

The Future of Class, Mass, and Collective Arbitration

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Adam Raviv recently posted an entry about the Eleventh Annual ITA-ASIL Conference on class and mass claims in arbitration. Adam's summary provides excellent insights into the importance of large-scale arbitration in the international and investment contexts, both now and in the coming years. However, neither Adam nor the panelists had the benefit of a decision that was handed down on April 24, 2014, two weeks after the conference closed. This post considers that decision in light of conference proceedings.

The case in question relates to an issue raised by conference panelist Deepak Gupta, who suggested that the best way to address large-scale arbitration in the future might be through legislative and regulatory action. The discussion arose in response to statements by keynote speaker Carolyn Lamm that class and mass claims would not only continue to arise in the coming years but might in fact increase as a result of the demands of a globalized economy.

The case (*Department of Enforcement v Charles Schwab & Co., Inc.*) was decided pursuant to the regulatory regime established by the U.S.-based Financial Industry Regulatory Authority (FINRA). On April 24, 2014, the FINRA Board of Governors reversed the decision of a disciplinary hearing panel that had upheld a class action

waiver contained in a pre-dispute arbitration agreement found in the standard customer agreement used by Charles Schwab & Co., Inc. In overturning the earlier decision, the Board of Governors focused on the FINRA arbitration rules, which explicitly bar class waivers and protect investors' rights to bring class claims in court.

On first blush, the Board of Governors could be seen as acting contrary to certain opinions recently rendered by the United States Supreme Court upholding waivers of class arbitration. However, the Board of Governors justified its decision on the grounds that the Securities Exchange Act includes a grant of regulatory authority to the Securities Exchange Commission, which has in turn delegated certain powers to FINRA. This grant of regulatory authority allows FINRA to adopt an arbitral regime that differs from that established under the Federal Arbitration Act (FAA). As a result, the claimants in this proceeding were able to rely on language found in the FINRA arbitral rules and avoid some of the U.S. Supreme Court's more problematic precedents on class waivers.

Because FINRA has taken the view that class claims should be heard in court rather than in arbitration, the Schwab case could be read as boding against further development of large-scale arbitration. However, the decision can and perhaps should be read for the larger proposition that regulatory agencies have a significant amount of freedom to address large-scale arbitration in whatever way they think is appropriate. Thus, some legislative or regulatory bodies might conclude that class, mass or collective claims can be heard in arbitration. In fact, experience shows that some jurisdictions have adopted precisely that attitude.

Perhaps the most innovative approach to large-scale arbitration that has yet been identified comes out of Spain. Several years ago, the Spanish legislature adopted a statute on collective consumer arbitration which authorizes regulatory bodies known as Consumer Arbitration Boards to organize and oversee arbitration involving consumers. The statute creates a unique, non-representative collective procedure that addresses many of the concerns commonly enunciated by respondents, particularly with respect to the issue of consent. As a result, the Spanish model may be acceptable to other jurisdictions seeking to identify a way to allow large-scale disputes to go to arbitration.

Another intriguing approach to large-scale arbitration is seen in Germany. Here, the German Institution of Arbitration (DIS) created its Supplementary Rules for

Corporate Law Disputes (DIS-SRCoLD) after the German Federal Court of Justice authorized arbitration of shareholder disputes in the wake of legislative inaction. Although the rules are aimed primarily at so-called “traditional” multiparty disputes (i.e., those that typically involve only a handful of disputants), some of the procedural elements could be usefully adopted in matters involving larger numbers of parties.

Regulatory and legislative reforms may also be generated as a result of efforts by the European Union to identify a new, more effective means of providing cross-border collective redress. Although the European debate has focused primarily on judicial forms of relief, the European Parliament and European Commission have specifically noted the need to develop alternative forms of large-scale dispute resolution, which would include arbitration.

The preceding is just a brief discussion of one aspect of the law relating to large-scale arbitration. As the participants at the ITA-ASIL conference noted, the law in this field is both diverse and evolving, and the coming years will doubtless see further challenges relating to class, mass and collective proceedings. However, this does not appear to be an area of law that is going to disappear any time soon. Instead, if Ms. Lamm’s prediction holds true, the number of large-scale arbitrations will only increase with time.

Those who are interested in reading more on this subject can find the FINRA Board of Governors decision in *Department of Enforcement v Charles Schwab & Co., Inc.* at

<http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p493598.pdf>. Commentary regarding points raised in this post include Barbara Black & Jill I. Gross, ‘Investor Protection Meets the Federal Arbitration Act’, 1 *Stanford Journal of Complex Litigation* 1 (2012) (regarding FINRA arbitration), and S.I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* (Oxford University Press 2013) (discussing developments in Spain and Germany). Papers from the ITA-ASIL conference will be published in a future edition of the *World Arbitration and Mediation Review*.