Desirability of International Class Arbitration

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It is now well established and well documented that class arbitrations are possible, at least in the United States.1 But are they desirable? The answer to this, as to so many questions, is it depends. It depends on the particulars of the case and the claim, and whether you are a claimant or respondent, a bank or consumer, an issuer or shareholder, an employer or employee, and your country of origin.

But make no mistake, the issue has been joined and positions staked out. In the United States, where the courts have ruled that the permissibility of a class action in arbitration is essentially a question of clause construction that is left up to the arbitrators (at least in the first instance), the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS), two leading arbitral institutions, have promulgated rules for class arbitrations and are actively administering them. In stark contrast, the International Chamber of Commerce (ICC) has promulgated a policy statement that “implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to society,” including “exposure to ‘legal blackmail.’”2 The ICC’s International Court of Arbitration has not taken any action to date to create rules to accommodate class arbitration.

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On both the international and domestic fronts, public policy and due process concerns are among the greatest obstacles to the acceptability of class arbitration. Many of the same procedural concerns that implicate due process also inform the debate over whether class arbitration is consistent with the conventional notion of arbitration as a prompt, inexpensive proceeding. As Professor Stacie Strong has pointed out, overcoming these concerns may require “a radical reconceptualization of both (1) acceptable procedure in international arbitration and (2) the nature of individual rights in arbitration.” The path toward rethinking time and costs in arbitration has already been paved, to some extent, by the large, complex individual arbitrations that have become commonplace. Coming to terms with broader concerns over policy and justice may not be as easy.

While the debate rages, international class securities arbitrations may make their debut in a case brought by Harvard College against JSC Surgutneftegaz (“Surgut”), currently pending before an AAA tribunal, which serves as a useful paradigm for considering some of the issues relevant to the desirability of class arbitrations. Harvard commenced an arbitration pursuant to a 1998 deposit agreement governing American depository receipts. The parties to the deposit agreement were Surgut, a Russian oil and gas company, Bank of New York as depository, and the owners and beneficial owners of the Surgut American depository receipts. Harvard brought claims on behalf of all owners of the American depository receipts, alleging that Surgut had violated U.S. securities laws and the deposit agreement.

After Surgut’s court challenges to arbitrability were denied, the distinguished AAA panel issued two interim awards, one of which addressed the issue relevant here: Did the arbitration clause in the deposit agreement permit the arbitration to proceed on behalf of a class?

The deposit agreement provided that disputes arising out of or relating to the American depository receipts or the deposit agreement would be settled “in accordance with the rules of the American Arbitration Association.” It did not specify what rules. The arbitrators applied the AAA Supplementary Rules for Class Arbitrations, which had become effective before the arbitration was commenced but some five years after the deposit

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4 President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04.
7 See id. at 2.