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

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1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

Class arbitration is currently set up to reflect the common law bias in favour of representative proceedings. As class arbitration becomes more international, state courts – particularly those in civil law countries – will have to consider whether and to what extent they should permit foreign conceptions of rights to be enforced in arbitration.

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[6] Weston, p. 1726.

[7] Weidemaier, p. 70.

[8] *Ibid.*

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

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

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

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

2. Representative and Collective Actions Around the World

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

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

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

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

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

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