DEMOCRATIZING INTERNATIONAL ARBITRATION?
MASS CLAIMS PROCEEDINGS IN ABACLAT v ARGENTINA

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Abstract: Mass claims have been accepted, in principle, in the landmark 2011 ICSID Decision on Jurisdiction and Admissibility of Abaclat v Argentina. Welcoming this development as providing novel access for the common man and woman to international investment arbitration, the author explores related streamlined procedures in domestic and international laws — such as class actions and international mass claims commissions as well as vanguard use of technology and statistical methods — that allow the processing of a high number of claims arising from common factual and/or legal issues with a view toward elaborating rules and mechanisms tailor-made for the context of international arbitration.

Keywords: Mass claims; mass claims proceedings; international arbitration; international investment arbitration; ICSID; democratization; investment treaties; class action.

I. The Problem

War and deep economic and social crises often lead to decisions by ruling elites that heavily injure an immense number of people and leave them bereft of their lives, physical or psychological integrity or wealth. The claims of these victims are pretty uniform, but they tend, due to their sheer quantity, to overwhelm formalized justice systems — courts and arbitration fora alike. The latter are built to mete out justice in a way tailored to the equities of the individual case. In arriving at this goal, due process is an indispensable facet of the decision-making process. It is usually afforded by individualized proceedings in which each party submits briefs and presents oral arguments that are fully examined by the pertinent tribunals. Such procedure cannot be dispensed with in cases leading to the imposition of sanctions of the criminal kind — even, and particularly, in cases of mass murder. As far as civil remedies are concerned, where there are cases of mass injuries, both personal and financial, due to some

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allegedly tortious act, a taking or a violation of contract, some modification of the strict rules of due process may be in order — lest justice for many victims be denied, resulting in mass injustice. Such procedural solutions would have to accommodate both the interests of a large number of victims and the legitimate claim of the defendant to an effective defense. The claimants in a mass claims context could never receive relief in a realistic timeframe through regular, individualized proceedings; they thus ask for streamlined procedures as their only way to obtain justice, procedures that might deprive them of their usual right to fashion and pursue their individual litigation strategy. Conversely, the defendant might not be able to effectively address all the circumstances relating to individual claims as this might lead to interminable delays. What is needed in these cases is thus an efficient, timely and affordable way to settle disputes with largely the same pertinent facts and legal issues. Some helpful ways facilitating the resolution of such mass claims include a standardization of the initiation of proceedings, including the use of computerized forms determining the eligibility of the claimants, the admission of paperless evidence and reliance on scanned documents, often replacing originals.

Modern domestic justice systems have addressed the mass victims issue through the invention of the class action paradigm. In the US, a representative of a proposed class, typically composed of victims of a defective product causing a common injury to all of them, files suit on the behalf of the class. The court certifies the class, and all members of the class have to be properly notified, although not all the members of the class need to be named in the complaint starting the litigation. Crossing the Atlantic, the idea has now reached classical civil law countries such as France, where consumer organizations can now bring suit on behalf of large groups of customers in similar circumstances.

Internationally, administrative bodies have been established with the mission of restoring property rights after war. Examples include the United Nations Compensation Commission (UNCC), set up after Iraq’s invasion of Kuwait, and similar bodies providing relief from property dislocations in Bosnia and Kosovo. Bodies of this kind also decide cases brought by survivors of the Holocaust with respect to their insurance claims and Swiss bank accounts as well as claims advanced by slave labourers in World War II Germany.1

Defaults of sovereigns on their international debts also cause mass damages, particularly to people who provided them essential financial support through the purchase of their bonds in reliance on their full faith and credit. Bondholders, individually or en masse, have sought to make themselves whole through resort to domestic tribunals in various countries, as appointed by the documents of the bond issue. While the claims of large individual investors, such as hedge funds, in this context are, at least procedurally, nothing out of the ordinary, it is the

Mass Claims Proceedings in *Abaclat v Argentina* claims of hundreds of thousands of individual bondholders seeking the protection of bilateral investment treaties before international arbitral tribunals that have challenged the traditional ways to mete out justice in the International Center for the Settlement of Investment Disputes (ICSID) world. That world is usually closed to the common man as ICSID proceedings are very costly; they mean taking on the vast legal defense apparatus of a state; and they involve specialized law firms of the highest prestige and billing. The case now styled *Abaclat v Republic of Argentina* launches the intrusion of the common man or woman — pensioners and other retail investors — into the marbled halls of international investment arbitration. It has its own, rather unique story with parameters that might make its repetition a rare occurrence. Still, it is a fascinating account of how huge institutional and procedural obstacles can be overcome in the pursuit of justice.

II. The Abaclat Story²

In the early 1990s, the Republic of Argentina made a deliberate move to open its economy to the outside world. Not that it had not been connected to other countries before with distinctive export items such as beef and wine.³ The novelty of this opening was the encouragement and promotion of foreign investment in the country, facilitated by the entry into bilateral investment treaties with no less than 58 countries.⁴ One of those countries was Italy — more than any other place, its ancestral home.⁵ The Argentina-Italy bilateral investment treaty (BIT) was signed on 22 May 1990 and entered into force on 14 October 1993.⁶ In addition

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> Italian speakers in Argentina are said to number about 1.5 million, one of the largest concentrations outside of Italy itself. Aside from borrowing many words, Argentine Castellano also takes its particular accent and rhythm from several Italian dialects. In the portside neighborhood of La Boca, longtime residents use a local slang that borrows heavily from the Genoese dialect, as it was immigrants from Genoa who populated the neighborhood in its formative years.