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RELATÓRIO OCDE SOBRE ARBITRAGEM COLETIVA *"PRIVATE ENFORCEMENT OF SHAREHOLDER RIGHTS: A COMPARISON OF SELECTED JURISDICTIONS AND POLICY ALTERNATIVES FOR BRAZIL"*

Guilherme Setoguti J. Pereira
Doutor, Mestre e Bacharel pela USP. Professor do Insper. Advogado, sócio de Monteiro de Castro, Setoguti Advogados.

1. Introdução

Desde 2018, a Comissão de Valores Mobiliários ("CVM") e o Ministério da Economia vêm conduzindo um projeto com a finalidade de avaliar eventuais mudanças legislativas, regulatórias e institucionais para a melhora da proteção de direitos de acionistas e investidores no mercado de capitais brasileiro. Foi constituído um Grupo de Trabalho para tanto e a primeira fase desse projeto culminou na elaboração do estudo "Fortalecimento dos meios de tutela reparatória dos direitos dos acionistas no mercado de capitais brasileiro", para o qual tive oportunidade de contribuir, que pode ser encontrado no seguinte endereço: [www.gov.br/cvm/pt-br/centrais-de-conteudo/publicacoes/estudos/fortalecimento-dos-meios-de-tutela-reparatoria-dos-direitos-dos-acionistas-no-mercado-de-capitais-brasileiro-relatorio-preliminar-cvm-ocde-spe-me-outubro-2019/view].

O projeto conta com apoio técnico da Organização para Cooperação e Desenvolvimento Econômico ("OCDE") e com apoio financeiro do UK Prosperity Fund.

Em 19.11.20, a OCDE publicou o relatório "Private Enforcement of Shareholder Rights: A Comparison of Selected Jurisdictions and Policy Alternatives for Brazil", que contém conclusões e sugestões para a melhora do ambiente de proteção a acionistas e investidores no Brasil. O relatório contém recomendações de política legislativa, regulatória e institucional sobre (i) arbitragem coletiva e (ii) ações indenizatórias contra administrador e acionista controlador no Brasil. O relatório pode ser encontrado no seguinte endereço: OECD (2020), "Private

enforcement of shareholder rights: A comparison of selected jurisdictions and policy alternatives for Brazil", [www.oecd.org/corporate/shareholder-rights-brazil.htm].

O projeto conduzido pela OCDE analisou legislações de 10 (dez) países (Alemanha, Brasil, Espanha, Estados Unidos, França, Israel, Itália, Portugal, Reino Unido e Singapura), relativamente a ações indenizatórias contra administradores e acionistas controladores, e arbitragem coletiva.

O trabalho da OCDE conta com 3 (três) relatórios, sendo um deles elaborado por mim, como consultor da OCDE no projeto.

Referido relatório permitiu concluir que, no que diz respeito às arbitragens societárias e às arbitragens coletivas, o Brasil está em uma posição bastante peculiar frente às jurisdições analisadas. Poucos países adotam a arbitragem como mecanismo de solução de litígios societários e de mercado de capitais, e nenhum dos países analisados usa a arbitragem para solução de disputas coletivas societárias e de mercado e capitais. Entre os países analisados, apenas os Estados Unidos têm, de fato, arbitragens coletivas, mas que cuidam de disputas envolvendo outras matérias (direito do consumidor, direito concorrencial etc.).

Com algumas arbitragens coletivas societárias e de mercado de capitais em curso, o Brasil realmente se coloca numa posição única. E isso faz com que tenhamos que pensar em soluções para responder aos desafios que essa situação cria.

O relatório elaborado por mim a respeito de arbitragem coletiva no Brasil é, neste livro, publicado na íntegra. A parte do relatório a respeito de ações indenizatórias contra acionista controlador e administrador não é publicada neste livro, mas pode ser encontrada em: http://www.oecd.org/corporate/shareholder-rights-brazil.htm.

As opiniões contidas no referido relatório são exclusivamente do autor, e não refletem, em absoluto, as opiniões ou visões da OCDE ou de seus membros.[1] Os direitos autorais do relatório pertencem à OCDE. Além disso, agradeço, uma vez mais, o convite feito pela CVM e pela OCDE para participar do referido projeto, nas pessoas dos Diretores e ex-Diretores Gustavo Gonzalez, Marcelo Barbosa e Pablo Renteria, e de Daniel Blume e Caio Figueiredo C. de Oliveira.

* * *

4. Report on derivative litigation and collective arbitration in Brazil

This chapter describes the Brazilian framework for derivative suits and collective arbitration proceedings, and subsequently proposes changes to Brazilian laws and regulations governing these two instruments. It builds on the conclusions and recommendations from Chapters 2 and 3. It was authored by Guilherme

1. *The opinions expressed herein are those of the author. They do not purport to reflect the opinions or views of the OECD or its members.*

Setoguti J. Pereira, Professor, INSPER and IBMEC and Partner, Monteiro de Castro, Setoguti Advogados [1-2]

4.1. Introduction

This chapter was prepared to support the Brazilian Ministry of Economy and the Brazilian Securities Commission (Comissão de Valores Mobiliários – "CVM") consideration of proposals to enhance the Brazilian law on (i) collective arbitration and (ii) derivative suits for imposition of liability on managers (directors and officers) and controlling shareholders under the Brazilian Corporation Law ("LSA"). Accordingly, this Chapter: (i) describes the Brazilian legal framework for derivative suits and collective arbitration proceedings; and (ii) proposes changes to the Brazilian laws governing these two issues.[3]

In March 2018 the Brazilian Ministry of Economy and the CVM created a working group ("WG") and launched a project to improve investor protection in the capital market of the country through the improvement of private enforcement mechanisms of shareholder rights. The project is supported by the United Kingdom's Prosperity Fund. The OECD also is providing technical support, which includes benchmarking Brazil against the rules and practices of other OECD members to help ensure that Brazil's efforts to strengthen its framework and practices in this area are consistent with the G20/OECD Principles of Corporate Governance. The CVM and the OECD jointly prepared a Project Specification in June 2018 which established an initial scope for the project.

In October 2019 the WG, with the support of the OECD, published the "Strengthening the enforcement of shareholders' rights – Interim Report" ("Interim Report") as a product of the first phase of the project.

This Chapter has relied on the conclusions and recommendations from the Interim Report together with those written by Prof. Martin Gelter (Chapter 2), and Profs. André Monteiro and Renato Beneduzi (Chapter 3), prepared under the supervision of the OECD Secretariat. These two chapters respectively address the frameworks for derivative suits and collective arbitration in four Common Law jurisdictions (USA, UK, Singapore and Israel) and in four Civil Law jurisdictions (France, Germany, Italy and Spain). Chapter 3 also analyses the Portuguese framework for collective arbitration.

> This work focuses on how these two instruments are dealt with when it comes to publicly traded joint stock companies (*sociedade anônima*), which are governed by the Lei das Sociedades Anônimas ("LSA") and CVM regulation.
>
> (...)
>
> 4.12. Collective Arbitration Under Brazilian Law
>
> *4.12.1. Corporate and Capital Market Arbitration in Brazil*
>
> Brazilian legal scholars and lawmakers have made great strides in improving the country's capital markets since the late 1990s and early 2000s by enhancing the corporate law framework and putting in place a more reliable system for investor protection.[4]
>
> In this spirit of reform, Law No. 10,303 of 2001 and Law No. 10,411 of 2002[5] introduced, among other changes, paragraph 3 to article 109 of the LSA expressly providing for the inclusion of an arbitration clause in the company's bylaws (for resolution of disputes between the shareholders and the company, or between the controlling and minority shareholders).
>
> The Bolsa de Valores de São Paulo – Bovespa (currently, B3) followed suit and decided in 2000 (i) to institute various corporate governance levels (*Novo Mercado*, *Nível 1* and *Nível 2*) designed to foster a more attractive securities trading environment by raising the bar on corporate governance practices that went beyond those prescribed by law,[6] and (ii) to make arbitration compulsory for dispute resolution involving shareholders, managers and companies trading at the two highest governance levels (*Novo Mercado* and *Nível 2*).[7] In 2001 Bovespa set up the Market Arbitration Chamber ("CAM-B3") with the purpose of contributing towards enhancing the Brazilian stock market.[8] Section 3.2 of the Interim Report[9] and Profs. Monteiro and Beneduzi's Report (Chapter 3 of this publication)[10] present interesting statistics about the activities of the CAM-B3. Studies have shown that corporate disputes are the most common subjects of arbitration in Brazil and represent, in some arbitration chambers, up to 40% of their proceedings.[11]

These initiatives sought to supply the country's stock market with adequate enforcement tools that were viewed as vital to its development.[12] [13] The installation of specialized arbitration centers was promised to lead to a more suitable resolution of corporate conflicts.[14] This measure taken by the private regulator

relied on the assumption that arbitration is an excellent (if not the best) means for corporate dispute resolution conflicts in the capital markets.

The Code of Best Corporate Governance Practices of the Brazilian Corporate Governance Institute (IBGC) establishes that corporate conflicts should be settled by negotiation between the parties or, if not possible, by mediation and/or arbitration.[15] The CVM's Corporate Governance Guide also suggests that corporate disputes should preferably be resolved by arbitration.[16]

In initiating these reforms, public and private regulators signaled that arbitration goes hand in hand with the highest standards of corporate governance and, consequently, is an effective tool to protect the interests of minority shareholders and investors. By extension, companies with bylaws containing an arbitration clause would be more prone to receive investments.

However, legal scholars until recently were split as to whether the arbitration clause set out in the company's bylaws as per article 109, paragraph 3 of the LSA bound the shareholders as well.

Law No. 13,129 of 2015 sought to shed light on this matter by adding article 136-A to the LSA. The article states that all shareholders are bound by the arbitration clause and, in turn, provides dissenting shareholders with a right to withdraw. The article states that this right to withdraw does not apply only if the choice for arbitration was a condition for the company's eligibility to a special listing segment of stock exchanges or organized over-the-counter markets, or if the company stocks are highly liquid and widely dispersed (LSA article 137, I(a) and (b)).

This legislative change has further cemented the choice of arbitration as a mechanism for alternative resolution of corporate disputes involving listed companies. However, it is also important to note that a significant number of listed companies that have not adhered to a special listing segments requiring the use of arbitration still have chosen not to make it their preferred choice to resolve shareholder disputes. Legally, it remains a voluntary mechanism not required by law, but only if a company wishes to subscribe to certain listing segments, or voluntarily designate arbitration as the means for settling disputes by changing their bylaws.

The Brazilian scenario and experience regarding corporate and capital market arbitration are unique. Brazil differs from other countries, as explained in Section 3.2 of the Interim Report:

"The issue of mandatory arbitration provisions in the bylaws is a highly controversial topic, and the Brazilian position of allowing arbitration to solve disputes involving capital market players (including publicly-held companies) does not find support in other jurisdictions usually seen as reliable benchmarks, such as Germany, Italy, Israel, and Sweden.

In such countries, in general, arbitration is considered inappropriate for publicly-held companies, and the discussion about the use of arbitration to settle corporate disputes involves other corporate types. In a prima facie analysis, in fact, no jurisdiction with a legal system similar to Brazil's (Civil Law) has regulated the use of arbitration in disputes involving or related to publicly-held companies.

This debate also exists in Common Law countries. In the United States, for instance, the inclusion of mandatory arbitration agreements in North-American publicly-held companies' bylaws, until this moment, has not been expressly authorized by the SEC".

Chairman Jay Clayton of the Securities and Exchange Commission has stated that "the ability of domestic, publicly-listed companies to require shareholders to arbitrate claims against them arising under the federal securities laws is a complex matter that requires careful consideration" and "if the issue were to arise in an actual initial public offering of a domestic company, it would not be appropriate for resolution at the staff level but would rather be best addressed in a measured and deliberative manner by the Commission."

Other U.S. agencies, however, have supported the use of arbitration in securities litigation. For example, the U.S. Department of the Treasury issued a report in October 2017 suggesting that mandatory arbitration should be used as a tool to reduce the costs of shareholder litigation. It recommended that the states and the SEC continue to investigate the various means to reduce costs of securities litigation for issuers in a way that protects investors' rights and interests, including allowing companies and shareholders to settle disputes through arbitration.

As stated in Section 3.2 of the Interim Report, "these facts sparked a vigorous discussion about the practical effects that mandatory arbitration agreements would have on shareholders' ability to adequately vindicate their rights under the U.S. securities laws, possibly depriving them of important federal rights

to litigate securities fraud violations in court. According to a recent article published on the Harvard Law School Forum on Corporate Governance and Financial Regulation, "many scholars and advocates have concluded that the potential harm to investors of being forced to arbitrate securities violations significantly outweighs such benefits".

These barriers are mainly related to information asymmetry (which derives from the confidentiality of the arbitral proceedings) and cost of the proceeding issues. These issues will be addressed in the following sections of this Chapter.

4.12.2. Collective Arbitration

One of the major problems faced in capital markets wrongdoing disputes is that the damage suffered by investors from an individual standpoint usually involves insignificant amounts. Therefore, it is not uncommon that the only economically feasible means of recovery is to engage in group litigation via collective mechanisms.[17] This is the very reason why the class action operates as the primary mechanism for private enforcement of capital market regulations under US law.[18]

As Section 2.1.3 of the Interim Report describes, the Brazilian legal system has provided for collective protection of investor rights in the securities market[19] since the enactment of Law 7,913 in 1989. But only a few class actions have been brought in reliance on such law.[20] In fact, Brazil is not alone in this dilemma: apart from the United States and a handful of other common-law countries, class actions defending capital markets interests are, in the words of John Coffee Jr., *as rare as unicorns*.[21]

Law 7,913/1989 establishes that civil public actions (*ações civis públicas*) may be filed to protect the interests of the investors themselves (termed 'homogenous individual interests') as well as diffuse and collective interests.

The Public Prosecutors Office has exclusive authority to file a class action as per article 1 of Law 7,913/1989. Notwithstanding, in light of article 3 of the same law, several legal scholars and past court rulings have defended that all entities listed in article 5 of Law 7,347/1985 have standing to file a class action as well. As a result, the CVM[22] and associations, among others, are determined to have standing to sue. The law more specifically states that associations must list amongst their core objectives the protection of the securities holders rights and must also have been set up at least one year before the filing date (article

5, V(a) and (b) of Law 7,347/1985; article 82, IV of the Consumer Protection Code). The judge may opt to dispense with this latter requirement if there is a community interest in the claim on account of the extent or characteristic of the damage or due to the relevance of the legal right for which court relief is sought (Consumer Protection Code, article 82, paragraph 1).

It is within this context that Brazil is currently discussing the matter of collective arbitration as well as in light of the clear intention of Brazilian lawmakers to foster arbitration as a method of choice for the resolution of corporate disputes. In reality, some collective arbitration proceedings have even been initiated by investors against Brazilian companies over the last years.

Scarce information is available since these proceedings are not public. However, public databases cite at least seven collective arbitrations currently underway in Brazil.

The 2019 Reference Form of Petróleo Brasileiro S/A - Petrobras (Petrobras) reports that "Petrobras is a respondent in five arbitration proceedings installed by Brazilian and foreign investors in the Market Arbitration Chamber linked to B3 – Brasil, Bolsa, Balcão'.[23] Further, according to the press, in July 2019 investors commenced arbitration against Vale S/A (Vale) on account of the Brumadinho tailings dam collapse.[24] Vale's 2019 Reference Form and Material Fact do not refer to such arbitral proceeding though.[25] More recently the press also informed that investors commenced a collective arbitration against IRB – Instituto de Resseguros do Brasil.[26]

The Brazilian legal system has yet to come to grips with this recent trend. The Arbitration Act has no rule dealing with collective arbitration matters and provisions of leading arbitration centers in Brazil[27] are also silent in this specific regard. The Arbitration and Mediation Chamber of the Federation of Industries of the State of Paraná ("CAMFIEP") arbitration rule stands alone in an effort to tackle the issue of addressing the rights of representation in an arbitration commenced by associations.[28]

As seen before, when the subject is collective and corporate arbitration, Brazil is unique in two ways. First, since the beginning of the years 2000, Brazil has been choosing to submit our corporate disputes to arbitration, especially those regarding listed companies. As explained by Profs. Monteiro and Beneduzi's Chapter, only Spain has adopted arbitration as a means of solving corporate and capital markets disputes. Second, Brazil does have ongoing collective *corporate*

arbitral proceedings. The US is the only country analyzed by the chapter with collective arbitration, but no collective *corporate* arbitration. Brazil may learn from other countries' experiences. However, we must keep in mind that Brazil faces a very unique and peculiar situation and that we are facing unknown ground with collective corporate arbitration.

There are four fundamental issues this chapter raises before addressing the concrete proposals related to collective corporate arbitration in Brazil.

First, is arbitration truly the best method of resolving corporate and capital markets disputes, as mentioned above? Since early 2000s, Brazil has chosen to submit its corporate disputes to arbitration. This choice was made by the lawmakers, by B3 (then Bovespa) and by the legal scholars. Brazilian arbitration is strongly associated with high levels of corporate governance and investor protection. But now some scholars are beginning to question if that arbitration choice was correct and if Brazil has gone too far. There are reasons to question the assumption that arbitration is *always* the best means to solve corporate and capital market disputes: arbitration is costly, confidential, not as fast as we would it like to be, and presents other transactional costs. If it is not adapted to address the characteristics of collective disputes, arbitration may represent more of a barrier than a facilitator to access to justice, at least when dealing with capital markets disputes.

The second fundamental question is: do we want to apply to collective arbitration the same rules that govern our judicial collective suits system (*ações civis públicas*)? The Brazilian judicial collective suits system has peculiarities, including regulation on standing to sue and *res judicata*, among others. There is a relative consensus among scholars and lawyers that the Brazilian collective suits system does not work as it should. There have been some legislative initiatives, and some scholars have drafted bills of law. But none of them have succeeded and they have all been stuck in the Congress for years. Therefore, it would be a natural conclusion to suggest that we should take this opportunity to create a new, parallel and better collective (arbitration) system. But we must also be fully conscious of the side effects of having two different collective systems coexisting in the same jurisdiction.

This gets us to the third fundamental question: if Brazil decides to move forward with a collective arbitration system, will we establish statutory/legal provisions or will we delegate this task to the arbitral centers? Among the countries analyzed in chapter 3, only the US has collective arbitration provisions, but these

provisions are all laid out in the arbitration center regulation and not in the law. What would be the best approach for Brazil? This question will be addressed below and is a crucial and strategic question of politics.

The fourth fundamental issue is: if we do decide to proceed with a collective arbitration system as a means of solving capital markets and corporate disputes there is no doubt that we need to address the confidentiality issue. It is inconceivable to think about confidentiality with any collective rights system, be it judicial or be it arbitral. In any situation, the market and the members of the class must be aware of what is being discussed in collective suits. Information is one of the pillars of any collective system.

4.13. Confidentiality

Brazilian law requires that the arbitrator's conduct be discreet during the course of arbitration (Brazilian Arbitration Act, article 13, paragraph 6). However, it stands to reason that arbitration and confidentiality are not necessarily intertwined[29] as there is no reference in the law to a confidentiality duty attributable to the parties in arbitration proceedings.[30]

In spite of this omission, confidentiality is generally cited by legal scholars[31] and litigants[32] alike as one of the major advantages in referring a dispute to arbitration in lieu of the Judiciary. Following the same line of reasoning, the agreements to arbitrate as well as the rules of arbitration bodies generally mandate that the arbitration must be secretive.[33]

Article 9.1 of the Arbitration Rules of the CAM-B3, for instance, reads that "the arbitration proceeding is confidential, and the parties, arbitrators and members of the Arbitration Chamber shall abstain from disclosing information on its content, save for compliance with the rules of regulatory bodies or by operation of law."[34] The Internal Rules of CAM-B3 support the rationale and add that (i) the arbitration proceedings under its administration "must be kept secret" (article 6.1), (ii) the General Secretary must ensure that the arbitration is being accorded a confidential treatment (article 3.3, (d)), (iii) the chair of the CAM-B3 and the chair of the arbitral tribunal must verify the parties' abidance of the duty of confidentiality (article 6.1), and (iv) the arbitration documents must remain private and non-public.[35]

The downsides of handling corporate and capital markets litigation under a cloak of confidentiality are (i) the asymmetry of information and (ii) the lack

of a body of public case law in corporate dispute matters, especially involving listed companies.[36] The confidentiality also represents a relevant barrier for collective redress. The investors may have a total lack of adequate information on the wrongdoing and that will also hinder their ability to join collective suits commenced by others, as further explained below.

4.14 Issues for discussion/Recommendations

a) Establish legal and contractual (arbitration center) rules governing collective arbitration

Many of the jurisdictions analyzed by Profs. Monteiro and Beneduzi's Chapter do not set forth rules regarding collective arbitration and several of them do not even set forth *class actions/collective suits* rules.

The UK law does not establish legal proceedings such as US-style class actions and collective arbitrations are non-existent (item 3.9 of the current document). In France the class actions were incorporated in the legal system only in 2014 and do not encompass collective disputes between shareholders and the company (item 3.2 of the current document). In Germany, "disputes over rights of minority shareholders of publicly held companies (...) are not arbitrable" and may be adjudicated collectively only by state courts (item 3.3 of the current document).

The Israeli law does provide for class actions and in theory does admit the arbitrability of shareholders disputes, however in practice it is not the common way to resolve collective shareholders disputes. In spite of the well-developed system of derivative claims and class actions in Israel, "arbitration is apparently not the common way to solve shareholder's disputes, at least collectively" (item 3.4 of the current document). Singaporean Law is quite restrictive when it comes to collective redress. The system is mostly based on English Law and does not provide a collective mechanism as seen in US-style class actions (item 3.7 of the current document).

The US law does not contain collective arbitration rules, although some arbitration centers do. Nonetheless, Profs. Monteiro and Beneduzi inform that the chapter "did not identify any cases in practice of class arbitration being used to resolve shareholders' disputes in the US" (item 3.10 of the current document). This is probably because US case law and the SEC historically have discouraged mandatory arbitration for corporate disputes. In sum, the US does have favorable

case law and prepared arbitral institutions to deal with class actions and class arbitration, but apparently the use of class arbitrations for shareholder disputes has not yet been tested in practice.

The analyzed data shows that Brazil has a unique situation: a significant proportion of listed companies have opted to submit their corporate and capital market disputes to arbitration, which furthermore has recently resulted in cases of collective corporate and capital arbitrations, as seen above.

Brazilian law does contain rulings on class actions, but Brazilian law and arbitration centers have yet to set forth specific rules on collective arbitration. Despite this fact, collective corporate and capital market arbitral proceedings have already become a reality in the country with an increase certainly expected in the future. This current trend clearly suggests that Brazil should adopt distinct rules on collective arbitration, as these proceedings have particularities which current bilateral arbitration rules address insufficiently.

How and where to prescribe the rules governing such proceedings are the first questions that would arise when debating collective arbitration. One possible way would be for the arbitration centers to set these rules: arbitration is a contractual dispute resolution mechanism and it would only make sense that the rules should be stated by the parties and the arbitration centers chosen by them.

In fact, none of the jurisdictions analyzed by Profs. Monteiro and Beneduzi's Chapter set forth *legal rules* on collective arbitration. The only country to specifically determine rules regarding collective arbitration is the US. However, these rules are not provided by the law but by the arbitral institutions, such as the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service (JAMS (Profs. Monteiro and Beneduzi's Chapter, item 3.10 of the current document).

Some scholars adopt a hybrid position that the rules should be determined mainly by the arbitration centers and also by the law to a lesser degree.[37] This is the position taken by Profs. Monteiro and Beneduzi:

"the large use of class arbitrations in the United States — where the Federal Arbitration Act is silent on the subject — suggests that the rules of arbitral institutions such as those from the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service (JAMS) are perhaps better suited than statutory provisions to regulate in detail how proceedings in class arbitrations should be

carried out because the applicable rules can be more easily changed and adapted when needed while arbitral institutions are also more responsive than lawmakers to the feedback provided by users of the service" (item 3.11 of the current document).

(...)

"For the sake of legal certainty, nonetheless, the Brazilian Arbitration Act could be also amended in order to dispel doubts about the legality of this type of agreement under which someone agrees to be bound by an arbitral award rendered in proceedings to which he or she was not a party" (item 3.11 of the current document).

It appears that the best possible option for Brazil would be the latter, i.e., to leave it to the arbitration centers to set out specific rules on collective arbitration but to also have some rules stated in the law. The law could (i) expressly admit collective arbitration, which would clear up any doubt on its usage, and (ii) provide for *generic guidelines* regarding the procedural safeguards that must be respected by the arbitration centers and then permit them to delimit and specify these rules. This subject still requires further analysis, but these generic guidelines could set forth that (i) collective arbitration is admissible under Brazilian law, (ii) the shareholders and the market must have proper and adequate information about the commencement and the development of the arbitration, (iii) corporate arbitration involving listed companies should be public (non confidential), (iv) the arbitration centers can adopt an opt out system[38] and a specific model of *erga omnes res judicata*, different from the rules set forth in Law 7,347/1985 and in Consumer Protection Code, that govern court collective suits, if the arbitration centers provide the members of the class with information and certain procedural safeguards. The last suggestion must be thoroughly examined, but in principle it is possible to establish a collective arbitration system that differs from the rules that govern court collective suits. The arbitration centers should have the role to specify these generic guidelines and to establish other rules governing collective arbitrations.

b) Establish rules making public the information on corporate and capital market disputes involving listed companies

The confidentiality of the arbitral proceedings makes it difficult for the market – and even for the shareholders of a company involved in the litigation – to have a clear grasp on the aspects surrounding the dispute. This lack of knowledge may end up hindering an informed decision on buying, selling or holding stocks.[39]

> The knowledge amassed on corporate wrongdoing and the means of curbing it is of fundamental importance to the application of corporate law and to the development of the capital markets. This knowledge not only reduces the information asymmetries by enabling market participants to engage in adequate pricing of securities and to make a more informed and effective decision but also allows for better monitoring of those involved in the litigation as well as those adjudicating on it.[40]

> *Full disclosure* is one of the pillars of the capital market[41] and it is undermined by the confidentiality of arbitration in corporate litigation matters.[42] Confidentiality increases the information asymmetry between market players and even between the shareholders of a same company. This inevitably reduces the efficiency of the capital markets as a whole.

> It holds true that listed companies may treat the litigation being referred to arbitration as a *material fact* in that the dispute may have a significant bearing on the trading prices of securities or on the decision to exercise any rights associated with such securities. If arbitration falls under any of such categories, it must be disclosed to the market as provided in article 157, paragraph 4 of the LSA and in CVM Ruling 358. But this disclosure requirement is not enough.

> First, not every arbitration would trigger the disclosure of a material fact which is defined by article 2 of CVM Ruling 358 as an event that may have a "substantial" bearing on the securities prices or on the investor's decisions concerning these securities. The interpretation of what constitutes a material fact is somewhat subjective.

> Second, the rules on compulsory disclosure of a material fact do not address its required content which ends up being superficial and poorly detailed. In practice, the material fact touches on the existence of the litigation itself and some of its developments without delving deeply into its content or putting forth supporting documents.

> Third, the LSA contains a waiver of disclosure (article 157, paragraph 5) "if the senior management believes that such disclosure may pose a risk to the company's legitimate interests"[43] which may also help circumvent the disclosure requirements.

> When arbitration revolves around a corporate matter or involves the capital market segment, its disclosure is in the interest of *all shareholders* in the

company concerned and ultimately of the *market as a whole*. Collective arbitral proceedings should be public with full disclosure[44], and this especially applies to arbitral proceeding involving corporate disputes that include listed companies. The entire market, and not only the shareholders of the company, should be informed about the dispute and have access to the filings of the proceeding.[45]

A further downside of a confidentiality shield on corporate litigation is that the legal precepts enforceable in this regard are unknown or vague to the public without further details on the concrete application of the rules within the context of the litigation. This is a serious problem in that it impairs the creation of robust *corporate jurisprudence*.

In 2019 the CAM-B3 began publishing a digest of arbitral awards, which is redacted for information on the arbitration proceedings and their parties.[46] This important breakthrough is insufficient for a full understanding of the decisions or the rationale behind them. Apparently, no other Brazilian arbitration chamber to date has published a digest of this type.

According to s. 9 of the American Arbitration Association Supplementary Rules for Class Arbitrations, "the presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations" and "all class arbitration hearings and filings may be made public". The institution maintains on its website a "class arbitration docket" with information about the cases, such as copies of some motions, the identities of the parties, the names of the arbitrators, the names of the counsel, copies of the awards (including the final award), and information about any scheduled hearing (date, time and place). There is no confidentiality in collective arbitrations administered by the American Arbitration Association (Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication).

This Chapter suggests that arbitrations involving corporate litigation should generally be non-confidential or, at most, the confidentiality treatment accorded to it should be lessened. This position is in line with the conclusions of the Interim Report: "In conclusion, it is clear to the WG that maintaining confidentiality with respect to the course and outcome of arbitral proceedings about corporate and capital markets issues and involving publicly-held companies is not recommended" (Section 3.3.4.3 of the Interim Report).

More specifically, this Chapter suggests that if the litigation of listed companies has an impact on the legal realms of other shareholders and investors

(*litisconsórcio unitário*), (i.e., if the award is capable of binding people who are not parties in the arbitration) the whole market should have access to the data and documents surrounding the dispute.

When the litigation has no such impact, then the managers, in response to their disclosure duty (article 157, paragraph 4 of the LSA and CVM Ruling CVM 358), should consider whether the arbitration and its procedural acts imply a material fact. If the answer is positive, then such information should be disclosed to the market. Otherwise, no disclosure would be required.[47]

c) Establish rules to disclose to the market proper information on the commencement and development of the arbitration

A fundamental aspect of a collective arbitration system is that the interested parties must be kept informed of the commencement and development of the arbitration. The passing of information to the interested parties is the only possible way to legitimize the proceeding, to make third party intervention feasible and to bind the members of the class to the award (*erga omnes* effect).

This is especially true in litigation involving listed companies, where the information of a collective arbitration involving them is of interest to the entire market. This concern was a subject of the Interim Report:

"During the workshop, Prof. Dr Christian Borris presented the German experience on the matter – discussed in a context of limited liability companies. In 2009, the German Federal Supreme Court ruled in the case known as 'Arbitrability II' that arbitration agreements shall incorporate some features in order to legitimize the erga omnes/res iudicata effects on all shareholders: (i) all shareholders must be bound by the arbitration agreement; (ii) all shareholders have the right and must be given an opportunity to participate in the selection of arbitrators; (iii) all shareholders must be given the opportunity to participate in the arbitration; (iv) parallel arbitrations relating to the same shareholder resolution must be precluded. (...).

(...)

Regardless of the mechanisms that will be considered as the most suitable to the Brazilian reality, it is clear to the WG that any participation mechanism will only work properly if there is an adequate disclosure of the proceedings. According to some scholars, while confidentiality can be accepted for certain cases that only affect the parties of the proceeding, it is inadmissible when there are other interested parties

that do not or cannot participate in the proceeding. After all, if existing rights common to all or at least a group of shareholders are at stake, the non-disclosure of a case/decision will prevent them from the possibility of co-claiming their rights. Therefore, only the most informed and well-assisted shareholders, that filed the arbitration, will have had full access to justice, making clear the social costs associated to this situation." (Section 3.3.3 of the Interim Report).

In the same direction Profs. Monteiro and Beneduzi's Chapter states that "shareholders must be given proper and timely notice of the initiation of the arbitration and its subject matter" (item 3.1.4 of this document).

According to the AAA Supplementary Rules for Class Arbitrations, in the initial phase of the arbitration, the arbitral tribunal must render a partial award defining the class, the class representative, the class counsel as well as the class claims, issues and defenses. This decision is called "class determination award" and must be notified to all members of the class by "the best notice practicable under the circumstances" (s. 6)[48]. Once the notice is given the members of the class have the faculty to opt-out of the class arbitration and pursue their claims individually, "otherwise they will be bound by the future arbitral award, as set forth in Rule 6(b)(6)"[49]. JAMS Rules also state a similar rule (s. 4(6)[50]. The German *Bundesgerichtshof* (BGH) has also ruled that in arbitrations involving limited liability companies the shareholders must be granted "a fair opportunity to participate in the proceedings in general and in the constitution of the tribunal in particular".[51]

For the same reason disclosing information to the market is crucial for an effective opt out collective system of redress. The "shareholders must have the right to opt out from the arbitration if they so wish".[52] And to make that possible the shareholders must be appropriately informed on the beginning and the development of the arbitration. Information is the key to legitimating the proceeding and making feasible *erga omnes* effects.

Full disclosure of the arbitration is a fundamental aspect to legitimize the process and the information could be provided to the shareholders and investors in various forms: (i) personal notification, (ii) filing of the request for arbitration with the trade boards[53], or (iii) publication on the internet.

Publishing the information, data and documents of the arbitration on the internet appears to be the most adequate and least costly way to provide full and effective disclosure. Brazil should consider adopting rules that set forth the

duty of the company to properly inform the shareholders and the market on the initiation as well as the development of the proceeding. The author considers that the internet is the best locus as it is the least expensive and most effective way to ensure that the shareholders will obtain the information.

d) Establish rules regarding third party intervention

Another problem of adopting arbitration to resolve corporate disputes of publicly held companies relates to the difficulties concerning the intervention of third parties. In disputes marked by a unitary nature, the possibility of such intervention is an essential tool for validating the award and its *erga omnes* effects, as it enables the interested parties to express themselves and participate in the process which will result in an award that affects them as well.[54]

These difficulties arise, above all, from confidentiality: if the third party does not have access to the particulars of the dispute and, in some cases, does not even know it exists, it cannot make an informed decision as to whether it should intervene in the arbitration proceeding. In arbitration the third party faces an additional difficulty, which is the knowledge of the existence of the arbitral proceeding and, most of all, the subject matter in dispute.

In other words, lack of proper information is the first obstacle for third parties to intervene in pending arbitral proceedings. It is worthless to set forth rules condoning voluntary third-party intervention if there is a lack of adequate information for the third party to make a decision on its intervention.[55]

Making third party intervention possible is essential to legitimize the proceedings that may bind those other than the parties. That is the very reason why article 2.1 of Annex 5 of the Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Rules of 2018 establishes that "*in disputes requiring a uniform decision binding all shareholders and the corporation, and in which a party intends to extend the effects of an arbitral award to any shareholder or the corporation who are not named parties to the arbitration ('Concerned Others'), the Concerned Others shall be granted the opportunity to join the arbitration pursuant to these DIS-CDR as a party or compulsory intervenor in the sense of Section 69 of the German Code of Civil Procedure ('Intervenor')*" (Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication).

In Portugal the Associação Portuguesa de Arbitragem (Portuguese Arbitration Association) drafted a bill of law and arbitration rules proposals regarding

corporate arbitration in 2016. The arbitration rules proposals suggest similar provisions, stating that if the arbitral decision is capable of binding those who are not formal parties to the arbitration, the claimant must list all potentially affected parties, who will be notified of the case and have the right to intervene.[56]

S. 9(2) of the rules of arbitration of the *Corte de Arbitraje de Madrid* states that the arbitrators may, at the request of any party and after hearing them all, admit the intervention of a third party. S. 13 of the CIMA Rules contains a similar provision. However, the problem with these provisions is that third parties may not intervene if not invited by one of the parties to the proceedings, as explained in Profs. Monteiro and Beneduzi's Chapter, item 3.8 of the current document.

Moreover, in different countries, including Brazil, usually the intervention of third parties is generally accepted up until the constitution of the arbitral tribunal.[57] For instance, the CAM-B3 rules set forth the conditions in which the parties of the arbitration may request the inclusion of a third party and the conditions in which a third party may claim to intervene in the proceeding. Third party intervention is allowed only up to the appointment of the arbitrators.[58]

The Italian Law establishes that the forms of third party intervention referred to in the Code of Civil Procedure for court proceedings are also applicable to arbitral proceedings, although only if the arbitrators and all the parties agree (art. 816-*quinquies* of the Italian Code of Civil Procedure). The German Annex 5 of the *Deutsche Institution für Schiedsgerichtsbarkeit* (DIS) Rules of 2018 also applies to arbitral proceedings certain rules of the German Civil Code of Civil Procedure governing the intervention of third parties (Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication).

Nonetheless, to simply apply the third-party intervention modalities set forth in the codes of civil procedure to arbitration may not be the best approach. Court and arbitral proceedings have differences and peculiarities which supports the conclusion that the indiscriminate transposition of court rules to the arbitral environment may be inadequate. The arbitration centers undoubtedly should learn from the experience of the courts but must also set forth rules taking into consideration the peculiarities of the arbitral proceedings.

All told, rules on third party intervention are fundamental for a collective arbitration system. These rules should set out who may intervene, in what manner and at which stage of the proceeding. The question that arises is *which rules* to prescribe. This Chapter does not have all the answers to that question,

but can provide some partial conclusions: (i) disclosing proper information to the interested parties is essential to any third party intervention mechanism; (ii) the indiscriminate transposition of the Brazilian Code of Civil Procedure to the arbitral proceedings is not the best option, as the latter presents peculiarities that must be addressed[59]; (iii) third party intervention is usually accepted until the constitution of the arbitral tribunal, and this rule seems advisable in order to stabilize the arbitration; and (iv) the third parties should not only be summoned to join the arbitration, but also must be granted the opportunity to voluntarily do so.

It is also worth mentioning that the Brazilian law provides that the Public Prosecutors Office must be summoned in judicial proceedings as a law enforcement authority when the case discusses certain aspects. If the collective arbitration involves one of these matters, then the Public Prosecutors Office must also be informed on the arbitral proceeding to intervene if it so desires.[60] The CVM can also serve as *amicus curiae* in arbitral and judicial proceedings regarding matters included under its authority, pursuant to article 31 of Law No. 6,385/1976. This subject will be further addressed below.

e) Establish rules regarding the constitution of the arbitral tribunal

Party autonomy is the guiding principle of arbitration and for such reason the parties have the prerogative of choosing the arbitral tribunal,[61] as well as appointing and defining the number of arbitrators.

Under Brazilian law the arbitral tribunal must comprise an odd number of members; if an even number of members is appointed, such members must appoint another arbitrator (Arbitration Act article 13, paragraphs 1, 2 and 4).[62] In practice, as a rule, arbitral tribunals are composed of three arbitrators, since the risk of error is reduced when the parties appoint more than one arbitrator.[63] Therefore, each party (or the parties on each side of the dispute) appoints one arbitrator, and these two arbitrators appoint the chairman of the tribunal.

In multiparty arbitration problems may arise when the arbitral tribunal is constituted, as the rule which establishes that each party must appoint an arbitrator only works properly in arbitrations involving two sides of interest or in those in which, although there are more than two sides, the parties on each side have similar interests. This general rule does not apply when there are several different sides with different interests, as may happen in a dispute involving

shareholders of a company and the company itself, which, in a given dispute, may have opposing interests.[64]

Multiparty arbitrations usually adopt two solutions when deliberating arbitral tribunal constitution. The first possibility is to set a deadline for the plaintiffs and the defendants to indicate one arbitrator each. If either party fails to reach a consensus on its indication, all the members of the arbitral tribunal or at least the co-arbitrators should be selected by the arbitral institution. Otherwise, the only feasible alternative is to confer on an impartial third party (perhaps the arbitration body itself, in the event of institutional arbitration) the task of appointing the arbitrators. Therefore, the second possibility is to eliminate that phase and go directly to indications by the arbitral institution or another third party.[65]

Italian law expressly prohibits the articles of association of listed companies to contain arbitration clauses (*Decreto Legislativo* n. 5 of 17 January 2003) but it does admit corporate arbitration involving non listed companies. The law states that the tribunal in corporate arbitration is to be appointed by a person or institution outside the company. More specifically, the rules set out that the arbitration agreement must expressly indicate a third party, with no relationship to the company, which will have the duty to nominate the arbitrators. If the arbitration agreement does not contain such rule the arbitrators must be nominated by the president of the judicial court in which the company is headquartered (*Decreto Legislativo* n. 5 of 17 January 2003 Article 34, paragraph 2) (Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication).

As mentioned before, the Associação Portuguesa de Arbitragem (Portuguese Arbitration Association) drafted a bill of law and arbitration rules proposals regarding corporate arbitration in 2016. One proposes that the arbitral institution appoints the sole arbitrator or all the members of the arbitral tribunal in corporate arbitrations (s(4)(4))[66]. The other suggests that the arbitral institution appoint the arbitrators, except in cases where the parties had already agreed on the names. If the parties cannot reach a consensus, a sole arbitrator or whole arbitral tribunal would be appointed by the arbitration center (s. (5)(2); Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication). Additionally, in cases of relief for the annulment of shareholders resolutions or if the award may bind formal non-parties to the arbitration, the agreement on names is irrelevant as the arbitration center will appoint the sole arbitrator or the arbitral tribunal.[67]

In the US the AAA Supplementary Rules for Class Arbitrations state that (i) the arbitral institution has a specific list of arbitrators who are specialists in class

arbitration, and (ii) the arbitral institution will appoint at least one of the arbitrators (in general, the presiding arbitrator) (Profs. Monteiro and Beneduzi's Report, Chapter 3 of the publication).

Taking account of all these possibilities, the best solution is to give the parties the opportunity to reach a consensus on the appointment of the co-arbitrators and subsequently the arbitrators appoint the president of the tribunal. The ability to choose and appoint the arbitrators is one of the main advantages of arbitration. Therefore, the parties should be afforded this possibility even in collective arbitrations. If the parties do not reach a consensus after a specific time established by the arbitration center, then the arbitration center will appoint the sole arbitrator or the co-arbitrators. In the last situation, the president of the tribunal must be appointed by the co-arbitrators.

If the intervention of a third party is admissible after the appointment of the arbitrators, then it must accept the composition of the arbitral tribunal as prescribed by S. 52(5) of the rules of arbitration of the *Corte de Arbitraje de Madrid* and by s.68((5) of the rules of the *Centro de Arbitraje Internacional de Madrid* (CIAM).

f) Discuss establishing specific rules on allocation of costs in collective arbitration

Compared to court litigation arbitration is more costly,[68] as the parties incur expenses with arbitrators as well as the managing body fees. Although, some argue that if one considers all transaction costs involved in a judicial proceeding – delay, uncertainty, lack of legal certainty –, court litigation can end up being much more costly.[69]

There are some alternatives to bring down such costs. The parties may choose to submit the dispute to a sole arbitrator[70] and reduce costs of arbitrator fees, which represent a significant expense in an arbitral proceeding. They may also opt for an arbitration chamber that is less expensive than the average or even for arbitration *ad hoc*, which entrusts management of the case to an arbitration body.

Even employing the expense-reducing techniques above arbitration is still costly, at least when comparing direct and immediate expenses. This discourages parties from resolving their corporate disputes through arbitration. Listed companies may have tens or hundreds of millions of small investors and quite often their investment is less than the average spent with merely the initial arbitrators' fees.[71] It is very unlikely the individual investor would be adversely affected by

a shareholders' resolution or by an act of management that will initiate arbitral proceedings alone. From a cost perspective this may indicate that arbitration is making the enforcement of corporate and Brazilian capital market rules more daunting and is discouraging small investors instead of stimulating them to exercise their rights. For such reason it is necessary to consider mechanisms that reduce arbitration costs and facilitate access to justice within the arbitration sphere. Accessibility to arbitration by the average investor is essential and corporate disputes costs involving listed companies must be affordable for the investor.

This Chapter has analyzed the cost of the proceedings and attorney fees aspects in derivative lawsuits. Article 27 of the Brazilian Arbitration Act establishes that "the arbitral award shall decide on the parties' duties regarding costs and expenses for the arbitration, as well as on any amount resulting from bad faith conduct, if applicable, complying with the provisions of the arbitration agreement, if any", but sets forth no criteria for such division. Therefore, the parties are free to stipulate how the costs of the proceeding will be shared at the end of the arbitration. Usually the arbitral agreements and the arbitration center rules set forth that the losing party must reimburse the winning party for the costs of the litigation (arbitrators fees, chamber fees, expert fees etc.), except for the attorney fees. As explained previously in this chapter, the CPC "loser pays" rule does not necessarily apply to arbitration proceedings as the CPC is not automatically applicable to arbitrations. The rule will only govern arbitral proceedings if the arbitration convention stipulates so and, thus, the arbitral tribunal has no authority to award loss-of-suit fees unless stipulated by the parties.

The assessment and the conclusions that have been made in that section are applicable to arbitral proceedings involving those claims, which are usually bilateral disputes. Remaining is the question on whether there should be *specific rules* on allocation of costs for collective arbitration.

Chapter 3 suggests that "arbitral institutions and regulators could establish special rules concerning allocation of costs in securities matters — diverging from those applicable to securities litigation before state courts — so that they may serve as an economic incentive for shareholders to seek redress on their behalf and, even more importantly from a regulatory point of view, on behalf of the company" (See Section 3.11.6).

However, the jurisdictions analysed for this review lacked specific rules on the allocation of costs. The only special provision on the matter can be found in the

> AAA Supplementary Rules for Class Arbitrations, which, as explained in the chapter, set forth that "the claimant is required to pay USD 3 350 (a 'preliminary filing fee') to file a claim, counterclaim or additional claim as a class arbitration. These initial fees will cover all arbitral institution fees until the rendering of the 'clause construction award'. In case of a favourable decision, accepting the availability of the class arbitration, a supplemental filing fee – calculated on the basis of the amount in dispute – is required from the claimant. If one of the parties fails to pay the costs, the other one will be notified to pay the amount required".
>
> This Chapter is of the opinion that the arbitration centers should prescribe specific allocation of costs rules in collective arbitration. However, the experiences of other countries suggest that perhaps corporate and collective arbitration should be governed by the general rules applicable to all arbitrations. This Chapter does not have a final conclusion on this subject.

g) Discuss establishing rules on adequacy of representation

> The Brazilian law does not expressly provide for a court control of adequacy of representation in collective suits. This procedure is contemplated neither in the Law 7,347/1985 nor in the Consumer Protection Code (which applies to all collective suits, and not only to consumer disputes). This fact has led some legal scholars to state that such control has been previously done by the law (*ope legis* control), which means that it should be presumed that the legal entities listed in article 82 of the Consumer Protection Code are adequate representatives to file a public civil action (*ações civis públicas*).[72]

However, based on an interpretation of the Brazilian Constitution, some jurists have taken the stand, stating that the Brazilian system of collective relief does not preclude court review of adequacy of representation, despite the absence of an express legal provision.[73]

By means of this interpretation, the Brazilian law indeed admits judicial review of adequacy of representation. Adequate representation is in line with the dictates of due process of law and grants legitimacy and effectiveness to the proceeding.[74] Therefore, the judge must first confirm whether there is legal standing for the plaintiff to act on behalf of the class and to conduct the proceeding. After such analysis the judge must actually review the representation by ruling whether the representative party has a relation to the matters being discussed in the proceeding (*pertinência temática*),[75] whether the representative party has the

financial ability to bear the costs of the proceeding, whether its attorneys have the competence and expertise to act, and whether there are any conflicts of interest between the representative, its attorneys and the subject matter of the suit.

The same control should be carried out for in collective arbitration: such proceedings should be subject to an *adequacy of representation* analysis based on the criteria mentioned above, such as knowledge and past experience on the subjects under discussion (of the party and of its counsel), financial ability to bear the costs of the proceeding and absence of conflict of interests, among others.

Pursuant to AAA and JAMS rules on collective arbitration, one of the most important steps of the proceeding is the *class certification*, in which the arbitral tribunal issues a "class determination award", which defines the class, as well as its representative and counsel, among other issues (s. 5 of the AAA Rules and s. 3 of the JAMS Rules). The class members must be notified of the decision and have the opportunity to opt out of the arbitration. If they do not wish to be bound by the final award, they may opt out and pursue their claims individually.

When issuing a class determination award and defining the representative parties and the counsel that will represent the class, the arbitral tribunal must consider any law or agreement applicable and assess if "the representative parties will fairly and adequately protect the interests of the class" (s. 4(a)(4) of the AAA Rules) and if "the counsel selected to represent the class will fairly and adequately protect the interests of the class" (s. 4.(b)5).

Similarly, s. 3(a) of the JAMS Rules sets out that when certifying the class the arbitrator "shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described" and that "shall permit a class member to serve as a representative only if the conditions set forth in the Federal Rules of Civil Procedure, Rule 23(a), are met".[76]

Rule 23(a) of the US Federal Rules of Civil Procedure establishes that one or more members of a class may sue or be sued as representative parties on behalf of all members if certain prerequisites are met, including "if the representative parties will *fairly and adequately protect* the interests of the class" (Rule 23(a)(4)).[77]

The choice of class counsel is set forth in Rule 23(g), which establishes that the court that certifies a class must appoint the class counsel, considering different criteria such as (i) the work the counsel has done in identifying or investigating

> claims in the action, (ii) counsel's track record regarding class actions, complex litigation and the subjects discussed in the proceeding, (iii) counsel's knowledge of the law, (iv) the resources that counsel will commit to representing the class and (v) any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.[78]

> The Private Securities Litigation Reform Act (PSLRA) of 1995 amended the Securities Exchange Act (which is codified in Section 78 of Title 15 of the U.S. Code) and established the rebuttable presumption that in certain securities class actions, the most adequate representative is the party that "has the largest financial interest in the relief sought by the class", since it is, in theory, the party with the greatest incentive to defend the common interest (15 U.S.C. 78u-4(a)(3)(b)(iii)).[79]

> By doing so the law intends to align interests and, consequently, reduce agency costs and attorneys' power over the suit. This is a rebuttable presumption that the member most harmed by the wrongful act is, as a rule, the party most qualified to act as a class representative. The class representative may choose its own counsel under the judge's supervision (15 U.S.C. 78u-4(a)(3)(b)(v).[80-81]

This criterion should be regarded with some reservations. Brazil could indeed adopt it, but as *one among* several other reference criteria. The majority shareholder is not always aligned with the interests of the company or of the other shareholders. Moreover, adoption of this criterion on an absolute basis would entail additional problems in state-controlled companies.

In sum, one should consider establishing a control of adequacy of representation in collective arbitration, taking into account different criteria such as (i) party's and counsel's previous experience regarding collective arbitration and the matters under discussion, (ii) potential conflicts of interest, (iii) financial capacity and (iv) other criteria that indicate that the party and its counsel will be able to fairly represent the class.

h) Establish rules prescribing terms and conditions for third party funding

Litigation is expensive and for such reason issues related to procedural costs may hinder access to justice.

An alternative to overcome these difficulties is to seek third-party funding (by investment funds and specialized companies), as happened initially in Australia

and subsequently in other countries such as the United Kingdom, Canada and South Africa. This alternative has become increasingly widespread in other countries, including Brazil.[82] According to Profs. Monteiro and Beneduzi, Israeli courts are opposed to private entity third party funding in class actions.[83]

Funding terms are usually established in a funding agreement, which provides for the obligation to refund and remunerate the investor upon receipt of the credit by the funded party. In the event of defeat, the investor may receive nothing. It is for this very reason such funding is usually preceded by a careful assessment of the chances of success of the party seeking third-party funding.[84]

Third-party funding in Brazil is still quite recent but is increasingly becoming a known and adopted alternative in arbitrations. This fact has led an important arbitration and mediation center to issue a resolution recommending that, whenever applicable, the parties immediately notify it of the existence of third-party funding. In such notice the funded party must fully identify the funder for verification by the appointed arbitrators for any conflicts of interest and, being the case, disclosure of the facts which may give rise to doubts as to the impartiality or independence of one or more members of the arbitral tribunal.[85]

Although this practice is still incipient in Brazil, there is no legal obstacle to third-party funding of court litigation or arbitral proceedings.[86]

Third-party funding also brings with it some concerns, such as the possibility of judges or arbitrators being influenced by the prior assessment made by the potential investor and the possibility of the third-party funder exercising certain influence on the proceeding, even if indirectly, given its interest in the success of the funded party.

These issues should be discussed and properly regulated. However, third-party funding should be allowed as a tool to overcome the hurdles to exercise the right of access to justice and to make possible disputes which would be extremely costly to the weakest party, to the point of discouraging it from filing the suit.[87]

The arbitration centers should consider rules expressly accepting third party funding and establishing the terms and conditions for it, including for the disclosure and management of potential conflicts of interest. This would reduce the uncertainties involved in the third party funding as well as foster it. This suggestion is in harmony with the conclusions of the Interim Report:

> *"Although not studied in detail for this report, another possibility that can allow compensation would be the involvement of third parties, either (i) to finance the litigation (scholars have been studying the feasibility of third-party funding in arbitral proceedings); or (ii) to replace the shareholders in the litigation through the transference of "litigation rights" (e.g. compensation rights sought in arbitrations) to third-parties interested in seeking their rights78 (see Article 109 of the Brazilian Civil Procedure Code). Both ideas were mentioned during the Workshop by panelists and, at a first glance, appear to be possible means to address the problems of costs and redress."* (Section 3.3.2 of the Interim Report).

i) Consider expressly stating that the CVM must be called to intervene as *amicus curiae* in capital market disputes arbitration and not only in judicial proceedings

One way of overcoming the Judiciary's lack of expertise in corporate and capital market matters is to have the CVM serving as *amicus curiae* in judicial proceedings. This role is set out in article 31 of Law No. 6,385/1976: "In any judicial proceedings or actions regarding matters included under the authority of The Securities Commission of Brazil, the latter shall always be notified and be given the opportunity to submit an opinion or render explanations within a period of fifteen days of the date of the notice".

Under this legal provision – which was the first provision to introduce the "friend of the court" mechanism into the Brazilian legal system – the judge has the duty[88] to invite the CVM to offer information or advice on "lawsuits involving matters within its sphere of authority" should the CVM find it suitable.[89] It is important to note that the CVM will only intervene if it finds adequate, as properly explained in the Interim Report:

"taking into account all the functions assigned to CVM, it understands that it must exercise the legal prerogative to act as "amicus curiae" only in exceptional situations which, in addition to falling within its competence, involve matters with relevant repercussions to the capital markets or to a relevant part of its participants" (Section 2.2 of the Interim Report).

The rationale behind this rule is clear: given the specificities of capital markets litigation, the CVM should be called upon to provide insight on questions of law or fact[90] thereby assisting the judge to render a seasoned decision on the matter in dispute.[91] [92]

The CPC also provides for *amicus curiae* as a type of third-party intervention.[93] CPC article 138 reads that, considering the relevance of the matter at issue, its specificities or the social repercussions of a dispute, the judge may – based on a non-appealable decision, on his own initiative or at the request of any litigant or of an interested third person – order or permit a third individual, body or entity (with adequate representation powers) to act as *amicus* within 15 days of the notice date.[94]

The CVM role as *amicus curiae* in cases surrounding matters that fall within its sphere of institutional authority is an interesting way to bring public and private aspects together for legislative enforcement purposes. This aspect drove Prof. John Coffee Jr. to suggest that the regulatory body should provide advice and oversight in those settlements by acting as *amicus*[95] to rule out potential conflicts of interests and the risk of collusion in settlements for collective suits involving capital market disputes in the USA.

Article 31 of Law No. 6,385/1976 suggests that the CVM should intervene only in court disputes, which would in principle rule out its role as *amicus* in arbitration. This is not the best interpretation though. The aforementioned article makes no express reference to arbitration because when the provision was enacted this alternative dispute resolution mechanism did not exist as it is today in 2020. For this same reason, calling in the CVM to offer insight or advice in court disputes should also extend to arbitration. If the law requires the CVM to assist in financial markets disputes, this should also hold true for arbitration involving matters within its authority.

Some experts advocate that, as the CVM is a federal independent government agency, its participation as *amicus curiae* vests the federal court with legal authority to adjudicate on the corresponding dispute.[96] This is technically questionable in that the 'friend of the court' is not a party acting in defense or support of claims of its own.[97] This stand is also questionable in terms of convenience as only state courts have corporate chambers and district courts. Nonetheless, since the enactment of the CPC in 2015, there clearly must be no change of jurisdiction (as expressly stated in its article 138, paragraph 1).

Based on the above, perhaps the Brazilian law should be clarified to ensure that the CVM is notified to offer information or advice on arbitration "involving matters within its sphere of authority" should the CVM find it advisable, and not only on court disputes.[98] The collective arbitration involving capital market and

corporate disputes of listed companies would fit in this rule. This amendment is necessary to clarify the existing legal rule (article 31 of Law No. 6,385/1976).

4.15 Conclusions

This chapter analyses various aspects of derivative suits and collective arbitration systems, reaches conclusions and makes recommendations for Brazil regarding these issues. These conclusions and recommendations are explained and justified in detail in the previous sections of the chapter. To facilitate the understanding, the two following tables bring together and summarize the main aspects of this chapter. However, we strongly advise the reader to go through the entire chapter, as the tables merely summarize the conclusions and recommendations without explaining the rationales on which they are based.

Table 4.3. Proposals on collective arbitration

Number	Proposals on collective arbitration
15	Establish legal and contractual (arbitration center) rules governing collective arbitration. Taking into consideration the experience of other countries it appears that the best possible option would be to leave it to the arbitration centers to set out specific rules on collective arbitration but to also have some rules stated in the law. The Brazilian law could (i) expressly admit collective arbitration, which would clear up any doubt on its usage, and (ii) provide for only *generic guidelines* regarding the procedural safeguards that must be respected by the arbitration centers. The arbitration centers themselves would be entitled to delimitate and specify these rules.
16	Establish rules making public the information on corporate and capital market disputes involving listed companies. Arbitrations involving corporate litigation should generally be non-confidential. This Chapter suggests that if the litigation of listed companies has an impact on the legal realms of other shareholders and investors (*litisconsórcio unitário*), i.e., if the award is capable of binding people who are not parties in the arbitration, the whole market should have access to the data and documents surrounding the dispute. When the litigation has no such impact then the managers, in response to their disclosure duty (article 157, paragraph 4 of the LSA and CVM Ruling CVM 358), should consider whether the arbitration and its procedural acts characterize a material fact. If the answer is positive, then such state of affairs should be disclosed to the market. Otherwise no disclosure would be required.

Number	Proposals on collective arbitration
17	Establish rules to disclose to the market proper information about the commencement and development of the arbitration. Full disclosure is a fundamental aspect to legitimize the arbitral proceeding. Publishing the information, data and documents of the arbitration on the internet appears to be the most adequate and least costly way to provide full and effective disclosure. Brazil should consider adopting rules that set forth the duty of the company to properly inform the shareholders and the market on the initiation as well as the development of the proceeding. This Chapter believes that the internet is the best locus as it is the least expensive and most effective way to ensure that the shareholders will obtain the information.
18	Consider establishing a control of adequacy of representation in collective arbitration, taking into account different criteria such as (i) party's and counsel's previous experience regarding collective arbitration and the matters under discussion, (ii) potential conflicts of interest, (iii) financial capacity and (iv) other criteria that indicate that the party and its counsel will be able to fairly represent the class.
19	Establish rules regarding third party intervention. Rules establishing who may intervene, in what manner and at which stage of the proceeding are fundamental for a collective arbitration system. The question that arises is *which rules* to prescribe. This Chapter does not have all the answers to that question, but can provide some partial conclusions: (i) disclosing proper information to the interested parties is essential to any third party intervention mechanism; (ii) the indiscriminate transposition of the Brazilian Code of Civil Procedure to the arbitral proceedings is not the best option, as the latter presents peculiarities that must be addressed; (iii) third party intervention is usually accepted until the constitution of the arbitral tribunal, and this rule seems advisable in order to stabilize the arbitration; and (iv) the third parties should not only be summoned to join the arbitration, but also must be granted the opportunity to voluntarily do so.
20	Establish rules regarding the constitution of the arbitral tribunal. The parties should have the opportunity to reach a consensus on the appointment of the co-arbitrators and subsequently the arbitrators appoint the president of the tribunal. If the parties do not reach a consensus after a specific time, then the arbitration center should appoint the sole arbitrator or the co-arbitrators, and the president of the tribunal must be appointed by the co-arbitrators. If the intervention of a third party is admissible after the appointment of the arbitrators, then it must accept the composition of the tribunal.

Number	Proposals on collective arbitration
21	Consider establishing specific allocation of costs rules in collective arbitration. This Chapter believes that the arbitration centers should prescribe specific allocation of costs rules in collective arbitration. However, the experiences of other countries suggest that perhaps corporate and collective arbitration should be governed by the general rules applicable to all arbitrations. This Chapter does not have a final conclusion on this subject and recommends its discussion in the OECD workshop.
22	Establish rules prescribing terms and conditions for third party funding. The arbitration centers should consider rules expressly accepting third party funding and establishing the conditions for it. This would reduce the uncertainties involved in the third party funding as well as foster it.
23	Consider expressly stating that the CVM must be called to intervene as *amicus curiae* in capital market disputes arbitration and not only in judicial proceedings (article 31 of Law No. 6,385/1976). Perhaps the Brazilian law should consider clarifying that the CVM must be notified to offer information or advice on arbitration "involving matters within its sphere of authority" should the CVM find it advisable, and not only on court disputes. This amendment is necessary to clarify the existing legal rule (article 31 of Law No. 6,385/1976).

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2. I thank Daniel Blume, Gustavo Gonzalez and Caio Figueiredo C. de Oliveira for the helpful comments on this Chapter. The opinions expressed herein are those of the author. They do not purport to reflect the opinions or views of the OECD or its members.
3. References to data in this chapter were last updated on 14 July, 2020.
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9. The data collected in September, 2018 showed that, since the beginning of its activities in 2001, the chamber had conducted a total of 116 proceedings (51 in course, 65 concluded), with 79 of the disputes related to corporate law issues, such as annulment of shareholders meeting decisions, recovery of damages caused by contractual breaches or wrongdoing by the company management. The Interim Report also explains that, among the 79 proceedings discussing corporate law issues, (i) 20 proceedings involved companies listed in special segments in which the use of arbitration is mandatory; (ii) 6 involve publicly-held companies not listed in the referred listing segments, but which also had included in their bylaws arbitration agreements; and (iii) the 53 remaining proceedings involve parties that voluntarily decided to submit the issue to arbitration at the Chamber. Eleven of the 79 proceedings (13.94%) were initiated by minority shareholders demanding redress from controlling shareholders or from the company itself, all of which remain pending. Four of the 11 were based on Article 246 of the Brazilian Corporate Law providing for minority shareholders to seek damages from controlling shareholders without submitting the matter to a general shareholder meeting.
10. "Almost 70% of the cases administered by the institution from 2010 to 2019 were related to shareholders' disputes. In 2019, according to the data provided by e-mail, the arbitral institution received 27 new requests for arbitration, 59% of them dealt with internal company disputes, including 2 class arbitrations".
11. Selma Lemes, Adriana Braghetta, Daniela Gabbay, Eleonora Pitombo and K. "Arbitragem e Poder Judiciário: uma radiografia dos casos que chegam ao Judiciário brasileiro". *Cadernos Direito GV*, v. 6, n. 6, nov. 2009; CBAR-Comitê Brasileiro de Arbitragem. *Separata – Arbitragem no Brasil – Pesquisa CBAr-Ipsos*. São Paulo: IOB, 2012; and Selma Lemes, *Análise da Pesquisa Arbitragem em Números de 2010 a 2013*, http://selmalemes.adv.br/artigos/An%C3%A1lise%20da%20Pesquisa%20Arbitragem%20em%20N%C3%BAmeros%20-2010-2013.pdf
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14. Calixto Salomão Filho, "Direito societário e Novo Mercado". In: *O novo direito societário*, 3ª ed. São Paulo: Malheiros, 2006, p. 59.
15. Article 1.4 (http://www.ibgc.org.br/userfiles/2014/files/CMPGPT.pdf).
16. Article III.6 (http://www.cvm.gov.br/export/sites/cvm/decisoes/anexos/0001/3935.pdf.
17. "Characteristic of so many of the suits under Rule 10b-5 for false corporate announcements by a publicly traded company is that most purchasers or sellers have relatively small amounts at stake. When there are numerous investors who have suffered a common misrepresentation, the class action device is often the only economically viable means of achieving the compensatory and deterrent goals underlying private action" (James D. Cox, Robert Hillman and Donald Langevoort, *Securities regulation*, 7ª ed. New York:

Kluwer, 2013, p. 789). See also Ian Hunter and Louis Flannery, "Class action and arbitration procedures – United Kingdom". In: *Class arbitration in the European Union* (Editor: Phillippe Billiet). Antwerpen: Maklu, 2013, p. 185.

18. William Savitt and Noah Yavitz, *The securities litigation review – Chapter 14* (ed. William Savitt). London: Law Business Research, 2015, p. 182; and Guilherme Setoguti J. Pereira. *Enforcement e tutela indenizatória no direito societário e no mercado de capitais*. São Paulo: Quartier Latin, 2018, p. 172.
19. Ada Pellegrini Grinover, *Código Brasileiro de Defesa do Consumidor comentado pelos autores do Anteprojeto*, 6ª ed. Rio de Janeiro: Forense, 1999, p. 767; Camilo Zufelato, "Tutela jurisdicional coletiva dos investidores no mercado de capitais e dos sócios minoritários e a judicialização da negativa de fusão entre Pão de Açúcar e Carrefour". *Revista de Processo*, v. 233, jul. 2014, p. 185; Antonio Gidi, *Coisa julgada e litispendência em ações coletivas*. São Paulo: RT, 1995, p. 138, footnote 333; and Márcia Tanji, *Mercado de capitais brasileiro e tutela coletiva dos interesses*. São Paulo: USP, 2009, p. 158.
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23. https://www.investidorpetrobras.com.br/ptb/16375/Formulario-de-Referencia-2018-2019_V30.pdf
24. https://oglobo.globo.com/economia/investidores-iniciam-acao-arbitral-contra-vale-por-causa-do-acidente-em-brumadinho-23814997
25. http://www.vale.com/PT/investors/information-market/annual-reports/reference-form/Documents/docs-pt/Vale%20l%20Formul%C3%A1rio%20de%20Refer%C3%AAncia%20-%20Vers%C3%A3o%2022.pdf
26. https://valor.globo.com/financas/noticia/2020/03/18/investidores-iniciam-arbitragem-contra-o-irb.ghtml
27. This Report has analyzed the arbitration rules of CAM-CCBC, Market Arbitration Chamber/B3, CIESP-FIESP, CAMARB, FGV, CCI and AMCHAM.
28. "9.7. The associative entity, including the one that represents its members by means of authorization in the form of article 5, XXI, of the Federal Constitution, is considered a unique Party.

9.8. In the case of representation provided in Article 5, XXI, of the Federal Constitution, the provisions on the addition of third parties apply to the addition of other associates to be represented by the associative entity, whether if the association to the entity is

supervenient to the arbitration or not. It will be up to the entity, if applicable, to initiate a different procedure in favor of the other associates if their entry into the ongoing procedure is not admitted. In this case, it will be possible to reunion of arbitrations, if the other applicable requirements are met."

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34. http://www.bmfbovespa.com.br/lumis/portal/file/fileDownload.jsp?fileId=8A828D294E6F7F51014E734202294677.
35. http://www.bmfbovespa.com.br/lumis/portal/file/fileDownload.jsp?fileId=8A828D294E6F7F51014E7342026E46C8.
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37. Rômulo Greff Mariani, *Arbitragens coletivas no Brasil*. São Paulo: Atlas, 2015, p. 192 and 199.
38. The advantages of adopting an opt out system or not is also something that needs to be better addressed.
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41. Marcelo Trindade, "O papel da CVM e o mercado de capitais no Brasil". In: *Fusões e aquisições: aspectos jurídicos e econômicos* (org. Jairo Saddi). São Paulo: IOB, 2002, p. 309); André Grünspun Pitta, *O regime de informação das companhias abertas*. São Paulo: Quartier Latin, 2013, p. 67; and André Antunes Soares de Camargo, *Revista de Direito Bancário e do Mercado de Capitais*, n. 38, out./dez. 2007, p. 106-112.

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43. Alex Hatanaka, "Limites da confidencialidade na arbitragem envolvendo sociedades por ações de capital aberto". *Revista de Direito das Sociedades e dos Valores Mobiliários*, v. 3, maio 2016, p. 121 e 122.
44. Rômulo Greff Mariani, *Arbitragens coletivas no Brasil*. São Paulo: Atlas, 2015, p. 198; and Ana Luiza Nery, *Arbitragem coletiva*. São Paulo: RT, 2016, p. 279, 292 and 306.
45. This is the reason why Profs. Monteiro and Beneduzi's Chapter states that is "practically impossible to address a collective or mass claim through arbitration in England and Wales without significant legislative change", considering that "English law implies the confidentiality of the arbitral proceedings" (Section 9).
46. "7.10 From time to time the Arbitration Chamber shall publish a Summary of Arbitral Awards. Such summaries shall be grouped by the topics involved and may be taken into consideration by arbitrators as mere reference material to orient their decisions. Published awards shall omit any elements that enable the proceedings to be identified."
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48. JAMS Rules also provide for the notice of class determination (s. 4).
49. AAA Supplementary Rules for Class Arbitrations. Rule 6. Notice of Class Determination. (...). (b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language (...) (6) the binding effect of a class judgment on class members.
50. JAMS Class Action Procedures. Rule 4. Notice of Class Determination. (...). The Notice of Class Determination must concisely and clearly state in plain, easily understood language (...) (6) the binding effect of a class award on class members.
51. See Section 3 of Profs. Monteiro and Beneduzi's Chapter.
52. "In this case, the rules of arbitration of the arbitral institution should define specific opportunities and the corresponding time periods for that. According to the AAA Supplementary Rules for Class Arbitrations and the JAMS Class Action Procedures, shareholders have two opportunities to exercise their right to opt-out: (i) after being notified of the commencement of the class arbitration (Rules 6(b)(5); and Rule 4(5)) and (ii) after being notified of the purposed terms of a settlement (Rule 8(c); and Rule 6(c))" (Section 12.5 of Profs. Monteiro and Beneduzi's Chapter).
53. In Italy the request for arbitration involving a corporate dispute must be published in the business register, in order to give publicity and facilitate the intervention of third parties (art. 35, par. 1 *Decreto Legislativo* 5 of 2003).
54. Guilherme Setoguti J. Pereira. *Enforcement e tutela indenizatória no direito societário e no mercado de capitais*. São Paulo: Quartier Latin, 2018, p. 167.
55. This explains why Profs. Monteiro and Beneduzi wrote that "The intervention of third parties and other shareholders may be indirectly facilitated by the rule under which the

request of arbitration needs to be published in the business register" pursuant to the Italian law (Section 5).

56. "If the case regards the annulment of shareholders' resolutions or if the arbitral decision is capable of binding people who were not formal parties to the arbitration, s. 6(3) imposes on the claimant the duty to list all potentially affected people, who will be notified of the case. They have the right to intervene in the ongoing arbitration as a co-claimant or as a co-respondent (s. 7(2))" (Section 3.6 of Profs. Monteiro and Beneduzi's Chapter).

57. Eleonora Coelho, "Necessidade de criação de regulamentos adaptados para arbitragens coletivas no mercado de capitais". In: *Processo societário III* (coords. Flávio Luiz Yarshell and Guilherme Setoguti J. Pereira). São Paulo: Quartier Latin, 2018, p. 133.

58. "JOINDER OF PARTIES AND CONSOLIDATION OF PROCEEDINGS

6.1 Joinder of parties. Before any arbitrators have been appointed, the parties may request the inclusion of one or more additional parties in the arbitration proceedings by filing a Motion for Joinder of Parties ("Motion for Joinder"). Third parties with a legitimate claim to join or intervene in the proceedings may request permission to do so by filing a Motion for Joinder.

6.1.1. Motions for Joinder shall be submitted to the Arbitration Tribunal's Secretariat. They shall contain a justification for requiring the inclusion of additional parties and be accompanied by copies of the Request for Arbitration and the Answer or Answers thereto.

6.1.2 Answers to Motions for Joinder must be filed within fifteen (15) days and shall comply with the provisions of 2.1.3 above.

6.1.3 The parties shall be directed to respond to the Answers to Motions for Joinder within ten (10) days.

6.1.4 The President of the Arbitration Chamber shall decide whether to accept a Motion for Joinder. If he accepts it, the joined party shall enter the arbitration proceedings at that point, signing an undertaking to comply with these Rules and to be bound by the arbitral award. Should any party object and if the President of the Arbitration Chamber overrides such objection, enforcing the Motion for Joinder, the Arbitration Tribunal shall review the matter and issue a final decision regarding the joinder."

59. For example, the CPC allows the intervention of third parties that are not bound by the arbitration agreement, which in principle is not admissible in arbitration. Third party intervention in court proceedings are usually public, whereas arbitral proceedings are usually confidential, and these differences have important effects on how a third party can join or be summoned to participate in the proceeding. Another distinction: in court proceedings the judge is designated according to the court rules and if a third party joins the proceeding the fact does not impact on the designation of the judge. In arbitration, however, if a third party joins the proceeding it may impact the arbitral tribunal constitution.

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74. Viviane Siqueira Rodrigues, *O processo coletivo para a defesa dos direitos individuais homogêneos*. São Paulo: USP, 2012 p. 87.
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76. "Rule 3. Prerequisites to a Class Certification. (a) The Arbitrator shall determine whether a class should be certified.

    In making that determination, the Arbitrator shall consider the criteria enumerated in this Rule 3 and any law that the Arbitrator determines applicable to the arbitration. The Arbitrator shall also determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The Arbitrator shall permit a class member to serve as a representative only if the conditions set forth in the Federal Rules of Civil Procedure, Rule 23(a), are met.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, in addition to the criteria set forth in the Federal Rules of Civil Procedure, Rule 23(b).
(c) The Arbitrator shall set forth a determination with respect to the matter of Class Certification in a partial final award subject to immediate court review."

77. "Rule 23. Class Actions
1.1. Primary tabs
(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class."

78. "(g) Class Counsel.
(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
(A) must consider:
(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law; and
(iv) the resources that counsel will commit to representing the class;
(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
(E) may make further orders in connection with the appointment.
(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class."

79. "(iii) Rebuttable presumption
(I) In general. Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that:
(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
(II) Rebuttal evidence. The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—
(aa) will not fairly and adequately protect the interests of the class; or
(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class."

80. "(v) Selection of lead counsel: The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."
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95. *Entrepreneurial litigation – its rise, fall, and future*. Cambridge: Harvard Press. 2015, p. 224 e 234.
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