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CLASS ARBITRATIONS IN NEW ZEALAND

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Abstract

While class arbitrations have been a popular source of debate in the United States, it is not often in the context of New Zealand law. Class arbitrations can be a useful in some factual examples, such as consumer claims against companies. However, there are also arguments that class arbitration changes the nature of arbitration. Furthermore, it is worth considering how well class arbitrations would work in jurisdictions where class actions are not popular, such as New Zealand. This paper analyses the reasons for and against class arbitrations, posed in the context of consumer claims. It will first set out the background of class arbitrations and the landscape of consumer claims in a globalised world, before moving on to a comparison of arguments for and against class arbitration. It then ties these arguments back into the consumer claims context and asks whether class arbitration is the right solution for resolving these disputes, and if not, whether there are any conclusions. It will conclude that class arbitration is a process that may yield useful results, if carried out according to a carefully constructed process.

Key Words

International commercial arbitrations, class arbitrations, class actions.

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I Introduction

In the context of consumer claims, where a contract entered into with a trader may lead to similar disputes with numerous parties, class actions have been a popular method of litigation. Class actions are considered an efficient way to litigate a large number of similar claims, and has been recognised as a legitimate means of furthering policy goals in various common law and civil law jurisdictions, particularly the United States.[1] Such procedures have also developed in the field of arbitration, known as class arbitrations. However, the combination of representative relief and the inherent nature of arbitration based on consent and party autonomy has raised a multitude of issues regarding the validity and effectiveness of the practice. These issues have prevented the practice from being adopted as a common procedure internationally and in other jurisdictions outside the United States.[2]

This paper discusses whether class arbitrations should be implemented in New Zealand as a procedure to protect consumers' interests. Part II begins by explaining the background of New Zealand consumer law and setting out the interests of consumers which must be protected in today's market. This will be done by setting out the current laws which are meant to protect consumers, as well as methods in which consumers can seek compensation where these laws have been breached by traders. It will consider if these methods are sufficient to meet consumers' needs, and introduce class arbitration as a possible way to meet these requirements.

Part III will introduce class arbitrations as they are practiced in the United States. It begins with the procedure of class arbitrations as they are carried out under institutional rules, and then goes on to outline a brief history of class arbitration and how they developed in the United States, mainly through Supreme Court decisions which have shown a shift from a pro-class arbitration stance to one which conceptually opposes against class arbitration.

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[1] S I Strong Class, Mass and Collective Arbitration in National and International Law (Oxford University Press, Oxford, 2013) at 3.20.

[2] Aside from the United States, other countries including Canada, Columbia, Germany and Spain have contemplated the use of arbitration to solve mass legal disputes, with Columbia having adopted class arbitration in the case of *Valencia v Bancolombia*.

Part IV discusses issues which have arisen in the United States experience with class arbitrations. These include due process concerns, consent as to class arbitration in arbitration agreements, class action waivers, and other concerns which may impact on whether class arbitration "changes the nature of arbitration". This part then looks at a discussion of class arbitrations which have occurred in other jurisdictions, and to assess what their experience can add to this analysis.

Part V then brings the points which have been discussed above and applies them to the New Zealand context. It explains why class arbitrations are suitable for addressing the concerns with consumer protection which were listed in Part II. It then goes on to consider how class arbitrations may be implemented in New Zealand, suggesting a procedure which may satisfy the concerns that have been raised about class arbitrations in the United States. This procedure will draw on the provider models of class arbitration from the United States, and the Class Action Bill which was proposed but not legislated in New Zealand. This Part will also consider whether class arbitration awards are compatible with being enforced internationally under the New York Convention. This paper then concludes that with the proper procedure, class arbitrations are feasible, and indeed will assist consumers with the problems they are facing with access to justice in the global context.

II The Consumer Context

This Part of the paper sets out the context of the paper in the consumer law background. It raises problems which have an adverse impact on consumers' access to justice and outlines the current avenues available in New Zealand to protect customers in cases of complaints or disputes against traders. It then moves on to assess the adequacy of these regimes in resolving international or multi-jurisdictional disputes against traders who are not present in New Zealand, and concludes by recommending what is necessary for consumers in order to overcome this hurdle when faced with such circumstances.

A *Problems impacting consumers' access to justice*

With the advent of technology and the encouragement of international trade in the 21st century, international movement of goods and services has increased.[3] The modern

[3] John Goldring "Globalisation and Consumer Protection Laws" (2008) 8 Macquarie LJ 79 at 80.

day consumer would encounter issues with a global market much more frequently than before. For example, a product purchased by a consumer in an online or physical store may be supplied, manufactured, or both, by an overseas trader. This is supported by statistics which show that the value and quantity of imported consumption goods have been steadily increasing for the past five years.[4]

The problem which arises with overseas manufacturers or suppliers is that they may not be covered under national consumer protection laws. The principles of private international law apply in this context, where transactions, relationships or disputes have connections with more than one country. Private international law rules differ according to the law of the country in which the judgment is sought to be enforced in. While they are not not based on a body of international rules, there are substantial similarities between such rules between common law jurisdictions, which in turn are strongly influenced by civil law concepts.[5]

Two of the most important issues in private international law are jurisdiction and enforcement. The question of jurisdiction pertains to whether the national courts of one country have the power to hear and determine the case. In English and New Zealand law, this depends on whether the defendant has been validly served with New Zealand proceedings under the High Court or District Court Rules.[6] However this only applies to a defendant who is present in New Zealand, or a company which was either incorporated in, or is carrying on business in New Zealand. A foreign defendant who does not satisfy any of these is unable to be sued under New Zealand jurisdiction, meaning that a consumer who wishes to sue him/her will need to file a claim in the defendant's resident country in order to seek redress. This would have to be done under that country's consumer protection laws, which may differ significantly depending on jurisdiction.

When a defendant is validly served in New Zealand, they can object to the courts' jurisdiction or apply to stay the proceedings on the grounds of *forum non conveniens*,

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[4] Statistics NZ "Consumption goods continue upward trend in January 2016" (21 March 2016) <www.stats.govt.nz>.
[5] David Goddard and Helen McQueen "Private International Law in New Zealand" (paper presented to New Zealand Law Society "Private International Law in New Zealand", December 2001) at 1.
[6] At 14.

meaning the case would be more appropriately brought in another jurisdiction.[7] A plaintiff is able to apply for a judgment by default if the defendant does not do anything and allows the filing time for defence to lapse.[8] The plaintiff bears the burden of proof in proving that New Zealand is the *forum conveniens* where the defendant challenges the jurisdiction of the court.[9] These factors combined makes it difficult for a consumer to bring a successful claim against a trader in a New Zealand court where there is a cross-border element in the case. Alternatively, for a plaintiff to initiate proceedings against a defendant outside of New Zealand without leave from the court, rule 6.27 of the High Court Rules lists the circumstances in which that can be done.[10]

In the case where the plaintiff is successful in obtaining judgment against the defendant, there are also issues with enforcement in private international law. This includes both when a plaintiff obtains a judgment in a foreign court, and in a New Zealand court. For a foreign judgment to be enforceable in New Zealand, the defendant has to have submitted to that court's jurisdiction and participated in the proceedings.[11] Similar to the question of jurisdiction, the defendant needs to have assets in New Zealand of sufficient value in order to enforce a judgement in the national courts. In a case where this is not satisfied, and the plaintiff obtains a judgment against the defendant in a foreign jurisdiction, it is still not directly enforceable in New Zealand.[12] The plaintiff would have to bring an action in the New Zealand courts based on the judgment in order to enforce it.[13]

With differing sets of private international law rules between foreign jurisdictions and no global enforcement regimes for judgments, a consumer's claim against a trader, even a successful one where a judgment has been obtained, may not be enforceable. As a result, the consumer cannot easily receive the redress that they deserve, and outcomes may vary significantly depending on which country the judgment is sought to be enforced in, or where the case was heard. Furthermore, the questions of jurisdiction and

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[7] Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) at 12-007.
[8] High Court Rules, Part 15, Subpart 2.
[9] Goddard and McQueen, above n 5, at 47.
[10] High Court Rules, rule 6.27.
[11] Goddard and McQueen, above n 5, at 54–55.
[12] At 53.
[13] At 53.

enforcement would have to depend heavily on where the defendant is primarily resident, where the defendant company is based, or where the defendant holds assets.

Another prevalent issue in the area of consumer law is whether consumers are able to access the means of redress available to them. If they are unable to do so, the substantive consumer protection laws are rendered meaningless as they are unable to be enforced.[14] One of the main reasons that consumers often find it difficult to bring claims against traders is due to the financial cost of litigation, and the lengthy period of time required for the entire process.[15] Furthermore, claims are usually brought for items of small value, which means the cost of litigation would exceed the amount compensated if the case was successful. This becomes a disincentive for consumers from pursuing individual claims in the courts.

In order to have a functioning consumer protection regime, there has to be solutions for consumers which can address the imbalance between traders and purchasers, and give value to substantive protection laws. Such solutions need to be equally effective in both domestic and international claims, in order to properly allow consumers access to justice as required.

B *Consumer Protection in New Zealand*

This section describes the current laws in New Zealand which protect consumers' interests, including:

a) Legislation such as the Consumers' Guarantees Act 1993 and the Fair Trading Act 1986, and the role of the Commerce Commission as a regulatory body;
b) Section 11 of the Arbitration Act 1996 which safeguards against the inappropriate use of class action waivers in consumer contracts;
c) Class actions in the courts;
d) The Disputes Tribunal as an alternative to litigation for small claims.

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[14] James Greenland "The power of the collective" *Law Talk* (New Zealand, 14 July 2016) and Jessica Palmer "Access to Justice" in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis NZ, Wellington, 2014) at 495.
[15] At 497.

All of these mechanisms provide ways in which consumers can seek redress from traders in various situations, each with their own advantages and disadvantages. These will be discussed later in Section C.

1 Consumer Protection Laws and Regulatory Enforcement

The main consumer protection laws in New Zealand which apply to purchasers are the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. The Consumer Guarantees Act ensures that goods sold are at an acceptable quality,[16] and the Fair Trading Act protects consumers from misleading and deceptive practices in trade.[17] Both Acts provide redress in circumstances where they are breached by traders, in that consumers are able to bring a claim in court against a trader who is alleged to have committed a breach of the Acts.

The Fair Trading Act provides for a public enforcement agency to enforce the law on behalf of consumers, which is the Commerce Commission. Instead of allowing consumers to pursue claims individually, the Commerce Commission is empowered by several sections in the FTA to pursue claims against traders.[18] They are allowed to issue infringement notices and impose fees on traders who have committed contraventions of the Act, and can also bring civil actions in court for damages which are to be paid to persons who have suffered loss by the conduct of the defendant. This functions as a "quasi-class action" in which the Commerce Commission becomes the representative plaintiff instead of a consumer.[19]

Through the Commerce Commission, consumers are able to overcome the hurdles of bringing litigation by themselves as they do not have to fund the claim nor go through the legal battle themselves. The imbalance between individual consumers and businesses is also reduced. However, the Consumer Guarantees Act is self-enforcing and requires consumers to take action themselves in order to enforce their rights under the Act. The Commerce Commission has no enforcement powers under this Act, despite calls from commentators for an amendment in this area.[20] This shortage in the law

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[16] Consumer Guarantees Act 1993, s 1A.
[17] Fair Trading Act 1986, s 1A.
[18] Palmer, above n 14, at 522.
[19] At 522.
[20] At 523.

means that for the majority of consumer complaints, which are for defective goods or goods that are not of reasonable quality, access to justice for the consumer is not resolved by the enforcement powers of the Commerce Commission.

2 Section 11 Arbitration Act

In the New Zealand context, while class arbitrations have not been implemented, there is a form of consumer protection in the Arbitration Act 1996. Section 11 requires all arbitration agreements in consumer contract to be expressly agreed to by the consumer in a separate agreement.[21] The separate agreement is to be made after the dispute has arisen, or at the time the contract is entered into.[22]

The purpose of this provision is to address the inequality in bargaining power between traders and consumers, and the possible lack of understanding by consumers of the fine print in consumer contracts.[23] Consumers who enter into contracts without full understanding of an arbitration clause cannot be seen to have properly consented to arbitral proceedings in the event of a dispute.[24] By having to sign a separate agreement to arbitrate, consumers are protected from being bound by arbitration clauses containing a class action waiver.

3 Class actions

A class action is a term used to describe any procedure that allows a single plaintiff to being an action on behalf of persons with a common interest in the subject matter of the litigation.[25] In New Zealand, class actions are not as popular and as widely used as in the United States. This is due to the lack of procedural rules and third party funders, and the absence of a tort action for personal injuries.[26] While class actions have been a

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[21] Arbitration Act 1996, s 11(1).
[22] David AR Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (LexisNexis NZ, Wellington, 2011) at 4.6.
[23] Law Commission *Arbitration* (NZLC R20, 1991) at 235.
[24] Williams and Kawharu, above n 15, at 4.6.
[25] Kate Tokeley "Class Actions for New Zealand Consumers" (2008) Yearbook of Consumer Law 297 at 297–298.
[26] Jenny Stevens and Sophie East "New Zealand" in Omar Shah (ef) *Class Actions: A Global Guide from Practical Law* (Thomson Reuters, 2015) at 295–296.

burgeoning trend in the courts in recent years,[27] there are no formal rules regarding class actions in New Zealand. Instead, cases which have proceeded on a representative basis have been brought under r 4.24 of the High Court Rules, which allows "representative actions".[28]

A class action which proceeds in New Zealand under the High Court Rules can be initiated either by the consent of the class members or by the direction of the court on the application of any of the parties to the proceedings. The rule only requires that the members of the class have the "same interest" in the claim. Later cases have added the requirements that the class has to cover all or virtually all potential plaintiffs, all class members must have a common interest, and the represented members must consent to the payment of global damages to the representative plaintiff.[29]

While a representative action has the overall effect of allowing claims to be brought as a class, it has many differences from a legislative class action procedure. The focus on representative actions is on the commonality of interests amongst the class members, whereas the focus of class actions is on their consent.[30] The one paragraph-long rule generally lacks detail as to procedure that is to be followed, which leads to uncertainty and confusion. This uncertainty, combined with the requirements from case law have led to inconsistency in the use of opt-in or opt-out mechanisms in order to constitute the class which brings the class action.[31] Due to the uncertain way representative actions have developed in the courts, and the lack of a firm basis and procedure for group litigation, proper legislation needs to be enacted if the development of class litigation were to continue in New Zealand.[32]

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[27] Class actions that have been brought in New Zealand courts include litigation arising out of misleading information released by company directors in a public float of company shares and claims against bans for excessive penalty fees.

[28] High Court Rules, r 4.24.

[29] *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC), affirmed in *Saunders v Houghton* [2010] 3 NZLR 331 (CA).

[30] Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] NZ L Rev 73 at 105.

[31] At 103.

[32] At 102.

A Class Action Bill was proposed in 2009, but further legislative action has not been taken. A further analysis of the Class Action Bill and the proposed amendments to the High Court Rules will be undertaken later in this paper.

4 Disputes Tribunal

The Disputes Tribunal is an informal alternative to the courts for consumers to settle small claims with traders. It has jurisdiction over contract and tort law, and various consumer protection statutes, and is governed by the Disputes Tribunal Act 1988.[33] Dispute Tribunal proceedings are held in private and parties are not represented by lawyers.[34] Parties are assisted to come to a settlement amongst themselves but if they are unable to, the referee makes a binding decision.[35] Referees are not bound by the law in admitting evidence, nor in making a decision.[36] There is also no requirement for them to be legally trained.[37] This characteristic of the Disputes Tribunal gives it flexibility, but may also lead to inconsistent results across the country. Decisions made by the Disputes Tribunal can be judicially reviewed and parties can apply to the District Court to have a referee's ruling enforced if it is not complied with.

Section 16 of the Disputes Tribunal Act 1988 also provides additional protection to consumers against class action waivers by allowing the Tribunal jurisdiction over claims under contracts with arbitration clauses.[38] However, if a separate agreement to arbitrate has been entered into between the consumer and the trader, s 16 ceases to apply.[39]

C *Adequacy of current consumer protection regimes*

The current consumer protection regimes available in New Zealand may not be able to adequately resolve cross-border disputes between consumers and traders, and may not be sufficient to provide access to justice to consumers as well. In cross-border disputes, it is difficult to enforce national regulatory laws as they are confined to the geographical

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[33] Palmer, above n 14, at 505.
[34] Disputes Tribunal Act 1988, s 39(1).
[35] Palmer, above n 14, at 505.
[36] Disputes Tribunal Act, above n 34, s 40(4).
[37] Section 7.
[38] Section 16(2).
[39] Section 16(4).

boundaries of the nation state.[40] This would affect consumers who wish to invoke the Consumer Guarantees Act, the Fair Trading Act and the requirement for a separate arbitration agreement in the Arbitration Act. Most countries generally enforce only the judgments and orders of the local courts, and courts may refuse to enforce a foreign judgment if they find that the issuing court lacked jurisdiction.[41] In finding jurisdiction, difficulties tend to arise when the defendant is a corporation which does not have a physical presence anywhere. Jurisdiction will depend either on where the corporation was registered, where it does business or where it holds significant assets.

In a national court, the complexity involving "choice of law" which would apply to the case may be a deterrent for parties to litigate the claim.[42] The uncertainty of obtaining a successful claim may also impede consumers' confidence in opting to go through the courts in the event of a dispute. Hence, methods of enforcing local legal consumer laws will not be effective where there are foreign elements to the manufacture or supply of a product. These would include bringing a claim under the consumer protection laws which are available currently in New Zealand as they are subject to the principles of private international law when they are to be applied in the cross-border context. In cases where a product was manufactured or supplied overseas and purchased online by a New Zealand consumer, this would give rise to issues as mentioned earlier, and would impede consumers' access to justice as the would not be a guaranteed way of obtaining redress. The consumer is likely to be discouraged from bringing proceedings against the foreign trader due to the complexity of private international laws, and the lengthy and expensive process involved.

There are also hurdles in domestic claims in increasing access to justice to consumers based on the above consumer protection regimes. Consumers are unlikely to bring small claims to court due to their low value as compared to the time and cost involved in litigation.[43] The Commerce Commission may not be able to prosecute small claims brought by consumers under the Fair Trading Act if they are not great enough in numbers or public significance. While class actions are essential as a means for consumers to bring claims against traders as a large group, having to go through the

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[40] Goldring, above n 3, at 83
[41] At 98
[42] At 100.
[43] Palmer, above n 14, at 497.

courts system would mean significant costs and time delays imposed on the plaintiffs. The relatively recent popularity of class actions and the lack of a proper, defined procedure aside from representative actions also limit the efficiency of the mechanism. Furthermore, there is a lack of experience in class actions in the legal profession and the uncertainty in the law regarding third-party litigation funding, further complicating the use of class actions in consumer disputes.

While the Disputes Tribunal may settle small claims effectively due to their inherent flexibility in evidence and decision-making, there is a concern that this may also lead to outcomes that may not be in accordance with the consumer protection laws which apply to the dispute.[44] The Tribunal also lacks enforcement powers when dealing with a party who refuses to abide with the agreement that has been reached.[45] Disputes Tribunal proceedings are also unhelpful against a trader that is not present in New Zealand, based on common law decisions[46] and the policy underlying the Disputes Tribunal Act that Tribunal proceedings are meant to be an inexpensive and expeditious method of resolving small claims.[47]

With such concerns, it may not be sufficient for consumers to rely on the current consumer protection regimes to resolve their disputes with traders. Local legal consumer protection laws are not able to easily extend beyond the geographical boundaries of New Zealand where a trader is not located in the country, and are currently not able to meet the concerns for access to justice for consumers.

D *What is necessary*

A strong pro-arbitration policy and an overarching need for large scale relief is needed for development of class arbitration. These requirements are fulfilled in New Zealand as there is a need for increased access to justice for consumers, and the Arbitration Act 1996 which encourages the use of arbitration as a form of alternative dispute resolution.[48]

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[44] Palmer, above n 14 at 507–508.
[45] Palmer, above n 14 at 507.
[46] *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851 at 852.
[47] Goddard and McQueen, above n 5, at 28.
[48] Arbitration Act 1996, s 5.

Compared to litigation, arbitration can be a solution to the problems which New Zealand consumers face as it can transcend geographical boundaries. This is due to the parties' choice of law and jurisdiction, and the New York Convention which calls for global enforcement of arbitral awards. In cross-border cases it may be more appropriate for class arbitrations to resolve the dispute as a local court will not be able to assert jurisdiction over all of the putative parties, and hence fail to resolve the mass dispute in a single time and a single forum.[49] It is also much less efficient to require different parties to seek redress in different jurisdictions as that may lead to inconsistent results for a class of consumers with the same factual scenario. Arbitrations allow the parties to grant jurisdiction to the arbitral tribunal, eliminating any concerns on lack of jurisdiction.[50] In arbitrations, arbitral tribunals are also more free to apply foreign law to any particular dispute, and are seen as more neutral when resolving disputes involving foreign nationals of different countries.

Arbitration can also be a cheaper and quicker solution as compared to litigation, and will provide an increased level of access to justice for consumers if a claim is allowed to be brought as a class. This is because it will be easier to deal with claims in arbitration as a class than to deal with individual bilateral claims. Arbitrators are also allowed to adapt their procedures to suit the case at hand, which ensures that all potential concerns as to due process and parties' rights are covered.[51] Respondents may also prefer arbitration due to the increased privacy afforded compared to litigation, even though class arbitrations may waive this confidentiality to a certain extent.[52]

For the above reasons, class arbitration is potentially an effective solution to improve consumers' access to justice in New Zealand. However, there are many debatable issues which are unique to class arbitration which may impact on the question of whether they should be introduced as an acceptable procedure in New Zealand. These issues will be discussed in Part IV.

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[49] Strong, above n 1, at 6.12.
[50] At 6.16.
[51] At 6.31.
[52] At 6.41.

III Class arbitrations in the United States

This Part of the paper undertakes a closer analysis of class arbitrations as they are practiced in the United States, to provide a developmental background of how they were conceptualised over the years. These developments involve Supreme Court decisions which were influential in shaping the attitudes of the legal and business community towards class arbitrations, and procedural rules by arbitral institutions detailing how such proceedings are to be carried out. An illustration of the background and procedure of class arbitrations in the United States is pertinent for the analysis of the issues with the practice which will be discussed in Part IV.

A *What is class arbitration?*

It is important to appreciate how class arbitration differs from traditional multiparty arbitrations, which are widely accepted and practiced internationally. While parties in both proceedings may go up to similarly large numbers, claimants in multiparty proceedings have each commenced individual proceedings of their own which are then consolidated into one proceeding. On the other hand, class arbitration is a procedure of representative relief, based on the United States class action procedure.[53] It involves one or more claimants who bring the claims on a representative basis, on behalf of a class of people who are in similar circumstances. The members of the class are "unnamed", and have the choice to opt out of the proceeding.[54]

Class arbitrations, to date, are only widespread in the United States, and the American Arbitration Association (AAA) and Judicial, Arbitral and Mediation Services, Inc (JAMS) have both established rule-based models.[55] Under both models, the arbitrator retains jurisdiction over the entire arbitration, including the certification of class—whether the claim should proceed as a class. However, the arbitrator's decisions as to clause construction and class certification can be judicially reviewed to ensure fairness to both claimants and respondents should any dispute arise as to class treatment.[56]

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[53] Rule 23 of Federal Rules
[54] Strong, above n 1 at 1.12.
[55] AAA Supplementary Rules for Class Arbitrations and JAMS Class Action Procedures.
[56] Strong, above n 1, at 3.25.

B *How class arbitrations work in the United States*

The process in which class arbitrations are carried out is largely similar to bilateral or multiparty arbitrations, and are heavily based on class action procedure. However, there are a number of procedural steps in a class proceeding that are included due to its representative nature.[57] There are two models of class arbitration: the hybrid model and the provider model. Under the hybrid model, the court retains control over class-action related aspects of the arbitration.[58] It decides whether or not the arbitration should proceed as a class, and makes decisions on matters such as notice and settlements which are typical steps in a class action suit.[59] The hybrid model was introduced in the early days of class arbitration by the courts, and is also known as court-initiated proceedings as the court decides whether the circumstances of the case are suitable for class arbitration.[60] It has largely been swept away as the Supreme Court has recognised that an arbitrator has jurisdiction over class-related issues as well as the substantive merits of the arbitration.[61]

In recent times, the more popular model under which class arbitrations are conducted is the provider model. Under this model, the claimants bring a class claim straight to arbitration under rules which have been developed by institutions, such as the AAA and JAMS. In class arbitrations which are not commenced according to this model, arbitrators can adopt procedures complying with basic notions of procedural due process, guided by the approach in both bilateral or multi-party proceeding and court procedures. The arbitrator decides whether a general set of arbitration rules can support a class proceeding, based on the rights of the parties.[62]

The AAA Supplementary Rules and the JAMS Rules are both based on Rule 23 of the Federal Rules of Civil Procedure, which makes them mostly identical.[63] The process of bringing a class arbitration starts with a clause construction award, where the arbitrator decides whether the arbitration agreement between the parties allows for the proceeding

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[57] At 2.1.
[58] Carole J Buckner "Due Process in Class Arbitration" (2006) 58 Florida L Rev 185 at 226.
[59] At 228.
[60] Strong, above n 1, at 2.4.
[61] At 2.5.
[62] Strong at 2.32.
[63] Strong at 2.36.

to advance on a class basis.[64] This is determined as a threshold matter, and the decision released as a partial final award is judicially reviewable. In construing an arbitration clause, arbitrators are not to be biased in favour of allowing the arbitration to proceed as a class.[65]

If none of the parties challenge the award, or if the requisite time period passes, the case proceeds to the class certification stage. The decision for this stage is also to be expressed in a judicially reviewable, partial, final award.[66] Here, the arbitrator decides if one or more members of the class may act as a representative for all the parties, based on the conditions as set out in Rule 4(a).[67]Once the representative is approved, the Tribunal allows the class arbitration to proceed only if the questions of law or fact common to the class are predominant over individual members.[68]

The Tribunal must also be satisfied that class arbitration is superior to other available methods for fair and efficient adjudication of the dispute, based on the matters listed in Rule 4(b).[69] While substantially similar to the AAA rules, the JAMS rules allow for the arbitrator's discretion as to whether the clause construction and class certification awards are to be written as partial, final awards.[70] If the arbitrator chooses not to do so, the parties lose the ability to review the decisions at these two stages before substantive matters are heard.

The AAA Rules specify that the usual privacy and confidentiality in commercial arbitration do not apply in class arbitrations. Hearings and filings are made public on the AAA website Class Arbitration Docket to the extent known to the AAA.[71] This is to enable class members to be notified about the details of proceedings, and to produce a deterrent effect as seen in class action suits.[72] The JAMS rules do not mention

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[64] Bernard Hanotiau *Complex Arbitrations: Multiparty, Multicontract Multi-issue and Class Actions* (Kluwer Law International, The Hague, 2005) at 277.
[65] AAA Supplementary Rules for Class Arbitrations, Rule 3.
[66] Rules 3 and 5.
[67] Rule 4(a).
[68] Rule 4(a)(2).
[69] AAA Supplementary Rules, Rule 4(b).
[70] Hanotiau, above n 64, at 279.
[71] AAA Supplementary Rules, Rule 9.
[72] Strong at 2.96.

confidentiality, which leaves it open to be available in a class arbitration commenced under these rules.[73]

Class members must be provided with the "best notice practicable under the circumstances", and this notice must be given to all class members who can be identified through reasonable effort.[74] The contents of the notice are set out in Rule 6(b) which includes the nature of the action, the definition of the class, the claims, issues and defences.[75] It must also specify that any class member is allowed to enter an appearance through counsel if necessary, and are allowed to attend the hearings at all times.[76] Information about the arbitrator must also be included in the notice, along with the class representatives and class counsel.[77] Finally, class members must also be notified about the AAA Class Arbitration Docket.[78] Rule 4 of the JAMS rules also specify that similar information must be included in notices to class members.[79]

C *Background; origin in United States*

Class arbitrations are widely accepted as having arisen as a "particularly American experiment",[80] a result of attempts by businesses to use arbitration agreements to eliminate the possibility of class action suits being brought by consumers. By stipulating in a consumer contract that disputes are to be resolved by arbitration, businesses are able to restrict any form of proceedings brought by consumers to individual bilateral arbitration, as that was the only form of arbitration available at the time.

The first case to establish class arbitrations as a valid mechanism was *Keating v Superior Court*.[81] The dispute arose between the nationwide owner and franchisor of 7-Eleven convenience stores and the franchised operators of the stores in California. The contracts between the owner and the franchised operators had contained class action

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[73] At 2.97.
[74] AAA Supplementary Rules, Rule 6.
[75] Rule 6(b).
[76] Rule 6(b)(4).
[77] Rule 6(b)(7).
[78] Rule 6(b)(8) and Rule 9.
[79] JAMS Class Action Procedures, Rule 4.
[80] Lea Haber Kuck and Gregory A Litt "International Class Arbitration" in Paul G. Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions around the Globe* (Oxford University Press, New York, 2012) at 30.1.
[81] *Keating v Superior Court* 645 P 2d 1192 (Cal 1982).

waivers which the petitioner sought to invoke against the respondents, effectively forcing each of them to partake in individual arbitration. As a response, the Court permitted class arbitrations as an attempt to retain the benefits of both class relief and arbitration. Class arbitration was described as "a better, more efficient…fairer solution" that could avoid unfairness arising from the denial of an opportunity for consumers to bring the case on a classwide basis.[82]

The popularity of class arbitration surged after the decision in *Green Tree Corp v Bazzle.*[83] The defendant was a commercial lender and the plaintiffs were its customers, who had similarly entered into contracts containing arbitration clauses. The contracts were silent as to whether class arbitration was permissible, making that the main issue to be decided in the case. The Court interpreted the contract to hold that it was agreed by parties that any class certification decision was to be made by the arbitrator. This was concluded on reliance to the rule that if there is doubt about matters regarding the scope of arbitrable issues, it should be resolved in favour of arbitration.[84] The court also clarified that the hybrid model, where the judge decides on class proceedings, is only to be used in limited circumstances if the parties had intended so. Following *Bazzle*, class arbitration came to be seen as a common and accepted practice in the United States. Arbitral institutions began to formulate specialised rules for class arbitrations, and over 300 claims for class arbitration proceedings have since been lodged with these institutions.

However, the Supreme Court reopened the debate about class arbitrations in in *Stolt-Nielson v AnimalFeeds*, an antitrust dispute between shipping companies and charterers.[85] The parties had arbitration clauses which were not only silent on the question of class arbitration, but also contained an agreement between the parties that they were "silent" on the issue. Following *Bazzle*, this was submitted to the arbitrator, who decided that there was an implicit agreement to proceed as a class. The decision was appealed. The majority held that class arbitrations could not be conducted in agreements which are silent or ambiguous as to the type of procedure to be held,

[82] At 1209.
[83] *Bazzle v Green Tree Financial Corp* 539 US 444 (2003).
[84] *Mitsubishi Motors v Soler Chrysler-Plymouth* 473 US 614 at 626.
[85] *Stolt-Nielsen S.A v AnimalFeeds Intl Corp* 559 US 662 (2010).

because they "changed the nature of arbitration" to such an extent that it cannot be allowed to proceed without express consent by all parties.[86]

The Supreme Court's stance against class arbitrations was further promulgated a year later, when they held that waivers used in consumer contracts which prohibit both class action suits and arbitrations were enforceable.[87] Following these developments, continued the stance against class arbitration has continued, despite the cases which have been filed with the AAA and JAMS under their Specialised Rules.[88] However, in *Oxford Health Plans v Sutter*, the Court upheld the arbitrator's ruling that the arbitration clause permitted class arbitration.[89] The judges held that "because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably constructing or applying the contract must stand".[90] While this decision is seen by some commentators as a shift in the Supreme Court's view on class arbitrations, it has also been distinguished from *Stolt-Nielson* due to its difference in facts. A discussion of these two cases will be undertaken later in Part IV of this paper.

D *Interim Conclusion*

The decisions starting from *Stolt-Nielson* take a very narrow view on class arbitrations and their validity under the Federal Arbitration Act.[91] The Court does not seem to contemplate any policy reasoning for a procedural issue, rather they take an entirely constitutional viewpoint in contractual interpretation of arbitration agreements.[92] The debate regarding class arbitrations is set to continue in the United States courts in years to come, hence the future of class arbitrations is uncertain.

However, despite these turn of events, the procedure has been successful in a claim with international parties,[93] and in other jurisdictions as well.[94] In particular, the arbitrators'

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[86] At 21.
[87] *AT&T Mobility LLC v Concepcion* 563 US 333 (2011).
[88] Examples include *American Express v Italian Colours* and *DirecTV v Imbruglia.*
[89] *Oxford Health Plans LLC v Sutter* No 12-135, 569 US (10 Jun 2013).
[90] *Oxford Health Plans*, above n 89, at 1.
[91] Gary Born and Claudio Salas "The United States Supreme Court and Class Arbitration: A Tragedy of Errors" (2012) J Disp Resol 21.
[92] The constitutional viewpoint here is based on the Federal Arbitration Act and the rights provided to parties under that Act.
[93] *JSC Surgutneftegaz v Harvard College* 167 F Appx 266 (2d Cir 2006).

ruling in favour of class arbitration has been upheld in *Harvard v Surgutneftegaz*, involving multiple claimants from varying jurisdictions, proving that the mechanism can indeed be used to successfully resolve a cross-border dispute. Due to this potential for increasing access to justice for consumers, New Zealand is likely to benefit from the introduction of class arbitration. This analysis continues with a discussion regarding the propriety of class arbitrations as a practice, and any procedural concerns which may arise.

IV Are Class Arbitrations a good idea?

The debate on whether class arbitrations are a valid form of arbitration is a divisive one. The reasoning provided by the *Stolt-Nielson* majority as to why class arbitration changes the nature of arbitration is that it does not provide many of the benefits which are sought after in bilateral arbitration, such as lower costs, greater efficiency and speed, flexibility in choice of arbitrators, and confidentiality.[95] With these "changes" to the nature of arbitration, class arbitrations cannot be allowed to proceed without having been expressly consented to in arbitration agreements.

Other concerns include due process for absent members of the class, and the use of class action waivers and its effect on class arbitration. A widespread use of waivers may deny consumers access to justice, leading to the question of whether waivers should be enforceable when its overall effect is that consumers would be left without an option aside from bilateral arbitration. This Part considers these issues to determine if any of them are serious enough to warrant the conclusion that class arbitrations should not be practiced elsewhere. It also looks at other jurisdictions and their treatment of class arbitrations to pick out reasoning for and against New Zealand's adopting class arbitrations.

A *Consent in arbitration agreement as to type of proceedings*

One of the most widely debated issues which has thrown the use of class arbitrations into doubt is whether express consent to arbitrate as a class is required in the arbitration agreement. As discussed earlier, the *Bazzle* decision popularised class arbitration after it

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[94] *Valencia v Bancolombia* Supreme Court of Justice, Civil Division, Case no. 1100122030002001-0183-01, Carlos Ignacio Jaramillo J, May 11 2001.
[95] *Stolt-Nielson v AnimalFeeds*, above n 85, at 21.

gave arbitrators the power to decide if a case should proceed as a class. However, *Stolt-Nielson* explicitly disallowed arbitrations to proceed as a class where there has not been explicit consent in the arbitration agreement. In addition, the Supreme Court also held that the arbitrators had exceeded their authority under the Federal Arbitration Act because the parties had expressly provided that no agreement had been reached between them.[96] An implicit agreement to authorise class arbitration cannot be inferred solely from the arbitration clause, which only represents the parties' agreement to submit the dispute to arbitration.[97] As respondents are unlikely to agree to class arbitration in consumer contracts, the Supreme Court decision are taken to have significantly limited the use of class arbitration as a suitable procedure for consumer claims.

In *Oxford Health Plans v Sutter*, the Supreme Court was faced with a similar set of facts.[98] The proposed claimants to the case were a group of physicians who brought a claim against Oxford Health Plans, an insurance company, alleging that they had not made full payment to the claimants. Similar to *Stolt-Nielson*, the contracts contained arbitration clauses which were silent as to the possibility of class arbitration.

The Supreme Court upheld the arbitrator's decision that class arbitration could proceed. While this decision has been cited as a shift in the Supreme Court's conceptual opposition to class arbitration, there was a technical difference between its facts and that of *Stolt-Nielson*. Here, parties had not decided on the permissibility of class arbitration in the arbitration clause, and hence submitted the question to the arbitrator. They had not explicitly stated that there had been no agreement as to the means of arbitration. The arbitrators hence had to construe the arbitration clause as a matter of contractual interpretation to find the parties' intent.[99]

The Supreme Court held that if the arbitrators had only performed the task they were asked to do, and that decision must stand if the arbitrators had done so. It was not within the court's power to overturn the arbitrator's decision if it did not exceed the bounds of their authority. As the parties had "bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must

[96] At 3–4.
[97] At 21.
[98] *Oxford Health Plans v Sutter*, above n 89, at 1.
[99] At 2.

stand".[100] Unlike in *Stolt-Nielson*, the arbitrator had not exceeded its powers under s 10(a)(4) of the Federal Arbitration Act.[101]

Another related issue in terms of consent in arbitration agreements are the use of class action waivers, which require consumers to resolve disputes through arbitration. While class arbitration was initially recognised as a way to avoid the potentially unjust effects of class action waivers on consumers,[102] they are increasingly being upheld by the United States Supreme Court, starting from *AT&T Mobility v Concepcion*, a dispute regarding cellular telephone contracts.[103] The claimants were customers of AT&T, and had all signed contracts containing a class action waiver requiring only individual, bilateral arbitration. They brought the case as a class arbitration after being charged sales tax for mobile phones provided free under their service contract.

AT&T appealed to the Supreme Court after their motion to enforce the class action waiver was denied by the Californian District Court based on the *Discover Bank v Superior Court* rule that class action waivers were held to be unconscionable and cannot be enforced.[104] The Supreme Court allowed the appeal, holding that the *Discover Bank* rule was pre-empted by the Federal Arbitration Act. They found that compelling class arbitration in a dispute involving a class action waiver interferes with the fundamental attributes of arbitration which was contractual-based and guaranteed the speedy resolution of a dispute.[105] Furthermore, the waivers were taken to be conclusive proof of a respondent's denial of class arbitration proceedings due to the Supreme Court's refusal to extend the meaning of "arbitration" in the class action waivers to include class arbitration procedures.[106]

After *AT&T*, the Supreme Court has continued upholding many class action waiver clauses in arbitration agreements, and refusing to order class arbitration despite the unavailability of class action litigation. In *American Express v Italian Colours*, the Court refused to invalidate a contractual waiver of class action arbitration based on

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[100] At 8.
[101] At 7.
[102] Class arbitrations were developed in *Keating v Superior Court* for this reason.
[103] *AT&T Mobility v Concepcion* 563 US 333 (2011).
[104] *Discover Bank v Superior Court* 113 P 3d 1100 (Cal 2005).
[105] *AT&T*, above n 103, at 2.
[106] Strong, above n 1, at 4.83.

relative cost of individually arbitrating the action to the potential recovery.[107] Even though it was argued by the plaintiffs that there was no alternative way to bring the claim against the credit card companies without joining as a class either in litigation or arbitration, the Court refused to allow class arbitrations as the arbitration agreement did not provide for it.[108]

In her dissent, Justice Kagan strongly opposed the majority's decision, saying that the *Discover Bank* rule which was overturned in *AT&T Mobility* was far wider than cases where the consumers only have one option: to bring a case as a class.[109] The *Discover Bank* rule had purported to render all class action waivers unenforceable, and that was the reason it was pre-empted by the FAA. However, to deny the plaintiffs the only remedy available to them would be to "insulate [the credit card companies] from antitrust liability".[110] It would be equivalent to denying the plaintiffs any remedy and telling them "too darn bad".[111]

Realistically, consumers are not able to bargain with companies whom they enter into arbitration contracts with. By allowing companies to enforce arbitration agreements with class action waivers, and subsequently denying the claimants the option of class arbitration, consumers' access to justice is severely limited.[112] While companies have stated that bilateral arbitration is well-equipped to resolve claims with individual consumers, the New York Times in its independent investigation has found that only a very small number of consumers bring individual claims, and most of them will drop these claims due to the idea that it is not worth bringing an individual arbitration for a small claim.[113]

After these developments in the United States Supreme Court, class action waivers are becoming more widespread as a way for businesses to "opt out of the legal system

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[107] *American Express v Italian Colours Restaurant* 133 S Ct 594 (2012).
[108] At 4.
[109] *American Express v Italian Colours*, dissent, at 1.
[110] At 13.
[111] At 1.
[112] Ted B Howes and Hannah Banks "A Tale of Two Arbitration Clauses: The Lessons of *Oxford Health Plans LLC v Sutter* for the Future of Class-Action Arbitration in the United States" (2013) 30(6) J Int Arb 727 at 734.
[113] Jessica Silver-Greenberg and Robert Gebeloff "Arbitration Everywhere, Stacking the Deck of Justice" *The New York Times* (online ed, New York, 31 Oct 2015).

altogether and misbehave without reproach".[114] Class action waivers and arbitration agreements can now be found hidden in contracts for services such as credit cards, cellphone services, Internet and even nursing homes.[115] This is also the case in New Zealand where class arbitration has yet not even been introduced. A quick Google search shows that class action and class arbitration waivers have begun to be included in consumer contracts, proving that the widespread use of such waivers would also occur here as it has in the United States. Consumers don't often read these contracts before agreeing to the service, or may not fully understand the terms and conditions even after reading them. Hence, the inclusion of class action waivers and arbitration clauses in consumer contracts to prevent consumers from exercising their constitutional right to bring a class action in the courts, is a large hurdle to consumer protection.

Aside from its implications for consumers' access to justice, the Supreme Court's decisions and sudden change in stance against class arbitrations (since *Bazzle*) is conflicting and ill-considered.[116] The Supreme Court's sudden hostile approach to class arbitrations after *Bazzle* was has resulted in confusion and a waste of resources by litigants, courts and arbitral institutions.[117] Their statements on the compatibility of class arbitrations with the Federal Arbitration Act in *Stolt-Nielson* and *AT&T Mobility* would impact on parties who have commenced class arbitration proceedings with the AAA at the time.

Particularly, Justice Scalia's views on class arbitrations and the Federal Arbitration Act is too narrow and inflexible.[118] In the majority opinion of *AT&T Mobility*, Scalia J stated that class arbitration was fundamentally different from the "true historic character" of arbitration, because it was slower, more costly, and more formal than bilateral arbitration, and cannot be reviewed by the courts to the extent of class action decisions. However, this view that the Federal Arbitration Act only protects a particular type of arbitration that existed in 1925 is fundamentally wrong and dangerous. It threatens to exclude the different types of arbitration that have developed over the years

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[114] Above n 113.
[115] Above n 113.
[116] Born and Salas, above n 91.
[117] Above n 116.
[118] *AT&T Mobility*, above n 103, dissent.

in response to economic, social and technological changes.[119] On the contrary, arbitration needs to have the flexibility which allows it to evolve according to the needs of parties who bring different sorts of claims to tribunals. Arbitration is also not necessarily informal and small-scale as described by Scalia J in *AT&T*—rather, the focus is on procedural autonomy.[120] Hence the decision radically limits the meaning and effect of the Federal Arbitration Act, and treats arbitration as a second class for of rough justice suitable only for limited types of disputes and subject to strict judicial supervision.[121]

As the decisions of the Supreme Court are mostly limited to the United States, they are only persuasive in New Zealand if class arbitrations were to be practiced here. Given the inconsistency in the decisions and its strict adherence the Federal Arbitration Act, coupled with the criticisms of the decisions being too narrow, they may not have a large impact on New Zealand courts.

The combined effects of s 11 of the Arbitration Act and s 16 of the Disputes Tribunal Act makes it harder for class action waivers to obstruct consumers' right to redress against traders. Consumers still have the option of disagreeing to an arbitration clause when a dispute arises, or bringing their claim to the Disputes Tribunal without having signed a separate agreement under s 11. As the consumer protection regime in New Zealand differs from the United States in that disputes are not usually resolved through class actions, consumers also have the option of bringing any complaints they have to the Commerce Commission. However, as discussed earlier, these remedies are only effective for domestic disputes.

B *Due Process Concerns*

Due process is defined as the fundamental guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before being deprived of their life, liberty or property.[122] In New Zealand, this guarantee is derived from the retention of the Magna Carta as law, and is reflected in various statutes. In ordinary litigation through the courts, due process for all parties are

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[119] Born and Salas, above n 91.
[120] Above n 119.
[121] Above n 119.
[122] Butterworths New Zealand Law Dictionary (7th ed, 2011).

protected, including providing notice to all parties involved, opportunities to be heard in an evidentiary hearing, the assistance of counsel, cross-examination, and a neutral decision-maker.[123]

In class action litigation, there is a greater need to protect the due process rights of absent members, as they are unnamed and are not heavily involved in the proceeding.[124] For example, once a class action litigation has commenced, the matter cannot be re-litigated individually. Hence if an absent class member is not satisfied with the outcome, they are not able to bring the case to court again individually.[125] The decision is also binding on all class members, including any absent member who has not been notified of the proceedings and objects to the decision.[126] Due process protection for members of a class in a class action suit include notice to the class, adequacy of counsel and class representatives and settlements.

Unlike in litigation, there is no requirement for due process protection in bilateral arbitration. This is due to the contractual nature of arbitration which is based on party autonomy and agreement between parties.[127] As the proceeding involves no state action, due process to the parties are not guaranteed through constitutional means.

However, class arbitrations also involve numerous absent parties who, although had individual arbitration clauses with the respondent, may not have a large role in the proceedings, such as the selection of the arbitration, choice of laws etc.[128] The flexibility in terms of due process afforded to parties in bilateral arbitration cannot apply to class arbitrations as well in order to protect the due process rights of the unnamed members of the class. The increased level of judicial involvement in both the hybrid and provider models of class arbitration also brings state action and due process into the

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[123] Buckner, above n 58, at 195.
[124] Dana Freyer and Gregory A Litt "Desirability of International Class Arbitration" in Arthur W Rovine (ed) *Contemporary Issues in International Commercial Arbitration and Mediation: The Fordham Papers* (Brill, Boston, 2008) at 177.
[125] Hanotiau, above n 64, at 276.
[126] Buckner, above n 58, at 196.
[127] At 214.
[128] *Stolt-Nielson v AnimalFeeds*, above n 85, at 22.

equation. For these reasons, due process rights need to be protected in class arbitrations, in accordance with democratic values, fairness and equality of treatment.[129]

1 What rights?

Notice to class members is a due process right meant to protect their interest in the proceedings. It is meant to provide class members with an opportunity to opt in or out of the class, depending on which system is used. It also allows for any member of the class to oppose to the representative or the counsel who will be taking the case to court.[130] However, notice to the class about the representatives will not satisfy due process on its own. The adequacy of the class counsel and representative still has to be assessed by the court. The main reason for this is to identify any conflicts of interest between the class representative and counsel with class members, to ensure that the class representative and counsel will vigorously represent the needs and interests of the class.[131] In class arbitration, this is done through the class certification stage either by the court or the arbitral tribunal.

Another aspect of due process afforded to members of a class in class action litigation is the expanded judicial control over settlement arrangements between parties. This important due to the absent members not having any role to play in negotiating the settlement. The courts are to approve any settlement by determining if it is fair, reasonable and adequate for all class members.[132] However, with all the available due process protection provided by the courts in class action litigation, there is a concern that United States courts "rubber stamp" these reviews, giving inadequate protection to class members.[133] As class action litigation is at a developmental stage in New Zealand, it is too early to ascertain if the same will happen here.

Respondents also lose a portion of their right to defence as they face the risk of being held liable to unnamed claimants whom they have not had the chance to examine during the proceedings.[134] While these concerns may also arise in class action litigation, it is

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[129] Buckner, above n 58, at 225.
[130] At 197.
[131] At 198
[132] At 200.
[133] At 199.
[134] Kuck and Litt, above n 6, at 30.4.3.2.

more significant in class arbitration which has flexibility and party autonomy at its core. The requirement in the AAA rules that the filing and hearing documents of a class arbitration be made available on the Class Arbitration Docket, which forgoes privacy and confidentiality, may also pose a risk to respondents' interests. However, this allows for class arbitrations to play a deterrent role as with class action litigation.

The way these interests are protected in the hybrid and provider models differ from each other significantly, and will be discussed in the following sections.

2 Hybrid model of class arbitration

In the hybrid model of class arbitration, the court maintains judicial oversight of the class certification process, as in class action litigation.[135] Hence, it is bound by its constitutional function to protect due process rights of the class members. However, the hybrid allows too much judicial involvement in arbitration, a process which is itself favoured for not involving the state and remaining neutral.

Retaining a high level of judicial involvement in the hybrid system of class arbitration also puts forward the idea that arbitrators are not well-equipped to make decisions regarding class certification and to protect the due process rights of the class members, which is unfounded. To make this assumption is to ignore the fact that arbitrators often have to provide such protection to parties in bilateral arbitration, and frequently administer complex litigations.[136] It may even be more appropriate for this task to be given to arbitrators given the heavy workload in the courts.[137] By allowing the arbitral tribunal to take on this role, there is no risk of simply having the court "rubber stamp" the assessment of the class. The process is also simplified as there is no need to pass a case back and forth from the arbitrator to the courts and vice versa to make decisions on different aspects of the proceeding.

As the hybrid model is no longer popular, it should not be the model of class arbitration introduced into New Zealand. This analysis moves on to the provider model to assess if due process concerns are adequately addressed under that model.

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[135] Buckner, above n 58, at 226.
[136] At 238.
[137] At 231.

3 Provider model of class arbitration

Under the provider model of class arbitration, judicial involvement is not guaranteed, as the court will only get involved where the parties apply for judicial review of the partial final awards. Where this occurs, both sets of rules only authorise a review of the arbitrator's decision in due-process related aspects of the arbitration.[138] Under the JAMS rules, the arbitrator could even elect not to create partial final awards for class certification and clause construction, effectively limiting judicial involvement to the level as seen in bilateral arbitration.[139] Hence while still allowing for judicial involvement, it is less than the hybrid model and is dependent on the parties, court and arbitrator, and may not occur in every case.

Thus the provider model allows the arbitrator a more extensive role in the proceedings of a class arbitration, and recognises the arbitrator's ability to administer due process protection to the parties. This is more consistent with recognising the arbitral tribunal's competence in deciding all aspects of the arbitration. It also preserves the integrity of the arbitration system in the public eye.[140]

However, the provider model does not guarantee the protection of due process rights as in the hybrid model, where the courts have to adhere to their constitutional function.[141] Rather, the AAA rules and the JAMS rules do not specify that the arbitrator has to satisfy due process requirements in any class arbitration proceeding. While they require that the arbitrator makes decisions in "fairness", they do not explicitly protect the rights of absent members.[142] They also do not provide an opportunity for the class members to object to the adequacy of counsel or representatives, and do not authorise arbitrators to divide members of the class into subclasses to address conflicts of interests within classes.[143]

Other difficulties of due process in class arbitrations are related to the arbitrator's position in the proceeding, as compared to judges in the courts which administer class

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[138] As discussed earlier in Part III(B).
[139] Buckner, above n 58, at 242.
[140] At 250.
[141] At 251.
[142] At 251.
[143] Buckner, above n 58, at 252.

action litigation. The unique feature of arbitration in that the arbitrator is selected by the parties give rise to this concern. This complicates matters in certain matters such as an objection to the class counsel or his/her adequacy, and settlement approval.[144] The arbitrator is put in an awkward position to assess the adequacy of the class counsel who appointed him/her and has paid for the arbitrator's fees.[145] The arbitrator may also find it difficult to act as the guardian of the proceedings to ensure that settlements do not involve any sort of collusion between the parties due to having been selected by the parties themselves.[146]

4 Suggestions to improve due process protection in provider model class arbitrations

With these concerns, there are some suggestions as to how to improve the protection of due process rights for absent members in class arbitrations. One of these is to create a voluntary due process protocol for class arbitrations which can avoid the issues which arise in both provider model and hybrid model class arbitrations. In adopting a voluntary protocol, class arbitrations can be kept to a pure arbitral model whilst vesting the responsibility to safeguard the due process rights of absent members in the arbitration providers.[147] This avoids the issues with extensive judicial involvement beyond what is allowed in bilateral arbitration, and at the same time avoid issues with arbitrator fairness. Arbitration providers are incentivised to fully administer due process protections as awards rendered without such protection may be attacked in the courts.[148]

Other safeguards which may be introduced to protect due process rights are practical steps to ensure that an arbitrator is not biased in making procedural decisions. Parties could select arbitrators with extensive litigation experience who would be better suited to deal with the requirements of class arbitrations.[149] They could also insist on a written award by the arbitrators to ensure that they are made aware of the justifications used by the arbitrators in reaching their decision.[150]

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[144] Thomas A Doyle "Protecting Nonparty Class Members in Class Arbitrations" (2009) 25 ABA J of Labor and Employment Law 25.
[145] At 30.
[146] At 31.
[147] Buckner, above n 58, at 256.
[148] At 259.
[149] Doyle, above n 144, at 33.
[150] At 33.

Providers can also ensure that notice to the absent members of the class are made as extensive and as widespread as possible so as to make the arbitration proceedings more transparent. As it is difficult to provide adequate notice to all class members unless the class arbitration was commenced on an opt-in basis, this task can be facilitated by sending a formal notice to relevant government or news agencies, or by sending notice to class members notice electronically.[151] While this does not conform with confidentiality as afforded in commercial arbitrations, that requirement could be relaxed or waived for class arbitration due to the interest in protecting the rights of absent members, as has been done in the AAA rules.[152]

In other some circumstances where there are serious concerns about due process, parties may find that it is simply more appropriate to bring the case as a class action litigation instead of class arbitration, if the procedural concerns are unable to be met.[153] However, this is only possible where there is no class action waiver in the arbitration agreement between the parties. With the increasing use of waivers and the United States' increasing stance in upholding them, bringing cases to class action litigation may not be possible.

C *Nature of arbitration and other policy reasons*

While the difference between bilateral and class arbitrations are many, the foundational nature of arbitration is not altered by class arbitration at all. The number of parties and types of claims in class arbitrations are comparable to multi-party joinder arbitrations which are widely practiced in many jurisdictions and internationally. In both types of proceedings, parties can reach up to hundreds, or even thousands.[154] Claimants in class arbitrations often bring similar, almost identical claims (both legally and factually) against a single respondent, which do not raise issues when compared to traditional multiparty proceedings.[155] Furthermore, in most cases of class arbitrations in the consumer context, claimants have similar or identical arbitration agreements with the

[151] At 34.
[152] AAA Specialised Rules for Class Arbitrations, Rule 9.
[153] Doyle, above n 144, at 33.
[154] Strong, above n 1, at 3.15.
[155] At 3.58–3.60.

respondent. Hence the respondent trader would have consented to the use of arbitration as a means of dispute resolution with each of the claimants.[156]

With regards to any impairment in selection of arbitrators, claimants who choose to participate in a class arbitration are taken to have ratified the choice of arbitrators.[157] Respondents are also able to select arbitrators based not on the identity of the claimants, but on the legal or factual issues the claimants are asserting.[158] While the selection of arbitrators in class arbitrations may not be as flexible as in bilateral arbitration, it cannot be said to be so serious as to change the nature of arbitration as a whole.

Lastly, policy considerations in favour of class arbitrations is the efficiency afforded by class arbitrations, and the fairness to consumers to be allowed to bring a claim in this way. In many cases where there is a class action waiver, allowing consumers to bring all related claims into a single arbitral forum would no doubt be more efficient than having to arbitrate thousands of individual claims.[159] It would also improve access to justice for consumers, as their claims are likely to be of small value[160]. Such claims are unlikely to be brought individually, as the cost of bringing proceedings would outweigh the cost of any possible redress. Without a large scale mechanism for arbitration, and the widespread use of class action waivers in consumer contracts, consumers are unlikely to have recourse from traders whenever a dispute arises.

D *Other jurisdictions*

Currently, class arbitrations are only widely practiced in the United States. However, a number of other jurisdictions have also begun to consider its use as an appropriate way to resolve disputes in areas such as consumer and employment law, or in shareholder disputes. As arbitrations are based solely on the arbitration agreement between the parties, the issues raised can only be contractual, meaning its use cannot be extended to tort claims as in a class action litigation.[161]

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[156] At 3.50.
[157] At 3.69.
[158] At 3.70.
[159] Strong, above n 1, at 3.73.
[160] At 3.80.
[161] Amer Pasalic and Michael Schafler "Is Canada Ready for Class Arbitration?" (presented at ADRIC 2013—Gold Standard ADR, Toronto, October 2013) at 3.

This section of the paper discusses other jurisdictions which have considered the implementation of class arbitrations. It also describes other large scale arbitration mechanisms which are practiced in other jurisdictions, that may serve as an alternative to class arbitration. Such an analysis adds to our understanding of the idea of class arbitrations and the variants in the way they can be practiced, however it should be kept in mind that these jurisdictions may differ significantly from New Zealand in terms of legal systems.

1 Canada

The class arbitration debate has recently spread from the United States to Canada. Canada allows their provinces to retain legislative autonomy over arbitration laws, instead of having a uniform federal law such as the Federal Arbitration Act in the United States. Each province has agreed to implement the New York Convention and to follow the UNCITRAL Model Law, however, provincial legislatures and courts retain a significant ability to limit or define how arbitrations are carried out.[162] The Supreme Court of Canada has provided a measure of uniformity to this system, by adopting a pro-arbitration stance when interpreting arbitration legislation in *Les Editions Chouette v Desputeaux*.[163]

Canada has also faced the debate of the enforceability of class action waivers. In *Dell Computer Corp v Union des Consommateurs*, the Supreme Court held that arbitration of consumer claims was in line with their pro-arbitration stance, hence holding that pre-dispute arbitration clauses in consumer contracts were enforceable.[164] However, since that decision, the provinces of Quebec, Ontario and Alberta have inserted a prohibition on such clauses in their consumer protection legislation, thus providing a statutory guarantee of access to courts for all consumers in any dispute, notwithstanding the inclusion of a waiver in the consumer contract.[165] Similarly, courts in British Columbia

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[162] Genevieve Saumier "Mass and Class Claims in Arbitration: A Canadian Perspective" (2014) 8(3) World Arbitration and Mediation Rev 351 at 352.
[163] *Les Editions Chouette v Desputeaux* [2003] 1 SCR 178 (Can).
[164] *Dell Computer Corp v Union des Consommateurs* [2007] 2 SCR 801 (Can).
[165] Saumier, above n 162, at 354.

and Manitoba have also interpreted their consumer protection legislation in a way which effectively limits arbitration clauses in consumer contracts.[166]

The combined effect that these legislation has had is to effectively stall arbitrations in terms of consumer disputes. Despite the inconsistencies in provincial legislation and the current interpretation of consumer protection legislation against the possibility of arbitrating consumer disputes, there is still a chance of implementing class arbitration as an acceptable practice in Canada. This is due to its strong pro-arbitration policy, and its international reputation as a hub for arbitration.[167] The combination of these two characteristics should make Canada more open to the idea of class arbitration as an alternative to class action litigation. Class arbitration also exceeds litigation in efficiently resolving disputes with a cross-border dimension, without being limited by any inconsistencies between provincial jurisdictions.[168] This is particularly significant for Canada due to its proximity with the United States, where class arbitrations are widely practiced. The use of class arbitration would harmonise the procedure of grouping claimants together as a class in terms of jurisdiction and choice of law as over 40 per cent of Canadian class action claims involve a cross-border dimension with parties in the United States.[169]

However, for arbitration to be a viable option for class claimants, there are hurdles that need to be overcome due to the differences in consumer protection and arbitration law between provinces. Class arbitration needs to be recognised through federal legislation that would be uniform across the country, in order to resolve the tension between Canada's pro-arbitration policies and consumer protection laws which fail to recognise arbitrators' ability to make arbitrate cases on a representative basis.[170] Arbitral institutions in Canada can also implement rules for class arbitrations to clarify the procedure and to ensure that due process protections are present. The law for class action litigations and arbitrations are similar across the United States and Canada,

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[166] Pasalic and Schafler, above n 161, at 8 and 9.
[167] At 13.
[168] Saumier, above n 162, at 367.
[169] At 361.
[170] Pasalic and Schafler, above n 161, at 18.

making it simple for arbitral institutions to adopt or refer to the AAA and JAMS rules for class arbitrations if necessary.[171]

New Zealand does not face problems of differences in provincial legislation, as Canada does. Hence, if class arbitrations were to be implemented in New Zealand, the process of doing so would be much simpler as any legislation passed in Parliament would apply uniformly to the entire country. As the Canadian experience has shown, commentators from overseas jurisdictions have also began to consider class arbitration as a desirable, sometimes even necessary procedure to provide consumer protection in cases with a cross-border dimension. This strengthens its case for being adopted in New Zealand.

2 Civil Law Countries

Class arbitration as conceptualised in the United States was based on the class action procedure which is mainly practiced in common law jurisdictions. On the contrary, class actions and other representative proceedings are not widely available in many civil law countries. Some civil law jurisdictions are even opposed to representative claims on the basis of policy and due process rights of the plaintiffs. This is due to the concern that absent plaintiffs are not considered as having the ability to exercise their rights over the proceedings, even if they are able to opt out of it.[172] Furthermore, defendants also need to have the right to mount a full, individualised defence of each claim that is brought against them.[173] The right to an individual cause of action cannot be overridden by any arguments of social or judicial efficiency, thus weakening the reasoning behind class proceedings as a procedure of consolidating claims.[174]

For example, French law is currently incompatible with both class actions, and by extension, class arbitrations. This is because French law does not allow representative proceedings, on the basis that no party may be a claimant unless he or she has expressed individually the right to sue, is duly represented, agrees to the claim and remains free to end it at whim.[175] The ability of class members in a representative proceeding to opt out

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[171] Saumier, above n 162, at 366.
[172] SI Strong "Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns" (2008) 30(1) U Pa J Intl L 1 at 9.
[173] Strong, above n 172, at 9.
[174] At 22.
[175] Yves Derains and Aurore Descombes "France" in Phillippe Billiet (ed) *Class Actions and Arbitrations in the European Union* (Maklu, Antwerp, 2013) at 47.

is not enough to satisfy this requirement as they would be included in the claim if they did not take steps to opt out of the proceeding.[176] These class members are assumed to not have exercised their individual autonomy to be included in the claim, and may be seen as contrary to the Constitution. This position is mirrored by many other jurisdictions in Europe, including under Swiss law and German law.[177] For such jurisdictions, it is suggested that class arbitrations would need to be opt in mechanisms, and agreements to arbitrate would need to be explicit.[178]

Colombia, a civil law jurisdiction, is one of the only countries outside the United States which have approved a class arbitration all the way to a final award in the case *Valencia v Bancolombia*.[179] In that case, minority shareholders of Banco de Colombia sued Bancolombia as a class after a merger of the two banks. Both the lower courts and the Supreme Court of Colombia held that they had no jurisdiction over the matter due to the arbitration agreement. The Supreme Court agreed to allow class arbitration to go ahead because the shareholders were all bound by the same arbitration agreement. While this case may be a positive development towards class arbitration being adopted in countries outside the United States, it may also be fact-specific and limited to shareholder disputes, which makes it unclear whether class arbitrations will be used in consumer disputes in Colombia.

Overall, civil law countries are currently unlikely to adopt the trend of class arbitrations as it is practiced in the United States. Any form of mass proceedings may be created by statute, such as in Spain where a form of collective arbitration known as Ley 231/2008 is available for consumer disputes.[180] However, this procedure is not widely used either. In this sense, perhaps mass proceedings in arbitration will not be a norm in civil law countries until there is a change in attitudes towards representative claims in general.

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[176] At 47.
[177] Francesco Blavi and Gonzalo Vial "Class Actions in International Commercial Arbitration" (2016) 39(4) Fordham International LJ 791 at 823.
[178] Roman Khodykin "Class arbitration: is there an appetite for it in Europe?" (May 14 2015) Lexology <www.lexology.com>.
[179] Above n 94.
[180] SI Strong "Collective Consumer Arbitration in Spain: A Civil Law Response to US-Style Class Arbitration" (2013) 30 J Intl Arb 495.

E *Should we implement class arbitrations in New Zealand at all?*

While class arbitrations in the United States have given rise to a number of issues on a procedural, conceptual and sometimes practical level, these issues can be overcome with a proper procedure as to how class arbitrations will be carried out. A proper procedure for class arbitrations should address due process concerns for all parties, and not allow for too much judicial involvement in the process. It could resemble the provider model as has been developed by the AAA or JAMS in the United States, with safeguards against having the court "rubber stamp" the clause construction and class certification if they are judicially reviewed. Alternatively, institutions can also adopt voluntary due process protocols while allowing arbitral tribunals full control over each aspect of the case.

A procedure for class arbitrations provide for some protection against the widespread use of waivers in arbitration clauses. With consumers' access to justice already inadequate in some situations in New Zealand, it is important to ensure that consumer protection is not further eroded by the widespread use of waivers in arbitration clauses. In order to avoid issues with whether the arbitration clause permits class arbitration, parties should not make a statement that they do not have an agreement to carry out class arbitration, as in *Stolt-Nielson*. Rather, they should leave the task to the arbitrator to decide, as in *Oxford Health Plans*.

Since the United States Supreme Court decisions on class arbitrations and their conceptual opposition have not been reflected in New Zealand, it is a possibility that if class arbitrations were implemented here, it would follow the direction of *Bazzle* and allow arbitrators to decide if the agreement to arbitrate as a class can be found impliedly. To recognise the competence of arbitrators in deciding such issues is more in line with the strong pro-arbitration policy of the Arbitration Act, and with the flexible nature of arbitration itself. It is also more compatible with the purpose of introducing class arbitrations into New Zealand, which is to improve consumers' access to justice without having to involve the courts in the process.

V Implementation and Enforcement in New Zealand

As class arbitrations may assist in resolving some of the issues that consumers are facing in New Zealand, it may be worthwhile to consider how class arbitration may look like if it was adopted as a valid arbitration procedure. This section attempts to tie together the points that have been raised earlier in this paper, and devise a possible way to implement class arbitrations into New Zealand, based on what has been experienced in the United States and in other jurisdictions.

A *Would class arbitrations work in New Zealand*

As explained, class arbitrations manage to solve problems of both cross-border consumer disputes and access to justice by consumers, this section considers whether any issues will arise in adopting the procedure for practice in New Zealand. This includes considering how the procedure will be carried out, and whether any award which arises out of a class arbitration will be enforceable both under the Arbitration Act and the New York Convention.

1 Enforcement under the New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention of 1958, is one of the most widely ratified multilateral treaties, having been ratified or acceded to by 156 countries.[181] Article III requires all contracting states to "recognise arbitral awards as binding and enforce them according to rules of procedure of the territory where the award is relied upon".[182] This Article applies to all arbitral awards made in any of the contracting states, meaning that foreign arbitral awards need also be recognised as binding and enforceable as far as they are not challengeable under art V.

In terms of class arbitrations, the main grounds for challenging an arbitral award under the New York Convention are due process and policy. Article V sets out limited grounds on which a State may refuse to enforce a foreign arbitral award, ranging from both procedural and substantive. Potential grounds which may threaten the

[181] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (Opened for signature 10 June 1958, entered into force 7 June 1959).
[182] New York Convention, above n 181, art III.

enforceability of a representative proceeding arbitral award are contained in both Arts V(1) and V(2).[183] Art V(1) requires the party who is challenging the award to prove the grounds in (a)–(e),[184] whereas art V(2) allows the State in which enforcement is sought to set aside arbitral awards if they breach grounds (a) and (b).[185] In particular, parties can challenge an award if no proper notice of the arbitrator's appointment was given, or if they were unable to present their case.[186] States can also refuse to enforce awards under Art V(2)(b) if the recognition or enforcement of the award would be contrary to the State's public policy. While these avenues are available to challenge arbitral awards, they are to be construed narrowly as exceptions to the general rule that foreign arbitral awards are to be recognised and enforced.[187]

Class arbitration proceedings have raised issues about due process because of their representative nature. While the notice provided to class members may be considered sufficient in the United States under the AAA and JAMS rules, such standards differ widely from jurisdictions, especially civil law jurisdictions as discussed in Part IV(4). "Proper notice" as set out in the New York Convention has been defined as "notice reasonably calculated, under all the circumstances" and must afford interested parties a reasonable time frame to make their appearance before the Tribunal.[188] Whether the notice given to class members suffice as "proper notice" is to be determined by the court of the enforcing state.

The notice requirements under the AAA and JAMS procedures to the standard of "best notice practicable" to all members who can be identified with reasonable effort.[189] This wording is consistent with the definition of "proper notice" in the New York Convention as they both refer to notice that is reasonable under the circumstances. As the two approaches to notice are comparatively similar, it is likely that a class arbitration award made under these rules will be enforced internationally. While different countries no doubt have their own standards of "proper notice" in representative proceedings, national courts are required to conduct a factual

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[183] Art V(1)–(2).
[184] Art V(1)(a)–(e).
[185] Art V(2)(a)–(b).
[186] Art V(1)(b).
[187] Strong, above n 172, at 52.
[188] At 57.
[189] AAA Rules, Rule 6 and JAMS Rules, Rule 4.

investigation into the circumstances of the case in order to determine if these standards have been reached.[190]

This is at odds with New York Convention jurisprudence that any objections to a foreign arbitral award must come from an international perspective.[191] National courts are also required to impose international standards when considering violations of due process, instead of their own domestic standards.[192] Hence as the AAA rules and JAMS rules are based on the Federal Code of Civil Procedure which is widely recognised internationally, arbitral awards made under these institutions are more likely to enforceable at the international level. For class arbitration proceedings that are not instituted under these rules, it is necessary to check that the process being followed is compatible with the law of the seat of arbitration in order to reduce the possibility of the award being attacked for lack of due process protection.[193]

Another due process concern which allows a foreign arbitral award to be challenged is the inability to present one's case.[194] This is a concern in class arbitrations as absent members do not have the opportunity to "shop around" for counsel, and do not have extensive control over the proceedings.[195] However, class arbitrations conducted under the provider model allow absent members to attend every hearing. Any objections to the proceeding can also be made by absent class members at fairness hearings which are conducted upon the disposition of a claim.[196] With adequate notice, absent members are afforded opportunities to follow the proceeding and object to any decision made by the class representative or class counsel, and even their appointments. Under these rules, the rights of class members over their case are likely to be recognised, provided the enforcing state does not have any objections to the nature of representative actions as a violation to the right to be heard. Any such objections will rise to the level of public policy, meaning that it will be challengeable under Art V(2)(b) by the national courts of the enforcing state.

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[190] Strong, above n 172, at 60.
[191] At 28.
[192] At 28.
[193] At 61.
[194] New York Convention, above n 181, art V(1)(b).
[195] Strong, above n 172, at 62.
[196] At 63.

As discussed earlier, many jurisdictions do not recognise representative actions as valid due to the perceived lack of individual autonomy by class plaintiffs. Professor SI Strong has argued that this should not be a ground to render a final award unenforceable as the members have chosen to exercise their individual rights as a class.[197] The arbitration agreement would have allowed arbitrators to follow procedures which they deem proper according to their discretion, subject to the parties' objections or any mandatory arbitral rules or laws. The absent parties' failure to opt out of the proceedings also demonstrates their intention to be included in the claim.[198]

Any objections on the ground of "public policy" is defined by reference to "violations of basic notions of morality and justice" by the International Law Association.[199] As it is meant to be seen through an international lens, a valid objection needs to reflect the "fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community".[200] Domestic public policy concerns are not enough to invalidate an arbitral award because violation of public policy under this Article needs to be in respect to international relations.

A successful challenge against a foreign arbitral award on the basis of public policy will also need to be serious enough violation to run counter to the pro-arbitration stance of the New York Convention. This pro-arbitration policy is encouraged by both the Convention and the UNCITRAL Model Law, which has been adopted by many jurisdictions as a foundation upon which to form their arbitration laws, including New Zealand. Cases which have had the final award rendered unenforceable due to public policy include those of fraud, breach of natural justice and manifest disregard of the law. A particular jurisdiction's objection towards the use of a representative action mechanism falls short of these standards, as there is no international consensus that class actions are a violation of natural justice.[201] On the contrary, class actions are recognised as providing many advantages to the international business community, many of which also extend to class arbitrations. Enforcing class arbitration awards would also act in the favour of the New York Convention's emphasis on arbitration

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[197] At 64.
[198] At 64.
[199] Strong, above n 172, at 65.
[200] At 66.
[201] At 9.

being a mechanism that encourages flexibility, informality, and innovation.[202] Hence while the domestic laws of some countries may conceptually oppose to class arbitration, they should still enforce these awards as they are a valid exercise of the arbitrator's competence in deciding to allow the case to proceed as a class.

This analysis of the enforceability of class arbitration awards under the New York Convention shows that is it likely that such awards made in New Zealand are likely to be enforceable on an international level. In New Zealand, the pro-arbitration policy of the Arbitration Act 1996 would push courts to enforce any awards arising out of a class arbitration proceeding.[203] This section will now move on to consider the problems which may arise out of a lack of defined class action procedure in New Zealand.

2 Lack of defined class action procedure in New Zealand

As class actions in New Zealand are currently being brought as representative actions under Rule 4.24 of the High Court Rules, there are no proper procedural rules which control how a class action is meant to proceed in the courts. The Class Action Bill and the High Court Amendment (Class Actions) Rules were drafted by the Rules Committee and forwarded to the government in July 2009. The purpose behind this was to create a class action regime by primary legislation, which could provide detailed procedural rules under which class actions are to be carried out in New Zealand.[204] However, there has been no further developments to legislate the Class Actions Bill in Parliament. It has been suggested by the Chief Justice that the law regarding representative actions should be allowed to develop through individual cases instead of having rules developed based on case law so far.[205]

The reasons put forward by the Rules Committee for a class action regime include, amongst others, to provide redress and compensation for wrongs which affect consumers but are not practical to be litigated individually. It would ensure efficient use of court time of judicial resources, and would act as a deterrent against unlawful action by large corporates. It also allows the courts wide judicial discretion to ensure that class

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[202] At 64.
[203] Arbitration Act 1996, s 5.
[204] Rules Committee *Class Actions for New Zealand: A Second Consultation Paper prepared by the Rules Committee* (October 2008) at [2].
[205] Greenland, above n 14.

actions proceed both fairly and quickly. Finally, a legislative procedure for class actions will provide for both opt-in and opt-out systems to be used in proceedings were appropriate on the facts of each case.[206]

As the current system for class actions remain the use of representative proceedings from the High Court Rules, it will be difficult to use this system to formulate a set of rules for class arbitrations. This is because most of the rules around how representative proceedings are conducted is made by case law which interpret rule 4.24. Furthermore, the law of representative proceedings is still at a developmental stage. Hence it may be possible to formulate a class arbitration procedure based on the amendment to the High Court Rules which was proposed but has not been made into law.

B *How would class arbitrations work in New Zealand*

As discussed above, it is more appropriate for class arbitrations to be conducted in New Zealand based on the provider model, which would provide stronger due process protection to all parties. New Zealand arbitral institutions, such as the New Zealand International Arbitration Centre (NZIAC) or the New Zealand Dispute Resolution Centre (NZDRC) could formulate rules specifically for class arbitrations, following in the footsteps of the AAA and JAMS. Alternatively, parties who opt to commence class arbitrations in New Zealand could also choose to adopt the AAA or JAMS rules. However, as those rules were formulated based on the American procedure for class actions, there may be some incompatibility to the New Zealand arbitration landscape. Hence, this section attempts to paint a picture of what a possible class arbitration procedure may look like, based on the procedure as detailed in the High Court Amendment (Class Actions) Rules of 2008.

1 The High Court Amendment (Class Actions) Rules 2008

The Rules specify a procedure for class actions which is much more detailed than the current representative action regime. These include specifying how a class action is initiated and conducted, how costs are to be calculated, and the supervision and fixation of legal fees incurred in conducting the class action.[207]

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[206] Rules Committee, above n 205, at [4].

[207] High Court Amendment (Class Actions) Rules 2008 (draft), rule 34.1.

Under the Rules, a person can apply to commence a class action as a lead plaintiff by following the pre-commencement procedure as set out in Rule 34.7.[208] The application should include information under Rule 34.7(3), and needs to specify reasons as to why it is appropriate to deal with the claims as a class action rather than as individual claims.[209] Rule 34.7(4) clarifies that it is not necessary to name or specify the number of class members.[210]

After the application is handed in, the court must then give the applicant and named defendants a reasonable opportunity to be heard before deciding whether to make a class action order. The class action order, if made, should include the following information in rule 34.8.[211] The court is to decide which information is to be included in the notice, and how it is to be given to class members.[212] It is also to approve the form and content of the notice.[213] Notice is to be given to class members by press advertisement, radio or television broadcast, or any other means as specified by the court.[214] Personal notice to each class member or affected person can only be ordered if it is not unduly expensive and is reasonably practicable under the circumstances.[215] Overall, the notice provisions allow the court extensive powers over the way notice is given, and specifies that all class members must be notified. However, as the means of notice are mostly ones that resemble public announcements, it is possible that some class members will not be notified if the size of the class is large. The judge would need to ensure that in such cases due process rights of absent members are still duly protected so that they are able to be adequately informed about the case.

2 Base class arbitration procedure on the High Court Amendment Rules

This section applies the procedure as detailed in the High Court Amendment Rules to class arbitrations as an attempt to envision how they may be conducted under the provider model in New Zealand. It takes into account the concerns regarding class arbitrations from Part IV in an attempt to craft a procedure which is compatible with

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[208] Rule 34.7.
[209] Rule 34.7(3).
[210] Rule 34.7(4).
[211] Rule 34.8.
[212] Rule 34.13(3).
[213] Rule 34.13(2).
[214] Rule 34.13(4).
[215] Rule 34.13(5).

enforcement under the New York Convention. It also incorporates elements of the AAA and JAMS Rules to include desired parts of a class arbitration procedure which are not covered in the High Court Amendment Rules.

It is important to note that the procedure in the High Court Amendment Rules is for class actions, which are presided over by a judge and is open to the public. On the other hand, a class arbitration procedure should allow the arbitral tribunal to make decisions relating to clause construction and class determination. The Arbitration Act 1996 also specifically requires that arbitrations be conducted in private, except where the parties have agreed otherwise.[216] As class arbitrations would involve numerous unnamed parties, it is desirable to have documents relating to the claim and hearing made available to the public to easily provide notice to persons who may be affected by the claim. Class arbitration rules could specify, such as the AAA Rules, that these documents and information are to be made public.[217] Alternatively, like the JAMS rules, the arbitrator could be given the freedom to decide whether or not waiving confidentiality would be appropriate for the circumstances of the case. If the Class Arbitration Rules were to contain a mandatory waiver of confidentiality, the requisite information could be disclosed under grounds of s 14C(b), as that would be necessary to protect the due process rights of absent members.

The Class Arbitration Rules should also explicitly require arbitrators to ensure that the due process rights of absent members are protected in each proceeding. This can be done by having the arbitrators adopt a voluntary due process protocol, or simply making it one of the arbitrators' core duties in the Rules. The Commerce Commission could assist in propagating notice to prospective class members, alongside news agencies and other broadcasting methods to ensure that there is as wide a coverage as possible so that all affected persons are able to be informed about the proposed class arbitration.

VI Conclusion

Even though a legislative procedure has not yet been passed for class actions in New Zealand, a procedure for class arbitrations should still be developed due to the relative benefits offered, especially in the cross-border context. Class arbitration combines the

[216] Arbitration Act 1996, s 14.
[217] AAA Rules, Rule 9.

advantages of both arbitration and class actions, in order to provide the best method of access to justice for consumers. While there have been conceptual objections to class arbitrations in the United States, courts in New Zealand should not view class arbitrations in a narrow manner as has been done in the recent United States Supreme Court cases. This is because New Zealand differs from the United States in a constitutional context, and also in terms of arbitration legislation. If faced with an issue regarding the validity of class arbitrations, courts in New Zealand should also emphasise the pro-arbitration policy of the Arbitration Act 1996.

The procedure for class arbitrations should take into account due process concerns as has been raised in the United States. In particular, it should give notice as wide as possible to class members, and allow the arbitrator the power to decide on class certification and clause construction. Confidentiality in the class arbitration should be waived if necessary, in order to ensure that all potential class members can be notified regarding the proceedings. Furthermore, comprehensively addressing all due process concerns would heighten the chances for a class arbitration award from New Zealand to be enforced internationally under the New York Convention. Such recognition would truly allow the arbitral award to transcend all jurisdictional barriers, and allow the claim to be heard fairly for all parties.

Class arbitration would also work well with s 11 of the Arbitration Act. With s 11 being available to all consumer contracts with arbitration clauses, the widespread use of class action waivers by businesses with the aim of circumventing justice for consumers can be limited. This would avoid the consumers' outrage in the United States regarding the rampant use of these waivers and the Supreme Court's enthusiasm to enforce them, effectively stripping them of any remedy for claims of small value.

While class arbitrations are not widespread in practice internationally, and has the potential to stir debates on many aspects, New Zealand should take the step in introducing class arbitrations for the benefit of consumers. Issues which arise in doing so can be further resolved by the passing of legislation, case law or the creation of specialised rules by New Zealand arbitral institutions. Arbitrators can also shape the process of developing class arbitration through arbitral awards. As long-term implications regarding the practice of class arbitrations in New Zealand cannot be

determined as of yet, it is worthwhile to take a step in this direction and shape an effective procedure for class arbitrations along the way.

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