



Problematizing *Abaclat's* Mass Claims Investment Arbitration Using Domestic Class Actions

Relja Radović*

*The 2011 decision on jurisdiction and admissibility in *Abaclat and Others v Argentina* has started a discussion about mass claims processes in investment treaty arbitration. The tribunal concluded that although proceedings were initiated in aggregate, the continuance of the case contained a representative feature. This determination led them to declare that the applicable procedure could and had to be adapted. Today, the legacy of *Abaclat* and the availability of mass claims procedural devices in investment treaty arbitration remain questionable: can mass claims investment arbitration be qualified as 'class-like'? If so, does it satisfy the fundamental principles of arbitration (particularly the principle of consent)? This article takes a comparative approach to answering these questions by putting mass claims investment arbitration procedures and United States class actions processes side-by-side. It argues that mass claims arbitration as construed in *Abaclat* cannot satisfy fundamental arbitration principles because it fails to observe the inextricable link between the parties' consent, representative procedure, and representative relief. It is therefore wrong to view mass claims arbitration as an available device for investors in investment treaty arbitration.*

*La décision de 2011 dans *Abaclat et autres c. Argentine* concernant la juridiction et l'admissibilité a initié une discussion sur les processus de réclamations collectives en arbitrage relatif aux traités d'investissement. Le tribunal a conclu que malgré que la procédure ait débutée en jonction, la continuation du cas contenait une caractéristique représentative. Ceci a mené le tribunal à déclarer que la procédure applicable pouvait, et devait, être adaptée. Aujourd'hui, l'héritage d'*Abaclat*, et la disponibilité des dispositifs procéduraux des réclamations collectives en arbitrage relatif aux traités d'investissement demeurent douteux: est-ce que les réclamations collectives en arbitrage d'investissement peuvent être qualifiées comme étant «collectives»? Le cas échéant, est ce qu'ils satisfont aux principes fondamentaux de l'arbitrage (particulièrement le principe de consentement)? Cet article adopte une approche comparative afin de répondre à ces questions en mettant la procédure des réclamations collectives en arbitrage d'investissement et la procédure des recours collectifs des États-Unis côte à côte. L'article avance que l'arbitrage des réclamations collectives, tel que conçu dans *Abaclat*, ne peut satisfaire aux principes fondamentaux de l'arbitrage, ne respectant pas le lien inextricable entre le consentement, la procédure représentative et la décision représentatif. Il est donc faux de considérer l'arbitrage des réclamations collectives comme étant un moyen disponible pour les investisseurs en arbitrage relatif aux traités d'investissements.*

* PhD Candidate at the University of Luxembourg. The author is grateful to Başak Bağlayan and Johannes Hendrik Fahner for their kind comments and suggestions during the work on this article. The present research is supported by the National Research Fund, Luxembourg.

I. INTRODUCTION

The idea of mass claims in investment treaty arbitration appeared in a 2011 decision in the case of *Abaclat and Others v the Argentine Republic*.¹ A tribunal found that it had jurisdiction to hear claims of some 60,000 claimants contesting aspects of Argentina's sovereign bond restructuring programme. These proceedings occurred under the auspices of the International Centre for Settlement of Investment Disputes ('ICSID')² and its Arbitration Rules ('ICSID-AR').³ Without special rules provided within that framework regulating large-scale arbitrations, the tribunal developed a new form of large-scale arbitration called 'mass claims proceedings'.⁴ The tribunal explained that the distinct name for the new process merely reflected the massive number of the claimants.⁵ However, it also made reference to its 'hybrid nature': the proceedings started as aggregate—initiated by a number of individually identified claims—but the continuance of the case purportedly contained a representative character.⁶ This feature had a direct and important effect. Because of the large number of the claimants, the tribunal had to fill the 'gap' in procedure to adapt for collective proceedings.⁷ After finding it had jurisdiction *in abstracto*, it created a special procedure for ruling on jurisdiction over individual claims,⁸ and issued a number of orders with that aim.⁹

The legacy of this case after its settlement in 2016,¹⁰ and particularly the availability of mass claims devices in investment treaty arbitration, remain unclear. Whether mass claims investment arbitration is similar to class arbitration or can at least be associated with the representative (class) action processes generally is questionable. The first thing that crosses one's mind is the massive contextual difference between class processes and dispute settlement tools in international law.¹¹

1 *Abaclat and Others v Argentina*, Decision on Jurisdiction and Admissibility (4 August 2011), ICSID, Case No ARB/07/5 [*Abaclat Decision*].

2 ICSID was established by virtue of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [ICSID Convention]. The ICSID Convention also provides the basic procedural rules applicable in arbitral proceedings, while besides that Convention, ICSID tribunals apply the ICSID Arbitration Rules, which contain detailed procedural rules.

3 ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* (effective 10 April 2006), online: <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> [ICSID-AR].

4 See also SI Strong, *Class, Mass, and Collective Arbitration in National and International Law* (Oxford: Oxford University Press, 2013) at 16-17 [Strong, *Class*].

5 *Abaclat Decision*, *supra* note 1 at para 480.

6 *Ibid* at para 488. See in more detail Part II, Section A below.

7 See *Abaclat Decision*, *supra* note 1 at para 551.

8 See in more detail Part IV, Section B, Subsection 2.

9 34 procedural orders are publicly available online, for this issue most important being orders Nos 12, 15 and 17, rendered in the course of 2012 and 2013.

10 *Abaclat and Others v Argentina*, Consent Award Under ICSID Arbitration Rule 43(2) (29 December 2016), ICSID, Case No ARB/07/5. The Consent Award includes the Settlement Agreement as Annex A, and it notes at para pp that "both the Settlement Agreement and the Consent Award and their terms and provisions are made and agreed without any admission by the Parties of ICSID jurisdiction and international liability [...]". As explained by Arbitrator Santiago Torres Bernárdez, this reservation means that the Settlement Agreement "is based upon considerations *alien* to the law applicable to the dispute as instituted"; see *Abaclat and Others v Argentina*, Declaration Appended to the Award by Arbitrator Santiago Torres Bernárdez (15 December 2016), ICSID, Case No ARB/07/5 at para 7 [*Declaration by Santiago Torres Bernárdez*].

11 It should be noted that the tribunal attempted to overcome the peculiarities of different collective proceedings by

Domestic class actions are “a procedural device allowing plaintiffs to sue not only for injury done to themselves but on behalf of other persons similarly situated for injury done to them”.¹² A single party representing an entire class can bind those members of a class who are not involved in the process, which was not the case in *Abaclat*.¹³ Class arbitrations also operate under a specific procedural system which makes their transposition onto the international stage difficult.¹⁴

What results from the hybrid process outlined in *Abaclat* then? Can mass claims investment arbitration be considered ‘class-like’? If so, would the process still satisfy fundamental principles of arbitration like consent? This article takes a comparative approach to answering these questions. It examines characteristics of mass claims investment arbitration, on one hand, and class action processes in the US on the other. Part two identifies the key features of mass claims arbitration by examining how it was set out in the *Abaclat* decision and two subsequent awards rendered under the same ICSID regime. Part three discusses class action regimes in US domestic law, looking at traditional class litigation as well as arbitration. It argues that all class action processes inextricably link the consent of the parties, representative procedure, and representative relief. Part four critically assesses mass claims investment arbitration, paying special attention to its functioning as a class-like arbitration. Part five concludes.

Based on the analysis, it is argued that mass claims arbitration proceedings as outlined in *Abaclat* are fundamentally flawed. First, unlike domestic class action processes, mass claims investment arbitration lacks a proper basis in law dictating the rules that govern such processes. The special procedure for conducting mass claims arbitration is not consented to by the parties. Second, while domestic class action regimes provide special mechanisms for awarding relief, mass claims investment arbitration aims to do so in a manner usually not available to investment tribunals. The *Abaclat* tribunal conceived mass claims arbitration as being able to introduce a form of a representative relief in investment arbitration, failing to observe its connection to the applicable procedure and to respect party consent. The decision did not strengthen the case for mass claims in investment treaty arbitration. To the contrary, mass claims arbitration is still not an available device for investors in this field.

II. *ABACLAT* AND MASS CLAIMS ARBITRATION

Part two puts forward the key findings in *Abaclat* and two related arbitrations (Section A) with the aim of sketching the basic features of a mass claims investment arbitration (Section B).

pointing to their “common ‘raison d’être’”, which is the necessity of ensuring an effective remedy “where the absence of such mechanism would *de facto* have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism”. *Abaclat Decision*, *supra* note 1 at para 484.

12 Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (The Hague: Kluwer Law International, 2006) at 260 [Hanotiau].

13 This difference has radical implications on individualized determinations: Donald Francis Donovan, “*Abaclat and others v Argentine Republic As a Collective Claims Proceeding*” (2012) 27 ICSID Rev-FILJ 261 at 263.

14 Berk Demirkol, “Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?” (2013) 2 Cambridge J Int’l and Comp L 612 at 624 [Demirkol]. For particulars of the US system allowing class arbitration see Part III. For an argument aiming at overcoming the differences among specific regimes and finding the legitimacy of mass claims actions in investment law by characterising them as a form of regulatory arbitration see SI Strong, “Mass Procedures as a Form of ‘Regulatory Arbitration’—*Abaclat v. Argentine Republic* and the International Investment Regime” (2013) 38 J Corp L 259.

A. A New Phenomenon Appears: *Abaclat* and Two Subsequent Awards

In 2011, the *Abaclat* tribunal ruled that some 60,000 claimants could join their claims in a single arbitration involving Argentina and its sovereign debt restructuring programme. It labelled its new creation a ‘mass claims proceeding’.¹⁵ There were two approaches available in characterizing the claims: as aggregate claims, meaning grouping individual claimants into a single process, or as representative or class actions, meaning a single claim be brought on behalf of an entire class of absent members. The tribunal compromised, qualifying the proceeding as a hybrid. It reasoned that although the claims before it were brought as aggregate, the continuance of the case resembled a representative process.¹⁶ Representativeness was purportedly caused by the large number of claimants and because the third party representing them collectively could not account for the interests of claimants individually.¹⁷

The hybrid character of the proceedings forced the tribunal to adapt procedure in order to make the case manageable.¹⁸ Two groups of adaptations were identified: those concerning the examination of the claims and those concerning the representation of the claimants.¹⁹ The former required the simplified verification of evidentiary material.²⁰ The tribunal also created and applied a unique method of examining the claims for the purpose of final ruling on jurisdiction and admissibility.²¹

Similar subsequent cases distanced themselves in their approach. In *Ambiente Ufficio and Others v the Argentine Republic*, a tribunal held that the large-scale case before it should not be treated any differently from simple multi-party proceedings.²² The same approach was taken in *Alemanni and Others v the Argentine Republic*.²³ The distinguishing factor in the latter two cases was scale: while *Abaclat* involved some 60,000 claimants, the *Ambiente* and *Alemanni* cases each involved about 100. It is thus understandable that the *Ambiente* tribunal relied on this explicitly to distinguish the case before it from *Abaclat* in taking a multi-party approach.²⁴ And so, the *Abaclat* decision still stands alone in qualifying an arbitration process as one of mass claims. The findings on jurisdiction, admissibility, and tribunal powers in that case are therefore most significant.

15 *Abaclat Decision*, *supra* note 1 at para 294.

16 *Ibid* at para 488.

17 *Ibid* at paras 486-488. See also SI Strong, “Mass procedures in *Abaclat v. Argentine Republic* – are they consistent with the international investment regime?” (2013) 3 *Yrbk Int’l Arb* 261 at 265-269 [Strong, “Mass procedures in *Abaclat*”]. As noted above, the tribunal took note of “a common ‘raison d’être’” of different collective proceedings, attempting to overcome the differences between aggregate and class proceedings. See note 11 above.

18 See *Abaclat Decision*, *supra* note 1 at paras 515-551. The adaptations of the procedural rules, and the tribunal’s power to conduct such changes in general, are of a particular significance for the issues of special consent; see Part IV, Section A.

19 *Abaclat Decision*, *supra* note 1 at para 530.

20 *Ibid* at para 531.

21 See Part IV, Section B, Subsection 2.

22 *Ambiente Ufficio SPA and Others v the Argentine Republic*, Decision on Jurisdiction and Admissibility (8 February 2013), ICSID, Case No ARB/08/9 at para 122 [*Ambiente*].

23 *Giovanni Alemanni and Others v the Argentine Republic*, Decision on Jurisdiction and Admissibility (17 November 2014), ICSID, Case No ARB/07/8 at paras 267 ff [*Alemanni*].

24 *Ambiente*, *supra* note 22 at paras 120 and 135.

B. Causal and Consequential Features of Mass Claims Arbitration and the Issue of Consent

Abaclat and the two subsequent awards are distinguished by their procedural findings: while the former concluded there was a need for adaptations, the *Ambiente* and *Alemanni* tribunals considered such adaptations unnecessary because they stemmed from the mass claim characterization.²⁵ The distinction appears to make it clear that mass claims arbitration contains two important and interrelated features: the causal implications of a large number of the claimants and a consequential need for procedural adaptations. If the mere plurality of claimants were definitive, mass claims proceedings remain multi-party processes. However, procedural adaptations were also deemed necessary, an important distinguishing factor was thus present and raised problems with consent.

Arbitration is generally consensual by nature.²⁶ This remains true in the investment dispute context.²⁷ Due to a unique method of expression of consent in investment arbitration, usually through a bilateral investment treaty ('BIT'),²⁸ State consent to arbitration bears a particular significance.²⁹ All aspects of the arbitral proceedings must be agreed to by the parties, and therefore any deviation from the original agreement must be validated by fresh consent.³⁰ The *Ambiente* and *Alemanni* tribunals determined that proceedings before them were multi-party and that accordingly, lacking the need for a change, there was no requirement of special State consent.³¹ Such a requirement appears, however, when a change is necessary.

Scholars have suggested that the *Abaclat* tribunal made an error by treating the case differently from a multi-party proceeding.³² These arguments emphasize that State consent is a standing offer not limited to a particular number of claimants. Indeed, offers to arbitrate in BITs are addressed to a plurality of investors by default—all potential claimants.³³ The only new element in *Abaclat*, it is argued, was to respond to the claims altogether instead of conducting multiple individual proceedings.³⁴ Another argument observes that there was no need for a special consent

²⁵ *Ibid* at paras 120 and 169; *Alemanni*, *supra* note 23 para 324.

²⁶ Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford: Oxford University Press, 2012) at 71 [Steingruber, *Consent*].

²⁷ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) Doc ICSID/2 at para 23, online: <<http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section05.htm#02>>.

²⁸ A State offers consent to arbitration through its national legislation, or in international investment agreements with other States, which is later perfected into an arbitration agreement upon an acceptance by an investor. See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford: Oxford University Press, 2012) at 254 ff.

²⁹ Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 151.

³⁰ *Abaclat Decision*, *supra* note 1 at para 522 (commenting that a modification of existing rules can only be effected subject to the parties' agreement).

³¹ *Ambiente*, *supra* note 22 at para 141; *Alemanni*, *supra* note 23 at para 269.

³² Hans van Houtte & Bridie McAsey, "*Abaclat and others v Argentine Republic* ICSID, the BIT and Mass Claims" (2012) 27 ICSID Rev-FILJ 231 at 234-235; Demirkol, *supra* note 14 at 631.

³³ Andrea Marco Steingruber, "*Abaclat and Others v Argentine Republic* Consent in Large-scale Arbitration Proceedings" (2012) 27 ICSID Rev-FILJ 237 at 241.

³⁴ Strong, "Mass procedures in *Abaclat*", *supra* note 17 at 280-281.

by the respondent State in the *Abaclat* case because the proceedings were initiated by a plurality of claimants without a subsequent change in the proceedings (such as the consolidation of cases).³⁵ While these arguments work if plurality is the only feature of mass claims arbitration, that is not the case. Expressly or implicitly, all three cases referred to above observe two features in mass claims investment arbitration: causality, and the consequential need for procedural adaptations. Only the latter raises concerns for a special State consent. Part four analyses these concerns in detail.

III. CLASS ACTIONS IN THE UNITED STATES

Section A analyses procedural aspects of US class actions while section B examines their relation to the need for a secondary consent. It is argued that any class action process, be it litigation or arbitration, inextricably links the disputing parties' consent to the representative procedure.

A. Class Action Processes: the Basics

Class action proceedings in the US take two forms: litigation and arbitration. The former has a well-established legal basis. The latter was formed in practice, and is still subject to various debates. Class litigation rules are outlined in Rule 23 of the Federal Rules of Civil Procedure ('FRCP').³⁶ It lays out certification and issuance procedures that give individuals an opportunity to participate in or request exclusion from proceedings.³⁷ Under its original incarnation in 1938, class actions functioned via an opt-in mechanism: if members of a class wanted to be bound by a decision of the court on their common issues of law or facts, they had to opt in to litigation.³⁸ In 1966 this changed to an opt-out mechanism: members of a class that did not want to be bound by a decision now had to express this desire.³⁹ The change was intended to increase the efficiency of the class litigation system by shifting the burden to take action to class members if they were unwilling to be bound by an outcome.⁴⁰ Today, the regime remains largely the same.

³⁵ Demirkol, *supra* note 14 at 629-631.

³⁶ Fed R Civ P (US), rule 23(b) ("A class action may be maintained if Rule 23(a) is satisfied and if: (1) *prosecuting separate actions by or against individual class members would create a risk of:* (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) *the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole;* or (3) *the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.* The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action" [emphasis added]).

³⁷ Rule 23(c)(2) provides that a court *may* direct a notice to class members in cases of class actions (b)(1) and (b)(2), while when a court is seized of a (b)(3) class action, a notice *must* be issued.

³⁸ See Deborah R Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica: Rand, 2000) at 11 ff (naming three types of class actions under the 1938 FRCP: true, spurious and hybrid) [Hensler].

³⁹ *Ibid* at 12-14.

⁴⁰ The new mechanism, however, in some instances is considered inappropriate. For arguments in favour of switching

Class arbitration has a much more complex history. As a class dispute resolution mechanism, it emerged in the US during the 1980s when some state courts began to order class arbitrations where there were a large number of similarly-situated claimants against the same defendant, having identical arbitration agreements.⁴¹ The practice was not unanimously approved of, as *Champ v Siegel* demonstrated when a federal court refused to order class arbitration without a specific agreement of the parties.⁴² However, early notable court rulings showed their support. In *Green Tree Financial Corp v Bazzle*, the United States Supreme Court ('USSC') held that arbitrators were supposed to determine if class arbitration was contractually permitted.⁴³ In a subsequent decision, the Supreme Court of California ('CSC') ruled in *Discover Bank v Superior Court of Los Angeles* that even explicit contractual clauses (i.e. class action waivers) obliging the parties not to pursue class action processes were unenforceable under state law in so far as they left the weaker party effectively without remedy.⁴⁴ The two rulings led many US courts to compel class arbitrations, holding that class action waivers were unconscionable.⁴⁵

In 2010 the USSC switched directions and adopted a stricter approach. In *Stolt-Nielsen SA v AnimalFeeds International Corp*, the court took the view that silent arbitration clauses did not allow for class arbitration.⁴⁶ The request in the case was to vacate an arbitral award where the arbitration clause in question was first interpreted as permitting class arbitration. The USSC supported the vacatur, concluding that the arbitration panel imposed its own policy view of class arbitration.⁴⁷ When faced with the interpretation of a 'silent' arbitral agreement, the court considered the tribunal's task as determining if any legal rule governed the situation. The tribunal failed to do so, they concluded, proceeding instead as if it had the authority to develop its own view of the

back to the opt-in mechanism see *ibid* at 476-477.

41 Gary Born & Claudio Salas, "The United States Supreme Court and Class Arbitration: A Tragedy of Errors" (2012) 2012 J Disp Res 21 at 21-22 [Born & Salas].

42 *Ibid* at 27.

43 *Green Tree Financial Corp nka Conseco Finance Corp v Bazzle et al* (2003) 539 US 444 at 451-453 [*Bazzle*]. This was only a plurality opinion joined by one additional judge. The case before the USSC stemmed from two cases which were later joined. The arbitrator in the first one (who was subsequently named arbitrator in the second case as well), reached the decision that class arbitration was permitted under the arbitration agreements at stake, and he did so after a trial court ordered class arbitration based on the identical arbitration agreements applicable in the second case. The USSC acknowledged that the arbitrator probably affirmed the reasoning of the trial court (*ibid* at 453-454). But see *Opalinski v Robert Half Int'l*, 2017 WL 395968, 3d Cir; *Dell Web Communities Inc v Carlson*, 2016 WL 1178829, 4th Cir; *Chesapeake Appalachia LLC v Scout Petroleum LLC*, 2016 WL 53860, 3d Cir; *Opalinski v Robert Half Int'l*, 2014 WL 3733685, 3d Cir; and *Reed Elsevier Inc v Crockett*, 2013 WL 5911219, 6th Cir (holding that the issue of the availability of class arbitration should be decided by courts).

44 *Discover Bank v Superior Court of Los Angeles* (2005) 30 Cal Rptr 3d 76. The CSC concluded that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration", and that the FAA did not pre-empt California law in this respect (*ibid* at 79). In reaching its conclusions the CSC used the doctrine of unconscionability and stated that class action waivers in adhesion contracts might be "substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy" (*ibid* at 85). It held that "one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable" (*ibid* at 85-86).

45 Born & Salas, *supra* note 41 at 33.

46 *Stolt-Nielsen SA et al v AnimalFeeds International Corp* (2010) 559 US 662 [*Stolt-Nielsen*].

47 *Ibid* at 7.

appropriate rule to be applied. It should have instead looked to whether there was a ‘default rule’ in governing law whereby arbitration clauses could be construed as allowing class arbitration in the absence of express consent.⁴⁸ Instead, the tribunal relied solely to a “post-*Bazzle* consensus” that class arbitration was beneficial in “a wide variety of settings”.⁴⁹ The court concluded on contractual principles that a party could not be compelled to submit to class arbitration under the FAA unless there was “a contractual basis for concluding that the party *agreed* to do so”.⁵⁰ The finding of no intention to preclude class arbitration was in discord with the foundational principle entrenched in the FAA that arbitration is a matter of consent.⁵¹ Class formation changed the nature of proceedings to such a degree that it could not be presumed to have been consented to because of the mere presence of arbitration clause.⁵²

The USSC continued on its new course in *AT&T Mobility LLC v Concepcion*, holding that the FAA pre-empted state law precluding class arbitration waivers.⁵³ The question before the court was whether §2 of the FAA pre-empted California’s law “classifying most collective-arbitration waivers in consumer contracts as unconscionable” (the *Discover Bank* rule).⁵⁴ It analysed the effect of the ‘saving clause’ in §2, which limits the validity and enforceability of an arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract”.⁵⁵ It found that no intent to preserve conflicting state-law rules standing as obstacles to the FAA’s objectives.⁵⁶ Invoking its reasoning in *Stolt-Nielsen*, it concluded that class arbitration, to the extent that it was enabled by *Discover Bank* rather than through contractual agreement, was inconsistent with the FAA.⁵⁷ Because it was “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”, the rule was pre-empted by the FAA.⁵⁸ The opinion invalidated the *Discover Bank* ruling that the FAA did not pre-empt the doctrine of unconscionability and consequently that class action waivers in consumer adhesion contracts were unenforceable. It has been argued that *Concepcion* does not say how to deal with situations when a claimant can prove factually that a class action waiver in an arbitration clause precludes the vindication of his or her rights.⁵⁹ This was precisely the reason for invoking the unconscionability doctrine in *Discover Bank*, although it was not followed by a deep examination of the facts pertaining to plaintiff’s options. It exceeds the scope of this article to examine the applicability issue in detail. Suffice it to end here with the reservation that a different outcome might be reached by new forms of contract interpretation and pre-emption.

48 *Ibid* at 9.

49 *Ibid*. The court expressed some doubts about the understanding of the *Bazzle* case. It argued that the opinion in that case was formed only by plurality, and therefore could not be taken as law. There was no need to address the question of who should rule on the availability of class arbitration in *Stolt-Nielsen*, because the parties agreed to assign that issue to the arbitrators (*ibid* at 15-16).

50 *Ibid* at 20 (emphasis in the original).

51 *Ibid*.

52 *Ibid* at 21.

53 *AT&T Mobility LLC v Concepcion et ux* (2011) 563 US 333 [*Concepcion*].

54 *Ibid* at 5.

55 *Ibid*.

56 *Ibid* at 9.

57 *Ibid* at 13.

58 *Ibid* at 18.

59 Myriam Gilles & Gary Friedman, “After Class: Aggregate Litigation in the Wake of *AT&T Mobility v Concepcion*” (2012) 79 Univ Chicago L Rev 623 at 628 [Gilles & Friedman].

The USSC relied heavily on its understanding of the ‘nature’ or ‘fundamental principles’ of arbitration in both *Stolt-Nielsen* and *Concepcion*, referring to the FAA definition and not a doctrinal one. The problem is that the FAA does not contain a clear definition either, which led justices to make their own determinations. It has been argued accordingly that different understandings of arbitration may have affected the consistency of their opinions.⁶⁰ The *Concepcion* majority has been particularly criticized for abandoning the prevailing 20th century idea of arbitration in the US and offering protection only to the type of arbitration prevalent at the time of the FAA’s adoption: “informal, small-stakes, bipartite proceedings”.⁶¹ However, it is submitted here that the definition of arbitration is likely an inappropriate criterion for determining the availability of class arbitration. That arbitration is a matter of consent is indisputable. Instead of debating arbitration’s essence then, a more productive question might be what is required for arbitration to proceed.

B. Consent to Class Actions in US Domestic Law

The issue of consent to class litigation is governed by statute and arises when determining who is treated as a class member bound by a decision. Until 1966, only those who opted in were treated as members. After that, the mechanism was reversed so that everyone who did not opt out was considered to have joined.⁶² Crucially, members are to receive a notice stating they need not take any action if they agree to be part of the class, while still giving them an opportunity to opt out if they wish.⁶³ If they do not, their consent is considered obtained. This heavy reliance on the consent of absent class members could be problematic because of issues with opt out opportunities⁶⁴ and has led to arguments for reintroducing an opt-in mechanism.⁶⁵ Consent is an issue because plaintiffs are still parties to the process. There is concern over whether they should be bound in this way by a decision that implicates awarded rights but also prospectively imposes obligations.

The stakes are different in class arbitration, where the issue of the existence of consent is more apparent. The primary question is whether special or ‘secondary’ consent by the respondent is present.⁶⁶ Arbitrators can order class or multiparty arbitration on the basis of either expressed or implied secondary consent.⁶⁷ In *Stolt-Nielsen*, the court ruled that consent to class arbitration

60 SI Strong, “Does Class Arbitration ‘Change the Nature’ of Arbitration? *Stolt-Nielsen*, *AT&T*, and a Return to First Principles” (2012) 17 *Harvard Negotiation L Rev* 201 at 228 [Strong, “Nature”].

61 Born & Salas, *supra* note 41 at 22.

62 See above Part III, Section A.

63 Hanotiau, *supra* note 12 at 262. Such notices are usually addressed individually to class members, but also other means can be used, such as publications, radio or television; see further *ibid* at 261-262.

64 For the same concern in the context of class processes and personal jurisdiction see Debra Lyn Bassett, “Implied ‘Consent’ to Personal Jurisdiction in Transnational Class Litigation” (2004) 2004 *Michigan State L Rev* 619 at 628 ff.

65 *Ibid* at 637-641; Hensler, *supra* note 38 at 476-477.

66 The issue of opting out of course appears also in the context of class arbitration. However, the attention here will be given primarily to the issue of “secondary consent” of the respondent. In that respect, “secondary consent” refers to consent to class (or mass claims) arbitration in particular, which might already be provided or come subsequently. Consent of the claimants initiating the arbitration is not an issue, because, should the requested arbitration amount to an alteration of the agreement to arbitrate, the initiation itself is considered a counteroffer triggering the issue of “secondary consent” of the respondent. See Steingruber, *Consent*, *supra* note 26 at 75.

67 Strong, “Nature”, *supra* note 60 at 252.

must be provided. The main question before the arbitrators should therefore not be whether the arbitration clause *prohibits* class arbitration, but whether it *allows* it. Strong argues that the case therefore “contemplates the same kind of interpretive analysis that has always been used to determine the existence of secondary consent in multiparty scenarios”.⁶⁸ She argues that the USSC “merely appears to be reinforcing the need to establish secondary consent”.⁶⁹ But she also rebutted the court’s proposition about the changed nature of class arbitration,⁷⁰ ultimately attempting to characterize the court’s approach as too restrictive. This article seeks to shift the focus of the debate from the issue of the ‘nature’ of arbitration towards the issue of consent to procedure. The question of party consent to class arbitration should be reformulated in terms of *whether the parties have consented to a procedure permitting class arbitration*.

Party consent to class arbitration can be determined by the arbitration agreement itself or the chosen arbitration rules.⁷¹ Looking to the agreement is problematic because it is usually silent on the issue.⁷² A choice of rules however, if present, represents the procedure consented to by the parties and a starting point for further procedural determinations.⁷³ Since arbitral rules are normally incorporated in arbitration agreements by reference, much depends on the content of the rules drafted by arbitral institutions.⁷⁴ Following *Bazzle*, the question that should be addressed is “what kind of arbitration proceeding the parties agreed to”, which concerns contract interpretation and arbitral procedures.⁷⁵ The adjudicator should use a three-step test, determining first the applicable procedure chosen by the parties, secondly whether that procedure allows for class arbitration, and finally whether the parties excluded the possibility of class arbitration altogether by modifying the chosen rules and limiting their scope of application.⁷⁶ Class arbitration can proceed only if the answers to the second and third question are ‘yes’ and ‘no’ respectively.

68 *Ibid* at 253.

69 *Ibid* at 254.

70 See *ibid* in general.

71 SI Strong, “The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?” (2009) 30 Michigan J Int’l L 1017 at 1061-1062 [Strong, “Silence”]. See also *ibid* at 1064-1065 (arguing that “[a]lthough the primary emphasis is of course on procedural law, some attention must also be paid to any relevant substantive law, in case it contains provisions that can explicitly or implicitly be said to permit or require class or group proceedings”).

72 Strong, “Nature”, *supra* note 60 at 221.

73 Strong, “Silence”, *supra* note 71 at 1072 (“[...] an arbitrator who is asked to decide whether an arbitration agreement supports class treatment must consider the provisions contained in any arbitral rules that have been adopted by the parties”).

74 Strong, “Nature”, *supra* note 60 at 206 (arguing that “it was not until 2003, when the United States Supreme Court gave its implicit approval to the procedure in *Green Tree Financial Corp. v. Bazzle*, that various U.S.-based arbitral institutions promulgated their specialized rules on class arbitration” [references omitted]). See also Strong, “Silence”, *supra* note 71 at 1025-1026 (where, before the *Stolt-Nielsen* ruling, Strong argued that “[n]ot only has the procedure been standardized to some extent through the creation of several sets of specialized arbitral rules, but the balance between judicial and arbitral authority has been stabilized after an initial period of confusion and contradiction” [reference omitted]).

75 *Bazzle*, *supra* note 43 at 452-453. See also Strong, “Silence”, *supra* note 71 at 1056 (arguing that a similar question regarding implied consent appears in consolidation cases).

76 Following the recent practice of the appellate courts for the Third, Fourth and Sixth Circuit (see note 43 above), it should be said that the final resolution of the issue who is authorized to rule on availability of class arbitration is to be seen in the future, given the differences between that practice and the one of the USSC in *Bazzle* and (at least to some extent) in *Stolt-Nielsen*.

Applicable procedure has also been discussed within the context of the New York Convention.⁷⁷ Under that Convention, an arbitral award should be enforceable if the procedure applied by the arbitrators is in conformity with that chosen by the parties or the governing law. This is arguably so even with minor deviations.⁷⁸ Nevertheless, a finding of implied consent to class arbitration must be reasonable and grounded clear interpretative methods.⁷⁹ Concluding that the parties consented to class arbitration via the incorporation of arbitration rules allowing for such a process has to be accompanied by clear reasons. A mere mentioning that the parties did not exclude class arbitration would not suffice.

Class arbitration waivers have been developed as a method of denying consent to class arbitration, a practice considered unfriendly towards claimants. This has raised questions about whether they can be invalidated in favour of establishing consent.⁸⁰ One argument advances that waivers demonstrate the awareness of the possibility of class actions at the time of drafting by all parties because otherwise they would be unnecessary.⁸¹ Another point is that arbitrators should not be able to establish parties' consent to class arbitration by invalidating class action waivers because this would be an issue of clause validity—not merely contractual interpretation—and therefore for the courts to decide.⁸² Nevertheless, any possibility of invalidating class action waivers has been significantly reduced by the *Concepcion* ruling.

A few words should also be said about policy considerations. Class arbitration is considered one of the most efficient ways of protecting rights and enforcing small claims of a large number of holders.⁸³ Along with representative relief, Strong regards this as a distinguishing feature of class arbitration.⁸⁴ But though class arbitration does offer efficiency advantages, arbitrators cannot impose a special procedure to save resources or time. This would be inconsistent with the arbitration agreement reflecting the parties' intentions,⁸⁵ violating the primacy of consent. Class arbitration should be considered the same as regular arbitration in the sense that it requires all aspects to be consented to by the parties. Arbitrators have no power to alter that agreement to form a class.⁸⁶

77 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

78 Strong, "Silence", *supra* note 71 at 1029 (arguing that allowing class process in case of silent arbitration agreement would not amount to a material breach of that agreement).

79 *Ibid* at 1085.

80 Apparently, challenges of class action waivers came in two waves. The first one challenged such waivers as unconscionable when contained in consumer adhesion contracts (this was reflected in the *Discover Bank* case), while the second wave challenged such waivers on the ground that their "implicit prohibition against spreading the costs of litigation across multiple claimants in collective litigation precludes the individual plaintiff from being able to vindicate her federal statutory rights". Gilles & Friedman, *supra* note 59 at 632-633.

81 Strong, "Nature", *supra* note 60 at 229.

82 Hanotiau, *supra* note 12 at 273-274. For the question whether this is an issue for courts or arbitrators to decide see the *Bazzle* case discussed in Part III, Section A above.

83 See, for example, Strong, "Silence", *supra* note 71 at 1048 (even arguing that "the benefits of efficiency in class arbitration extend not only to parties who are actively involved in the proceeding—i.e., the defendant(s) and named claimants—but also to scores of others, including both the unnamed claimants and, arguably, society as a whole"). Indeed, the *Abaclat* tribunal made the same observation; see note 11 above.

84 Strong, "Nature", *supra* note 60 at 241.

85 *Ibid* at 237.

86 The USSC commenced its opinion in another case in 2013 by affirming its position in *Stolt-Nielsen* and stating:

In sum, special consent to class processes remains crucial. Within the context of class litigation, statute considers abstention from opting out to indicate consent. In class arbitration, consent is achieved through the agreement to arbitrate. Secondary consent must be present via an agreement to class arbitration in particular and not simply to ‘an arbitration’ in general. This can be implied by the agreement, but not constructed through extensive interpretation by virtue of arbitrators’ views regarding the best solution. Implied consent must be found on the basis of factors that are consensual in nature such as those agreed upon and forming or governing the agreement to arbitrate (like the choice of particular arbitral rules).⁸⁷

IV. WHAT’S WRONG WITH *ABACLAT*?

This part critically examines the *Abaclat* decision and discusses the availability of mass claims in investment treaty arbitration. It pays particular attention to the need for a secondary consent to mass claims arbitration (Section A), as well as the relief pursued and used in such an arbitration (Section B).

A. The Need for a Secondary Consent to Mass Claims Investment Arbitration

Two questions surround secondary consent to mass claims arbitration: whether its availability should be discussed as a problem of admissibility or consent, and how ‘silence’ in the applicable procedural rules on collective proceedings should be treated.

1. Admissibility or Consent?

Mass claims in investment arbitration have two important features: the causal (large numbers of claimants) and the consequential (procedural adaptations). The *Abaclat* majority decision focused on the former,⁸⁸ and avoided consent issues by arguing that where the BIT qualified trans-

“Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them”. *Oxford Health Plans LLC v John Ivan Sutter* (2013) 569 US at 1.

⁸⁷ In addition, arbitrators have to verify the satisfaction of other important criteria. Thus, the American Arbitration Association Supplementary Rules for Class Arbitrations provide in Rule 4(a): “If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met: (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.” See American Arbitration Association, *Supplementary Rules for Class Arbitrations* (effective 8 October 2003), online: <<https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf>>.

⁸⁸ The tribunal, however, stated that “[r]epresentative proceedings raise issues relating to consent, especially for those who subscribe to a view of arbitration that requires the parties’ explicit consent not only to arbitration of the dispute but also to the procedure to be used in the arbitration”, and that “[t]he only remaining question is whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required,

actions at stake as investments (which were already likely to involve a large number of claimants), it would be contrary to the spirit of the BIT and the ICSID Convention to require additional consent by the responding State to collective actions and denying investors effective protection.⁸⁹ The question was therefore whether the process could be conducted within the ICSID framework subject to procedural modifications, and not whether the respondent State consented to mass claims arbitration.⁹⁰ For the tribunal, the ‘mass’ aspect of the proceedings (a large number of investors) was a question of “modalities and implementation of the ICSID proceedings”, not consent; it was a question of admissibility, not jurisdiction.⁹¹

This approach was subsequently criticized in *Alemanni*. According to the latter tribunal, the *Abaclat* majority presupposed that having jurisdiction over each individual automatically entailed jurisdiction over a multi-claimant proceeding.⁹² It created its own test to distinguish between jurisdiction and admissibility related issues, differentiating between objections to party consent to ICSID arbitration and those that questioned whether, even if parties consented, there were reasons the tribunal should decline hearing the dispute “in the form in which the dispute is brought before it”.⁹³ The tribunal still discussed prospective procedural changes as an issue of admissibility,⁹⁴ probably due to its opinion that the main jurisdictional notion in a case with multiple claimants should be a common dispute against the responding State.⁹⁵ Matters of consent were to be regarded narrowly, as related only to substance (the dispute itself) and not “the form in which the dispute is brought before it”. By contrast, the dissent in *Abaclat* opined that

jurisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence. They are no less jurisdictional, in fact more so, than the limits relating to one of the four dimensions of the ambit within which jurisdiction is exercised [...].⁹⁶

The dissent’s approach is consistent with the practice of the International Court of Justice (‘ICJ’) and other investment tribunals. Investment arbitration operates within, and is governed by, public international law. ICJ practice is instructive regarding what the *Abaclat* majority referred

i.e., regarding the form of collective proceedings”; *Abaclat Decision*, *supra* note 1 at paras 485 and 489 (emphasis added).

89 *Ibid* at para 490.

90 *Ibid* at para 491.

91 *Ibid* at para 492. For a critique of the tribunal’s distinction between jurisdiction and admissibility, see also Anna de Luca, “Collective Actions in ICSID Arbitration: The Argentine Bonds Case” (2011) 21 *Italian Yrbk Int’l L* 211 at 226-239 [De Luca].

92 *Alemanni*, *supra* note 23 at para 289.

93 *Ibid* at para 260.

94 *Ibid* at paras 321-325.

95 *Ibid* at para 292 (this led the tribunal to join the final ruling on jurisdiction to the merits phase of the case).

96 *Abaclat and Others v Argentina*, Dissenting Opinion of Professor Georges Abi-Saab (28 October 2011), ICSID, Case No ARB/07/5 at para 126 [*Abaclat Dissenting Opinion*].

to as “implementation of consent”.⁹⁷ In *Armed Activities on the Territory of the Congo*, the ICJ notes that “jurisdiction is based on the consent of the parties and is confined to the extent accepted by them”, and “[w]hen that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon”.⁹⁸ The same applies to consent to arbitration under public international law: specific wording in a compromissory clause specifying which procedure the parties are consenting to is nothing but a matter of consent.

The *Abaclat* majority’s approach is also inconsistent with ICSID case law. In the *SGS v Philippines*, the tribunal ruled that issues of jurisdiction were governed by the relevant BIT and the ICSID Convention, whereas issues of admissibility concerned impediments precluding the claim.⁹⁹ The two main features of inadmissibility are therefore said to be the *impediment* to bring a claim and *prematurity* of the claim.¹⁰⁰ Two criteria have been suggested for delimiting jurisdiction from admissibility: if a claim cannot be brought before the seized forum, then the issue concerns jurisdiction; but if a claim can be brought but could not be heard at all or not at the particular moment, the issue concerns admissibility.¹⁰¹ While it may be problematic to assign the question of applicable procedure to either category, forum seems more appropriate because the forum seized can only apply one procedure in a particular case, and that procedure is defined together with the forum itself. While ‘jurisdiction’ might not be the most appropriate label, the issue of consent to applicable procedure is ultimately what matters.

Qualifying the issue of applicable procedure as a matter of consent also concerns the fundamentals of arbitration. These apply in class arbitration where tribunals are given the freedom to award different relief than is available in ‘regular’ arbitration. Such freedom can only be triggered once it is clear the parties have consented to an arbitral procedure allowing for class arbitration.¹⁰² Class arbitration is available only if the parties have agreed to it and the agreement does not contain specific wording precluding it.¹⁰³ The agreement should not be understood formalistically as consent to class arbitration can also be inferred from other circumstances,¹⁰⁴ and this should also be the case in public international law.¹⁰⁵ Most important is that reasons for the existence of con-

97 In other parts of the decision, the *Abaclat* majority referred to the issues of admissibility as issues of “implementation of consent”. See *Abaclat Decision*, *supra* note 1 at paras 493-496.

98 *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, [2006] ICJ Rep 6 at para 88 (the court continued in the same paragraph by invoking its previous practice and concluding that it “considers that the examination of such conditions [of consent] relates to its jurisdiction and not to the admissibility of the application”).

99 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), ICSID, Case No ARB/02/6 at para 154.

100 Jan Paulsson, “Jurisdiction and Admissibility” in Gerald Aksen et al, eds, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (Paris: International Chamber of Commerce, 2005) 601 at 606-607.

101 *Ibid* at 617. Further on the distinction between jurisdiction and admissibility, see also Veijo Heiskanen, “*Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*” (2014) 29 ICSID Rev-FILJ 231.

102 For the interdependence between representative relief and the applicable procedure see Part IV, Section B.

103 See Part III, Section A.

104 See Part III, Section A (in respect to the *Stolt-Nielsen* ruling) and Section B.

105 Public international law follows the same approach in the construction of arbitration agreements. The ICJ has

sent must be given because a mere absence of an exclusion of class or mass arbitration does not suffice. If that is so for class arbitration, *a fortiori* it must be the same for a hybrid process.

The *Abaclat* dispute was subject to Article 8 of the Argentina-Italy BIT, which stipulates that arbitral disputes are subject to ICSID Convention.¹⁰⁶ The arbitration rules within that framework, the ICSID-AR, are the applicable procedure.¹⁰⁷ It has been argued that procedural issues are separate from State consent because they fall under Article 44 of the ICSID Convention, not under those provisions regulating the jurisdiction. According to this argument, the issue of State consent for arbitrating a particular dispute is different from whether that can be done in accordance with the existing rules—the latter issue concerning admissibility.¹⁰⁸ This reasoning, however, is inconsistent with Article 44, which provides that the arbitration proceeding will be conducted “in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules [i.e. ICSID-AR] in effect on the date on which the parties consented to arbitration”.¹⁰⁹ The choice of the applicable rules is accordingly governed exclusively by the parties’ agreement. A reference to the ICSID Convention in the relevant BIT amounts to consenting to that Convention and the ICSID-AR as the applicable procedural rules.

In short, the *Abaclat* majority erred in law by holding that the ‘mass aspect’ qualification fell under admissibility. It associated mass aspect with the mere number of the claimants and did not give due attention to consequential considerations. It disregarded the practice of international forums in omitting to identify all the matters covered by the consent to arbitrate. Instead, it gave significant weight to the silence of the ICSID procedural rules on mass claims procedures and the tribunal’s power to adapt accordingly. As the following section argues, this amounts to a departure from the agreement and violates the consensual nature of arbitration.

repeated numerous times that its jurisdiction is limited to the extent of the parties’ consent, but it has also referred to the possibility of consent by implication; see *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, [1954] ICJ Rep 19 at 32; and *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, Preliminary Objection, [1948] ICJ Rep 15 at 26-29 (where the ICJ inferred Albania’s consent to its jurisdiction).

106 An unofficial English translation of the Argentina-Italy BIT is available in *Abaclat Decision*, *supra* note 1 at para 270 (“[...] 3. If, after 18 months from the notification of commencement of an action before the national courts indicated in the above paragraph 2, the dispute between the Contracting Party and the investors still continues to exist, it may be subject to international arbitration. With this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration. [...] 5. In case of international arbitration, the dispute will be subject, upon choice of the investor, to one of the following arbitration bodies: a) *International Centre for Settlement of Investment Disputes (I.C.S.I.D.)*, established under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* opened for signature in Washington on March 18, 1965, provided that both Contracting Parties are parties to the said Convention. If this condition is not satisfied, each of the Contracting Parties agrees that the dispute shall be subject to arbitration in compliance with the Additional Facility Rules for conciliation and arbitration of the International Centre for Settlement of Investment Disputes.” [emphasis added]).

107 This clearly stems from Article 44 ICSID Convention, which provides that an arbitration under the ICSID auspices will be conducted in accordance with the ICSID-AR, except if the parties agree otherwise. For this reason Dolzer and Schreuer characterize the ICSID system as “self-contained and denationalized”. See Dolzer & Schreuer, *supra* note 28 at 278.

108 Demirkol, *supra* note 14 at 619.

109 ICSID Convention, *supra* note 2, art 44.

2. Silence in the ICSID Convention and Procedural Adaptations

The confusion about procedural adaptations and consent lies in the second part of Article 44 of the ICSID Convention. The article provides that “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the tribunal shall decide the question”.¹¹⁰ The *Abaclat* majority relied on this to adapt the arbitration rules for mass claims procedures, considering the ICSID Convention’s silence on collective procedures as a gap to be filled, rather than a ‘qualified silence’ implying that collective procedures not be allowed by being intentionally left out.¹¹¹ Relying on Article 44 in conjunction with Rule 19 of the ICSID-AR, it held that it had the power to fill the gaps without modifying the ICSID-AR or adopting new sets of rules.¹¹² The two determinations allowed it to conclude that the procedural adaptations necessary to deal with claimants’ claims in a collective way were admissible.¹¹³ It cited its power to resolve procedural questions in the event of lacunae,¹¹⁴ which was subsequently described in scholarship as the inherent power of the tribunal to make the necessary adaptations.¹¹⁵

The problem with the majority’s reasoning is its confusion of these two ‘inherent powers’. Although it emphasized it did not have the power to modify or adopt, it effectively concluded that it could *adapt* entire sets of rules. Article 44 provides that a tribunal can resolve a question of procedure if that question is not covered by the ICSID Convention, ICSID-AR, or any other applicable rules the parties agreed to. But as the dissenting opinion points out, Article 44 refers to the situations where *no rule exists*, while the majority’s reasoning is aimed at adapting existing rules because they did not fit within a mass claims process.¹¹⁶ Therefore, Article 44 cannot serve as the basis for adaptation of the rules of procedure. Furthermore, while Rule 19 provides that the tribunal will make orders for the conduct of the proceedings,¹¹⁷ the Notes to ICSID-AR state that procedural orders must be based on either the ICSID Convention itself, the ICSID-AR, other applicable rules if the parties have agreed so, or, if none of these rules contain the necessary provision, a decision reached by the tribunal itself.¹¹⁸ To base a procedural order on an *adapted* provision of the ICSID Convention, or on an *adapted* rule of the ICSID-AR is therefore problematic.

Finally, the modifications themselves need to be considered. The tribunal held that adaptations concerned examinations of the claims and representation of the claimants,¹¹⁹ as well

110 *Ibid.*

111 *Abaclat Decision*, *supra* note 1 at para 520.

112 *Ibid* at paras 521-524. See also para 525, where the tribunal attempted to make a clarification by saying that it “can and ought to fill gaps left where the application of existing rules are not adapted to the specific dispute submitted to ICSID arbitration”, and that “[i]n such a case, the filling of the gap does not consist of an amendment of the written rule itself, but rather of an adaptation of its application in a specific case”.

113 *Ibid* at para 547.

114 *Ibid* at para 521.

115 Demirkol, *supra* note 14 at 635.

116 *Abaclat Dissenting Opinion*, *supra* note 96 at para 201.

117 ICSID-AR, *supra* note 3, rule 19.

118 ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* (1986) 4 Int’l Tax & Business Lawyer 362 at 381, Rule 19, Note A (emphasis added). Notes are available with the previous version of the ICSID-AR, but Rule 19 remained unchanged.

119 *Abaclat Decision*, *supra* note 1 at para 530.

as creating “a simplified verification of evidentiary material”.¹²⁰ Furthermore, it created a unique mechanism for evaluating jurisdiction and admissibility of each individual claim.¹²¹ The tribunal adjusted entire sets of existing rules governing whole aspects of procedure. That procedure had to be made by the tribunal was not surprising because of the silence of existing procedure on large-scale processes.¹²² However, in finding that filling gaps could entail modifying entire sets of existing rules, the majority misinterpreted the wording of the ICSID Convention and ICSID-AR. Applicable procedure still fell under the exclusive competence of the parties’ agreement. Tribunals render orders determining the conduct of proceedings based on procedural rules consented to by the parties, whereas the *Abaclat* majority aimed at establishing entire new sets of rules in place of ones already consented to. The notion that filling gaps in this way does not amend the written rule itself but rather adapts its application in a specific case¹²³ is problematic because it violates the consensual nature of arbitration.

B. The Relief: Adapted versus Consented Procedure

The use of class-like relief in a mass claims proceeding marks a major departure from standard ICSID procedure. This section discusses this change within the context of the arbitral discretion to use representative relief and the compliance of such a relief with existing investment arbitration practices.

1. Do Arbitrators Enjoy the Discretion to Use Representative Relief?

Representative relief is a distinctive feature of class processes, awarding remedies to members of the class who do not take part in the proceedings.¹²⁴ Classes are certified to determine liability in a class action process, while damages are sometimes left for later determination in a small or administrative process.¹²⁵ Representative relief appears as an abstraction while concrete claims are finally settled separately.

The USSC has arguably never challenged the use of representative relief in arbitration, perhaps even approving the device implicitly.¹²⁶ In *Concepcion* however, the court found that the FAA did not signal congressional intent to leave the disposition of procedural requirements for a class process to an arbitrator.¹²⁷ The court indicated a clear connection between the procedural formality of class arbitration and the binding force of the decision.¹²⁸ Thus, class arbitration is

120 *Ibid* at para 531.

121 See Part IV, Section B, Subsection 2.

122 Strong, *Class*, *supra* note 4 at 75.

123 *Abaclat Decision*, *supra* note 1 at para 525.

124 Strong, “Nature”, *supra* note 60 at 213-214.

125 Hanotiau, *supra* note 12 at 262-263.

126 Strong, “Nature”, *supra* note 60 at 214-215.

127 *Concepcion*, *supra* note 53 at 15.

128 *Ibid* (“[...] [C]lass arbitration *requires* procedural formality. The AAA’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. [...] And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. [...] At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.”).

permissible only when the applicable class action procedure is clearly consented to. If the chosen rules provide for a class arbitration with its formalities there is no obstacle to its conduction and its ultimate binding effect on the parties. The USSC therefore links procedure with the possibility of awarding a class relief.

Strong has argued that representative relief complies with arbitration's adjudicatory feature because it passes the test as a neutral procedure that observes the parties' right to be heard and resolves the dispute in "an adjudicatory or quasi-judicial manner".¹²⁹ That test needs to be redefined in more concrete terms, however, because there is no general definition of arbitration¹³⁰ that entails specific procedural standards.¹³¹ Parties do not consent to arbitration *in abstracto*. Rather, they must specify its elements *in concreto*: is it *ad hoc* or institutionalized? What is the applicable procedure? What is the place of arbitration? etc. When the parties have chosen a particular procedure, any variation represents a change to what has been agreed upon—changing the definition of the arbitration *in concreto*.¹³² The question is therefore whether the use of a representative relief complies with the definition of arbitration *in concreto*, and particularly whether it complies with the chosen procedure. In class arbitration, representative relief must stem from a representative process. If the agreement to arbitrate does not allow for a class process then the outcome of the process cannot be representative relief. *A fortiori*, this must also be the case in a hybrid arbitration.

2. Is Representative Relief Compatible with the Investment Arbitration System?

Abaclat is the only mass claims investment arbitration conducted so far and was not a class proceeding because it had clearly identified claimants with individual claims. But it did contain a representative feature linked to the procedure applied by the tribunal (which is why it was qualified as a hybrid).¹³³ However, the conduct of that arbitration demonstrates that the tribunal did use a sort of representative relief. The tribunal limited itself to a general test on jurisdiction and admissibility while factual findings regarding each claimant (which were supposed to be applied to that test) were to be made by an expert. The operative part of the award referred to general tests (using the phrase 'to the extent') on the admissibility of the claims,¹³⁴ as well as jurisdiction

129 Strong, "Nature", *supra* note 60 at 266 (references to Gary Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2009) at 217 and 253).

130 *Ibid* at 242 ff (however, at 243-244 Strong does find helpful Born's approach in defining arbitration by concentrating on the notion of adjudication, as "it appears to describe a definitional requirement, meaning a quality that must exist for a particular process to be considered 'arbitration'").

131 *Ibid* at 244 (stating that "despite the centrality of adjudication to the arbitral process, no consensus appears to exist as to what the adjudicatory process must entail" and that "a wide variety of procedures have been deemed permissible"; however, Strong further notes that not "every possible type of adjudicatory procedure is permitted", that "[c]ertain minimal standards of due process or procedural fairness must be met if the so-called arbitration is to withstand judicial scrutiny", but that "the question of whether a particular process is adjudicatory is slightly different from the question of whether the same process is fair" [references omitted]).

132 As for the notion of variation, tribunals do have the power to conduct the proceedings before them and to issue orders for such purposes. In that sense, "a variation" refers only to situations where a tribunal finds a particular, existing rule of procedure inappropriate, and decides to substitute it with a new one. See the discussion on the power of the tribunal to adapt the applicable procedure in Part IV, Section A, Subsection 2.

133 See Part II, Section A.

134 *Abaclat Decision*, *supra* note 1 at para 713(1)(i) Issue 1(b).

rationae personae over both natural¹³⁵ and juridical persons.¹³⁶ The verification of claimants' database "against the requirements" set forth in the jurisdictional decision was to be done by an expert appointed by the tribunal, culminating in an expert report.¹³⁷ The expert's mandate was clarified to be purely factual, ignoring legal issues and focusing on "determining which factual conclusions can be drawn from the information and documents contained in the Database".¹³⁸ The tribunal noted that the verification process should help identify inconsistencies and irregularities in the information and documents, but that it remained the tribunal's task "to determine how to deal with such inconsistencies and irregularities, if any", and that the verification process was only a starting point for the tribunal to decide "to what extent an individualised review of claims or documents w[ould] be necessary and how to best address such review".¹³⁹

There are two problems with this approach. First, the tribunal was not consistent on the particulars of the expert's mandate. While Procedural Order 12 required that the verification of claimants' database be done against the requirements set forth in the jurisdictional decision, Order 15 stated that the expert was to ignore legal considerations and consequences and approach issues from a factual perspective. Second, the tribunal adopted a narrow understanding of its adjudicative power. This would normally include factual and legal findings,¹⁴⁰ with the former involving the assessment of evidence including expert reports.¹⁴¹ By mandating that the expert make definitive factual findings, the tribunal delegated a part of its own powers.¹⁴² The *Abaclat* ruling therefore

135 *Ibid* at para 713(1)(x).

136 *Ibid* at para 713(1)(xi). For a critique of the tribunal's abstract approach to the ruling on jurisdiction see also de Luca, *supra* note 91.

137 *Abaclat and Others v Argentina*, Procedural Order No 12 (7 July 2012), ICSID, Case No ARB/07/5 at para 4 of the dispositive.

138 *Abaclat and Others v Argentina*, Procedural Order No 15 (20 November 2012), ICSID, Case No ARB/07/5 at para 20.

139 *Abaclat and Others v Argentina*, Procedural Order No 17 (8 February 2013), ICSID, Case No ARB/07/5 at para 21(ii).

140 The same applies to jurisdictional determinations: *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, Decision on Jurisdiction (8 March 2010), ICSID, Case No ARB/08/8 at para 57 ("At the jurisdictional stage, the Tribunal must satisfy itself that it has jurisdiction to hear the merits of the dispute. This requires the Tribunal to make definitive findings of any facts that are directly determinative of its jurisdiction"). See also Christoph H Schreuer et al, *The ICSID Convention: A Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 641-642 (stating that "[d]uring the [ICSID] Convention's drafting, it was also made clear that fact-finding is not an independent function of a tribunal but an indispensable task incidental to its judicial function", and that failing to abide the applicable standards for taking and evaluation of evidence, governed both by the ICSID-AR and general principles of law, may risk annulment of the decision). See further *ibid* at 90 and 103.

141 Usually tribunals appoint experts in relation to the issues of quantum of damages. See Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) at 176 ff. On the difference between the roles of tribunal-appointed experts in assisting the tribunal in the valuation of the damages and the one assumed in *Abaclat* see Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (Cambridge: Cambridge University Press, 2014) at 120-121. See also Panayotis M Protosaltis, "The Role of Experts in ICSID and WTO Dispute Settlement Procedures: Towards a New Paradigm?" (2014) 3 *Developing World Rev on Trade and Competition* 1 at paras 12 and 26-28.

142 Another problem is that the tribunal did so despite an explicit disagreement between the parties: *Abaclat and Others v Argentina*, Dissenting Opinion to Procedural Order No 15 (20 November 2012), ICSID, Case No ARB/07/5 at paras 24-45.

resembles representative relief because, like one would normally expect from a class action, the tribunal limited its ruling to a general test while the concrete assessment of the facts related to each claim was assigned to a third party.¹⁴³

This outcome could not have been anticipated by the parties. Both the ICSID Convention and the ICSID-AR stipulate that the tribunal must examine every question before it.¹⁴⁴ Even the *Abaclat* majority acknowledged that it was obliged to examine “all relevant aspects of the claims relating to Claimants’ rights under the BIT as well as to Respondent’s obligations thereunder subject to the Parties’ submissions”.¹⁴⁵ But examining of all questions must include making factual examinations and findings. No rule allowed the tribunal to confer that duty to a third party. The procedure required examination of each issue, but the tribunal denied that duty and came up with a new procedure which delegated a part of its adjudicating power to a third party.¹⁴⁶ Procedure and relief must be compliant, even in class arbitration.¹⁴⁷ While it should be the case in a hybrid arbitration as well, this was not true for the *Abaclat* majority’s conception of mass claims investment arbitration. The relief and the manner of reaching it did not comply with the procedure agreed upon. The outcome of the mass claims arbitration is therefore inappropriate.

V. CONCLUSION: ACTING LIKE A COURT

In *Stolt-Nielsen*, the USSC noted that the tribunal in question acted like it had “the authority of a common-law court to develop what it viewed as the best rule to be applied” in the circumstances in ruling on the availability of class arbitration.¹⁴⁸ The same can be said of tribunal in *Abaclat*. The majority allowed itself to adapt procedure by finding that it had the power to change *pre-existing* procedural rules and that such adaptations did not trigger the issues of consent. It built a new procedure while ignoring the fact that arbitration requires party approval of procedural adaptations. This approach to mass claims arbitration demonstrates an artificial understanding of what constitutes an adaptation, resulting in the undue modification of existing rules. It is a backdoor way to mass claims arbitration.

A debate between those favouring collective proceedings in similar cases, despite their ability to undermine some procedural safeguards, and those sticking firmly to traditional procedural limitations, exists in both domestic class and international mass claims investment arbitration fields. The difference is that there are no appellate courts to review the consistency of the cases such as *Abaclat* with the international legal norms. The *Abaclat* decision went beyond simply

143 See Hanotiau, *supra* note 12 at 262-263 (on the needs of individualized determinations after a generalized determination in a class process).

144 ICSID Convention, *supra* note 2, art 48(3) (providing that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based”). ICSID-AR, *supra* note 3, rule 47(1) (providing that “[t]he award shall be in writing and shall contain [...] (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based”).

145 *Abaclat Decision*, *supra* note 1 at para 551(iii). It can be noticed, though, that this wording of the majority might imply the examination of the legal arguments in the merits only.

146 Interestingly, Arbitrator Santiago Torres Bernárdez pointed to the tribunal’s failure to render its final award on the merits, even after finishing with all the phases of the adapted procedure. See *Declaration by Santiago Torres Bernárdez*, *supra* note 10 at para 13.

147 See Part IV, Section B, Subsection 1.

148 *Stolt-Nielsen*, *supra* note 46 at 9.

enabling mass claims investment arbitration and initiated the development of a class process. The majority acted like a court developing policy, imposing its own view of what was needed in the proceedings and assuming the capacity to develop such a process for the future. The goal, it seems, was to create proceedings similar to a court class action: assuming its general availability, as well as using a 'class-like' relief limiting the tribunal's purview to general tests, and assigning the assessment of individual claims to another body. The tribunal unfortunately failed to observe the inextricable link in all class actions between the disputing parties' consent, representative procedure, and representative relief.

If this is a fair assessment of the decision, mass claims arbitration is still not a device available to investors in investment treaty arbitration. This article demonstrates that the approach taken in *Abaclat* did little to strengthen the case for mass claims in investment treaty arbitration. Stakeholders should therefore aim to develop a coherent set of specialized rules for collective proceedings available for adoption by States and investors. *Abaclat* only serves as a reminder that there is still much work to be done.