrate disputes of this type, then class proceedings may very well be proper, even if the parties have not specifically contemplated class arbitration. Second, class arbitrations are not so analogous to consolidated arbitrations on either a legal or policy level such that class arbitrations should be subject to any antipathy that might be shown to consolidated arbitration. Instead, class arbitration's unique policy considerations result in the view that strict construction of the arbitration agreement is inappropriate. Instead, the better approach, as a matter of public policy, is to allow arbitrators to use established methods of interpretation to see whether implied consent to this particular type of proceeding exists. While public policy will not overcome the parties' express wishes, the better default position in cases where there is silence or ambiguity is to allow the arbitrator to construe the contract in accordance with traditional legal principles.

When looked at in this light, class arbitration—and the decision that an arbitration agreement that is silent or ambiguous as to multi-party proceedings can support class arbitration—does not seem unduly problematic. However, the novelty of the procedure and the disfavor with which representative proceedings are held in many nations will doubtless lead to challenges at the international enforcement stage. Nevertheless, blanket objections to class awards based on the arbitrator's choice of this particular procedure in cases where the arbitration agreement is silent or ambiguous appear ungrounded. Instead, awards arising out of international class arbitration should be given the same presumption of enforceability that is granted to awards arising out of bilateral arbitrations under the New York Convention and national laws.³⁵⁶ That presumption can be overcome by an individualized showing of impropriety, but not by any claim in which the procedure or interpretive methodology used by the arbitrator is suspect. Instead, as a matter of international law and policy, class arbitrations should be considered presumptively proper and class awards presumptively enforceable, even in situations where the arbitration agreement is silent or ambiguous as to class treatment.

356. BORN, *supra* note 15, at 5.