CROSS-BORDER ADR FOR THE MASSES: A SURVEY OF THE VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION

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INTRODUCTION

Arbitration has quickly risen in prominence as a dispute resolution tool for large businesses across the globe. Class actions and, more recently, class arbitrations have been used to close the power gap between aggrieved consumers and large companies, though they are generally considered to be a "uniquely American device."[1] In 1842, the Supreme Court introduced Equity Rule 48, "officially recogniz[ing] representative suits where the parties were too numerous to be conveniently brought before the court, but refused to bind absent parties to any resulting judgments."[2] A century later, Congress promulgated the Federal Rules of Civil Procedure (FRCP), including a class action mechanism under Rule 23. The current form of Rule 23 "gained its current shape in an innovative 1966 revision."[3] However, while the United States pioneered the use of "class" in both litigation and arbitration, class arbitration is no longer limited to domestic disputes.[4] In the same way that class actions have provided a tool for otherwise-powerless litigants in the United States, so too can class arbitrations provide tools for individuals engaged in arbitral proceedings against more powerful entities to aggregate and push back.[5] Cross-border disputes involving large groups are becoming more common than ever

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1 JSC Surgutneftegaz v. President & Fellows of Harv. Coll., 167 F. App'x 266, 268 (2d Cir. 2006); *see also* The President and Fellows of Harv. Coll. Against JSC Surgutneftegaz, 770 PLI/LIT 127, 155 (2008).

2 In re Joint Eastern & Southern Dist. Asbestos Litigation, 129 B.R. 710, 803 (E.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

3 Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 613 (1997).

4 *See generally* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrator Creating Internationally Enforceable Awards in Cases of Contractual Silence or Ambiguity*, 30 MICH. J. INT'L L. 1017, 1018 (2009); S.I. Strong, *Class Arbitration Outside the United States: Reading the Tea Leaves*, *in* 7 MULTIPARTY ARB., DOSSIERS OF THE ICC INST. OF WORLD BUS. L. 189 (Eric A. Schwart & Bernard Hanotiau eds., 2010); S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW (2013); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 36–37 (2008); S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 497 (2010).

5 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 358 (2011) (Breyer, J., dissenting) ("[T]hat the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (quoting Discover Bank v. Superior Ct., 113 P.3d 1100, 1110 (2005))).

before,[6] and class commercial arbitration is well-situated to resolve these disputes through enforceable relief in a single forum.[7] Past international class arbitrations have demonstrated the useful role this dispute resolution method can have in consolidating up to hundreds of thousands of individual arbitrations.[8]

Though the American model of class arbitration could simply be emulated by the rest of world, it may also become a model from which other nations and arbitral organizations can draw inspiration and guidance. Despite a growing need for international class arbitration or a similar "collective arbitration" solution, "the academic community has been unable to provide a uniform understanding about the convenience of permitting class arbitrations, and most international regulations are silent in regards to its applicability."[9]

This comment will review the prospects for international class commercial arbitration, in part through an investigation of existing international treaties, institutional rules, and jurisprudence. Part I reviews the background of international class arbitration, domestic class arbitration, and its foundations in American class actions. Part II assesses the factors that may provide opportunities or challenges for international class commercial arbitration. Part III will conduct a review of existing legal doctrines and the potential for international class commercial arbitration in several common and civil law states.

This comment will conclude by proposing that, given the current state of American jurisprudence and growing global acceptance of arbitration, there are limited reasons to believe that the mechanism may well survive legal challenges and eventually be looked on favorably and

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[6] *See Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, *supra* note 4, at 13; *see e.g.*, Stolt-Nielsen SA v. Animalfeeds Int'l. Corp., 548 F.3d 85, 87 (2d Cir. 2008), cert. granted, 129 S. Ct. 2793 (2009); Surgutneftegaz v. President and Fellows of Harv. Coll., 2007 WL 3019234 (No. 6069) (S.D.N.Y 2007) (confirming cross-border class arbitration award); CBR Enter., LLC v. Blimpie Int' l, Inc. (Am. Arb. Ass'n 2006); Bagpeddler.com v. U.S. Bancorp, Case No. 11 181 0032204 (Am. Arb. Ass'n 2007); Pedcor Mgmt. Co., Inc. v. Nations Personnel of Texas, Inc., 343 F.3d 355, 362 (5th Cir. 2003) (discussing the potential for international class arbitration in that case).

[7] Dana H. Freyer & Gregory A. Litt, *Desirability of International Class Arbitration*, 2 CONTEMP. ISSUES IN INT'L COM. ARB, & MEDIATION: THE FORDHAM PAPERS 171, 172 (2008).

[8] Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22, Stolt-Nielsen SA v. Animal Feeds Int'l Corp., 2009 S. Ct. (No. 08-1198); Beccara v. Argentine Republic, ICSID Case No. ARB/07/5 (2011) (almost 200,000 Italian individuals and entities engaged in a single arbitral proceeding against Argentina).

[9] F. Blavi & G. Vial, *Class Action in International Commercial Arbitration*, 39 FORDHAM INT'L L.J. 791, 793 (2016); *see also Class Arbitration Outside the United States: Reading the Tea Leaves*, *supra* note 4.

validated as a useful means of dispute resolution both domestically and abroad.

I. BACKGROUND – SUMMARY OF CURRENT STATE OF AFFAIRS

A. PRINCIPAL DEFINITIONS

1. Class Action

The class action mechanism, found in the United States in Fed. R. Civ. P. Rule 23, allows for lawsuits in which a court "authorizes a single person or a small group of people to represent the interests of a larger group."[10] A class action lawsuit allows for litigation by or against an individual class representative on behalf of the entirety of the class.[11] For this reason, class actions are also known as "representative actions."[12]

2. Arbitration

Arbitration is a quasi-judicial system of adjudication, outside of the courts, in which disputes are resolved privately.[13] Generally, arbitration results in a binding, enforceable decision.[14] Parties agree to present their dispute to one arbitrator or a panel of three arbitrators, who are normally chosen by the same parties. An arbitration may be ad hoc, whereby all controlling rules are chosen by the parties.[15] Alternatively, and more commonly, an arbitration may be conducted and administered by a domestic or international arbitral institution, such as the American Arbitration Association.[16] In such cases, the rules of the arbitral institution, with any modifications stipulated by the parties, control the arbitration.[17]

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[10] *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] *Id.*

[12] *Id.*

[13] RESTATEMENT OF THE U.S. L. OF INT'L COM. AND INV.-STATE ARB. § 1.1 (Am. L. Inst. 2019).

[14] *Id.*

[15] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (3d ed. 2017).

[16] *Id.* at 1.

[17] THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §1:1 (2021).

There are three main benefits to arbitral proceedings. First, they require the consent of the parties.[18] In the absence of consent either before or after (*clause compromissoire a.k.a.* "compromise clause" vs. *compromise a.k.a.* "compromise") an issue arises from both parties, arbitration may not occur.[19] Arbitrators are expected to follow the contractually designated laws, rules, and procedures agreed upon by the parties, and may only decide issues within the scope of the arbitration agreement.[20] Second, arbitrators are nongovernmental actors, and, as a result, they are generally uninterested in public policy or the public interest.[21] Arbitrators may be subject matter experts, and sometimes, they may not be attorneys at all. While judges may weigh varying interests in their decisions, arbitrators are generally expected to focus only upon the individual dispute in front of them.[22] Third, and most importantly, arbitration results in a binding, final award.[23] If for no other reason than to preclude a lengthy and costly appellate process, the guarantee of a binding award is appealing for businesses and individuals alike. While it is possible for a court to mandate that an arbitral award be set aside, most arbitration laws favor the decision of the arbitrator.[24]

3. Commercial Arbitration

Contractual clauses requiring arbitration as a conflict-resolution method are ubiquitous in modern commercial law and at its intersection with consumers. Cheaper and faster than traditional litigation, companies are "injecting arbitration clauses into their contracts in order to avoid the formal court system" entirely,[25] precluding litigation and securing confidential (and likely less harmful) outcomes. These arbitration clauses serve as an effective deterrent against litigation and, as Justice Breyer himself charged, amplify the existing power imbalance between corporations and their customers.[26] However, arbitral proceedings may

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18 *Id.*

19 MOSES, supra note 15, at 2.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 2–3.

25 Diogo Duarte Ribeiro, *International Class Arbitration: Protecting Groups with Inferior Bargaining Power*, 3 J. ALT. DISP. RESOL. 42, 42 (2013).

26 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

result in fairer or "more correct" outcomes, as litigations on complex technical issues are unlikely to fall before judges with significant subject matter experience, whereas arbitrations allow for the choice of subject matter experts as arbitrators.[27]

4. Class Arbitration

A class arbitration is an arbitral proceeding that combines the representative (class-based) nature of class action litigation with the arbitral process.[28] As with a traditional class action suit, a class arbitral proceeding is conducted with a single representative or small group of representatives on behalf of the wider class, with the outcome binding the entire class.[29]

5. Waiver

A clause providing language that parties may insert into a corporate or commercial agreement to expressly prohibit class action, arbitration, or the consolidation of claims brought by more than one claimant.

B. PRINCIPAL US LAWS CONCERNING COMMERCIAL ARBITRATION

The Commonwealth of Massachusetts passed America's first arbitration law in 1632.[30] Pennsylvania and New York would eventually follow Massachusetts, and in the aftermath of the Civil War, disputes between former slaves and their former slave-owners were commonly resolved through arbitration.[31]

The Federal Arbitration Act of 1925 (FAA) established a national policy in support of arbitration.[32] For all agreements concerning "a

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[27] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 667, 682–83 (2010).

[28] Oehmke, *supra* note 17, § 16:2.

[29] *Class Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[30] Steven A. Certilman, *Throw Down the Muskets, Seek Out the Town Elders: This Is a Brief History of Arbitration in the United States*, 3 N.Y. DISP. RESOL. LAW. (New York State Bar Ass'n), Spring 2010, at 10.

[31] JEROME T. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT (1st ed. 2004).

[32] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1925–26).

transaction involving commerce,"[33] the FAA formed (and remains) the basis for domestic arbitrations within the United States.[34] As the US Court of Appeals for the Second Circuit described it: "the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed on the same footing as other contracts, where it belongs."[35] The FAA confirmed that agreements to arbitrate in the United States are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[36] The FAA permits for limited judicial involvement in the arbitral process– i.e., for the purposes of award modification or vacation[37]–but most courts only involve themselves in arbitrations for the purposes of compelling contractually stipulated arbitrations,[38] or to confirm arbitral awards.[39] The first chapter of the FAA governs domestic cases that involve interstate and other forms of cross-border commerce.[40] Chapter 2 of the FAA implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), adopted by the United Nations in 1958, and signed by the United States the same year.[41] Chapter 3 of the FAA implements the Inter-American Convention On International Commercial Arbitration (Panama Convention).[42]

The FAA has become invaluable for the enforcement of arbitration agreements and their resulting awards, for both domestic and international commercial arbitration.[43] And, as a result of the FAA, arbitration has become ever-present in the United States – *Judge Judy* and *The People's Court*, for instance, are binding arbitrations.[44]

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[33] Federal Arbitration Act, 9 U.S.C. § 1.

[34] Jacob Petersen, Note, *Splitting Hairs: Resolving the Circuit Split on AAA Incorporation in Class Arbitration Delegation*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC., 124, 126 (2021).

[35] Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

[36] Federal Arbitration Act § 2.

[37] *Id.* §§ 10–11.

[38] *Id.* § 4.

[39] *Id.* § 9.

[40] *Id.* § 1.

[41] *Id.* § 201.

[42] *Id.* § 301.

[43] Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: a powerful tool for enforcing arbitration agreements and arbitral awards*, LATHAM WATKINS, Apr. 17, 2014, https://web.archive.org/web/20180224155823/https://m.lw.com/thoughtleadership/the-us-fed-arbitration-act.

[44] Philip Z. Kimball, *Syndi-court Justice: Judge Judy and Exploitation of Arbitration*, 4 J. AM. ARB. 147, 150 (2005).

C. PRINCIPAL JURISPRUDENCE CONCERNING CLASS ARBITRATION IN THE UNITED STATES

Class action arbitration, the subject of this comment, has its foundations in American class actions. The class action first emerged in American jurisprudence, and, for a time, was rightly known as a "uniquely American device."[45] Class arbitration as a judicially enforced device remains "uniquely American," but the issue is ripe for development in other countries.

Beginning in the 1980s, class arbitrations began to be conducted in a similar manner to class action litigation, as "large-scale lawsuits seeking representative relief on behalf of dozens to hundreds of thousands of injured parties."[46] Class arbitrations take the form of a primary, "lead," claimant (much like a class representative in a Rule 23 class action litigation) who represents a group of claimants.[47] As under Rule 23 of the Federal Rules of Civil Procedure, class arbitration proceeds on an opt-out basis.[48]

It was not until 2003 that the Supreme Court waded into the class arbitration debate in *Green Tree Financial Corp. v. Bazzle*.[49] Until *Bazzle*, the growth of class arbitration had been stunted by "concerns about whether judges had the power to order class proceedings over the objection of one or more parties."[50] The *Bazzle* decision allowed the Supreme Court to "open the door" to class arbitration.[51] There, the Supreme Court reviewed a South Carolina Supreme Court holding that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."[52]

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45 The President and Fellows of Harv. Coll. Against JSC Surgutneftegaz, *supra* note 2.

46 S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 206 (2012) (citing 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)).

47 RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 3.8 (Am. L. Inst. 2019).

48 CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW, *supra* note 4, at 7.

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

50 Strong, supra note 46, at 10.

51 *Bazzle*, 539 U.S. at 453.

52 Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 360–61. ("If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. . . . Under those circumstances, parties with nominal individual claims,

The Court reversed the South Carolina decision, remanding the issue to the arbitral tribunal.[53] The decision held that "class action arbitrations are not inconsistent with the FAA and that the availability of class arbitration depends on the terms of the parties' arbitration agreement."[54]

Following *Bazzle*, the amount of domestic class arbitrations in the United States skyrocketed.[55] The American Arbitration Association and JAMS administered hundreds of class arbitrations over the intervening few years, and both promulgated rules for arbitral proceedings on a class basis.[56] Of these class arbitrations, some resulted from class arbitration stipulations in arbitration agreements.[57] However, many more followed from arbitration agreements that were silent as to class arbitration, and became class arbitrations as a result of arbitral tribunals seizing upon their power (reiterated in *Bazzle*) to construe that silence to allow class arbitration.[58]

The class arbitration gold rush set off by the *Bazzle* decision would not last long, however, as the Court retreated from its prior embrace of the mechanism. In 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court limited the circumstances under which an arbitral tribunal may order class arbitration when an arbitration clause is silent on the issue.[59] *Stolt-Nielsen* centered on an ambiguous arbitration

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but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.").

53 *Bazzle*, 539 U.S. at 454.

54 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1625 (2021).

55 *See* Mogilnicki & Cochran, *Current Issues in* Consumer *Arbitration*, 60 BUS. LAW. 785, 792 (2005); *see also* Strong, *supra* note 46, at 36–37.

56 *See AAA Policy on* Class *Arbitrations*, AMERICAN ARBITRATION ASSOCIATION (Mar. 29, 2023, 4:13 PM), https://www.adr.org/sites/default/files/document_repository/AAA%20Policy%20on%20Class%20Arbitrations.pdf. ("On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved in accordance with the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.").

57 *See, e.g.*, Jones v. Chubb Inst., No. 06-4937 (KSH), 2007 U.S. Dist. LEXIS 72606, at 3 (D.N.J. Sep. 28, 2007); Cheng v. Oxford Health Plans, Inc., 846 N.Y.S.2d 16, 17 (N.Y. App. Div. 2007).

58 *See, e.g.*, Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 572 (2013).

59 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010).

agreement.[60] The claimant, a bulk animal feed supplier, attempted to bring a class arbitration against Stolt-Nielsen, a major oceanic shipping company specializing in liquids transportation, on the grounds of illegal price fixing by shipping firms.[61] The original arbitration agreement made no mention of class arbitration, and the arbitral tribunal had exercised its authority, reaffirmed in *Bazzle*, to issue an award requiring the arbitration to proceed on a class basis (between Stolt-Nielsen and its customers with the same arbitration clause).[62] Stolt-Nielsen applied to vacate.[63] The Supreme Court held, in a majority opinion, that the arbitral tribunal had "simply imposed its own conception of sound policy" to the arbitration–namely, it imposed the view "that class arbitration is beneficial in 'a wide variety of settings.'"[64] The Court vacated the award on the grounds that the tribunal's judgement to arbitrate with the class mechanism exceeded their authority.[65] In doing so, the Court appeared to contravene the *Bazzle* plurality–going even further by prohibiting class arbitration unless when arbitration agreements are present where "the parties agreed to authorize class arbitration."[66]

In 2011, the Supreme Court upheld a class action waiver in a consumer contract, confirming the FAA's preemption over state law on the unconscionability of arbitration waivers.[67] The case, *AT&T Mobility v. Concepcion*, was predicated on the class action waiver present in AT&T's service contract. [68] AT&T's advertising offered a free phone in exchange for signing up for cellular service, but the company charged sales tax on the free phones they disbursed.[69] A class of plaintiffs formed, and sued.[70] AT&T filed a motion to compel individual arbitration, citing its arbitration clause that mandated arbitration on an "individual capacity, not as a plaintiff or class member in any purported class or representative proceeding."[71] The district court in *Concepcion* denied the motion, ruling that the class action waiver was plainly unconscionable under California

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60 *See id.* at 662.
61 *Id.* at 667.
62 *See id.* at 677.
63 *Id.* at 662.
64 *Id.* at 663.
65 *Id.* at 674.
66 *Id.* at 687.
67 *See Concepcion*, 563 U.S. at 352.
68 *Id.*
69 *Id.* at 337.
70 *Id.*
71 *Id.* at 336–37.

law.[72] The Ninth Circuit affirmed.[73] The Supreme Court, however, reversed the appellate decision on the grounds that holding class waivers unconscionable is disallowed by the Federal Arbitration Act if it functionally allows individuals to demand class arbitration.[74] The Court ruled that any state law "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[75]

Since *Concepcion*, the Supreme Court has continued a similar approach towards class action waivers. A year later, the Court again held that the FAA preempted state law in *Marmet Health Care Ctr., Inc. v. Brown*, allowing nursing homes to include arbitration agreements for personal injury or wrongful death.[76] In 2013, the Court again ruled on the strength of the FAA–preventing a court from invalidating a class action waiver even when "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[77]

Most recently, the Supreme Court considered several cases that returned to the issue of class arbitration in ambiguous arbitration agreements. In *Oxford Health Plans LLC v. Sutter*, the Court reviewed an arbitration agreement that stipulated that "no civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration."[78] Both parties agreed that the arbitrator was responsible for deciding whether the arbitration agreement allowed class arbitration.[79] The arbitrator concluded that the arbitration clause was intended to "vest in the arbitration process everything that is prohibited from the court process," and determined that class arbitration was permitted.[80] Unlike in *Stolt-Nielsen*, here, the Court held that the challenge to the arbitrator's decision

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[72] *See id.* at 338.

[73] *Id.*

[74] *See id*. at 343; *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018).

[75] *Concepcion*, 563 U.S. at 344.

[76] Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532–33 (2012).

[77] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Sara Anne Ford, R. Ashby Pate & Jeffrey P. Doss, *Class Arbitration and the Enforceability of Class Action Waivers in Arbitration Agreements*, A.B.A. (Feb. 23, 2021), https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2021/class-actions-arbitration-waivers/.

[78] Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 566 (2013).

[79] *Id.* The arbitrator also found that the class action mechanism "'could be brought in a court' absent the agreement," and so could therefore also be brought in an arbitral proceeding. *Id.*

[80] *Id.* at 567.

had failed to meet the burden required to vacate, as Oxford Health Plans had failed to show that the arbitrator "strayed from his delegated task of interpreting a contract."[81]

In 2018,[82] the Court held that agreements to use "individualized rather than class or collective action procedures" are protected by the FAA.[83] The next year, the *Lamps Plus* decision was seen as a "lights out" of sorts for class arbitration.[84] In that case, an ambiguous arbitration agreement did not specifically preclude class arbitration, and the district and appellate courts both concluded that a class arbitration was permissible.[85] the agreement under dispute stated that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."[86] On appeal, the Ninth Circuit held that ambiguity in an arbitration clause should be interpreted against the drafter to permit class arbitration proceedings.[87] The Supreme Court accepted the case, certifying on the question of "whether, consistent with the FAA, an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration."[88] The Supreme Court reversed, holding that, on the contrary, class arbitration requires "more than ambiguity to ensure that the parties actually agreed to arbitrate on a class-wide basis,"[89] and that an ambiguous clause was insufficient as the "contractual basis" for proceeding with class arbitration.[90] In doing so, the Court continued its skepticism towards class arbitrations. Though the "light has dimmed" on class arbitration as a result of *Lamps Plus*, it remains a useful tool if the parties consent.

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81 *Id.* at 571–72.

82 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

83 Mitchell L. Lathrop, *Class Arbitration: Who Decides*, 86 DEF. COUNS. J. 1, 3 (2019).

84 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) ("[C]ourts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so.") (internal quotation marks and citation omitted).

85 *Id.* at 1413, 1415.

86 *Id.* at 1413.

87 *Id.* at 1417.

88 *Id.* at 1415.

89 *Id.*

90 *Lamps Plus, Inc.*, 139 S. Ct. at 1415.

D. STATE OF CLASS AND MASS ARBITRATION OUTSIDE THE UNITED STATES

While arbitration has a long history of use in Europe, both formally and informally in most countries, courts there have historically viewed arbitration with at least some degree of skepticism.[91] Some English judges saw arbitration agreements as essentially unenforceable, easily revoked by either party.[92] Furthermore, until the past half-century, English courts generally balked on enforcement of arbitration clauses, as they were viewed as infringing upon the jurisdiction of the courts.[93] Across the English Channel, however, French courts embraced *international* arbitration, though domestic adoption was slower.[94]

With Canada being the exception, there have been few arbitral proceedings or judicial decisions in the Americas outside the United States that have addressed the concepts of class and cross-border class arbitration. But even Canadian courts have only ruled on claims requiring class actions and individual arbitrations, with some upholding and some invalidating class action waivers.[95] Some Canadian courts have signaled opposition to class actions and arbitration, with one court writing that:

> Clauses that require arbitration and preclude the aggregation of claims have the effect of removing consumer claims from the reach of class actions. The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding.[96]

Other Canadian courts have ruled otherwise, within the bounds of arbitral proceedings set by the Canadian legislature.[97] However, Canadian

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[91] *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942).

[92] *See id.* at 982 (citing Vynior's Case [1609] 77 Eng. Rep. 597 (KB)).

[93] Arthur Taylor von Mehren, *A General View of* Contract, *in* 7 CONTRACTS IN GENERAL, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 52–56 (1982).

[94] Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1050, 1052, 1056–57 (1986).

[95] *See* Strong, *supra* note 46, at 15.

[96] Griffin v. Dell Can. Inc., [2010] 98 O.R. 3d 481 (Can. Ont. C.A.).

[97] Dell Computer Corp. v. Union des Consommateurs, [2007] S.C.R. 34, 87 (Can.); *see* Murphy v. Amway Canada Corp., [2014] F.C.R. 478 (Can.) ("The Supreme Court has made it clear that express legislative language in a statute is required before the courts will refuse to give effect to

jurisprudence has not yet reached the point where American-style class arbitration may be successfully exported north.[98]

This is not to say, of course, that the United States and Canada are the only nations in the Americas to have been affected by class (or mass) arbitration. In 2011,[99] an ICSID tribunal proposed "mass arbitration" to resolve the claims of 60,000 bondholders against Argentina.[100] Though an investor-state arbitration rather than a traditional international commercial arbitration, the extreme size of the "class" in the arbitral proceeding proves that smaller arbitral proceedings are just as possible. And, in some cases, all-but-necessary, when the claim at hand would cost more in expenses than any individual claimant could recover. In the case of *Abaclat*, the bondholders (investors) consented to a mass arbitration being conducted on their behalf against the state of Argentina.[101] Argentina, however, attempted to withhold its participation in the arbitral proceedings, arguing that ICSID rules did not permit any form of arbitral proceedings involving a large group of individuals consolidated into one "mass" (or "class") arbitration.[102] The ICSID tribunal rejected Argentina's argument, writing that "it would be contrary . . . to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration."[103] The tribunal wrote that, unlike an American class action or class arbitration in which an individual "initiates a proceeding in the name of a class composed of an undetermined number of unidentified claimants," each claimant in the arbitration had been identified and had consented prior to the initiation of the arbitral proceeding, creating "a sort of a hybrid kind of collective

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the terms of an arbitration agreement. In that regard, the Competition Act does not contain language which would indicate that Parliament intended that arbitration clauses be restricted or prohibited. More particularly, there is no language in the Competition Act that would prohibit class action waivers so as to prevent the determination of a claim by way of arbitration."); Wellman v. Telus Commc'ns Co., [2017] 138 O.R. 3d 413 (Can. Ont. C.A.).

98 *See, e.g.*, Chatfield v. Saskatchewan Telecomm. (2014), 29 Sask. R. 14 (Can. Sask. C.A.) ("there is no Canadian jurisprudence which even remotely suggests that class-wide arbitration can be ordered within the context of a class action. Mr. Chatfield cites only some American authorities for this proposition and [§]14 of The Class Actions Act. No lower level court has thoroughly considered this issue.").

99 Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011).

100 *Id*.

101 *Id.* at 13–14.

102 Strong, *supra* note 46, at 332.

103 Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011).

proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of claimants involved."[104] As the award explained,[105] for the purposes of *Abaclat*, "collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law."[106]

II. ASSESSMENT OF RELEVANT LEGAL AND PRACTICAL FACTORS IN THE UNITED STATES (THAT WILL OR MAY INFLUENCE VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION)

A. INTRODUCTION

The fundamental assumption underlying this analysis is that the existence of, or familiarity with, class action litigation in a national legal system will make for more receptivity to, and less skepticism about, class arbitration. Laws in the United States concerning class action litigation are on the cutting edge: the United States has the greatest experience with, and development of, class action litigation in the world.[107] Courts review "gateway matters" like scope and validity of arbitration agreements,[108] but not the question of the applicability and permissibility of class arbitration, which, according the plurality in *Bazzle*, "concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question."[109]

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[104] *Id.* at ¶ 138; Blavi & Vial, *supra* note 9, at 809; *From Class to Collective: The De-Americanization of Class Abritration*, *supra* note 4, at 495.

[105] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Consent Award Under ICSID Arbitration Rule 43(2), (Dec. 29, 2016); *See, e.g.*, Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶¶ 188–266 (Feb. 7, 2020); Alemanni v. Argentina, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, ¶¶ 261–325 (Nov. 17, 2014); Ambiente Ufficio Spa v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 7–13 (Feb. 8, 2013).

[106] Abaclat v Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 190 (Aug. 4, 2011).

[107] *See* BORN, *supra* note 54.

[108] *Id.* at 453 (discussing "gateway matters," including allocation of jurisdictional competence between arbitral tribunals and courts under the FAA).

[109] *Id.*

B. PRINCIPAL ISSUES IN THE UNITED STATES CONCERNING VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION

To find parallels in other countries (and thereby the potential for domestic and cross-border class arbitration involving those countries), we should examine the jurisprudence in the United States concerning class arbitration first – primarily in two respects: (i) who decides the class arbitrability issue (the "delegation issue"); and (ii) on what rationales is the class arbitrability issue ultimately decided?

If a country has no collective or class action jurisprudence, it follows that it would be less likely to be on the leading edge of permitting class arbitration. A jurisprudential prohibition on class actions would likely immutably close the door to class arbitrations in their entirety – either fully domestically or internationally. Notwithstanding the New York Convention, the prohibition of enforcement of arbitral awards would provide a significant stumbling block to any form of collective arbitrations. Countries with histories of class actions and other forms of collective litigations, on the other hand, will be less likely to be skeptical about class or collective arbitration. These countries (both common and civil law jurisdictions) include Germany, France, the United Kingdom, Canada, and Australia. Looking at the laws of these other countries in this survey, we must answer the following questions: Do we find legal principles and concepts that are the same or similar to those applied in the United States to justify permitting, prohibiting, or "not permitting" class arbitration? Have those legal principles already been applied or rejected in cases involving issues concerning class arbitrability? If not, what are the prospects they will be?

1. Delegation Issue

Before we can address these questions, however, we must elaborate upon the domestic jurisprudence that we will use as a baseline for comparison. To accomplish this, we begin with the delegation issue.[110]

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[110] Alexander Corson, *Who Decides Class Arbitrability?: The Vanishing Class Action Mechanism's Last Stand*, 50 SETON HALL L. REV. 1095 (2020); Mitchell L. Lathrop, *Class Arbitration: Who Decides*, 86 DEF. COUNS. J. 1 (2019); Virginia Stevens Crimmins, *Delegating Questions of Whether a Case Can Be Arbitrated on a Class-Wide Basis - The Fight Over Who Decides Continues*, 74 DISP. RESOL. J. 63 (2019).

"Who decides" the class arbitrability issue depends on where the issue is broached in the first instance.[111]

If, in the first instance, the issue of arbitrability is raised in court (either on motion to compel or stay arbitration), the court must turn to the "clear and unmistakable manifestation of intent" standard. In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court introduced the "clear and unmistakable manifestation of intent" standard to provide a guide for a court to address the arbitrability (delegation) issue.[112] If a court finds that a clear and unmistakable manifestation of intent to arbitrate, the delegation issue is resolved by the court – passing the dispute to the arbitrator, who will then decide the class arbitration issue. If the court does not find such manifestation of intent, the court may proceed to a determination of the class arbitrability issue.

2. Party Arbitrability – Overcoming Issues of Lack of Privity, Incomplete Consent, and Contract Formation

Once the delegation issue has been resolved or preserved, the issue of class arbitrability itself must be resolved. There are two distinguishable lines of domestic (United States) jurisprudence concerning the arbitrability issue – i.e., (i) decisions by a court in the first instance concerning the class arbitrability issue; and (ii) decisions by a court upon review of a class arbitrability decision in the first instance by an arbitrator. In turn, looking at these two jurisprudential lines separately, we must examine the judicial rationales for (a) permitting a finding that class arbitration is permitted, and (b) finding that class arbitration is prohibited or not permitted.[113] The available methods of handling the delegation issue and the rationales provided by courts for resolving the class arbitrability issue form the foundation for the analysis of the potential for class arbitration in other countries.

In the first instance, a court may rule on whether class arbitration is permitted by an arbitration agreement. Under the FAA, this is accomplished through a motion to compel or to stay arbitration. If the court rules that class arbitration is permitted or not permitted by the arbitration agreement, an objecting party may file an appeal. If a stay of arbitration is

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[111] William W. Park, Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law, 8 NEV. L.J. 135, 136-37 (2007).

[112] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944–945 (1995).

[113] These are two distinct issues – judicial "gateways" and "barriers."

not granted, the court will order the arbitral proceeding to commence. There are several theories or factors supporting class arbitrability. Among them are express agreement, implied agreement, and estoppel.

3. Judicial Review of Arbitral Conclusions

In the United States, the Supreme Court has recognized that the FAA provides for "a national policy favoring arbitration."[114] As such, the role of the American judiciary is limited.[115] American judges are not permitted to review the substantive conclusions made by an arbitrator, as doing so would undermine the contractually binding nature of arbitration.[116]

4. Enforceability of Putative International Class Commercial Arbitral Award

However, just because the judiciary may not review the underlying basis of an award, does not mean that the American judiciary has no say in the enforcement of the award.[117] Under Article V of the New York Convention (implemented in Chapter 2 of the FAA), a judge may vacate or otherwise set aside an award to protect "both the integrity of the contract and the fairness of the procedure."[118]

C. CHALLENGES – LEGAL AND PRACTICAL FACTORS IMPEDING VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION

1. Arbitration is a Consensual Creature of Contract

After *Bazzle*, corporations in the United States began to include class arbitration waivers in their arbitration agreements to preclude the possibility of class arbitrations involving large numbers of customers. Some courts, however, ruled that these waivers could not be enforced,

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[114] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

[115] Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 627 (1997).

[116] *Id.* (citing Northrop Corp. v. Triad Int'l Mktg., S.A., 811 F.2d 1265, 1269 (9th Cir. 1987)).

[117] *Id.*

[118] *Id.* at 629.

whether due to "unconscionability, public policy, or [on] other grounds."[119] In particular, the 11th Circuit wrote that:

> Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims. We thus conclude that the enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect [sic] the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.[120]

Many lower courts followed similar reasoning when confronted with class arbitration waivers, either overturning the waivers or the arbitration agreements in their entirety.[121]

2. Judicial Skepticism

Lamps Plus and *Oxford Health* do provide some signals for how the Supreme Court will likely opine in the future – and the prospects are not bright.[122] *Bazzle* had previously decided when class arbitration is authorized in an arbitration agreement. But *Bazzle* is unlikely to continue to be held as precedent in this way for much longer. The Court will need

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[119] BORN, *supra* note 54, at 1628.

[120] Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007).

[121] *See, e.g.*, Omstead v. Dell, Inc., 594 F.3d 1081, 1086 (9th Cir. 2010); Lowden v. T-Mobile U.S. Inc., 512 F.3d 1213, 1215 (9th Cir. 2008); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981 (9th Cir. 2007); *Dale*, 498 F.3d at 1216; Luna v. Household Fin. Corp., III, 236 F.Supp. 2d 1166, 1178-83 (W.D. Wash. 2002); Leonard v. Terminix Int'l Co., 854 So.2d 529, 539 (Ala. 2002); Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161 (Ohio Ct. App. 2004); Powertel, Inc. v. Bexley, 743 So.2d 570, 575–76 (Fla. Dist. Ct. App. 1999); Gerald Aksen, *Class Actions in Arbitration and Enforcement Issues: An Arbitrator's Point of View*, *in* MULTIPARTY ARBITRATION 215 (Bernard Hanotiau & Eric A. Schwartz eds., 2010); Thomas Carbonneau, *Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 151 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009); Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006).

[122] Pravin R. Patel, *Lamps Plus: Supreme Court Turns Out the Lights on Class Arbitration*, ABA PRACTICE POINTS (Apr. 30, 2019), https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2019/lamps-plus-supreme-court-turns-out-the-lights-on-class-arbitration.

to address this question in the near future, and it may rule that class arbitrability is a judicial, not arbitral, decision. If it does, class arbitrations will be far less common than today, or the halcyon days of *Bazzle* class arbitrations.

3. Issues in Showing "clear and unmistakable" Manifestation of Intent to Delegate Class Arbitrability Issue

The "clear and unmistakable" standard from *First Options* has been adopted by many arbitral institutions.[123] But what is a "clear and unmistakable" manifestation of intent to arbitrate? This appears at first glance to be a seemingly consistent standard, though courts have applied it in drastically different ways.[124] Circuit courts across the country have "differed on whether broad language used in the arbitration clause,"[125] or even "the incorporation of institutional arbitration rules is sufficient to evidence such intention."[126]

When an arbitration agreement covers (or is purported to cover) all disputes that may arise between the parties, some courts (including the Second and Fifth Circuits) have found this language sufficient to satisfy the "clear and unmistakable manifestation of intent" standard.[127] Furthermore, the Second Circuit's interpretation of the Supreme Court's standard has not been unchallenged. The Fourth, Eight, and Tenth Circuits have held parties to a heightened version of the standard.[128] The Fourth Circuit ruled that "the presence of an expansive arbitration clause. . . will

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[123] *See, e.g., Commercial Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION (2013); *International Dispute Resolution Procedures*, INTERNATIONAL CENTER FOR Dispute RESOLUTION, art. 19(1) (2014); *Arbitration Rules*, INT'L CHAMBER OF COM., art. 6 (2021); *Arbitration Rules*, UNCITRAL, art. 23(1) (2021); *Arbitration Rules*, LCIA, art. 23.1 (2020); *Rules for Non-Administered Arbitration of International Disputes*, CPR, art. 8.1.

[124] Tamar Meshel, *"A Doughnut Hole In The Doughnut's Hole": The Henry Schein Saga and Who Decides Arbitrability*, 73 RUTGERS U. L. REV. 83, 114 (2020).

[125] *Id.* ("Several circuit courts have indeed refused to apply the clear and unmistakable principle to questions that related to the formation or existence of arbitration agreements, leaving such questions within the exclusive purview of the courts regardless of the parties' intentions. However, some of these courts have not been consistent or clear in this regard.").

[126] *Id.* at 117.

[127] *See, e.g.*, Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392 (2d Cir. 2018); Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630 (5th Cir. 2012); Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 507 (7th Cir. 2018).

[128] Meshel, *supra* note 124, at 119.

not suffice."[129] The Eight Circuit similarly held that blanket clauses using nonspecific language such as "any controversy" are too general to prove useful in decision-making of the delegation issue by a court.[130] Likewise, the Tenth Circuit ruled that the standard requires "a specific intent to submit to an arbitrator the question whether an agreement to arbitrate exists or remained in existence."[131] But even with the Second Circuit's more forgiving interpretation of the standard, two issues arise: (a) is incorporation by reference of rules with a *kompetenz-kompetenz* provision sufficient to fulfil the Second Circuit's interpretation of the standard; and (b) is incorporation by reference of AAA rules with (i) a *kompetenz-kompetenz* provision,[132] AND (ii) class arbitration-specific procedural rules sufficient to fulfil the standard?[133] The answer would appear to be yes, as "virtually all circuit courts have found that the adoption of institutional arbitration rules that empower the arbitrator to determine arbitrability questions constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability."[134] This applies to AAA rules, as well as JAMS, UNCITRAL, ICC, and any other rules of arbitral institutions that may be incorporated into arbitration clauses or commercial contracts generally.[135]

4. Lack of Independent (and Unilateral) Means to Add Non-signatory to Arbitration

The FAA does not permit a court to compel arbitration by parties who are non-signatories (i.e., not bound) to an arbitration agreement.[136]

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[129] Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012); Simply Wireless, Inc v. T-Mobile U.S., Inc, 877 F.3d 522, 526 (4th Cir. 2017), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 305 (2018).

[130] Lebanon Chem. Corp. v. United Farmers Plant Food, Inc., 179 F.3d 1095, 1100 (8th Cir. 1999).

[131] Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 780 (10th Cir. 1998).

[132] *Kompetenz-kompetenz*, literally "jurisdiction on jurisdiction," is the arbitral principle by which arbitrators may define their own jurisdiction and rule upon challenges to their jurisdictional determination. *Competence-Competence Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[133] *See generally* Charles B. Rosenberg, *Henry Schein v. Archer & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause*, 8 AM. U. BUS. L. REV. 381 (2020); David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633 (2020); Adam Samuel, *The US Supreme Court Does Kompetenz-Kompetenz*, 35 ARB. INT'L 263 (2019).

[134] Meshel, *supra* note 124, at 120.

[135] *Id.* at 120–121.

[136] EEOC v. Waffle House Inc., 534 U.S. 279, 289 (2002); Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) ("the FAA does not require parties to arbitrate when they have not agreed to do so").

Generally, individuals who have a claim against another party, but are not signatories to an arbitration agreement with that party may not arbitrate that claim – even if another person in an identical situation (albeit with a signed arbitration agreement) may. Absent agreement to arbitrate in some form, there is no method for a court to compel arbitration at all.[137]

D. OPPORTUNITIES – LEGAL AND PRACTICAL FACTORS SUPPORTING VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION

1. Pro-arbitration Policy of the Courts

As previously mentioned, American courts have a strong and generally unassailable pro-arbitration policy.[138]

2. Power of Arbitrators in the First Instance

In the first instance, when the parties commence arbitration without objection, the delegation issue is settled, and the arbitrator may decide the arbitrability issue (even in the absence of an agreement to arbitrate, the presence of the parties without objection is sufficient to be considered an *ad hoc* arbitration. The rules of arbitral institutions typically specify procedures regarding objections to an arbitrator's jurisdiction (i.e., in AAA Art. R-7 and ICDR Art. 21).[139] If a party does object to the adjudication of the class arbitrability issue by the arbitrator, the delegation issue remains unresolved, and is preserved for possible later disposition by a court upon application to vacate or confirm the arbitral award.

If the arbitral proceeding has been initiated, the issue of class arbitrability is addressed by the arbitrator.[140] If the arbitrator determines that class arbitration was permitted by the arbitration agreement, the

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[137] *Cf.* United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[138] JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 1 (2017).

[139] See *Commercial Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION (2013); *International Dispute Resolution Procedures*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (2014).

[140] *See, e.g.*, Edwards v Macy's Inc., 2015 WL 4104718, at 11 (S.D.N.Y. June 30, 2015) ("It is clear that the issue of whether the language quoted above authorizes class-wide arbitration is for the arbitrators in the first instance, not for the court.").

arbitral award will come in the form of a class award.[141] If the arbitrator finds to the contrary, a standard arbitral award will apply. In either event, an objecting party may bring the issue to the courts for review – through an application to confirm or vacate the award. The courts, however, give great deference to arbitral awards; as arbitrator adherence to judicial doctrine is not necessarily required, overturning an arbitral award (even a class award) is quite difficult.[142]

3. The Supreme Court Has Not Completely "closed the door" on the Viability of Class Arbitration

Recall *Bazzle*: there, the plurality had first discussed whether the South Carolina court was correct in its determination that Green Tree's arbitration agreement affirmatively forbade class arbitration, or if it was silent on the issue.[143] Justice Breyer, writing for the plurality, concluded that arbitration agreements should be interpreted by the arbitrators conducting the arbitral proceeding, with only "minimal judicial review."[144] After the decision, American arbitral institutions began to construct a framework for class arbitration proceedings.[145]

4. Legal Theories and Doctrines

Whether an American court may join a non-signatory to an arbitration depends on relevant principles within the jurisdiction. The Restatement of U.S. Law of International Commercial Arbitration clarifies that the FAA requires that judges apply choice-of-law rules, particularly state law, when applying theories such as estoppel or third-party beneficiary.[146]

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[141] INTERNATIONAL CHAMBER OF COMMERCE, CLASS AND GROUP ACTIONS IN ARBITRATION 13 (Bernard Hanotiau & Eric Schwartz eds., 2016).

[142] *Id.*

[143] *Id.; see* OEHMKE, *supra* note 17, § 16:4; K.R. Pierce, *Down the Rabbit Hole: Who Decides What's Arbitrable*?, 21 J. INT'L ARB. 289 (2004).

[144] *Id.*

[145] *Supplementary Rules for Class Arbitrations*, AMERICAN ARBITRATION ASSOCIATION (2003); *JAMS Class Action Procedures*, JAMS (2009); *Arbitration Class Procedures*, NATIONAL ARBITRATION FORUM.

[146] RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARB. § 2.3, cmt. c (Am. L. Inst. 2019).

a. Estoppel

The theory of estoppel in the United States is a basis, in lieu of contractual privity, upon which a non-signatory can compel a signatory of an arbitration agreement to arbitrate. That theory has been described as follows:

> U.S. courts have given the doctrine of arbitration estoppel a dynamic meaning, which diverges from its traditional origins of equity. Here, courts attach less importance on whether the party avoiding the arbitration agreement has gained a substantive and direct benefit from a contract including the arbitration clause. Instead, courts will enjoin a signatory to arbitrate its claim against a non-signatory (and vice versa) if they are satisfied that a 'tight relatedness of the parties, contracts and controversies' exists.[147]

Courts invoke the theory of estoppel to preclude a signatory party of a contract with an arbitration clause from dodging contractually mandated arbitration.[148] American courts have bound non-signatories to arbitration agreements under this theory.[149] The Texas Supreme Court, for instance, found in *Meyer v. WMCO-GP L.L.C.*, that a plaintiff "cannot, on the one hand, seek to hold [a] non-signatory liable pursuant to duties imposed by [an] agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory."[150] Generally, courts have been willing to estop signatories from avoiding the arbitration of claims derived from contracts containing arbitration clauses.[151] And, courts have also estopped parties from avoiding their contractual obligations to arbitrate in cases where non-

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[147] Stavros Brekoulakis et al., *The Evolution and Future of International Arbitration*, 37 INT. ARB. L. LIB. 126 (2016).

[148] R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 160–61 (4th Cir. 2004) ("in the context of arbitration, the doctrine applies when one party attempts to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause.").

[149] *See e.g.*, Thomson-CSF SA v. Am. Arb. Ass'n, 64 F.3d 773, 776-778 (2d Cir. 1995); Machado v. System4 LLC, 28 N.E.3d 401, 410 (Mass. 2015); Heritage Capital Corp. v. Christie's, Inc., 2017 WL 1550514, at 3 (N.D. Tex. May 1, 2017).

[150] Meyer v. WMCO-GP L.L.C., 211 S.W.3d 302 (Tex. 2006) (quoting Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 528 (5th Cir. 2000)).

[151] G. Allan Van Fleet, P.C., & Mark A. Correro, Correro & Leisure, P.C., *Joining Nonsignatories to an Arbitration in the US*, PRACTICAL LAW PRACTICE Note w-011-3186, https://1.next.westlaw.com/Document/Ic6a1a888c08e11e79bef99c0ee06c731/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=fc31be7726cc4bcdaeee3d4c8a689224&contextData=(sc.Default).

signatories sought to join a signatory,[152] and signatories sought to join a non-signatory.[153]

b. Third-party Beneficiary Theory

The third-party beneficiary theory has been used by third-party plaintiffs seeking to compel arbitration, as well as to compel arbitration against third-party beneficiaries.[154] To do so, "courts look at the intent of the parties at the time they executed the contract."[155]

c. Other Theories

To compel arbitration by or on behalf of non-signatories, American courts have also used the theories of incorporation by reference, alter ego, agency, assignment, assumption, and waiver.[156]

5. Evolution of Existing Institutional Procedural Mechanisms (Joinder and Consolidation)

Class arbitration is far better equipped to handle large arbitral proceedings than any existing procedural mechanism. The joinder of parties "implies the addition of a third party to an existing arbitral proceeding."[157] But the use of joinder to add a claimant or respondent does not change the nature of the arbitral proceeding, and becomes impractical when the putative class membership is sufficiently numerous.[158]

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[152] *See, e.g.*, Tradeline Enters. Pvt. Ltd. v. Jess Smith & Sons Cotton, LLC, 772 F. App'x 586 (9th Cir. 2019); Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001); Caporicci U.S.A. Corp. v. Prada S.P.A., No. 18-20859, 2018 WL 2264194, at 3 (S.D. Fla. 2018); *System4 LLC*, 28 N.E.3d at 410; Doe v. Trump Corp., 453 F.Supp.3d 634, 641 (S.D.N.Y. 2020), *aff'd*, 6 F.4th 400, 413 (2d Cir. 2021); Ostrolenk Faber LLP v. Lagassey, No. 18-CV-1533, 2020 WL 30350, at 6 (S.D.N.Y. Jan. 2, 2020).

[153] *See* Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 68 (2d Cir. 2021) (quoting MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLC, 268 F.3d 58, 62 (2d Cir. 2001); *see, e.g.*, Shelton v. Comcast Corp., No. 20-1763, 2021 WL 214303, at 4 (E.D. Pa. Jan. 21, 2021); Bentley v. Control Grp. Media Co., Inc., 2020 WL 3639660, at 3 (S.D. Cal. July 6, 2020); BGC Notes, LLC v. Gordon, 36 N.Y.S.3d 130, 132 (1st Dep't 2016); Exigen Props., Inc. v. Genesys Telecomms. Labs., Inc., 2016 WL 520283, at 6 (Cal. Ct. App. Feb. 9, 2016).

[154] Van Fleet & Correro, *supra* note 151.

[155] *Id.*

[156] *Id.*

[157] Blavi & Vial, *supra* note 9, at 796 (citing William W. Park, arbitration of International Business Disputes 103 (2012)).

[158] *Id.*

A consolidated arbitration is also significantly less efficacious in this situation than true class arbitration.[159] A class arbitration is "contemplated when stakes in any individual case remain small enough to make [individual] arbitration impractical from a cost standpoint."[160] A consolidated arbitration, however, still involves multiple cases that would otherwise proceed separately if not for the efficiency gained from having their claims heard by a single tribunal. Additionally, consolidations still maintain the independence of the parties, while in a class arbitration, the claimant uniformly represents the other parties.[161]

6. Other Factors and Pressures Promoting Change

Class and mass arbitral proceedings are undeniably more efficient than individual arbitrations. *Abaclat* resolved the disputes of hundreds of thousands of individuals with one arbitral proceeding.[162] It would be hard to quantify how much time and how many resources were saved through this mass arbitration, and others, but one can easily see how the savings are overwhelming.

The advent of modern telecommunications software like Zoom, combined with the almost total shutdown of international travel that resulted from the COVID-19 pandemic, led to the rise of remote hearings in international arbitral proceedings.[163] These technologies not only allow cross-border arbitral proceedings to happen remotely, but also enable frictionless remote multi-party participation.

Additionally, international treaties and model laws may be amended. The New York Convention, for instance, could be amended to explicitly permit class arbitration, and can provide methods for compelling class arbitration for all signatory states similar to those found in the United States. The UNCITRAL model laws on international arbitration could also be amended, which could provide for class arbitration in any adoptee states. International arbitral institutions may also choose to amend their procedural rules to allow class arbitrations, where their rules may have previously been silent.

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159 *Id.*

160 WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 103 (2012)).

161 *Id.* at 104.

162 *See* Strong, *supra* note 46.

163 Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, J. OF INT'L ARB. (2020).

Finally, arbitrator adoption of "transnational" rules (for instance, "good faith" principle of *Lex Mercatoria*) in place of domestic contract laws or other arbitral rules may allow for more leeway in the introduction of class arbitral proceedings in countries lacking the domestic jurisprudential backing.

III. SURVEY IN SEVERAL OTHER COUNTRIES OF LEGAL [AND PRACTICAL] FACTORS THAT WILL OR MAY INFLUENCE VIABILITY OF INTERNATIONAL CLASS COMMERCIAL ARBITRATION

A. INTRODUCTION

Though the exact contours of the role that "uniquely American" class arbitrations play in the United States are still unresolved pending further Supreme Court input, class arbitrations remain relatively common in domestic arbitral proceedings. However, only very limited jurisprudence on class arbitration exists beyond North America. Some legal scholars maintain that "foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation."[164] Legal practitioners from the UK, Germany, Switzerland, Italy, and France submitted signed affidavits to this effect in *Bersch v. Drexel Firestone, Inc*.[165]

While there is a noticeable lack of jurisprudence on class arbitration outside of the United States, this does not mean that class arbitration may not occur elsewhere. Class and other "mass" and collective arbitrations have occurred in a few limited situations already, demonstrating the potential for the expansion of applicability in the future. Arbitral institutions have permitted "large, consolidated arbitrations, but have not embraced class arbitration."[166] In 2005, the International Chamber of Commerce ("ICC") issued a statement arguing that class action litigation has "adverse consequences for business and consumers,

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[164] Ilana Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy - Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1566 (2005).

[165] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996–97 (2d Cir. 1975).

[166] Lea Haber Kuck & Gregory A. Litt, *International Class Arbitration*, *in* WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 711 (Paul G. Karlsgodt ed., 2012).

outweighing the perceived benefits to society."[167] It is unlikely that the ICC would have a different opinion on class arbitrations.

Furthermore, most arbitral institutions lack rules relating to class arbitrations. For instance, the ICC and the London Court of International Arbitration ("LCIA") Rules both lack "guidelines governing class certification, class representative, notices, confidentiality or advances for costs, among other issues."[168] But class arbitrations are still possible outside the United States and across borders.

Domestic subject matter experts were consulted for their perspective on potential for international commercial class and collective arbitration in several common and civil law countries. Their responses were collected in the form of a questionnaire seeking to assess the conditions and relevant legal principles necessary, but not sufficient, to allow for international class commercial arbitral proceedings.

A. OVERVIEW OF CLASS AND COLLECTIVE ARBITRATION

Country Name	Overview: Class and Collective Arbitration Laws
Australia	In Australia, class action litigation may begin in the Federal Court or in four of its six State Supreme Courts. For actions in Australian Federal Court, the *Federal Court of Australia Act 1976* controls (Federal Court Act).[169] Under the Federal Court Act, a class action requires "seven or more persons with claims against one defendant in respect of the same, similar, or related circumstances giving rise to at least one substantial common question of law or fact."[170] Within Australia's six states, five states have statutes mirroring the Federal Court Act. New South Wales,[171] Victoria,[172] Queensland,[173] and Tasmania,[174] all currently have

[167] Gabrielle Nater-Bass, *Class Action Arbitration: A New Challenge?*, 27 ASA BULLETIN 671, 671 (2009).

[168] Blavi & Vial, *supra* note 9, at 808.

[169] *Federal Court of Australia Act 1976* (Cth) pt IVA (Austl.).

[170] *See Federal Court of Australia Act 1976* (Cth) s 33C(1) (Austl.).

[171] *Civil Procedure Act 2005* (NSW) pt 10 (Austl.).

[172] *Supreme* Court *Act 1986* (Vic) pt 4A (Austl.).

[173] *Civil* Proceedings *Act 2011* (Qld) pt 13A (Austl.).

[174] *Supreme Court Civil Procedure Act 1932* (Tas) pt VII (Austl.).

	class action statutes, with Western Australia following the passage of their *Civil Procedure (Representative Proceedings) Bill 2021* (WA).[175]
Canada	Canada does provide for class action proceedings, in a similar manner to US class actions. Class action statutes exist at the provincial and territorial levels "as constitutionally they have the jurisdiction."[176]
France	Collective actions *(actions de groupe)* are a relatively new construction under French Law. They were introduced in France in 2014 in the area of consumer affairs, and then extended in 2016 to the areas of discrimination, health and cosmetics, personal data breaches and the environment. Two distinct models of collective actions exist: a general collective action in civil matters, and a special collective action limited to consumer law. The class action mechanism is rarely used in France, with only 32 class actions since 2014.[177]
Germany	There are no laws in Germany which would allow for class actions similar to the Federal Rules of Civil Procedure 23. However, there are laws that allow collective actions under certain circumstances. Since 2018, German procedural law provides for the opportunity to bring forward a model declaration action (Musterfeststellungsklage). The model declaration action is laid down in sections 606-614 of the German Code of Civil Procedure (CCP).

[175] Civil Procedure (Representative Proceedings) Bill 2021 (WA) (Austl.).

[176] Interview with The Honourable Barry Leon.

[177] *See Notre registre* [*Our registry*], OBSERVATOIRE DES ACTIONS DE GROUP, https://observatoireactionsdegroupe.com/registre/registre-france/ [https://perma.cc/MU28-F3JK].

	Besides this, claimants have the option to combine their claims by assigning numerous individual claims to a collector, a special purpose vehicle set up to collect claims by assignment models. In contrast to a class action, such assignment models do not have any effect for other persons outside the individuals participating in the assignment model.
United Kingdom	Class actions, in the American context, are generally impermissible under English law. However, any number of claimants or defendants may be joined as parties to a claim.[178] Under Rule 19.1 of the Civil Procedure Rules, there are several methods by which such a claim may be brought, including cases in which: a. Multiple joint claimants using a single claim form (or added to a claim). b. Multiple claims managed by the court under a group litigation order (GLO). c. "Same interest" representative claimant: where one or more claimants can represent other claimants with the same interest. d. Representative claimant (claim about a trust or interpretation): where the claim is about the estate of a deceased person, property subject to a trust or the meaning of a document, including a statute.[179] Under Section 5 of the Arbitration Act 1996, arbitration agreements must be in writing.[180] However, courts in the UK have considered "relevant matters of foreign law such as if the arbitration agreement is governed by foreign law."[181] In *Egiazaryan*, the parties accepted a finding by the tribunal that was predicated on a Russian Civil Code provision extending the obligation to arbitrate across subsidiary and parent companies.[182] In that case, an English court ruled that a

[178] CPR 19.1 (UK).

[179] Interview with Dan Harrison, Galina Borshevskaya, Greg Fullelove, and Artem Doudko.

[180] Arbitration Act 1996, c. 23, § 5 (UK).

[181] *Supra* note 179.

[182] Egiazaryan v. OJSC OEK Finance [2015] EWHC (Comm) 3532 (UK). It appears that an English court, applying the law of the situs of the arbitration – in this case, English conflicts of law rules – determined that the issue in question was to be determined in accordance with foreign law – i.e.,

	Russian non-signatory could be joined to the arbitration on the basis of a Russian Civil Code provision.[183]

B. OVERVIEW OF DOMESTIC CLASS AND MASS ARBITRATION

Country Name	Overview: Mass/Class Arb Laws
Australia	Neither the Commonwealth of Australia, nor any of its constituent states, has any statute that permits or prohibits class or mass arbitration.[184] Any referral by a court to arbitration may only be done with the consent of the parties.[185] As a practical matter, it would seem unlikely that such consent would occur.[186] The Federal Court Act does not expressly refer to class arbitration or mass arbitration. Federal Court judges are highly experienced with class actions and the procedural technicalities these types of proceedings involve. It is unlikely that the Federal Court would refer a class action to arbitration where the tribunal would lack this experience. This factor would also be a disincentive for any party to seek arbitration.[187]
Canada	While there are no class or mass arbitration laws in Canada, class and mass arbitration are not explicitly statutorily or judicially prohibited.[188]
France	The existence of class arbitration under French law is questionable as (i) there is no express provision providing for a class arbitration mechanism under French law, (ii) the Consumer Code does not seem to prohibit arbitration for a damage suffered by a group,

the Russian Civil Code. The issue was whether a non-signatory parent company could be deemed a party to an arbitration agreement signed by a subsidiary in the United Kingdom. *Id.*

183 *Id.*

184 Interview with Mike Hales and Amy Barcock.

185 *Federal Court of Australia Act 1976* (Cth) s 53A(1)(a) (Austl.).

186 *Supra* note 184.

187 *Id.*

188 *Supra* note 176.

	and (iii) authors are discussing whether a class arbitration would be possible under French law.[189] Article 2061(2) of the French Civil Code reads: "Where one of the parties has not entered into a contract in the course of his professional activity, the clause may not be invoked against him."[190] However, according to some French scholars,[191] consumer class arbitration may be possible under French law, under three hypotheses: (i) under Article 2061 CPC, if the consumer rejects the unenforceability of the clause (which "*may not be invoked*"), (ii) if the judge did not consider that the clause is unfair,[192] (iii) if a *compromis d'arbitrage* was concluded (*i.e.*, the arbitration agreement concluded after the dispute arose).[193]
Germany	The national rules on arbitration are laid down in sections 1029 to 1066 of the German Code of Civil Procedure (CCP). German law does not provide rules for class actions or class arbitration.[194] Sections 1026 to 1066 of the CCP require an arbitration agreement or arbitration clause to initiate an arbitration. Thus, only the parties of such an

[189] Interview with Dr. Ioana Knoll-Tudor.

[190] Code civil [C. civ.] [Civil Code] art. 2061(2) (Fr.).

[191] Malo Depincé & Daniel Mainguy, *Fasc. 15—Actualité: Action de Groupe Francaise*, *in* DISPOSITIONS GÉNÉRALES ET PROCEDURES SPÉCIALES, JCI CONCURRENCE—CONSOMMATION § 69. According to Depincé and Mainguy, "arbitration should be possible in international situations, but also in domestic situations, in the event of the presence of an arbitration clause between a professional and a non-professional where the latter has rejected the unenforceability of the clause or where the clause has not been considered unfair by the judge, or else by means of an arbitration agreement [agreed after the dispute arose]."

[192] *See* Code de Commerce [C. com.] [Commercial Code] art. 212-1 (Fr.).

[193] The French Court of Cassation held that a *compromis d'arbitrage* does not constitute a clause in a contract concluded between a professional and a non-professional or consumer and is therefore not likely to be unfair within the meaning of Article L. 132-1 of the French Consumer Code. Cour de cassation [Cass.] [supreme court for judicial matters] Feb. 25, 2010, Bull. civ. I, No. 09-12.126 (Fr.).

[194] Interview with Dr. Maxim Kleine.

	arbitration agreement/clause can participate in the respective arbitration. However, as the parties of the agreement may choose the applicable procedural law, under section 1042 (3), they could opt for a procedural framework which provides means for class arbitration or mass arbitration. Nevertheless, such an alteration is limited to the mandatory rules of the CCP. Furthermore, an option for class or mass arbitration could be perceived as a contract at the expense of a third party. Such agreements are not permitted in general in Germany.[195] An obligation to arbitrate without previous consent could be an infringement of the right of access to justice. In 2022 the German Federal Constitutional Court (Bundesverfassungsgericht) ruled that the guarantee of the general right of access to justice must be considered "when interpreting and applying the provisions on the recognition and enforcement of arbitration proceedings and the effectiveness of arbitration agreements."[196] As this guarantee is part of the German constitutional guarantees, an infringement of this guarantee could render the arbitration agreement invalid.[197] In line with these decisions the BGH also ruled that if the arbitration agreement grants a non-signee the right to initiate an arbitration, the clause would only be valid, if the party has the option to choose between an arbitration tribunal and a state court.[198]

[195] Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court of Düsseldorf] May 19, 2006, I-17 U 162/05, openJur.

[196] Press Release No. 61/2022, The Federal Constitutional Court, Constitutional Complaint Challenging Admissibility of Arbitration Clause Successful (Jul. 12, 2022), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-061.html. [https://perma.cc/Z6SA-UQZQ].

[197] BGH, Apr. 6, 2009, II ZR 255/08, openJur.

[198] BGH, Aug. 11, 2018, I ZB 24/18, openJur.

	Further, the CCP allows a third party to participate in an arbitration as an intervening party ("Nebenintervenient").[199] There is no limit on the numbers on interveners. Nevertheless they have to have proper cause to intervene, are limited in their actions and the parties would have to consent on the application of the CCP.[200]
United Kingdom	English law does not explicitly permit or prohibit class or mass arbitration.[201]

C. THE ARBITRABILITY ISSUE

Country Name	Judicial Involvement: Who Decides Arbitrability?
Australia	Arbitral tribunals in Australia have the power to rule on their own jurisdiction, including "any objections regarding the existence or validity of an arbitration agreement."[202] In that regard, the *kompetenz-kompetenz* doctrine is strictly enforced, and is both authority-granting and exclusivity-granting to arbitral tribunals.
Canada	Arbitral tribunals have the power to decide arbitrability issues in the first instance, though "there is a narrow exception developed by the Supreme Court of Canada where if the issue depends on a specific legal question that would determine the 'arbitrability issue' then the court will answer the question."[203]
France	In France, the arbitral tribunal has almost absolute priority in deciding on its jurisdiction. To this end, the *principe de compétence-compétence*, as construed

[199] Oberlandesgericht Frankfurt [OLG] [Higher Regional Court of Frankfurt] May 10, 2012, 26 SchH 11/10, openJur.

[200] *Supra* note 194.

[201] *Supra* note 179.

[202] *Supra* note 184.

[203] *Supra* note 176.

	under French law, has both a positive and a negative effect: Under Article 1465 CPC: "The Arbitral Tribunal shall have exclusive jurisdiction to rule on disputes relating to its jurisdictional powers."[204] The positive effect of the *principe de compétence-compétence* bears two aspects under French law[205]: a. the main effect of the arbitration agreement is to impose itself on the parties, since it establishes the jurisdiction of an arbitral tribunal to decide the disputes it covers and thus obliges the parties to refer to it in the event of a dispute; however, b. it also concerns the arbitral tribunal itself, since it will justify the tribunal's having the power to examine the challenges relating to its power to rule that are raised before it. Under French law, this positive effect of the arbitration agreement is imposed as a substantive rule of international arbitration (with the resulting legal consequences) without the judges having to consider the applicable law.[206] The negative effect is noted in Article 1448 of the CPC: "Where a dispute under an arbitration agreement is brought before a State court, the latter shall declare that it has no jurisdiction unless the arbitral tribunal is not yet seized and the arbitration agreement is manifestly null and void or manifestly unenforceable. The State court may not declare of its own motion that it does not

[204] Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1506(3) (Fr.).

[205] *See* Christophe Seraglini & Jerome Ortscheidt, droit de L'arbitrage Interne et International § 675 (2d ed. 2019).

[206] *Id.*

	have jurisdiction. Any stipulation contrary to this article shall be deemed unwritten."[207] The negative effect of the *principe de compétence-compétence* also bears two aspects under French law[208]: a. No action is available before the courts directly against this agreement, as the *principe* prohibits a party from bringing a main action before the state court to have the nullity of the arbitration agreement declared as a preventive measure, and b. A party cannot file a claim before the state courts: it is up to the arbitrator, and to him alone, to rule primarily on the validity or the limits of his own jurisdiction, under the control of the judge of the annulment (the Court of appeal where the award was rendered, and the Paris Court of appeal as concerns international arbitration annulment proceedings). In other words, the courts must refrain from involvement when a dispute arises from an arbitration agreement, except "if the arbitral tribunal is not yet seized of the matter and if the arbitration agreement is manifestly null and void or manifestly unenforceable."[209] French courts, when judging on a "manifestly null and void or manifestly unenforceable" arbitration clause, have thus adopted a very narrow interpretation,[210] i.e. the one that is imposed by the force of evidence with a simple *prima facie* examination, and are therefore deterred from to conducting a substantial and thorough

[207] Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1448 (Fr.).

[208] *See* SERAGLINI & ORTSCHEIDT, *supra* note 205, § 687.

[209] *Id.*

[210] *Id.* § 689.

	review. At a later stage – during annulment proceedings – a judge is not bound by the findings of fact or law of the arbitral tribunal and may "look for all legal or factual elements allowing to assess the scope of the arbitration agreement and to deduce the consequences on the respect of the mission entrusted to the arbitrators."[211]
Germany	Tribunals have the power to decide party arbitrability under the CCP.[212] However the kompetenz-kompetenz decision is fully revisable by state courts if the parties complain about the competence of the tribunal. In this respect the state courts are not bound by the tribunal's decision. Thus, the arbitration tribunals do not have a final kompetenz-kompetenz.[213]
United Kingdom	English law does not expressly reserve the power to decide arbitrability for either the court or the arbitral tribunal.[214] In practice, this does mean that "the tribunal will often decide issues of arbitrability in the first instance."[215] The *kompetenz-kompetenz* doctrine under the Arbitration Act 1996 is slightly more limited than in the previous two commonwealth nations, in that it "provides that the parties may agree that the arbitral tribunal may not rule on its own substantive jurisdiction."[216]

[211] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 6, 2010, Bull. civ. I, No. 08-20.563 (Fr.).

[212] *Supra* note 194.

[213] *Id.*

[214] Arbitration Act 1996, c. 23, s 30 (UK).

[215] *Supra* note 179.

[216] *Id.* ("In addition, section 67 of the Act, allows the parties to apply to court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. Section 72 extends the same right to a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings.").

D. PRESUMPTION OF ARBITRABILITY

Country Name	Judicial Involvement: Presumption of Arbitrability
Australia	While there is no presumption favoring arbitration, broadly speaking, "Australian courts are supportive of arbitration."[217] It is noteworthy in this regard that unilateral arbitration clauses are enforceable in Australia. An arbitration agreement does not need to include mutual or bilateral rights of referral to arbitration; it will be enforceable even where it provides one party with the discretion to elect to submit a dispute to arbitration.[218]
Canada	Canadian courts are pro-arbitration, but this is not a "presumption of arbitrability."[219] Instead, Canadian courts "support the concept that when commercial parties agree to arbitrate, the courts should lean in favour of supporting that agreement to the extent reasonably possible (under their arbitration clause) and should give a broad interpretation to the arbitration clause."[220] Generally, Canadian courts seek to give effect to the parties' agreement to arbitrate.[221]
France	France has developed a legal system favoring arbitration, particularly in the case of international arbitration. This legal system has been set up through various reforms and case law, creating a solid tradition of judicial non-interference of French courts in the arbitral process.[222]

[217] *Supra* note 184.

[218] *Id.* (citing *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 (Austl.)).

[219] *Supra* note 176.

[220] *Id.*

[221] *Id.*

[222] *Supra* note 189.

Germany	The BGH's rulings confirm a pro-arbitration stance and a preference towards upholding arbitration agreements/clauses.[223]
United Kingdom	The Arbitration Act 1996 states that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[224] While not an explicit pro-arbitration policy or presumption favoring the finding of arbitrability, English courts have interpreted this statute to "grant anti-suit injunctions in support of arbitration to prevent parties to an arbitration agreement from initiating proceedings in courts of other states."[225] There has been a clear trend in the past decade for English courts to "uphold awards and lend support to the arbitral process."[226]

E. JUDICIAL FINDINGS OF CLASS ARBITRABILITY

Country Name	Judicial Involvement: Findings of Class Arbitrability
Australia	There is no class arbitration in Australia, and therefore no courts have discussed the class arbitrability issue.[227]
Canada	Class arbitrability, as it exists in the United States, does not exist in Canada.[228]
France	The class arbitrability issue, as it exists in the US, does not exist in France.[229]
Germany	The BGH used to call an arbitration agreement a substantive contract concerning procedural relations

[223] BGH, Feb. 6, 2020, I ZB 44/19, openJur; BGH, Sept. 23, 2021, I ZB 13/21, openJur.
[224] Arbitration Act 1996, c. 23, § 5 (UK).
[225] *Supra* note 179.
[226] *Id.*
[227] *Supra* note 184.
[228] *Supra* note 176.
[229] *Supra* note 189.

	("materiell rechtlichen Vertrag über prozessrechtliche Beziehungen").[230] In a later decision the BGH classified an arbitration agreement solely as a procedural contract.[231] If German law is applicable, the basic contractual principles (see sec. 145 et seq. German Civil Code) and the rules on procedural contracts must be fulfilled.[232] Otherwise the agreement would be invalid and the parties would not be bound to arbitrate.[233]
United Kingdom	Class arbitrability does not exist in the United Kingdom.[234]

F. AWARD ENFORCEMENT

Country Name	Judicial review of commercial arbitration awards
Australia	The NSW Supreme Court made clear that "courts should exercise the utmost in judicial restraint, and limit to the absolute minimum any interference with the arbitral process."[235] Under existing Australian arbitration statutes, appeals may be made with consent of the parties on questions of law arising from an arbitral award (and the court may either vacate, remit, or vary the award).[236] Therefore, "the opportunity for judicial review on a question of law is narrow."[237] These statutes, however, do not apply to international

[230] BGH, Nov. 28, 1963, VII ZR 112/62, openJur; BGH, Jan. 30, 1957, V ZR 80/55, openJur.

[231] BGH, Dec. 3, 1986, IVb ZR 80/85, openJur.

[232] Oberlandesgerict München [OLG] [Higher Regional Court of Munich] Aug. 11, 2016, 34 SchH 7/16, openJur.

[233] *Id.*

[234] *Supra* note 179.

[235] *Nat'l Distrib Servs Ltd v IBM Austl Ltd* (Unreported, Supreme Court of New South Wales, Rogers CJ, 5 October 1990) 14 (Austl.).

[236] *Commercial Arbitration Act 2017* (ACT) s 34A (Austl.); *Commercial Arbitration Act 2010* (NSW) s 34A (Austl.); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 34A (Austl.); *Commercial Arbitration Act 2013* (Qld) s 34A (Austl.); *Commercial Arbitration Act* 2011 (SA) s 34A (Austl.); *Commercial Arbitration Act 2011* (Tas) s 34A (Austl.); *Commercial Arbitration Act 2011* (Vic) s 34A (Austl.); *Commercial Arbitration Act 2012* (WA) s 34A (Austl.).

[237] *Supra* note 184.

	arbitrations – which are challenged through the New York Convention.
Canada	Judicial review of a commercial arbitration award is limited to the grounds set out in the Model Law, expressly included verbatim in arbitration statutes in all Canadian provinces and territories (except Quebec, though it is substantively the same).[238] If an arbitration clause includes the potential for appeal on questions of law, courts may rule on the arbitral tribunal's determination.[239] Otherwise, "under the various domestic arbitration statutes, there are different provisions for rights of appeal, usually in relation to a question of law, which the parties can elect to retain or not in their arbitration agreement."[240] Overall, other than the applicable Model Law and its analogue in Quebec, the New York Convention provides the only other applicable provisions allowing for a form of "judicial review" for recognition and enforcement of an arbitral award.
France	Under Article 1514 of the CPC, recognition and enforcement of an arbitral award *(exequatur*) shall be granted by the court of first instance if: (i) its existence is demonstrated by the applicant who has provided the required documentation in this respect; and (ii) recognition or enforcement of the award would not be manifestly contrary to French international public policy.[241]

[238] *Supra* note 176.

[239] *See id.* ("As a side note, Canadian courts have said that, despite the overlap in terminology, the review of arbitral awards by a court is not the usual "Canadian" judicial review in the administrative law sense.").

[240] *See id.*

[241] Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1514 (Fr.).

	In the context of the *ex parte* exequatur proceedings, the court of first instance carries out a *prima facie* review of compliance with international public policy. If an appeal is lodged against the enforcement order or if annulment proceedings are brought against the award itself, the court of appeal may scrutinize the award more intensely, under the conditions set forth in Article 1520 of the CPC.[242] The most significant distinction with the grounds provided under Article V of the New York Convention is that an arbitral award that has been set aside at the seat of arbitration may be recognized or enforced in France.[243] Unlike appeals, applications to set aside an award do not entail a *de novo* review of the merits of the case. Successful challenges to arbitral awards before French courts are rare.[244]
Germany	The standards for judicial review are laid down in sec. 1058 – 1061 CCP.[245] Sec. 1058 CCP allows parties to apply for a supplementation, correction, and interpretation of an award. Each party may request the correction, supplementation, or interpretation within one month, sec. 1058 (2) CCP. The court should decide the correction and interpretation within one month and about the supplementation within two months, sec. 1058 (3) CCP.[246]

[242] Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1520 (Fr.).

[243] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 9, 1984, Bull. civ. I, No. 83-11.355 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, Bull. civ. I, No. 92-15.137 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, Bull. civ. I, No. 05-18.053 (Fr.).

[244] *Supra* note 189.

[245] *Supra* note 194.

[246] *Id.*

	Sec. 1059 CCP provides rules for legal remedies against an award. Sec. 1059 (2) CCP lists possible reasons for setting an award aside. The application for setting an award aside must be filed within in three months after the award was received, sec. 1059 (3) CCP.[247] The parties may agree on a different time period for the judicial review options, sec. 1059 (3), 1058 (2) CCP. Secs. 1060 and 1061 CCP state the conditions for an enforcement and/or acknowledgement of an award. Further Germany is party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) as of 30 June 1961, the 1961 European Convention on International Commercial Arbitration (the Geneva Convention) as of 27 October 1964 and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) as of 18 April 1969.[248]
United Kingdom	Challenges under the Arbitration Act 1996 can be made on the basis of lack of substantive jurisdiction (s 67) or due to serious irregularity (s 68) or on a point of law (s 69).[249] Any such challenge may be made separate from an application to confirm or to enforce an award, and there are various potential outcomes which may not comprise an entire 'vacation' of the award (e.g. if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b)set the award aside in whole or

[247] *Id.*
[248] *Id.*
[249] *Supra* note 179.

	in part, or (c)declare the award to be of no effect, in whole or in part.[250]

G. RELEVANT LEGAL THEORIES

Country Name	Theory	Legal theories overcoming consent and privity problems
Australia	Estoppel	Australia lacks a theory of estoppel as defined in this comment, as "contractual privity is fundamental."[251]
	Third-Party Beneficiary	Likewise, the third-party beneficiary theory does not hold the same weight in Australia as it does in the United States. Generally, third parties "cannot have rights arising out of a contract."[252] With some exceptions, the importance of contractual privity limits the enforcement of a contract to the parties who signed it.[253] For instance, "it has been held that it is unjust not to allow a third party named in an insurance contract to benefit from it."[254] However, "it is unlikely that these rights would extend to allow the third party to claim to be a party to an arbitration agreement within a contract."[255]
	Other Theories	There are no other methods by which a person who is not a party to an arbitration

[250] *Id.*

[251] *Supra* note 184.

[252] *Supra* note 184 (citing Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC 847, 853 (Austl.)).

[253] *See Price v Easton* (1833) 110 ER 518 (Austl.).

[254] *Supra* note 184 (citing *Trident Gen Ins Co v McNiece Bros Pty Ltd* (1988) 165 CLR 107 (Austl.)).

[255] *Id.*

		agreement may compel arbitration with a party to an arbitration agreement.[256]
Canada	Estoppel	Canada lacks the American conception of the legal theory of estoppel.[257] However, in some provinces, including British Columbia, courts have interpreted "party" to include non-signatories "where [they are] bound by estoppel."[258]
	Third-Party Beneficiary	The third-party beneficiary theory is not uniformly applied throughout Canada. The Canadian approach to privity and third-party beneficiaries varies from province to province. The Province of Ontario, for example, retains the classic approach that calls for "strong privity", i.e., consideration remains essential to enjoy benefits from a contract. The Province of New Brunswick, on the other hand, much like England, has abrogated the rule.[259]
	Other Theories	There are no other bases by which a non-signatory of an arbitration agreement may compel a signatory to arbitrate.[260]
France	Estoppel	The French Cour de Cassation has formally recognized and relied upon estoppel as a general principal of law. Though it has consistently been reaffirmed by that court, it is not applied often. The principle of estoppel has been used in the

[256] Leon Chung et al., *Arbitration Procedures and Practice in Australia: Overview*, THOMSON REUTERS PRACTICAL L. (Jun. 1, 2022), https://uk.practicallaw.thomsonreuters.com/1-618-2164?transitionType=Default&contextData=(sc.Default)&firstPage=true. [https://perma.cc/6JKA-6XX9].

[257] *See supra* note 176.

[258] DNM Systems Ltd. v. Lock-Block Canada Ltd., [2015] 82 B.C.L.R. (5th) 374 (Can. B.C.).

[259] *Supra* note 176.

[260] *Id.*

		arbitration context to reject the application of an arbitration clause.
	Third-Party Beneficiary	The third-party beneficiary theory, as described, does not exist in France.
	Other Theories	There are no other bases by which a non-signatory of an arbitration agreement may compel a signatory to arbitrate.
Germany	Estoppel	The American conception of estoppel does not exist in Germany.[261] A third party may only be bound to an arbitration agreement, if there are legal rules or valid contracts which bind them to the arbitration agreement. For example, a legal successor,[262] an insolvency administrator,[263] or the beneficiary of the contract, which includes the arbitration clause, could be bound to the arbitration agreement/clause, s. sec. 328 (1) German Civil Code.[264] Further, the BGH ruled that arbitration clauses within a legal partnership agreement can also bind the partners/shareholders to an arbitration agreement.[265] However, these exemptions are only applicable to persons with specific rights or roles. They are not applicable to classes or in arbitration.[266]

[261] *Supra* note 194.

[262] *Compare* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 1922, para. 1, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html. [https://perma.cc/7FMX-PZZW], *with* BGH, Sept. 23, 2021, I ZB 13/21, openJur.

[263] BGH, Apr. 25, 2014, IX ZR 49/12, openJur.

[264] BGH, May 5, 1967, VI ZR I88/64, openJur.

[265] BGH, Feb. 6, 2020, I ZB 44/19, openJur; BGH, Sept. 23, 2021, I ZB 13/21, openJur.

[266] *Supra* note 194.

	Third-Party Beneficiary	sec. 328 (1) of the German Civil Code provides a rule for the involvement of a third-party beneficiary. If a third party is the beneficiary of the contract and the contract between the two other parties include an arbitration agreement, the third party could be bound to this clause.[267]
	Other Theories	There could be a basis for such an approach in bi- or multilateral investment treaties or if the arbitration agreement includes a flexibility clause, which would allow non-signees to initiate arbitration against a signee.[268]
United Kingdom	Estoppel	The English theory of estoppel is similar to those in Australia and Canada and has never been applied in relation to a class arbitration or the issue of class arbitrability.[269]
	Third-Party Beneficiary	The third-party beneficiary theory does allow for the enforcement of contractual terms by third parties: "Under the Contracts (Rights of Third Parties) Act 1999 a third party can enforce a term of the contract if the contract expressly provides that it can do so (section 1(a)), or if the term provides a benefit to it (section 1(b)).[270] Section 8 of this Act expressly envisages the applicability of section 1 to arbitration agreements. It is common, however, for contracts to exclude the applicability of the Contracts (Rights of Third Parties) Act 1999. If excluded, the courts will not

[267] *Id.*
[268] *Supra* note 194.
[269] *Supra* note 179.
[270] *Id.*

		compel or allow a third party to arbitrate."[271]
	Other Theories	There are no other methods by which a person who is not a party to an arbitration agreement may compel arbitration with a party to an arbitration agreement.[272]

H. PROSPECTS FOR INTERNATIONAL CLASS COMMERCIAL ARBITRATION IN THE SURVEYED COUNTRIES

If certain principles of contract and agency law, etc. as applied in the United States constitute the bedrock upon which class commercial arbitration must be founded, then the prospects for the proliferation of that dispute resolution mechanism outside of the United States seem currently to be limited. Further evolution or innovation in the laws of the other common law and civil law countries surveyed would likely be required in order to support the viability of international class commercial arbitration. That is quite possible if this novel mechanism is considered worthy of adoption.

Moreover, amendments of the rules of various arbitral-administering institutions (e.g., ICC, LCIA, SIAC) specifically to allow for and implement class arbitration if parties so choose or are deemed to have so chosen – similar to what the American Arbitration Association (AAA) has done – might foster such an evolution.

More specifically, the current prospects for the viability of class commercial arbitration in the foreign common law countries surveyed – Australia, Canada, and the United Kingdom – appear somewhat dim. If precise analogs of certain US principles of estoppel, third-party beneficiary, agency, etc. are required in order to make class commercial arbitration viable, or if a model procedural framework like that in Fed. R. Civ. P. 23 would be helpful in that regard, none of these factors currently exist in those jurisdictions. They may emerge in time, or those countries may forge their own different legal frameworks on which to base the development of class commercial arbitration by or against non-signatories of an arbitration agreement.

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[271] *Supra* note 179 (citing Contracts (Rights of Third Parties) Act 1999 (UK)).

[272] *Id.*

In the meantime, other legal developments may afford a pathway to that end. For example, the *Egiazarayan* decision in the U.K. apparently established that English choice of law rules, where applicable, enable the application in arbitrations of foreign law that would bind a non-signatory as a party. If so, then the agreed or deemed choice of "U.S. law" (or, more likely, New York law or the like) in an English arbitral proceeding might be a means to make class arbitration viable in the U.K (and arguably also to enable the confirmation or enforcement there of a class arbitration award).

The picture in the surveyed civil law countries – France and Germany – is similar. Both reportedly currently lack a legal structure on which to base class arbitration. For example, the estoppel doctrine in France is not understood or applied in the same way for present purposes as it may be in the United States, and it does not appear to have ever been invoked successfully in connection with arbitration in any case. Moreover, France reportedly does not recognize a third-party beneficiary doctrine. Germany, on the other hand, does recognize a third-party beneficiary doctrine in contract law, but it would not work to create a class of non-signatory parties. Moreover, Germany has no estoppel doctrine as it is understood in the United States relating to contracts. French and German courts demonstrate strong pro-arbitration policies, but the fundamental legal principles and procedural experience that have created a fertile ground for class arbitration in the United States are absent in both civil law jurisdictions.

IV. CONCLUSION

International class commercial arbitration is a relatively novel mechanism of dispute resolution. But it is founded in the United States on several longstanding legal doctrines and theories of contract law, agency, etc. that enable the interpretation of an arbitration agreement such that non-signatories can be deemed bound by determinations made in a private proceeding that was authorized by the agreement. While the American experience with judicial class actions probably makes the US the most fertile ground on which class arbitration may flourish (or at least be deemed viable), other countries with pertinent legal concepts and practice elements similar to those found in the United States – most importantly, the broad application of estoppel – would in principle be well-suited to enable the class commercial arbitral mechanism. However, such conditions do not exist at present in the several common law and civil law jurisdictions surveyed herein.