Book Review

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Class, Mass, and Collective Arbitration in National and International Law.

From the perspective of the investment treaty practitioner (or those focused on international economic law more broadly), it is tempting to reduce the discussion of class, mass, and collective arbitration – large-scale arbitration – to the cases arising out of the 2001 Argentinian sovereign bond default, most notably Abaclat.1 But in this book, the aim of which is ‘to better understand the circumstances in which arbitration can be used to resolve large-scale legal disputes, nationally and internationally’ (p. 5), Professor Strong has set out to look at different dispute settlement regimes in an integrated manner. It is one of its great strengths.

Notwithstanding the wide and geographically diverse variety of procedures already available for the resolution of large-scale arbitrations as a matter of both national and international law, it would still be easy to approach this subject as a novice. It is appropriate, therefore, that Strong introduces her topic with a brief history of large-scale arbitration. Out of necessity this is heavily skewed toward US class arbitration, but the book also finds space to consider, inter alia, collective arbitration procedures in Germany and Spain.

Chapter 2 considers the rules and procedures which may govern such disputes. This type of descriptive analysis, though at times somewhat dry, provides essential background for understanding how, in practice, large-scale arbitrations operate nationally and internationally. For it is in the nature of such disputes that they may permit or require certain departures from procedural norms.

1 Abaclat and others v Argentine Republic (formerly Giovanna a Beccara and others v The Argentine Republic), ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011). See also Ambiente Ufficio SpA and others v Argentine Republic (formerly Giordano Alpi and others v Argentine Republic), ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) and Giovanni Alemanni and others v Argentine Republic, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014).
Of particular interest is the account of the procedural peculiarities of the Abaclat arbitration, a claim brought by 60,000 Italian bondholders against Argentina pursuant to the Italy-Argentina BIT. Strong presents a clear account of how this departs from class arbitration, as well as from the typical procedural norms of treaty-based arbitration. The matter might have been further elucidated and would certainly have benefitted from a comparative analysis with the findings of the Ambiente and Alemanni tribunals, cases in which similar large-scale claims were brought by 90 and 74 Italian bondholders, respectively.2

It is also to be regretted that, at the time of going to press, the Abaclat Tribunal had not determined the precise procedures to be used during the merits phase of the proceeding. Doubtless Strong would have proved an able guide to the on-going controversy provoked by the Tribunal’s procedural innovations.3

Chapter 3 marks a distinct departure from description into analysis, as Strong attempts to answer the question: ‘is large-scale arbitration really arbitration?’ In doing so, Strong tackles the notion that the procedures of large-scale arbitration are such that it leaves the nature of arbitration fundamentally changed. This debate has its genesis in the ruling of the US Supreme Court in Stolt-Nielsen S.A. v AnimalFeeds Int’l Corp,4 in which the Court held that class arbitration ‘changes the nature of arbitration.’ This phrase, as Strong notes (p. 108), has become ‘something of a watchword for both courts and commentators.’

In the international arena, the Tribunal in Abaclat reasoned that the ‘mass’ aspect of the proceedings was a question of admissibility, which pertained to the ‘modalities and implementation of the ICSID proceedings’, and not to the issue of whether the respondent State had consented to ICSID arbitration.5 However, Professor Abi-Saab’s dissenting view referred to – and shared – the view of the US Supreme Court. He considered that there was a fundamental difference between regular bilateral arbitration and mass proceedings, such that the latter fell outside the scope of Argentina’s consent to arbitrate. This approach views the decision to proceed as a group as having more than a merely procedural quality, and rather as a core concern that is inextricably linked to the decision to arbitrate.

Strong sets out her stool early that she has no truck with this idea, noting (p. 109) that the ‘flexibility inherent in arbitration is precisely what makes Stolt-Nielsen … so troubling.’ Her approach, in common with that taken by the

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2 The Alemanni tribunal’s Decision on Jurisdiction and Admissibility was not issued until after the date of publication of Strong’s book.

3 Exemplified by Abaclat v Argentina (n 1), Statement of Dissent of Dr Santiago Torres Bernardez to Procedural Order No 27 (30 May 2014).

4 Case No 08–1198, Opinion of the Court (27 April 2010), 130 S Ct 1758 (2010).

5 Abaclat v Argentina (n 1) paras 491–492.