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Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared

S.I. Strong

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Resolving Mass Legal Disputes through Class Arbitration: the United States and Canada Compared

S.I. Strong[†]

I.	Introduction	922
II.	The United States and Canada—Similar but Not Identical	924
	A. Basic Legal Structures	924
	B. Class Actions	928
	C. Arbitration Law	932
III.	Class Arbitration.....	934
	A. Class Arbitration Defined	934
	B. The Development of Class Arbitration.....	936
	C. The Importance of Class Arbitration Domestically and Internationally	941
IV.	Class Arbitration Compared.....	943
	A. When Is Class Arbitration Available?	944
	1. United States.....	944
	2. Canada	948
	B. What Procedures Must Be Used in Class Arbitration?	957
	1. United States.....	957
	2. Canada	961
	C. What Is the Nature of the Right to Proceed as a Class?	965

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1. United States.....	965
2. Canada.....	972
V. Conclusion.....	975

I. Introduction

Class arbitration—sometimes known as “class action arbitration”—is a somewhat controversial dispute resolution device that takes certain procedures more commonly seen in judicial class actions and transplants them into arbitration. The mechanism is receiving a great deal of attention in North America right now, with two closely observed cases having gone all the way to the U.S. Supreme Court in the last two years.¹ However, interest in this procedure is not limited to the United States. Canadian courts have also been active in this field, with the Supreme Court of Canada resolving issues relating to the assertion of class claims in the face of an arbitration agreement twice in the last four years.²

Despite sharing a similarly liberal attitude toward the availability of both arbitration and judicial class actions, the two countries have taken different approaches to the question of class arbitration.³ However, neither nation has identified a completely satisfactory solution to the problems associated with mass claims in arbitration, suggesting that both jurisdictions could benefit from a comparative analysis.

Furthermore, Canada and the United States are not the only countries currently considering the merits of class arbitration. Interest in class and collective relief in arbitration is increasing all over the world, with new procedural mechanisms developing all the time.⁴ Many observers from outside North America would

¹ 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). Although some commentators claim that class arbitration is “dead” as a result of these cases, that conclusion is premature. See *infra* notes 82-86 and accompanying text.

² See *Seidel v. Telus Commc'ns, Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (Can.); *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, para. 87 (Can.); Jeffrey S. Leon et al., *Class Arbitration in Canada: The Legal and Business Case*, 6 CANADIAN CLASS ACTION REV. 381, 386 (2010).

³ See Claude Marseille et al., *Arbitration and Class Actions in Canada: Where Do We Stand?*, 28 CLASS ACTION REP. 5, 5 (Apr. 2007).

⁴ For example, Colombia has contemplated the adoption of class arbitration. See

benefit from a deeper understanding of the differences in the way in which the United States and Canada address the tensions between collective redress and arbitration.

This Article undertakes just such a comparative analysis and proceeds as follows. First, Section II lays the groundwork for comparing class arbitration in Canada and the United States by describing relevant aspects of each nation's legal system. Section III then introduces the concept of class arbitration, including its basic procedures, its history and its importance in both domestic and international dispute resolution.

Once the foundation has been laid, the comparative analysis begins. Section IV contrasts the current state of class arbitration in the United States and Canada, focusing on three issues that have arisen as a result of recent Supreme Court precedent in both countries and that are particularly amenable to comparative analysis: circumstances in which class arbitration is available; procedures that must or may be used; and the nature of the right to proceed as a class. Section V concludes the Article by bringing the various threads of analysis together and identifying the lessons that can be learned from comparing the two countries.

Eduardo Zuleta Jaramillo, *Arbitral Tribunal from the Bogota Chamber of Commerce, A contribution by the ITA Board of Reporters*, KLUWERARBITRATION (Apr. 24, 2003), <http://kluwerarbitration.com>. Germany recently created a form of collective arbitration for shareholder disputes. See DIS Supplementary Rules for Corporate Law Disputes, effective Sept. 15, 2009 [hereinafter DIS Supplementary Rules], available at www.dis-arb.de/ (follow link to proceed in English and select "DIS-Rules" on the left); see also Christian Borris, *Arbitrability of Corporate Law Disputes in Germany*, in ONDERNEMING EN ADR 55, 55-71 (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 (2011) [hereinafter Strong, DIS]. Mass procedures have also been adopted in the context of international investment arbitration. See *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (2011) [hereinafter *Abaclat Award*], available at www.iareporter.com/downloads/20110810 (involving 60,000 Italian bondholders). This approach has not gone uncriticized. See *Abaclat (formerly Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion (Oct. 28, 2011) [hereinafter *Abaclat Dissent*], available at http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf.

II. The United States and Canada—Similar but Not Identical

A. Basic Legal Structures

Before undertaking any comparative analysis, it is important to outline the differences and similarities between the legal systems at issue. In many ways, Canada and the United States have a great deal in common, thus facilitating cross-border comparisons.⁵ Both are primarily English-speaking countries,⁶ strongly influenced by the English common law tradition, with one civil law territory (Quebec in Canada, Louisiana in the United States) standing as the sole representative of continental Europe's influence on the nation.⁷ Both are also federal states that give considerable authority to the national government while nevertheless retaining significant power for state, provincial and territorial governments.⁸

Despite these similarities, several distinctions can be made. First, important differences arise with respect to the relative ability of parties within each nation to assert national (or, better stated, multi-jurisdictional domestic) class actions as a result of distinctions in the way each nation implements principles of federalism and jurisdiction. For example, U.S. federal courts have

⁵ There are many existing comparative studies in the realm of class actions and arbitrations in Canada and the U.S. See, e.g., Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 1 (2007-2008); Marseille et al., *supra* note 3, at 5; Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L. J. 361 (2010); Ellen Meriwether & Andrew J. Morganti, *Emerging Trends in Certification of Antitrust Class Actions in Canada*, 24 ANTITRUST 71 (2010); Geneviève Saumier, *USA-Canada Class Actions: Trading in Procedural Fairness*, 5 GLOBAL JURIST ADVANCES 1 (2005); Susan M. Sharko, et. al., *Global Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation*, 77 DEF. COUNS. J. 295 (2010). Calls have also been made for Canada to adopt class arbitration. See J. Brian Casey, *Commentary: Class Action Arbitration Should be Available*, LAW. WKLY. (Can.), Mar. 31, 2006.

⁶ Canada is officially bilingual (English-French), although English is the primary language outside Quebec.

⁷ See Jasminka Kalajdzic et al., *Class Actions in Canada: Country Report Prepared for the Globalization of Class Actions Conference*, in 622 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 41, 41 (Deborah Hensler et al. Eds., 2009) [hereinafter THE ANNALS]; see also Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, in THE ANNALS, *supra*, at 32.

⁸ See Kalajdzic et al., *supra* note 7, at 41; Pace, *supra* note 7, at 32.

an expansive ability to intervene in a variety of matters, including those involving class actions. The wide-ranging competence of the federal judiciary is a direct result of the broad interpretation of the concept of interstate commerce under the Commerce Clause of the U.S. Constitution,⁹ which has arisen despite the jurisdictional limitations explicitly reflected in Article III of that document.¹⁰ As a result, multi-jurisdictional class actions can be brought in U.S. federal court with relative ease.

The situation is very different in Canada because, there, the Federal Court:

is a statutory court, and its statutory jurisdiction does not include most of the topics that typically give rise to class actions. As the Court's statute now stands, its jurisdiction over claims against the Crown in right of Canada would be the most promising avenue for class actions. But the Court does not have jurisdiction over claims in tort or contract against defendants other than the federal Crown.¹¹

These limitations on the jurisdiction of the Federal Court of Canada would be of scant significance if provincial courts in Canada were able to hear multi-jurisdictional classes. However, provincial courts experience difficulties when attempting to assert jurisdiction over non-residents.¹² As territorially-restricted institutions, the only time that provincial courts may assert jurisdiction over a party is: (1) if the party is present in the jurisdiction, based on service of a writ on the defendant in the province; (2) if the party consents to jurisdiction; or (3) if the court can assume jurisdiction, as in cases where there is service of the writ outside the province supported by a "real and substantial

⁹ U.S. CONST. art. II, § 8.

¹⁰ *Id.*, art. III; *see also* U.S. CONST. amend. XI.

¹¹ Peter W. Hogg & S. Gordon McKee, *Are National Class Actions Constitutional?*, 26 NAT'L J. CONST. L. 279, 283 (2010). Proposals to expand the power of the Federal Court with respect to multijurisdictional class actions have been opposed on constitutional grounds. *See* CAN. BAR ASS'N, CONSULTATION PAPER: CANADIAN JUDICIAL PROTOCOL FOR THE MANAGEMENT OF MULTIJURISDICTIONAL CLASS ACTIONS 6-7 (June 2011) [hereinafter CAN. BAR ASS'N].

¹² *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 13-22 (5th ed., 2011 supp.).

connection between the litigation and the province.”¹³ Although there is no conceptual reason why this test could not be met in cases involving multi-jurisdictional class actions, the difficulties associated with asserting jurisdiction over non-residents (which could include both defendants and unnamed members of the plaintiff class) have severely limited the development of multi-jurisdictional classes in Canada.¹⁴

The problems experienced by Canada with respect to jurisdiction over multi-jurisdictional classes involving persons from different Canadian provinces and territories also extends to international classes involving persons from Canada and

¹³ *Id.* As this article was going to press, the Supreme Court of Canada handed down decisions in four appeals involving the “real and substantial connection” test. The main decision, *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, CarswellOnt 4268 (Can.), addresses two of the four appeals, while the two other decisions, *Banro Corp. v. Éditions Écosociété Inc.*, 2012 SCC 18, 2012 CarswellOnt 4270 (Can.), and *Breedon v. Black*, 2012 SCC 19, 2012 CarswellOnt 4272 (Can.), each concern a separate matter. While it is impossible to discuss these decisions in this Article at this late date, the Supreme Court of Canada appears to be announcing a new approach to jurisdiction based on service *ex juris*. Of particular interest is the discussion concerning the interaction between constitutional and private international law as well as the analysis regarding application of the doctrine of *forum non conveniens*. All of these matters are central to multi-jurisdictional class actions in Canada, and parties should therefore remain alert to the law as it develops.

¹⁴ See Hogg & McKee, *supra* note 11, at 292; Tanya Monestier, *Is Canada the New “Shangri-La” of Global Securities Class Actions?*, 32 NW. J. INT'L L. & BUS. ___ (forthcoming 2012) (noting issues relating to conflict of laws, jurisdiction, enforcement of judgments, parallel proceedings and notice). *But see* Janet Walker, *Are National Classes Constitutional? A Reply to Hogg and McKee*, 48 OSGOOD HALL L.J. 95, 143 (2010) [hereinafter Walker, *National*]. The debate in Canada has focused on both the constitutionality of multijurisdictional class actions as well as practical procedural issues. See generally CRAIG JONES, *THEORY OF CLASS ACTIONS* (2003); Chris Dafoe, *A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel*, 3 CAN. CLASS ACTION REV. 541 (2006); Stephen Lamont, *The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court*, 24 ADVOCATES' Q. 252 (2001); F. Paul Morrison et al., *The Rise and Possible Demise of the National Class in Canada*, 1 CAN. CLASS ACTION REV. 67 (2004); Janet Walker, *Recognizing Multijurisdictional Class Action Judgments Within Canada: Key Questions—Suggested Answers*, 46 CANADIAN B. L.J. 450, 465 (2008) [hereinafter Walker, *Recognizing*]. Nevertheless, Canadian courts, commentators and counsel have been working on mechanisms to facilitate multijurisdictional and national class actions in both the domestic and international contexts. See CAN. BAR ASS'N, *supra* note 11, at 1-25. Although several protocols have recently been adopted by the Canadian Bar Association (CBA), these are merely advisory and thus do not provide parties with any degree of certainty.

elsewhere.¹⁵ Indeed, Canada is not alone in this, for the United States has also experienced difficulties in this regard, although it, like Canada, has had some limited ability to assert jurisdiction over international classes.¹⁶ Interest in cross-border collective relief has also been seen outside North America.¹⁷

¹⁵ See *Can. Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549 (Can.); see also *Currie v. McDonald's Rest. Can. Ltd.* (2005) 74 O.R. 3d 321 (Can. Ont. C.A.). However, the recent case of *Silver v. Imax Corp.* has been heralded as potentially making "Ontario a new haven for secondary market class actions" involving shareholders from around the world. Mark Gelowitz, *Court Certifies Class Action Against Imax: Liability May be Coming Soon to a Theatre Near You*, LAW. WKLY., Feb. 19, 2010, available at <http://www.lawyersweekly.ca/> (select "archives," then select "2010," and then "February"); *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Can. Ont. Sup. Ct. J.); see also *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Can. Ont. Sup. Ct. J.); Monestier, *supra* note 14.

¹⁶ See *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HBP), 2009 WL 855799, at *14 (S.D.N.Y., Mar 31, 2009); see also *HSBC Bank Can. v. Hocking*, [2006] R.J.Q. 804, 2006 QCCS 330, paras. 83-88; *Parsons v. McDonald's Rest. Can. Ltd.*, (2004), 45 C.P.C. 5th 304 (Ont. Sup. Ct.). However, such mixed international classes are dismissed at least as often, if not more so. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885-89 (2010); *Kern v. Siemens Corp.*, 393 F.3d 120, 128-29 (2d Cir. 2004); *Johnson v. United States*, 238 F.R.D. 199, 214-15 (W.D. Tex. 2006). The American Bar Association (ABA) has recently adopted two protocols on judicial communications and notice provisions in cross-border class actions. See ABA, *PROTOCOL ON COURT-TO-COURT COMMUNICATIONS IN CANADA-U.S. CROSS-BORDER CLASS ACTIONS AND NOTICE PROTOCOL: COORDINATING NOTICE(S) TO THE CLASS(ES) IN MULTI-JURISDICTIONAL CLASS PROCEEDINGS* (Aug. 2011), available at <http://www.cba.org/cba/resolutions/pdf/11-03-A-bckd.pdf>; see also Betsy M. Adeboyejo, *Protocols for Cross-Border Cases . . . Will They Work?*, ABA NOW (Aug. 6, 2011), <http://www.abanow.org/> (select "Around the Bar"). The American Law Institute (ALI) has also drafted guidelines in this area of law. See AM. L. INST., *GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES* (2000), available at http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf; see also AM. L. INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* (2010).

¹⁷ One of the leading jurisdictions for resolution of mass disputes is the Netherlands. See Monestier, *supra* note 14 (citing 2005 Dutch Act on the Collective Settlement of Mass Claims but noting that is a settlement-only device); see also Ianika Tzankova & Daan Lunsingh Scheurleer, *The Netherlands*, in *THE ANNALS*, *supra* note 7, at 149. Cross-border collective redress is also becoming a major issue in the European Union, with the European Commission recently undertaking a public consultation on the issue. See European Commission, *Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 (Feb. 4, 2011), available at http://ec.europa.eu/justice/news/consulting_public/ou54/sec_2011_173_en.pdf. The International Bar Association (IBA) has not only weighed in on the European consultation process but has also drafted its own set of guidelines regarding cross-border

B. Class Actions

Another area of interest involves the laws specifically relating to class actions. Here, too, there are both disparities and similarities.

On the one hand, both the United States and Canada take a broad, trans-substantive approach to representative relief in their national courts.¹⁸ Furthermore, there are significant similarities in the way which the two countries structure their class actions, which is unsurprising given that many Canadian provinces considered the U.S. approach to class relief when drafting their own class action legislation.¹⁹

On the other hand, class actions in the United States and Canada differ with respect to the sources of authority relating to collective proceedings. Class actions in the United States are asserted pursuant to the relevant rules of civil procedure at both the state and federal level.²⁰ This results in few, if any, difficulties in creating national class actions, since the class action provisions simply ride on the coattails of broad jurisdictional principles reflected in other parts of the procedural law. For example, the U.S. Supreme Court has stated that state courts have:

jurisdiction to certify a national class action as long as the defendant has a sufficient connection to the forum state. The plaintiff class can include . . . non-resident persons with no connection to the forum state, provided they have been given notice of their rights, an opportunity to opt out of the action, and adequate representation by the representative plaintiffs.²¹

collective redress. See INT'L BAR ASS'N, SUBMISSION TO EUROPEAN COMMISSION CONSULTATION ON COLLECTIVE REDRESS (June 27, 2011) [hereinafter IBA SUBMISSION], available at http://ec.europa.eu/competition/consultations/2011_collective_redress/iba_awg_en.pdf; INT'L BAR ASS'N, GUIDELINES FOR RECOGNISING AND ENFORCING FOREIGN JUDGMENTS FOR COLLECTIVE REDRESS (Oct. 16, 2008) [hereinafter IBA GUIDELINES], available at www.ibanet.org/LPP/Dispute_Resolution_sectionguidelines/Arbitration/Projects.aspx#.

¹⁸ See Kalajdzic et al., *supra* note 7, at 42-48; see also Pace, *supra* note 7, at 36-39.

¹⁹ See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10-15 (2000); Kalajdzic et al., *supra* note 7, at 42.

²⁰ See FED. R. CIV. P. 23; see also Pace, *supra* note 7, at 36.

²¹ Hogg & McKee, *supra* note 11, at 291.

Individual state courts are not the only possible venues for class actions in the United States. The various U.S. federal courts are also empowered to assert jurisdiction over parties from multiple states and have done so in the class context.²² Interestingly, the importance of the federal system in the U.S. class action regime has increased in recent years as a result of the Class Action Fairness Act of 2005, which “liberalized the rules for transferring state court class actions with interstate implications into the federal courts.”²³

Class actions in Canada stand on very different ground. Rather than being authorized through the rules of civil procedure, Canadian class actions are based almost entirely on statutory provisions enacted by provincial and territorial legislatures.²⁴ Because the precise wording of the statutes varies from province to province, judicial opinions regarding procedural issues arising in one province or territory may have little or no persuasive value elsewhere in the nation, not only due to jurisdictional limitations but also due to differences in the relevant statutory language or underlying policy.²⁵ To some extent, the Supreme Court of Canada can provide a harmonizing influence, since the Court “does not tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes.”²⁶ Nevertheless, leading commentators have suggested that provinces that do not like the direction the Supreme Court of Canada has taken with respect to a particular issue can change the legal landscape in their territory through statutory reform,²⁷ which certainly has been the case in the area of class

²² See HENSLER ET AL., *supra* note 19, at 73.

²³ Pace, *supra* note 7, at 39.

²⁴ See *id.* at 48-49. Parties in provinces or territories that do not have class action legislation can rely on certain common law authority regarding class relief, but this procedure has been used in only very limited circumstances. See *W. Canadian Shopping Ctrs. Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (Can.). Janet Walker has argued that *Dutton* suggests a means by which Canadian courts can develop the law of class actions beyond its statutory limitations by relying on certain provisions of the rules of civil procedure, but it is unclear whether such an approach will be adopted. See Walker, *National*, *supra* note 14, at 112.

²⁵ See Pace, *supra* note 7, at 48-49.

²⁶ HOGG, *supra* note 12, at 8-10.

²⁷ See *id.*

actions.²⁸

This combination of limited jurisdictional competence and local class action legislation has led class actions in Canada to operate primarily on a local level.²⁹ This can lead to a somewhat fragmented approach to class action law and procedure, for although provincial and territorial courts can occasionally use their case management powers to coordinate actions when disputes regarding the same subject matter are going forward in different provinces, this sort of procedure has not seen widespread use.³⁰

The localized nature of class actions in Canada can make it difficult to undertake a detailed comparison to procedures used in the United States, since each province or territory has adopted a slightly different approach.³¹ However, certain broad-brush observations can be made about the two nations' class action regimes.³²

For example, U.S. federal courts faced with a potential class action typically begin by considering whether certain prerequisites to a class proceeding (such as numerosity, commonality, representativeness and fairness) have been met.³³ If these elements exist, the court then considers whether the class suit can be maintained, focusing on issues such as whether class relief would create a risk of inconsistent judgments or dispose of the rights of non-parties, or whether the opponent to the class has acted on grounds applicable to the entire class.³⁴ A class suit may also be maintained in cases where commonality exists and:

²⁸ For example, both Ontario and Quebec have made significant legislative changes in response to certain judicial decisions regarding consumer class actions. See *infra* notes 178, 191 and accompanying text.

²⁹ See Kalajdzic et al., *supra* note 7, at 46.

³⁰ See CAN. BAR ASS'N, *supra* note 11, at 4-6; Kalajdzic et al., *supra* note 7, at 46. However, the situation may change in the wake of recent protocols on multijurisdictional class actions adopted by the C.B.A. See CAN. BAR ASS'N, *supra* note 11, at 11-15.

³¹ See Kalajdzic et al., *supra* note 7, at 42-48; Pace, *supra* note 7, at 36-39.

³² Compare Kalajdzic et al., *supra* note 7, at 42-48, with Pace, *supra* note 7, at 36-39.

³³ See FED. R. CIV. P. 23(a). State courts undertake similar analyses, but this Article focuses on the federal system for ease of comparison.

³⁴ See FED. R. CIV. P. 23(b); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2566 n.8 (2011).

a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.³⁵

The Canadian analysis is remarkably similar, even across provincial lines. Therefore, although:

[t]he details of the tests for certification differ in each jurisdiction[] [, g]enerally speaking . . . five criteria must be satisfied for the action to be certified:

- the pleadings must disclose a cause of action,
- there must be an identifiable class,
- the proposed representative must be appropriate,
- there must be common issues, and
- the class action must be the preferable procedure.³⁶

Interestingly, it is this last element—the “preferability analysis”—that varies the most from province to province. For example, some jurisdictions leave the matter to the discretion of the judge while other jurisdictions set forth a non-exhaustive list of factors to be considered by the court.³⁷ Quebec does not specifically refer to “preferability” per se, but addresses many of the same factors that other jurisdictions do in its class action legislation.³⁸ Notably, the concept that the “class action must be the preferable procedure” is reminiscent of the requirement contained in the U.S. Federal Rules of Civil Procedure that the class action must be “superior to other available methods for the

³⁵ FED. R. CIV. P. 23(b).

³⁶ Kalajdzic et al., *supra* note 7, at 43.

³⁷ *See id.*

³⁸ *Id.*

fair and efficient adjudication of the controversy.”³⁹

C. Arbitration Law

The final background matter to discuss involves arbitration law. This issue is important for two reasons. First, a strong state policy in favor of arbitration is typically necessary for the development of class arbitration.⁴⁰ Second, a state’s views about the legitimacy of multiparty arbitration, even in the non-class context, can influence the development of class arbitration in that jurisdiction.⁴¹

As it turns out, both Canada and the United States exhibit strong pro-arbitration policies through their statutory schemes.⁴² In the United States, the Federal Arbitration Act (FAA) addresses issues at the national level, with additional laws enacted at the individual state level.⁴³ However, the FAA has gained increasing influence in recent years,⁴⁴ although the FAA has never entirely preempted state law.⁴⁵

In Canada, the Commercial Arbitration Act (CAA) provides guidance at the federal level, with provincial and territorial statutes governing local matters.⁴⁶ Arbitration law in Canada demonstrates a high degree of national consistency, since the CAA and the legislation from the common law provinces are both based on the United Nations Commission on International Trade Law

³⁹ FED. R. CIV. P. 23; *see also* Kalajdzic et al., *supra* note 7, at 43.

⁴⁰ *See* S.I. Strong, *Class Arbitration Outside the United States: Reading the Tea Leaves*, in *ARBITRATION AND MULTIPARTY CONTRACTS* 183, 198-201 (Bernard Hanotiau & Eric A. Schwartz eds., 2010) [hereinafter Strong, *Tea Leaves*].

⁴¹ *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, 1059-72 (2009) [hereinafter Strong, *Sounds of Silence*].

⁴² *See id.*

⁴³ *See* 9 U.S.C. §§ 1-307 (2012).

⁴⁴ This is due to expansive readings of what constitutes “commerce” under the FAA. *See* 9 U.S.C. §§ 1-2 (2012); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

⁴⁵ *See* Christopher R. Drahozal, *State Law and International Arbitration*, 2012 *J. DISP. RESOL.* __ (forthcoming 2012).

⁴⁶ *See* Commercial Arbitration Act, R.S.C. 1985, c. 17 (2d Supp.), am. R.S.C. 1985, ch. 1 (4th Supp.) (Can.), §§ 8-10; J. BRIAN CASEY & JANET MILLS, *ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE* 21, 30 (2005).

(UNCITRAL) Model Arbitration Law.⁴⁷ However, the Canadian emphasis on provincial legislation and the limitation on federal jurisdiction results in the CAA's playing a relatively limited role in arbitration in Canada.⁴⁸

A second issue to consider involves how each state treats multiparty arbitration, even outside the class context. The United States has varied its approach somewhat over the years, first taking an expansive view of the power of the court to order multiparty arbitration, then pulling back from that position, only to have a number of individual state legislatures subsequently adopt laws that increased the ability of judges to order multiparty proceedings.⁴⁹ However, the debate in both the class and traditional multiparty realm was transformed in 2003 as a result of the U.S. Supreme Court decision in *Green Tree Financial Corporation v. Bazzle*.⁵⁰ That case, which has commonly been understood as giving the arbitral tribunal the power to decide whether class or multiparty proceedings are proper, made the issue of multiparty arbitration largely, if not entirely, a question of contract construction.⁵¹

Canada takes a somewhat more conservative approach, restricting the ability of courts and arbitrators to consolidate arbitral proceedings absent the agreement of all parties or the statutory power to do so over the objection of a party.⁵² However, at least one Canadian commentator takes the view that a party who

⁴⁷ See UNCITRAL Model Law on International Commercial Arbitration, arts. 34-36, U.N. Commission on International Trade Law, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, arts. 34-36, UNCITRAL, 39th Sess., Annex, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter UNCITRAL Model Law]. Quebec combines its domestic and international arbitration in a single statute in the Code of Civil Procedure (CCP), with certain additional matters embodied in the Quebec Civil Code (CCQ). See BABAK BARIN ET AL., THE OSLER GUIDE TO COMMERCIAL ARBITRATION IN CANADA 20-21 (2006).

⁴⁸ See BARIN ET AL., *supra* note 47, at 17.

⁴⁹ See Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 312-13 (2004) [hereinafter Buckner, *Toward*].

⁵⁰ 539 U.S. 444 (2003) (plurality opinion).

⁵¹ See *id.*, at 444, 451-52; see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770-76 (2010) (casting doubt on *Bazzle*).

⁵² See CASEY & MILLS, *supra* note 46, at 96-97, 269-70.

has agreed to an arbitral rule set that allows multiparty proceedings based on the application of only one party may be deemed to have consented to such proceedings.⁵³

III. Class Arbitration

The elements introduced in the preceding sections will be revisited later in the Article, but it is now necessary to describe class arbitration, a mechanism that has most often been used in the context of domestic disputes in the United States. However, the device has also been used in international matters⁵⁴ and may be an optimal means of overcoming some of the more intransigent problems commonly associated with cross-border class actions.⁵⁵

A. Class Arbitration Defined

Class arbitration—alternatively known as “class action arbitration” or “classwide arbitration”—has been characterized as a “‘uniquely American’ device,”⁵⁶ and it is certainly true that the procedure, as currently practiced and envisaged, explicitly imports elements of U.S.-style class actions into the arbitral context, resolving anywhere from dozens to hundreds of thousands of individual claims in a single representative proceeding.⁵⁷ Although class arbitration currently reflects a strong bias toward U.S. conceptions of collective justice,⁵⁸ other jurisdictions have

⁵³ See BARIN ET AL., *supra* note 47, at 95-96.

⁵⁴ At least three types of international class arbitration exist. See Strong, *Sounds of Silence*, *supra* note 41, at 1021. Collective forms of international investment arbitration have also been seen in the context of International Centre for the Settlement of Investment Dispute (ICSID) arbitration. See *Abaclat Award*, *supra* note 4, at 483-85.

⁵⁵ See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 32-41 (2009). The concept of international class arbitration may be particularly useful for those considering the possibility of class arbitration involving parties from both Canada and the United States since the device is most likely to be successful when the parties come from states that share similar views on the availability and form of class relief. 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, 24 (2008) [hereinafter Strong, *Due Process*].

⁵⁶ *The President and Fellows of Harvard College Against JSC Surgutneftegaz*, 770 PLI/LIT.127, 155 (2008).

⁵⁷ For a detailed description of procedures in class arbitration, see BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 257-79 (2005).

⁵⁸ See S.I. Strong, *From Class to Collective: The De-Americanization of Class*

begun to develop related forms of class or collective relief, based on their own domestic procedures regarding the provision of mass relief for large-scale legal injuries.⁵⁹

Class arbitration has been commonly used in consumer, employment and healthcare disputes,⁶⁰ but the device is not limited to those fields. Instead, class arbitration mirrors the diversity of judicial class actions and can involve a wide range of subject matters ranging from insurance and financial disputes to maritime and antitrust claims.⁶¹ The one notable difference is that class arbitration has not yet been used 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 legal injury arises.⁶² Although it is theoretically conceivable that such parties could be joined through a *compromis* or through existing principles of law regarding non-signatories, the practical problems with such an approach would be immense, and all known class arbitrations to date have involved situations where every potential party to the proceeding has a signed arbitration agreement covering the dispute.⁶³

Arbitration, 26 ARB. INT'L 493, 494 (2010).

⁵⁹ See *supra* note 4 and accompanying text.

⁶⁰ See Brief of Am. Arbitration Ass'n as Amicus Curiae in Support of Neither Party at 22-24, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198) [hereinafter AAA Brief].

⁶¹ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764-65 (2010); Buckner, *Toward*, *supra* note 49, at 301; Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 250-55 (2006).

⁶² However, there is room for development in this regard. 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, *Lessons from Abaclat*].

⁶³ See S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* *Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEG. L. REV. ___ (forthcoming 2012) [hereinafter Strong, *First Principles*]. However, it has not been impossible to obtain large-scale post-dispute agreements in the context of ICSID arbitration, as has been seen by the recent *Abaclat* decision on jurisdiction. See *Abaclat Award*, *supra* note 4, ¶¶ 501-02; Strong, *Lessons from Abaclat*, *supra* note 62. However, that procedure was assisted by the fact that treaty-based arbitration is considered to constitute an offer of arbitration that is subsequently accepted by the individual investors. See *Abaclat Award*, *supra* note 4, ¶¶ 467-92 (discussing consent to collective

B. *The Development of Class Arbitration*

Class arbitration developed in the United States as a result of a unique confluence of facts: a strong public policy in favor of class relief; a robust view of arbitration as a legitimate means of resolving disputes; and an overarching need to maintain a consistent response to mass legal injuries, regardless of the forum chosen for hearing those claims.⁶⁴ It has been suggested that these elements must be in place before class or collective arbitration can develop in other jurisdictions.⁶⁵

However, class arbitration also owes its existence to the U.S. corporate community's opposition to judicial class actions⁶⁶ and the belief, prevalent in the late 1980s and 1990s, that arbitration would eliminate the possibility of class suits by forcing claimants to resolve their claims individually.⁶⁷ However, corporate defendants were in for something of a surprise. When class claims were asserted in cases involving arbitration agreements, as they inevitably were, the disputes were not automatically sent to bilateral arbitration. Instead, judges viewed the situation as

procedures). However, the dissent in that case had significant issues with the way in which the majority interpreted the treaties. See *Abaclat* Dissent, *supra* note 4, ¶¶ 120-273; Strong, *Lessons from Abaclat*, *supra* note 62.

⁶⁴ See Strong, *Tea Leaves*, *supra* note 40, at 197-205.

⁶⁵ See, e.g., *Abaclat* Award, *supra* note 4; Strong, *Tea Leaves*, *supra* note 40, at 1. There may be good reason for preferring class arbitrations to class actions, but more analysis is needed on this point. Some initial thoughts can be found in AAA Brief, *supra* note 60, at 24 (regarding relative speed of class litigation and arbitration); Dana H. Freyer & Gregory A. Litt, *Desirability of International Class Arbitration*, in *CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 171 (Arthur W. Rovine ed., 2008); Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 *AM. REV. INT'L ARB.* 199, 210-12 (2004); Strong, *Lessons from Abaclat*, *supra* note 62; S.I. Strong, *Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration*, 23 *HAGUE Y.B. INT'L L.* 2010, 113 (2011) [hereinafter Strong, *PCA*].

⁶⁶ Class actions were and are commonly seen by the business community as risky, expensive and frivolous, despite empirical evidence suggesting that most class litigation is not without merit. See Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 *GA. L. REV.* 63, 85 (2008).

⁶⁷ 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/COMM.* 561, 590 (1989); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action?*, 8 *DISP. RESOL. MAG.* 13, 13 (2002).

presenting several different possibilities.⁶⁸ On the one hand, a court faced with this dilemma might give precedence to one form of dispute resolution over another (either arbitration over class actions or class actions over arbitration).⁶⁹ On the other hand, a court might find a way to harmonize the two processes in some way on, the ground that they were not mutually inconsistent.⁷⁰ As time went, an increasing number of judges chose to adopt the latter of the two alternatives, resulting in the creation of an entirely new form of dispute resolution: class arbitration.⁷¹

Although the mechanism originally developed as a common law, judge-made device,⁷² it is unclear whether this older model is still in use⁷³ following the U.S. Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.⁷⁴ Not only did that decision give implicit approval to the device, it led several U.S.-based arbitral institutions to promulgate specialized rules on class arbitration.⁷⁵ The two rule sets currently in use—the American Arbitration Association's Supplementary Rules for Class Arbitration (AAA Supplementary Rules)⁷⁶ and the JAMS Class Action Procedures⁷⁷—are very similar to one another, which is

⁶⁸ See, e.g., *Keating v. Superior Court*, 645 P.2d 1192, 1206-10 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁶⁹ See *id.*

⁷⁰ See *id.*; see also *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866-67 (Pa. Super. Ct. 1991).

⁷¹ See *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 785-86 (Cal. Ct. App. 1998); *Dickler*, 596 A.2d at 867.

⁷² See *Blue Cross of Cal.*, 78 Cal. Rptr. 2d at 785-86; *Dickler*, 596 A.2d at 867; *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) [hereinafter Buckner, *Due Process*].

⁷³ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (discussing only procedures under AAA Supplementary Rules); Buckner, *Toward, supra* note 49, at 301 (claiming the hybrid model has been “swept away”).

⁷⁴ *Green Tree Fin. Corp.*, 539 U.S. at 444.

⁷⁵ See Supplementary Rules for Class Arbitration, AM. ARB. ASS'N. (Oct. 8, 2003), [hereinafter AAA Supplementary Rules], available at www.adr.org/ (select the “Rules & Procedures” hyperlink; then select the “Rules” hyperlink); JAMS Class Action Procedures, effective May 1, 2009, available at <http://www.jamsadr.com/rules-class-action-procedures/>.

⁷⁶ See AAA Supplementary Rules, *supra* note 75

⁷⁷ See JAMS Class Action Procedures, *supra* note 75.

unsurprising given that both were intentionally modeled on Rule 23 of the Federal Rules of Civil Procedure so as to allow courts and arbitrators to rely on existing case law when construing the provisions of the new arbitral rules.⁷⁸ Since 2003, over 300 class arbitrations have been filed with one arbitral institution alone,⁷⁹ a figure that is roughly similar to the number of international investment arbitrations filed with the International Centre for the Settlement of Investment Disputes (ICSID) in the last forty years.⁸⁰

Despite class arbitration's lengthy presence on the U.S. legal stage, "[n]o statute, state or federal, prescribes the rules or procedures for class arbitrations to ensure that the process is uniform, fair, or efficient. Moreover, whether any level of court involvement is required—or even permissible—is an open question."⁸¹ The issue of judicial involvement has become particularly contentious in the wake of the U.S. Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁸² as further discussed below.⁸³

Some commentators believe that class arbitration suffered a fatal blow as a result of *Stolt-Nielsen* and another recent Supreme Court decision, *AT&T Mobility LLC v. Concepcion*.⁸⁴ However,

⁷⁸ See Meredith W. Nissen, *Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept*, 11 DISP. RESOL. MAG. 19 (2005).

⁷⁹ See Class Arbitration Case Docket, AM. ARB. ASS'N, available at www.adr.org/ (under the "services" heading" select the "Class Arbitration Case Docket" hyperlink) (last visited Mar. 22, 2012).

⁸⁰ See ICSID Cases, available at icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (listing 140 cases as currently pending and 229 as concluded).

⁸¹ Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1723 (2006).

⁸² *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1759 (2010).

⁸³ See *infra* notes 194-222 and accompanying text.

⁸⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *AT&T* struck a California law making certain types of class waivers unconscionable. See *id.* at 1753; Sarah Cole, *Stolt-Nielsen v. AnimalFeeds—Major Victory for Business*, ADR PROF BLOG (Apr. 27, 2010), www.indisputably.org/?p=1268; Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011 [hereinafter *Gutting Class Action*], available at www.nytimes.com/2011/05/13/opinion/13fri1.html; Jean Sternlight, *Sternlight on Stolt-Nielsen v. AnimalFeeds*, ADR PROF BLOG (Apr. 29, 2010), www.indisputably.org/?p=1287.

the opinions are perhaps better viewed as opening the door to a great deal of ancillary litigation as parties attempt to define the outer bounds of the procedure.⁸⁵ Indeed, numerous cases that have arisen in the wake of the two decisions have already suggested that the effect of these two precedents will be relatively limited.⁸⁶ Furthermore, a large-scale arbitral action brought by AT&T customers against AT&T subsequent to the Supreme Court decision in *AT&T* suggests that plaintiffs' counsel will find new ways of asserting the power of collective redress.⁸⁷

It is also possible that *Stolt-Nielsen* and *AT&T* will inspire Congress to exclude certain types of class claims from arbitration.⁸⁸ However, this will not eliminate class arbitration in the United States because class claims can arise in contexts that will not be covered by the proposed legislation.⁸⁹

Class arbitration has not yet been formally adopted in Canada, although Canadian authorities have contemplated the procedure at

⁸⁵ See Philip J. Loree Jr., *Stolt-Nielsen Delivers a New FAA Rule—And Then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LIT. 121, 121-25 (June 2010); S.I. Strong, *Opening More Doors Than It Closes: Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 2010 LLOYD'S MARIT. & COMM. L. Q. 565, 566-68 [hereinafter Strong, *Doors*].

⁸⁶ See *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 125-27 (2d Cir. 2011); *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 194, 199 (2d Cir. 2011).

⁸⁷ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); Martha Neil, *After Supreme Court Win Forcing Customers to Arbitrate, AT&T Now Sues to Stop the Arbitration*, ABA J. ONLINE (Aug. 17, 2011), www.abajournal.com/news/article/after_supreme_court_win_requiring_customers_to_arbitrate_att_now_tries/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email [hereinafter Neil]. Ultimately the U.S. Department of Justice stepped in to address the proposed merger, giving AT&T some practical relief from the arbitrations but leaving the question open as to whether a respondent can seek judicial relief from multiple arbitrations after having included a class arbitration waiver in its contracts. See Juliana Gruenwald, *Justice Department Gives AT&T Merger Plan Zero Bars*, NAT'L J. (Sept. 1, 2011), <http://www.nationaljournal.com/tech/justice-department-gives-at-t-merger-plan-zero-bars-20110831>; see also *Abaclat Award*, *supra* note 4, ¶ 537 (stating that "not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations").

⁸⁸ See Arbitration Fairness Act, S. 987.IS, 112th Cong. (2011); Arbitration Fairness Act, H.R. 1873.IH, 112th Cong. (2011) (regarding consumer and employment claims).

⁸⁹ See Arbitration Fairness Act, S. 987.IS, 112th Cong. (2011); Arbitration Fairness Act, H.R. 1873.IH, 112th Cong. (2011) (regarding consumer and employment claims); Strong, *Sounds of Silence*, *supra* note 41, at 1018-19.

both the legislative and judicial levels.⁹⁰ However, a recent decision of the Supreme Court of Canada—*Seidel v. Telus Communications, Inc.*,⁹¹ further discussed below—may be seen as having a chilling effect on the further development of the device, at least as a matter of the common law. This is not to say that courts in Canada are foreclosed from considering use of the device, particularly since the localized nature of Canadian class action and arbitration statutes means that precedent—even from the Supreme Court—may not be followed elsewhere in the nation.⁹² However, the court in *Seidel* was asked to construe legislation from British Columbia, which is one of the provinces that has traditionally been most receptive to the concept of class arbitration, which bodes ill for judicial development of the device.⁹³

Of course, it is always possible that class arbitration in Canada will develop through legislative means. In fact, Manitoba has already considered that possibility, and at least one judge has called for other provincial legislatures to consider the matter.⁹⁴ Alternatively, parties could expressly consent to class arbitration, an approach that has not yet been tried in Canada.⁹⁵ In this, Canada might follow the lead of Germany, which developed a new form of collective arbitration following a judgment by the German Federal Court of Justice in 2009 declaring shareholder disputes arbitrable.⁹⁶ Later that year, the German Arbitration Institute (DIS) promulgated a specialized set of arbitral procedures to

⁹⁰ See Man. Law Reform Comm'n, Report 115, *Mandatory Arbitration Clauses and Consumer Class Proceedings* 3-4, 22-23 (Apr. 2008); Leon et al., *supra* note 2, at 386-98; Geneviève Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN ST. L. REV. 1203, 1215-22 (2009).

⁹¹ *Seidel v. Telus Commc'ns Inc.*, [2011] 1 S.C.R. 531 (Can.).

⁹² See *supra* notes 24-39 and 47-53 accompanying text.

⁹³ See Leon et al., *supra* note 2, at 390-92; *infra* notes 169-178 and accompanying text.

⁹⁴ See Man. Law Reform Comm'n, *supra* note 90, at 3-4, 22-23; MacKinnon v. Nat'l Money Mart Co., 2009 BCCA 103, ¶ 14 (relating to British Columbia).

⁹⁵ There are some good reasons why parties might prefer class arbitration to class litigation. See Strong, *PCA*, *supra* note 65, 115-17; Strong, *Lessons from Abaclat*, *supra* note 62.

⁹⁶ See *S v. M*, Case No. II ZR 255/08 (German Federal Court of Justice) Apr. 6, 2009, Kriendler Digest for ITA Board of Reporters, available at www.kluwerarbitration.com.

govern disputes of this nature.⁹⁷ Canadian arbitration institutions might follow a similar course of action and develop their own set of rules to be adopted by parties by consent.⁹⁸

Interestingly, at least three of the same motivating factors that existed in the United States prior to the adoption of class arbitration currently exist in Canada: a strong public policy in favor of class relief, a robust view of arbitration as a legitimate means of resolving disputes, and a proliferation of arbitration agreements in contexts where class suits are common.⁹⁹ Canadian parties may also experience a heightened need for class arbitration because of the difficulties associated with the creation of multi-jurisdictional class actions in Canadian courts.¹⁰⁰ However, it is unclear whether Canada will take the view that there is an overarching need to maintain a consistent response to mass legal injuries, regardless of the forum chosen for hearing those claims.¹⁰¹

C. The Importance of Class Arbitration Domestically and Internationally

As the preceding discussion suggests, class arbitration stands in a very interesting position. Maligned by corporate interests and by members of the bench and bar,¹⁰² class arbitration is seldom

⁹⁷ See DIS Supplementary Rules, *supra* note 4; Strong, *DIS*, *supra* note 4, at 147.

⁹⁸ Alternatively, Canadian parties who wish to proceed in class arbitration could rely on provisions found in procedural rules promulgated by international arbitral institutions. Both the AAA Supplementary Rules and the JAMS Class Action Procedures would be suitable for use in Canada. See *infra* notes 234-246.

⁹⁹ See Strong, *Tea Leaves*, *supra* note 40, at 1; Jacob Ziegel, *Class Actions to Remedy Mass Consumer Wrongs: Repugnant Solution or Controllable Genie? The Canadian Experience*, 27 PENN ST. INT'L L. REV. 879, 890 (2008).

¹⁰⁰ See *supra* notes 11-14 and accompanying text.

¹⁰¹ See Strong, *Tea Leaves*, *supra* note 40, at 5. The recent protocols on multi-jurisdictional class actions in Canada have suggested the need to coordinate class actions proceeding in different provinces so as to avoid inconsistent or conflicting decisions. See CAN. BAR ASS'N, *supra* note 11, at 8. However, these protocols are only advisory and do not have the force of law.

¹⁰² See P. Christine Deruelle & Robert Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now*, 15 METRO. CORP. COUNS. (Aug. 2007), available at <http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf>; Smit, *supra* note 65, at 210-11.

defended as an optimal means of resolving large-scale disputes, despite the possibility that class arbitration might in fact provide parties with a better outcome or procedure.¹⁰³ However, class arbitration has a unique and potentially important role to play in both the domestic and international spheres.

Class arbitration's place in the domestic realm is already well established.¹⁰⁴ Indeed, most class arbitrations filed to date have involved domestic, rather than cross-border, disputes.¹⁰⁵ With hundreds of known class arbitrations having been filed,¹⁰⁶ class arbitration has shown itself to be entirely capable of addressing large-scale domestic disputes, either because the procedures that are now used in most class arbitrations are already familiar to the parties due to similarities to the procedural rules used in judicial class actions or because class arbitration appears to serve many of the same ends as judicial class actions.¹⁰⁷ Although the United States is by far the largest user of large-scale domestic arbitration, other jurisdictions have also considered adopting such procedures.¹⁰⁸

Although class arbitration is most likely to be seen in domestic matters, it may be particularly well-suited to address international disputes.¹⁰⁹ Large-scale cross-border disputes are one of the biggest issues facing the international legal community today,¹¹⁰ and class or collective arbitration is uniquely placed to provide parties from different states with the opportunity to resolve their claims at a single time and in a single, neutral venue, not only helping parties obtain justice more quickly and efficiently but also overcoming problems associated with obtaining jurisdiction over

¹⁰³ See Strong, *PCA*, *supra* note 65, 139-40.

¹⁰⁴ See Class Arbitration Case Docket, *supra* note 79.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-31 (2000).

¹⁰⁸ See *supra* note 3 and accompanying text.

¹⁰⁹ See *supra* notes 3, 14-15.

¹¹⁰ See European Commission, *supra* note 17; ABA, *supra* note 16, at 1-4; CAN. BAR ASS'N, *supra* note 11, at 1; IBA GUIDELINES, *supra* note 17, ¶ 3; JONATHAN HILL, CROSS-BORDER CONSUMER CONTRACTS 6-8 (2008); Adeboyejo, *supra* note 16 (concerning Canadian-U.S. cross-border protocols); Nagareda, *supra* note 55, at 20-28.

parties from a variety of states.¹¹¹ Notably, arbitration's ability to obtain jurisdiction over a geographically diverse group of individuals may also influence the development of domestic class arbitration in states (such as Canada) that face legal obstacles to multi-jurisdictional class actions.

Furthermore, arbitral awards are much easier to enforce internationally than civil judgments.¹¹² Difficulties in enforcement have been particularly acute in cases involving class relief,¹¹³ since some nations view representative actions as jurisprudentially unsound.¹¹⁴ To the extent that some nations may categorically refuse to recognize any judgment arising out of a judicial class action, arbitration may be the best or only alternative for obtaining or providing class relief from or to parties resident in those jurisdictions.¹¹⁵

IV. Class Arbitration Compared

Having laid the necessary groundwork, it is now possible to compare the way class arbitration is considered in the United States and Canada. Given the known differences in how the two countries contemplate the device, a comprehensive comparison of every aspect of the mechanism is inappropriate. Nevertheless, it can be useful to discuss three specific issues that are particularly amenable to comparative analysis: the circumstances in which

¹¹¹ See Nagareda, *supra* note 55, at 32-41; Strong, *PCA*, *supra* note 65.

¹¹² See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7-10, 19 (2009).

¹¹³ See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975); John C.L. Dixon, *The Res Judicata Effect in England of a U.S. Class Action Settlement*, 46 INT'L & COMP. L.Q. 134, 136, 140 (1997); Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 19, 25-26 (2002). The IBA has issued guidelines to assist in the recognition of judgments arising out of cross-border collective actions, but these procedures are only advisory. See IBA GUIDELINES, *supra* note 17.

¹¹⁴ This bias is based on the view that the right to pursue and defend against a legal claim is individual in nature. See Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 310-11 (2007); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 233 (1992); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 344-50, 385-86 (2003).

¹¹⁵ Although public policy could be used as a means of blocking enforcement of a class award, there are restrictions on the type of public policy that may be relied upon. See Strong, *Due Process*, *supra* note 55, at 75-93.

class arbitration is available; the procedures that must or may be used; and the proper description of the nature of the right to proceed as a class. This analysis will not only help those parties or institutions (in Canada or elsewhere) who wish to develop their own forms of class or collective arbitration, it will also help give those in the United States a new perspective on particularly intransigent problems. Each issue is considered separately below.

A. When Is Class Arbitration Available?

1. United States

The first issue to address involves the circumstances in which class arbitration is available. In the United States, parties must first demonstrate existence of an arbitration agreement between the parties, created either before or after the dispute arose.¹¹⁶ There can be either one agreement binding all the parties or a series of bilateral agreements between each of the claimants and the respondent.¹¹⁷ In the latter case, the documents must each include “an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.”¹¹⁸

Once it is established that the parties agreed to arbitrate their dispute, it is necessary to consider the procedure that will be used to resolve the matter. Here, there are several possible alternatives. For example, the agreement(s) in question will either (1) include language expressly contemplating the possibility of class or multiparty treatment or (2) be silent or ambiguous on that point.¹¹⁹ If the agreement contains an express provision allowing class arbitration, that language will be given effect.¹²⁰ If the agreement contains an express prohibition of class arbitration (i.e., a waiver of class treatment), then it is necessary to consider whether the waiver is effective.¹²¹ This issue was recently considered by the

¹¹⁶ See Strong, *First Principles*, *supra* note 63, at 4 n. 9.

¹¹⁷ See *id.* at 23-24.

¹¹⁸ AAA Supplementary Rules, *supra* note 75, rule 4(a)(6).

¹¹⁹ See HANOTIAU, *supra* note 57, at 104-05.

¹²⁰ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (Breyer, J.).

¹²¹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*.¹²²

AT&T considered whether a state law indicating that certain types of class waivers would be struck as unconscionable was consistent with the FAA.¹²³ A strongly divided Court (5-4) upheld the waiver, based on the finding that the state law acted as a hindrance to arbitration, contrary to the pro-arbitration policy embodied in the FAA.¹²⁴ In so doing, the majority appeared to operate on the assumption that class arbitration was in some way fundamentally different from bilateral arbitration, a conclusion that was challenged by the four dissenting justices.¹²⁵

Although *AT&T* has been heralded as marking the end of both class arbitration and class actions in the United States (since it is believed that the vast majority of corporate defendants will now use arbitration agreements in conjunction with class waivers to eviscerate class suits in both court and arbitration),¹²⁶ that conclusion appears to be somewhat precipitous. First, litigation will likely arise as parties challenge specific language in various waivers. Second, *AT&T* only addressed matters arising under state law.¹²⁷ Not only have federal courts already indicated a willingness to strike waivers on other grounds, including public policy,¹²⁸ but state courts may also find ways of evading *AT&T*, as has occurred in other contexts.¹²⁹

Another alternative is that the arbitration agreement is silent or ambiguous as to the possibility of class treatment, a situation that

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1753.

¹²⁵ *Id.* at 1758 (Breyer, J., dissenting). This issue is discussed in detail in Strong, *First Principles*, *supra* note 63.

¹²⁶ See *Gutting Class Action*, *supra* note 84. Indeed, AT&T has already raised this argument in the context of a large-scale effort to mount multiple arbitrations following the Supreme Court decision in early 2011. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); Neil, *supra* note 87.

¹²⁷ *AT&T*, 131 S. Ct. 1740.

¹²⁸ See *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 125-27 (2d Cir. 2011); see also *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 194, 199 (2d Cir. 2011).

¹²⁹ See *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 (Tex. 2011) (allowing heightened review of an award under the Texas Arbitration Act despite the decision in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)), *cert. denied*, 132 S. Ct. 455 (2011).

is relatively common.¹³⁰ This issue was considered by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*¹³¹ Although the decision leaves a great many questions unanswered,¹³² it does clearly state that the issue of whether class arbitration is proper must be determined by reference to the parties' intent, even in cases of contractual silence or ambiguity.¹³³ The logical question, of course, is how the necessary intent is to be demonstrated if the agreement is silent or ambiguous.

Some commentators have suggested that *Stolt-Nielsen* requires parties to show express consent to class arbitration.¹³⁴ This conclusion appears to be based on language in the majority opinion indicating that "we see the question as being whether the parties *agreed to authorize* class arbitration" and 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."¹³⁵

However, the quoted language does not go as far as these commentators suggest. Instead, these 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 never been the case in any type of multiparty arbitration.¹³⁶

Instead, *Stolt-Nielsen* is better read as holding that consent to class procedures can be demonstrated implicitly.¹³⁷ Support for this proposition can be found in language indicating that when the parties have not "reached any agreement on the issue of class arbitration, the arbitrators' proper task [is] to identify the rule of

¹³⁰ Silence or ambiguity can arise either because the parties have failed to address the matter or because a waiver of class proceedings has been struck and severed by a court or arbitral tribunal.

¹³¹ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764 (2010).

¹³² See Loree, *supra* note 85; Strong, *Doors*, *supra* note 85, at 566-68.

¹³³ See *Stolt-Nielsen*, 130 S. Ct. at 1776.

¹³⁴ See Cole, *supra* note 84; see also Sternlight, *supra* note 84.

¹³⁵ *Stolt-Nielsen*, 130 S. Ct. at 1775.

¹³⁶ See Strong, *Sounds of Silence*, *supra* note 41, at 1059-83.

¹³⁷ See Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67, 68-70 (2002); see also Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent"*, 24 ARB. INT'L 199, 243-45 (2008).

law that governs in that situation.”¹³⁸ This statement obviously negates the proposition that the parties must expressly consent to class arbitration, since there would be no need to identify the applicable rule of law to determine that issue if consent had to be express. Therefore, class arbitration continues to be available in the United States even in cases involving implicit consent.

The problem is that the Supreme Court failed to give any clear guidance on what must be shown in the way of implicit consent, instead explicitly (and inexplicably) stating that it had “no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”¹³⁹ However, the majority did suggest that in this instance recourse might properly have been had “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.”¹⁴⁰

Stolt-Nielsen therefore suggests that the question of what procedure should be used in a putative class arbitration is a matter of contract interpretation that remains subject to the same kind of analysis that had previously been used in cases involving class and other types of multiparty arbitration.¹⁴¹ This process involves consideration of the language contained in the agreement between the parties as well as the governing law and arbitral rules so as to determine whether the parties have demonstrated the requisite consent to multiparty or class proceedings.¹⁴² In undertaking this analysis, arbitrators typically rely on three 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 *contra proferentem* (C). However, the principles of strict interpretation (D) and of interpretation *in favorem validitatis* (E) should

¹³⁸ *Stolt-Nielsen*, 130 S. Ct. at 1768.

¹³⁹ *Id.* at 1776 n.10.

¹⁴⁰ *Id.* at 1768.

¹⁴¹ See Strong, *First Principles*, *supra* note 63.

¹⁴² See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 16-18 (2003); Strong, *Sounds of Silence*, *supra* note 41, at 1059-83.

not . . . apply.¹⁴³

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.¹⁴⁴ In both cases, the principle of effective interpretation is used to give effect to the parties' clear desire to arbitrate their disputes, even if the precise procedures to be used are inelegantly or insufficiently described in the agreement to arbitrate.¹⁴⁵ This approach is said to be preferable to strict contractual interpretation, which is "based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements."¹⁴⁶ This view is not consistent with the notion that arbitration is a reputable means of resolving a wide variety of disputes.¹⁴⁷

2. *Canada*

Canada takes a very different stance than the United States does when it comes to the availability of class arbitration.¹⁴⁸ No Canadian court has yet ordered class arbitration,¹⁴⁹ nor has an arbitral tribunal sitting in Canada done so on its own authority.¹⁵⁰

¹⁴³ EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 476 (1998) (citation omitted) [hereinafter FOUCHARD, GAILLARD, GOLDMAN]; see also Strong, *Sounds of Silence*, *supra* note 41, at 1055-83.

¹⁴⁴ See Benjamin G. Davis, *Pathological Clauses: Frédéric Eisemann's Still Vital Criteria*, 7 *ARB. INT'L* 365, 365-66 (1991).

¹⁴⁵ See Strong, *First Principles*, *supra* note 63, at 59-62 (describing the treatment of procedural formalities in *AT&T* and *Stolt-Nielsen*).

¹⁴⁶ FOUCHARD, GAILLARD, GOLDMAN, *supra* note 143, ¶ 480.

¹⁴⁷ *Id.*

¹⁴⁸ See Strong, *First Principles*, *supra* note 63, at 59-62; see also CASEY & MILLS, *supra* note 46, at 97, 269-70.

¹⁴⁹ Though the Supreme Court of Canada comes close in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, para. 87 (Can.), the Court did not "explicitly endorse" class arbitration. Jan-Kyzysztof Dunin-Wasowicz, *Collective Redress in International Arbitration: An American Idea, a European Concept?*, 22 *AM. REV. INT'L ARB.* 285, 290 (2011); see also *infra* notes 165-68 and accompanying text.

¹⁵⁰ See Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses:*

However, the stage may be set for just such a development, at least in some provinces.¹⁵¹

This conclusion is based on similarities between certain decisions recently rendered by Canadian courts and the United States Supreme Court's seminal decision in *Green Tree Financial Corp. v. Bazzle*.¹⁵² *Bazzle* is commonly understood to stand for the proposition that arbitrators, rather than the court, are typically to decide the issue of whether an arbitration agreement permits class treatment.¹⁵³ This approach facilitated the development of class arbitration by eliminating what has been called the "lack of power" argument.¹⁵⁴

The "lack of power" debate dates back to the years prior to *Bazzle*, when judges were the only ones who could decide whether class treatment was appropriate.¹⁵⁵ However, opponents to class arbitration claimed that courts lacked the power "to certify an individual plaintiff as a class representative for other parties whose claims [were] subject to arbitration, lack[ed] express authority to consolidate arbitration proceedings, and lack[ed] authority to apply Federal Rule of Civil Procedure 23 in class arbitration."¹⁵⁶ Part of the strength of this argument lay in the fact that the FAA and many state statutes either were silent on the issue of court-ordered consolidation or indicated that consolidation of arbitrations was only possible with the unanimous consent of the parties.¹⁵⁷

Notably, similar issues could arise in Canadian jurisdictions where the applicable arbitration statute limits the power of the court to order multiparty proceedings over the objection of one or

Denying Access to Justice?, 51 MCGILL L.J. 693, 703-719 (2006).

¹⁵¹ The Supreme Court decision in *Seidel* has limited the likelihood that such developments will take place in British Columbia. See *Seidel v. Telus Commc'ns Inc.*, [2011] 1 S.C.R. 531, paras. 33-42 (Can.) (concluding that class action legislation barred arbitration of claims arising under the statute).

¹⁵² See 539 U.S. 444 (2003) (plurality opinion).

¹⁵³ See *id.* at 451-53 (Breyer, J.). The U.S. Supreme Court recently cast doubt on the common understanding of *Bazzle*, but did not provide an alternate reading. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770-72 (2010).

¹⁵⁴ See Buckner, *Toward*, *supra* note 49, at 312.

¹⁵⁵ See *id.* at 227-31; see also Strong, *Sounds of Silence*, *supra* note 41, at 1026-29.

¹⁵⁶ Buckner, *supra* note 49, at 312.

¹⁵⁷ See 9 U.S.C. §§ 1-307 (2012); Buckner, *supra* note 49, at 312-13.

more of the parties.¹⁵⁸ Indeed, some people believe that, as a matter of Canadian law, “[t]here is no power in an arbitrator, absent an agreement of all parties, to order a consolidation of arbitration.”¹⁵⁹ However, at least one Canadian commentator has taken the position that parties who agree to arbitral rules that allow the arbitral tribunal to order multiparty proceedings based on the application of only one party may be deemed to have agreed to multiparty arbitration, which suggests some opportunity for the development of class proceedings.¹⁶⁰ Furthermore, restrictions on consolidated arbitrations may not be applicable to class arbitration because the two procedures are not entirely analogous.¹⁶¹

The significance of *Bazzle* lies in the way it places the concept of *competence-competence* (*Kompetenz-Kompetenz*) into the realm of class arbitration.¹⁶² Interestingly, the Canadian Supreme Court may have enunciated its own version of this principle in *Dell Computer Corp. v. Union des consommateurs*,¹⁶³ which involved a consumer dispute that was initially brought as a judicial class action.¹⁶⁴ In deciding whether to stay the court proceedings in favor of arbitration, Justice Deschamps, writing for the majority, stated:

First of all, I would lay down a general rule *that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator*. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator’s jurisdiction is based

¹⁵⁸ For example, British Columbia’s International Commercial Arbitration Act requires parties “to have agreed on consolidation in their arbitration agreements.” BARIN ET AL., *supra* note 47, at 94; *see* British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, s. 27(2).

¹⁵⁹ CASEY & MILLS, *supra* note 46, at 97, 269-70.

¹⁶⁰ BARIN ET AL., *supra* note 47, at 95-96.

¹⁶¹ *See infra* notes 187-89 and accompanying text.

¹⁶² *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion).

¹⁶³ 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.).

¹⁶⁴ *See id.* para. 87. In its decision, the Supreme Court noted that the principle of *competence-competence* is reflected in the Model Arbitration Law, suggesting that provincial courts might come to a similar conclusion under their own statutes, given the influence of the Model Arbitration Law throughout the nation. *See id.* para. 74; *supra* note 47 and accompanying text.

solely on a question of law. . . .

. . . If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.¹⁶⁵

This language suggests a good deal of confidence in the abilities of the arbitral tribunal and might be used to support the view that arbitral tribunals are competent to make decisions about class arbitration in Canada. This is particularly true to the extent that the question of the propriety of class arbitration in Canada can be framed as a contractual issue focusing on the question of intent and involving a mixed question of fact and law.¹⁶⁶ Furthermore, this approach is consistent with basic principles of arbitration law recognizing that arbitrators are competent to determine their own jurisdiction¹⁶⁷ and have wide discretion to shape arbitral proceedings, subject only to the expressed and permissible wishes of the parties.¹⁶⁸

Justice Deschamps reiterated this point along with Justice LeBel when dissenting in *Seidel*, a case that saw the Supreme Court strongly divided in 5-4 split.¹⁶⁹ However, *Seidel* was

¹⁶⁵ *Dell*, 2007 SCC 34, [2007] 2 S.C.R. 801, paras. 84-85 (emphasis added).

¹⁶⁶ Certainly in the United States “[t]he job of interpreting the parties’ intent . . . implicates mixed questions of fact and law, as well as evaluation of industry custom and practice, [and] has always been entrusted to the arbitrators.” William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 163 n.113 (2007). This appears to be the case in several Canadian provinces as well. See *British Columbia v. Gibson Pass Resort, Inc.*, 2009 BCSC 96, paras. 1-15 (considering several provincial decisions).

¹⁶⁷ See Bernard Hanotiau, *Groups of Companies in International Arbitration*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 279, 292 (Loukas A. Mistelis et al. eds., 2006).

¹⁶⁸ See *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2004 ABQB 918, para. 36 (Can.); see also FOUCHARD, GAILLARD, GOLDMAN, *supra* note 143, para. 1238.

¹⁶⁹ See *Seidel v. Telus Commc’ns Inc.*, [2011] 1 S.C.R. 531, para. 66 (Can.) (LeBel

somewhat different from *Dell* in that one of the major issues, at least for the dissent, was whether an arbitral tribunal had the same power as a court to issue injunctive or declaratory relief.¹⁷⁰ The four dissenting justices held that tribunals did have such powers under the British Columbia consumer protection statute, while the majority held the opposite, based on a different reading of the statutory powers granted to arbitrators by the legislature.¹⁷¹ Although the dissent does not discuss class arbitration per se, the device might have been within the contemplation of the dissenting justices, who noted that:

it must be determined, as a matter of law, what rights, benefits and protections are found in s.172 [of the Business Practices and Consumer Protection Act]. . . . In answering this question of law, we are of the view that means are just a way to attain an end. The remedy is the end, and the same remedies, and perhaps others as well, can be obtained through the arbitration process as they can through the public court system. . . . What is important here is that the adjudicator has jurisdiction to make a declaration or order an injunction, which are the same remedies as are contemplated in s.172.¹⁷²

& Deschamps, JJ., dissenting).

¹⁷⁰ See *id.* para. 85.

¹⁷¹ See *id.* ¶¶ 55, 146; see also James Sullivan and Sara Knowles, *SCC Clarifies Role of Arbitration/Mediation Clauses in Class Actions*, BLAKES (Apr. 14, 2011), www.blakes.ca/english/view_printer_bulletin.asp?ID=4704.

¹⁷² *Seidel v. Telus Commc'ns Inc.*, [2011] 1 S.C.R. 531, para. 142 (LeBel & Deschamps, JJ., dissenting). The remedies in question involved the ability to make a declaration under section 172(1)(a) or an interim or permanent injunction under Section 172(1)(b) of the Business Practices and Consumer Protection Act. See *id.* para. 141. Either of these remedies would have a class-type effect, not because they would bind third parties, but because they would bind Telus. See *id.* para. 150. However, since the order would not affect the third parties' rights, it would not act to their detriment and would therefore be permissible in the dissenters' minds. See *id.* para. 150. Notably, the Supreme Court of Canada had to have been aware of the existence of class arbitration as a possible procedural device, having considered authorities that were introduced on that point. See *id.* para. 23 (Binnie, J.) (citing Frédéric Bachand, *Should No-Class Action Arbitration Clauses Be Enforced?*, in CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, *supra* note 65, at 153). Notably, although remedies provided for in Section 171 may have class effect, class remedies are also explicitly provided for in Section 172(2) of the Business Practices and Consumer Protection Act. See Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, § 172(2) (Can.).

The dissenting justices also focused on the use of the word “may” in section 172, concluding that this “makes it even clearer that the Supreme Court is not intended to be the only forum in which these remedies can be sought.”¹⁷³

Alternatively, the majority in *Seidel* focused on the fact that “[t]he policy objectives of s. 172 would not be well served by low-profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action.”¹⁷⁴ This suggests that the majority was only considering the difference between a class action in court and a bilateral arbitration. This is further demonstrated by language indicating that:

it can hardly be denied that arbitrators, who derive their jurisdiction by virtue of the parties’ contract, cannot order relief that would bind third parties, or that only superior courts have the authority to grant declarations and injunctions enforceable against the whole world. Ms. Seidel does not seek remedies applicable only between her and TELUS but between TELUS and the whole world. Provided TELUS complied with any order in relation to Ms. Seidel, it could carry on as before in relation to TELUS customers who are not parties to the arbitration and are therefore unaffected by its outcome, just as a successful defence by TELUS against Ms. Seidel’s complaint would not create in its favour a precedent in future arbitrations raising the same or similar complaints.¹⁷⁵

Interestingly, the Supreme Court of Canada in *Seidel* demonstrated the same definitional split that the U.S. Supreme

¹⁷³ *Seidel*, [2011] 1 S.C.R. 531, para. 154 (LeBel & Deschamps, JJ., dissenting); see also Sultana L. Bennett, *Supreme Court of Canada Allows the Pursuit of a Class Action Despite a Contractual Mandatory Arbitration Clause*, STIKEMAN ELLIOTT (Apr. 20, 2011), www.stikeman.com (select “English” hyperlink; then select “publications” hyperlink; and select page two).

¹⁷⁴ *Seidel*, [2011] 1 S.C.R. 531, para. 37 (Binnie, J.).

¹⁷⁵ *Id.* para. 39; see also *supra* text accompanying note 172 (discussing the dissenting justices’ views about the scope of the arbitrators’ powers vis-à-vis third parties).

Court did in *AT&T*, namely whether class arbitration constitutes a form of arbitration that should be given equal consideration as bilateral arbitration.¹⁷⁶ While the two countries engage in this debate in slightly different ways, the underlying concerns are similar. Thus, both countries would likely benefit from a more transparent discussion about the nature of arbitration and the extent to which class arbitration falls within previously established norms.¹⁷⁷

Although the decisions in *Dell* and *Seidel* are important, their precedential value may be limited as a result of factors relating to Canadian federalism.¹⁷⁸ Therefore, it is important to consider decisions from provincial courts when considering the circumstances in which class arbitration might arise elsewhere in the nation.

One interesting decision is *Kanitz v. Rogers Cable Inc.*,¹⁷⁹ which was heard by the Ontario Superior Court of Justice. Like other disputes in this area of law, the case involved a class claim arising in the face of an arbitration agreement.¹⁸⁰ When considering what procedures might be proper, the court stated that:

[w]ithout deciding the point, it would appear that s. 20(1) [of the Ontario Arbitration Act] would permit *an arbitrator*, at the very least, to consolidate a number of arbitrations which raise the same issue. Therefore, it appears at least arguable that if each of the five named representative plaintiffs here chose to seek arbitrations of their claims, *an arbitrator* might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the plaintiffs that the arbitration clause operates so as to erect an economic wall

¹⁷⁶ See *supra* notes 124-25 and accompanying text.

¹⁷⁷ The author discusses this issue at length elsewhere. See generally Strong, *First Principles*, *supra* note 63.

¹⁷⁸ For example, *Dell* is not even currently applicable in Quebec, the jurisdiction that generated the decision, due to a change in the underlying legislation during the pendency of the appeal to the Supreme Court. See Saumier, *supra* note 90, at 1209. Other limitations might arise due to differences in the relevant provincial legislation on class actions.

¹⁷⁹ [2002] 58 O.R. 3d 299, 21 B.L.R. 3d 104 (Can. Ont. Sup. Ct. J.).

¹⁸⁰ See *id.*, para. 1.

barring customers of the defendant from effectively seeking relief.¹⁸¹

This decision is intriguing in several regards. First, it (like *Dell*) suggests that the question of whether to proceed on a multiparty basis is one for the arbitrator, not the courts. Second, the judgment does not mention Section 8 of the Ontario Arbitration Act,¹⁸² which involves consolidation of arbitrations with the consent of all parties.¹⁸³ Instead, the court relied exclusively on Section 20(1), which states that “[t]he arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.”¹⁸⁴ Although the phrase “in accordance with this Act” could be read as referring the arbitral tribunal back to Section 8(4), it is at least equally likely that in invoking the provision describing the Arbitration Act’s broadest grant of discretion the court was suggesting that an arbitral tribunal could permit a class arbitration to proceed (1) even over the objection of one of the parties and (2) even without court intervention.¹⁸⁵

Furthermore, by citing Section 20(1) rather than Section 8(4), the Ontario Superior Court of Justice might be seen as suggesting that class arbitration should not be considered as entirely analogous to consolidated arbitration.¹⁸⁶ This would be consistent with the view enunciated by several U.S. commentators that the

¹⁸¹ *Id.* para. 55 (emphasis added).

¹⁸² S.O. 1991, c. 17, § 8.

¹⁸³ Section 8(4) states:

On the application of all the parties to more than one arbitration the court may order, on such terms as are just,

- (a) that the arbitrations be consolidated;
- (b) that the arbitrations be conducted simultaneously or consecutively; or
- (c) that any of the arbitrations be stayed until any of the others are completed.

Id. § 8(4).

¹⁸⁴ *Id.* § 20(1).

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*; *see also Kanitz*, [2002] 58 O.R. 3d 299, 21 B.L.R. 3d 104.

policies associated with class suits are different from those associated with consolidated proceedings and that the consequences of a decision to refuse class arbitration are different from a refusal to order consolidation.¹⁸⁷ For example, the failure to certify a class (in a class action or a class arbitration) can sound the “death knell” of a cause of action, since claimants cannot justify the financial costs associated with pursuing their claims individually, no matter how meritorious those claims may be as a matter of law or policy.¹⁸⁸ Without consolidation of multiple claims, disputes can still go forward individually, albeit with some additional expense.¹⁸⁹ Without classwide arbitration, many small claims simply cannot or will not be heard.¹⁹⁰

In many ways, *Kanitz* does not prove useful as a practical matter, since the Ontario legislature amended the Consumer Protection Act soon thereafter so as to disallow pre-dispute arbitration agreements in consumer cases.¹⁹¹ Nevertheless, the reasoning used in *Kanitz* suggests, together with *Dell*, that there is judicial support for the proposition that arbitrators may have the ability to decide their own jurisdiction, even in disputes involving class claims.¹⁹² However, *Seidel* signals some resistance to this idea, based on differing notions of arbitrator competence regarding class-type remedies and relief.¹⁹³ Nevertheless, the cases suggest that the debate about class arbitration in Canada is developing and is addressing issues that are somewhat similar to those currently

¹⁸⁷ See Sternlight, *supra* note 107, at 86; see also Strong, *Sounds of Silence*, *supra* note 41, at 1038-55.

¹⁸⁸ See Weston, *supra* note 81, at 1728-30. Indeed, that is precisely what happened in *Dell*. See Grant Hanessian & Christopher Chinn, *The U.S. Model for International Class-Action Arbitration*, 75 ARB. 400, 407 (2009).

¹⁸⁹ See Weston, *supra* note 81, at 1730.

¹⁹⁰ See *id.* at 1726-27.

¹⁹¹ See Consumer Protection Statute Law Amendment Act, S.O. 2002, c. 30 (Can. Ont.) (containing the Consumer Protection Act, 2002, § 7(2), stating that “any term or acknowledgment in a consumer agreement . . . that requires . . . that disputes . . . be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act”).

¹⁹² See *Kanitz v. Rogers Cable Inc.*, [2002] 58 O.R. 3d 299, 21 B.L.R. 3d 104 (Can. Ont. Sup. Ct. J.); see also *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.).

¹⁹³ See *Seidel v. Telus Commc’ns Inc.*, 2011 SCC 15 (Can.), [2011] 1 S.C.R. 531 (Can.).

under discussion in the United States.

B. What Procedures Must Be Used in Class Arbitration?

1. United States

The second matter to consider concerns the procedures that are to be used in class arbitration. In particular, courts in the United States must shortly decide what role, if any, judges may or should have in reviewing the procedural decisions of the arbitral tribunal. This is a question that the Supreme Court declined to address in *Stolt-Nielsen*, leaving the lower federal courts to struggle with a number of pressing issues.¹⁹⁴

The coming years will focus primarily on certain partial final awards rendered in rule-based class arbitration. These awards deal with whether class arbitration is permitted under the terms of the arbitration agreement (“Clause Construction Awards”) and whether the facts of the dispute warrant class treatment (“Class Determination” or “Class Certification Awards”).¹⁹⁵ These determinations are of the utmost importance to the parties, since they are in many ways similar to determinations regarding class certification in judicial class actions.¹⁹⁶ It has been said that class certification in court can either sound the “death knell” for class proceedings or fuel the drive toward settlement,¹⁹⁷ and the same may be true in class arbitration, since few disputes have progressed past the clause construction stage.¹⁹⁸

One matter that must be addressed is whether partial final awards arising under the AAA or JAMS class arbitration rules may or must be reviewed immediately upon being rendered.¹⁹⁹ Although the majority in *Stolt-Nielsen* refused to consider this point on the belief that the issue had been waived by the parties in

¹⁹⁴ See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010).

¹⁹⁵ See AAA Supplementary Rules, *supra* note 75, R. 3, 5; see also JAMS Class Action Procedures, *supra* note 75, R. 2-3.

¹⁹⁶ For further comparison of class action and class arbitration procedures, see Weston, *supra* note 81, at 1725-41.

¹⁹⁷ See *id.* at 1728-30.

¹⁹⁸ See AAA Brief, *supra* note 60, at 22-23 (the percentage of disputes progressing is twenty-four percent).

¹⁹⁹ See *Stolt-Nielsen*, 130 S. Ct. at 1767 n.2.

this instance, the opinion did suggest (*obiter*) that it was inclined to permit immediate review of this type of award because to do otherwise would work a hardship to the parties.²⁰⁰ This approach was strongly opposed by the dissenting justices, who read previous Supreme Court precedent as forbidding parties from contracting for this type of early judicial review.²⁰¹ The absence of a definitive ruling on this issue has already led to confusion in the lower courts.²⁰²

A second matter to consider involves the proper scope and standard of review for these sorts of partial final awards, regardless of the timing of that review. Two possibilities appear to exist. The first would involve the same deferential standard and limited scope of review that has been traditionally used in arbitration.²⁰³ Although judicial review of partial final awards would be more systematically sought in class disputes than is usually the case in other forms of arbitration and at an earlier stage of the proceedings, use of a deferential standard would be consistent with existing arbitral practice concerning these sorts of awards.²⁰⁴

The second alternative is much more troubling. In this approach, courts would review partial final awards in class arbitration using a less deferential standard, such as review for a mistake of law.²⁰⁵ Some people may claim that this is the necessary result under *Stolt-Nielsen*, given that the majority refused to return the issue of the interpretation of the arbitration agreement to the arbitral tribunal.²⁰⁶ Furthermore, the majority's refusal to say whether the concept of vacatur for manifest disregard of law survived *Hall Street*²⁰⁷ could be seen as a means of leaving the door open for a future decision allowing review of

²⁰⁰ *See id.*

²⁰¹ *See id.* at 1779 (Ginsburg, J., dissenting).

²⁰² *See Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 247-53 (2010).

²⁰³ *See BORN, supra* note 112, at 36-37.

²⁰⁴ Partial final awards have long been available in arbitration, although such awards have been rendered irregularly and have been largely discouraged. *See id.* at 2430-33.

²⁰⁵ Judicial review of the merits of an award still exists in some jurisdictions. *See id.* at 2638-39.

²⁰⁶ *See Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1782 (2010) (Ginsburg, J., dissenting).

²⁰⁷ *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 591-92 (2008).

the merits of these kinds of partial final awards.²⁰⁸

This approach would be problematic enough if the review focused only on procedural issues,²⁰⁹ but it is by no means clear that the matters that are at the heart of these partial final awards are indeed procedural only.²¹⁰ Furthermore, use of a less deferential standard of review could be seen as creating a mixed blend of arbitral and judicial competence, which is something that would appear to be contrary to the concept of arbitration as involving a neutral, non-governmental decision-maker.²¹¹ Allowing courts to review the merits of partial final awards would also increase judicial workloads, perhaps significantly, and affect other key attributes of arbitration, such as informality and privacy.²¹²

The current state of U.S. law on the scope and standard of review is unclear. Although the majority in *Stolt-Nielsen* made no reference to the fact that substantive review might now be required, Justice Ginsburg suggested in her dissent that she found the review procedure used in *Stolt-Nielsen* troubling.²¹³ However, it is safe to say that if it had been the majority's intent to depart from well-established principles of law regarding the standard and scope of review, one would have expected an explicit discussion of the benefits and detriments of such an approach as well as a detailed enunciation of the method to be used going forward.²¹⁴ In the absence of such remarks, it would appear appropriate to conclude that such a rule is not currently in place. Furthermore, the fact that the majority refused to opine on the timing of judicial review of partial final awards in class arbitration suggests that questions regarding scope and standard have also been postponed.²¹⁵

²⁰⁸ See *id.* at 1768 n.3.

²⁰⁹ See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1137 (2009).

²¹⁰ See Buckner, *Due Process*, *supra* note 72, at 243-44.

²¹¹ See FOUCHARD, GAILLARD, GOLDMAN, *supra* note 143, ¶ 661.

²¹² See Reuben, *supra* note 209, at 1136.

²¹³ *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (Ginsburg, J., dissenting).

²¹⁴ See Strong, *First Principles*, *supra* note 63, at 51-52.

²¹⁵ See *id.* at 51.

These concerns relate to the rule-based approach to class arbitration. However, the United States has at various times used a common law-based approach to class arbitration. While this procedure may no longer be in use in the United States,²¹⁶ it merits at least some brief discussion, if only to provide fodder for comparative analysis.

Unlike rule-based class arbitration, which simply invites courts to review certain partial final awards at the parties' request, common law forms of class arbitration give courts original and mandatory jurisdiction over issues such as class certification, notice and fairness approvals of the final arbitral award.²¹⁷ This shared form of jurisdiction has resulted in use of the term "hybrid model" to describe the way in which courts "remain involved in the class action-related aspects of the arbitration, to assure that due process protection of absent class members is provided,"²¹⁸ even though arbitral tribunals retain responsibility for evaluating the merits of the case.²¹⁹

The hybrid model of class arbitration gives rise to two major problems. First, this approach conflicts with the fundamental principle that matters in arbitration are to be decided by a neutral, non-governmental decision-maker.²²⁰ Although the partial final award system set forth in the specialized rules of class arbitration also involves some court participation, that mechanism is less troubling because judicial involvement occurs only at the invitation of the parties.²²¹ The hybrid model, in contrast, involves the forceful insertion of the court into the arbitral process, thereby infringing on arbitration's status as a private system of adjudication.²²²

Second, hybrid proceedings give rise to difficulties with respect to the issues that the court is determining. There is a fundamental difference between ensuring the procedural fairness of the arbitral process through a review process and substituting

²¹⁶ See Buckner, *Toward*, *supra* note 49, at 301.

²¹⁷ See *id.* at 320-23.

²¹⁸ Buckner, *Due Process*, *supra* note 72, at 226.

²¹⁹ See *id.* at 228.

²²⁰ See BORN, *supra* note 112, at 217.

²²¹ See Strong, *First Principles*, *supra* note 63, at 16-17.

²²² See *id.* at 16.

judicial decisions for arbitral decisions on matters of procedure.²²³ Furthermore, it is by no means clear that the issues given to the court in a hybrid proceeding (i.e., certification of and notice to the class as well as control over fairness approvals of the final arbitral award) are entirely procedural.²²⁴

As the above suggests, there are significant questions about the proper procedure to be used in class arbitration in the United States, even though the device has been in use for thirty years. While these issues are not fatal to the continued use and development of class arbitration in the United States, there will doubtless be significant litigation in the coming years as parties attempt to define what practices are permissible.

2. *Canada*

Canada stands in a very different position than the United States because no class arbitration has yet taken place in Canada. As such, there are no established procedures to consider. However, Canadian arbitrators may appear to be empowered to consider the possibility of class arbitration in some provinces.²²⁵ Furthermore, it may be that Canadian legislators, arbitral institutions or parties may be inclined to adopt class arbitration procedures through non-judicial means. As such, it is useful to consider what procedures might be appropriate in a Canadian class arbitration.

First, Canadians could embrace the hybrid model of class arbitration, which was how the device first developed in the United States.²²⁶ Although there could be few jurisprudential objections if this approach were adopted through legislative means, since legislatures are often free to adopt procedures that parties and courts cannot, Canadians may do well to avoid this form of class arbitration for several reasons.²²⁷

For example, “[t]he concept that the court is an effective watchdog overseeing due process under the hybrid model of class arbitration sounds nice; but it may be more a vestige of the historic

²²³ See BORN, *supra* note 112, at 1781; Reuben, *supra* note 209, at 1137.

²²⁴ See Buckner, *Due Process*, *supra* note 72, at 230.

²²⁵ See *supra* notes 160-191 and accompanying text.

²²⁶ See Buckner, *Due Process*, *supra* note 72, at 227.

²²⁷ *Id.* at 239, 234-35.

mistrust of arbitration than practical reality.”²²⁸ Furthermore, the cost and delay associated with a back-and-forth system of split competence is contrary to the common notion of arbitration as a faster and less expensive method of dispute resolution.²²⁹ Finally, the way in which this method of class arbitration involves shared jurisdiction threatens the notion of arbitration as involving a neutral decision-maker.²³⁰ Thus the hybrid model does not seem to be a promising route for Canada to take when developing its own form of class arbitration.

Second, Canadians could choose to adopt procedures resembling the rule-based model of class arbitration currently used in the United States and Germany.²³¹ This approach is much more promising than the previous alternative, since the AAA, DIS and JAMS have, each in their own way, addressed many of the salient issues relating to large-scale arbitration.²³²

For example, if Canada or one of its provinces wished to make a limited entry into the world of class or collective arbitration, it could follow the DIS model, which is restricted to one particular type of substantive dispute.²³³ Those looking to adopt a more trans-substantive approach could consider rules enacted by the AAA or JAMS, which already reflect significant similarities to Canadian class action procedures.²³⁴ Nevertheless, some amendments might be made to make the procedure more Canadian. For example, criteria regarding the availability and maintainability of class procedures could be altered to reflect Canadian standards rather than Rule 23 of the U.S. Federal Rules of Civil Procedure.²³⁵ Alternatively, some change to the partial final awards system could be made if Canadian audiences found that such a system involved an inappropriate contractual expansion

²²⁸ *Id.* at 238.

²²⁹ *See id.* at 237.

²³⁰ *See* BORN, *supra* note 112, at 217; Strong, *First Principles*, *supra* note 63, at 17.

²³¹ DIS Supplementary Rules, *supra* note 4; AAA Supplementary Rules, *supra* note 75; JAMS Class Action Procedures, *supra* note 75.

²³² *See supra* note 229.

²³³ *See* Strong, *DIS*, *supra* note 4, at 149.

²³⁴ *See generally* AAA Supplementary Rules, *supra* note 75; JAMS Class Action Procedures, *supra* note 75 (providing rules which might be considered for adoption).

²³⁵ *See supra* Part I.B (comparing class actions in the United States and Canada); *see also* FED. R. CIV. P. 23.

of judicial review of arbitral awards.²³⁶ One solution might be to defer review of these issues until the time the final award is rendered.²³⁷

There are several ways a rule-based model of class arbitration could be adopted in Canada. First, the procedures in question could be enacted by a legislative body.²³⁸ Second, an arbitral institution such as the Canadian Commercial Arbitration Centre could create its own set of specialized rules for use in Canadian disputes. Third, parties to individual disputes could agree to adopt one of the specialized sets of arbitral rules already in existence, in whole or in part.²³⁹

Interestingly, some Canadian parties may already be subject to specialized arbitral rules involving class arbitration, since both the AAA Supplementary Rules and the JAMS Class Action Procedures can be imposed as a result of the parties' having previously agreed to use any one of the other rule sets offered by either the AAA or JAMS, respectively, and both the AAA and JAMS provide services at the international level.²⁴⁰ The fact that the AAA and JAMS are not Canadian institutions should not pose any difficulties under Canadian law, since Canadian jurisprudence takes the view that arbitration is "territorially neutral" and the use of an arbitral institution that is based outside of Canada is not

²³⁶ Canada, as a Model Arbitration Law jurisdiction, may view contractually expanded review as problematic. See UNCITRAL Model Law, *supra* note 47, art. 9; Vikram Raghavan, *Heightened Judicial Review of Arbitral Awards: Perspectives From the UNCITRAL Model Law and the English Arbitration Act 1996 on Some U.S. Developments*, 15 J. INT'L ARB. 103, 121-28 (1998). *But cf.* Barry Leon & Laila Karimi, *The Canadian Position: Can Parties to an Arbitration Agreement Vary the Statutory Scope of Judicial Review of the Award?*, 14 ILSA J. INT'L & COMP. L. 451, 459 (2008) (arguing that the majority opinion in *Hall Street* found that "parties cannot expand the scope of judicial review of arbitral awards" on language of the FAA alone).

²³⁷ See ICSID Arbitration Rules, art. 41, effective Apr. 2006, available at icsid.worldbank.org/ICSID/index.jsp (select "Rules" hyperlink) (providing that the Tribunal will determine if any jurisdictional challenges will be heard as a preliminary matter or joined in the case on the merits).

²³⁸ Manitoba has already considered this option. See Man. Law Reform Comm'n, *supra* note 90, at 3-4, 22-23.

²³⁹ *Stolt-Nielsen* showed how international parties can adopt the AAA Supplementary Rules in part by special agreement post-dispute. See *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765 (2010).

²⁴⁰ AAA Supplementary Rules, *supra* note 75, R. 1(a); JAMS Class Action Procedures, *supra* note 75, R. 1(b).

legally troubling.²⁴¹ Similarly, no problems arise by virtue of the fact that Canadian, rather than U.S. parties, would be involved in the dispute, since neither of the rule sets require the parties to be of any particular nationality.²⁴²

One interesting point to consider is whether Canadian courts would take the view that class claims could only be properly heard in the judicial context even in a case where the parties could be said to have implicitly agreed to class proceedings through the adoption of the AAA or JAMS rules on class arbitration.²⁴³ *Seidel* suggests that the outcome might turn on whether the arbitral tribunal was considered to have sufficient ability to bind the entire class.²⁴⁴ However, the answer might depend on where the suit was filed, since each province or territory might decide the issue differently.

Notably, the fact that the class treatment should be considered under a particular set of rules does not mean that class arbitration should necessarily result. Neither the AAA Supplementary Rules nor the JAMS Class Action Procedures require the imposition of class proceedings in any case where they are invoked.²⁴⁵ Instead, both sets of rules explicitly state that the mere applicability of the rules does not require a determination that class proceedings are proper, although the procedures and standards outlined in the rules will be used when answering the question of whether class treatment is warranted.²⁴⁶ If the necessary requirements are not met, then the arbitral tribunal will hear the claim on a bilateral basis or dismiss the arbitration altogether, depending on the terms of the parties' agreement and the nature of the claim asserted.²⁴⁷

²⁴¹ See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, paras. 52, 55-59 (Can.).

²⁴² See *id.*

²⁴³ See *infra* notes 254-55 and accompanying text.

²⁴⁴ See *Seidel v. Telus Commc'ns Inc.*, [2011] 1 S.C.R. 531, para. 39 (Can.).

²⁴⁵ See AAA Supplementary Rules, *supra* note 75; JAMS Class Action Procedures, *supra* note 75.

²⁴⁶ See AAA Supplementary Rules, *supra* note 75, R. 3; JAMS Class Action Procedures, *supra* note 75, R. 2.

²⁴⁷ See AAA Supplementary Rules, *supra* note 75, R. 3; JAMS Class Action Procedures, *supra* note 75, R. 2.

C. *What Is the Nature of the Right to Proceed as a Class?*

1. *United States*

The third and final point to consider involves the nature of the right to proceed as a class and the effect that determination can or should have on class arbitration. The issue was first heard by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*, which held that the class action provisions of the Federal Rules of Civil Procedure cannot “abridge, enlarge or modify” any substantive right and, as such, should be considered procedural in nature.²⁴⁸ Although the analysis of the issue in *Amchem* was formalistic at best, in that it relied primarily on the placement of the right in the Federal Rules of Civil Procedure, the decision may influence how the issue is framed going forward.²⁴⁹ However, several circuit courts have “evaluate[d] the enforceability of the class action waivers under the federal substantive law of arbitrability,”²⁵⁰ which suggests *Amchem*’s characterization of the nature of the right may not be the only analytical path to take.

Characterizing a right as procedural or substantive is an important endeavour, since U.S. courts regularly permit parties to waive their procedural rights in order to obtain the benefits of arbitration.²⁵¹ Given that waivers have become central to the class arbitration analysis in the United States as a result of *AT&T*, it would be useful to confirm whether *Amchem* can be considered a reliable precedent in cases involving class arbitrations, as opposed to class actions.²⁵² However, this is in many ways a novel issue, since no one has ever attempted to waive the right to proceed as a class outside the arbitral context.²⁵³

Several factors may affect the waiver analysis. For example, courts must consider whether the right at issue is enacted for the

²⁴⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

²⁴⁹ Subsequent case law has done little to clear up this issue. *See id.*; *Shady Grove Orthopedic Assocs., PA v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1461 (2010).

²⁵⁰ *Nat’l Supermks Ass’n. v. Am. Express Travel Related Servs. Co.*, 634 F.3d 187, 194 (2d Cir. 2011) (citations omitted).

²⁵¹ *See* MARTIN DOMKE, ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 7:4 at 7-12 (2010).

²⁵² *See* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *see also* *Nat’l Supermks Ass’n.*, 634 F.3d at 194, 199.

²⁵³ *See* Smit, *supra* note 65, at 203.

benefit of individuals or for the public at large. Traditionally, parties have been able to contract out of individual procedural rights but not those that are intended to inure to society as a whole.²⁵⁴ This makes sense, since the individual in question is considered capable of determining which individual right is more important to him or her and can do a reasonably rational cost-benefit analysis.²⁵⁵ Thus, for example, the right to a jury trial—which is individual to the parties involved in the dispute—may be waived, even though the right to a jury is constitutionally protected, because the individual nature of the right to a jury trial allows one-to-one analogies and set-off. Notably, it may be relevant that individuals are allowed to waive the right to a jury trial even in the purely judicial context, something that has not even been tried with respect to waivers of class remedies.²⁵⁶

However, it is not altogether clear whether the right to proceed as a class can or should be considered individual in nature. Indeed, *AT&T* shows several problems with that approach.²⁵⁷ This is particularly true if the inquiry is limited to an economic cost-benefit analysis conducted on an entirely individual basis.²⁵⁸

The waiver in question in *AT&T* was extremely comprehensive, in that it:

provide[d] that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifie[d] that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone,

²⁵⁴ See *Armendariz v. Found. Heath Psychcare Servs., Inc.*, 6 P.3d 669, 680 (Cal. 2000); BORN, *supra* note 112, at 1776.

²⁵⁵ See *id.*

²⁵⁶ See *Smit*, *supra* note 65, at 203.

²⁵⁷ See *AT&T v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

²⁵⁸ See *id.*

or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denied[d] AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, require[d] AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees.²⁵⁹

In presenting its case to the Supreme Court, AT&T argued that the waiver satisfied the two most often-cited rationales for class relief: access to justice and deterrence.²⁶⁰ However, these interests were framed exclusively in individualized terms.²⁶¹ For example, the argument was made that concerns about access to justice disappear if individual members of the purported class can find reasonable access to justice for their individual claims.²⁶² Furthermore, AT&T took the view that access to justice can be considered solely in economic terms, using a utilitarian analysis that simply looks at whether any eventual award to the claimant equals or exceeds individual damages and out-of-pocket transaction costs.²⁶³ Although the majority spent very little time on this issue, the majority opinion did appear to adopt AT&T's rationale.²⁶⁴

The question of deterrence was also formulated by AT&T as an entirely individualized issue.²⁶⁵ Commentators have noted that class relief has a deterrent effect to the extent that such relief provides either a realistic reflection of the monetary injuries caused by the respondent or a sum large enough to cause the respondent to reconsider its potentially harmful activities.²⁶⁶

²⁵⁹ *Id.* at 1744.

²⁶⁰ These are not the only interests at stake in class suits. *See infra* notes 320-17 and accompanying text.

²⁶¹ *See AT&T*, 131 S. Ct. at 1753 (2011).

²⁶² *See id.*

²⁶³ *See id.*; Petition for Writ of Certiorari, *AT&T*, 130 S. Ct. 3322 (2010) (No. 09-893), 2010 WL6617833 at *3 [hereinafter *AT&T* Petition].

²⁶⁴ *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

²⁶⁵ *See AT&T* Petition, *supra* note 263, at 30.

²⁶⁶ *See HENSLER ET AL.*, *supra* note 19, at 121-22.

AT&T claimed that the waiver at issue in *AT&T* met these goals because it provided individual claimants with an economically viable route to justice that would accurately compensate claimants for actual, non-frivolous injuries suffered, and thus, acted as an adequate deterrent measure to the corporation.²⁶⁷

The dissenting justices in *AT&T* took a very different view of the deterrence and compensation issues.²⁶⁸ For example, Justice Breyer noted that under this waiver:

“the maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22.” . . .

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim? . . . “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30”. . . . [N]onclass arbitration over such sums will . . . sometimes have the effect of depriving claimants of their claims.²⁶⁹

This more holistic approach was also recently reflected in *In re American Express Merchants' Litigation*.²⁷⁰ There, the Second Circuit noted (post-*Stolt-Nielsen*) that the only way for a party to vindicate its statutory rights in the antitrust realm was through the class remedy, since the costs of mounting even an individual antitrust action would range from several hundred thousand dollars to something in excess of \$1 million just for expert economic analysis alone, with a maximum recovery of \$13,000, which, when trebled, would be less than \$40,000.²⁷¹ Interestingly, in its decision, the Second Circuit quoted *Amchem* for the proposition that “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his

²⁶⁷ See *AT&T* Petition, *supra* note 263, at 19-22.

²⁶⁸ See *AT&T*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting). Justices Ginsburg, Sotomayor and Kagan joined in the dissent.

²⁶⁹ *Id.* (citations omitted).

²⁷⁰ 634 F.3d 187 (2d Cir. 2011).

²⁷¹ See *id.* at 198.

or her rights.”²⁷²

A similar analysis was conducted by the arbitration tribunal in *Abaclat* (formerly *Beccara*) *v. Argentine Republic*,²⁷³ which involved a collective claim in the context of an ICSID arbitration.²⁷⁴ There, the tribunal focused on the fact that a collective was necessary to give force to the treaty-based right to relief.²⁷⁵ Notably, this right existed even though the mass claims were being asserted outside the consumer realm.²⁷⁶

Allowing corporate actors to adopt procedures that unilaterally reduce the amount of damages payable to groups of claimants may be acceptable if class suits are seen solely in economic or individualized contractual terms. However, that may not be the best way to conceptualize class relief in arbitration or in litigation.²⁷⁷ For example, although some types of class suits (such as those involving mass torts) appear to act primarily as compensatory mechanisms, other types of class relief (such as those in the consumer context) are viewed as fulfilling both regulatory and compensatory functions.²⁷⁸

Class relief also addresses certain concerns that cannot be formulated as an aggregation of individual interests. For example, class relief appears to play an educative role, alerting potential claimants to the existence and extent of potential injuries.²⁷⁹ It also provides a mechanism for allowing indigent claimants to have

²⁷² *Id.* at 194 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)) (internal quotation marks omitted).

²⁷³ ICSID Case No. ARB/07/5 (2011), available at www.iareporter.com/downloads/20110810.

²⁷⁴ See *Abaclat Award*, *supra* note 4, at 1.

²⁷⁵ See *id.* ¶ 484. The dissent denied that failure to allow the claims to proceed en masse would deprive the claimants of their substantive rights. See *Abaclat Dissent*, *supra* note 4, ¶¶ 254-57.

²⁷⁶ See *Abaclat Award*, *supra* note 4, ¶ 461.

²⁷⁷ Indeed, this sort of pure economic analysis of class litigation has not prevailed outside the realm of arbitration, which begs the question why it is appropriate to do so within the arbitral context. See *Smit*, *supra* note 65, at 210-11.

²⁷⁸ See IBA SUBMISSION, *supra* note 17, at 5-6; HENSLER ET AL., *supra* note 19, at 121-22.

²⁷⁹ See Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 74 n.36 (2010) (citing DAVID S. GOULD, STAFF REPORT ON THE CONSUMER CLASS ACTION SUBMITTED TO THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE 48-52 (Aug. 15, 1972)).

access not just to formal justice—since the dispute resolution system at issue in *AT&T* would provide that—but to sophisticated and informed justice by creating a mechanism that allows claimants to obtain the advice of counsel in an economically viable manner.²⁸⁰

Forcing claimants into small, bilateral arbitrations has not only the effect of reducing the overall number of claims but also of reducing the complexity and exposure for each individual claim brought. This is because claimants in individual arbitrations are more likely to represent themselves, either because they do not think that they need a lawyer due to the informality of arbitration or because they cannot find an affordable attorney without the promise of a significant contingency fee.²⁸¹ Claimants in bilateral arbitration are therefore more likely to bring simple, easy-to-understand compensatory contract claims rather than the kind of complicated statutory causes of action and expansive remedies that give class actions much of their deterrent value.²⁸²

The deterrence associated with class suits can also be expanded from a narrow, individualized perspective (i.e., whether this particular corporation will be deterred) to a broad, collective perspective (i.e., whether other companies in this and similar industries will be deterred after seeing what has happened to this particular corporation).²⁸³ In this regard, it is important to consider the precedential value of particular tactical decisions. For

²⁸⁰ See Vince Morabito, *Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States*, 14 DUKE J. COMP. & INT'L L. 197, 198 (2004). For example, recovery of attorneys' fees may not be enough to allow an indigent client to hire an attorney, since (1) the attorney may not be able to wait to be paid until after the case has concluded and (2) the client may not be able to pay the attorney if the client loses. Most lawyers will not work under these conditions, absent the possibility of a significant contingency fee based on more than a single claim.

²⁸¹ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

²⁸² For example, it is extremely unlikely an individual acting alone will bring an antitrust claim or an international investment action. See *In re Am. Express Merchs' Litig.*, 634 F.3d 187, 197-99 (2d Cir. 2011); cf. *Abaclat Award*, *supra* note 4, ¶ 458 (noting that individual claimants are unlikely to finance arbitration themselves).

²⁸³ The majority in *Abaclat* noted the possibility that collective suits could bring unique pressure to bear on rogue debtors. See *Abaclat Award*, *supra* note 4, ¶ 514. The dissent urged against an expansive reading of the ability of international investment arbitration to reach claims of this nature. See *Abaclat Dissent*, *supra* note 4, ¶¶ 265-74.

example, if waivers such as the one at issue in *AT&T* are allowed in one individual instance, then one can expect them to proliferate, expanding into any area of law where class suits are common and reducing the likelihood of both class actions and class arbitrations.²⁸⁴ Although common law courts may not always be comfortable contemplating broad regulatory issues, some consideration can and should be given to the long-term, global effect of individual decisions, particularly in situations where the legislature has indicated the need and propriety of class relief as a regulatory mechanism.²⁸⁵

The various restricting factors associated with bilateral arbitration suggest that it is significantly more cost-effective for a corporation to defend a (perhaps vanishingly small) series of individual contract claims in arbitration, despite the inefficiencies and increased per-claimant transaction costs, than it is to defend a class suit that includes both more people and more expansive causes of action.²⁸⁶ Indeed, such cost-effectiveness would be anticipated, given that businesses are encouraged or, in some cases, required to act in an economically rational manner.²⁸⁷ In some ways, considering the social benefits of class arbitration could be seen as inconsistent with the corporate duty to maximize profit.

²⁸⁴ See *Gutting Class Action*, *supra* note 84. Indeed, *AT&T* appears to have interpreted the decision in *AT&T* as foreclosing the possibility of anything other than individualized relief. See Neil, *supra* note 87. Although several cases were filed to resolve this issue, the question appears to have been mooted as a result of the decision by the U.S. Department of Justice to bring its own antitrust action. See Gruenwald, *supra* note 87.

²⁸⁵ See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."); see also *In re Am. Express Merchs.' Litig.*, 634 F.3d at 199; *Bisaillon v. Concordia Univ.*, 2006 SCC 19, [2006] 1 S.C.R. 666, para. 46 (Can.).

²⁸⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., dissenting); *Abaclat Award*, *supra* note 4, ¶¶ 537, 545.

²⁸⁷ Although there is a growing movement to encourage corporate actors to behave in a socially responsible manner, those principles are not yet fully developed. See Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 771, 787 (2009).

2. *Canada*

The United States is not the only country to have struggled with how to characterize the right to proceed as a class. The Supreme Court of Canada has also considered the issue, though the analysis differs somewhat, possibly because the issue arose as a jurisdictional matter in a dispute involving the intersection between class actions and arbitration.²⁸⁸

The case at issue, *Bisaillon v. Concordia University*,²⁸⁹ involved a group of union employees who sought to have a class certified in court despite a provision in their collective bargaining agreement requiring grievance arbitration.²⁹⁰ The Supreme Court held that the right to proceed as a class was procedural in nature, focusing on the placement of the right in the Quebec Rules of Civil Procedure and on precedent from the Quebec Court of Appeal that the class remedy's "use neither modifies nor creates substantive rights."²⁹¹

Interestingly, the court in *Bisaillon* did not appear to consider the possibility of a class arbitration, instead contemplating only a judicial class action or a bilateral arbitration.²⁹² Because a class proceeding in court would "undermine[] two pillars of [their] collective labour relations system: the exclusivity of the arbitrator's jurisdiction and the collective representation system," the Supreme Court decided to give precedence to the arbitration provision in this instance.²⁹³

Just one year later, the Supreme Court was asked to decide a similar issue in *Dell Computer Corp. v. Union des consommateurs*.²⁹⁴ However, this case arose in the context of a consumer class action rather than a labor dispute.²⁹⁵ Rather than emphasizing the importance of protecting collective bargaining agreements, the court here focused on the need to respect party

²⁸⁸ See *Bisaillon*, 2006 SCC, [2006] 1 S.C.R. paras. 15-19.

²⁸⁹ *Id.*

²⁹⁰ *Id.* paras. 7, 10.

²⁹¹ *Id.* paras. 15, 17; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *supra* note 246 and accompanying text.

²⁹² *Bisaillon*, 2006 SCC, [2006] 1 S.C.R. paras. 13-14.

²⁹³ *Id.* para. 46.

²⁹⁴ 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.).

²⁹⁵ *Id.* para. 4.

autonomy and the substantive nature of the right to arbitration.²⁹⁶ Thus the Supreme Court sent the dispute:

to arbitration on the grounds that: (1) the class procedure in Quebec is a procedural vehicle that, by its nature, is incapable of conferring powers on a court over a subject matter that falls within the jurisdiction of arbitrators; (2) parties' choice of arbitration is an exercise of their substantive rights and should be given judicial deference; and (3) arbitrators should rule first on their jurisdiction unless the issue is a matter of law and its disposition does not require any factual inquiries.²⁹⁷

This is an interesting analysis, since it suggests that in designating the right to proceed as a class as procedural, the Supreme Court of Canada was simply setting a limit on the power of the Canadian courts to involve themselves in matters more properly suited to arbitral tribunals.²⁹⁸ However, that determination does not appear to have any bearing on the ability of an arbitrator to order class treatment in arbitration. Indeed, arbitral tribunals considering class arbitration in Canada appear to have considerable latitude in this regard, particularly since it is not precisely clear what is entailed in the right to proceed as a class.²⁹⁹

This issue was first raised in intervenor papers submitted by the London Court of International Arbitration (LCIA) to the Supreme Court in *Dell*.³⁰⁰ Not only did the LCIA suggest that class arbitration was consistent with the policy objectives of class actions, it also stated that:

²⁹⁶ *Id.* para. 160.

²⁹⁷ Leon et al., *supra* note 2, at 386.

²⁹⁸ See *Dell*, 2007 SCC 34, [2007] 2 S.C.R. 801, para. 216; *Bisailon v. Concordia Univ.*, 2006 SCC 19, [2006] 1 S.C.R. 666, paras. 16-17 (Can.). Notably, the Supreme Court in *Seidel* declined to opine on the nature of the right to proceed as a class, holding that it was irrelevant to the analysis. See *Seidel v. Telus Commc'ns Inc.*, [2011] 1 S.C.R. 531, para. 33 (Can.) (construing legislation from British Columbia as opposed to Quebec).

²⁹⁹ See *supra* notes 160-90 and accompanying text.

³⁰⁰ Factum of the Intervener, London Court of International Arbitration in *Dell Computer Corp. v. Union des Consommateurs*, Supreme Court of Canada, ¶¶ 51-52 (emphasis omitted), available at www.mcgill.ca/files/arbitration/LCIAFactumDell.pdf.

[c]rucial to the analysis is the exact nature of the right conferred by class action legislation. Under one view the right at issue is not merely a right to sue on a class-wide basis, but rather a right to sue on a class-wide basis before the courts. From that perspective, arbitration clauses inevitably conflict with class action rights.

. . . A different view, however, holds that the right conferred by class action legislation is simply a right to proceed on a class-wide basis. From this perspective, [class arbitration] is not necessarily inimical to the legislation's public policy.³⁰¹

Interestingly, although the Supreme Court did not mention the LCIA Factum in its decision in *Dell*, the British Columbia Court of Appeal did refer to it in a later case, noting that the policy position enunciated by the LCIA appeared unobjectionable, although adoption of such an approach would likely have to be by legislative means, at least in British Columbia.³⁰²

The designation of the right to proceed as a class as procedural in nature has led some commentators to state that these judicial precedents should be read to mean that “deference to contractually based arbitration as a dispute resolution mechanism is generally to be preferred over the access to justice provided by class proceedings in Canada.”³⁰³ However, that conclusion appears to go too far, particularly if the issue of class arbitration is viewed as a question of intent.³⁰⁴ If that is indeed the case, then arbitrators sitting in Canada have both the right and the duty to give effect to the parties' intentions regarding arbitral procedure. This could transform the right to proceed as a class from one that is procedural to one that is contractual in nature and make it co-equal with other contractual rights, including the right to arbitrate the dispute itself. Given that “legislation on class actions should be construed flexibly and generously” in Canada due, in part, to the

³⁰¹ *Id.* (emphasis omitted); see also Saumier, *supra* note 90, at 1221.

³⁰² MacKinnon v. Nat'l Money Mart Co., 2009 BCCA 103, para. 14 (Can.); see also *Dell*, 2007 SCC 34, [2007] 2 S.C.R. 801; Leon et al., *supra* note 2, at 397.

³⁰³ Leon et al., *supra* note 2, at 389.

³⁰⁴ See *supra* note 166 and accompanying text.

“social dimension” of class suits,³⁰⁵ it might be that class arbitration would be preferred over bilateral arbitration in some circumstances.

Thus, the view that class relief is or may be procedural in nature is not in any way fatal to the development of class arbitration in Canada. Instead, precedent in cases characterizing the right to proceed as a class as procedural can simply be seen as requiring the dispute in question to be heard in arbitration, without making any conclusion about what type of procedure is the most appropriate vehicle for hearing those claims.

V. Conclusion

Class arbitration is an issue that the United States has been grappling with for some time. However, other countries are also considering the device, either because it is seen as providing certain benefits that other dispute resolution mechanisms do not or because it has developed unexpectedly in response to a confluence of other factors.³⁰⁶ Of these other nations, Canada is perhaps the most advanced, having considered the intersection of class actions and arbitration on numerous occasions.³⁰⁷

In order to shed light on the complex issues arising in this area of law, this Article has compared the different ways that the United States and Canada approach three separate questions: the circumstances in which class arbitration is available;³⁰⁸ the procedures that must or may be used; and the nature of the right to proceed as a class. From this comparative analysis comes the conclusion that class arbitration is driven by two different policy determinations. Ultimately, where each state stands with respect to these two matters drives its approach to class arbitration.

The first policy concern addresses the proper balance between policies in favor of class suits and those in favor of arbitration. While some courts view the two devices as mutually exclusive,

³⁰⁵ *Bisailon v. Concordia Univ.*, 2006 SCC 19, [2006] 1 S.C.R. 666, para. 16 (Can.).

³⁰⁶ *See supra* notes 4, 66-68 and accompanying text.

³⁰⁷ *See Leon et al.*, *supra* note 2, at 386-98.

³⁰⁸ Although no class arbitration has yet arisen in Canada, it is possible that an arbitral tribunal sitting in Canada could adopt class arbitration even before action is taken by a legislature or arbitral organization.

other courts use class arbitration as a means of harmonizing the various interests and concerns.³⁰⁹ Although the Supreme Court of Canada has not yet found a way of combining the two mechanisms, opportunities may still exist in cases where different legislation is at issue. Thus, it may be that class arbitration may yet develop as a judicial measure in Canada. Indeed, the Ontario Superior Court of Justice has perhaps taken preliminary steps in that direction, holding in *Kanitz* that:

it is apparent that there are two public policies at issue here which may, to some degree, conflict. While the *Class Proceedings Act, 1992* represents one public policy, the *Arbitration Act, 1991* represents another. There is no reason to prefer one over the other if there should be a conflict between the two. However, these public policies do not have to be interpreted in a manner such that they do conflict. They can be interpreted in a manner where they co-exist.

[T]he *Class Proceedings Act, 1992* itself requires the court to consider whether a class action is the preferable procedure for the resolution of the common issues before granting a certification order. In considering whether a class action is the preferable procedure, the court must take into account alternative methods of redressing the putative class members' complaints.

It would seem unarguable that the arbitration of claims is one such other procedure.³¹⁰

Ontario's approach appears very similar to that taken in the United States, particularly in the days when class arbitration was just beginning. Thus, for example, the California Supreme Court stated in the first U.S. case on class arbitration, *Keating v. Superior Court*,³¹¹ that:

[t]his court has repeatedly emphasized the importance of the

³⁰⁹ See, e.g., *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. 3d 299 (Can.).

³¹⁰ *Id.* ¶¶ 51-53 (citations omitted); see also Leon et al., *supra* note 2, at 390-94.

³¹¹ See *id.* at 307.

class action device for vindicating rights asserted by large groups of persons. . . . Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to “retain[] the benefits of its wrongful conduct.”

. . .

One possible solution to this dilemma would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions. The statutes and public policy supportive of arbitration require, however, that this result be avoided if means are available to give expression to the basic arbitration commitment of the parties. We turn our attention, therefore, to the solution offered by franchisees: that the arbitration itself proceed on a classwide basis.³¹²

Ultimately, the California Supreme Court decided in *Keating* to require class arbitration because “an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship.”³¹³ This respect for the parties’ contractual rights appears very similar to Canadian courts’ concern for the substantive rights of the parties to arbitration.³¹⁴

It therefore appears that courts in both Canada and the United States recognize (1) the importance of policies in favor of both class relief and arbitration and (2) the possibility of harmonizing the various concerns rather than elevating one over the other.³¹⁵ However, a second policy concern is also suggested by the cases. This matter relates to whether and to what extent arbitration and litigation can and should be considered as equally viable dispute resolution mechanisms and whether they should reflect the same roles in the larger legal scheme and offer the same remedies to the parties.³¹⁶

³¹² See *Keating v. Superior Court*, 645 P.2d 1192, 1206-07 (Cal. 1982) (citations and footnotes omitted), *rev’d on other grounds sub nom Southland Corp. v. Keating*, 465 U.S. 1 (1984); Leon et al., *supra* note 2, at 307.

³¹³ *Keating*, 645 P.2d at 1209.

³¹⁴ See *supra* notes 292-94 and accompanying text.

³¹⁵ See, e.g., *Keating*, 645 P.2d at 1192; *Kanitz v. Rogers Cable, Inc.* (2002), 58 O.R. 3d 299 (Can.).

³¹⁶ Interestingly, this issue has not been discussed at length by commentators. See

The second point—the equivalency of available remedies—appears to be a hotly contested issue in Canada.³¹⁷ However, this issue is far less important in the United States. Instead, the debate in the United States focuses on whether and to what extent arbitration is able to give effect to certain statutory rights, which gives rise to a discussion about the nature of those rights and how they must or can be protected.³¹⁸

However, the problem in the United States is that many of these discussions are formulated entirely in individualistic terms that facilitate superficially simple waiver analyses.³¹⁹ Furthermore, the debate appears to focus almost exclusively on access to justice and deterrence, with little, if any, mention being made of other policy considerations³²⁰ or of the various public benefits associated with class relief, including:

- (1) the ability to set legal precedent that is important for future individual and class action cases;
- (2) the ability to promote public education concerning questionable business and industrial practices that are being challenged in representative litigation;
- (3) the ability to uncover a pattern of wrongdoing that otherwise would not be apparent from infrequent or widely scattered individual cases; and
- (4) the ability to promote intangible psychological benefits accruing to a public that would feel less frustrated about the unavailability of any redress when the vindication of group rights can be observed.³²¹

To some extent, the United States' focus on individual rights

DOMKE, ET AL., *supra* note 251, § 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 be applicable); *see also* Strong, *First Principles*, *supra* note 63.

³¹⁷ *See supra* notes 169-77 and accompanying text.

³¹⁸ *See* Sternlight, *supra* note 107, at 92-104; *see generally* Weston, *supra* note 81 (discussing the constitutional implications of arbitral class actions).

³¹⁹ *See supra* notes 254-85 and accompanying text.

³²⁰ *See* HENSLER ET AL., *supra* note 19, at 68-72; RACHEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 47-66 (2004); Burch, *supra* note 66, at 92-111 (discussing deterrence, information sharing, accountability and transparency as functions of securities class actions).

³²¹ Luff, *supra* note 279, at 74 n.36.

and remedies is understandable, given the emphasis placed on individual rights in Western legal analysis.³²² Nevertheless, courts and arbitrators must exercise caution, since “extralegal dispute resolution could easily, even reflexively, adopt market responses to social conflict.”³²³ Instead, attention should be paid to larger issues rather than simply allowing those with “superior economic power” to take “unilateral control over designing a dispute system for conflicts to which it is a party.”³²⁴ To this end, Richard Posner has argued not only that “[a]ny alternative to the trial must respect relevant legal and institutional constraints,” but that “[a]ny proposed reform must move the legal system in the right direction, where ‘right’ is defined in accordance with broad social policy rather than narrow craft standards of success.”³²⁵

Thus, both the United States and Canada, in their own ways, must consider whether class arbitration can or should play the same role as class actions in the national legal system.³²⁶ This is an inherently difficult task, however, since some authorities believe that “arbitration is a substitute for adjudication by litigation”³²⁷ while others take the view that there is something inherently different about the two processes.³²⁸ However, it does appear appropriate to view class arbitration as playing some sort of regulatory role, since class actions are used in both the United States and Canada as a means of relieving public entities of the

³²² See, e.g., Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 734 (1986) (discussing religion and society).

³²³ Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 80 (2009).

³²⁴ Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation in the Workplace*, 14 HARV. NEGOT. L. REV. 1, 5 (2009).

³²⁵ 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) (condemning any form of private dispute resolution that “disserve[s] fundamental social interests—while serving all too well the legal profession’s narrow self-interest”).

³²⁶ See Burch, *supra* note 66, at 74.

³²⁷ Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007).

³²⁸ DOMKE, ET AL., *supra* note 328, § 1:3, at 1-8 to 1-9; Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1069 (2011).

burden of enforcing certain public laws.³²⁹ If this is indeed the case, then it is vitally important to consider the effect of allowing private parties to eliminate class relief through contractual means or of permitting courts to force parties into bilateral arbitration, since doing so could distort the legislatively mandated balance between public (i.e., state initiated and controlled) and private means of regulation. Interestingly, the elimination or significant reduction of class remedies could lead to the imposition of new regulatory measures that corporate interests might find even less palatable.³³⁰ Indeed, “[f]orgetting the regulatory advantages [of the current system] is easy when corporations focus exclusively on the back-end” costs associated with class actions and arbitrations.³³¹

Class arbitration is a very complicated subject that must be considered from a variety of perspectives. Despite the fact that this device relies heavily on domestic laws and policies, comparative analysis can shed a great deal of light on a wide variety of issues. This is not to say that class arbitration is perfect or that it is not in need of additional improvements. Certainly the preceding discussion has highlighted a number of difficulties relating to the circumstances in which class arbitration is available, the procedures that must or may be used, and the nature of the right to proceed as a class. Nevertheless, “[c]lasswide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.”³³² Though more analysis is needed, this Article has begun that discussion by comparing two of the leading jurisdictions in this increasingly important area of law.

³²⁹ See IBA SUBMISSION, *supra* note 17, ¶¶ 5-6; HENSLER ET AL., *supra* note 19, at 121-22; Burch, *supra* note 66, at 74-76.

³³⁰ See Burch, *supra* note 66, at 70-77, 128. Several U.S. legislators have proposed a new form of the Arbitration Fairness Act in the wake of *AT&T*. See Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011). Furthermore, AT&T has argued against the use of large-scale bilateral arbitration, even though that is the direct effect of its use of class action waivers in its arbitration agreements. See Neil, *supra* note 87.

³³¹ Burch, *supra* note 66, at 77.

³³² Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982).