ITA-ASIL 2014: Mass and Class Claims in Arbitration

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In the wake of hotly contested domestic and international developments, speakers at the Annual ITA-ASIL Conference in Washington, DC on April 9 gave varied and sometimes conflicting perspectives on the use of mass and class claims in arbitration.

Mass Claims in Investment Arbitration – A Favorable View

In her keynote speech, **Carolyn B. Lamm** of White & Case LLP discussed her own experiences with mass claims and the future of large scale claims. Ms. Lamm is lead advocate for the claimants in the ICSID case *Abaclat v. Argentine Republic*. In a groundbreaking 2011 ruling, the Abaclat tribunal found that the jointly filed claims of 60,000 individual investors arising out of Argentina's 2001 sovereign debt default and subsequent state actions, including the "cram down law," were within the tribunal's jurisdiction and admissible.

Ms. Lamm explained that there are a variety of types of collective actions in legal proceedings. Though class actions used to be confined largely to the United States, Canada, and Australia, they are now becoming more common in other countries. Moreover, the rules of many leading arbitral institutions have procedures that allow for multiple parties in an action.

Ms. Lamm drew a distinction between U.S.-style class arbitrations and the mass individual claims that have recently been allowed in investor-state proceedings. In

its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the U.S. Supreme Court held that a party must affirmatively consent to class arbitration before it can be required to participate in such a proceeding. By contrast, according to Ms. Lamm, investment treaties often contain an "open-ended" consent of the host state that provides for the possibility of multiple claimants. Whether mass claims are permissible in investment arbitration thus depends on an interpretation of the applicable treaty in a specific case.

Focusing on her work in *Abaclat*, Ms. Lamm explained that every one of the 60,000 claimants signed an individual consent to pursue claims and a power of attorney, and presented evidence of nationality, domicile, and ownership. The *Abaclat* tribunal's majority, in allowing the case to go forward, concluded that the proceeding was not a class action but rather a "mass" action, because each claimant had personally consented to arbitration under the applicable investment treaty.

The *Abaclat* majority also concluded that there is no valid limit on the number of homogenous claims that can be consolidated into a single proceeding. Allowing a mass action might require modification of standard ICSID procedures, but that was within the tribunal's power to do and did not require additional state consent beyond the existing language of the Argentina-Italy bilateral investment treaty (BIT) at issue in *Abaclat*.

In particular, Ms. Lamm explained, the Argentina-Italy BIT contained numerous references to plural claims or claimants. Moreover, according to Ms. Lamm, it would be a denial of due process if every potential claimant against Argentina had to pursue a separate proceeding. A mass action is not only the cheapest and most efficient way, but the only way, to resolve claims like the ones in *Abaclat*. It makes little sense to require individual adjudication of claims that all arise form a single state measure or series of the same state measures, under the same treaty, for essentially the same investments.

Moreover, Ms. Lamm pointed out that multiple parties have frequently been allowed to bring investment claims in a single case. If states do not want to allow multiparty claims, they can draft treaty language that disallows them.

Ms. Lamm also discussed the logistical challenges of bringing a mass case like *Abaclat*. It required the creation of a database of information on every claimant,

including backup documentation and spreadsheets that set forth the evidence in support of each individual's claims. The tribunal, in turn, appointed an independent expert to verify the information in the database for proof of claimants' nationality and domicile, and the basis for their individual claims.

Mass Claims in Investment Arbitration – Dissenting Views

Speakers on one of the panels that followed queried Ms. Lamm's view that mass claims are appropriate in investor-state proceedings. This panel was moderated by **Prof. S.I. Strong** of the University of Missouri School of Law, who has written widely on mass and class claims in arbitration.

Dr. Michael Waibel of Jesus College at the University of Cambridge had both legal and policy disagreements with the *Abaclat* jurisdictional decision. He observed that *Abaclat* arose out of an economic crisis in Argentina comparable in severity to the Great Depression. Four years after its default, Argentina offered a restructuring of its debt at 35 cents on the dollar—an offer to which the majority of its creditors agreed. Dr. Waibel cautioned that allowing mass investor claims would undermine the already cumbersome system of sovereign debt restructuring. If hold-out creditors are able to force full repayment through arbitral awards, the potential result is severe fiscal austerity or the need for bailouts. Moreover, the investors who purchased Argentine sovereign debt did so with the knowledge that a default might not be compensated in a domestic court—and enjoyed payments at a higher interest rate because of this risk. Dr. Waibel also expressed concern that the Abaclat decision opens the door to claims by holders of all sorts of financial instruments, potentially turning ICSID tribunals into commercial courts.

Dr. Waibel also argued that the ICSID Convention, from which tribunals derive their jurisdiction along with investment treaties, does not provide for collective claims. Rather, Article 25 of the Convention extends jurisdiction over a dispute between a contracting state and a singular "national of another Contracting State." The Convention, according to Dr. Waibel, is silent on whether a tribunal has jurisdiction over mass claims. He disagreed with the **Abaclat** majority's view that the tribunal could fill this silence by allowing mass claims in a single proceeding. Under international law, according to Dr. Waibel, consent to jurisdiction is the exception, not the default rule. Thus, when the Convention is silent as to whether the parties consented to jurisdiction, the tribunal should have found there was no consent and therefore no jurisdiction.

Whereas Dr. Waibel focused on the ICSID Convention, the next speaker, **Samuel Wordsworth QC** of Essex Court Chambers, looked specifically at the BIT language. Mr. Wordsworth, who has represented states in numerous arbitrations, analogized the **Abaclat** majority's reasoning to the Roman empress Messalina, who supposedly entered into a contest to sleep with as many men as possible in a day, and said "I sleep with one, I sleep with one thousand, it makes no odds to me."

Mr. Wordsworth acknowledged that the BIT at issue in both Abaclat and in the later ICSID case *Ambiente Officio v. Argentina*, which allowed ninety claimants to pursue a consolidated action, offers few clues on whether the signatory states intended to allow multiparty proceedings. But he challenged the *Ablacat* majority's reliance on the fact that the BIT uses the singular term "investor" and the plural "investors" interchangeably in the substantive provisions. According to Mr. Wordsworth, the use of the plural in the substantive provisions means only that the BIT was intended to protect all investments and investors. What mattered was the precise wording of the offer to arbitrate, and whether the singular or the plural was used. According to Mr. Wordsworth, if the singular was used, effect should be given to the ordinary—and singular—meaning of the terms used. The wording of the Argentina-Italy BIT added to the interpretative difficulties as it—unlike certain other Argentina BITs—uses both the singular and plural. The *Ambiente* majority noted this language, while the dissent was unable to explain away the usage of the plural.

Mr. Wordsworth also questioned the *Abaclat* majority's underlying assumption that it would have jurisdiction over a small, but plural, number of claimants. He pointed to the history of investment treaties, which grew out of the historic failure of foreign investor protection through diplomatic efforts. Such diplomatic protection often involved numerous aggrieved investors, so the possibility of multiparty investment claims was entirely conceivable to BIT drafters. Nonetheless, BITs commonly do not contain language clearly providing for mass or multiparty claims.

Mr. Wordsworth also explained that while a number of pre-*Ambiente* investor-state cases involved multiple claimants, in no previous instance did a state raise a jurisdictional objection on that basis. However, according to Mr. Wordsworth, no inference could be drawn from this fact as, in the bulk of these cases, the multiple claimants were corporate affiliates. In such cases, the state would presumably have preferred to be in a single proceeding rather than deal with the increased

costs and risks of numerous cases arising out of the same actions. Mr. Wordsworth questioned whether it was appropriate to allow claimants to decide whether to bring their actions collectively or apart, where a respondent state facing multiple claimants would not enjoy the same strategic choice. He also pointed out that a victorious state respondent would have a very hard time enforcing a cost award against thousands of small individual claimants.

Mr. Wordsworth also queried the *Abaclat* majority's failure to reconcile its holding with section 8.3 of the Argentina-Italy BIT, which requires investors to pursue judicial relief before initiating ICSID arbitration. The tribunal found that fulfilling this requirement was not feasible for the mass claims, and so allowed the claims to move forward without doing so. But, according to Mr. Wordsworth, the tribunal failed to appreciate that the impossibility of meeting this requirement itself suggests that the BIT does not provide arbitration of mass (as opposed to multiparty) claims.

Class Claims in Commercial Arbitration – U.S. and Canadian Perspectives

Another panel addressed the equally contentious issue of class claims in commercial arbitration, with a focus on recent court decisions in the United States and Canada. **Prof. Christopher R. Drahozal** of the University of Kansas School of Law, who moderated the panel, explained that the United States Supreme Court has, in its last three terms, decided four important cases on class arbitration—two that addressed the enforceability of class arbitration waivers, and two on how to construe arbitration clauses that do not mention class relief. Prof. Drahozal remarked that class arbitrations largely involve consumer and employment claims, but that a significant number are business-to-business disputes.

Deepak Gupta of Gupta Beck PLLC, the first speaker on the panel, represented the would-be class plaintiffs in the recent Supreme Court cases *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors Restaurant*. Mr. Gupta explained that the Federal Arbitration Act (FAA) is the centerpiece of American arbitration law. Enacted in 1925, the FAA was initially intended to be used in agreements between sophisticated business parties. But in the 1970s and 1980s, companies began including arbitration provisions in consumer and employment agreements.

Mr. Gupta discussed several recent U.S. Supreme Court decisions that were hostile

to class arbitration. The 2010 *Stolt-Nielsen* ruling addressed an arbitrator's decision to certify a class arbitration where the agreement between the parties was silent as to class claims. In its opinion, the court spoke derisively of the use of aggregate claims in arbitration.

Mr. Gupta explained that the Court's 2011 *Concepcion* decision addressed whether a party can use an arbitration clause to enforce a class action ban. In that case, state law barred a class action waiver, but the Court found that the FAA preempted the state law and required enforcement of the class arbitration waiver. The Supreme Court found that while the state law did not discriminate against arbitration in violation of the FAA, it was nonetheless impermissible because requiring class proceedings undermined the supposed essential character of arbitration as a streamlined and bilateral proceeding.

Then, in *Italian Colors*, an antitrust case, the court enforced a class arbitration waiver even where requiring individual actions would be to make it economically impossible to bring the claims in the first place, because of the necessary cost of using economic experts to prove the claims.

Mr. Gupta explained that because the U.S. Supreme Court has thus taken a dim view of class arbitration, it is up to legislators and regulators to push back.

Prof. Geneviève Saumier of the McGill University Faculty of Law offered a Canadian perspective on mass and class claims in arbitration. Canada has no federal arbitration law equivalent to the American FAA, but all of Canada's provinces have adopted the UNCITRAL Model Law, and Canada is also a signatory to the New York Convention. Canadian courts have followed U.S. courts' lead on such issues as the arbitrability of statutory claims and *competenz-competenz*. Moreover, many Canadian companies have adopted arbitration clauses in consumer contracts just as U.S. companies have.

Prof. Saumier explained that the 2007 *Dell Computer Corp. v. Union* decision by the Canadian Supreme Court effectively recognized the validity of class arbitration waivers in contracts. But in response, some provincial legislatures acted to prohibit pre-dispute arbitration clauses in consumer contracts. And in its sharply divided 2011 decision in *Seidel v. TELUS Communications Inc.*, the Canadian Supreme Court suggested a move away from a purely pro-arbitration stance. Moreover, the Court of Appeal for Ontario has been very skeptical of arbitration, suggesting that

by seeking individual arbitration, defendants are really just seeking effective immunity.

Prof. Saumier explained that class actions are possible throughout Canada, but because there is no mechanism for multi-jurisdictional consolidation, the result is overlapping and redundant cases across provinces. Class or mass arbitrations could help solve this inefficiency, though Prof. Saumier also noted that Canadian arbitral institutions are not well prepared to administer multiparty proceedings.

In her concluding remarks, **Prof. Andrea Bjorklund** of the McGill University Faculty of Law, Chair of the ITA Academic Council, observed that only modern technology allows for the possibility of mass actions like Abaclat. She also noted the irony of how the concept of consent is addressed in differing contexts—in the commercial arena, in an effort to avoid class claims through waivers, while in the investor-state context, in the controversy over whether treaties provide for state consent to mass claims.

The event, co-chaired by Prof. Drahozal and Prof. Strong, took place just before the 108th Annual Meeting of the American Society of International Law.