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NOTES

Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration

MICHAEL P. DALY*

I. INTRODUCTION

Domestic arbitration has developed in two new and interesting ways.

First, nonsignatories¹ to an arbitration agreement may become involved in the arbitral proceedings resulting from that agreement. Although arbitration is a contractual matter based on party consent,² there are exceptions to this rule derived from common-law notions of implied consent and agency under which a person who never signed an arbitration agreement may either compel signatories to the agreement to arbitrate or be compelled to arbitrate.³ Arbitration agreements will apply only to such nonsignatories “in rare circumstances.”⁴ The mere existence of such circumstances, however, could potentially redefine the role of arbitration in general.

Second, arbitral tribunals may be used to resolve multiple disputes between different parties in one proceeding. Such a multiparty arbitra-

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1. “A signatory to an arbitration agreement is someone who has signed some form of an arbitration agreement; a nonsignatory is someone who has not.” Anthony M. DiLeo, *The Enforceability of Arbitration Agreements by and Against Nonsignatories*, 2 J. AM. ARB. 31, 33 (2003). This term has been spelled in two ways: “nonsignatory” and “non-signatory.” In the remainder of this note, only the first spelling will be used because this is the spelling most recently used by the U.S. Supreme Court. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2757, 2796 (2006); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203 (2000).

2. See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (“Arbitration is contractual by nature . . .”).

3. See discussion *infra* Part II.

4. *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 345 F.3d 347, 358 (5th Cir. 2003) (“Arbitration agreements apply to nonsignatories only in rare circumstances.”).

tion can take two forms. First, it can take the form of a "class arbitration,"⁵ whereby a large group of claimants seeks to arbitrate a dispute with one or more defendants.⁶ In the alternative, it can take the form of a "consolidation," whereby various existing arbitral disputes involving similar facts or parties are combined to be resolved in one proceeding.⁷

Given the increasingly global nature of business,⁸ it has become normal to expect that many business disputes will involve corporations, investors, creditors, affiliates, franchises, or any other interested parties who (1) are from different countries, and (2) have included a clause in their business agreements providing that any potential contractual disputes will be resolved through international arbitration.⁹ Thus, international arbitral tribunals are increasingly faced with the task of resolving a great variety of commercial disputes, often involving multiple contracts, multiple parties, and related or interested nonsignatory parties to the dispute.

This note considers the extent to which the traditional model of an international arbitral dispute, rooted in a consensual arbitration agreement between two parties, has been expanded and possibly distorted to include nonsignatories or to combine separate disputes. Part II examines the role and influence of the United States in international arbitration. Part III considers the development of nonsignatory involvement in

5. Such a proceeding has been referred to in many different ways, including "class arbitration," "class action arbitration," "class-wide arbitration," "classwide arbitration," and "arbitral class action." In the remainder of this note, only "class arbitration" will be used because this is the way that the U.S. Supreme Court has most recently referred to such proceedings. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 *passim* (2003).

6. See Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? No: Permitting Companies To Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, DISP. RESOL. MAG., Spring 2002, at 13, 18 [hereinafter Sternlight, *Dangerous and Unwise*] (discussing how class arbitrations resemble judicial class actions).

7. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 86 (2000) [hereinafter Sternlight, *Arbitration Meets the Class Action*] (noting that consolidation can arise only "after two or more arbitrations have been filed").

8. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005); see also T.R. REID, *THE UNITED STATES OF EUROPE* 111-18 (2004) (arguing that U.S. consumers are dependant on products that were produced by European companies).

9. See generally Phillip Capper, *Litigation, Arbitration and Dispute Resolution: A Birthday Tribute*, LEGAL WK., Oct. 5, 2006 (noting that international arbitration greatly increased in popularity as a business dispute-resolution method since the Arbitration Act was enacted in the UK); Lubna Kably, *Indian Arbitration Is in Sync with International Practice*, ECON. TIMES, Mar. 14, 2000 ("Nowadays it is common practice to insert a suitable arbitration clause in international commercial joint venture agreements."); Joe Leahy & Sheila McNulty, *Where Judgments Rarely Stick: The Failure To Respect Arbitration in Asia Faces Scrutiny*, FIN. TIMES, July 11, 2002, at 33 (noting that foreigners usually insist on including arbitration provisions in contracts with parties from developing nations); see also Mary Flood, *Texas Lawyers Make a Splash Outside of U.S.*, WALL ST. J., May 10, 2000, at A1 (noting that U.S. lawyers with expertise in international arbitration have profited from the increase in international business disputes).

domestic and international arbitration. Part IV explains the recent growth of multiparty arbitrations in the United States and in Europe. Part V discusses the ways in which these concepts could overlap in the context of international arbitration, whereby nonsignatory class members to a dispute may be compelled to participate or be subject to class arbitration. The implications and ramifications of such a scenario reflect real questions and concerns facing the international arbitration community today about the evolving nature of arbitration and the actual differences between arbitration and judicial litigation. This note concludes that, although these two developments could potentially distort the traditional model of international arbitration, they also offer potential benefits to the same model.

II. U.S. INVOLVEMENT IN INTERNATIONAL ARBITRATION

The United States has been involved in international arbitration since 1794.¹⁰ In modern times, however, the United States is regarded by some as a “latecomer” to the arena of international arbitration¹¹ because it did not become a member of the New York Convention¹² until 1970. Nevertheless, as the overall caseload of international arbitration proceedings has increased substantially in the 1990s and into the current decade,¹³ U.S. involvement in international arbitration has also increased.¹⁴ The American Arbitration Association (“AAA”) announced in 2002 that it had become the largest international commercial arbitral institution in the world,¹⁵ and U.S. parties have appeared in arbitrations before the International Chamber of Commerce (“ICC”) more than any other nationality for every year since 1998.¹⁶

The increased role of the United States in international arbitration

10. Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 242 (2006).

11. Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 347 (2005).

12. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]; *see also* Drahozal, *supra* note 10, at 243.

13. *See* Drahozal, *supra* note 10, at 233.

14. *Id.*

15. *ICDR Becomes World's Largest International Commercial Arbitral Institution*, MARKET WIRE, May 16, 2002, http://www.findarticles.com/p/articles/mi_pwwi/is_200205/ai_mark02042262; *see also* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 711 (2003) (“The number of international arbitrations occurring under the auspices of the American Arbitration Association (AAA) has increased dramatically [between 2001 and 2003].”).

16. *See* Drahozal, *supra* note 10, at 244; *see also* Michael Goldhaber, *The Court That Came in from the Cold*, AM. LAW., May 2001, at 98, 101–02 (explaining how U.S. lawyers are beginning to take greater part in international arbitration).

has triggered certain tensions between U.S. lawyers and foreign arbitration practitioners. Some commentators believe that U.S. lawyers have attempted to “legalize” the field of international arbitration.¹⁷ One example is the importation of jargon from domestic litigation into arbitration.¹⁸ In addition, U.S. and European courts differ in their approaches to important questions of procedural and substantive law that affect arbitration. For example, the U.S. Supreme Court specifically stated that a court should decide independently the question of arbitrability—whether parties must arbitrate as opposed to litigate—when the parties did not agree to have the arbitrator make such a decision; but a court should defer to an arbitrator’s decision regarding arbitrability if the parties clearly and unmistakably agreed to have the arbitrator decide this matter.¹⁹ This contravenes the practice of many European courts, which simply allow arbitrators to decide such issues.²⁰ The United States has also created unique arbitration practices for consumer and employment disputes, which differ from those practices in the rest of the world.²¹

The unique nature of U.S. litigation and arbitration practices is reflected in the development of nonsignatory arbitration and multiparty arbitration abroad.

III. NONSIGNATORY INVOLVEMENT IN ARBITRATION

A. *Nonsignatory Involvement in Domestic Arbitration*

Arbitration is fundamentally a matter of contract, whereby contractual parties may only be required to submit a dispute to arbitration pursuant to their formal agreement.²² However, there are several important exceptions to this rule that have developed under common-law notions of “implied consent.”²³ These doctrines may serve either to benefit or to

17. Dunham, *supra* note 11, at 346.

18. *Id.* at 332.

19. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); see also James M. Hosking, *Non-Signatories and International Arbitration in the United States: The Quest for Consent*, 20 ARB. INT’L 289, 301 (2004).

20. See Dunham, *supra* note 11, at 345.

21. See Drahozal, *supra* note 10, at 233, 253.

22. See *Livadas v. Bradshaw*, 512 U.S. 107, 127 (1994) (“[E]nforcement [of an arbitration agreement] turns exclusively on the fact that the contracting parties consented to any arbitration at all.”).

23. See Lamm & Aqua, *supra* note 16, at 720 (“[I]f the actions or relationships of a non-signatory link it to one of the signed parties to an arbitration, [an arbitral] tribunal can find ‘implied consent,’ or a ‘backdoor’ obligation to arbitrate.”). The concept of “implied consent” is also referred to as an “inherent link” of claims that are “inseparably wound.” See Charles Lee Eisen, *What Arbitration Agreement? Compelling Non-Signatories To Arbitrate*, DISP. RESOL. J., May–July 2001, at 40, 45.

harm a nonsignatory to an arbitral agreement because either (1) the nonsignatory may compel a signatory to the agreement to arbitrate a dispute or (2) the nonsignatory may be compelled to arbitrate a dispute despite never having signed an arbitration agreement.²⁴ The U.S. Supreme Court has a long-standing domestic policy of favoring arbitration,²⁵ and these doctrines reflect that policy.

1. INCORPORATION BY REFERENCE

An arbitration clause may apply to a party who is a nonsignatory to one agreement containing an arbitration clause but who is a signatory to a second agreement that incorporates the terms of the first agreement.²⁶ This doctrine is often used under the heading of “succession,” whereby a merged entity continues to prosecute arbitral proceedings started by one of its original entities.²⁷

2. ASSUMPTION

An arbitration clause may apply to a nonsignatory who has impliedly agreed to arbitrate.²⁸ Under this theory, the nonsignatory’s conduct is a determinative factor.²⁹ For example, a nonsignatory who voluntarily begins arbitrating the merits of a dispute before an arbitral tribunal may be bound by the arbitrator’s ruling on that dispute even though the nonsignatory was not initially required to arbitrate the dispute.³⁰ The principle underlying this doctrine is that a nonsignatory should not be able to manifest an intent to arbitrate on which an opposing party is caused to rely, only later to assert that the resulting arbitral award is invalid.³¹

24. See Carroll E. Neesemann et. al., *The Law of Securities Arbitration*, in SECURITIES ARBITRATION 2002: TAKING CONTROL OF THE PROCESS 821, 855 (PLI Corp. Law & Practice, Course Handbook Series No. B0-01A6, 2002) (“[N]on-signatories may compel arbitration of claims asserted against them and conversely, some non-signatories may be compelled to arbitrate their claims.”).

25. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (discussing that doubts about the scope of arbitrable issues should be resolved in favor of arbitration); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that there is a “federal policy favoring arbitration”); see also Eisen, *supra* note 23, at 42.

26. See, e.g., *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir. 1965) (holding that a nonsignatory may enforce an arbitration clause against the signatory of a contract that is incorporated by reference into a second contract to which the nonsignatory is a party).

27. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 3-37-38, at 180-81 (4th ed. 2004).

28. See *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

29. See *id.* (“[A]n agreement [to arbitrate] may be implied from the party’s conduct.”).

30. See *id.* (holding that employee nonsignatory “manifested a clear intent to arbitrate” by sending union representative to negotiate in arbitral proceeding).

31. See *In re Transrol Navegação S.A.*, 782 F. Supp. 848, 851 (S.D.N.Y. 1991).

3. AGENCY

A nonsignatory to an arbitration agreement may be bound to arbitrate a dispute stemming from that agreement under the traditional laws of agency.³² A principal may also be bound to arbitrate a claim based on an agreement containing an arbitration clause signed by the agent.³³ The agent, however, does not generally become individually bound by executing such an agreement on behalf of a disclosed principal unless there is clear evidence that the agent intended to be bound.³⁴ If the agent executes such a contract but fails to reveal a relationship with the principal, the agent may be compelled to arbitrate either individually³⁵ or alongside the principal.³⁶ Courts have specifically compelled nonsignatory agents to arbitrate where the agent played an important role in the alleged wrongful conduct³⁷ or where the agent derived a benefit from the contract.³⁸

Likewise, an agent is "entitled, pursuant to an arbitration agreement between his principal and the plaintiff, to compel arbitration of the plaintiff's claims against the agent for acts taken in his or her representative capacity."³⁹ Further, the U.S. Court of Appeals for the Sixth Circuit has upheld such a ruling on the ground that holding otherwise would allow a plaintiff who had signed an arbitration agreement to avoid "the practical consequences of [the] agreement . . . by naming nonsignatory parties as [defendants] in his complaint."⁴⁰

4. VEIL PIERCING / ALTER EGO

In the corporate context, a nonsignatory corporation to an arbitration agreement may be bound by that agreement if the agreement is

32. Eisen, *supra* note 23, at 44.

33. See REDFERN & HUNTER, *supra* note 27, ¶ 3-30, at 176 ("[A] principle may find itself bound by an arbitration agreement signed by its agent.").

34. See Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2, 5 (2d Cir. 1991) ("An individual who is only an indirect beneficiary of the agreement thus should not be directly bound to the terms of the agreement absent clear evidence of an intent to create individual liability."); see also Lamm & Aqua, *supra* note 15, at 720.

35. See Beck v. Suro Textiles, Ltd., 612 F. Supp. 1193, 1194 (S.D.N.Y. 1985).

36. See Baum v. Avado Brands, Inc., No. Civ.A. 3:99-CV-0700G, 1999 WL 1034757, at *8 (N.D. Tex. Nov. 12, 1999). In *Baum*, the court held that both a principle and an agent may be bound to arbitrate a claim that arises from an arbitration agreement to which the principle was a signatory, where claims against the principle and the agent are identical, and where the agent acted in an agency capacity in relation to agreement. *Id.*

37. See *id.*

38. See Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999).

39. *Baum*, 1999 WL 1034757, at *7.

40. Arnold v. Arnold Corp.—Printed Commc'ns for Bus., 920 F.2d 1269, 1281 (6th Cir. 1990) (quoting Arnold v. Arnold Corp., 668 F. Supp. 625, 629 (N.D. Ohio 1987)).

signed by its parent, subsidiary, or affiliate.⁴¹ Although no uniform federal law for piercing the corporate veil exists,⁴² courts will generally do so when a nonsignatory corporation controls another corporation and uses it as a signatory for an improper purpose, such as to perpetrate a fraud or to bring about substantial injustice or inequity.⁴³ Under this theory, the totality of circumstances must be examined in a highly fact-sensitive manner.⁴⁴

5. EQUITABLE ESTOPPEL / THIRD-PARTY BENEFICIARY

The doctrine of equitable estoppel is usually applied by non-signatory defendants who wish to compel signatory plaintiffs to arbitrate a dispute.⁴⁵ This will generally be permitted when (1) the signatory must rely on the terms of the contract in support of its claims against the nonsignatory,⁴⁶ or (2) the signatory alleges that it and the nonsignatory engaged in interdependent misconduct that is intertwined with the obligations imposed by the contract.⁴⁷

A nonsignatory may also be bound to arbitrate by knowingly exploiting an agreement that contains an arbitration clause.⁴⁸ Thus, a nonsignatory may be estopped from accepting the benefits of a contract while at the same time asserting that its lack of signature precludes enforcement of the contract's arbitration clause.⁴⁹ The doctrine is in place to stop nonsignatories from "disregard[ing] equity and contraven[ing] the purposes underlying enactment of the Arbitration Act."⁵⁰

This doctrine is also referred to as "third party beneficiary" doctrine

41. See Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 FRANCHISE L.J. 175, 179 (2006). Likewise, a corporate nonsignatory may bind a signatory to an arbitration agreement if the agreement was signed by one of the nonsignatory corporation's subsidiaries. See *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004).

42. See Williams, *supra* note 41, at 179.

43. See *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 359 (5th Cir. 2003); *InterGen N.V. v. Grina*, 344 F.3d 134, 148–49 (1st Cir. 2003); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1119–20 (Fla. 1984).

44. See Williams, *supra* note 41, at 179.

45. See *id.* at 178.

46. See *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

47. See *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177–78 (2d Cir. 2004); *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 975 (11th Cir. 2002); *MS Dealer*, 177 F.3d at 947.

48. See *E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001) (citing *Thomson-CSF, S.A. v. Am. Arbitration Assoc.*, 64 F.3d 773, 778 (2d Cir. 1995)).

49. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993). Courts have held that, to bind the nonsignatory to arbitration, the nonsignatory must receive a "direct benefit" under the arbitration agreement and not merely an "incidental benefit." See *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999).

50. *Avila Group, Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977).

because it exists to bind third parties to arbitration agreements when they intentionally and directly benefit from the agreement without objecting to it.⁵¹ Nonsignatories are often bound under the doctrine of third-party beneficiary if they are members of a class of people who will benefit from a contract between other parties.⁵²

6. ASSIGNMENT / SUCCESSION

Under standard contract doctrine, an assignee or successor in interest to a contract has certain rights and duties.⁵³ For example, the assignee or successor in interest of an insurance contract may have the right to begin arbitral proceedings against the insurer of the original insured party.⁵⁴ On the other hand, an assignee or successor in interest of any contract containing an arbitration provision may have the duty to arbitrate any disputes arising from that agreement despite never having signed the agreement.⁵⁵ This doctrine is also grounded in the belief that a nonsignatory assignee or successor in interest should be prohibited from receiving a contractual benefit left behind by a predecessor signatory without also having to honor the arbitration provision of the contract.⁵⁶

B. *Nonsignatory Involvement in International Arbitration*

Nonsignatory involvement in international arbitration has been described as a “delicate” and critical aspect of international arbitration.⁵⁷ The New York Convention, which has been regarded as “the most important international treaty relating to international commercial arbitration,”⁵⁸ reflects this concern over nonsignatory involvement in arbi-

51. See *Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004–05 (N.D. Ill. 2001).

52. See, e.g., *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.*, 85 F.3d 21, 22–23 (2d Cir. 1996) (holding that insurance company is entitled to compel arbitration as third-party beneficiary to New York Stock Exchange rules that provide that disputes between members and non-members shall be arbitrated).

53. James M. Hosking, *The Third Party Non-Signatory's Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 493–94 (2004). Assignment and succession in law are “closely analogous” but not identical doctrines. *Id.* at 491. Assignment refers to “[t]he transfer of rights or property.” BLACK’S LAW DICTIONARY 115 (7th ed. 1999). Succession refers to “[t]he acquisition of rights or property by inheritance.” *Id.* at 1145.

54. See REDFERN & HUNTER, *supra* note 27, ¶ 3-30, at 176.

55. See DiLeo, *supra* note 1, at 63 (“When a contract states that it binds successors and assigns, or, when by operation of law, successors in interest are bound by the terms of a contract, arbitration clauses may also bind such nonsignatory successors in interest.”); see also *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999).

56. See Lamm & Aqua, *supra* note 15, at 726–27.

57. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.—FOREIGN INVESTMENT L.J. 232, 257 (1995).

58. REDFERN & HUNTER, *supra* note 27, ¶ 1-146, at 81.

tration by requiring that an arbitration agreement be “in writing” and “signed by parties” or be contained in an exchange of letters or telegrams to be held enforceable.⁵⁹ U.S. jurisprudence is inconsistent as to whether a court should apply a strict or lenient interpretation of this requirement in the context of nonsignatories.⁶⁰ Many commentators agree that this requirement is indicative of the fact that the New York Convention was originally written in 1958 and is “beginning to show its age.”⁶¹ Many international arbitral tribunals also currently ignore the requirement as long as there is *some* written evidence of an agreement to arbitrate, including an oral agreement to arbitrate recorded by any party or by a third party.⁶²

International contractual agreements increasingly tend to contain interwoven and multilayered legal obligations. Consequently, the question of how to deal with nonsignatories who become entangled in disputes over such agreements is no longer theoretical. Rather, it has become a regular issue before international arbitral tribunals.⁶³ Arbitral tribunals frequently encounter this issue in disputes involving construction companies, maritime parties, state entities, and investment treaty disputes.⁶⁴ Tribunals also deal with third parties in evidentiary issues, whereby third parties may sometimes be compelled to produce evidence or documents in arbitral proceedings with the assistance of a court of competent jurisdiction.⁶⁵

Nonsignatories to arbitration agreements may also be bound to arbitrate before an international arbitral tribunal under various legal theories that reflect domestic legal theories concerning nonsignatories.⁶⁶

Under the “group of companies doctrine,” the benefits and duties arising from an arbitration agreement may be extended to other members of the same group of companies or to the shareholders, officers, or directors of a signatory company.⁶⁷ For example, in *Dow Chemical France v.*

59. 9 U.S.C. § 201 (2000); *see also* Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666, 669 (5th Cir. 1994); Walker & Zanger (W. Coast) Ltd. v. Stone Design S.A., 4 F. Supp. 2d 931, 936 (C.D. Cal. 1997), *aff’d*, 142 F.3d 447 (9th Cir. 1998). *But see* Fabrizio Marrella, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT’L L. REV. 1055, 1095–98 (2005) (explaining that maritime arbitration agreements and e-commerce arbitration agreements may not be required to be in writing under the New York Convention).

60. *See* Hosking, *Quest for Consent*, *supra* note 19, at 300.

61. *See* REDFERN & HUNTER, *supra* note 27, ¶ 1-146, at 81.

62. *See id.*, ¶ 3-09, at 161.

63. *See* Hosking, *Quest for Consent*, *supra* note 19, at 289.

64. Hosking, *Doing Justice Without Destroying Consent*, *supra* note 53, at 479.

65. *See* REDFERN & HUNTER, *supra* note 27, ¶ 6-79, at 360.

66. *See* discussion *supra* Part III.A.

67. *See* REDFERN & HUNTER, *supra* note 27, ¶ 3-31, at 176–78; *see also* Hosking, *Quest for Consent*, *supra* note 19, at 294.

ISOVER Saint Gobain,⁶⁸ the ICC arbitral tribunal determined that non-signatory parent companies and affiliates to an arbitration agreement can be treated by the parties to the agreement as “one and the same economic reality” with the signatories.⁶⁹ Such parent and affiliate companies could probably be included as claimants alongside the signatories to a dispute because of their unique and special relationship with the signatory claimants.

Statistically, non-party involvement in international arbitration is increasing and has been compared to the issue of privity in product-liability cases in the United States in the 1960s.⁷⁰ Nonsignatories may become involved in international arbitration through the private law of assignment, agency, and succession.⁷¹ U.S. courts have applied the doctrine of agency to bind agents to arbitrate claims in international disputes.⁷² An agent may be bound to an agreement, which works to his or her benefit.⁷³ Similarly, courts have applied the doctrine of equitable estoppel to international disputes by compelling arbitration between companies that had not signed an arbitration agreement if the claims were “inherently inseparable.”⁷⁴ Some European countries have even enacted statutes, requiring nonsignatories to arbitrate certain kinds of disputes in domestic arbitrations within those countries.⁷⁵

68. Cour d'appel [CA] [regional court of appeal] Paris, Oct. 21, 1983, J.D.I. 1983, 110, 899.

69. *Id.* at 904. The court used the phrase “une réalité économique unique.” *Id.*

70. See Paulsson, *supra* note 57, at 255–57 (describing the ability of a complainant to directly face a defendant before an international arbitral tribunal despite contractual formalities as analogous to the ability of a consumer to bring a direct product liability action against an upstream manufacturer).

71. See REDFERN & HUNTER, *supra* note 27, ¶ 3-34, at 179.

72. See, e.g., *Alamria v. Telcor Int'l, Inc.*, 920 F. Supp. 658, 669–74 (D. Md. 1996) (holding nonsignatory Saudi Arabian agent of U.S. manufacturer bound by an ICC arbitration clause under principles of apparent authority).

73. See *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (holding that Italian agent who signed arbitration agreement with boat classification society on behalf of French principal could be bound to arbitrate claim against society because agent derived benefit from the contract).

74. See, e.g., *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177–78 (2d Cir. 2004) (permitting nonsignatory subsidiaries of companies from the Netherlands, Norway, and Luxembourg to compel signatory customers to arbitrate claims that were “undeniably intertwined”); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–21 (4th Cir. 1988) (referring company's claims against another company and its foreign affiliates to arbitration where the claimant company only had distribution contracts containing arbitration clauses with some of the affiliates); see also Eisen, *supra* note 23, at 45.

75. See Otto Sandrock, “Intra” and “Extra-Entity” Agreements To Arbitrate and Their Extension to Non-Signatories Under German Law, 19 J. INT'L ARB. 423, 433 (2002) (explaining that under the German Arbitration Act enacted in 1998 a “new entrant [to an arbitration agreement] will be bound by the arbitration agreement although he never attached his signature to it”).

IV. CLASS ARBITRATION

A. *Class-Action Litigation in the United States*

The class action is a “uniquely American procedural device” that allows a small number of individual plaintiffs to represent a larger group of plaintiffs in one litigation proceeding against a single defendant who caused a similar injury to all of the plaintiffs.⁷⁶ Federal class-action suits are governed by Federal Rule of Civil Procedure 23 (“Rule 23”), which was adopted in 1966 and coincided with the American civil-rights revolution.⁷⁷

To start a class-action suit, a self-appointed class representative or a group of representatives may file suit on behalf of the entire class.⁷⁸ An “entrepreneurial” lawyer often recruits, represents, and finances the litigation, hoping that it will result in a large settlement or a high jury verdict that includes attorney fees.⁷⁹ Because prior consent is not required from absent class members, elaborate and strict procedural steps must be taken under Rule 23 to protect the rights of the absent class members.⁸⁰ The representative plaintiff or plaintiffs must provide notice that each member of the class action is aware of the action, knows of the class, has the opportunity to opt out of the class, and has the chance to enter an appearance or a meaningful opportunity to participate should he or she wish to do so.⁸¹ Generally, notice must entail more than “mere publication.”⁸²

The court presiding over a class action plays a critical role in ensuring that the appropriate procedural steps are taken.⁸³ Most importantly, the judge must “certify” the class very early in the proceeding.⁸⁴ To

76. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002).

77. See FED. R. CIV. P. 23; see also Sherman, *supra* note 76, at 409. Many class actions during the civil-rights revolution involved plaintiffs requesting injunctive relief as opposed to damages. See *id.* at 404–05. Both are allowed under the U.S. system of class actions. *Id.* Please note that class actions may also be governed by state law. See Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation over Tobacco Industries*, 33 GA. L. REV. 979, 998 (1999) (“Many states have class action statutes or rules similar to Federal Rule 23.”). For purposes of efficiency, this note focuses primarily on federal class actions.

78. See FED. R. CIV. P. 23(a).

79. Sherman, *supra* note 76, at 409.

80. See Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1727–31 (2006). As part of this process, the court may select appropriate counsel where several people are competing for the same position. See MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.271, at 279 (2004).

81. FED. R. CIV. P. 23(c)(2)(B); see also Weston, *supra* note 80, at 1730, 1768–72.

82. Weston, *supra* note 80, at 1730.

83. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (“[A court] must provide minimal procedural due process protection [to bind absent class members].”).

84. FED. R. CIV. P. 23(c)(1)(A).

certify, the judge affirms that (1) the class is so large that joinder would be impracticable ("numerosity requirement"), (2) there are questions of law and of fact common to the class ("commonality requirement"), (3) the representative plaintiffs' claims and defenses are typical of those of the entire class ("typicality requirement"), and (4) the representative plaintiffs will fairly and adequately protect the interests of the entire class ("representativeness requirement").⁸⁵ Because the decision is often outcome determinative, class certification has been referred to as a "death knell."⁸⁶ The court also has the responsibility of determining the adequacy of representation and the fairness of settlements.⁸⁷

Class actions serve important policy purposes. First, they are efficient and economically beneficial because they render it unnecessary to retry the same issue on behalf of each class member.⁸⁸ Second, class actions encourage finality of claims by avoiding inconsistent outcomes in separate trials of the same issues.⁸⁹ Third, they are a cost-effective way for plaintiffs with individual claims that are small but with an aggregate claim that is large to obtain proper representation from an attorney who is willing to treat the claim seriously.⁹⁰ Last, class actions serve the public interest as a "mechanism for the enforcement of public rights."⁹¹

B. *Class Arbitration in the United States*

Two recent developments in the United States have made it more difficult for plaintiffs to pursue class actions. First, Congress enacted the Class Action Fairness Act of 2005, granting federal courts exclusive subject-matter jurisdiction over all class-action claims where the value in controversy exceeds \$5,000,000 and where minimal diversity exists.⁹²

85. *Id.* at 23(a).

86. Weston, *supra* note 80, at 1728.

87. FED. R. CIV. P. 23(e), (g). These procedures are not required in regular litigation.

88. See Sherman, *supra* note 76, at 401.

89. See *id.*

90. See Joseph E. Tilson & Bradford A. LeHew, *FLSA Cases: The New Wave of Employment Litigation*, in 31ST ANNUAL INSTITUTE ON EMPLOYMENT LAW, 395, 401 (PLI Litig. & Admin. Practice, Course Handbook Series No. H0-00K5, 2002) ("Although . . . each individual's claim . . . is generally small, when plaintiffs join together in nationwide class actions, the resulting damages (and attorney's fees) can be immense."); Eric A. Feldman, *Blood Justice: Courts, Conflict and Compensation in Japan, France, and the United States*, 34 LAW & SOC'Y REV. 651, 657 (2000) ("[C]lass actions allow large groups of individuals to join in a common legal action.").

91. Greg Kilby, Note, *Leaving a Stone Unturned—The Unanswered Question from Green Tree Financial Corp. v. Bazzle: Does the Federal Arbitration Act Permit Classwide Arbitration?*, 59 U. MIAMI L. REV. 413, 418 (2005).

92. 28 U.S.C.A. §§ 1332(d)(2)(a)–(c) (2005); see also Justin D. Forlenza, Note, *CAFA and Erie: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1075–77 (2006) (discussing congressional expansion of federal subject matter jurisdiction over class actions).

This change in the law is regarded as detrimental to class-action plaintiffs because federal courts have traditionally been less sympathetic to class-action plaintiffs than state courts have been.⁹³ Second, over the last ten years, large corporations have attempted to minimize their potential to become class-action defendants by placing mandatory binding arbitration clauses in many of their consumer contracts.⁹⁴ These contracts of adhesion have generally been enforced.⁹⁵

As a result of these two developments, some classwide claims have been brought before arbitral tribunals rather than before courts.⁹⁶ This type of proceeding may occur if the parties consent to class arbitration,⁹⁷ if the arbitrator rules that the arbitration agreement permits such a proceeding,⁹⁸ or if a judge enforces the arbitrator's determination.⁹⁹

In practice, class arbitrations have existed as a procedural device in the United States since the 1980s;¹⁰⁰ however, they have not been universally or clearly accepted into U.S. jurisprudence. Entire industries have rejected class arbitrations as a means of dispute resolution.¹⁰¹ Procedural details of class arbitrations are largely undefined by the Federal

93. See Sherman, *supra* note 76, at 409 (“[F]ederal courts . . . are perceived to be less sympathetic to class actions than state courts.”).

94. See Allison Torres Burtka, *Courts Weigh in on Class Action Bans in Arbitration*, TRIAL, Sept. 2006, at 16 (“Mandatory arbitration clauses are common in all types of consumer agreements . . .”); Kilby, *supra* note 91, at 413 (“Corporate America is increasingly relying on adhesive contracts to procure mandatory binding arbitration.”); Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 5–6 (examining how potential class action defendants hope to surreptitiously defeat the class action through the use of mandatory binding arbitration).

95. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (holding that a court may not compel arbitration of class action unless parties expressly provide for class arbitration); see also Bernard Hanotiau, *A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, 20 ARB. INT’L. 39, 46 (2004) (“In the United States, most courts enforce arbitration agreements that are imposed in contracts of adhesion . . .”).

96. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 449 (2003). The *Green Tree* plaintiffs sought arbitration of a classwide dispute after the state court of appeals reversed the trial court’s ruling denying the defendant’s motion to compel arbitration. *Id.*

97. Under standard contract principles, the parties can agree to resolve their dispute according to their wishes. Nevertheless, the idea that all parties to a class arbitration could clearly agree to arbitrate their dispute outside of a contractual arrangement is perhaps unrealistic, because class actions often involve an enormous and amorphous class of claimants. Thus, it is more realistic to expect class arbitration to occur pursuant to the original agreement or pursuant to a judge’s or arbitrator’s ruling.

98. See *Green Tree*, 539 U.S. at 451 (“Under the terms of the parties’ contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”).

99. 9 U.S.C. § 2 (2000) (“[A]n agreement . . . to submit to arbitration . . . shall be valid, irrevocable, and enforceable . . .”).

100. See *Keating v. Superior Court*, 167 Cal. Rptr. 481, 492 (Ct. App. 1980) (“[T]here is no insurmountable obstacle to conducting an arbitration on a class-wide basis.”), *vacated*, 645 P.2d 1192 (Cal. 1982), and *rev’d in part on other grounds sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

101. See Kilby, *supra* note 91, at 422–23 (“[T]he entire securities industry has rejected classwide arbitration as a dispute resolution mechanism.”).

Arbitration Act ("FAA")¹⁰² and the Uniform Arbitration Act ("UAA").¹⁰³ Thus, such procedures are "largely left to the ad hoc determination of the arbitrator or provider."¹⁰⁴ In 2003, the American Arbitration Association created a list of Supplementary Rules for Class Arbitrations.¹⁰⁵ Under the prevailing view, there may be no class arbitration or consolidation of separate arbitral claims without the express consent of the parties.¹⁰⁶ However, some courts have found that class arbitration or consolidation may be a fair and just way to resolve a dispute if the agreement is silent on the issue.¹⁰⁷

The opinion of the U.S. Supreme Court on this issue has been ambiguous. Although the Court has avoided addressing whether the FAA permits class arbitration,¹⁰⁸ it has suggested in dicta that such a proceeding may be permissible.¹⁰⁹ Given the due process concerns that the Court has consistently shown in the past regarding class-action litigation,¹¹⁰ it is likely that these concerns would only be magnified in the

102. 9 U.S.C. §§ 1–16 (2000) (stating no procedures to be followed in class arbitration).

103. UNIF. ARBITRATION ACT §§ 1–25, 7 U.L.A. 10–87 (1997) (stating no procedures to be followed in class arbitration).

104. Weston, *supra* note 80, at 1732; *see also* Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 16 ("[N]o state arbitration statute contains specific provisions dealing with the treatment of class actions.").

105. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), available at <http://www.adr.org/sp.asp?id=21936>.

106. *See, e.g.,* Deulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 482 (4th Cir. 1999) (noting that the FAA provides that "non-class-action arbitration" is the proper procedure where parties did not expressly provide for class arbitration in their agreement); Champ v. Siegel Trading Co., Inc., 55 F.3d 269, 275 (7th Cir. 1995) ("[T]he FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter."); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings").

107. *See, e.g.,* Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can., 210 F.3d 771, 775 (7th Cir. 2000) (holding that an arbitration agreement that is silent regarding consolidation of proceedings can reasonably be interpreted to mean that the parties impliedly consented to consolidated claims); Keating v. Superior Court, 167 Cal. Rptr. 481, 492 (Ct. App. 1980) ("[T]here is no insurmountable obstacle to conducting an arbitration on a class-wide basis."), *vacated*, 645 P.2d 1192 (Cal. 1982), and *rev'd in part on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991) (discussing how class arbitration is a better option than class action litigation or multiple individual arbitrations).

108. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453–54 (2003) (holding that the permissibility of class arbitration is for an arbitrator to decide under state contract law); *see also* Kilby, *supra* note 91, at 414 (arguing that the Supreme Court "failed to seize the opportunity" to address whether the FAA permits class arbitration).

109. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (suggesting that class arbitration is possible under New York Stock Exchange rules because the rules "provide for collective proceedings"); *see also* Kilby, *supra* note 91, at 425–26 (discussing the Court's suggestion in *Gilmer*).

110. *See also* Kilby, *supra* note 91, at 423 ("A major theme running through contemporary

context of arbitration. Nevertheless, the Court has consistently stated that it views arbitration as a preferred dispute-resolution method.¹¹¹ The domestic debate over class arbitrations is likely to continue in the future.

C. *Class Litigation Abroad*

The U.S. class-action procedural device is viewed with “admiration and suspicion” abroad.¹¹² For example, European countries have had very little experience with group litigation with the exception of common-law countries, such as the United Kingdom and Wales.¹¹³

Despite this tradition, there has been a recent trend toward multiparty litigation in Europe.¹¹⁴ One reason for this trend is the decline of welfare and legal-aid programs abroad.¹¹⁵ Another reason for this trend is the need for greater protection to investors.¹¹⁶ As a result, countries that have traditionally ignored group litigation as a dispute-resolution mechanism are now eager to experiment with different variations of this U.S. procedure.¹¹⁷

Legislation governing and outlining rules for group actions has been enacted in the past twelve years in many countries, including the Netherlands, Portugal, England, Wales, Sweden, and Spain.¹¹⁸ This trend was reflected in the European Directive on Injunctions for the Pro-

Supreme Court class action jurisprudence is the fact that the class action, as a dispute resolution device, raises several due process concerns.”).

111. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (noting that there is a “national policy favoring arbitration”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that there is a “liberal federal policy favoring arbitration agreements”).

112. Sherman, *supra* note 76, at 401.

113. See Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT’L L. 321, 328 (2001) (“[T]he only European jurisdictions that have any significant experience with multi-party actions for compensatory damages are the common law countries: England and Wales . . .”).

114. See Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT’L L. & POL’Y 281, 284 (2006) (noting that there is a “recent trend to adopt variations of U.S.-style class action mechanisms in Europe”); *If You Can’t Beat Them, Join Them*, ECONOMIST, Feb. 17, 2007 (“[C]lass-action lawsuits are on their way [to Europe.]”); Paul Llewellyn & Colleen Davies, *American Glean*, LAWYER.COM, Mar. 27, 2006, <http://www.thelawyer.com/cgi-bin/item.cgi?id=119356&d=122&h=24&f=46> (explaining that there is an increase in the occurrence of quasi-class actions in Europe because EU citizens are allured by the U.S. system).

115. See Sherman, *supra* note 76, at 402.

116. See Grace, *supra* note 114, at 284 (noting that Europeans have adopted U.S. class action procedures “in an effort to provide greater investor protections”).

117. See Sherman, *supra* note 76, at 432 (“The pace of experimentation by other countries with group, representative, or class litigation devices has increased enormously in recent years.”).

118. See *id.* at 420 (“In May 2002, the Swedish Parliament passed the Act on Group Actions . . .”); Hodges, *supra* note 113, at 327 (outlining statutes allowing group actions in the Netherlands, Portugal, England, Wales, and Spain).

tection of Consumers' Interests in 2000, allowing certain organizations and entities to file group litigation in European courts.¹¹⁹ In fact, this is not such a radical change for many European jurisdictions including Germany, France, and Italy, which, for many years, have allowed non-parties to join ongoing criminal investigations or prosecution proceedings as a *partie civile* in order to receive compensation in the event of a favorable ruling.¹²⁰ French government officials have held an ongoing debate about enacting legislation to introduce class-action lawsuits in France,¹²¹ and U.S. firms that specialize in class-action work are "positioning themselves in anticipation of a potential fusillade of class actions across the Atlantic."¹²²

European group actions differ from U.S. class actions in a number of important ways.

First, individuals may not appoint themselves as class representatives in the European system.¹²³ This is a function of the fact that the European public is generally protected from injury by public institutions such as Social Security. Thus, the European system does not need entrepreneurial trial attorneys motivated by contingency-fee agreements to act as private Attorney Generals through the tort litigation system like in the United States.¹²⁴ Naturally, this means that Europeans must recuperate from any such injuries under a more bureaucratic system with less zealous representation.¹²⁵

Second, successful European group actions will generally result in

119. See Sherman, *supra* note 76, at 418.

120. See Hodges, *supra* note 113, at 331 (explaining the *partie civile* system).

121. See Erik E. Larsen, *France Moves Toward Allowing Class Action Suits*, COMPETITION.LAW360.COM, July 12, 2006, <http://competition.law360.com/Secure/ViewArticle.aspx?id=7462>; Bailey Somers, *France Drops Class Action Bill*, COMPETITION.LAW360.COM, Jan. 30, 2007, <http://competition.law360.com/secure/ViewArticle.aspx?Id=17511> (noting that until the French National Assembly debated a class action bill in the fall of 2007, "[a] group of Parisian lawyers was already offering collective legal actions through a Web site called classaction.fr, which works around restrictions in French law by allowing clients to sign up for [class action] suit[s] on the Web").

122. Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, LAW.COM, June 25, 2007, <http://www.law.com/jsp/article.jsp?id=1182416759806>. Skadden, Arps, Slate, Meagher & Flom LLP has already "put together a group of its class action and litigation specialists to carefully follow the development of class actions throughout Europe." *Id.*

123. See Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 357-58 (2001) ("[T]here is no method of self-appointment of an individual champion . . .").

124. See *id.* at 358 (noting that there is "no concept of an individual private Attorney General"); see also Hodges, *supra* note 113, at 339 (explaining that social security systems rather than tort law "are the principal mechanisms of providing security and finance for injured citizens in Europe").

125. See Koch, *supra* note 123, at 358 (arguing that the resulting European system involves "poorly-motivated, cumbersome, and perhaps understaffed bureaucracy," as well as questionable legal representation).

an award of injunctive relief rather than in damages.¹²⁶ If damages are awarded, they will generally be lower than in the United States, and they will not include punitive damages.¹²⁷ From a policy standpoint, potential European tortfeasors are more heavily regulated than their U.S. counterparts and thus do not require a system of punitive damages to deter them from wrongdoing.¹²⁸

Third, European attorneys are usually reimbursed for their services by public funding or in accordance with the “loser pays” principle.¹²⁹ Bearing the risk of incurring multiple legal fees under this principle, European plaintiffs are discouraged from bringing weak or speculative claims against corporate defendants in hopes of receiving a speedy settlement.¹³⁰ Because of this payment principle, because European lawyers are restricted from advertising as freely as U.S. lawyers,¹³¹ and because most European courts function in a predictable and scientific manner,¹³² European lawyers have little incentive to devote much of their practice to group litigation.

In sum, although most Europeans continue to reject the class-action system as it exists in the United States, some people in the European legal community are interested in adapting the class-action system to fit their own legal framework.¹³³

D. *Multiparty Arbitration Abroad*

Given the new and developing nature of class litigation abroad, it is no surprise that multiparty arbitration is little known outside of the

126. *See id.* (explaining that European-style collective actions emphasize injunctive relief rather than damages).

127. Hodges, *supra* note 113, at 330 (“No European jurisdiction generally permits punitive damages . . .”).

128. *See id.*

129. *See* Koch, *supra* note 123, at 365 (describing the cost rules for most European countries, which include public funding and financing “via the market”). According to the “loser pays” principle, the losing party to a dispute pays not only their own attorney’s fees but also the opposing party’s attorney’s fees. *See* STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 288 (6th ed. 2004).

130. *See* Hodges, *supra* note 113, at 329–44 (arguing that the lack of a “loser pays” principle which would aim “to discourage weak cases” in the U.S. has created a “grossly over-heated litigation market” here).

131. *See id.* at 329 (noting that lawyers are prohibited from advertising in most European jurisdictions outside of England).

132. This predictable and scientific manner stands in contrast to U.S. jury verdicts, which can be heavily swayed by emotion. *See id.* at 330 (“The U.S. jury system introduces a level of instability by lowering the level of intellectual and scientific understanding of which the court is capable.”).

133. *See If You Can't Beat Them, Join Them*, *supra* note 114 (“[A London-based lawyer] believes that businesses might cheer the arrival of class actions in Europe if they understood how they differ from the American sort.”).

United States.¹³⁴ Class arbitrations are particularly rare and unknown in civil-law countries.¹³⁵ Indeed, many commentators agree that international arbitral tribunals are an inappropriate venue to resolve class disputes because many parties agree only to arbitrate outside of their home country when they are certain that the entire arbitral process will be based on the common will and agreement of the parties.¹³⁶ Thus, the more parties there are to a contract or to a dispute, the more care the arbitral tribunal will generally take to ensure that all of the parties have agreed to resolve the dispute by arbitration.¹³⁷

In addition, related disputes that are being heard before an international arbitral tribunal generally cannot be consolidated because of certain "practical and legal problems."¹³⁸ For example, the different disputes to be consolidated usually stem from different arbitration agreements that usually contain differing provisions concerning arbitrator-appointment methods, rules of arbitration, and conflicting laws governing the merits of the dispute.¹³⁹

There are, however, examples of courts ordering a consolidation of claims before an international arbitral tribunal. Among the countries that have enacted reforms such as the Revised Uniform Arbitration Act of 2000 ("RUAA")¹⁴⁰ are the Netherlands, New Zealand, and Hong

134. See REDFERN & HUNTER, *supra* note 27, ¶ 3-82, at 205-06 (noting that it is difficult and sometimes impossible to achieve joinder and consolidation in arbitral proceedings).

135. See Hanotiau, *supra* note 95, at 39-40 ("[Group actions] are still relatively rare and unknown in civil law countries.").

136. See REDFERN & HUNTER, *supra* note 27, ¶ 3-73, at 200 ("[T]he arbitral process is based upon agreement of the parties . . ."); see also Dunham, *supra* note 11, at 329 (noting that under ICC rules, a third party may only intervene in arbitral proceedings if all parties agree to it). It is presumably very difficult to imagine that all members of a nebulous class of claimants could come to an agreement that they all wish to arbitrate.

137. See REDFERN & HUNTER, *supra* note 27, ¶ 3-73, at 200 ("The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against its will.") (quoting Jean-Louis Delvolvé, *Final Report on Multi-party Arbitrations*, 6 ICC BULL. 1, 26 (1995)).

138. *Id.* at 206. Consolidation, of course, differs from class arbitration in that consolidation concerns claims that have already been filed and may be arbitrated separately. On the other hand, class arbitration concerns small claims that may never be heard other than through the vehicle of a class proceeding. See Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 86 (explaining the difference in consequences between a court's order to refuse consolidation and a court's order to refuse class arbitration).

139. See REDFERN & HUNTER, *supra* note 27, ¶ 3-82, at 206.

140. The RUAA empowers courts to order consolidations of arbitral claims. As of late 2006, this act was adopted in 11 states and it is under consideration in many other states. See Michael H. Diamant, Philip R. Bautista & Kahn Kleinman, *Strategies for Mediation, Arbitration, and Other Forms of Alternative Dispute Resolution*, in ALI-ABA COURSE OF STUDY: LITIGATING TRADEMARK, DOMAIN NAME & UNFAIR COMPETITION CASES 237, 248 (2006) (noting that the RUAA has been adopted in Alaska, Colorado, Hawaii, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Oregon, Utah, and Washington).

Kong.¹⁴¹ Likewise, the London Court of International Arbitration Rules ("LCIA Rules") permit joinder or intervention of third parties without the consent of the existing parties if it would be just, expeditious, and economical to provide a single forum.¹⁴² Disputes concerning commodities and maritime matters are regularly resolved using "string arbitrations" whereby all parties in a product chain are bound by the arbitrator's decision.¹⁴³ This type of practice implies a quasi "industry-wide permission" to settle all matters through arbitration despite blurring the traditional boundaries set by the nature of party consent. In addition, even though the text of the New York Convention implies that an arbitral award granted after consolidation of claims might not be enforceable,¹⁴⁴ there is broad support for the theory that the award would be enforceable by any party to the arbitration.¹⁴⁵

Because many transnational business deals concern multilayered contractual obligations,¹⁴⁶ arbitral tribunals often confront the question of consolidating related but distinct claims that stem from these multilayered obligations. Consider the following hypothetical example of an international construction project.¹⁴⁷ An investor from country A enters into a contract, including an arbitration provision, with a main contractor from country B who subsequently enters into numerous additional contracts containing separate arbitration provisions with subcontractors. If any of the work performed on the project is inadequate, the investor would be able to join all of the parties together to resolve the dispute in most national courts.¹⁴⁸ However, because the arbitration provisions involved in the contracts governing the project are separate, the investor

141. See Hosking, *Quest for Consent*, *supra* note 19, at 298 (outlining legislation in the Netherlands, New Zealand, and Hong Kong).

142. London Court of International Arbitration Rules, arts. 8.1, 8.2 (1998), available at http://www.lcia.org/ARB_folder/arb_main.htm.

143. See REDFERN & HUNTER, *supra* note 27, ¶ 3-80, at 204 (noting that string arbitrations have been created because it would be "wasteful for the dispute to be litigated or arbitrated at each stage").

144. New York Convention, *supra* note 12, at 6, art. V(1)(d) ("[The recognition and enforcement of an arbitral award may be refused if] the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place").

145. See REDFERN & HUNTER, *supra* note 27, ¶ 3-82, at 206 (arguing that where an arbitral tribunal issues an award after being "imposed upon the parties," there is "strong support" for the view that the award would be enforceable under the New York Convention).

146. See *supra* text accompanying notes 64-65.

147. This hypothetical is an adapted version of the hypothetical in REDFERN & HUNTER, *supra* note 27, ¶ 1-48, at 29-30.

148. For example, if the investor brought such a claim in U.S. federal court, the defendants could be joined under Federal Rule of Civil Procedure 20(a), which provides in pertinent part: "All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences . . ." FED. R. CIV. P. 20(a).

may arbitrate only against the main contractor, after which the main contractor may seek to recover against the subcontractors in separate arbitrations.

Of course, even though these claims could be consolidated with the consent of all of the parties involved, this rarely happens because consolidation does not appear to be in any party's interest. The investor would not want to lengthen and complicate proceedings.¹⁴⁹ The subcontractors would also prefer to await the outcome of the main arbitration to see if there is even a case for them to answer.¹⁵⁰ But given that arbitration contains no comparable notion to *stare decisis*,¹⁵¹ the subcontractors in this case would not necessarily have a better understanding of the strength or weaknesses of their case by knowing the outcome of the main arbitration because their follow-up arbitrations could very well result in inconsistent findings on the very same questions of law.¹⁵² Thus, the subcontractors would be confronted with the choice of whether they should (1) await the results of the arbitration between the main contractor and the investor, with the risk of an inconsistent decision¹⁵³ in a potential future arbitration against the main contractor, or (2) agree to consolidate the main contractor's claims against them with the investor's claim against the main contractor, thereby risking the cost and the time of arbitrating a dispute that they would have been able to avoid if the main contractor prevailed in the initial arbitration.

Although party consent is the cornerstone of international arbitration,¹⁵⁴ courts are not without a voice on such matters. For example, in *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.*, a British

149. The investor would be even less inclined to consolidate proceedings if the European "loser pays" principle applied to the proceedings, because the investor would then risk having to pay a larger amount in the event of an adverse ruling from the arbitral panel.

150. If the main contractor prevailed in the initial arbitration against the investor, the main contractor would presumably not seek to collect from the subcontractors and suppliers.

151. *Stare decisis* is defined as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY, *supra* note 53, at 1414. As applied to arbitration, an arbitral tribunal is not ultimately bound by its previous rulings in the same manner as a court, although the tribunal may consider its previous rulings persuasive authority. See *Conn. Light & Power Co. v. Local 420, Int'l Bhd. of Elec. Workers*, 718 F.2d 14 (2d Cir. 1983) (discussing in the context of labor arbitration that "[p]rinciples of *stare decisis* and *res judicata* do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings").

152. For example, there could be inconsistent findings on the issue of causation.

153. For example, in the first arbitration between the main contractor and the investor, an arbitral panel could rule that the main contractor caused all damages to the investor, but in a second arbitration between the main contractor and the subcontractors, a different arbitral panel could rule that the subcontractors were responsible for all damages.

154. See REDFERN & HUNTER, *supra* note 27, ¶ 1-08, at 6 ("An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation stone of modern international commercial arbitration.").

court that was confronted with a similar factual scenario compensated for the fact that it could not order consolidation of the various arbitrations by insisting that the same arbitrator decide each of the separate arbitration proceedings.¹⁵⁵ Thus, applying this ruling to the facts of the hypothetical, the subcontractors would probably still decide to await the result of the first arbitration, hoping that the main contractor would prevail and not seek to recover from them. The subcontractors, however, would also know that if the main contractor lost and sought to recover from them, the result of subsequent arbitral proceedings would likely be consistent with the result of the main proceeding.

V. "THE PERFECT STORM"

The concept of arbitration has evolved from its core as a simple, two-party dispute-resolution mechanism based on contractual consent into a complex system that may involve multiple parties, including both nonsignatories and groups of claimants who wish to resolve their disputes through class arbitration or consolidated arbitration.¹⁵⁶ If these two trends—toward nonsignatory arbitration and class arbitration—continue, it is increasingly likely that they will also overlap.

Consider the following scenario. A group of claimants decides to begin a class arbitration before an international tribunal against a single defendant stemming from separate contracts that each of the claimants had with the defendant. To increase their chances of obtaining a potentially large recovery, the claimants try to form a large class, including people who have suffered similar injuries at the hands of the defendant but who have never signed an arbitration agreement with the defendant. The resulting dispute involves a class arbitration with nonsignatory class members. Such disputes are conceivable under several nonsignatory theories, including succession, estoppel, and assumption.

Under the theory of succession, an assignee or successor in interest of a contract containing an arbitration provision may have the duty to arbitrate any disputes that arise from that agreement despite never having signed the agreement.¹⁵⁷ In *Florida Farm Bureau Insurance Cos. v. Pulte Home Corp.*, homeowners who brought suit against the builder of their house were compelled to arbitrate their claim.¹⁵⁸ This was so because the previous owners of the home had signed an agreement with the builder containing an arbitration clause that provided that warranties given to the original purchasers were also provided to "all subsequent

155. (1982) 2 Lloyd's Rep. 425, 427.

156. See discussion *supra* Part III–IV.

157. See discussion *supra* Part III.A.6.

158. No. 8:04-CV-2357-T-EAJ, 2005 WL 1345779, at *7 (M.D. Fla. June 6, 2005).

owners.”¹⁵⁹ This situation could be replicated in the case of any company that produces or manufactures a product with a similar warranty, which is then sold to buyers in various countries. A group of buyers, including second-hand and third-hand owners who have been injured by the product,¹⁶⁰ could potentially bring a class arbitration against the company as absent nonsignatory class members.

Under the theory of estoppel, a party who signed an arbitration agreement may be estopped from avoiding arbitration with an opposing party who never signed the same arbitration agreement if “the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.”¹⁶¹ In *JLM Industries, Inc. v. Stolt-Nielsen SA*,¹⁶² the U.S. Court of Appeals for the Second Circuit compelled arbitration of antitrust claims by a group of maritime charterers that purported to represent an estimated class of 500 to 700 charterers¹⁶³ because each of the charterer claimants had signed an arbitration agreement with subsidiaries of the defendant parcel-tanker owners.¹⁶⁴ In addition, the Second Circuit held that the signatory charterers were estopped from avoiding arbitration against the nonsignatory parcel-tanker owners where the charterer’s claims against the nonsignatory owners stemmed from alleged joint and several liability arising from the signatory owners’ contracts.¹⁶⁵

In a related litigation by other putative class representatives following the *JLM* decision, the U.S. District Court for the Southern District of New York held that an arbitral panel’s decision to permit a class arbitration between a nonsignatory defendant and a class of signatory claimants had been made in manifest disregard of the law.¹⁶⁶ The court held that arbitration clauses that are silent on the issue of class arbitration cannot be construed to permit such class proceedings under federal maritime law or under New York state contract law.¹⁶⁷ Nevertheless, in *JLM* the Second Circuit suggested that it could permit piecemeal arbitration involving a class of nonsignatories in the future, when it stated that just

159. *Id.* at *2.

160. Products are regularly resold from one consumer to another consumer in informal marketplaces such as www.ebay.com.

161. *Choctaw Generation Ltd. v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001) (internal quotation marks omitted) (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 779 (2d Cir. 1995)).

162. 387 F.3d 163 (2d Cir. 2004).

163. *Id.* at 180–81.

164. *Id.* at 177–78.

165. *Id.* at 178 n.7.

166. *See Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006).

167. *Id.* at 384–86.

because an underlying lawsuit takes the form of a class action, that does not bar the matter from arbitration, because “[f]ederal courts have . . . consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue.”¹⁶⁸ Thus, future nonsignatory defendants who have been sued for antitrust violations by a group of customers could conceivably compel arbitration or be compelled to arbitrate the resulting dispute against the class of customers.

Under the theory of assumption, an arbitration clause may apply to a nonsignatory where the nonsignatory has impliedly agreed to arbitrate.¹⁶⁹ Consider the following hypothetical example under this theory. Suppose that at the opening ceremony of the Olympic Games in Beijing in 2008, a piece of the newly constructed stadium collapses, and injures or kills hundreds of attendees from all over the world. Suppose further that the admission tickets the attendees used to enter the stadium contained a clause stating that any dispute arising from the ceremony and brought against the Olympic Committee must be resolved by arbitration. Finally, suppose that this arbitration clause contained no provision barring the possibility of class arbitration. Under these facts, each of the attendees who obtained their admission ticket without physically signing the agreement would be considered a nonsignatory to the agreement and may be adjudged to have consented to arbitrate any potential disputes stemming from the use of the ticket and attendance at the opening ceremony. If a group of representative-injured attendees brought arbitral action against the Olympic Committee on behalf of the entire group of injured attendees, the nonrepresentative attendees would presumably have to accept the arbitral award or decision unless they opted out of the proceedings.¹⁷⁰

These hypothetical scenarios raise critical legal and policy questions, which will be addressed below under the following issue headings: (A) Constitutionality, (B) Consent, (C) Confidentiality, and (D) Efficiency. Each heading will first address common arguments made for prohibiting the use of arbitral tribunals to resolve such hypothetical disputes in order to maintain the traditional, contractual basis of arbitra-

168. *JLM Indus., Inc.*, 387 F.3d at 180 n.9 (quoting *Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 239 F. Supp. 2d 332, 338 (S.D.N.Y. 2002) (internal quotation marks omitted)). Because no class had been certified and only the claims of JLM were before the court, the Second Circuit specifically refused to decide whether the arbitrations would be in class form or piecemeal form. *Id.*

169. See discussion *supra* Part III.A.2.

170. To keep this illustration simple, this hypothetical considers one defendant only, the Olympic Committee. In reality, there would probably be many other potential defendants responsible for designing and building the stadium, including contractors, subcontractors, architects, and engineers.

tion. Each heading will then recognize the strongest arguments highlighting the possible advantages of using arbitration to resolve such disputes.

A. Constitutionality

Class arbitrations raise a variety of constitutional concerns.¹⁷¹ Absent class members to a federal class action being litigated in an Article III court are constitutionally protected by a government-appointed judge who is required to follow specific procedural rules ensuring constitutional protection.¹⁷² In contrast, absent members to class arbitration find themselves in a vulnerable position where the same constitutional rights, protected in a court of law, could be neglected. There are two reasons for this disparity.

First, an arbitrator, unlike a judge, is not a servant of the state and does not have state-sanctioned authority to imprison people or impose penalties in the form of payments to the state.¹⁷³ An arbitral tribunal's jurisdiction is not the same as a judge's jurisdiction.¹⁷⁴ Arbitrators require judicial support in some aspects of their proceedings under the FAA¹⁷⁵ because arbitrators are "not considered [] state actor[s] within the meaning of constitutional jurisprudence."¹⁷⁶ Thus, whereas a judge's jurisdiction, powers, and duties are "clearly established" by statutory and constitutional law, an arbitrator's jurisdiction, powers, and duties derive from a "complex mixture" of the law as well as the wills of the parties to a dispute as expressed by contract.¹⁷⁷ Also, less uniformity exists between arbitrators on international tribunals who come from different countries and legal backgrounds than between a panel of appellate judges all trained in the same law from the same country.¹⁷⁸ These fun-

171. This subsection will primarily focus on class arbitrations; the contractual concerns involved in nonsignatory arbitrations are deferred to subsections B, C, and D.

172. See discussion *supra* Part IV.A.

173. See REDFERN & HUNTER, *supra* note 27, ¶ 8-11, at 423 (noting that the powers to imprison and to impose penalties in the form of fines are reserved to judges appointed by the state).

174. See *id.* ("[T]he powers of an arbitral tribunal are not necessarily the same as those of a court."). Usually an arbitral tribunal's jurisdiction is more limited than a judge's jurisdiction, but the tribunal's jurisdiction may be wider than a judge's in some respects if so provided by the controlling arbitration agreement. For example, a British court applying U.S. law would have no power to order triple damages, but an arbitral tribunal sitting in England may have this power under the disputed arbitration agreement. *Id.*

175. For example, the FAA authorizes courts to stay litigation pending arbitration, enforce arbitration agreements, appoint arbitrators, and confirm arbitration awards. 9 U.S.C. §§ 3-5, 10 (2000).

176. Weston, *supra* note 80, at 1717.

177. REDFERN & HUNTER, *supra* note 27, ¶ 5-01, at 277.

178. See *id.*, ¶ 8-25, at 434 (noting that arbitrators who decide major commercial disputes usually do not have a "shared legal background").

damental differences between courts of law and arbitral panels could lead to an unpredictable and perhaps volatile system of justice for vulnerable class members in arbitration.

Second, arbitral proceedings are private actions unaffected by the procedural due process regulations provided by Rule 23.¹⁷⁹ Thus, if class arbitration is instituted based on an arbitration agreement that does not specify procedural rules to govern the proceedings, there are no universal requirements as there would be in a court proceeding under Rule 23.¹⁸⁰ Even if there were rules governing the procedure, it is difficult to imagine an effective method of requiring notice to class members who could be scattered across the globe.¹⁸¹

In addition to not receiving traditional court-imposed protections, absent class members to an arbitration might also miss some of the benefits normally bestowed on parties to a regular arbitral dispute. For example, parties to an international arbitration generally have the right to participate in the process of nominating or selecting an arbitrator.¹⁸² In class arbitration, however, absent class members would probably have no say in the selection of an arbitrator.¹⁸³ Thus, absent class members would be deprived of an inherent characteristic of arbitration that usually instills confidence in the parties.¹⁸⁴ Absent class members to an international arbitration appear even more vulnerable when one considers that arbitral awards, unlike judicial decisions, traditionally did not come in the form of a written opinion, which can be inspected on appeal.¹⁸⁵ Arbitral awards are generally expected to be honored—even

179. See Weston, *supra* note 80, at 1717 (“[A]rbitration typically need not afford parties the due process otherwise guaranteed in a court of law.”).

180. In such a class arbitration, there would be no requirement to provide absent class members with notice or the option to opt-out. There would be no set class certification method regarding numerosity, commonality and representativeness and no expectation that an arbitrator would be responsible for determining the adequacy of representation and the fairness of settlements. See *supra* text accompanying notes 89–91.

181. Perhaps constitutional issues could be avoided if notice were given on an “opt-in basis” rather than on an “opt-out basis.”

182. See REDFERN & HUNTER, *supra* note 27, ¶ 4-12, at 216–17 (outlining the arbitrator selection process).

183. See Weston, *supra* note 80, at 1773 (explaining that only the named plaintiffs and the defendants select an arbitrator with their attorneys in a class arbitration proceeding). It may be appropriate that counsel for the class selects an arbitrator because counsel is usually more informed about the arbitrators than the class members are.

184. See REDFERN & HUNTER, *supra* note 27, ¶ 4-12, at 216–17 (describing how parties should be free to choose their own arbitrators).

185. See Weston, *supra* note 80, at 1777 (“[A]rbitrators do not typically provide written opinions that explain their decisions . . .”). This tradition is changing particularly among ICSID and NAFTA arbitral tribunals, which regularly publish written decisions. See *infra* note 220 and accompanying text. Parties to complex proceedings may also be more likely to demand a written decision from their arbitral tribunal.

if they are considered incorrect.¹⁸⁶ For these reasons, some commentators suggest that constitutional concerns "pose a major hurdle for arbitral class actions."¹⁸⁷

Despite these constitutional concerns, there are a number of responsive arguments in favor of class arbitrations. Although an arbitral tribunal differs fundamentally from a courtroom, this does not mean that an arbitral tribunal is incapable of protecting the due process rights of the parties in class arbitration. An arbitration agreement signifies consent to resolve a dispute in an alternative forum, but it does not necessarily signify "consent to forgo due process rights."¹⁸⁸ It is not beyond an arbitrator's capability to oversee a complex case and still protect the due process rights of the parties involved.¹⁸⁹ An arbitrator may work alongside a judge or under the limited supervision of a judge to ensure that the arbitrator is accurately protecting the due process rights of all parties concerned.¹⁹⁰

Both the New York Convention and the United Nations Commission on International Trade Law, Model Law on International Arbitration ("UNCITRAL Model Law")¹⁹¹ place special emphasis on the principle of equality in party treatment.¹⁹² In fact, the New York Convention places more rigorous standards on due process compliance for international arbitral awards than the FAA places on due process compliance for domestic arbitral awards.¹⁹³

186. See REDFERN & HUNTER, *supra* note 27, ¶ 9-06, at 482 (explaining that parties should be prepared to accept the decision of an international arbitral tribunal even if they consider it wrong, so long as the correct procedures are observed). Most judicial systems still may extend some form of judicial review to assure arbitral fairness; however, parties are expected to consider the arbitral tribunal's ruling final so that arbitration does not become another form of litigation where unfavorable decisions can simply be appealed. *Id.*

187. Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 52.

188. Weston, *supra* note 80, at 1722-23.

189. See Hanotiau, *supra* note 95, at 54 (arguing that experienced arbitrators can handle complex cases in compliance with due process requirements).

190. See Daniel R. Waltcher, Note, *Classwide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 CORNELL L. REV. 380, 403-05 (1989) (describing how an arbitrator could handle a class arbitration with the assistance of a court); see also Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 118 (noting that this type of "back and forth" between judge and arbitrator has been criticized as diminishing the efficient aspects of arbitration).

191. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, June 21, 1985, 24 I.L.M. 1302 (1985) [hereinafter UNCITRAL Model Law].

192. See *id.*, art. 18 ("[P]arties shall be treated equally and each party shall be given a full opportunity of presenting his case."); see also New York Convention, *supra* note 12, art. V(1)(b) (providing that recognition and enforcement of an arbitral award may be refused if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case").

193. Under the New York Convention, a court may vacate an international arbitral award because the arbitrator did not comport with due process. See New York Convention, *supra* note

Although the due process provisions implemented into the New York Convention and the UNCITRAL Model Law are admittedly vague in order to allow adaptability in different countries,¹⁹⁴ there is no reason to believe that these provisions could not be expanded to provide more complex and specific notice requirements in the event a class arbitration involved a large class of geographically diverse class members. These procedural requirements may be enforced by national courts.¹⁹⁵ Even if courts have traditionally deferred to arbitral decisions regarding due process issues in the past,¹⁹⁶ there is no reason to believe that courts could not be required to analyze the due process aspects of arbitral decisions more closely in the case of class arbitration.¹⁹⁷ Courts have provided “adequate judicial supervision” for domestic class arbitrations in the past.¹⁹⁸ There is no reason to believe that a national court could not provide the same services for an international arbitral dispute.

To address any concerns regarding absent class members’ ability to select an arbitrator before class arbitration, the New York Convention or the UNCITRAL Model Law could allow selection of an arbitrator according to a vote where absent class members are counted equally with representative claimants. A national court sitting in the country of arbitration could also oversee the selection process. Under this method, the will of the majority of the parties would still be respected, and those class members who were unsatisfied with the arbitrator selection could either opt out of the arbitration or remain, keeping in mind that class members in judicial litigation are not allowed to select a judge.

Important negative consequences could also result from a court’s decision to prohibit class arbitration. For example, under the International Bar Association (“IBA”) Ethics for International Arbitrators, arbitrators are not permitted to communicate with parties to an ongoing arbitration.¹⁹⁹ In class arbitration or a consolidated arbitration, this

12, art. V(1)(b). In contrast, the FAA does not list an arbitrator’s failure to comport with due process as a specific ground for vacating a domestic arbitral award. *See* 9 U.S.C. § 10(a) (not listing due process violations).

194. *See* REDFERN & HUNTER, *supra* note 27, ¶ 9-22, at 491 (noting that provisions are deliberately left vague in order to suite the different needs of many countries).

195. *See id.*, ¶ 10-40, at 533 (explaining that the appropriate function of a court is simply to decide whether there has been a fair hearing).

196. *See id.*, ¶ 9-21, at 491 (noting that there are numerous examples of unsuccessful due process defenses before national courts).

197. One way to require courts to do this would be to expand or amend the New York Convention and the UNCITRAL Model Law.

198. *See, e.g.,* Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 75 (Ct. App. 1986) (“This case appears to offer no great difficulty in adapting arbitration to fit the class action mold, with adequate judicial supervision over the class aspects.”).

199. INT’L BAR ASS’N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 5.3 (1987) *available at* http://www.ibanet.org/publications/Publications_home.cfm (follow “Guides and free materials”

would mean that the arbitrator would be prohibited from communicating with any parties, including absent class members. However, if all interested parties were required to resolve their claims separately pursuant to a court order, an arbitrator involved in any one of the related disputes could become ripe for corruption by communicating with the parties to a separate arbitration who were intimately familiar with the facts of their case.²⁰⁰

B. Consent

Because arbitration is based on a contractual agreement, each party usually consents to use arbitration as a dispute-resolution mechanism before the dispute arises.²⁰¹ Thus, extending arbitration agreements to include nonsignatories may weaken or even destroy this important foundation of the arbitral process.²⁰² Likewise, representative claimants in class arbitration are not required to obtain consent of other class members to begin arbitral proceedings.²⁰³ These developments could further erode party autonomy in international arbitration, which already looks “a little frayed [a]round the edges.”²⁰⁴

Because of the vast geographical distances and cultural differences between potential claimants in a class arbitration or a consolidated arbitration, it might be practically impossible to obtain consent from all potential participants to such a dispute before proceedings begin.²⁰⁵ In *Siemens A.G. v. Dutco*,²⁰⁶ a French court expressed this exact concern. In that case, one party brought arbitral proceedings against a consortium of two German companies under ICC rules, and when the ICC requested that the two German companies make a joint nomination for an arbitrator rather than two independent nominations, the French court held that

hyperlink; then follow “IBA Rules of Ethics for International Arbitrators” hyperlink) (“Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives.”).

200. This is because the IBA Ethics for International Arbitrators does not prohibit communications between arbitrators and non-parties. *See id.*

201. *See REDFERN & HUNTER, supra* note 27, ¶ 3-30, at 175 (“Party consent is a prerequisite for arbitration.”).

202. Hosking, *Quest for Consent, supra* note 19, at 290 (concluding that “an over-zealous approach to ‘extending’ the arbitration agreement to non-signatories may undermine the fundamental touchstone of arbitration—consent”).

203. *See Weston, supra* note 80, at 1726 (explaining that representative plaintiffs are not required to receive prior consent to initiate a class action lawsuit).

204. REDFERN & HUNTER, *supra* note 27, ¶ 7-42, at 415 (quoting Lord Mustill, Address at LCIA conference at St John’s College: International Economic Disputes: A Wider Perspective (April 1, 2004)).

205. *See Lamm & Aqua, supra* note 15, at 717–18 (arguing that obtaining consent in a class arbitration would be “impossible”).

206. Cour d’appel [CA] [regional court of appeal] Paris, Jan. 7, 1992, J.D.I. 1992, 119, 707.

this violated their principle of equality.²⁰⁷

Contracting parties choose to include arbitration provisions in their agreements and are motivated to remain cordial to one another precisely because they know that any potential disputes that arise will be resolved according to their consensual wishes.²⁰⁸ Thus, if these parties believe that the arbitral process is losing its consensual foundation, they may begin to question the entire process or choose to resolve their disputes using another method of dispute resolution.

Despite these arguments, consent has never been an absolute notion in the context of international arbitration. For example, under the LCIA Rules, consent of all of the parties to an arbitration is not required to join a third party to the arbitration; rather, consent may be inferred.²⁰⁹ Consent is also interpreted broadly by many national courts, which look to honor and validate arbitration agreements.²¹⁰ Some federal district courts have even held that parties intended to arbitrate a dispute stemming from an agreement that referred to an arbitral forum that did not exist.²¹¹ Thus, consent has always been a flexible concept in arbitration.

In the event of a class arbitration involving nonsignatory class members who do not consent to arbitrate, there are two possible ways to resolve the dispute without abandoning the concept of consent. First, the nonsignatory class members could opt out of the class arbitration and arbitrate their disputes in a separate proceeding to which they consent. Second, the arbitral institutional rules could include a separate provision for multiparty, complex proceedings under which the consent of the parties would be determined not by unanimous vote, but rather by a majority vote. Thus, the dispute would still be resolved in an efficient and effective manner according to most, if not all, of the parties' wishes. In

207. *Id.* at 727–28.

208. See Kilby, *supra* note 91, at 419 (explaining that the goodwill between contracting parties is preserved because the manner in which their disputes are resolved is “tailored to their wishes”).

209. London Court of International Arbitration Rules, art. 22(h) (1998), available at http://www.lcia.org/ARB_folder/arb_main.htm (“[An arbitral tribunal may order that any third person] be joined in the arbitration as a party, provided any such third person and the applicant party have consented thereto in writing . . .”). This rule does not require that *all* parties to the arbitration consent. REDFERN & HUNTER, *supra* note 27, ¶ 3-85, at 208; see also Hosking, *Quest for Consent*, *supra* note 19, at 297 (“[C]onsent to permit joinder may be inferred from consent to a particular institution’s rules.”).

210. See REDFERN & HUNTER, *supra* note 27, ¶ 3-38, at 182 (noting that most national courts give effect to arbitration agreements whenever possible).

211. See, e.g., *Warnes, S.A. v. Harvic Int’l, Ltd.*, No. 92 Civ. 5515 (RWS), 1993 U.S. Dist. LEXIS 8457, at *3, *7 (S.D.N.Y. June 22, 1993) (holding that parties who contracted to arbitrate before a non-existent “New York Commercial Arbitration Association” must arbitrate before the AAA); *Astra Footwear Indus. v. Harwyn Int’l, Inc.*, 442 F. Supp. 907, 911 (S.D.N.Y. 1978) (appointing an arbitrator to settle a dispute between parties that had agreed to arbitrate before the New York Chamber of Commerce, which had ceased to arbitrate disputes).

the event that a party voted against the arbitral proceeding and refused to participate in the subsequent proceedings, the arbitral tribunal would still be required to consider the merits of the nonparticipating parties' case in its absence before making a determination.²¹²

Thus, the arbitral process offers additional safety mechanisms in order to protect the rights of nonconsenting parties.

C. Confidentiality

Arbitrations have generally been more secretive than litigation because arbitral decisions have traditionally been unpublished²¹³ and commercial arbitral proceedings usually occur in the private confines of rented hotel rooms rather than in public courtrooms.²¹⁴

On the one hand, many parties choose to arbitrate rather than to litigate precisely because they do not want the subject matter of their dispute to become public.²¹⁵ Allowing large-scale, multiparty disputes to be resolved by arbitration could turn a traditionally private affair into a public spectacle.²¹⁶ Although international arbitral forums have traditionally been successful in avoiding the influence of local politics in the outcome of a dispute,²¹⁷ this tradition could be threatened if the dispute involved massive numbers of litigants permitted to arbitrate simultaneously in one location, triggering local media and other attention. In addition, to the extent that parties to an arbitration clause agree to keep the subject matter of their potential dispute confidential, this agreement would not apply to nonsignatories who are later compelled to arbitrate alongside the contracting parties. These concerns could cause parties to abandon arbitration as a dispute-resolution device.

212. See REDFERN & HUNTER, *supra* note 27, ¶ 6-122, at 386, ¶ 8-46, at 446 (explaining that arbitral tribunals, unlike courts, cannot issue default judgments, but must test the assertions made by the present party before deciding a dispute).

213. See Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 ARB. INT'L. 211, 213 (2005) (noting that the general rule is that an arbitral decision will not be published if one party objects).

214. See REDFERN & HUNTER, *supra* note 27, ¶ 4-99, at 262 ("[Hotels provide the] most frequent solution to the problem of finding a suitable venue for an international commercial arbitration . . ."); see also *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A26 (arguing that the private nature of arbitral proceedings benefits large corporations).

215. See S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 933 (1998) ("[M]any parties choose to arbitrate their disputes rather than litigate them precisely because they do not want certain information, such as trade secrets, revenue, and other sensitive data, to become public.").

216. See generally Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L. J. 121 (1995).

217. See Dunham, *supra* note 11, at 327 ("One of the key selling points of international arbitration is the avoidance of the 'politics is local' problem.").

On the other hand, a general overview of international arbitration will confirm that confidentiality, like consent, is not an absolute notion. Most North American Free Trade Agreement ("NAFTA") awards are published, and the International Centre for Settlement of Investment Disputes ("ICSID") also routinely publishes entire decisions or, at least, the names of parties to an arbitration.²¹⁸ Even if the parties to an arbitration do not consent to have the result of their dispute published, arbitral tribunals often publish awards by simply withdrawing the names of the parties.²¹⁹ This formality of withdrawing party names would probably be ineffective in the event of a large-scale multiparty arbitration, especially if the proceeding attracted the attention of the media.²²⁰ Since the 1990s, the prevailing line of thought is that the benefits of publishing arbitral awards outweigh the traditional need for confidentiality in international arbitration.²²¹

The privacy of arbitral proceedings has also always been subject to factors outside of the arbitration itself. Courts may appoint the same arbitrator to two or more similar cases, thereby making all of the relevant documents and transcripts from one proceeding available to the next proceeding to ensure consistent results.²²² Courts also play an important role in challenging or enforcing arbitral awards, and any decision that a court makes may become a matter of public record.²²³ Publicly held corporations that become involved in arbitral proceedings may have to disclose information about any such disputes to its shareholders and to the general public under securities regulations.²²⁴ Finally, sovereign entities, which are often parties to international arbitrations, should expect that their participation in arbitral disputes will become a matter of public interest.²²⁵ Thus, large-scale, multiparty arbitrations will not

218. See Mistelis, *supra* note 213, at 212 (outlining the award publication process); see also International Centre for Settlement of Investment Disputes [ICSID], <http://www.worldbank.org/icsid/> (last visited Sept. 30, 2007); NAFTA Claims, <http://www.naftalaw.org> (last visited Sept. 30, 2007). Note that ICSID and NAFTA arbitral tribunals primarily hear disputes between private investors and sovereign entities deriving from treaties. See ICSID, *supra*; NAFTA Claims, *supra*.

219. See Mistelis, *supra* note 213, at 216. ("In practice many awards are published without consent of the parties and without reference to their names.") (footnote omitted).

220. See discussion *supra* Part V.B.

221. The clearest benefit to publishing arbitral awards is the establishment of a body of persuasive precedent for future arbitrations. See REDFERN & HUNTER, *supra* note 27, ¶ 8-106, at 478 ("The prevailing trend appears to favor publication.").

222. See *Abu Dhabi Gas Liquefaction Co. v. E. Bechtel Corp.*, (1982) 2 Lloyd's Rep. 425, 427; see also REDFERN & HUNTER, *supra* note 27, ¶ 3-81, at 205 (explaining that a national court or an arbitrator may direct that all documents from one arbitral proceeding should be made available to the parties of another proceeding).

223. See REDFERN & HUNTER, *supra* note 27, ¶ 8-106, at 478.

224. *Id.*

225. See Mistelis, *supra* note 213, at 212 (describing how the participation of state entities in

destroy the notion of confidentiality in arbitration because this notion is flexible and not absolute.

Nor does the participation of nonsignatories in arbitral disputes destroy confidentiality. Even though a nonsignatory who becomes involved in arbitral proceedings was never a party to the original arbitration agreement, the arbitrators routinely ensure that such nonsignatories honor any confidentiality clauses contained in the original agreement by simply requiring the nonsignatories to sign a confidentiality order upon entering the arbitration.²²⁶ In fact, this procedure would ensure a higher level of confidentiality than the alternative of not making the nonsignatory a party to the dispute and risking that the nonsignatory would publicly release information or knowledge about the dispute.

D. *Efficiency*

Arbitration has a reputation of being an efficient dispute-resolution mechanism.²²⁷ Because arbitration is seen as a reliable alternative to litigation, which diminishes court-docket backlogs, courts generally will enforce arbitration agreements and confirm arbitration awards.²²⁸ But by transforming itself into a forum for resolving class disputes and disputes involving nonsignatories, the institution of arbitration may lose this traditional hallmark of efficiency.

Resolving class actions in an arbitral setting would probably force arbitration to mimic the lengthy litigation class-action process in order to adhere to due process requirements.²²⁹ Thus, arbitration would no longer differ from litigation, and it would no longer offer this advantage over litigation in a national court.²³⁰ If an arbitral tribunal had to rely on a court to adjudicate and to confirm certain aspects of such a dispute,²³¹ this could result in a tedious "back and forth" between the tribunal and the court. Class arbitrations also raise practical concerns that could

international disputes can "shift the emphasis from privacy and confidentiality to knowledge and accountability").

226. See Strong, *supra* note 215, at 994.

227. See Kristin M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIR. REV. 391, 408 (2006) (noting that the traditional benefits of arbitration include time and cost efficiency).

228. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (discussing the Court's "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes"); see also Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 22–23 (explaining how the U.S. Supreme Court has gone from being reluctant to mandate arbitration to become "an extremely strong advocate of binding arbitration").

229. See sources cited *supra* notes 175–76.

230. See Sternlight, *Arbitration Meets the Class Action*, *supra* note 7, at 44–45 (noting that attorneys who had participated in class arbitrations thought that they differed little from litigation).

231. See sources cited *supra* and text accompanying note 175–76.

diminish the traditional efficiency benefit associated with arbitration. For example, arbitrations involving parties from all over the globe would inevitably be constrained by the time and expense of translation and interpretation services necessary to ensure fairness to everyone involved.²³² Even if the parties to such a dispute decided to settle, the party receiving settlement would probably want the terms of the settlement to be in form of an award,²³³ and this would still require a long, drawn-out arbitral process.

Class arbitrations involving absent nonsignatory class members could become even more inefficient than regular class arbitrations because any nonsignatories who are not satisfied with the arbitral decision would probably try to challenge the validity of the decision in court on the basis of their nonsignatory status.²³⁴ In addition, arbitral tribunals frequently reopen proceedings when evidence is offered by a party after a hearing, because arbitral tribunals prefer to rule on a dispute only after receiving all relevant evidence.²³⁵ In the case of a large-scale, multiparty dispute, this would mean that arbitral proceedings would more likely be reopened and delayed because new evidence could be offered by any one of the many parties involved in the dispute.

On the other hand, class arbitration and nonsignatory arbitration would not completely destroy the efficiency of the arbitral process. Arbitration's reputation as a "time-saving device" is seen by some commentators as a myth even without the influence of class arbitration or nonsignatory arbitration.²³⁶ In addition, although the prospect of arbitrating many interrelated claims at once appears daunting and inefficient, the only alternative would be a duplication of a similar disputes, resulting in potentially conflicting decisions after wasting a great deal of time and money.²³⁷ The drawn-out procedures that may be necessary to ensure the due process rights of all parties involved in a class arbitration may seem tedious; however, they would serve to ensure the rights of the parties and leave minimal grounds for appeal thereby saving time on any potential appellate process.²³⁸ Finally, bringing multiparty disputes

232. See REDFERN & HUNTER, *supra* note 27, ¶ 3-54, at 190 (explaining how contracts drawn up in different languages may force the occurrence of simultaneous translations during arbitral proceedings despite the expensive and tedious nature of the translations).

233. See *id.*, ¶ 8-48, at 447 (discussing how parties receiving settlement offers usually want the settlement in the form of an award, especially if the settlement involves any future performance).

234. See Hosking, *Quest for Consent*, *supra* note 19, at 300 (noting that a nonsignatory who loses in arbitration may try to "re-litigate" the issue).

235. See REDFERN & HUNTER, *supra* note 27, ¶ 6-125, at 387.

236. See Dunham, *supra* note 11, at 345-46 ("International arbitration typically lasts over four years and costs a substantial amount of money.").

237. See Hosking, *Quest for Consent*, *supra* note 19, at 297.

238. See REDFERN & HUNTER, *supra* note 27, ¶ 10-07, at 513 (explaining that it is better to go

before an arbitral tribunal rather than a court would save the parties the time and expense of having to secure local counsel as would be required in judicial litigation.²³⁹

VI. CONCLUSION

The nature of international arbitration is changing and must adapt to fit the gaps left by imperfect national-court systems as well as the evolving needs of the international community. One way to do this is to continue to expand international arbitration to provide resolutions for class disputes and disputes involving nonsignatories. Although the immediate reaction of many arbitration practitioners is not to expand arbitration beyond its traditional core, there are also important potential benefits in using the arbitral process to resolve these new and untraditional disputes.

through an arbitral process slowly so that little time will be spent on litigating the enforcement of the resulting arbitral award).

239. *Id.*, ¶ 8-95, at 472 (arguing that a major attraction of international commercial arbitration is that it is unnecessary to call upon local lawyers).