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Review of Class, Mass, and Collective Arbitration in National and International Law, by S.I. Strong

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As Professor Stacie Strong describes in the conclusion to her impressive work on *Class, Mass, and Collective Arbitration in National and International Law*, "[t]he last few decades have seen a number of significant shifts in the social, legal, and economic world order, resulting in the increased incidence of large-scale harms in both domestic and cross-border contexts." These shifts also require changes in the methods used to respond to such harms.

Class, mass, and collective arbitration (which I will refer to below as "group arbitration") provide an additional procedural mechanism for bringing claims that may not be feasible as individual proceedings (such as those involving consumers and employees), thereby also responding to concerns of access to justice globally. Moreover, as Professor Strong observes, group arbitration can often be more advantageous than litigation for particular claims, especially with respect to considerations such as procedure and enforcement. Her book comprehensively addresses the ways in which arbitration can be used to resolve multi-party, large-scale disputes in both national and international contexts, thus comprising a much-needed addition to arbitration scholarship. It also provides an enormously useful guide to practitioners drafting dispute resolution clauses or weighing the pros and cons of bringing a group claim in arbitration.

Group arbitration proceedings are, as of yet, still relatively rare, and may be unfamiliar to many. Readers will likely be aware of class arbitration, the child of the civil class action suit, which is an action brought by one or more named claimants on behalf of a group of similarly-situated individuals pursuing related claims. Nonetheless, class arbitration is a little-used procedure about which there remain many theoretical and practical questions.

The latter two types of group arbitration referenced in Professor Strong's title, mass and collective arbitration, are likely even less familiar. Mass arbitration is a *sui generis* type of group proceeding in the international investment dispute context, arising from the procedure adopted in the recent ICSID jurisdictional award in *Abaclat v. Argentine Republic*. There, 60,000 Italian bondholders were permitted to pursue claims against Argentina following its default on USD 100 billion in sovereign debt.

And, as Professor Strong explains, collective arbitration "includes a variety of different large-scale procedures unified only by the fact that they are private (non-treaty-based) mechanisms that do not bear the hallmarks of U.S.-style class arbitration," based on an opt-in (rather than opt-out) procedure.

Professor Strong places group arbitration in its historical context, noting that class arbitration arose in the US "as a result of a failed strategy by the corporate community to eliminate relief on a class-wide basis." She explains that, because the debate

> has been framed as an either-or proposition, with respondents attempting to eliminate class relief in all fora and claimants attempting to identify increasingly ingenious ways of retaining the ability to proceed as a group, very little time has been spent considering whether class arbitration might, in fact, provide a better means of resolving large-scale disputes than similar forms of litigation.

Professor Strong's book usefully fills this gap by providing a thorough description and assessment of the relative benefits of arbitration as compared to litigation, a theme that runs throughout her work. While noting the benefits of arbitration in this context, Professor Strong reminds readers that the relative advantages of arbitration or litigation depend on the precise nature and circumstances of the dispute.

In addition to providing historical context, Professor Strong looks ahead, discussing the likelihood of group arbitration being adopted in new jurisdictions and contexts:

•Group arbitration is currently most prevalent in the U.S., being available only on a more limited basis in certain other jurisdictions (for example, Germany and Spain). Against this backdrop, she queries whether group arbitration can arise only in countries that allow group litigation in national courts – taking the view, in persuasive terms, that the development of group arbitration in new jurisdictions is not limited in this way.
• Professor Strong expands on the potential for the development of "regulatory arbitration" (a term coined by Marc Blessing to refer to arbitration of competition law disputes). On this topic, she addresses the question whether regulatory arbitration could be precluded by what she describes as "procedural non-arbitrability," the idea that certain procedures are acceptable only in litigation and not in arbitration. She generally – and persuasively – rejects this thesis.
• Few group arbitrations having been resolved on the merits to date, Professor Strong ends her book by assessing how the New York Convention would apply to the enforcement of awards in group arbitration, and in the case of its application, when its provisions might preclude recognition and enforcement. She recognizes that there are arguments in both of these veins against the enforcement of group awards, but demonstrates ways in which these might be overcome – again showing the potential for the effective use of arbitration in addressing large-scale harms.

Perhaps the most impressive of the many strengths of Professor Strong's work is the

manner in which it confronts foundational questions about the nature of arbitration. Departing from the U.S. Supreme Court's statement in *Stolt-Nielsen S.A. v. AnimalFeeds Intl'l Corp*. that class arbitration "changes the nature of arbitration," the overarching theme of the book is the question whether group arbitration is a different beast from "arbitration proper." Professor Strong demonstrates it is not, but her discussion also compels the reader to reflect on the nature of arbitration – what aspects are so fundamental that, if discarded, would cause a process to be something other than arbitration? What aspects, when added to a dispute resolution process, make that process something other than arbitration? These are questions that are important to the general development of arbitration, both in group proceedings and otherwise.

Professor Strong's work is an extremely welcome and important addition to the commentary on the use and development of group arbitration. More generally, it is a very valuable contribution to the broader subject of arbitration and its theoretical roots.

By Gary Born and Eleanor Daley

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