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## Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles

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# Does Class Arbitration “Change the Nature” of Arbitration? *Stolt-Nielsen, AT&T, and a Return to First Principles*

by S.I. STRONG\*

*In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., the United States Supreme Court stated that class arbitration “changes the nature of arbitration,” an idea that was also reflected in the Supreme Court’s subsequent decision in AT&T Mobility LLC v. Concepcion. Certainly class proceedings do not resemble the traditional view of arbitration as a swift, simple, and pragmatic bilateral procedure with few witnesses, documents, or formalities, but do these types of large-scale disputes violate the fundamental nature of the arbitral procedure? This article answers that question by considering the jurisprudential nature of arbitration and determining whether and to what extent class arbitration fails to meet the standards necessary for a process to qualify as “arbitration.” During the course of the discussion, the article analyzes the ways in which class arbitration differs from other forms of multiparty arbitration and investigates whether a form of “quasi-arbitration” is in the process of developing as a means of responding to the demands of class proceedings.*

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## I. INTRODUCTION

### A. *The Question Arises*

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the United States Supreme Court stated that class arbitration (sometimes called “class action arbitration” or “classwide arbitration”) “changes the nature of arbitration.”<sup>1</sup> On the one hand, this conclusion

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1. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). The procedural posture of this case is somewhat complicated and could lead to questions as to whether *Stolt-Nielsen* constitutes a class or consolidated proceeding. The matter arose when a number of charterers filed a series of class actions in different U.S. federal courts, alleging civil antitrust violations against several international shipping companies. The charter parties in question included arbitration agreements, and the defendant in one of the lawsuits moved to compel arbitration. A federal appellate court ultimately determined that the agreement was binding and that those particular claims should proceed in arbitration. However, while the appeal on that proceeding was pending, the Judicial Panel on Multidistrict Litigation consolidated the various lawsuits into a single action. As a result of the various judgments and orders, the parties in the now-consolidated proceeding agreed that the dispute must be heard in arbitration, although they did not agree as to whether class or individual

may be little more than empty rhetoric, given the Court's ruling, just one year prior, that "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum."<sup>2</sup> On the other hand, references to the statement about class arbitration ostensibly changing the nature of arbitration have already begun to appear in judicial decisions and commentary,<sup>3</sup> including the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*.<sup>4</sup>

Certainly class proceedings do not resemble the traditional view of arbitration as a swift, simple, and pragmatic bilateral procedure with few witnesses, documents, or formalities. However, it is by no means clear that this classic model of arbitration still holds true in all or even most instances.<sup>5</sup> Instead, the term "arbitration" has been

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arbitration was warranted. Instead, they referred that question to an arbitral tribunal by special agreement. However, the fact that the various actions were judicially consolidated is ultimately irrelevant because all of the underlying actions were class actions. Thus, *Stolt-Nielsen* is correctly considered to be a class arbitration, not a consolidated arbitration. Furthermore, because several of the respondents were based outside the United States, the dispute constitutes an international class arbitration. See S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1021 (2009) [hereinafter Strong, *Sounds of Silence*] (defining international class arbitrations).

2. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 (2009). Among other things, the Supreme Court in *Pyett* condemned old-style judicial hostility to arbitration. *Id.* Interestingly, many of the arguments that are condemned in *Pyett* as belonging to an earlier era appear to be adopted by the majority in *Stolt-Nielsen*, suggesting that the current animosity towards class arbitration is perhaps out of step with other areas of arbitration law and may eventually wane with time. Compare *id.*, with *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

3. Hicks v. Cadle Co., 355 F. App'x 186, 197 (10th Cir. 2009); Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 462, 477 (S.D.N.Y. 2010); Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 447 (S.D.N.Y. 2010); McArdle v. AT&T Mobility LLC, No. C 09-1117 CW, 2010 WL 2867305, at \*1 (N.D. Cal. May 10, 2010), *leave to file for reconsideration granted by* 2010 WL 2179161 (N.D. Cal. May 27, 2010), *granting a further stay*, 2010 WL 2867305 (N.D. Cal. July 20, 2010) (awaiting the outcome of *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010)); Dominic J. Campisi, *Fiduciary Liability*, Paper in the course book from the ALI-ABA program, REPRESENTING ESTATE AND TRUST BENEFICIARIES AND FIDUCIARIES CS004 ALI-ABA 7 (July 15–16, 2010); Jill I. Gross, *Arbitration Case Law Update 2010*, in SECURITIES ARBITRATION 2010, 1829 PLI/CORP. 111, 119 (Aug. 11, 2010) Philip J. Loree, Jr., *Stolt-Nielsen S.A. Delivers A New FAA Rule – And Then Federalizes the Law of Contracts*, 28 ALT. HIGH COST LIT. 121 (June 2010).

4. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

5. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1746 (2009) (discussing varying degrees of formality in arbitration). Although traditionalists often point to a mythical "golden age" of arbitration in which pragmatism rather than legalism prevailed, it is unclear whether such an era ever actually existed. See Dennis R. Nolan, *Disputatio: "Creeping Legalism" as a Declension Myth*, 2010 J. DISP. RESOL. 1, 3–7 (2010).

used to describe a wide variety of processes, both bilateral and multilateral.<sup>6</sup>

Indeed, the flexibility inherent in arbitration is precisely what makes *Stolt-Nielsen's* conclusion that class arbitration “changes the nature of arbitration”<sup>7</sup> so troubling, since the statement is based on the unspoken premise that the nature of arbitration is something that can be both defined and universally agreed upon. This conclusion is particularly problematic because the jurisprudential nature of class arbitration has not been discussed with any rigor, academically or judicially.<sup>8</sup>

However, as recent events show, inquiries into the nature of class arbitration are not simply academic exercises; instead, this issue can have a significant real-world effect.<sup>9</sup> Indeed, it has long been recognized that the determination that a procedure is not “arbitration” can have widespread legal ramifications.<sup>10</sup>

This article therefore tests various assumptions about the nature of class arbitration as well as the conclusion that class arbitration falls outside established parameters regarding what constitutes “arbitration.” The inquiry proceeds as follows. Section II lays the

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6. In fact, procedures that are common in one sub-specialty often bear little resemblance to those used in other types of disputes. Thus, for example, domestic U.S. labor arbitration is very different from international commercial arbitration, just as online arbitration varies significantly from arbitration conducted by the Iran-U.S. Claims Tribunal. See BORN, *supra* note 5, at 217–46, 1744; JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 3-1 to 3-59 (2003); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 385–87 (2008) (differentiating between “mass” and “custom” arbitration).

7. *Stolt-Nielsen*, 130 S. Ct. at 1775.

8. Justice Breyer himself noted that the majority in *AT&T* did not explain how it arrived at the conclusion “that individual, rather than class, arbitration is a ‘fundamental attribut[e]’ of arbitration.” *AT&T*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

9. As discussed further below, the unspoken assumption that class arbitration somehow does not constitute “arbitration” appeared to be one reason why five justices voted to strike a California law regarding class waivers in *AT&T*. See *id.* at 1750; *infra* notes 124–36 and accompanying text. However, because *AT&T* only addressed issues relating to federal preemption of state laws, the waiver issue remains live in other contexts. See *In re Am. Express Merchs' Litig.*, 634 F.3d 187, 194, 199 (2d Cir. 2011) (stating that “*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable,” and concluding that the waiver was void for public policy).

10. Processes that are not considered “arbitration” cannot take advantage of laws limiting judicial review, ensuring immunity for neutrals, or permitting easy international enforceability of the resulting award. See Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 433–34 (2007); see also SIR MICHAEL J. MUSTILL & STEWART C. BOYD, *COMMERCIAL ARBITRATION* 3840 (1989).

groundwork for further discussion by comparing class arbitration to other multiparty proceedings. If class arbitration is found to differ from other types of multiparty arbitration, then it may be possible to conclude that class arbitration “changes the nature of arbitration.”<sup>11</sup> However, if class arbitration is found to fall within the norms set by established forms of multiparty arbitration, then class proceedings cannot be said to affect the nature of arbitration. The analysis in Section II focuses on five possible items of concern: the number of parties and the amount in dispute, the nature of the parties’ claims, the relationship between the parties, the selection of arbitrators, and underlying policy considerations.

Next, Section III considers the jurisprudential nature of arbitration and attempts to identify a universally acceptable definition of arbitration that can be used in Section IV to determine whether class arbitration does, in fact, “change[ ] the nature of arbitration.”<sup>12</sup> The discussion in Section IV considers how certain characteristics said to be unique to class arbitration (including several identified in Section II) measure up to the elements identified in the definition of arbitration as being necessary for a procedure to qualify as “arbitration.” The analysis in Section IV focuses on four separate issues that are potentially problematic: excessive formalities, excessive judicial involvement, competence of the arbitral tribunal, and the nature of representative relief. Section V concludes the article by drawing together the diverse strands of law and policy and offering some final observations.

Before beginning the analysis, it is useful to set forth a working definition of class arbitration. Not only will this avoid confusion regarding terms, it will help identify those aspects of class arbitration that critics find most objectionable.

### B. *A Working Definition of Class Arbitration*

Class arbitration has been characterized as a “‘uniquely American’ device,”<sup>13</sup> and it is certainly true that class arbitration, as currently practiced and envisaged, explicitly imports elements of U.S.-style class actions (i.e., large-scale lawsuits seeking representative

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11. *Stolt-Nielsen*, 130 S.Ct. at 1775.

12. *Id.*

13. *The President and Fellows of Harvard College Against JSC Surgutneftegaz*, 770 P.L.L.R. 127, 155 (2008) [hereinafter *Harvard Award*].

relief on behalf of dozens to hundreds of thousands of injured parties)<sup>14</sup> into the arbitral context. As such, class arbitration reflects a strong bias toward U.S. conceptions of collective justice.

The device has been in existence since at least the early 1980s,<sup>15</sup> although it was not until 2003, when the United States Supreme Court gave its implicit approval to the procedure in *Green Tree Financial Corp. v. Bazzle*,<sup>16</sup> that various U.S.-based arbitral institutions promulgated their specialized rules on class arbitration.<sup>17</sup> The procedure quickly gained momentum during the first decade of the century, with more than 300 class arbitrations known to have been initiated since 2003.<sup>18</sup> This is roughly similar to the number of international investment arbitrations filed with the International Centre

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14. For a brief overview of U.S. judicial class actions, see Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, in 622 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 32, 36–39 (Deborah Hensler et al. eds., 2009) [hereinafter *The Annals*].

15. See *Keating v. Superior Court*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984). Interestingly, there may be U.S. precedent allowing representative relief in arbitration dating back to 1918–19, when the National War Labor Board effectively acted as an arbitral tribunal whose decisions affected employees beyond those who were named in the suit before it. See Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 421–25 (2008).

16. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

17. See AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (effective Oct. 8, 2003), available at [www.adr.org/sp.asp?id=21936](http://www.adr.org/sp.asp?id=21936) [hereinafter AAA SUPPLEMENTARY RULES]; JAMS THE RESOLUTION EXPERTS, JAMS CLASS ACTION PROCEDURES (effective May 1, 2009), available at <http://www.jamsadr.com/rules-class-action-procedures/> [hereinafter JAMS CLASS ACTION PROCEDURES]. At one point, the National Arbitration Forum (NAF) had its own set of class arbitration rules. See NATIONAL ARBITRATION FORUM, ARBITRATION CLASS PROCEDURES, [www.adrforum.com/users/naf/resources/Arbitration%20Class%20Procedures%202007.pdf](http://www.adrforum.com/users/naf/resources/Arbitration%20Class%20Procedures%202007.pdf) [hereinafter NAF ARB. CLASS PROCEDURES]. However, the NAF rules are now only applicable to arbitrations filed prior to August 2009, which is when the NAF ceased to administer consumer arbitrations. See *Firm Agrees to End Role in Arbitrating Credit Card Debt*, N.Y. TIMES, July 19, 2009, <http://www.nytimes.com/2009/07/20/business/20credit.html>.

18. As of January 2012, the American Arbitration Association (AAA) had received filings for over 307 class proceedings. See *AAA Searchable Class Arbitration Docket*, [www.adr.org/sp.asp?id=25562](http://www.adr.org/sp.asp?id=25562). Class arbitrations can also be administered by other arbitral institutions or proceed *ad hoc*, although precise numbers cannot be determined due to the confidentiality of such proceedings. However, the existence of such arbitrations has become known through challenge or enforcement measures in court. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010); *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 362 n.31 (5th Cir. 2003); *JSC Surgutneftegaz v. President & Fellows of Harvard Coll.*, No. 04 Civ. 6069 (RMB), 2007 WL 3019234, at \*2-3 (S.D.N.Y. Oct. 11, 2007).

for the Settlement of Investment Disputes (ICSID) in the last forty years.<sup>19</sup>

Although class arbitrations resemble judicial class actions in some regards, the two devices differ in a few significant ways. For example, class arbitration incorporates a number of procedures that are unique to the arbitral realm, such as those regarding the naming or challenging of arbitrators, the form of an award, etc.<sup>20</sup> Notably, punitive damages—which are commonly (though mistakenly) believed to be a necessary part of judicial class actions<sup>21</sup>—are not a required element in class arbitration.<sup>22</sup>

Class arbitrations can be administered by an arbitral institution or can proceed on an entirely *ad hoc* basis.<sup>23</sup> Either type of proceeding may be subject to one of the specialized rule sets on class arbitration (the American Arbitration Association's Supplementary Rules

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19. See ICSID Cases, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited Jan. 5, 2012) (listing 140 cases as currently pending and 229 as having concluded); see also ICSID Caseload Statistics, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (last visited June 30, 2011); UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1 (2009), [http://www.unctad.org/en/docs/webdiaeia20096\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20096_en.pdf) (last visited June 30, 2011).

20. For a description of procedures in class arbitration, see BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 257–79 (2005); John Fellas, *Feasibility of Class Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2008 183, 184–95 (Arthur W. Rovine ed., 2009); Eric P. Tuchmann, *The Administration of Class Action Arbitrations*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 325, 325–36 (Permanent Court of Arbitration ed., 2009). It is possible that the procedures currently in use will change in the wake of *Stolt-Nielsen*. See *Stolt-Nielsen*, 130 S. Ct. at 1758.

21. See Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 311 (2007); Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 315 (2003).

22. Although punitive damages can be sought in some class arbitrations, it may be unwise to seek such relief in anything other than domestic U.S. proceedings since punitive damages awards are strongly disfavored outside the United States. See generally LEW ET AL., *supra* note 6, ¶ 24-75.

23. Although most people associate administered class arbitrations with the AAA, there is nothing prohibiting the assertion of class claims in arbitrations proceeding under other institutional rules. See Strong, *Sounds of Silence*, *supra* note 1, at 1072–76. Indeed, the London Court of International Arbitration (LCIA) has stated in intervener papers in the Supreme Court of Canada that it sees class arbitration as consistent with the goals of arbitration, suggesting that the LCIA will not find class arbitration problematic under its rules. See *Factum of the Intervener*, London Court of International Arbitration, *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801 ¶ 8 (Can.), available at [www.mcgill.ca/files/arbitration/LCIAFactumDell.pdf](http://www.mcgill.ca/files/arbitration/LCIAFactumDell.pdf); see also S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 530 (2010) [hereinafter Strong, *De-Americanization*].



for Class Arbitrations (AAA Supplementary Rules) or the JAMS Class Action Procedures),<sup>24</sup> which can be adopted by the parties either before or after the dispute arises, or imposed as a result of the parties' having previously agreed to the use of any one of the other rule sets offered by either the AAA or JAMS, respectively.<sup>25</sup> While other procedures can also be agreed upon by the parties and/or set forth by the arbitral tribunal,<sup>26</sup> the published rule sets provide a useful means of describing and analyzing class arbitration procedure and reflect what might be considered the standard understanding of how class arbitration operates today.<sup>27</sup> Notably, the application of these specialized rule sets does not require a determination that class arbitration is appropriate in any particular dispute, even though the

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24. See AAA SUPPLEMENTARY RULES, *supra* note 17; JAMS CLASS ACTION PROCEDURES, *supra* note 17. The DIS–German Institution for Arbitration has also recently enacted rules regarding arbitration in shareholder disputes that might be said to create a form of “collective arbitration,” which is an arbitral proceeding that uses procedures akin to various forms of collective redress used in the national courts of states that have not adopted U.S.-style class relief. See DIS–GERMAN INSTITUTION FOR ARBITRATION, SUPPLEMENTARY RULES FOR CORPORATE LAW DISPUTES (effective 15 Sept., 2009), available at [www.dis-arb.de/erges/srcold09.html](http://www.dis-arb.de/erges/srcold09.html) [hereinafter DIS SUPPLEMENTARY RULES]; see also Christian Borris, *Arbitrability of Corporate Law Disputes in Germany*, in ONDERNEMING EN ADR 55, 64–65 (C.J.M. Klaassen et al., eds., 2011); S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?*, 29 ASA BULL. 45, 64 (2011) [hereinafter Strong, *DIS*]. Although the DIS Supplementary Rules will not be discussed in detail herein, they do provide an interesting comparison to U.S.-style class procedures.

25. See *Stolt-Nielsen*, 130 S. Ct. at 1765 (referencing post-dispute adoption); AAA SUPPLEMENTARY RULES, *supra* note 17, rule 1(a); JAMS CLASS ACTION PROCEDURES *supra* note 17, rule 1(b).

26. Early in the development of class arbitration, courts were involved in defining appropriate procedures, but this approach appears to have fallen out of practice. See *Keating v. Superior Court of Alameda Cnty.*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds sub nom*; *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 301 (2004).

27. See Buckner, *supra* note 26, at 301 (claiming the hybrid model has been “swept away”). The AAA Supplementary Rules are particularly influential, perhaps because they have been at issue in a number of high-profile litigations, including *Stolt-Nielsen*. See *Stolt-Nielsen*, 130 S. Ct. at 1765. The AAA is also known to have administered over 300 class arbitrations since 2003, as demonstrated by the number of proceedings listed on its online class arbitration docket. See *AAA Searchable Class Arbitration Docket*, *supra* note 18. The JAMS Class Action Procedures are in many ways similar to the AAA Supplementary Rules, but are less detailed. Compare AAA SUPPLEMENTARY RULES, *supra* note 17, with JAMS CLASS ACTION PROCEDURES, *supra* note 17. Unlike the AAA, JAMS does not publish information about class arbitrations that it administers.

rules include certain criteria and procedures that the arbitral tribunal should follow in determining whether class proceedings are warranted.<sup>28</sup> Instead, both sets of rules explicitly state that the existence of the specialized rules should not factor into the decision of whether to proceed as a class.<sup>29</sup>

Although class arbitration is primarily used in large-scale consumer and employment disputes,<sup>30</sup> the device is not limited to those fields. Instead, class arbitration mirrors the substantive diversity of judicial class actions and can involve everything from insurance and financial disputes to maritime and antitrust claims.<sup>31</sup> The one notable difference is that class arbitrations typically do not arise in cases sounding exclusively in tort, since parties to such disputes seldom have a pre-existing contractual relationship and thus rarely have an arbitration agreement in place at the time the injury arises.<sup>32</sup> (Although it is always possible for the parties to agree to arbitration after the dispute has arisen, post-dispute arbitration agreements are notoriously difficult to obtain, even in cases involving only two parties.<sup>33</sup>)

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28. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 3.

29. AAA SUPPLEMENTARY RULES *supra* note 17, rule 3; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 2.

30. See Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309 at 22–24 (noting 37% of all class arbitrations administered by the AAA involved consumer actions, 37% involved employment actions, 7% involved franchising, 7% involved healthcare, 3% involved financial services, and 11% involved other business-to-business concerns).

31. See *id.*; see also AAA *Searchable Class Arbitration Docket*, *supra* note 18; Buckner, *supra* note 26, at 301 (discussing areas of law where class actions and class arbitrations are common); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 407 (2002) (discussing areas where class actions are likely); Strong, *De-Americanization*, *supra* note 23, at 525.

32. See Carolyn B. Lamm & Joceyln A. Aqua, *Defining the Party – Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 717–18 (2002–03) (discussing situations where the commonality of facts is the sole link between parties, noting it is “impossible” to obtain consent to arbitrate from all parties in such circumstances). However, recent events in the realm of international investment arbitration have suggested the possible development of a form of mass tort arbitration. See S.I. Strong, *Mass Torts and Arbitration: Lessons from Abaclat v. Argentine Republic*, in UNCERTAINTY AND MASS TORT: CAUSATION AND PROOF (forthcoming 2012) [hereinafter Strong, *Abaclat*]. Judicial class actions for mass torts are common in the United States. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 99–119 (2000).

33. See LEW ET AL., *supra* note 6, ¶ 6-5.

Issues about who may join a class arbitration can raise questions about whether these sorts of proceedings really are “class” arbitrations or simply very large consolidated arbitrations. The concern arises as a result of the perception that judicial class actions are in some way open to anyone who wishes to join the suit. Class arbitration can be seen as deviating from this open-access aspect of class actions to the extent that class arbitrations are limited to those who have a valid arbitration agreement.<sup>34</sup> However, judicial class actions are not in fact open to the world and are instead restricted to those who have suffered an injury arising out of the same set of laws or facts.<sup>35</sup> Class arbitrations impose precisely the same criteria on the parties,<sup>36</sup> although claims in class arbitration are limited by the nature of the contract in which the arbitration agreement is found (in that the legal injury will relate to or arise out of that document). As such, the arbitral class is restricted to those who are also parties to the relevant agreements.<sup>37</sup>

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34. This requirement is stated explicitly in the AAA Supplementary Rules. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4. The JAMS Class Action Procedures are silent on this point, although the requirement could be implied as a matter of common law, *supra* note 17. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 448 (2003) (plurality opinion) (involving functionally identical arbitration agreements).

35. See FED. R. CIV. P. 23(a)(2) (allowing class suits only when there are, among other things, “questions of law or fact common to the class”).

36. The language in the AAA Supplementary Rules regarding the prerequisites for a class proceeding is identical to that found in Rule 23 of the Federal Rules of Civil Procedure, except that the AAA Supplementary Rules include an extra provision indicating the need for substantially similar arbitration agreements among the members of the class. See FED. R. CIV. P. 23; AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4. The JAMS Class Action Procedures explicitly incorporate Rule 23 by reference and do not include an explicit requirement that all parties be signatories to substantially similar arbitration agreements. See JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 3. The similarities between the class arbitration rules and the Federal Rules are intentional, in that the drafters of the arbitral rules wanted to provide courts and arbitrators with the opportunity of relying on existing precedents and principles involving Rule 23 when construing the arbitral rules. See Meredith W. Nissen, *Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept*, 11 DISP. RESOL. MAG. 19 (2005); W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 94–95 (2007).

37. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4(a)(2). It is conceivable that a class claim in arbitration could be initially made on behalf of both signatories and non-signatories, as in a product liability claim where some injured parties had purchased the defective items from the manufacturer (and thus were signatories of an arbitration agreement included in the contract of sale) while other injured parties were simply users of the defective items or innocent bystanders. However, existing principles of arbitration law would not only permit but would likely require the non-signatory claims to be severed from the signatory claims. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20–21 (1983); LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* § 15:6, at 15-29 to 15-30 (3d ed. 2010) [hereinafter *DOMKE*]; LEW ET AL., *supra*

## II. DISTINGUISHING CLASS ARBITRATION FROM OTHER MULTIPARTY PROCEEDINGS

Having provided a brief working understanding of class arbitration, the next analytical step involves distinguishing class arbitration from more established forms of multiparty arbitration. If class arbitration does not deviate from these procedures in any significant way, then the claim that class arbitration “changes the nature of arbitration”<sup>38</sup> would appear insupportable.

As it turns out, the arbitral community is well versed in multiparty proceedings, having had decades of experience with consolidation, joinder, and intervention, as well as disputes initiated on a multilateral basis. Once relatively rare, these types of “traditional”<sup>39</sup> multiparty arbitrations have been seen with increasing frequency in recent years and now constitute a significant proportion of the caseload of certain arbitral institutions.<sup>40</sup>

At one time, courts and commentators looked on multiparty proceedings with a great deal of skepticism, but this longstanding hostility has apparently waned.<sup>41</sup> This shift in attitude may be due to the adoption of increasingly strong pro-arbitration policies in many states, but it may also be the result of fundamental changes in commercial practice that have led to a rising need for such proceedings.<sup>42</sup>

The depth and diversity of the discussion about traditional multiparty arbitration provides a strong basis for comparison with class

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note 6, ¶¶ 16-39 to 16-40. Notably, requiring a class of non-signatories to proceed in court would not affect the class (i.e., representative) characteristics of the claims remaining in arbitration, nor would it do violence to the concept of class suits, since class actions have long recognized the use of subclasses. See FED. R. CIV. P. 23(c)(5).

38. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

39. For purposes of this article, the term “traditional multiparty arbitration” will include non-class proceedings that are initially filed as multiparty arbitrations as well as those that achieve multiparty status later through consolidation, joinder, or intervention.

40. From 1995 to 2001, the percentage of multiparty arbitrations administered by the International Chamber of Commerce (ICC) rose from 20% to 30%. See LEW ET AL., *supra* note 6, ¶ 16-1. Furthermore, more than 50% of LCIA arbitrations reportedly involve more than two parties. See Martin Platte, *When Should an Arbitrator Join Cases?*, 18 *ARB. INT'L* 67, 67 (2002).

41. Debate still arises about the propriety of multiparty arbitration in traditional contexts, but the focus is on whether multiparty arbitration is permissible in various individual circumstances, not whether the device is permissible as an abstract concept. See BORN, *supra* note 5, at 2065–2104. See generally LEW ET AL., *supra* note 6, ¶¶ 16-1 to 16-99.

42. See LEW ET AL., *supra* note 6, ¶¶ 16-1 to 16-3.

arbitration.<sup>43</sup> Five areas of analysis require consideration: the number of parties and the amount in dispute, the nature of the parties' claims, the relationship between the parties, the selection of arbitrators, and underlying policy considerations. Each is discussed separately below.

#### A. *Number of Parties and Amount in Dispute*

The first difference between class arbitration and traditional forms of multiparty arbitration relates to the number of participants and the amount in dispute. Experience suggests that most non-class multiparty arbitrations are relatively small, involving only three to five parties. Class arbitration, on the other hand, typically determines the rights of anywhere between a dozen to hundreds of thousands of parties in a single proceeding.<sup>44</sup>

Although the sheer magnitude of the dispute is one hallmark of class arbitration, there is, at this point, no requirement that a certain minimum number of parties be involved. Instead, published rules on class arbitration adopt an approach similar to that used in U.S. judicial class actions and inquire simply whether the number of parties is "so numerous that joinder of separate arbitrations on behalf of all members is impracticable."<sup>45</sup> In cases where no such rules apply, tribunals will likely look to the law of the seat and/or the governing substantive or procedural law to decide whether there is a sufficient number of parties to constitute a class.<sup>46</sup>

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43. This is not to say that class arbitration is entirely analogous to such proceedings. For years, class arbitration was considered to be analytically similar to consolidated arbitration, an approach that created some jurisprudential difficulties. See Strong, *Sounds of Silence*, *supra* note 1, at 1038–43.

44. See Opinion and Order regarding Class Certification, *Bagpeddler.com v. U.S. Bancorp.*, No. 11 181 0032204 (Am. Arb. Ass'n, May 4, 2007), [www.adr.org/si.asp?id=4667](http://www.adr.org/si.asp?id=4667) (seeking to certify a class of 400,000 internet merchants); Class Determination Partial Final Award, *Partners Two, Inc. v. Adecco North Am., LLC*, No. 11 114 03042 40 (Am. Arb. Ass'n, Dec. 2004), <http://www.adr.org/si.asp?id=3821> (seeking to certify a class of twenty-nine franchisees).

45. AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4(a)(1); see also Fed. R. Civ. P. 23(a); JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 3(a).

46. See Strong, *De-Americanization*, *supra* note 23, at 514. As class arbitration moves beyond U.S. borders, some variations regarding the minimum number of participants could arise since different states use different standards regarding the number of parties who must be present to justify class treatment in national courts. Some of these jurisdictions use a numerosity requirement similar to that used in the United States, whereas others prescribe a certain minimum number of class members. See generally RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 6–8 (2004) (discussing Australian class actions); Gidi, *supra* note 21, at 367 n.167 (noting no numerosity requirement in Brazilian judicial

Although traditional multiparty arbitrations are typically much smaller than class arbitrations, there are exceptions. For example, one well-known ICC arbitration from the late 1990s involved more than 140 parties, with more than \$14 billion in dispute.<sup>47</sup> Examples of other large-scale non-class arbitrations exist, both in terms of the number of parties and the amount in dispute.<sup>48</sup> Indeed, Justice Breyer noted numerous instances of high-stakes arbitration in his opinion in *AT&T*.<sup>49</sup> No one has claimed that these disputes constitute something other than “arbitration,” based merely on the number of parties involved or the amounts in dispute. Therefore, while the magnitude of a proceeding may constitute a hallmark of class arbitration, it is not a defining factor. Furthermore, the mere fact that a proceeding resolves a large number of individual claims or a large amount in dispute cannot be said to “change[] the nature” of the proceeding from arbitration to something else, since large-scale claims have been resolved in arbitration before.<sup>50</sup>

#### B. *Nature of the Parties’ Claims*

The second difference between class arbitration and other forms of multiparty arbitration involves the nature of the claims that are being asserted. Unlike traditional multiparty arbitration, which involves claims brought by individuals on their own behalf, class arbitration involves parties who seek relief on a representative basis.<sup>51</sup> In other words, several named individuals not only bring their own claims but also assert the claims of other parties who are unnamed at

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group actions); Sherman, *supra* note 31, at 424–30 (discussing Australian and Canadian class actions).

47. See LEW ET AL., *supra* note 6, ¶¶ 16-57 to 16-58; Barry R. Ostrager et al., *Andersen v. Andersen: The Claimants’ Perspective*, 10 AM. REV. INT’L ARB. 443, 443 (1999).

48. See *Arbitration Scorecard 2007: Top 50 Treaty Disputes*, AM. LAW. (June 13, 2007), <http://www.law.com/jsp/article.jsp?id=900005555705&slreturn=1> (noting fifty multimillion and multibillion dollar arbitrations); Tim Webb, *Yukos Shareholders Win First Round in Legal Battle*, GUARDIAN (Nov. 30, 2009), [www.guardian.co.uk/business/2009/nov/30/yukos-shareholders-russian-government-oil](http://www.guardian.co.uk/business/2009/nov/30/yukos-shareholders-russian-government-oil) (noting \$100 billion at stake in a Russian shareholder arbitration).

49. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting). Although the majority questioned whether arbitral awards of this size were “predictable when the arbitration agreement was entered,” *id.* at 1752 n.8, there has never been a requirement in arbitration that the parties must be able to anticipate the quantum of damages that might arise. Instead, the inquiry has always focused simply on whether the type of claim made falls within the scope of the arbitration agreement.

50. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

51. It is possible to have a respondent class instead of, or in addition to, a claimant class, but this seldom occurs even in the context of judicial class actions. Notably,

the time of filing.<sup>52</sup> While these unnamed parties have some choice as to whether to have their rights asserted in the proceeding and personally receive the benefit of any individual damages that may be won on their behalf should they join the proceeding, unnamed parties typically do not exert a great deal of independent control over the conduct of the case.<sup>53</sup> Although concerns have been raised about possible infringements of the procedural rights of unnamed parties in both judicial and arbitral contexts,<sup>54</sup> class proceedings are also considered to be a legitimate means of furthering certain regulatory and policy goals.<sup>55</sup>

*AT&T* illustrates the tension between these two viewpoints. For example, although Justice Scalia found it “odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied,”<sup>56</sup> Justice Breyer noted that “class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere.”<sup>57</sup> Indeed, class arbitration has been in existence for thirty years and has been reviewed several times by the U.S. Supreme Court.<sup>58</sup> Never once has the Supreme Court questioned or curtailed the use of representative relief in arbitration, thereby implicitly approving the device and making it too late to revisit the propriety of

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the presence of several named respondents does not reflect the existence of a respondent class so long as those respondents are individually named in their own capacity. *See id.* (involving seven named respondents).

52. Eventually the identity of unnamed parties will be made known. *See infra* notes 151–54 and accompanying text.

53. Unnamed parties are explicitly given the right to participate in class arbitrations proceeding under the AAA Supplementary Rules, even if some or indeed most parties do not exercise that right. *See* AAA SUPPLEMENTARY RULES, *supra* note 17, rule 9(a). The JAMS Class Action Procedures include no such provision. *See* JAMS CLASS ACTION PROCEDURES, *supra* note 17.

54. *See* HENSLER ET AL., *supra* note 32, at 445–66; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 32, 52–53 (2000); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1721–22, 1741–44, 1768–78 (2006).

55. *See infra* notes 118, 171–79 and accompanying text.

56. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

57. *Id.* at 1758 (Breyer, J., dissenting).

58. *See id.* at 1751–52 (questioning use of representative relief but not restricting it); *Stolt-Nielsen*, 130 S. Ct. at 1758 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *see also* *Southland Corp. v. Keating*, 465 U.S. 1 (1984); Szalai, *supra* note 15, at 421–25.

resolving the rights of unnamed members of a class in arbitration as a general matter.<sup>59</sup>

Nevertheless, the provision of representative relief in the arbitral context can create at least two problems. First, some nations do not permit parties to seek representative relief, even in court, on the grounds that anything other than individualized relief violates the fundamental rights of either the defendant or the represented party (or possibly both).<sup>60</sup> States that take this view are not only unlikely to adopt class arbitration themselves (although they may develop their own forms of collective arbitration),<sup>61</sup> they may also attempt to invoke domestic public policy to refuse enforcement of class awards rendered in other states or under other states' laws.<sup>62</sup>

This particular problem is somewhat speculative at the moment, since most class arbitrations are currently seated in the United States, a jurisdiction that expressly permits parties to seek representative relief in court.<sup>63</sup> However, there is a second problem that applies to U.S.-based arbitrations as well as class proceedings seated

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59. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that courts that agree to allow certain complex claims to go to arbitration pursuant to the parties' express agreement cannot later claim that those matters are "inherently insusceptible to resolution by arbitration").

60. See Baumgartner, *supra* note 21, at 310–11; Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 233 (1992); Gidi, *supra* note 21, at 385–86.

61. See Borris, *supra* note 24; Strong, *De-Americanization*, *supra* note 23, at 498–508; Strong, *DIS*, *supra* note 24, at 64–65; see also DIS SUPPLEMENTARY RULES, *supra* note 24 (involving collective arbitration).

62. This would be improper for a variety of reasons. See S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 89–93 (2008) [hereinafter Strong, *Due Process*].

63. See FED. R. CIV. P. 23. Although most, if not all, class arbitrations so far have been seated in the United States, class and collective arbitration have been legislatively and judicially considered in several other jurisdictions, including Canada, Colombia, Germany, and Luxembourg. See MANITOBA LAW REFORM COMMISSION, REPORT 115, MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS (April 2008), at 3–4, 22–23; Valencia v. Bancolombia (Colombia v. Colombia), Zuleta Digest for Institute for Transnational Arbitration (ITA) (Arb. Trib. Bogotá Chamber Comm. 2003), available on [www.kluwerarbitration.com](http://www.kluwerarbitration.com); Stephanie Bodoni, *UBS, Custodians Have Duty to Pay Madoff Investors*, Frieden Says, BLOOMBERG (June 5, 2009), [www.bloomberg.com/apps/news?pid=20601087&sid=a8KUxW1cXdvU](http://www.bloomberg.com/apps/news?pid=20601087&sid=a8KUxW1cXdvU); Borris, *supra* note 24, at 57–64; Jeffrey S. Leon et al., *Class Arbitrations in Canada: the Business Case*, (2010) CAN. CLASS ACTION REV. 381 (discussing Canadian developments); Ian Meredith & Sean Kelsey, *Treasury and Budget Minister of Luxembourg Calls for Arbitration of Madoff Claims*, K&L GATES, <http://www.globalfinancialmarketwatch.com/2009/06/articles/treasury-and-budget-minister-of-luxembourg-calls-for-arbitration-of-madoff-claims/>; S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L. L. & COMM. REG. —



elsewhere.<sup>64</sup> The issue here involves certain procedures that have been imposed to help protect the rights of unnamed parties in class arbitration.<sup>65</sup> These measures either permit or require an increased degree of judicial involvement in arbitral proceedings.

Two different approaches exist. The first—termed the “hybrid model”—allows courts to retain responsibility for certain decisions (such as certification of and notice to the class as well as fairness approvals of the final arbitral award),<sup>66</sup> while the arbitrators take jurisdiction over the evaluation of the merits of the case. This approach, which developed as a common law, judge-made device, came about as a means of avoiding any violation of the parties’ procedural rights that might arise as a result of arbitrators’ inexperience with

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(forthcoming 2012). Furthermore, at least one mass arbitration is currently proceeding in the international investment realm. See *Beccara v. Argentine Republic*, ICSID Case No. ARB/07/5, INVESTMENT TREATY NEWS (Apr. 27, 2007); *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5 (Apr. 7, 2007), available at [icsid.worldbank.org](http://icsid.worldbank.org); see also MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS 203–18 (2008) (describing a second possible group investment arbitration); Veijo Heiskanen, *Arbitrating Mass Investor Claims: Lessons of International Claims Commissions*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION, *supra* note 20, at 297–98, 308–23. The *Abaclat* case has yielded a very interesting preliminary award and dissenting opinion on jurisdiction. See *Abaclat and Others (formerly Beccara and Others) v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. Arb/07/5, INVEST. ARB. REP. (Aug. 10, 2011), [www.iareporter.com/downloads/20110810](http://www.iareporter.com/downloads/20110810) (discussing nature of mass investment arbitration involving 60,000 Italian bondholders); *Abaclat and Others (formerly Beccara and Others) v. Argentine Republic*, Dissenting Opinion on Jurisdiction, ICSID Case No. Arb/07/5 (Oct. 28, 2011), [http://italaw.com/documents/Abaclat\\_Dissenting\\_Opinion.pdf](http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010)); Strong, *Abaclat*, *supra* note 32; S.I. Strong, *Collective Arbitration in ICSID Disputes: Abaclat (formerly Beccara) v. Argentine Republic*, 17 ARB. NEWS \_\_ (Mar. 2012).

64. A growing number of commentators take the view that the device will eventually expand beyond U.S. borders. See BORN, *supra* note 5, at 1231–32; J. Brian Casey, *Commentary: Class Action Arbitration Should be Available*, LAW. WKLY. (Can.), Mar. 31, 2006, at 9; Leon et al., *supra* note 63; Gabrielle Nater-Bass, *Class Action Arbitration: A New Challenge?*, 27 ASA BULL. 671, 687 (2009); S.I. Strong, *Class Arbitration Outside the United States: Reading the Tea Leaves*, in DOSSIER VII: ARBITRATION AND MULTIPARTY CONTRACTS 183, 183–84 (Bernard Hanotiau & Eric A. Schwartz eds., 2010); Strong, *De-Americanization*, *supra* note 23, at 494–95.

65. Some also see these procedural protections as reflecting the concept of inferred consent to dispensation of the unnamed parties’ claims through litigation or settlement. See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1157–58 (2010). This interpretation of the nature of the procedural protections may be useful as a means of establishing consent to the procedures in class arbitration.

66. These fairness reviews are similar to those used by courts in class actions proceeding under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 23; Buckner, *supra* note 26, at 320–23.

class proceedings.<sup>67</sup> Although this model was typically used during the early days of class arbitration, it is unclear whether hybrid procedures are still in use,<sup>68</sup> a factor that may be important in determining whether class arbitration “changes the nature of arbitration.”<sup>69</sup>

The second method of protecting the rights of unnamed parties is still very much in use and was explicitly discussed by both the majority and the dissent in *Stolt-Nielsen*.<sup>70</sup> Rather than arising out of the common law, this approach developed as a result of the publication of special rules on class arbitration.<sup>71</sup> This model allows the arbitral tribunal to retain jurisdiction over all aspects of the arbitration, including certification of and notice to the class as well as control over fairness approvals of the final arbitral award.<sup>72</sup> Courts are not given any mandatory duties under these rules, nor are they allowed to insert themselves *sua sponte* into the process. However, increased judicial oversight is expressly contemplated in rule-based class arbitration by virtue of certain partial final awards that must be rendered by the arbitrators at two predetermined times. These awards, which involve (1) the construction of the arbitration agreement and (2) the determination of whether class treatment is warranted as a factual matter, may be taken by one or more parties to court for immediate review.<sup>73</sup> Although partial final awards have been used in

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67. See *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 785 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 876 (Pa. Super. Ct. 1991); *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360–61 (S.C. 2002), *vacated*, 539 U.S. 444 (2003); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 226–39 (2006).

68. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1765 (2010) (discussing only procedures under AAA Supplementary Rules); see also Buckner, *supra* note 26, at 301 (claiming the hybrid model has been “swept away”).

69. *Stolt-Nielsen*, 130 S. Ct. at 1775; see *infra* notes 297–300 and accompanying text.

70. See *Stolt-Nielsen*, 130 S.Ct. at 1776; *id.* at 1778 (Ginsburg, J., dissenting).

71. See AAA SUPPLEMENTARY RULES, *supra* note 17; JAMS CLASS ACTION PROCEDURES, *supra* note 17; NAF ARB. CLASS PROCEDURES, *supra* note 17; *supra* notes 16–17 and accompanying text.

72. See AAA SUPPLEMENTARY RULES, *supra* note 17, rules 4, 6, 8; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 3–4, 6. In rule-based class arbitrations, the tribunal acts as a check on party autonomy by independently reviewing the scope of the class, notice to the class, and settlement agreements for reasonableness. In judicial class actions, the court undertakes this type of heightened review. See FED. R. CIV. P. 23. The intent in either case is to avoid collusion between respondents and named parties in creating or settling a class for improper purposes and injuring the interests of the unnamed parties. See HENSLER ET AL., *supra* note 32, at 79–99.

73. See AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3, 5; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–3.

other contexts in both bilateral and traditional multiparty proceedings,<sup>74</sup> no other form of arbitration requires arbitral tribunals to render partial final awards on such a systematic basis.

Interestingly, the rationale underlying the use of partial final awards is not precisely the same as the rationale for shared jurisdiction under the hybrid model. The hybrid approach reflects a concern about arbitrator competence in light of an assumption that arbitrators have little experience with class proceedings.<sup>75</sup> The rule-based model allows immediate judicial review of certain preliminary decisions that go to the heart of whether class proceedings are warranted in order to protect parties from the effect of an ill-advised decision regarding class treatment. This procedure, which mimics the interlocutory appeal process used in judicial class actions,<sup>76</sup> provides benefits across the board, in that claimants are not forced to abandon their claims precipitously if class treatment is not ordered while respondents are not pressured to settle frivolous claims if class treatment is ordered.<sup>77</sup> Thus, the rule-based approach to class arbitration reflects the view that arbitrators and judges are equally competent to decide matters regarding class procedure, while also acknowledging that errant decisions are possible in individual cases, which creates the need to make immediate review available. Unfortunately, transplanting judicial review procedures from class actions directly into the arbitral realm has led to certain problems.<sup>78</sup>

Thus, the nature of the parties' claims gives rise to two types of concern. First, class arbitration differs from traditional multiparty

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74. Use of such awards is generally discouraged. See BORN, *supra* note 5, at 2815–26; EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1999) ¶¶ 1359–62 [hereinafter FOUCHARD, GAILLARD, GOLDMAN]; LEW ET AL., *supra* note 6, ¶¶ 24-14 to 24-23.

75. The AAA explicitly addressed these concerns by creating a national panel of class arbitration experts that must be used in any class proceeding. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 2 (requiring at least one panelist to come from the class arbitrator roster).

76. The specialized rules on class arbitration involve two opportunities for judicial review rather than one, since judicial class actions do not need to construe the terms of an arbitration agreement. See FED. R. CIV. P. 23(f); AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3, 5; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–3.

77. See *infra* notes 176–77 and accompanying text. Business interests have long taken the view that class suits are routinely brought for frivolous reasons simply to achieve a windfall through settlement, although empirical evidence does not support that conclusion. See Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 85 (2008).

78. In particular, questions are raised with respect to the scope and standard of review. See *infra* notes 225–45 and accompanying text.

arbitration with respect to the character of the relief requested. Class arbitrations involve representative, rather than individual, claims, and it is this attribute, rather than the size of the dispute or the amount in contention, that distinguishes class arbitrations from very large multiparty proceedings.<sup>79</sup>

Secondly, the arbitral and judicial communities have required or permitted the use of certain special procedures in response to the assertion of representative rights. One method of protection for unnamed parties—the hybrid model—requires significant judicial intervention, although it is unclear whether this approach is still in use. The second method of protection—the rule-based model—only permits judicial involvement when one or both parties seek review of certain partial final awards rendered under the rules.

Since these are both ways in which class arbitration differs from traditional forms of multiparty arbitration, these issues require closer analysis to see if they “change[ ] the nature of arbitration”<sup>80</sup> in some manner. That analysis will be conducted below.<sup>81</sup>

### C. *Relationship Between the Parties*

The third potential difference between class and traditional multiparty arbitration relates to the relationship between the parties. The analysis here is somewhat involved, although it can be simplified by separating out the issue of non-signatories, meaning parties who have not signed an arbitration agreement with any of the other participants, from issues regarding the propriety of multiparty or class proceedings.<sup>82</sup> Questions involving non-signatories arise in multiparty proceedings with some frequency and are usually resolved through recourse to concepts such as consent, agency, assumption, alter ego, piercing the corporate veil, estoppel, incorporation by reference, and the group of companies doctrine.<sup>83</sup> Confusion can arise because some of these principles can also be invoked when determining

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79. See *supra* notes 47–48 and accompanying text.

80. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

81. See *infra* notes 224–45, 290–313 and accompanying text.

82. See BORN, *supra* note 5, at 2086 (distinguishing non-signatory issue from multiparty issue); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.39 (2009) (framing the issue as “third parties to the arbitration agreement”) [hereinafter REDFERN AND HUNTER].

83. See *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (outlining means of obtaining arbitral jurisdiction over non-signatories in a U.S. proceeding); BORN, *supra* note 5, at 1142–1205.

whether multiparty proceedings are proper.<sup>84</sup> However, there is no need to consider “pure” non-signatory issues in this discussion because all of the parties in *Stolt-Nielsen* signed an arbitration agreement with at least one other party to the dispute, a situation that will be true of most, if not all, class arbitrations.<sup>85</sup>

Once the matter of non-signatories has been set aside, the issue becomes whether multilateral arbitration is warranted in the circumstances at bar.<sup>86</sup> The analysis here is facilitated by differentiating between two types of contractual relationship. The first type of relationship involves multiple parties to a single contract. The paradigmatic example in the context of traditional multiparty proceedings is a consortium or joint venture agreement that provides for arbitration and that includes several different signatories.<sup>87</sup> Although the existence of a single arbitration agreement with multiple signatories does not require multiparty proceedings, this type of relationship can—absent contractual language or relevant law that forbids multiparty treatment—suggest that the parties intended or at least anticipated the possibility of multiparty arbitration.<sup>88</sup>

Single-contract relationships can also give rise to class arbitration. In this case, the paradigmatic example involves a corporation whose bylaws or articles of incorporation require arbitration of any disputes relating to those bylaws or articles of incorporation.<sup>89</sup> Again, the fact that all of the parties are bound by the same document can suggest that a dispute arising out of, or related to, that agreement could or should involve all signatories.<sup>90</sup>

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84. For example, the group of companies theory could be used to inquire whether a series of related entities—all of whom have signed arbitration agreements with at least one other party—should be required to proceed in a single arbitration. Although this could be seen as a non-signatory issue to the extent that not all of the parties have signed the same agreement, it has also been considered a question of intent with respect to the type of proceedings to be adopted. See BORN, *supra* note 5, at 2084–86.

85. See *Stolt-Nielsen*, 130 S. Ct. at 1764–65; see also *supra* note 37. However, to the extent that non-signatory issues arise, they can be handled through existing principles of law without altering the class analysis in any way. See *supra* note 83.

86. See HANOTIAU, *supra* note 20, at 4–5, 103; see also BORN, *supra* note 5, at 2086.

87. See REDFERN AND HUNTER, *supra* note 82, ¶ 2.188; Platte, *supra* note 40, nn.23–33.

88. See BORN, *supra* note 5, at 2085 n.83; REDFERN AND HUNTER, *supra* note 82, ¶ 3-73; Fritz Nicklisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT'L ARB. 57, 59–60, 71 (2004); Platte, *supra* note 40, nn.18–22.

89. See *Valencia v. Bancolombia (Colombia v. Colombia)*, Zuleta Digest for Institute for Transnational Arbitration (ITA) (Arb. Trib. Bogotá Chamber Comm. 2003), available on [www.kluwerarbitration.com](http://www.kluwerarbitration.com); see also Borris, *supra* note 24; Strong, *DIS*, *supra* note 24, at 50.

90. See BORN, *supra* note 5, at 2084; LEW ET AL., *supra* note 6, ¶ 16-8.

Analyses regarding the propriety of multiparty arbitration in the case of single-contract relationships are relatively straightforward, regardless of whether the dispute involves class or traditional multiparty claims.<sup>91</sup> Because there is nothing to distinguish the two types of proceedings, class arbitrations arising out of a single contract therefore cannot be said to affect the nature of arbitration, at least with respect to this issue.

The second type of contractual relationship to consider is slightly more complicated, in that it not only involves multiple parties but also multiple contracts.<sup>92</sup> In these situations, all of the parties to the purported arbitration have signed arbitration agreements with at least one other party, but the agreements are found in different documents. Because the arbitration agreements are all bilateral on their face, it is more difficult to conclude that the parties have agreed to have their disputes heard in anything other than a bilateral proceeding.

This is not to say that these relationships cannot result in multiparty arbitration. To the contrary, courts and arbitrators have found that multiparty arbitration—either traditional or class—may be ordered, even in multi-contract situations, so long as the parties have demonstrated the requisite type of consent.<sup>93</sup> To find such consent, courts and arbitrators look first to the terms of the parties' agreement.<sup>94</sup> However, that document is often silent or ambiguous with respect to class or multiparty treatment.<sup>95</sup> In those cases, the analysis focuses on a variety of factors, which may include the type of relationship between the parties.<sup>96</sup> For example, the context in which

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91. See BORN, *supra* note 5, at 2084; LEW ET AL., *supra* note 6, ¶ 16-8; see also Strong, *Sounds of Silence*, *supra* note 1, at 1059-83; *infra* note 96.

92. See REDFERN AND HUNTER, *supra* note 82, ¶ 2.191.

93. See BORN, *supra* note 5, at 2085 n.83. The amount and type of consent necessary to result in class arbitration is an interesting question that is possibly in a state of flux. Compare *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion) (stating "the relevant question here is what *kind of arbitration proceeding* the parties agreed to"), with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (claiming "we see the question as being whether the parties *agreed to authorize class arbitration*"); see also *infra* notes 255-69 and accompanying text.

94. See *Stolt-Nielsen*, 130 S. Ct. at 1773-74.

95. Sometimes that is an intentional choice, whereas other times it is simply an omission. See HANOTIAU, *supra* note 20, at 104-05.

96. See BORN, *supra* note 5, at 2084; LEW ET AL., *supra* note 6, ¶ 16-8. When arbitration agreements are silent or ambiguous as to the issue of multiparty proceedings, arbitrators often rely on three general interpretive rules that

are the same as the general principles frequently adopted with respect to all contracts. They include the principle of interpretation in good faith (A), the principle of effective interpretation (B) and the principle of interpretation

the multiple bilateral contracts were drafted may demonstrate that the parties knew of the existence of a larger contractual scheme and intended that any disputes between the parties were to be resolved on a multilateral basis, involving all or many of the signatories to the individual contracts.<sup>97</sup> Alternatively, it may be that a number of the potential parties operated as a single group of companies, thus justifying resolution of disputes in a single proceeding.<sup>98</sup> A more novel argument would consider whether the parties might have expected a multiparty proceeding because that would be the only way to effectuate certain statutory rights or protect the parties' right to access to justice.<sup>99</sup> Interestingly, the majority in *Stolt-Nielsen* seemed to accept (at least in part) the argument that because the charter party in question had never been the subject of a judicial class action, the parties could not have anticipated a class arbitration.<sup>100</sup> If this is a relevant consideration, then the opposite would be equally true—that a class arbitration could be expected in a situation where a class action would have arisen had no arbitration agreement been in place.

One way to analyze multiparty issues would be by reference to these sorts of factual considerations. However, it is also possible to evaluate these relationships in a more formalistic manner, relying on concepts of contractual privity.<sup>101</sup> As the following shows, the privity approach yields important information about possible distinctions between class and multiparty arbitrations.

Multi-contract, multiparty relationships appear to fall into two basic types. The first involves a series of contracts that can be visualized as a vertical string. The paradigmatic example of this type of

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*contra proferentem* (C). However, the principles of strict interpretation (D) and of interpretation *in favorem validitatis* (E) should not . . . apply.

FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 476 (citation omitted); *see also* Strong, *Sounds of Silence*, *supra* note 1, at 1055–83. The technique is similar to that used in cases involving pathological clauses, which raise issues of intent that are similar to those found in multiparty scenarios. *See* Benjamin G. Davis, *Pathological Clauses: Frédéric Eisemann's Still Vital Criteria*, 7 *ARB. INT'L* 365, 365–66 (1991); Klaus Peter Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*, 17 *ARB. INT'L* 1, 11–12 (2001).

97. *See* Platte, *supra* note 40, nn.37–38.

98. *See* BORN, *supra* note 5, at 1168–78.

99. *See, e.g.*, *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (noting a class waiver precluding plaintiffs from vindicating statutory rights rendered an arbitration provision unenforceable, even after *Stolt-Nielsen*).

100. *See* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 (2010).

101. *See* Platte, *supra* note 40, nn.18–22.

relationship would be a construction dispute involving a series of bilateral contracts with the client at the top level, the general contractor at the second level, and the various subcontractors at the third level.<sup>102</sup> All of these agreements are bilateral, although one party—the general contractor—stands in contractual privity with each of the other parties. The general contractor therefore acts as the intermediary between the injured party (the client) at the top of the string and other potential parties (the subcontractors) at the bottom of the string.<sup>103</sup> As such, the general contractor is the party most likely to seek multiparty proceedings, since the general contractor will often want to bring in one or more of the subcontractors as co- or cross-respondents. Seldom will the client want to add the subcontractors as parties, since it is easier and less expensive to proceed solely against the general contractor.

Not all multiparty, multi-contract relationships can be visualized in string format, however. A second type of scenario exists, reflecting more of a hub-and-spoke arrangement, with a single party standing at the center of the wheel, typically as both the offending party (i.e., the respondent) and the only participant with a contract with each of the individual claimants. Although these types of relationships can arise in traditional multiparty arbitrations,<sup>104</sup> the hub-and-spoke model is far more typical of class arbitration.<sup>105</sup> For example, a manufacturer could be seen to stand in the middle of various consumer claimants in a consumer class arbitration. Alternatively, an employer could be viewed as acting as the center of a class suit brought by a group of employees.

Interestingly, the two types of multiparty, multi-contract relationships give rise to very different concerns. The analysis can be broken into two separate issues, one involving the form of the various arbitration agreements and the other relating to the type of claims made. Each is addressed in turn.

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102. See LEW ET AL., *supra* note 6, ¶¶ 16-34 to 16-38.

103. This assumes that the claim moves down the chain. It is also possible for claims to move upward, as in a dispute seeking payment for services rendered.

104. For example, a hub-and-spoke relationship would arise in disputes involving an umbrella organization (such as a *société coopérative*) and its constituent members. See Ostrager et al., *supra* note 47, at 443 (discussing arbitration involving 140 parties, all of whom had bilateral arbitration agreements with the Swiss *société coopérative* that acted as the umbrella organization).

105. A class claim could conceivably involve a string relationship (for example, in a dispute involving a class of insured parties, a cedent and a reinsurer), although these relationships resemble a multi-respondent hub-and-spoke model more than a vertical string.



i. *Form of the arbitration agreement*

When considering the propriety of multiparty or class arbitration in cases of contractual silence or ambiguity, the form of the agreement between the parties is often highly relevant, with courts and arbitrators being more likely to order multiparty proceedings when the arbitration agreements in question are identical or nearly identical in form.<sup>106</sup> To some extent, this result may be because, as a jurisprudential matter, using the same or similar arbitration agreements suggests that the parties contemplated the likelihood of a single proceeding, even though the individual arbitration agreements are found in a series of bilateral contracts.<sup>107</sup> However, it may also be true that, as a practical matter, using the same or similar arbitration agreements eliminates many of the interpretive problems associated with construing conflicting arbitral provisions.<sup>108</sup>

Applying this principle to the two types of multiparty, multi-contract relationships described above yields interesting results. For example, string relationships frequently involve very different arbitration provisions, since the individual contracts in which the arbitration agreements are found are usually negotiated separately.<sup>109</sup> Although there are ways to address the practical problems associated with construing conflicting arbitral provisions,<sup>110</sup> difficulties remain at the jurisprudential level. For instance, differences in language can offset the suggestion that claims should be handled jointly because the transaction as a whole was structured at one time and with one purpose in mind.<sup>111</sup> The more disparate the various provisions, the less likely multiparty proceedings are to be ordered.<sup>112</sup> Thus, string contracts can experience significant practical and jurisprudential difficulties with respect to the form of the relevant arbitration agreements.

Hub-and-spoke relationships exhibit very different characteristics with regard to the form of the various arbitration agreements.

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106. See Platte, *supra* note 40, nn.37–39. The AAA Supplementary Rules require the existence of arbitration agreements that are the same or substantially similar, a requirement that may also exist as a matter of common law. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 448 (2003) (plurality opinion) (involving functionally identical arbitration agreements); AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4.

107. See HANOTIAU, *supra* note 20, at 109–14, 161.

108. See *id.* at 109–20, 161.

109. See *id.* at 104–05.

110. See *supra* note 96.

111. See HANOTIAU, *supra* note 20, at 108–18.

112. See Platte, *supra* note 40, nn.34–50 (discussing differences regarding arbitral institutions, arbitral rules, arbitral seat, or governing law).

Disputes in these contexts almost always involve a series of identical (or functionally identical)<sup>113</sup> arbitration provisions, often embodied in a series of standard contracts that are offered on a take-it-or-leave-it basis and that cannot be individually negotiated.<sup>114</sup> Therefore, few, if any, practical issues arise with respect to the construction of differing arbitration provisions.<sup>115</sup>

The jurisprudential analysis is not quite so simple, however. Here, the difficulty is whether the intent to arbitrate disputes on a multilateral basis can be found, given that the parties who represent the spokes of the wheel typically do not know each other personally. Although each dispute will turn on its own facts, an element of collectivity can nevertheless be identified in many instances. For example, the members of a *société coopérative* typically know that other, similarly situated parties exist as part of the larger commercial relationship and would likely consider it logical to resolve identical or related disputes in a single proceeding.<sup>116</sup> Similarly, in the context of class arbitration, the nature of the respondent's business dealings can lead members of a class to surmise that other, similarly situated parties exist, even if the various individuals do not know each other by name.<sup>117</sup> The notion of collectivity in the class context may be strengthened in jurisdictions that traditionally permit or require certain claims to be brought as judicial class actions, since even laypersons will understand that their individual claims could be joined with those of other parties, in appropriate circumstances.<sup>118</sup>

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113. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 448 (2003) (plurality opinion).

114. All of the United States Supreme Court decisions on class arbitration have dealt with hub-and-spoke arrangements. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Bazzle*, 539 U.S. at 444; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

115. *But see Bazzle*, 539 U.S. at 456–57 (Rehnquist, J., dissenting) (claiming a minor difference in language had to be given weight). Some people have suggested that corporations can avoid the possibility of class arbitration simply by amending their arbitration agreements slightly from time to time. See Philip Allen Lacovara, *Class Action Arbitrations – the Challenge for the Business Community*, 24 *ARB. INT'L* 541, 559 (2008); Kathleen M. Scanlon, *Class Arbitration Waivers: The “Severability” Doctrine and its Consequences*, *DISP. RESOL. J.* 44 (Feb.–Apr. 2007).

116. See *The Decision, Judgment of the Swiss Federal Court*, 10 *AM. REV. INT'L ARB.* 559, 564–68 (1999) (discussing construction of arbitration agreements in Andersen arbitration); *supra* note 47 and accompanying text.

117. For example, parties to a consumer class arbitration know that the respondent is in the business of dealing with consumers. Similarly, parties to an employment class arbitration know that the respondent has other employees.

118. See *In re Am. Express Merchs' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (considering congressional intent in enacting antitrust laws and interplay with class waivers); *supra* notes 98–100 and accompanying text. Although the United States is the

Corporate respondents are also aware of the collective nature of many of these kinds of claims. Indeed, that is precisely why many of these respondents turned to arbitration in the first place: to avoid the possibility of judicial class actions.<sup>119</sup> This creates an interesting dilemma as to whether the respondent's subjective intent to use arbitration to eliminate class proceedings can or should be given effect.

The question implicates the concept of party autonomy, which is universally agreed to be a fundamental principle of arbitration.<sup>120</sup> Certainly, parties may agree to a wide variety of procedural approaches to arbitration, subject to only a few provisos.<sup>121</sup> However, it is clear that the subjective intent of one party cannot control the interpretation of a contract.<sup>122</sup> Thus, even if a party intends a contractual provision to have a certain effect, courts and arbitrators are bound by the objective intent reflected in the agreement, as determined by the contractual language and governing law. Furthermore, it has long been true that parties wishing to evade certain onerous provisions of substantive law cannot do so simply by inserting an arbitration agreement into their contracts.<sup>123</sup>

In some cases, states have cast a critical eye on what might be considered an improper motive on the part of one or both of the parties.<sup>124</sup> Thus, for example, the State of California took the view that a

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best-known adherent of the judicial class action, other common law and civil law nations have adopted the device. See *The Annals*, *supra* note 14; see also GLOBAL CLASS ACTIONS EXCHANGE, <http://globalclassactions.stanford.edu>.

119. Numerous articles from as early as 1989 touted arbitration as an effective means of eliminating the risk of a class suit. See Michael R. Davis, *The Prospective [sic] of In-House Counsel: Organization, Compliance/Enforcement Programs, Negotiated Sales, Transfer, Termination and Advertising and Franchisee Sales*, 486 PLI COM. 561, 590 (1989); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 BUS. L. TODAY 24, 25–26 (May/June 1998); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, 8 DISP. RESOL. MAG. 13, 13 (Spring 2002).

120. See *infra* notes 217–19, 253–69 and accompanying text.

121. See *infra* notes 210–16 and accompanying text.

122. See *Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1127 (W.D. Wash. 2010); *Giuliano v. Inland Empire Personnel, Inc.*, 149 Cal. App. 4th 1276, 1299 (Cal. Ct. App. 2007).

123. See Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23, 23 (1997); DONALD F. DONOVAN & ALEXANDER K.A. GREENAWALT, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 11, 43 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

124. Remedy-stripping provisions are strongly disfavored as a matter of public policy, even if they are embedded within an arbitration agreement. See David S.

waiver of class proceedings<sup>125</sup> would be ruled unconscionable if it was:

found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it [was] alleged that the party with the superior bargaining power ha[d] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.<sup>126</sup>

This provision was recently struck by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* as being inconsistent with, and therefore preempted by, the Federal Arbitration Act (FAA).<sup>127</sup> Although some view *AT&T* as heralding the end of class arbitration (in that corporations will now routinely insert similar waiver language into their arbitration agreements), this decision is much more limited than it appears, in that it deals only with state law preemption issues<sup>128</sup> and leaves courts free to strike class waivers on other grounds.<sup>129</sup> Indeed, several federal circuit courts take the view that class waivers should be considered pursuant to the federal substantive law of arbitrability rather than state law of unconscionability.<sup>130</sup>

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Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 53–56 (2003).

125. See *Discover Bank v. Superior Court*, 113 P.3d 1110, 1162–63 (Cal. 2005). California is not the only jurisdiction to exhibit a concern about powerful corporate interests using arbitration as a means of reducing their exposure to legal claims. For example, the European Union prohibits the use of pre-dispute arbitration clauses in the consumer context for precisely this reason. See Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts [1993] O.J. L95/29; see also Arbitration Fairness Act of 2009, H.R. 1020, 111st Cong. (2009) (proposing a similar change in U.S. law). Several U.S. legislators have proposed a new form of the Arbitration Fairness Act in the wake of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). See Arbitration Fairness Act, S. 987.IS, 112th Cong. (2011); Arbitration Fairness Act, H.R. 1873.IH, 112th Cong. (2011).

126. *Discover Bank*, 113 P.3d at 1162–63.

127. 9 U.S.C. § 2 (2010); *AT&T*, 131 S. Ct. at 1753.

128. *AT&T*, 131 S. Ct. at 1751 (noting “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA”). Furthermore, a number of state courts have found that certain practices are permitted under their state arbitration statutes, despite seemingly contrary U.S. Supreme Court precedent. See *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87 (Tex. 2011) (allowing heightened review of an award under the Texas Arbitration Act despite the decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)).

129. See *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 193–94, 199 (2d Cir. 2011) (stating that “*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as [Amex Travel] urges, that a contractual clause barring class arbitration is *per se* enforceable,” and concluding that the waiver was void for public policy).

130. See *id.* at 194 (citing cases from the First, Second, and Third Circuits).

Nevertheless, *AT&T* is important to this discussion because the decision demonstrates how views about the nature of arbitration can be issue-determinative. Because Justice Scalia, writing for the majority, viewed class arbitration as something other than “arbitration,” he was able to find that the California law striking certain waivers “interferes with arbitration” under the FAA.<sup>131</sup> Notably, he arrived at his conclusion about the nature of class arbitration based on his characterization of the speed, size, and formality of class disputes, as well as the representative nature of class claims, all points that are considered in this article.<sup>132</sup>

Justice Breyer, on the other hand, considered class arbitration and bilateral arbitration as equally legitimate forms of arbitration. Because the California law could result in either bilateral or class arbitration, the provision was consistent with the FAA.<sup>133</sup> In reaching this conclusion, Justice Breyer noted that a long line of existing Supreme Court precedent “cautioned against thinking that Congress’ primary objective was to guarantee . . . particular procedural advantages. Rather, that primary objective [of the FAA] was to secure the ‘enforcement’ of agreements to arbitrate.”<sup>134</sup>

Although there is much to be said about *AT&T*,<sup>135</sup> it is sufficient to note for the purposes of this discussion that the way in which the various justices defined “arbitration” had a significant effect on the outcome of the case. Because there has historically been little analysis of this issue, the point will doubtless continue to be litigated, an

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131. *AT&T*, 131 S. Ct. at 1753 (claiming class arbitration “is not arbitration as envisioned by the FAA”).

132. *See id.* at 1748, 1750–51.

133. *See id.* at 1758 (Breyer, J., dissenting).

134. *Id.* Justice Scalia’s references to precedent were somewhat tortured, in one instance claiming that the seminal case of *Mitsubishi* stood for the proposition that “parties may agree to limit the issues subject to arbitration,” *id.* at 1748, even though *Mitsubishi* has long been understood to have expanded, rather than restricted, the realm of arbitrable issues. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985). Justice Scalia also attempted to characterize the purpose of the FAA as intending “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T*, 131 S. Ct. at 1748. Of course, it is the last portion of that sentence—“so as to facilitate streamlined proceedings”—that is problematic, since, as Justice Breyer noted, there is nothing in the FAA or in nearly a century’s worth of Supreme Court precedent to support that reading of the statute. *Id.* at 1761 (Breyer, J., dissenting).

135. The author discusses other aspects of the case in a forthcoming book from Oxford University Press. *See* S.I. STRONG, CLASS ARBITRATION AND COLLECTIVE ARBITRATION: MASS CLAIMS IN THE NATIONAL AND INTERNATIONAL SPHERE (forthcoming 2013).

outcome that is made even more likely given the complicated and contentious nature of waivers.<sup>136</sup>

Waivers will be discussed more fully below.<sup>137</sup> The point to be made at this stage of the analysis is that waivers demonstrate that both respondents and claimants were aware of the possibility of collective action at the time of drafting, since without such a possibility, a waiver would be unnecessary. However, this is not to say that the only time that parties can be said to have considered the prospect of large-scale legal actions is in cases of (1) express consent to or (2) express prohibition of class or collective arbitration. Consent to class suits can be found implicitly even in cases where the contract is silent or ambiguous as to class treatment.<sup>138</sup> Instead, the issue is always one of objective intent, as reflected in the contract. In this regard, class arbitration is the same as traditional forms of multiparty arbitration.

As the preceding shows, the form of the arbitration agreement is highly relevant to the question of whether multiparty proceedings are proper. Since class arbitrations not only fall within established paradigms for multiparty arbitration but also exhibit characteristics of the more favorably viewed type of contractual relationship (i.e., hub-and-spoke relationships), there is nothing about class arbitration, at least in this regard, that could give rise to the charge that the device “changes the nature of arbitration.”<sup>139</sup> Instead, the issue is simply whether multiparty (i.e., class) proceedings are proper under

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136. For example, many believe that certain rights—such as those enacted for the benefit of the public at large rather than the benefit of a single individual—cannot be waived by a single individual. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 680 (Cal. 2000); BORN, *supra* note 5, at 1776, 1230–31; Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT’L ARB. 199, 203–04 (2004). However, class arbitration may involve certain public benefits that distinguish it from other forms of multiparty arbitration and that make the waiver discussion particularly difficult. See *infra* notes 173–94 and accompanying text.

137. See *infra* notes 173–94 and accompanying text.

138. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 (2010) (stating that when the parties have not “reached any [explicit] agreement on the issue of class arbitration, the arbitrators’ proper task [is] to identify the rule of law that governs in that situation,” which in *Stolt-Nielsen* would have required reference “either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, i.e., either federal maritime law or New York law”); Strong, *Sounds of Silence*, *supra* note 1, at 1059–83. The interpretive analysis used in these situations is not the same as “allow[ing] any party to a consumer contract to demand [class arbitration] *ex post*,” as Justice Scalia incorrectly seemed to assume. *AT&T*, 131 S. Ct. at 1750.

139. *Stolt-Nielsen*, 130 S. Ct. at 1775.

the facts arising in any particular case, not whether class arbitration affects the fundamental nature of the process.

ii. *Types of claims made*

Courts and arbitrators considering the propriety of multiparty arbitration in multi-contract scenarios do not focus solely on the form of the arbitration agreements at issue. Decision-makers also consider the types of claims at issue. Again, clear distinctions exist between the two major categories of contractual relationships.

The first type of contractual relationships (i.e., those resembling vertical strings) tend to involve a great deal of diversity in the kinds of claims, counterclaims, and defenses that are asserted by the various parties. For example, the general contractor in a construction dispute usually mounts a very different defense than the various subcontractors do. In fact, the general contractor is likely to assert claims, defenses, and positions that directly conflict with those taken by other parties, an approach that can create serious procedural problems. For example, the disparity between the parties' positions may make it difficult to identify a sufficient unity of interest among the various participants to allow the parties to be grouped for purposes of naming the arbitrators (an issue that plagued multiparty arbitration until the early 1990s).<sup>140</sup> The absence of uniformity among parties to string relationships can also lead to parties being asked to reveal confidential or sensitive information to market competitors.<sup>141</sup>

Interestingly, these issues do not arise in hub-and-spoke relationships. This is partly due to the fact that the parties who represent the spokes of the wheel bring claims that are similar, if not identical, on both a factual and legal level. Although this unity of interests and

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140. The issue came to a head following the famous *Dutco* case. See *BKMI Industrieanlagen GmbH v. Dutco Construction Co. Ltd.* XV Y.B. COM. ARB. 124 (1990); FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶¶ 792–93, 986–89; Platte, *supra* note 40, nn.71–75. Matters involving the selection of arbitrators are discussed below. See *infra* notes 146–63 and accompanying text.

141. See Nicklisch, *supra* note 88, at 68; Joseph T. McLaughlin et al., *Recent Developments in Domestic and International Arbitration Involving Issues of Arbitrability, Consolidation of Claims and Discovery of Non-parties*, SM090 ALI-ABA 757, 772 (2007); see also JOACHIM G. FRICK, *ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS* 234 (2001) (claiming arbitral institutions should appoint arbitrators for all parties if a conflict of interest might arise between groups of claimants or respondents).

circumstance can exist in traditional multiparty proceedings exhibiting a hub-and-spoke approach,<sup>142</sup> it is even more marked in class arbitration.<sup>143</sup> Because the class is asserting concordant legal strategies, grouping the parties for procedural purposes such as the selection of arbitrators becomes extremely easy. Furthermore, hub-and-spoke arbitrations tend not to involve market competitors as part of the class, thus avoiding situations where parties must share sensitive or confidential trade information.<sup>144</sup>

Thus, the types of claims at issue in class arbitration fall easily within the norms established for traditional multiparty proceedings. Indeed, on this point, class arbitration is most closely aligned with the less objectionable type of multiparty, multi-contract proceeding, namely that involving a hub-and-spoke relationship. Therefore, class arbitration cannot be said to “change[] the nature of arbitration”<sup>145</sup> with respect to the type of claims asserted.

#### D. *Selection of Arbitrators*

The preceding section alluded briefly to certain potential problems associated with the selection of arbitrators in multiparty disputes. It is useful now to take up that subject in more detail, since the ability to select one’s arbitrators has long been considered a fundamental right in arbitration.<sup>146</sup> For years, the right was interpreted so strictly that it acted as an almost insurmountable barrier to the development of any form of multiparty arbitration. The problem arose because virtually all of the contractual and institutional mechanisms for appointing arbitrators at that time contemplated bilateral proceedings.<sup>147</sup> The typical procedure then, as now, was that that each party was entitled to select its own arbitrator, with the chair to be nominated by the two party appointments. However, this approach ran into difficulties when there were more than two parties to

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142. See Ostrager et al., *supra* note 47, at 444 (discussing traditional multiparty arbitration with more than 140 parties).

143. Claimants in a class proceeding often allege precisely the same type of legal injuries, even if the quantum of damages suffered may vary between different individuals. For example, if a financial institution imposed an improper monthly surcharge on all credit card accounts, the claims would be legally identical, even if the amount ultimately due to each individual claimant would depend on how long he or she held an account with the respondent.

144. See Nicklisch, *supra* note 88, at 59–60, 68.

145. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

146. See BORN, *supra* note 5, at 1363–86.

147. See generally LEW ET AL., *supra* note 6, ¶¶ 16-11 to 16-29.



the dispute. In the absence of any alternative appointment mechanisms or appointment agencies, many multiparty proceedings failed to materialize, a result that only further reinforced the presumption that bilateral proceedings were the only legitimate form of arbitration.

Reforms came in the early 1990s, at least with respect to disputes that were known to involve multiple parties from the very beginning.<sup>148</sup> As a result, many national laws and arbitral rules now provide that a neutral entity (such as a court or arbitral institution) can appoint the entire tribunal in cases where the parties cannot themselves agree on individual panelists or selection procedures.<sup>149</sup>

Although these revised appointment mechanisms have been very useful in arbitrations that are initially designated as having a multiparty character, the new procedures do not address situations where multiparty status is asserted after the tribunal has been formed. The late arrival of new parties can have serious ramifications, in that the arbitration must either (1) begin again, after a new panel has been selected (thus incurring additional costs of time and money for the original participants) or (2) proceed with the original panelists (thus possibly infringing on the fundamental rights of the new parties to name their own arbitrators).<sup>150</sup>

The problem with class arbitrations is that they do not fit easily into one of these two models. For example, class arbitrations are usually filed on a classwide basis and thus can be considered multilateral actions from the very beginning, an interpretation that allows parties to benefit from rules and laws facilitating the selection of arbitrators in multiparty scenarios.

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148. The changes were inspired by the famous *Dutco* case. See *BKMI Industrieanlagen GmbH v. Dutco Construction Co. Ltd.* XV Y.B. COM. ARB. 124 (1990); FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶¶ 792–93, 986–89.

149. See generally LEW ET AL., *supra* note 6, ¶¶ 16-11 to 16-29. This approach clearly applies in multiparty arbitrations arising out of a single contract (the *Dutco* dilemma), but can also be used in multi-contract situations. See BORN, *supra* note 5, at 2103–04. In those cases, the arbitral institution typically undertakes an initial analysis to determine whether the multiple contracts can support a multiparty proceeding, although the final determination as to multiparty status lies with the arbitral tribunal. See *id.* at 2104.

150. See BORN, *supra* note 5, at 2099–100. Of course, acceptance of the existing tribunal could be made a condition of joining the arbitration. See DIS SUPPLEMENTARY RULES, *supra* note 24, § 4.3.

However, the precise identity of many of the parties in the class is not known until well after the tribunal is constituted.<sup>151</sup> The delay arises because the tribunal first must decide that (1) class arbitration is warranted under the arbitration agreement and (2) the facts in this particular dispute warrant class treatment.<sup>152</sup> Only then can the tribunal define the scope of the class and identify its individual members.<sup>153</sup>

This process can take months, which means that a large number of parties are not fully “present” at the time the arbitrators are named. Indeed, none of the participants in the early stages of the proceedings—not the named claimants, the respondent(s), or the members of the tribunal—will know the identity of all of the members of the class when the arbitration begins.<sup>154</sup> This, of course, gives class arbitration some of the attributes of late-arising multiparty proceedings. However, this practice does not lead to the same problems in class arbitration as it does in traditional multiparty proceedings due to the unique way in which unnamed parties demonstrate their consent to join a class suit.

Under current forms of class arbitration, unnamed members of a class do not officially become parties to the proceeding unless and until they have each been given the option of joining the action. Some legal systems use an opt-in approach, wherein the party must affirmatively signal that he or she wishes to join the class, while others use an opt-out approach, wherein the party is assumed to be part of the class unless he or she indicates otherwise.<sup>155</sup>

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151. In practice, claimants provide some description of the size of the class and the characteristics of the members in the initial pleadings and update those assertions as new information becomes available. See FED. R. CIV. P. 23(d)(1)(D).

152. See AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3–6; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–4.

153. See AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3–6; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–4.

154. There may be exceptions to this rule, such as when the class is relatively small. See *Class Determination Partial Final Award, Partners Two, Inc. v. Adecco North Am., LLC*, Case No. 11 114 03042 40 (Am. Arb. Ass’n, 2004), available at <http://www.adr.org/si.asp?id=3630> (seeking to certify a class of twenty-nine franchisees). One issue that has not yet arisen concerns the extent to which late disclosure of the identity of the members of the class might lead to conflicts of interest for one or more of the arbitrators. Given the low monetary value of many individual claims in a class suit and the low level of participation of many unnamed class members in the proceedings, it is likely that any such conflicts would or should be waived as *de minimus*. However, the issue remains open.

155. Both the AAA and JAMS have adopted opt-out provisions. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 6(b)(5); JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 4(5). The DIS Supplementary Rules use an opt-in approach, although those rules are better described as providing for collective arbitration rather than

Potential class members may choose not to participate in an arbitration for any one of a variety of reasons. For example, some putative members of the class may believe that they can obtain a better result by proceeding individually.<sup>156</sup> Others may have concerns about the identity of the panelists. Those who are subject to an opt-in regime may not understand the ramifications of a failure to signal their consent to join the arbitration.<sup>157</sup> Regardless of the reason for declining to join the class, choosing not to participate preserves both the individual party's substantive legal claim and the right to name an arbitrator in any future legal dispute.<sup>158</sup>

The niceties of the opt-in/opt-out process mean that those unnamed parties to class arbitrations who choose to participate in the proceedings can be said to have effectively ratified the choice of arbitrators. These class members, therefore, have no cognizable legal injury vis-à-vis the selection of arbitrators, unlike late-arriving parties in traditional multiparty arbitrations who may not have the same choice as to whether to become part of the arbitration.<sup>159</sup> Furthermore, potential class members who choose not to join a class proceeding do not suffer any cognizable legal injury vis-à-vis their

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class arbitration. See DIS SUPPLEMENTARY RULES, *supra* note 24, section 4; Strong, *DIS*, *supra* note 24, at 55–56.

156. Statistics suggest that individual claims can result in higher damage awards, although many claimants will not wish to undertake the trouble of bringing an action of their own. See Petition for a Writ of Certiorari, *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893) at 12 [hereinafter *AT&T Petition*].

157. A healthy debate has arisen as to the relative merits of an opt-in versus an opt-out approach. See HENSLER ET AL., *supra* note 32, at 476–77. One of the reasons why a state may prefer to use an opt-out approach is because opt-out procedures are traditionally considered to be more likely to result in a larger class than an opt-in regime and thus carry more deterrent value. See Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 431–34 (2009) (citing rationales for opt-in versus opt-out classes).

158. Only if a party chooses to become a member of the class (either by opting in or not opting out) does that individual claim become part of the class award. See *Harvard Award*, *supra* note 13, at 144.

159. Of course, if a late-arriving party consented to consolidation or joinder, then it can be said to have ratified the choice of arbitrators, just as late-arriving parties in class arbitration do. However, some consolidation or joinder cases are made over the contemporaneous objection of one or more parties. See LEW ET AL., *supra* note 6, ¶ 16-38. To some extent, class arbitration can be seen as more similar to arbitrations involving intervention, at least on this point, since interveners have inserted themselves into the proceedings by choice, knowing who the arbitrators are. However, unlike additional class members, interveners can bring significantly different substantive claims or defenses that might cause the existing parties to change their views about the continuing desirability of certain panelists, thus raising arbitrator appointment issues from the reverse perspective.

substantive claims, since the determination of a class claim typically does not affect the rights of any non-participating parties.<sup>160</sup>

Interestingly, some respondents—even those that are present since the beginning of the arbitration—may argue that their right to select an arbitrator is injured as a result of the class procedure. The premise would be that the respondent would have proposed or agreed to different panelists, depending on who precisely was in the claimant group.<sup>161</sup> Since the respondent did not know the identity of all of the members of the class when the panel was selected, the respondent could be said to suffer an injury when new parties officially become part of the class. Although this argument makes some logical sense, it is unlikely to prevail because claims made by named and unnamed members of a group are identical, or functionally identical, as both a factual and legal matter, and thus should not affect the selection of arbitrators.<sup>162</sup>

Thus, class arbitration protects the fundamental right to select one's arbitrators, regardless of whether the procedure is considered more analogous to early-initiated multiparty arbitrations or late-arising multiparty procedures. Therefore, although class arbitration raises some unique issues with respect to the selection of arbitrators, these matters do not appear so serious as to give rise to claims that class arbitration "changes the nature of arbitration."<sup>163</sup>

#### E. *Underlying Policy Considerations*

The fifth and final means of comparing class and traditional multiparty arbitration involves the procedures' underlying policy considerations. Historically, the primary policy driving arbitration has been party autonomy, with the intent of the parties—as reflected in the

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160. The exception is when the class claim is against a limited fund. See Nagareda, *supra* note 65, at 1118–19. Mandatory classes do exist in the judicial context as a matter of U.S. practice. See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 236–37 (2003) (discussing mandatory class actions in the United States under Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure versus permissive class actions under Rule 23(b)(3)).

161. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, J., dissenting) (claiming the corporate respondent had the right to name a different arbitrator in each of 3734 individual arbitrations, based on the specific language of the arbitration agreements).

162. See *id.* at 451 (plurality opinion).

163. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

arbitration agreement—standing at the center of the analytical process.<sup>164</sup> The emphasis on party intent remains at the core of the multiparty inquiry, although the decision-maker in multiparty disputes must consider both (1) the intent to arbitrate the claims at issue and (2) the type of procedure to be adopted.<sup>165</sup>

Although party autonomy is central to the arbitral process, efficiency concerns also play a role in both bilateral and multilateral proceedings. Interestingly, the weight given to efficiency may be changing. For example, courts and arbitrators at one time routinely denied parties' attempts to bring all related claims into a single arbitral forum, even if doing so was more efficient, since allowing claims that were outside the scope of the arbitration agreement to go forward in arbitration would breach the principle of party autonomy.<sup>166</sup> Parties' attempts to bring non-signatories into the proceedings often met with similar results.<sup>167</sup> From these decisions was born the common understanding that the benefits of arbitration should not be considered as accruing to third parties, the courts, or the public at large.<sup>168</sup>

Although these older decisions elevate party autonomy over efficiency, the tide seems to have turned, at least in some regards. Thus, "procedural efficiency has been increasingly advocated by scholarly writers and taken into account in practice by arbitral tribunals and courts" on the grounds that the parties intended the arbitration to proceed in an efficient manner.<sup>169</sup> Certainly an efficient procedure

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164. See BORN, *supra* note 5, at 1059–60.

165. These questions involve what might be called primary and secondary consent. See *infra* notes 254–55 and accompanying text.

166. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 221 (1985) (involving arbitrable and nonarbitrable claims and requiring "piecemeal litigation" and "the possibly inefficient maintenance of separate proceedings in different forums").

167. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20–21 (1983) (stating that "federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement," and that the agreement must be enforced "notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement").

168. See FRICK, *supra* note 141, at 231–32 (claiming "efficiency is not in itself a goal of a dispute resolution mechanism, at least in proceedings that are not publicly financed").

169. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321–22 (2003); see also LEW ET AL., *supra* note 6, ¶ 16-92 (suggesting multiparty arbitration may be appropriate if "it serves procedural economy"); FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 476; Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* 24 ARB. INT'L 199, 243 (2008); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV 1103, 1106 (2009) (suggesting that the U.S. Supreme Court may have elevated efficiency

can save both time and money, two goals that are said to be central to the choice of arbitration as a dispute resolution mechanism.

Despite this potentially increased respect for efficiency, there is still no presumption in arbitration that the parties agreed to create the single most efficient procedure possible.<sup>170</sup> Furthermore, arbitrators still cannot impose a procedure that is inconsistent with the parties' wishes as expressed or implied in the arbitration agreement, even to save money or time.

This can cause difficulties for class arbitration, at least if the procedure is viewed—as it sometimes is—as having the sole aim of processing mass claims efficiently.<sup>171</sup> However, efficiency in the class context differs from efficiency in the non-class context in several significant respects.

For example, traditional multiparty arbitrations typically consider efficiency concerns by creating analogies to multiparty proceedings in court. In a judicial multiparty proceeding, benefits accrue to both the parties (by resolving the dispute at a single time in a single

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concerns over personal autonomy, at least in some regards, in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 591–92 (2008)).

170. Interestingly, Justice Scalia in *AT&T* attempted to argue that bilateral is the only proper form of arbitration because it is faster and more streamlined than class arbitration, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011), ignoring the fact that class arbitration is “more efficient than thousands of separate proceedings for identical claims,” *id.* at 1759 (Breyer, J., dissenting). However, the fact is that efficiency of proceedings is not a requirement under the FAA or U.S. case law, although it may—as noted in this discussion—factor into the analysis.

171. This assumption may be based on language in the specialized rules on class arbitration that indicates that class arbitration may be maintainable when “a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.” AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4(b); see also JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 3(b) (incorporating Rule 23 of the Federal Rules of Civil Procedure by reference). However, a more detailed reading of the rules shows that efficiency is but one of several factors that arbitrators are required to take into account. See AAA SUPPLEMENTARY RULES, *supra* note 17, rule 4(b)(1-4); JAMS CLASS ACTION PROCEDURES, *supra* note 17, rule 3(b). Furthermore, even a brief review of the literature on judicial class actions demonstrates that class suits involve more than mere efficiency goals. See HENSLER ET AL., *supra* note 32, at 49–50 (discussing the “efficiency and enabling goals of class actions” and concluding that the controversy over class claims is essentially “a dispute about what kinds of lawsuits and what kinds of resolutions of lawsuits the legal system should enable” (emphasis omitted)); *id.* at 49–123, 471–500; see also Burch, *supra* note 77, at 70–111 (discussing relative roles of public and private actors in regulatory schemes); Stempel, *supra* note 6, at 391–92; Sternlight, *supra* note 54, at 28; Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 172–74 (2001); Weston, *supra* note 54, at 1727.

forum) and the court itself (by reducing the burden on judicial resources). However, the interest in preserving judicial resources disappears in arbitration, leaving only the benefits to the parties. These personal benefits can be and often are displaced in arbitration by principles of party autonomy.<sup>172</sup>

Class suits are somewhat different. In addition to the factors at play in traditional multiparty proceedings, class actions and class arbitrations must also consider whether and to what extent the benefits of the class proceeding inure to society as a whole.

Although class suits give rise to a variety of social benefits in both the judicial and arbitral contexts,<sup>173</sup> several matters merit particular attention. First, class suits provide access to justice to parties with low-value claims.<sup>174</sup> Many of these types of claims are unlikely to be heard on an individual basis, since the anticipated recovery is often not expected to exceed the cost of bringing suit.<sup>175</sup> Thus, the failure to certify a class, either in court or arbitration, can sound the “death knell” for a particular cause of action, no matter how meritorious the underlying claims may be.<sup>176</sup> Indeed, this is one of the reasons why Jean Sternlight has argued that the consequences of a decision to refuse class certification are different than a refusal to order consolidation.<sup>177</sup> Failure to consolidate different arbitral proceedings still allows disputes to go forward individually, albeit with

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172. See HANOTIAU, *supra* note 20, 104–05 (discussing reasons why arbitration agreements may not explicitly address multiparty issues).

173. In addition to access to justice and respect for deterrent and regulatory aims, class suits also result in principled predictability, proportionality of the response to multiparty actions, judicial economy, and the balancing of judicial activism and personal autonomy. See MULHERON, *supra* note 46, at 47–66 (noting that deterrence is not common to all systems of class relief); Burch, *supra* note 77, at 92–111 (adding transparency and information-sharing as additional aims); HENSLER ET AL., *supra* note 32, 68–72; Sternlight, *supra* note 54, at 28; Strong, *Sounds of Silence*, *supra* note 1, at 1043–55; Weston, *supra* note 54, at 1727.

174. Often these claims are made in the context of consumer actions, but class suits in other fields can involve low-value individual claims as well.

175. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1769 n.7 (2010); *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 194, 197–99 (2d Cir. 2011).

176. See Grant Hanessian & Christopher Chinn, *The U.S. Model for International Class-Action Arbitration*, 75 ARB. 400, 407 (2009) (noting how failure to certify a class led to abandonment of claim in the Canadian Supreme Court case of *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801 (Can.)); Weston, *supra* note 54, at 1730. Certification of a class also has consequences, in that respondents will often seek to settle a case as soon as possible after class certification in order to avoid the costs of defending such a suit. See Hanessian & Chinn, *supra*, at 407.

177. See Sternlight, *supra* note 54, at 86.

some additional expense, whereas the failure to certify a class often results in the claims languishing altogether.<sup>178</sup>

Secondly, class suits create a financial disincentive for corporations to engage in risky or socially unacceptable behavior. The issue here also involves low-value claims, since the likelihood in such situations is that, absent a class remedy, only a few people will pursue their claims in court or in arbitration. In such cases, the corporate wrongdoer would be expected to (1) reap financial gains because not all injuries are recompensed and (2) continue the injurious behavior, since there is no adequate financial deterrent.<sup>179</sup> Other corporate actors, seeing the absence of any financial ramifications for wrongdoers, might be inclined to adopt similarly risky behavior.

An interesting question has been raised recently, namely whether the creation of a cost-effective arbitral forum (meaning one where the claimant's recovery will exceed the costs of pursuing the claim) is enough to offset the need for a class remedy.<sup>180</sup> This issue was addressed only in passing by the majority in *AT&T Mobility LLC v. Concepcion*, although the dissent and other cases arising in the wake of *Stolt-Nielsen* have considered the matter more comprehensively.<sup>181</sup> These opinions note that policy plays an important role in the law relating to class suits.<sup>182</sup> Therefore, class waivers cannot be allowed to stand in the context of antitrust claims, for example, since "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes."<sup>183</sup> Similar legislative intent might also be found with respect to Rule 23 of the Federal Rules of Civil Procedure more generally, since providing for the wide, trans-substantive availability of class relief could very well be seen as a fundamental policy decision to permit and encourage private actors to enforce public laws.<sup>184</sup>

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178. See Hanessian & Chinn, *supra* note 176, at 407.

179. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

180. See *AT&T Petition*, *supra* note 156, at 28.

181. See *AT&T*, 131 S. Ct. at 1753; *id.* at 1761 (Breyer, J., dissenting); *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 194, 197–99 (2nd Cir. 2011).

182. *AT&T*, 131 S. Ct. at 1761 (Breyer, J., dissenting); *In re Am. Express Merchs.' Litig.*, 634 F.3d at 197–99.

183. *In re Am. Express Merchs.' Litig.*, 634 F.3d at 199.

184. See FED. R. CIV. P. 23; Strong, *De-Americanization*, *supra* note 23, at 503; see also Rules Enabling Act, 28 U.S.C. §§ 2071–72, 2074 (2010) (requiring congressional approval of rules of court, including the Federal Rules of Civil Procedure).



As part of this policy analysis, courts and arbitrators need to consider whether the adjudicatory function of arbitration is meant to fulfill the same role as the adjudicatory function of litigation.<sup>185</sup> If it is, then courts may find it useful to consider whether the jurisdiction whose law controls the issue<sup>186</sup> uses a particular form of dispute resolution—in this case, class suits—for a purpose beyond the simple compensation of individual parties.<sup>187</sup> If such a purpose does exist and is eliminated through the use of arbitration, then the state's entire regulatory scheme could be upset.<sup>188</sup>

Certain statements made in *Stolt-Nielsen* about the use of public policy in class arbitration reflect how important it is to understand the role that arbitration plays in a state's wider dispute resolution scheme. For example, one of the reasons that the Supreme Court decided to vacate the arbitral award in *Stolt-Nielsen* was that the arbitral tribunal had allegedly substituted its own view of public policy rather than relying on the principles stated in the governing law.<sup>189</sup> In so doing, the arbitrators were said to have been acting as a common-law court, rather than as an arbitral tribunal.<sup>190</sup>

This seems an odd conclusion, given the view of many commentators that arbitrators may properly take public policy into account to the extent that the policy is found within the governing law.<sup>191</sup> Indeed, the U.S. Supreme Court itself has indicated that the failure to consider relevant public policies can lead to the overturning of an award, suggesting that arbitrators should affirmatively strive to take

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185. Richard Posner has condemned the development of any form of private dispute resolution that “disserve[s] fundamental social interests—while serving all too well the legal profession’s narrow self-interest.” Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 368 (1986).

186. Choice of law issues can arise in both domestic U.S. and international disputes. The analysis is particularly difficult in international class arbitration, since the availability and form of class relief varies a great deal across national boundaries. See Strong, *De-Americanization*, *supra* note 23, at 546–47.

187. See also *supra* note 171 and accompanying text.

188. See *In re Am. Express Merchs.’ Litig.*, 634 F.3d at 199; see also Burch, *supra* note 77, at 76; Christopher Hodges, *Public and Private Enforcement: The Practical Implications for Policy Architecture*, in *MASS JUSTICE: CHALLENGES OF REPRESENTATION AND DISTRIBUTION* (Jenny Steele & Willem H. van Boom eds., 2011).

189. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1769 (2010) (noting “[t]he conclusion is inescapable that the panel simply imposed its own conception of sound policy”). *But see id.* at 1780 (Ginsburg, J., dissenting) (describing the majority’s characterization as “hardly fair”).

190. See *id.* at 1769.

191. See BORN, *supra* note 5, at 2177–84; MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 511–35 (2d ed. 2001).

note of appropriate policy concerns to increase the likelihood of producing an enforceable award.<sup>192</sup>

The issue may have been resolved to some extent by the Second Circuit, which recently noted that:

while *Stolt-Nielsen* plainly rejects using public policy as a means for divining the parties' intent, nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language void. We agree with plaintiffs that "[t]o infer from *Stolt-Nielsen's* narrow ruling on contractual construction that the Supreme Court meant to imply that an arbitration is valid and enforceable where, as a demonstrated factual matter, it prevents the effective vindication of federal rights would be to presume that the *Stolt-Nielsen* court meant to overrule or drastically limit its prior precedent."<sup>193</sup>

As the preceding shows, application of the concepts of efficiency and public policy in arbitration is a very complex undertaking.<sup>194</sup> While it is impossible to resolve or even comprehensively introduce the relevant issues in the space available, even this very brief discussion is sufficient to demonstrate that class arbitration does not fall within the same analytical parameters as traditional multiparty arbitration, at least in this regard. Therefore, it is necessary to consider whether class arbitration's underlying policy rationales can support the claim that class arbitration "changes the nature of arbitration."<sup>195</sup> That point will be taken up again shortly.<sup>196</sup>

### III. CLASS PROCEEDINGS AND THE NATURE OF ARBITRATION

As the preceding analysis has demonstrated, class arbitration differs from other, more established, types of multiparty arbitration in two important regards: the nature of the relief requested and the underlying policy rationales.<sup>197</sup> However, the fact that class arbitration is unique with respect to these matters does not perforce lead to

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192. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); see also *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42–44 (1987) (indicating that public policy that can be ascertained by reference to the relevant law can and should be considered in arbitral context, lest the award be rendered unenforceable); BORN, *supra* note 5, at 2181.

193. *In re Am. Express Merchs.' Litig.*, 634 F.3d at 194, 199 (citation omitted).

194. For a more complete discussion, see Strong, *Sounds of Silence*, *supra* note 1, at 1043–55.

195. *Stolt-Nielsen*, 130 S. Ct. 1758, 1775 (2010).

196. See *infra* notes 327–38 and accompanying text.

197. See *supra* notes 51–81, 164–96 and accompanying text.

the conclusion that class proceedings violate the fundamental principles of arbitration. Indeed, the preceding discussion identified several ways in which class arbitration falls entirely within previously prescribed norms regarding multiparty arbitration.<sup>198</sup>

Those aspects of class arbitration that conform to existing arbitral practices and procedures can now be set aside, since there is no way that those attributes can be said to “change[ ] the nature of arbitration.”<sup>199</sup> Instead, the remainder of the article will focus on those elements of class arbitration that are distinctive to see if they have some sort of effect on the nature of arbitration. To determine whether they do, it is necessary to define the nature of arbitration.

This task is more difficult than it initially appears. Even though most lawyers can list the various hallmarks of the procedure from memory, most national statutes and international conventions on arbitration fail to define the term at all.<sup>200</sup> Instead, the task of delineating the arbitral process is left to courts and commentators.<sup>201</sup>

This approach has created its own problems, however. For example, some courts have an unfortunate propensity to interpret the term “arbitration” as including alternative dispute resolution devices (such as mediation) that are patently not arbitration.<sup>202</sup> The intent is benign, in that judges simply want to give parties the benefit of certain legal remedies or procedures that are associated with arbitration, but the resulting effect is a lack of clarity about the proper boundaries of arbitration.<sup>203</sup> The situation becomes even more complicated when considered at the international level, since arbitration “does not always take the same form in different countries. Inevitably, each different form reflects local problems and sometimes a different approach to the entire legal system.”<sup>204</sup>

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198. For example, class arbitration does not raise any problems with respect to the number of parties, the amount in dispute, the relationship between the parties, or the selection of arbitrators. *See supra* notes 44–50, 82–105 and accompanying text.

199. *Stolt-Nielsen*, 130 S. Ct. at 1775. Thus, several of Justice Scalia’s concerns in *AT&T* can be set aside, as Justice Breyer suggested. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1751–52 (2011); *id.* at 1758–61 (Breyer, J., dissenting).

200. *See BORN, supra* note 5, at 212, 127; Rau, *supra* note 169, at 467.

201. *See BORN, supra* note 5, at 212, 127; Rau, *supra* note 169, at 467.

202. *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 858.

203. *See id.* at 427–28, 433–34; *see also* Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 273 (2007) (noting “labels can be important in dispute resolution, both for the legitimacy of the process as well as its legal and ethical consequences”).

204. RUBINO-SAMMARTANO, *supra* note 191, at 1; *see also* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 8.

Commentators who have tried to fill this particular gap have also experienced difficulties.<sup>205</sup> Some scholars refuse to attempt a definition altogether, preferring instead to list the various hallmarks of the procedure without saying whether any of the particular attributes are necessary for the proceedings to be classified as arbitration.<sup>206</sup> Other authors primarily prescribe the process by saying what it is not.<sup>207</sup>

Nevertheless, a few commentators have risen to the task. For example, Thomas Stipanowich has described arbitration in the United States as involving “(a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final, binding decision, or award, by the third party after the hearing.”<sup>208</sup> René David, writing from the French perspective, has stated that arbitration is:

a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.<sup>209</sup>

These statements approach the issue from the viewpoint of a single jurisdiction, but comparative inquiries yield similar results. Thus, Gary Born has concluded that “virtually all authorities would accept that arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.”<sup>210</sup>

Born’s characterization “emphasizes the requirement that arbitration be conducted in a manner which affords the parties an opportunity to be heard in an adjudicatory or quasi-judicial manner,” a

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205. See David St. John Sutton et al., *Russell on Arbitration* 5 (23d ed. 2007).

206. See DOMKE, *supra* note 37, § 3:2, at 3-2 to 3-3 (listing a series of alternative definitions of arbitration); LEW ET AL., *supra* note 6, ¶¶ 1-5 to 1-7; MUSTILL & BOYD, *supra* note 10, at 38–50 (stating certain factors are material and necessary, but not whether they are sufficient); JEAN-FRANCOIS POUURET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 1–3 (2007) (listing various formulations); Reuben, *supra* note 203, at 277–87.

207. See LEW ET AL., *supra* note 6, ¶¶ 1-31 to 1-54; POUURET & BESSON, *supra* note 206, at 10–24.

208. Stipanowich, *supra* note 10, at 435–46.

209. FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 7 (quoting RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 5 (1985)).

210. BORN, *supra* note 5, at 217.

distinction that is necessary “to distinguish arbitration from other forms of alternative dispute resolution.”<sup>211</sup> This focus on adjudication is useful because it appears to describe a definitional requirement, meaning a quality that must exist for a particular process to be considered “arbitration.” Born’s approach is also helpful because it highlights one of the reasons why class arbitration has come under attack as constituting something other than “arbitration.” Interestingly, despite the centrality of adjudication to the arbitral process, no consensus appears to exist as to what the adjudicatory process must entail. Instead, a wide variety of procedures have been deemed permissible.

For example, arbitration can adopt highly formal procedures mimicking litigation (although a slavish devotion to judicial processes can and often does lead to criticism about arbitration’s being too “legalistic”), or it can adopt procedures (such as documents-only or fast track relief) that are not found in state courts.<sup>212</sup> The range of acceptable procedures is so broad that Alan Rau has noted that “[t]o look for the ‘ideal type’ of a particular process is to miss the obvious point that the needs of contracting parties . . . are infinite in their variety—as are the types of dispute resolution mechanisms that they may devise.”<sup>213</sup>

This is not to say that every possible type of adjudicatory procedure is permitted. Certain minimal standards of due process or procedural fairness must be met if the so-called arbitration is to withstand judicial scrutiny.<sup>214</sup> (Of course, the question of whether a particular process is adjudicatory is slightly different from the question of whether the same process is fair.)

It is also necessary to consider how new and developing forms of private dispute resolution fit into the wider scheme of social justice established by any particular state. Thus, Richard Posner has indicated that “[a]ny alternative to the trial must respect relevant legal and institutional constraints.”<sup>215</sup> Furthermore, “[a]ny proposed reform must move the legal system in the right direction, where ‘right’

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211. *Id.* at 253.

212. *See id.* at 1232 n.442; *see also* SUTTON ET AL., *supra* note 205, at 17.

213. Rau, *supra* note 169, at 504; *see also* Stipanowich, *supra* note 10, at 432–33.

214. *See* BORN, *supra* note 5, at 1765; LEW ET AL., *supra* note 6, ¶ 25–36. The term “due process” has been said to “refer to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principle de la contradiction* and equal treatment.” Kaufmann-Kohler, *supra* note 169, at 1321–22.

215. Posner, *supra* note 185, at 368; *see also* DOMKE, *supra* note 37, § 1:1, at 1–3 (noting arbitration coexists with litigation as “part of the American system of administering justice”); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, ICCA CONG. SER. NO. 7,

is defined in accordance with broad social policy rather than narrow craft standards of success.”<sup>216</sup>

Adjudication as an essential element of arbitration appears to be matched in importance by only one other concept: consent.<sup>217</sup> However, these two attributes are more than just the twin pillars of arbitration, existing side by side, each in their own pure, unadulterated form. Rather, they are inextricably connected and intermingled, since “respect for the domain of private ordering has had a profound impact—not only on the types of disputes that may legitimately be submitted to arbitration—but also on the very form that the arbitration process may assume, shaped as it is by private will.”<sup>218</sup> This phenomenon is clearly exhibited in the hybrid theory of arbitration, commonly considered to be the most apt of the various means of describing the arbitral process, in that the hybrid theory explicitly recognizes the central importance of both consent and adjudication in arbitration while simultaneously refusing to give one principle precedence over the other.<sup>219</sup>

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24, 26 (1996) (noting arbitration is sometimes considered “a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends”); Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting “arbitration is a substitute for adjudication by litigation”). However, this characterization may not be true of all forms of arbitration. See DOMKE, *supra* note 37, § 1:3, at 1-8 to 1-9 (noting that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply).

216. Posner, *supra* note 185, at 368.

217. See FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 11. Commentators differ as to which of the two elements is the more important. For example, Alan Rau believes arbitration “should be understood through the lenses of contract rather than of adjudication.” Rau, *supra* note 169, at 451.

218. Rau, *supra* note 169, at 466; *see also id.* at 452.

219. There are four theories of arbitration: contractual, jurisdictional, hybrid, and autonomous. See BORN, *supra* note 5, at 184–86; LEW ET AL., *supra* note 6, ¶¶ 5-1 to 5-33; KATHERINE L. LYNCH, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* 68–71 (2003). Although these theories are useful to consider, they provide little, if any, practical guidance to those who are considering the propriety of any particular arbitral procedure, since the theories are descriptive rather than definitive. See LEW ET AL., *supra* note 6, ¶ 5-5; Rau, *supra* note 169, at 486 (noting definitions—as opposed to theories—refer to “the highest, the most perfect, the historically contingent; or the model form, associated with a process”). As such, it might seem that any discussion or debate about theory in arbitration is irrelevant. See THOMAS CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 624 (2000) (likening such discussions to a “tempest in a teapot”). However, others have taken the view that “differences of opinion over the theoretical basis for arbitration and the nature and legitimacy of the arbitral process, are important because the way in which . . . arbitration is characterized affects the manner in which the extent and scope of applicable rules in arbitration are

#### IV. DOES CLASS ARBITRATION CHANGE THE NATURE OF ARBITRATION?

##### A. *Effect of a Negative Determination*

Having laid out the parameters of “arbitration,” it is now possible to determine whether and to what extent the more distinctive elements of class arbitration deviate from the standard understanding of the procedure.<sup>220</sup> This is an important analysis, since the conclusion that a particular procedure is not “arbitration” can impose significant burdens on parties.<sup>221</sup> For example, those who are involved in processes that are not “arbitration” cannot take advantage of laws that limit judicial review or that allow a court to compel participation in the proceedings.<sup>222</sup> Furthermore, parties to a procedure that is deemed to fall outside the scope of “arbitration” are not necessarily able to ensure immunity for their neutrals or obtain easy international enforceability of their final award.<sup>223</sup> Indeed, courts’ desire to avoid these potentially devastating results may explain why, “as a practical matter, if the parties’ agreement provides for something labelled ‘arbitration,’ it is a rare case where this will be categorized as something other than an arbitration agreement.”<sup>224</sup>

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determined.” LYNCH, *supra*, at 65; *see also* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 9–11 (2010); LEW ET AL., *supra* note 6, ¶¶ 5-5 to 5-7. Certainly, the various theories of arbitration all support the conclusion reached herein that consent and adjudication are central to any proper definition of arbitration, since each of the four theories currently in use focus on these attributes, albeit to varying degrees. *See* BORN, *supra* note 5, at 184–86; LEW ET AL., *supra* note 6, ¶¶ 5-1 to 5-33; LYNCH, *supra*, at 68–71.

220. Interestingly, none of the definitions of arbitration introduced above suggest that the procedure must be private or confidential. *See* BORN, *supra* note 5, at 1765; FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 7; Stipanowich, *supra* note 10, at 435–36. Therefore, the fact that some class arbitrations may reflect a lower degree of privacy and confidentiality than is presumed to occur in other forms of arbitration is irrelevant to the discussion of whether class arbitration “changes the nature of arbitration.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also* Strong, *De-Americanization*, *supra* note 23, at 513–16 (discussing the need, extent, and rationale for decreased confidentiality in class arbitration). Furthermore, class arbitrations that proceed *ad hoc* or under the JAMS Class Action Procedures do not experience any decrease in confidentiality, and the disclosures required under the AAA Supplementary Rules are in many ways similar to those in investment arbitration under the ICSID Arbitration Rules. *See* ICSID ARBITRATION RULES, [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf); Strong, *De-Americanization*, *supra* note 23, at 513–16; *see also* AAA SUPPLEMENTARY RULES, *supra* note 17, rule 9.

221. *See* Stipanowich, *supra* note 10, at 433–34.

222. *See id.*

223. *See id.*

224. BORN, *supra* note 5, at 216. Commentators have noted that courts may not need to work so hard to find ways to classify proceedings as arbitration, since the

Although judicial efforts to bring a wide variety of procedures under the arbitral umbrella have led to a certain amount of confusion at the jurisprudential level, it has had the salutary effect of creating a remarkably simple analytical approach at the pragmatic level. Despite the diverse range of procedures that can constitute arbitration, the ultimate question of whether a procedure qualifies as “arbitration” has always been entirely binary, meaning that a procedure either is or is not arbitration. This is beneficial because the recognition of a spectrum of quasi-arbitral processes would likely require states to devise a similarly diverse range of responses to those intermediate procedures, further confusing arbitral law and practice.

Given *Stolt-Nielsen’s* statement that class arbitration “changes the nature of arbitration”<sup>225</sup> and the suggestion in *AT&T* that class arbitration may not be “arbitration as envisioned by the FAA,”<sup>226</sup> the question logically arises as to whether that sort of intermediate form of arbitration (“quasi-arbitration”) might be in the process of developing. Indeed, some might see two procedures that are unique to class arbitration as reflective of the type of response that might be necessary in light of this sort of intermediate type of arbitration. The procedures in question—hybrid jurisdiction and the partial final award system—involve a heightened degree of judicial involvement in class proceedings<sup>227</sup> and were developed in response to one of class arbitration’s more unique attributes, namely the use of representative relief.<sup>228</sup> While no conclusions can yet be drawn, several critical questions need to be addressed.

First, when considering these mechanisms it is important to determine whether a court must involve itself in the arbitral procedure (as would be the case with hybrid proceedings) or whether the court simply may do so at the request of one of the parties (as would be the case with rule-based proceedings).<sup>229</sup> Although class arbitration

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conclusion that a particular procedure is something other than arbitration does not leave the parties without a remedy in that they may nevertheless have recourse to similar benefits as a matter of contract law. See MUSTILL & BOYD, *supra* note 10, at 283 n.4; Rau, *supra* note 169, at 499.

225. *Stolt-Nielsen*, 130 S. Ct. at 1775.

226. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Justice Scalia appears to have been referring directly to some hypothetical forms of arbitration rather than class arbitration per se, but he may have meant to extend his characterization to class arbitration as well. See *id.* at 1752–53.

227. See AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3, 5; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–3; see also *supra* notes 66–77 and accompanying text.

228. See *supra* notes 66–77 and accompanying text.

229. See *id.*



could be seen as deviating from arbitration's usual presumption of judicial non-involvement in either instance,<sup>230</sup> the forceful insertion of the court into the arbitral process would be far more problematic as a matter of arbitral law and theory, since it would clearly infringe upon arbitration's status as a private system of adjudication.<sup>231</sup>

Because *Stolt-Nielsen* involved rule-based class proceedings, the Supreme Court did not have the opportunity to consider the hybrid approach.<sup>232</sup> Instead, the analysis focused on the partial final award system.<sup>233</sup> Nevertheless, the decision failed to address several key issues, including the question of whether partial final awards may or must be reviewed immediately upon being rendered.<sup>234</sup> Although the majority suggested in dicta that immediate review was both permissible and necessary, Justice Ginsburg and the other dissenting justices took the view that the parties could not contract for judicial review of such awards pursuant to *Hall Street Associates, LLC v. Mattel, Inc.*<sup>235</sup> In the absence of a controlling rule, lower courts are free to decide how to proceed, although the issue already appears to be creating considerable difficulty.<sup>236</sup>

Secondly, it is important to determine precisely what the court's role would be if this sort of increased judicial involvement were to be allowed. For example, if the court is allowed to hear challenges to these partial final awards, then it is necessary to identify what the scope and standard of review should be. Two possibilities appear to exist. The less objectionable approach would involve judicial consideration of partial final awards under the same deferential standard and limited scope of review as has traditionally been used in arbitration.<sup>237</sup> Although this kind of early review would be sought more systematically in class proceedings than is usually the case in other

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230. See LEW ET AL., *supra* note 6, ¶ 15-1.

231. See *infra* notes 292-300 and accompanying text.

232. AT&T did not consider arbitral proceedings at all, instead focusing on issues relating to contractual waiver. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

233. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1779 (Ginsburg, J., dissenting).

234. The majority believed that the issue had been waived by the parties. See *id.* at 1767 n.2; *id.* at 1778-79 (Ginsburg, J., dissenting).

235. See *id.* at 1767 n.2; *id.* at 1779 (Ginsburg, J., dissenting) (citing *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)).

236. See *Countrywide Fin. Corp. v. Bundy*, 113 Cal. Rptr. 3d 705, 714-19 (Ct. App. 2010) (outlining the complexity of the analysis); S.I. Strong, *Opening More Doors Than It Closes: Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 2010 LLOYD'S MAR. & COM. L.Q. 565, 576 [hereinafter Strong, *Opening More Doors*].

237. See Born, *supra* note 5, at 2636-37; see generally LEW ET AL., *supra* note 6, ¶¶ 25-31 to 25-50.

forms of arbitration,<sup>238</sup> there would not be such a break with existing arbitral practice as to require a conclusion that the procedure reflected a form of quasi-arbitration.

The other alternative is much more troubling. In this case, courts would not only permit judicial review of partial final awards, but would use a less deferential standard such as review for a mistake of law.<sup>239</sup> This approach would be problematic enough if the content of the review were believed to focus only on procedural issues,<sup>240</sup> but it is by no means clear that the matters that are at the heart of the two partial final awards rendered under the specialized rules are indeed procedural only.<sup>241</sup> Furthermore, this approach would not only mix arbitral and judicial competence (something that has not been contemplated or permitted in the past),<sup>242</sup> it would also increase judicial workloads, perhaps significantly.<sup>243</sup> These matters are discussed at more length below,<sup>244</sup> but it is useful to raise them now to demonstrate the possible ramifications of a determination that class arbitration is not really “arbitration.”<sup>245</sup>

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238. Partial final awards have long been available in arbitration, although such awards have been rendered irregularly and have been largely discouraged. *See* BORN, *supra* note 5, at 2434–35.

239. Judicial review of the merits of an award does still exist in some jurisdictions, despite the movement away from such measures. *See id.* at 2638–39; *see also Countrywide*, 113 Cal. Rptr. 3d at 714. Some may claim that this is the necessary result in *Stolt-Nielsen*, given that the majority refused to return the issue of the interpretation of the arbitration agreement to the arbitrators. *See Stolt-Nielsen*, 130 S. Ct. at 1758, 1782 (Ginsburg, J., dissenting). However, the issue was not explicitly discussed, although the majority’s refusal to say whether the concept of vacatur for “manifest disregard” of law had survived the Supreme Court’s earlier decision in *Hall Street* could be seen as a means of leaving the door open for a future decision allowing review of the merits of these kinds of partial final awards. *See id.* at 1768 n.3; *Hall St.*, 552 U.S. at 591–92.

240. *See* Reuben, *supra* note 169, at 1137 (arguing that the review and possible appeal of procedural decisions would eliminate the kind of flexibility that is a hallmark of arbitration).

241. *See* Buckner, *supra* note 26, at 333–44 (concluding that the partial final awards used in rule-based class arbitration are substantive in nature).

242. *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶ 661; LEW ET AL., *supra* note 6, ¶¶ 15-1 to 15-3. *But see* Stempel, *supra* note 6, at 428–29 (calling for stringent substantive review in cases involving “mass” arbitration).

243. *See* Reuben, *supra* note 169, at 1136; Reuben, *supra* note 203, at 293–96, 312.

244. *See infra* notes 303–13 and accompanying text.

245. *See* Stipanowich, *supra* note 10, at 433–34 (noting that only processes determined to be “arbitration” can take advantage of the concept of limited judicial review).

## B. Analyzing Class Procedures

It is now time to analyze whether and to what extent class arbitration “changes the nature of arbitration.”<sup>246</sup> If one accepts the view that “arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard,”<sup>247</sup> then some aspects of class arbitration are clearly non-controversial. For example, class arbitration meets the requirement that a dispute be submitted to a decision maker, selected by or for the parties,<sup>248</sup> and that the decision rendered be binding.

However, difficulties may arise with respect to other aspects of this definition. These issues can be analyzed under the general headings of consent and adjudication, not coincidentally the same two principles that were described above as being central to the decision whether to classify a procedure as “arbitration.”<sup>249</sup> The question is whether any of these concerns are so problematic as to (1) take class arbitration out of the realm of permissible arbitral procedures entirely or (2) justify the creation of some form of quasi-arbitration in response to the unusual nature of class proceedings.

The first option can be dismissed, at least in the United States, since the U.S. Supreme Court has had numerous opportunities to strike class arbitration entirely but has consistently refused to do so.<sup>250</sup> It is particularly telling that in both *Stolt-Nielsen* and *Bazzele*, the two cases that discussed arbitral procedure most comprehensively, the Supreme Court clearly took the view that class arbitration would be entirely proper if the parties had demonstrated express consent to such procedures.<sup>251</sup> Since the character of an arbitral procedure does not change merely by virtue of the nature of the consent at

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246. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

247. BORN, *supra* note 5, at 217.

248. Although some debate may exist with respect to the way arbitrators are selected in class arbitration, those issues are no more troubling than those involving other forms of multiparty arbitration in a post-*Dutco* world. See Nater-Bass, *supra* note 64, at 683–84; *supra* notes 146–63 and accompanying text.

249. See *supra* notes 208–19 and accompanying text.

250. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen*, 130 S. Ct. 1758 (2010); *Green Tree Fin. Corp. v. Bazzele*, 539 U.S. 444 (2003); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); see also *supra* note 15 and accompanying text.

251. See *Stolt-Nielsen*, 130 S. Ct. at 1768–69; *Bazzele*, 539 U.S. at 450 (plurality opinion).

issue, it therefore appears that whatever concerns the U.S. Supreme Court may have about class arbitration, they do not rise to a level that would require taking the device out of the purview of “arbitration” altogether.<sup>252</sup>

That leaves the second of the two options, namely whether class arbitration is so inherently problematic that it justifies the creation of a new form of quasi-arbitration in response to some special attribute of class proceedings. Therefore, the following discussion considers whether and to what extent those attributes that are unique to class arbitration fall within established arbitral norms, first with respect to the element of consent and second with respect to the issue of adjudication.

i. *Consent in class arbitration*

If arbitration is agreed to be “a process by which parties consensually submit a dispute to a non-governmental decision-maker,”<sup>253</sup> then consent obviously plays a necessary part of the proceedings. Indeed, the first question raised in every arbitration is whether the parties have agreed to arbitrate this particular dispute. This issue—which can be termed “primary consent”—is usually not directly challenged in class arbitration, since all the parties have signed agreements indicating their consent to arbitrate their disputes.<sup>254</sup> Instead,

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252. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that courts that agree to allow certain complex claims to go to arbitration pursuant to the parties’ express agreement cannot later claim that those matters are “inherently insusceptible to resolution by arbitration”). Indeed, it is this precedent that makes Justice Scalia’s recent suggestion in *AT&T* that class arbitration is or may not be “arbitration as envisioned by the FAA” so jarring. See *AT&T*, 131 S. Ct. at 1752–53 (referring to several hypothetical types of arbitration that might or might not include class proceedings).

253. BORN, *supra* note 5, at 217.

254. See *supra* notes 255–58 and accompanying text. Primary consent is the core concern in disputes involving non-signatories, since the absence of a signed arbitration agreement raises questions as to whether a party can be said to have agreed to arbitrate the dispute at hand. See *id.* Questions regarding the scope of the arbitration agreement would also fall within the ambit of primary consent, but that analysis is the same regardless of whether bilateral, multilateral, or class proceedings are alleged. Indirect challenges to primary consent can arise through arguments about unconscionability. See BORN, *supra* note 5, at 724–32; DOMKE, *supra* note 37, § 8:25. However, since unconscionability was not raised in *Stolt-Nielsen*, it cannot be a basis for the claim that class arbitration “changes the nature of arbitration.” *Stolt-Nielsen*, 130 S. Ct. at 1775.

class arbitration focuses for the most part on what can be called “secondary consent,” meaning consent to this particular type of procedure.<sup>255</sup> This concept is by no means unique to class disputes, since traditional multiparty arbitrations are also required to establish secondary consent in cases where the arbitration agreements are silent or ambiguous as to multiparty treatment.<sup>256</sup> However, a new layer may have been added to the analysis as a result of *Stolt-Nielsen*.<sup>257</sup>

In the past, arbitrators have been able to order both class and traditional multiparty arbitration on the basis of either express or implied consent.<sup>258</sup> However, several commentators have suggested that *Stolt-Nielsen* requires parties to show express consent to class arbitration.<sup>259</sup>

That interpretation appears to be based on two separate statements made in *Stolt-Nielsen*. First, the majority indicates that “we see the question as being whether the parties *agreed to authorize* class arbitration.”<sup>260</sup> Second, the opinion declares that:

[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. This is because class-action arbitration changes the nature of arbitration to such a degree

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255. The need to establish secondary consent in both class and traditional multiparty arbitration arose as a result of the longstanding bias in favor of bilateral arbitration. See LEW ET AL., *supra* note 6, ¶¶ 16-1 to 16-4; see also *supra* note 147 and accompanying text.

256. See *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 587 (3d Cir. 2007); *Emp’rs Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 578 (7th Cir. 2006) (noting consolidation was a procedural decision for the arbitrator); see also *Volt Info. Servs. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (upholding terms of arbitration agreements); *supra* note 96. Sometimes in multiparty scenarios the question is phrased as “with whom am I required to arbitrate?” See *Stolt-Nielsen*, 130 S. Ct. at 1774; Rau, *supra* note 169, at 254 (writing prior to *Stolt-Nielsen*).

257. *Stolt-Nielsen*, 130 S. Ct. at 1776.

258. See *supra* note 96.

259. See Sarah Cole, *Stolt-Nielsen v. AnimalFeeds – Major Victory for Business*, ADR PROF BLOG (Apr. 27, 2010), <http://www.indisputably.org/?p=1268> (last visited June 30, 2011) (stating “a logical interpretation of the opinion suggests that silent clauses will not be interpreted to permit class action arbitration”); Paul Kirgis, *More on Stolt-Nielsen v. AnimalFeeds*, ADR PROF BLOG (Apr. 29, 2010), [www.indisputably.org/?p=1284](http://www.indisputably.org/?p=1284) (last visited June 30, 2011) (claiming “[e]ffectively the case holds that silence on the issue of class arbitration can only be read as precluding class arbitration”); Jean Sternlight, *Sternlight on Stolt-Nielsen v. AnimalFeeds*, ADR PROF BLOG (Apr. 29, 2010), [www.indisputably.org/?p=1287](http://www.indisputably.org/?p=1287) (last visited June 30, 2011) (claiming the decision “will mean the end, almost immediately, of class-wide arbitration in all contexts”).

260. *Stolt-Nielsen*, 130 S. Ct. at 1776.

that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.<sup>261</sup>

However, the quoted language does not appear to go as far as commentators suppose.<sup>262</sup> Instead, the statements appear to be limited to the proposition that class arbitration cannot be ordered based on nothing more than the decision to arbitrate. That, however, has always been true in cases involving secondary consent in either the class or traditional multiparty context.<sup>263</sup>

Instead, a better reading of *Stolt-Nielsen* would be that the decision contemplates the same kind of interpretive analysis that has always been used to determine the existence of secondary consent in multiparty scenarios.<sup>264</sup> Support for that conclusion is found in language indicating that “the arbitrators’ proper task was to identify the rule of law that governs” in cases of contractual silence.<sup>265</sup> If express consent were required, there would be no need to identify the applicable rule of law to determine that issue. The majority also explicitly stated that it had “no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”<sup>266</sup> Again, this statement can only be taken to mean that the issue remains subject to existing law unless and until the Supreme Court makes a further ruling.

Finally, it would be remarkable if *Stolt-Nielsen* were read as requiring class proceedings to demonstrate a heightened form of consent when arbitrators have traditionally been both empowered and encouraged to exercise their discretion to determine any necessary procedures in the absence of party agreement.<sup>267</sup> Given the lack of detailed discussion by the Supreme Court on this question, it would appear inappropriate to assume that the Court meant to extend the law in such a manner.<sup>268</sup>

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261. *Id.* at 1775.

262. See Strong, *Opening More Doors*, *supra* note 236, at 566–68.

263. See Strong, *Sounds of Silence*, *supra* note 1, at 1059–83.

264. Alan Rau would apparently set a relatively low standard for this type of issue, at least where all the parties had signed an arbitration agreement. See Rau, *supra* note 169, at 242–44 (discussing concentric circles of consent).

265. *Stolt-Nielsen*, 130 S. Ct. at 1768.

266. *Id.* at 1776 n.10.

267. See LEW ET AL., *supra* note 6, ¶¶ 12-12 to 12-13.

268. Although Justice Scalia in *AT&T* suggested that it was “unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator,” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011), the Supreme Court previously had several opportunities to speak more directly on the scope of arbitral power and declined to do so, see *supra* notes 58–59 and accompanying text.

Therefore, although the issue of consent does arise in *Stolt-Nielsen*, there is no indication that the Supreme Court believes that class arbitration violates the fundamental nature of arbitration with respect to the procedure's consensual element. Instead, to the extent that consent is discussed, the Supreme Court merely appears to be reinforcing the need to establish secondary consent.

Furthermore, even if *Stolt-Nielsen* were taken to mean that express consent is now necessary, the element of consent is being raised in response to concerns about class procedures. Because actions taken in response to any alleged violations of the fundamental nature of arbitration cannot also be said to be the cause of such violations, there does not appear to be anything about the consent element of class arbitration that "changes the nature of arbitration."<sup>269</sup> If any such change exists, it must relate to arbitration's adjudicatory element, which is considered in the next section.

ii. *Adjudication in class arbitration*

To conform with the adjudicatory requirement of arbitration, the process in question must involve "a non-governmental decision-maker, selected by or for the parties," who is "to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard."<sup>270</sup> The proceeding must also "be conducted in a manner which affords the parties an opportunity to be heard in an adjudicatory or quasi-judicial manner."<sup>271</sup> If class arbitration violates one of these precepts, then the procedure can be said to "change[] the nature of arbitration."<sup>272</sup>

Evaluating class arbitration in light of these adjudicatory requirements gives rise to several possible issues, both with respect to the unique aspects of class arbitration identified previously and with respect to several additional points made by the parties in *Stolt-Nielsen* and *AT&T*.<sup>273</sup> The specific topics to be discussed in this section involve excessive formalities, excessive judicial intervention, concerns about the competence of the arbitral tribunal (which include issues regarding public policy rationales), and the nature of representative relief. Each item is addressed in turn below.

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269. *Stolt-Nielsen*, 130 S. Ct. at 1775.

270. BORN, *supra* note 5, at 217.

271. *Id.* at 253.

272. *Stolt-Nielsen*, 130 S.Ct. at 1775.

273. See *AT&T*, 131 S. Ct. at 1740; *Stolt-Nielsen*, 130 S. Ct. 1758; *supra* notes 51-81, 164-96 and accompanying text.

*Excessive formalities*

The first charge to be leveled against class arbitration is that it requires an excessive number of procedural formalities. Thus, for example, submissions to the Supreme Court in *Stolt-Nielsen* claimed that “class arbitration reflects a stark break from traditional arbitration, whereby a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”<sup>274</sup> This assertion suggests that only the most bare-bones procedures can constitute “arbitration.” Because “class arbitration, and the extensive, formal procedures that it necessarily entails, is not ‘essential to a determination of [the parties’] rights,’” class proceedings are somehow said to be outside the scope of arbitral norms.<sup>275</sup> This theme is repeated by Justice Scalia in *AT&T*, although it is challenged by Justice Breyer and the other dissenting justices.<sup>276</sup>

While it is indeed true that class arbitration can be more formal than some other types of arbitration,<sup>277</sup> the existence of court-like procedures has never raised questions about the legitimacy of an arbitration proceeding outside the class arbitration context.<sup>278</sup> Instead, it is the absence of any adjudicatory hallmarks, such as a written

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274. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 8, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198) [hereinafter Brief for the Chamber] (citation omitted); see also Initial Brief of Petitioners at 13, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198).

275. Brief for the Chamber, *supra* note 274, at 3.

276. *AT&T*, 131 S. Ct. at 1751; *id.* at 1758–61 (Breyer, J., dissenting).

277. The cry of excessive legalism depends largely on what is being compared. For example, class arbitration is not significantly more complicated than international or investment arbitration. Compare AAA SUPPLEMENTARY RULES, *supra* note 17, with ICC RULES OF ARBITRATION (effective Jan. 1, 2012), <http://www.iccwbo.org/court/arbitration/id4199/index.html>, LCIA ARBITRATION RULES (effective Jan. 1, 1998), [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx), and ICSID ARBITRATION RULES, *supra* note 220. Since arbitration under the ICC, LCIA, and ICSID Arbitration Rules all fall squarely within the definition of arbitration, it would appear inappropriate to conclude that class arbitration violated arbitral norms as a result of being too formalistic.

278. See BORN, *supra* note 5, at 1744 (noting arbitration “may involve using relatively conventional litigation procedures, much like those in some national courts”). Indeed, some commentators specifically suggest that newcomers to arbitration emulate the kind of advocacy techniques used in domestic litigation. See Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny*, 26 ALTS. HIGH COST LIT. 167, 168 (2008) (claiming “[e]ffective arbitration advocacy is remarkably similar to model advocacy in court”); Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1 (2008). The



award, written submissions, witness testimony, oral hearings, or argument, that is more likely to lead to the conclusion that a procedure is not “arbitration.”<sup>279</sup> It is also true that the amount and type of adjudicative formality can vary according to the nature of the claim asserted. Thus, for example, the procedural approach used in some arbitrations “can closely resemble proceedings in the commercial courts” at times, “[p]articularly in major matters” where a great deal of money is at stake.<sup>280</sup>

This is not to say that experts have not advised parties to avoid excess formality in arbitration. However, the intent in those instances appears to have been to keep costs down and avoid limiting the creativity that is possible in arbitration rather than impose any restrictions on possible procedures. Thus, for example, commentators who have criticized the formality of certain specialized rules on class arbitration have done so not because the suggested procedures violate the nature of arbitration, but because the rules “fail to engage with the possibilities of class arbitration” and take an “impoverished view” of the procedure by not taking advantage of the possibility of individually tailored procedures and remedies that are the hallmark of arbitration.<sup>281</sup>

Thus, the adjudicatory requirement in arbitration is better understood as a floor rather than a ceiling.<sup>282</sup> Further evidence of the merit of this approach can be seen in the fact that parties have always been allowed to choose to have formal rules of evidence or procedure apply in an arbitration. Indeed, “an aspect of the parties’ autonomy and the arbitrators’ procedural discretion is the freedom to adopt more elaborate or ‘judicial’ procedures, either when this is what particular parties desire in a specific case or where such procedures are best-suited for handling one or more aspects of a dispute.”<sup>283</sup>

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wisdom of these sorts of suggestions has been questioned, particularly in the international realm, but not on the grounds that such measures violated the nature of arbitration. See S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT’L ARB. 119, 124 (2009).

279. See BORN, *supra* note 5, at 234 (questioning whether “quality arbitration” is indeed a form of arbitration); see also *id.* at 1747 (noting national courts that have criticized arbitration for failing to adopt, *inter alia*, formal rules of evidence).

280. *Id.* at 1746.

281. Weidemaier, *supra* note 36, at 94–95; see also Smit, *supra* note 136, at 211.

282. See BORN, *supra* note 5, at 253 (suggesting the more difficult task will be whether “relatively informal or technical procedures” qualify as arbitration, not whether more formal procedures do).

283. *Id.* at 1746–47; see also *id.* at 1335–38, 1765, 1782 (noting that the usual contemporary practice is not to have recourse to national rules of procedure); LEW ET AL., *supra* note 6, ¶¶ 21-12 to 21-18.

Should the parties disagree with the approach chosen by the arbitral tribunal, they can impose their own procedural rules by concluding an express agreement to that effect, mid-arbitration.<sup>284</sup>

The difficulty, of course, is if only one party objects to the arbitrators' procedural decisions. This situation arises with regularity in all types of arbitration, including bilateral proceedings. Because a unilateral objection cannot overcome the parties' prior grant of discretion to the arbitral tribunal, the objecting party has no alternative but to wait until the arbitration has concluded and challenge the propriety of the procedure in court.<sup>285</sup> Tellingly, no cases have been found where a judge has vacated or refused enforcement of an award simply because the procedures used in the arbitration were too similar to those used in national court. Indeed, the opposite was true in some jurisdictions until quite recently.<sup>286</sup>

Based on the preceding, it therefore appears incorrect to claim that the number and type of procedural formalities used in class arbitration somehow "changes the nature of arbitration."<sup>287</sup> If such a change exists, it must lie elsewhere.

#### *Excessive judicial involvement*

The second adjudicatory issue to consider involves the characterization of arbitration as a private dispute resolution mechanism using "a non-governmental decision-maker, selected by or for the parties, to render a binding decision."<sup>288</sup> The question here is whether governmental decision-makers (i.e., courts) are so involved in class arbitration, either through the use of hybrid jurisdiction or early review of partial final awards, as to take the procedure out of the realm of "arbitration."

Interestingly, the practices at issue here are directly related to one of class arbitration's more unique characteristics: the grant of representative relief.<sup>289</sup> This gives rise to a very subtle analytical distinction. If the various forms of judicial intervention were created as a response to a particular aspect of class arbitration and are not

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284. See BORN, *supra* note 5, at 1757.

285. See *id.* at 2593–95. Both domestic annulment and international enforcement procedures tend to use relatively narrow grounds for avoiding arbitral awards. See LEW ET AL., *supra* note 6, ¶¶ 25-31 to 25-50, 26-65 to 26-66.

286. As recently as 1989, English law appeared to require the application of judicial rules of evidence in arbitration. See MUSTILL & BOYD, *supra* note 10, 352–54; see also BORN, *supra* note 5, at 1746–47.

287. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

288. BORN, *supra* note 5, at 217.

289. See *supra* notes 224–45 and accompanying text.

themselves a necessary feature of the device, then they can be altered if they are found to be too problematic. However, if the practices themselves constitute a core, necessary feature of class proceedings, then they cannot be changed, even if they violate the adjudicative element of arbitration.

For the reasons stated above, increased judicial intervention appears to be the result of practical and jurisprudential concerns about the ramifications of representative relief rather than a necessary, independent element of class suits.<sup>290</sup> Nevertheless, the following discussion will analyze these practices on their own merits, as if the court's expanded role were an integral part of class arbitration, since a determination that the procedures in question fall within accepted adjudicatory practices will render the question moot at all levels of application. Given that the two procedures have been introduced above, only a brief description of the various practices is needed here.<sup>291</sup>

The first type of judicial intervention to consider involves the so-called hybrid model of adjudication, wherein the court retains responsibility for certification of and notice to the class, as well as control over fairness approvals of the final award.<sup>292</sup> This approach—which grants the court the same supervisory powers that exist in judicial class actions<sup>293</sup>—was adopted out of a concern for the procedural rights of unnamed class members, who were thought to be particularly at risk given the representative nature of the proceedings.<sup>294</sup>

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290. See *supra* notes 224–45 and accompanying text. This conclusion is also based on the fact that (1) several different models of class arbitration have arisen over the years (including rule-based approaches designed by the AAA, JAMS, the NAF, and, to a lesser extent, the DIS, as well as the common law hybrid model) and (2) representative relief exists in a variety of forms in judicial contexts. See AAA SUPPLEMENTARY RULES, *supra* note 17; DIS SUPPLEMENTARY RULES, *supra* note 24; JAMS CLASS ACTION PROCEDURES, *supra* note 17; NAF ARB. CLASS PROCEDURES, *supra* note 17; The Annals, *supra* note 14; MULHERON, *supra* note 46; Strong, *De-Americanization*, *supra* note 23, at 498–508.

291. See *supra* notes 224–45 and accompanying text.

292. See Buckner, *supra* note 26, at 320–23 (further discussing the hybrid models used in various state courts).

293. See FED. R. CIV. P. 23; *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 785 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991); *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360–61 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

294. See *Keating v. Superior Court*, 645 P.2d 1192, 1209, 1215 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler*, 596 A.2d at 866–67; Buckner, *supra* note 26, at 320–23; Sternlight, *supra* note 54, at 52–53; Weston, *supra* note 54, at 1741–42.

Despite its good intentions, the hybrid model can run afoul of the adjudicatory element of arbitration to the extent that the court's involvement takes the decision-making process out of the exclusive control of the non-governmental actor (i.e., the arbitral tribunal). To say that the decisions being made by the court are "merely procedural" is no answer, since there is a fundamental difference between ensuring the procedural fairness of the arbitral process and substituting judicial determinations on matters of procedure for arbitral decisions on those same issues.<sup>295</sup> Furthermore, it is by no means clear that the matters in which the courts are involving themselves (i.e., certification of and notice to the class, as well as control over fairness approvals of the final arbitral award) are indeed entirely procedural.<sup>296</sup>

Although hybrid jurisdiction gives rise to serious concerns with regard to arbitration's adjudicatory requirement, there are questions as to whether this method of class arbitration is still in use. Detailed data is impossible to compile due to the confidential nature of the proceedings,<sup>297</sup> but it would appear that the hybrid approach was primarily, if not exclusively, used in the early days of class arbitration, with one commentator going so far as to claim that the hybrid model has been "swept away."<sup>298</sup> Nowadays, parties and arbitrators appear to prefer to adopt specialized rule sets such as the AAA Supplementary Rules or the JAMS Class Action Procedures to govern the proceedings, in whole or in part, even if the original arbitration agreement does not require the application of those procedures.<sup>299</sup>

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295. See BORN, *supra* note 5, at 1781 (noting "[j]udicial orders purporting to establish arbitral procedures would directly contradict the parties' objectives in agreeing to arbitrate"); Reuben, *supra* note 169, at 1137 (arguing that the review and possible appeal of procedural decisions would eliminate the kind of flexibility that is a hallmark of arbitration).

296. See Buckner, *supra* note 67, at 230 (taking the view that the hybrid theory does intrude on matters of substance).

297. Despite the outcry about decreased confidentiality in class arbitration, the process is still largely a private affair. Only two organizations—the AAA and ICSID—publicize any information at all about ongoing proceedings. See Strong, *De-Americanization*, *supra* note 23, at 515. Other arbitral institutions (including JAMS) do not make any information known about ongoing proceedings, and there is no way to track *ad hoc* arbitrations unless and until the parties themselves divulge the information through press releases or judicial actions. Furthermore, confidentiality does not seem necessary for a process to be considered "arbitration." See *supra* note 220.

298. Buckner, *supra* note 26, at 301.

299. See AAA SUPPLEMENTARY RULES, *supra* note 17; JAMS CLASS ACTION PROCEDURES, *supra* note 17.

Thus, for example, the parties in *Stolt-Nielsen* agreed to adopt portions of the AAA Supplementary Rules after it became clear that class proceedings were possible.<sup>300</sup>

Although this second type of class arbitration constitutes an improvement over the hybrid model, rule-based class proceedings are not themselves without controversy. Here, the concern about excessive judicial involvement relates to two partial final awards that may be brought to a court's immediate attention by one or more of the parties.<sup>301</sup> As suggested previously, the scope and standard of judicial review of these awards have not yet been fully defined, which makes detailed analysis difficult.<sup>302</sup> Nevertheless, some observations can be made.

First, rule-based class proceedings may preserve the private nature of the adjudicative process by inserting several critical degrees of separation between the court and the arbitral tribunal. Because judicial involvement occurs only at the request of the parties, the autonomy of the non-governmental decision-maker is respected and the "taint" of state involvement is thereby removed, unlike in hybrid procedures, where the courts made the affirmative choice to insert themselves into the proceedings.<sup>303</sup>

Secondly, even if the parties invite courts to become involved, that invitation may be declined. Two responses are possible. On the one hand, courts may decide as a general rule that systematic interim review is improper, based on precedent that prohibits contractually

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300. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765 (2010).

301. See generally AAA SUPPLEMENTARY RULES, *supra* note 17, rules 3, 5; JAMS CLASS ACTION PROCEDURES, *supra* note 17, rules 2–3.

302. See *supra* notes 224–45 and accompanying text. Furthermore, most of the debate concerning the propriety of the partial final award system has focused more on whether parties can contractually expand the opportunity for judicial review than on any potential infringements of the adjudicatory nature of arbitration. See *Stolt-Nielsen*, 130 S. Ct. at 1779 (Ginsburg, J., dissenting); Kristin M. Blankley, *Did the Arbitrator "Sneeze?" Do Federal Courts Have Jurisdiction over "Interlocutory" Awards in Class Action Arbitrations?*, 34 VT. L. REV. 493, 505, 522–27 (2010); Vikram Raghavan, *Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on Some US Developments*, 15 J. INT'L ARB. 103, 121–23 (1998); Reuben, *supra* note 169, at 1105–06.

303. Although only one party is needed to seek the court's review, the other party has already agreed to the early review process by virtue of accepting the adoption of the rule set in question. Furthermore, even if an arbitral tribunal operating outside a formal rule set were to take it upon itself to use a system of partial final awards, the parties still could not be heard to complain so long as the tribunal was working within the proper confines of its discretion in rendering partial final awards. See BORN, *supra* note 5, at 2430–35.

expanded review of final awards.<sup>304</sup> This would result in a blanket prohibition on interim review of any partial final awards rendered under the specialized rules for class arbitration. On the other hand, courts may take more of a case-by-case approach in deciding whether to hear these sorts of interim challenges. This second alternative may be the more likely, at least in the short term, given the absence of any definitive answer from the Supreme Court on this issue.<sup>305</sup>

When considering the propriety of rule-based class arbitrations, judges should be aware that there is nothing about the use of partial final awards that can be said to “change[] the nature of arbitration.”<sup>306</sup> While the use of such awards has generally been discouraged in both bilateral and multilateral proceedings,<sup>307</sup> the disfavor does not seem to stem from the view that partial final awards violate arbitration’s adjudicatory function. Instead, such awards are primarily opposed on more pragmatic grounds in that “[i]nterlocutory judicial review of an arbitral tribunal’s procedural decisions would frustrate” a variety of objectives of arbitration “while also imposing substantial risks of delay and appellate second-guessing on the arbitral process.”<sup>308</sup> However, the mere fact that the process might be better off without interim review does not determine whether that particular practice violates the nature of arbitration, since parties and arbitrators are entitled to, and often do, make procedural decisions that are counter to the goals of speed and efficiency.<sup>309</sup>

Interestingly, the majority in *Stolt-Nielsen* did not identify this aspect of class arbitration as being problematic in any way. Instead, the majority appeared (albeit in dicta) to be very much in favor of allowing early review of partial final awards.<sup>310</sup> This suggests that the use of partial final awards did not contribute to the majority’s

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304. This is the approach advocated by Justice Ginsburg. See *Stolt-Nielsen*, 130 S. Ct. at 1779 (Ginsburg, J., dissenting); see also *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 591–92 (2008); *Countrywide Fin. Corp. v. Bundy*, 113 Cal. Rptr. 3d 705, 714–19 (Ct. App. 2010) (discussing interplay between state and federal law); Raghavan, *supra* note 302, at 121–22.

305. See *Stolt-Nielsen*, 130 S. Ct. at 1767 n.2; see also BORN, *supra* note 5, at 2430–35; Strong, *Opening More Doors*, *supra* note 236, at 568.

306. *Stolt-Nielsen*, 130 S. Ct. at 1775.

307. See BORN, *supra* note 5, at 2815–26; FOUCHARD, GAILLARD, GOLDMAN, *supra* note 74, ¶¶ 1359–62; LEW ET AL., *supra* note 6, ¶¶ 24-14 to 24-23; PLOUDRET & BESSON, *supra* note 206, at 644.

308. BORN, *supra* note 5, at 1781 (but also noting that “interlocutory judicial involvement in procedural decisions in an ongoing international arbitration” may violate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)).

309. See *supra* note 171 and accompanying text.

310. See *Stolt-Nielsen*, 130 S. Ct. at 1767 n.2.

conclusion that class arbitration “changes the nature of arbitration.”<sup>311</sup> Thus, the process appears to pass muster as constituting a proper adjudicatory mechanism in arbitration. However, this conclusion may change, depending on how issues relating to the scope, standard, and availability of judicial review are resolved.<sup>312</sup> Therefore, while this practice does not currently appear to “change[ ] the nature of arbitration,”<sup>313</sup> courts and commentators should nevertheless maintain a close watch on future developments.

*Concerns about the competence of the arbitral tribunal*

A third issue that could affect the adjudicatory legitimacy of class arbitration involves the competence of the arbitral tribunal to address claims of this nature and complexity. Although there is nothing in *Stolt-Nielsen* that states directly that arbitrators are incompetent to handle the demands of a class proceeding, the majority spends a significant amount of time outlining the complexity of class proceedings and remarking on the amount of money at issue in such disputes, an approach also reflected by the majority in *AT&T*.<sup>314</sup> Furthermore, Justice Ginsburg suggests in her dissent in *Stolt-Nielsen* that the majority takes the view that “arbitrators ordinarily are not equipped to manage class proceedings.”<sup>315</sup> This, of course, could implicate the adjudicatory aspect of arbitration in that arbitral procedures must be “conducted in a manner which affords the parties an opportunity to be heard in an adjudicatory or quasi-judicial manner.”<sup>316</sup> If the decision-maker is somehow unable or unqualified to act in such a manner, then he or she may not be able to preside over an “arbitration” *per se*.

Competency concerns can exist at two different levels. First, problems may arise with respect to an individual arbitrator’s qualifications. This issue usually relates to various requirements imposed by the parties on the arbitrator (for instance, that the person be of a

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311. *Id.* at 1775.

312. *See supra* notes 224–45.

313. *Stolt-Nielsen*, 130 S. Ct. at 1775.

314. *See id.* at 1776; *see also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751–52 (2011).

315. *Stolt-Nielsen*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting); *see also* *AT&T*, 131 S.Ct. at 1741 (stating that “[w]e find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator”).

316. *See* Born, *supra* note 5, at 253.

certain nationality or hold certain commercial or professional qualifications) rather than any attributes imposed as a matter of law.<sup>317</sup> Typically, the only legal requirements regarding arbitrator qualifications are that arbitrators demonstrate judicial qualities such as independence, impartiality, and (in most jurisdictions) neutrality.<sup>318</sup>

Notably, there is nothing in *Stolt-Nielsen* to suggest that any of the issues in this first category of concerns were at stake.<sup>319</sup> Instead, statements about the inherent complexity of class proceedings seem to raise a second type of competency concern involving the general ability of arbitrators to handle matters of this type.<sup>320</sup>

To some extent, this article has already addressed this issue, with the earlier discussion concluding that there is nothing about the number of parties or the amount in dispute that makes class arbitration inherently different from other types of multiparty proceedings.<sup>321</sup> However, something else seems to be at play here. Although references are made to the size of the dispute, the Supreme Court also appears to be insinuating that arbitrators are inherently unable to handle particularly complex claims or matters touching on important questions of public policy, a charge that has been leveled against different types of arbitration at various times over the years.<sup>322</sup> However, class arbitration has been in existence for thirty years,<sup>323</sup> and it

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317. Arbitrators typically do not need to hold any special qualifications or undergo special training. *But see id.* at 1447 (noting some additional requirements under some national laws); *id.* at 1496–1501 (discussing U.S. move toward requiring neutrality).

318. *See id.* at 1461–64, 1496–1501.

319. To the contrary, Justice Ginsburg explicitly noted that the arbitrators in question were very experienced. *See Stolt-Nielsen*, 130 S. Ct. at 1777 n.1 (Ginsburg, J., dissenting).

320. *See id.* at 1776.

321. *See supra* notes 47–48 and accompanying text.

322. *See* Stavros L. Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 19, 19–32 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009); *see also Stolt-Nielsen*, 130 S. Ct. at 1776; *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) (noting shift in judicial attitudes over time); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633–34 (1985); BORN, *supra* note 5, at 768; Jan Paulsson, *International Arbitration is Not Arbitration*, 2 *STOCKHOLM INT'L ARB. REV.* 1, 10 (2008) (discussing 1944 *Yale Law Journal* article that condemns commercial arbitration as violating the notion that arbitration was intended to be a simple means of resolving the disputes of ordinary persons).

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



seems strange, if not disingenuous given existing precedent, to suggest now that arbitrators lack the competence to handle such matters.<sup>324</sup> Not only are such implications contrary to U.S. Supreme Court precedent indicating that class arbitration is a permissible form of dispute resolution,<sup>325</sup> but several commentators have noted that arbitrators are “as well equipped as courts” to deal with the special procedural concerns associated with class arbitration.<sup>326</sup>

The Supreme Court’s handling of this matter appears even more unusual when one recalls that objections regarding the general competence of arbitrators to decide certain issues are usually analyzed under the doctrine of arbitrability.<sup>327</sup> When considering whether a claim is arbitrable, courts and arbitrators look at a number of factors, including the extent to which public interests are at stake, whether the dispute involves significant inequalities in bargaining power, the effect of the decision on third-party rights, the ability of arbitrators to grant legislatively required remedies, and legislative intent.<sup>328</sup> Courts may also consider whether arbitral procedures (as opposed to judicial procedures) are adequate to resolve the dispute, although “the mistrust of arbitration that formed the basis” of some of the early decisions on this issue has been deemed “difficult to square with the assessment of arbitration that has prevailed since that time.”<sup>329</sup> Indeed, the recent trend, particularly in the United States, has been to broaden the definition of what is arbitrable and to consider arbitrators widely competent to handle even the most complex claims.<sup>330</sup>

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324. See *Mitsubishi*, 473 U.S. at 633 (noting that courts that allow certain complex claims to go to arbitration pursuant to the parties’ express agreement cannot later claim that those matters are “inherently insusceptible to resolution by arbitration”).

325. See *supra* notes 58–59 and accompanying text.

326. HANOTIAU, *supra* note 20, at 276; see also BORN, *supra* note 5, at 1232 n.442.

327. See Brekoulakis, *supra* note 322, at 26–32. The term “arbitrability” is used here in its international rather than its domestic U.S. sense and therefore goes to whether certain types of claims are amenable to arbitration as a general rule rather than whether a dispute falls within the scope of a particular arbitration agreement. See REDFERN AND HUNTER, *supra* note 82, ¶ 2.111. Interestingly, several circuit courts consider the issue of class waivers under the substantive federal law of arbitrability rather than state law of unconscionability, thus perhaps limiting the impact of *AT&T*. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).

328. See BORN, *supra* note 5, at 789–90.

329. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987); see also BORN, *supra* note 5, at 789 n.1155.

330. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633–34 (1985); BORN, *supra* note 5, at 783–85; Rau, *supra* note 169, at 209.

Surprisingly, the doctrine is not discussed in *Stolt-Nielsen*, despite the fact that class arbitration touches on several of the factors that are at issue in arbitrability determinations.<sup>331</sup> Skeptics might view this as a conscious decision to avoid troubling precedent that supports the arbitrators' ability to handle procedurally and factually complex claims that are in many ways similar to the types of issues raised in *Stolt-Nielsen*,<sup>332</sup> but there is another possible rationale. Questions of arbitrability arise when the dispute involves matters that the state wishes to reserve to itself and to the public dispute resolution system (i.e., the courts).<sup>333</sup> Thus, the Supreme Court may have intentionally avoided mentioning arbitrability in *Stolt-Nielsen* because invocation of that particular doctrine would have required class disputes to proceed in state courts, and the right to proceed as a class may not be a procedure that the Supreme Court wishes to protect.<sup>334</sup>

The question of arbitrability is particularly intriguing because of the unique policy issues that arise in class arbitration. For example, class suits implicate considerations regarding both access to justice and deterrence.<sup>335</sup> Neither of these concerns is typically taken into account in other forms of arbitration, which are seen as focusing primarily, if not exclusively, on matters affecting the parties to the immediate dispute.<sup>336</sup> However, arbitrators, particularly in the United States, are in fact qualified to consider policy matters that carry social implications beyond the parties to the dispute and that even involve deterrent elements, even if the issue is not directly framed as

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331. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). Of course, this may be because "it is difficult to see what . . . non-arbitrability objections could be raised to class arbitrations." BORN, *supra* note 5, at 1232 n.442. This issue was beyond the scope of the dispute in *AT&T*, so the Supreme Court's silence there is understandable.

332. See *Stolt-Nielsen*, 130 S. Ct. at 1758; *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009); *Bazzele*, 539 U.S. at 444 (plurality opinion) (assuming the arbitral tribunal was competent to handle class claims); *Shearson/Am. Express*, 482 U.S. at 232-33; *Mitsubishi*, 473 U.S. at 633-34 (involving antitrust claims in the international context).

333. See LEW ET AL., *supra* note 6, ¶ 9-2.

334. A state could choose to protect the right to proceed as a class either by making class claims nonarbitrable (thus forcing their return to state court) or by making the right to proceed as a class nonwaivable (thus allowing class claims to proceed either in court or in arbitration). See, e.g., *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 194, 199 (2d Cir. 2011) (holding that a class waiver was void for public policy).

335. See *supra* notes 174-88 and accompanying text.

336. See *id.*

such.<sup>337</sup> Therefore, the social concerns that are at issue in class arbitration—though somewhat unique in terms of content—do not appear dissimilar enough from the policy issues resolved in other forms of arbitration to allow a conclusion that class arbitration “changes the nature of arbitration.”<sup>338</sup> Thus, concerns about arbitrator competence—whether framed as an individual or a general matter—appear insufficient to call the legitimacy of class arbitration into question.

### *Nature of representative relief*

The final adjudicatory concern to consider involves the nature of representative relief, which, along with the policy considerations just discussed, is one of the ways in which class arbitration deviates from other, more established forms of multiparty arbitration.<sup>339</sup> In order to determine whether class arbitration “changes the nature of arbitration,”<sup>340</sup> it is necessary to identify whether the provision of representative relief violates arbitration’s adjudicatory element. In particular, it must be considered whether the use of representative relief in arbitration constitutes a “neutral, adjudicatory procedure[ ] affording the parties an opportunity to be heard”<sup>341</sup> and whether it resolves the dispute in “an adjudicatory or quasi-judicial manner.”<sup>342</sup>

As it turns out, it is difficult, if not impossible, to conclude that the use of representative relief violates the adjudicative aspects of arbitration in proceedings seated in the United States or governed by U.S. law, for two reasons. First, representative relief is expressly permitted in U.S. courts for a wide range of substantive claims. Thus, there can be no policy-based objections to this particular form of redress as a matter of U.S. law. What is more, the mechanisms used in class arbitration are nearly identical to those used in judicial class

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337. Antitrust/competition law claims are the clearest examples of this broad capability, but investment arbitration also involves public policy issues, widespread ramifications, and deterrent elements, although the situation there is slightly different due to the presence of state parties and international treaties. *See Mitsubishi*, 473 U.S. at 629–40 (allowing arbitration of antitrust claims, despite the deterrent element and implication of public interests); *id.* at 655 (noting antitrust claims, which are arbitrable, can affect “hundreds of thousands—perhaps millions—of people”) (Stevens, J., dissenting); LEW ET AL., *supra* note 6, ¶¶ 28-8 to 28-13; Szalai, *supra* note 15, at 421–25.

338. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

339. *See supra* notes 51–81, 164–96 and accompanying text.

340. *Stolt-Nielsen*, 130 S. Ct. at 1775.

341. BORN, *supra* note 5, at 217.

342. *Id.* at 253.

actions.<sup>343</sup> If class actions reflect a “neutral, adjudicatory procedure[ ] affording the parties an opportunity to be heard,”<sup>344</sup> as they undoubtedly do, then class arbitration must meet that standard as well. Indeed, this is one time when class arbitration’s high degree of formalism works to its benefit, since there is no way to argue that the process is not conducted in “an adjudicatory or quasi-judicial manner.”<sup>345</sup>

Secondly, the issue of arbitrability directly addresses the question of whether a particular type of claim is amenable to resolution in arbitration,<sup>346</sup> and the Supreme Court has held that class claims are arbitrable on several previous occasions.<sup>347</sup> Furthermore, as the Supreme Court recognized in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, courts that allow certain complex claims to go to arbitration pursuant to the parties’ express agreement cannot later claim that those matters are “inherently insusceptible to resolution by arbitration.”<sup>348</sup> Thus, the representative nature of class arbitration cannot support a claim that class arbitration “changes the nature of arbitration,”<sup>349</sup> at least in the context of U.S. law, since the device falls squarely within the definition of a proper adjudicatory mechanism as well as relevant precedent.

This does not mean that every jurisdiction would necessarily reach a similar conclusion. As indicated above, some countries do not permit parties to seek representative relief because of concerns about the nature of certain fundamental rights.<sup>350</sup> A court in one of those states might very well conclude that representative relief in arbitration violates the adjudicatory requirement of arbitration, not because the arbitral process was found lacking, but because the rights at issue cannot be adjudicated in either arbitration or litigation. In other words, representative relief in those countries could fail to meet the adjudicatory requirement in arbitration because no one—neither a

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343. See FED. R. CIV. P. 23; AAA SUPPLEMENTARY RULES, *supra* note 17; JAMS CLASS ACTION PROCEDURES, *supra* note 17.

344. BORN, *supra* note 5, at 217.

345. *Id.* at 253.

346. See *id.* at 789–90.

347. See *supra* notes 15–17, 250 and accompanying text.

348. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

349. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

350. See *supra* note 60 and accompanying text.

court nor an arbitral tribunal—would be capable of rendering a binding decision on a representative claim.<sup>351</sup> However, these sorts of objections are based on fundamental principles of other national laws and cannot be transferred to arbitrations governed by U.S. law.<sup>352</sup> Therefore, although representative relief constitutes a unique attribute of class arbitration, the provision of representative relief cannot of itself constitute a cause for concluding that class arbitration “changes the nature of arbitration.”<sup>353</sup>

## V. CONCLUSION

Despite the perhaps common perception that class arbitration is radically different from other forms of arbitration, class proceedings in fact resemble traditional forms of multiparty arbitration in several significant ways, including the number of parties, the amount in dispute, the relationship between the parties, and the method of selecting the arbitrators.<sup>354</sup> It is only with respect to two characteristics—the provision of representative relief and the underlying policy rationales—that class arbitration can be said to be distinctive.<sup>355</sup>

However, a conclusion that class arbitration is unique in some regards does not necessarily mean that the device “changes the nature of arbitration.”<sup>356</sup> The only way class arbitration could be said to

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351. Notably, it is equally likely—and perhaps preferred, as a matter of jurisprudence—that the issue would be considered under the concept of arbitrability, since the law in that area is comparatively better developed than the law regarding the nature of arbitration. See LEW ET AL., *supra* note 6, ¶¶ 9-2 to 9-3 (describing arbitrability). However, it has also been said that “it is difficult to see what . . . non-arbitrability objections could be raised to class arbitrations.” BORN, *supra* note 5, at 1232 n.442. Indeed,

[t]he fact that class actions are not recognized or available in many national litigation systems should not preclude the use of class action arbitrations (just as the unavailability of documents only, fast-track, or similar dispute resolution mechanisms in litigation does not invalidate arbitration agreements requiring such procedures). There may be requirements regarding procedural regularity and an opportunity to be heard, imposed by national law, but these would involve the implementation of the class action arbitration, not its basic enforceability.

*Id.*

352. See RUBINO-SAMMARTANO, *supra* note 191, at 1 (noting arbitration “does not always take the same form in different countries. Inevitably, each different form reflects local problems and sometimes a different approach to the entire legal system.”).

353. *Stolt-Nielsen*, 130 S. Ct. at 1775; see *supra* notes 164–96 and accompanying text.

354. See *supra* notes 44–50, 82–163 and accompanying text.

355. See *supra* notes 51–81, 164–96 and accompanying text.

356. *Stolt-Nielsen*, 130 S. Ct. at 1775.

have such an effect is if it were not “a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard”<sup>357</sup> or if the procedures used were not “conducted in a manner which affords the parties an opportunity to be heard in an adjudicatory or quasi-judicial manner.”<sup>358</sup> As it turns out, the two areas in which class arbitration differs most significantly from other forms of multiparty arbitration—the provision of representative relief and the underlying policy rationales—meet the standards necessary for a procedure to be considered “arbitration.” Furthermore, other matters that have been raised on occasion, including arguments that class arbitration involves excessive formalities and judicial involvement, as well as residual concerns about arbitrator competence, are also unpersuasive as a means of supporting the claim that class arbitration affects the fundamental nature of arbitration.

This is not to say that there are no areas of concern. In particular, the level and type of judicial involvement in class arbitration at times comes close to violating the requirement that arbitration utilize a neutral, non-governmental adjudicator.<sup>359</sup> While much will depend on how the law involving the partial final award system develops,<sup>360</sup> class arbitration, at the present moment, appears to fall within established parameters regarding arbitration. Nevertheless, the arbitral community will need to keep a close watch as procedures regarding the scope, standard, and availability of judicial review of partial final awards develop, since this issue was specifically left open in *Stolt-Nielsen*.<sup>361</sup>

Although some commentators have claimed that *Stolt-Nielsen* and *AT&T* herald the end of class suits in both litigation and arbitration,<sup>362</sup> the battle over class arbitration will likely continue for some time, reflecting the bitter debate that has been waged for years with

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357. BORN, *supra* note 5, at 217. Notably, there is no requirement that the procedures be confidential. *See supra* note 220.

358. BORN, *supra* note 5, at 253.

359. *See supra* notes 288–313 and accompanying text.

360. *See supra* notes 225–45 and accompanying text.

361. *See Stolt-Nielsen*, 130 S. Ct. at 1767 n.2; *see also* Strong, *Opening More Doors*, *supra* note 236, at 567.

362. *See* Cole, *supra* note 259; Editorial, *Gutting Class Action*, N.Y. TIMES (May 12, 2011), available at [www.nytimes.com/2011/05/13/opinion/13fri1.html](http://www.nytimes.com/2011/05/13/opinion/13fri1.html); Kirgis, *supra* note 259; Sternlight, *supra* note 259; *supra* note 128 and accompanying text.

respect to judicial class actions.<sup>363</sup> However, the issues in arbitration are somewhat more complex. For example, the use of representative relief not only gives rise to the due process concerns that lead to the perceived need for increased judicial involvement, it also drives issues regarding the size and scope of the proceedings and the attendant desire for express secondary consent.

Experience in the judicial realm suggests that corporate respondents find representative actions both risky and expensive, and that business interests are therefore inclined to do everything possible to minimize or eliminate class relief in all possible forms.<sup>364</sup> However, corporate concerns do not always align with larger social interests, and there are numerous reasons why abandoning or curtailing the class mechanism in arbitration would be problematic as a matter of U.S. law and policy.<sup>365</sup> For example, one commentator has argued that class relief is the price paid for an open, de-regulated commercial environment, and the loss of the class device would likely lead to more costs being imposed on businesses *ex ante*.<sup>366</sup> Furthermore, if corporations were to abandon their all-or-nothing strategy, they might discover that they are better off with class arbitration than with judicial class actions.<sup>367</sup>

Class arbitration is not without its challenges, and further consideration of numerous issues is necessary. However, as discussions progress, it is important that courts and arbitrators understand the first principles underlying arbitration so that class procedures can be developed in ways that are consistent with established arbitral

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363. See HENSLER ET AL., *supra* note 32, at 9–47; Strong, *Opening More Doors*, *supra* note 236, at 367.

364. See Smit, *supra* note 136, at 210–11; see also HENSLER ET AL., *supra* note 32, at 15–47.

365. Although access to justice and deterrence of irresponsible corporate actors are the two most often cited reasons to adopt class mechanisms, there are others as well. See *Stolt-Nielsen*, 130 S. Ct. at 1783 (Ginsburg, J., dissenting); *supra* note 171 and accompanying text.

366. See Burch, *supra* note 77, at 76–77.

367. Though more analysis is needed on this point, some initial thoughts can be found in Dana H. Freyer & Gregory A. Litt, *Desirability of International Class Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2008, *supra* note 20, at 171; Smit, *supra* note 136, at 210–12; Strong, *Abaclat*, *supra* note 32; S.I. Strong, *Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration*, 23 THE HAGUE YEARBOOK OF INTERNATIONAL LAW 2010, 113 (2011); Strong, *De-Americanization*, *supra* note 23, at 508.

norms and standards.<sup>368</sup> While it is currently true that there is nothing about class arbitration that “changes the nature of arbitration,”<sup>369</sup> it would be unfortunate if procedures were unknowingly adopted that brought that conclusion into question.

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368. For example, those who wish to give parties an opportunity to appeal certain early decisions affecting the availability of class relief could contract for substantive review through an arbitral appeal process rather than judicial review. See Reuben, *supra* note 169, at 1139–40 (noting such procedures would not violate U.S. Supreme Court precedent or fundamental principles of arbitration). Interestingly, although corporate respondents have traditionally supported the right to appeal in the class context, empirical evidence suggests that most appellate procedures are not to the respondent’s benefit. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 170–71 (1996) (noting plaintiffs are far more likely to appeal after losing a decision, suggesting that defendants seeking finality might be better off in a dispute resolution system (such as arbitration) that limits appeals).

369. *Stolt-Nielsen*, 130 S. Ct. at 1775.



