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## ***The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?***

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### **I. Introduction**

In 2013, India enacted one of the most robust private enforcement regimes for securities fraud violations in the world. Unlike in most other countries, Indian shareholders can now initiate securities fraud lawsuits on their own, represent all other defrauded shareholders unless those shareholders affirmatively opt out, and collect money damages for the entire class. The only thing missing is a better financing mechanism: unlike the United States, Canada, and Australia, India does not permit contingency fees, so class action lawyers cannot front the costs of litigation in exchange for collecting a percentage of what they recover. On the other hand, the 2013 law enacted a public financing regime for securities fraud class actions and it is possible third-party financing will be permitted; these mechanisms may make up some of the loss in effectiveness caused by the lack of contingency fees. It is still too early to tell.

All of this is true on paper. Yet, commentators are very pessimistic that the Indian securities fraud class action will do much good. The primary reason is because the Indian court system is notoriously unhurried. We have seen some data that suggests it takes over six years on average to resolve some civil appeals. And that's just the appeal. Who will bother to file a securities fraud lawsuit if it takes a decade to conclude?

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The solution to this problem in the 2013 law was to channel the securities fraud class action to a special court. Yet, this solution has been tried before in India, and we are told the special courts tend to quickly take on the negative characteristics of the general courts. This may be why very few securities fraud lawsuits have been filed since the 2013 law was enacted five years ago. As far as we know, there have been very few such lawsuits despite the fact that there are thousands of publicly-traded companies in India.

We propose a different solution to the problem of the Indian court system: class arbitration. Professor Vik Khanna suggested arbitration as a solution in an early article after the enactment of the 2013 law, and we pick up that suggestion and run with it here. As we explain, although class arbitration is not perfect, it may better facilitate robust private enforcement than the Indian court system.

In Part II, we describe the new Indian securities fraud class action and explain why commentators are pessimistic that it will live up to its potential. In Part III, we argue that the best way for it to do so is to channel its lawsuits into class arbitration.

## **II. The Indian Securities Fraud Class Action**

### **A. Background**

The new Indian securities fraud class action was born of scandal. In 2009, the founder of Satyam Computer Services, a publicly-traded Indian information-technology company, confessed to falsifying the financial statements of the company. There were fake customer identities, fake invoices to inflate revenue, forged board resolutions, and loans obtained through illegal means.<sup>1</sup> All told, the fictitious assets and non-existent cash

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<sup>1</sup> See Majumdar, Arjya B. and Bhawnani, Sneha, Class Action Suits – Genesis, Analysis and Comparison (December 12, 2016). The founder, Mr. Raju, confessed to such fraud through a letter dated January 7, 2009 addressed to its board of directors, copied to Securities and Exchange Board of India (“SEBI”) and stock exchanges:

totaled some \$1.56 billion.<sup>2</sup> Somehow, all of this evaded the detection of Satyam's auditor, PricewaterhouseCoopers.<sup>3</sup>

This billion-dollar, multi-year fraud started to fall apart when Satyam attempted to acquire two companies without seeking shareholder approval.<sup>4</sup> The target companies were owned in large part by Satyam's founder and his family.<sup>5</sup> When shareholders got wind of it, they objected vociferously, and the acquisition was suspended.<sup>6</sup> But the episode attracted the attention of regulators.<sup>7</sup> Eventually, the founder, members of Satyam's board, and other management personnel went to jail and paid fines,<sup>8</sup> and the company's share price fell from INR 544 to INR 11.50.<sup>9</sup>

What about the shareholders? At the time, Indian law did not permit shareholders to recover any of their losses. Thus, Indian shareholders did not recoup anything from the Satyam fraud. But some shareholders did recoup something: *American* shareholders. Satyam had American Depository

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The gap in the Balance Sheet has arisen purely on account of inflated profits over a period of last several years (limited only to Satyam standalone, books of subsidiaries reflecting true performance). What started as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years....Every attempt made to eliminate the gap failed. As the promoters held a small percentage of equity, the concern was that poor performance would result in a take-over, thereby exposing the gap. It was like riding a tiger, not knowing how to get off without being eaten...

SEBI order dated July 15, 2014 (WTM/RKA/SRO/64 - 68 /2014).

<sup>2</sup> See [http://www.newindianexpress.com/states/andhra\\_pradesh/article55212.ece](http://www.newindianexpress.com/states/andhra_pradesh/article55212.ece).

<sup>3</sup> Majumdar, Arjya B. and Bhawnani, Sneha, Class Action Suits – Genesis, Analysis and Comparison (December 12, 2016).

<sup>4</sup> See Varun Sinha, *Satyam Fraud: Why Ramalinga Raju Was Forced to Confess in 2009*, NDTV Profit (April 9, 2015), <http://profit.ndtv.com/news/corporates/article-satyam-fraud-why-ramalinga-raju-was-forced-to-confess-in-2009-753607>

<sup>5</sup> See Majumdar, Arjya B. and Bhawnani, Sneha, Class Action Suits – Genesis, Analysis and Comparison (December 12, 2016).

<sup>6</sup> See *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> See Majumdar, Arjya B. and Bhawnani, Sneha, Class Action Suits – Genesis, Analysis and Comparison (December 12, 2016).

<sup>9</sup> See *Indian IT scandal boss arrested*, BBC News (January 9, 2001), <http://news.bbc.co.uk/2/hi/business/7821087.stm>.

Receipts listed on the New York Stock Exchange. Thus, multiple securities fraud class action lawsuits were filed by Satyam's *American* investors in the Southern District of New York.<sup>10</sup> In 2011, Satyam and PricewaterhouseCoopers agreed to settle these lawsuits for over \$150 million.<sup>11</sup>

When there is wrongdoing like this that stretches across continents, the difference between the American system of private enforcement and the systems of public enforcement in most other places becomes apparent for all to see. When it does, people in other countries often do not like what they find. That is what happened with the recent scandal where Volkswagen rigged its diesel cars to turn off their pollution controls when they were not being tested for emissions. The 500,000 drivers in America collected billions of dollars in compensation; the ten million drivers in the rest of the world have basically received nothing.<sup>12</sup> The difference was the American class action. Other countries are now beefing up their own consumer class action devices in response.<sup>13</sup>

The same thing happened in India. No one could understand why the Indian shareholders of an Indian company got nothing when they were

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<sup>10</sup> See Kevin LaCroix, *Satyam Agrees to Pay \$125 Million to Settle Securities Suit*, The D&O Diary (February 18, 2011), <http://www.dandodiary.com/2011/02/articles/securities-litigation/satyam-agrees-to-pay-125-million-to-settle-securities-suit/>.

<sup>11</sup> See *Weil Secures Dismissal of Shareholder Class Action Against Satyam's Former Directors*, Weil, Gotshal & Manges LLP (January 4, 2013) <http://www.weil.com/articles/weil-secures-dismissal-of-shareholder-class-action-against-satyams-former-directors>.

<sup>12</sup> *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 U.S. Dist. LEXIS 148374 (N.D. Cal. Oct. 25, 2016); Patrick McGee, *VW car owners in EU face battle for compensation over scandal*, FINANCIAL TIMES, January 28, 2017, <https://www.ft.com/content/0b9bf1d2-e486-11e6-9645-c9357a75844a>.

<sup>13</sup> In response to the emissions scandal, the German government is pushing a new law that would allow consumer claims to be partially resolved on a collective basis. See Andrea Thomas, *Germany Set to Allow Collective Lawsuits Following VW Scandal*, WALL STREET JOURNAL, May 9, 2018, <https://www.wsj.com/articles/germany-set-to-allow-collective-lawsuits-following-vw-scandal-1525869967>

defrauded, but their American counterparts received millions of dollars. Thus, the Companies Act of 2013 was born to bring American-style private securities fraud enforcement to India. As we explain below, we think the Indian authorities made an admirable attempt in this endeavor.

#### B. The Companies Act of 2013

Section 245 of the Act and its enabling rules permit either 100 or 10% of shareholders—whichever is lesser—to file an application seeking to represent all other shareholders before a special court called the National Company Litigation Tribunal (“NCLT”) for fraud and other misconduct committed by a company or its officers.<sup>14</sup> Such an application can be filed against any type of company, whether in the public sector or in the private sector, except banking companies.<sup>15</sup> The Act also permits an investor association to file suit on behalf of shareholders.<sup>16</sup>

When considering whether to accept the application, the NCLT considers many of the same criteria American courts consider when they decide whether to certify class actions<sup>17</sup> as well as several additional matters.<sup>18</sup> If the application is accepted, the NCLT is required to consolidate

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<sup>14</sup> The Act uses the words “members” and “depositors.” *See* Companies Act, No. 18 of 2013, INDIA CODE, Sections 2(55), 245(1) & 245(3); Rule 16(1) of the National Company Law Tribunal Rules.

<sup>15</sup> *See* Companies Act, No. 18 of 2013, INDIA CODE, Section 245(9). The Central Government of India has a power to exempt a class or classes of companies from any provisions of the Act for the reason of public interest. *See* Companies Act, No. 18 of 2013, INDIA CODE, Section 462.

<sup>16</sup> Companies Act, No. 18 of 2013, INDIA CODE, Section 245(10).

<sup>17</sup> The NCLT is required to consider by rule whether: (i) whether the class has so many members that joining them individually would be impractical making a class action desirable; (ii) whether there are questions of law or fact common to the class; (iii) whether the claims or defences of representative parties are typical of the claims or defences of the class; (iv) whether the representative parties will fairly and adequately protect the interests of the class. Rule 85 of the National Company Law Tribunal Rules, 2016.

<sup>18</sup> The Act requires the NCLT to consider: (i) whether the application is filed in good faith; (ii) any evidence before it as to the involvement of any person other than directors or officers of the company in matters requiring relief; (iii) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an action under this section; (iv) any evidence before it as to the

all similar applications from any other jurisdiction and publish notice to the class.<sup>19</sup> Notice is published in newspapers in both English and the language of the state where the registered office of the company is located; additionally, notice is published on the company's website, the websites of the NCLT, the Ministry of Corporate Affairs<sup>20</sup>, and the Registrar of Companies<sup>21</sup> and the websites of any stock exchanges the company is listed on.<sup>22</sup> Class members have the right to opt out;<sup>23</sup> if they do not, they have the right to choose which lead applicant the lawsuit should proceed with; if no applicant garners a majority, the NCLT decides.<sup>24</sup>

The Act provides shareholders with what appears to be broad relief. Not only can shareholders win injunctive and declaratory relief<sup>25</sup>—backed up with fines and possible imprisonment if companies and their officers fail to

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views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section; (v) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be authorized by the company before it occurs or ratified by the company after it occurs; (vi) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company. Companies Act, No. 18 of 2013, INDIA CODE, Section 245(4).

<sup>19</sup> Rule 87(3) of the National Company Law Tribunal Rules, 2016.

<sup>20</sup> The Ministry of Corporate Affairs is an Indian government ministry regulating the functioning of the corporate sector in accordance with law - [http://www.mca.gov.in/MinistryV2/about\\_mca.html](http://www.mca.gov.in/MinistryV2/about_mca.html).

<sup>21</sup> The Registrar of Companies regulates company-related matters in India, including incorporation, financing, directors, and shareholders. - <http://www.mca.gov.in/MinistryV2/registrarofcompanies.html>.

<sup>22</sup> Rule 87(1) of the National Company Law Tribunal Rules, 2016.

<sup>23</sup> Rule 86(3) of the National Company Law Tribunal Rules, 2016

<sup>24</sup> Companies Act, No. 18 of 2013, INDIA CODE, Section 245 (5).

<sup>25</sup> The Act enables shareholders to obtain orders from the NCLT (i) restraining the company from committing act in breach of the memorandum or articles of the company/ any provisions of the Act or any other law/ any provisions of the resolution passed by members; or (ii) declaring a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of the material facts or obtained by mis-statement and restraining the company or its directors from acting on such resolution. Companies Act, No. 18 of 2013, INDIA CODE, Section 245(1).

comply<sup>26</sup>—but they can also win compensatory damages from the company, its directors, its auditors, and others.<sup>27</sup> Professor Khanna has worried that the damages provision in the Act does not go far enough. He argues that most of the corporate disputes in India are not shareholder-management disputes like in the United States, but disputes between majority shareholders and minority shareholders: i.e., majority shareholders try to exploit minority shareholders.<sup>28</sup> He argues that the 2013 Act offers no monetary remedy in these situations because it is unclear whether majority shareholders owe fiduciary duties to minority shareholders, and, even if they do, whether majority shareholders fall under the damages provision in the 2013 Act;<sup>29</sup> this provision covers only the company, directors, auditors and any “expert or advisor or consultant or any other person” for “any fraudulent, unlawful or wrongful act or conduct . . . .”<sup>30</sup> He worries that majority shareholders will not be covered under “other persons” because the “tenor” of the Act is to remedy shareholder-management disputes.<sup>31</sup>

This surprises us. Indian public companies commonly have majority shareholders either because they are state-controlled enterprises or because they were historically family-owned businesses.<sup>32</sup> This creates a classic agency cost problem as the actions of the majority shareholder can adversely

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<sup>26</sup> Any company which fails to comply with an order passed by the NCLT under is liable for a punishment with a fine of not less than INR 0.5 million which may extend to INR 2.5 million and every officer of the company in default is liable for a punishment with imprisonment for a term which may extend to 3 years and with fine of not less than INR 25 thousand which may extend to INR 100 thousand. Companies Act, No. 18 of 2013, INDIA CODE, Section 245(7).

<sup>27</sup> *Id.*

<sup>28</sup> Vikramaditya Khanna, *Enforcement of Corporate and Securities Laws in India: The Arrival of the Class Action? In ENFORCEMENT OF CORPORATE AND SECURITIES LAW: CHINA AND THE WORLD*, 348-51 (Robin Hui Huang & Nicholas Calcina Howson eds., Cambridge University Press 2017).

<sup>29</sup> *Id.* at 351.

<sup>30</sup> Companies Act, No. 18 of 2013, INDIA CODE, Section 245, 1(g).

<sup>31</sup> Khanna, *supra* note 28 at 354.

<sup>32</sup> George S. Geis, Can Independent Blockholding Really Play Much of a Role in Indian Corporate Governance?, 3 *Corporate Governance Review* 283, 304-306 (2007) (analyzing share ownership patterns of the 50 largest Indian public companies and finding that 56% of them have majority shareholders and 80% “have at least 30 percent of their shares owned by insiders or the government.”).

impact minority shareholders.<sup>33</sup> This fact must have been well known to regulators and the legislature.

Furthermore, the episode that led to the Act—the Satyam affair—was born of an effort by majority shareholders to take advantage of minority shareholders. It is true that the episode ended with fraud rather than minority exploitation because the acquisition of the target companies was stymied. But do we really think the Indian authorities who enacted the 2013 Act were unconcerned about the events that motivated the episode to begin with? We doubt it. It is a well-established principle to interpret ambiguous language in statutes in light of the purposes behind the legislation.<sup>34</sup> If the Indian authorities wanted to make sure the things that happened in the Satyam episode could not happen again without shareholder compensation, it would be fairly easy to interpret the words “any other person” and “any fraudulent, unlawful, or wrongful act or conduct” to include majority shareholders trying to exploit minority shareholders. Thus, we are not as worried as Professor Khanna about the breadth of the damages provision in the 2013 Act.

### C. Assessment

Compared to private enforcement mechanisms available in much of the world, the 2013 Act puts India in the vanguard. Scholars have identified several metrics by which to measure how robust a nation’s class actions are,<sup>35</sup> and, on all but one of these metrics, the Indian securities fraud class action fares very well. First, there is who can initiate the action: in some countries, individual shareholders are not permitted to bring class action lawsuits; the lawsuits must be brought by investor associations or the government; this obviously limits their use.<sup>36</sup> The Indian class action does not suffer this limitation. Second, there is who is included in the class action:

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<sup>33</sup> *Id.* at 308.

<sup>34</sup> See Antonin Scalia, Reading Law (2012); Subash C. Jain, *Indian Trends In The Interpretative Use Of Legislative History*, 24 STAT. L. REVIEW 63-73 (2003).

<sup>35</sup> See Deborah Hensler, *Can private class actions enforce regulations? Do they? Should they?* in COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 244-45 (Francesca Bignami and David Zaring eds., Edward Elgar Publishing 2016).

<sup>36</sup> *Id.*

in most countries, class members must affirmatively opt in to be included; this obviously limits the size and power of class actions.<sup>37</sup> The Indian class action does not suffer this limitation either. Third, there is what relief can be recovered in the class action: in most countries, compensatory damages are not available; this obviously limits the usefulness of class actions.<sup>38</sup> If we are right about how the 2013 Act should be interpreted vis-à-vis minority shareholders, the Indian class action fares better, here, too. On all these metrics, we rate the Indian securities fraud class action as one of the most robust in the world.

The one metric on which the Indian class action may not fare as well as those in nations like the United States, Canada, and Australia is with regard to how the actions are financed. If shareholders do not have access to adequate financing to bring their class actions, then much of the foregoing is for naught. In the United States, Canada, and Australia, class actions are financed on contingency: either lawyers or third parties invest in the actions and are repaid if successful by collecting a portion of the recovery.<sup>39</sup> This gives shareholders access to capital to fund a large portion of what we call “positive-expected-value” actions—actions for which the expected trial judgment exceeds the class’s litigation expenses.

It is unclear to us whether contingency-financing like this will be available in India. On the one hand, we understand contingency-financing is forbidden from lawyers.<sup>40</sup> On the other hand, it appears such financing may now be available from third parties;<sup>41</sup> if it takes off, shareholders in India may have all the resources they need. If it does not, securities fraud class actions will have to be financed by the shareholders themselves, with the

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<sup>37</sup> Deborah Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 15-16 (2009).

<sup>38</sup> Hensler, *supra* note 33 at 247.

<sup>39</sup> Hensler, *supra* note 35 at 22-25.

<sup>40</sup> Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT’L L. REV. 253, 320.

<sup>41</sup> *Bar Council of India v. A.K Balaji*, (2018) Civil Appeals No. 7875-7879 (2018) at para. 25. A new start-up company in India is dedicated to litigation financing. See <https://www.advok8.in/>.

prospect of recouping their litigation expenses under the loser-pays rule if they succeed.<sup>42</sup> If shareholders are widely dispersed, this makes financing difficult, especially because shareholders are liable for the defendant's litigation expenses if they lose. There is, however, one provision of the 2013 Act that could mitigate the hardship of self-financing, at least to some extent: the Act sets up a public financing mechanism.<sup>43</sup> Although it is too early to tell how much money will be available or what criteria will be used to disperse it, Canada has a fund like this and it has been used with some success.<sup>44</sup> Nonetheless, if we were to make one recommendation to India about how to revise the Act, it would be either to open securities fraud class actions to lawyer contingency-financing (as in the U.S. and Canada) or to grow third-party contingency-financing (as in Australia). With that caveat, we think the 2013 Act is an impressive attempt at private enforcement of the securities laws.

Nonetheless, the early commentators have been very pessimistic at its chances to do much good, and the pessimism is not confined to our concerns about financing. Perhaps the leading assessment has been the article by Professor Khanna.<sup>45</sup> He argues that the 2013 Act will be of "limited value" because of four shortcomings: "(1) the glacial speed of the Indian courts, (2) lack of contingency fees, (3) the limited availability of monetary remedies . . . , and (4) the interaction between ownership structure in India."<sup>46</sup> We addressed the latter three shortcomings above; we agree these could be shortcomings, but we are not as pessimistic that they cannot be overcome. That leaves the most serious shortcoming: the glacial speed of the Indian courts.

A great deal has been written about how slow the Indian court system is. Professor Khanna cited some of this writing and we have read other accounts

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<sup>42</sup> Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L REV. 253, 320.

<sup>43</sup> Companies Act, No. 18 of 2013, INDIA CODE, Section 125, (3)(d).

<sup>44</sup> Catherine Piche, *Public Financiers as Overseers of Class Proceedings*, 12 N.Y.U. J.L. & Bus. 779.

<sup>45</sup> Khanna, *supra* note 28 at 334-35.

<sup>46</sup> *Id.* at 333-58.

ourselves.<sup>47</sup> Perhaps our favorite statistic is this one: the average civil appeal in some courts takes over six years to complete!<sup>48</sup>

The causes appear to be many. First, there is a lack of judges: “India has one of the world’s lowest ratios of judges to population in the world, with only 13 judges for every million people, compared with 50 in developed nations. As a result, scores of cases are heard every day, which leads to a large number of adjournments, judges passing cases between them, and increasingly long queues of people waiting outside courtrooms on the off-chance that their case is heard.”<sup>49</sup> One reason there are so few judges is because judges are apparently not paid very well (much less than lawyers); we understand this has led to a steady decline in the number of people who want to become judges.<sup>50</sup>

Second, lawyer compensation. We understand that lawyers charge by “appearance,”<sup>51</sup> which is not unlike charging by the hour. Charging by the hour or by appearance gives lawyers an incentive to drag cases out so they can make more money. One of the virtues of the contingency fee system—besides the one noted above of opening the plaintiff side of litigation to financing—is that it gives lawyers an incentive to wrap things up quickly so they can get paid.

Third, inefficient procedural rules. We understand that the judges in India freely grant lawyers adjournments that would not be tolerated in other

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<sup>47</sup> Hiram E. Chodosh, Stephen A. Mayo, A.M. Ahmadi & Abhishek M. Singhvi, *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. Int’l L. & Pol. 1 (1998); Barry Bearak, *In India, the Wheels of Justice Hardly Move*, N.Y. TIMES, June 1, 2000.

<sup>48</sup> *How To Speed Up Judiciary: Let’s Make India’s Slow Courts World Class*, ECONOMIC TIMES (May 16, 2017, 10:45 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/how-to-speed-up-judiciary-lets-make-indias-slow-courts-world-class/articleshow/58693205.cms>.

<sup>49</sup> Vidhi Joshi, *India’s Long Wait for Justice: 27m Court Cases Trapped In Legal Logjam*, THE GUARDIAN (May 5, 2016), <https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam>.

<sup>50</sup> Chodosh et. al, *supra* note 44 at 47; Joshi, *supra* note 46.

<sup>51</sup> Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. REV. 173, 184 n.50.

countries.<sup>52</sup> Some commentators think these adjournments alone costs India's economy trillions of rupees every year.<sup>53</sup> Similarly, the Code of Civil Procedure does not require litigants to appear in court in person. Instead, litigants can send a "pleader" in their stead.<sup>54</sup> But the pleader cannot accept certain filings; hence, pleaders are often sent as a strategy to delay judgments.<sup>55</sup> Finally, the Code is less flexible than in other countries, and the lack of flexibility can lead risk-averse lawyers to over litigate. For example, litigants are not allowed to amend their original pleadings, which have lead to prolific filings that bog down rather than speed up proceedings.<sup>56</sup>

Of course, none of this was lost on the Indian authorities who enacted the 2013 Act. Their solution was to channel all securities fraud class actions to a special court, the NCLT. The NCLT is a new court. Although it was created in 2002,<sup>57</sup> it was under a constitutional cloud until 2015.<sup>58</sup> But it has now been up and running for a few years, currently with 11 benches in different regions of India, with the principal bench in New Delhi.<sup>59</sup> Thus, it is too early to tell whether the new court will be affected by the same malaise that affects most other courts in India. But India has other special courts, and

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<sup>52</sup> *Supra* note 16; Daksh, *Access to Justice Survey 2015-16*, (August 10, 2016, 6:00 PM) <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>.

<sup>53</sup> Vidhi Joshi, *India's Long Wait for Justice: 27m Court Cases Trapped In Legal Logjam*, THE GUARDIAN (May 5, 2016), <https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam>.

<sup>54</sup> Matthieu Chemin, *Does the Quality of the Judiciary Shape Economic Activity? Evidence from India* (October 11, 2004) <http://sticerd.lse.ac.uk/dps/03122004/chemin.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Afra Afsharipour, *Corporate Governance Convergence: Lessons From The Indian Experience*, NW. J. INT'L L. & BUS. 335, 360; *see also* Vikramaditya Khanna, *Regulating Squeeze-Outs in India: A Comparative Perspective*, 63 AM. J. COMP. L. 1009, 1018 n. 48.

<sup>58</sup> *Madras Bar Association v. Union of India* (2015), Writ Petition No. 1072 (India).

<sup>59</sup> *Organisation*, National Company Law Tribunal, 2017 <https://www.nclt.gov.in/content/national-company-law-tribunal>.

they have not escaped the problems we identified above.<sup>60</sup> For this reason, commentators like Professor Khanna are pessimistic that the NCLT will fare any better.<sup>61</sup> He may be right: as far as we can tell, there have been very few securities fraud class actions filed under the 2013 Act.<sup>62</sup> This is despite the fact that India has thousands of publicly-traded companies.<sup>63</sup> By comparison, in the United States, roughly 2% of public-traded companies are sued for securities fraud every year,<sup>64</sup> and the best estimates are that there are three times as many securities fraud violations as there are lawsuits.<sup>65</sup>

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<sup>60</sup> Marc Galanter and Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, chapter 3 in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, editors Erik G. Jensen and Thomas C. Heller, Stanford University Press (2003) (discussing the congestion of the Indian courts and unsuccessful attempts to use alternative court systems as a method of avoiding the logjams).

<sup>61</sup> Khanna, *supra* note 28 at 354-55.

<sup>62</sup> According to the NCLT website as of December 2016, only two actions had been filed: *K N Pillai v. R Prasanth* (Mumbai Bench) and *Vijaykumar v. SPM Exports Pvt. Ltd.* (Bangaluru Bench). As of November 2018, we found only nine more: *Jacob Mathew Vs. A.V. George and Ors.* Mr. Samvid Legal (384/245/PB/2018); *Zetatek Technologies Pvt. Ltd Vs. Gagan Aerospace Ltd & Ors* (87/245/PB/2018); *Atul Khanna Vs. Union of India & Ors.* (109/245/PB/2018); *Shumanto Gupta Vs. Ablaze Info Solutions Pvt. Ltd & Ors.* (408(ND)/2017); *Kamlesh Kumar Sen & Ors Vs. Gee Pee Hi Tech Industries Ltd & Ors* (124/245(1)/PB/2018); *Abhimanyu Singh & Ors Vs. Brijnandan Industries Pvt. Ltd. & Ors* (129/245/PB/2018); *Shiv Sevak Singh Vs. Ablaze Info Solutions Pvt. Ltd. & Ors* (408(ND)/2017); *UCO Bank Vs. Shree Shyam Pulp And Mills Ltd.* (129/245/PB/2018); *Mr. Sanjay Lalchand Siriah Vs. M /s White Street Engineering Solutions Pvt Ltd & Ors* (212/245/NCLT/MB/MAH/2017).

<sup>63</sup> N. Balasubramanian and R.V. Anand, *Ownership Trends in Corporate India 2001-2011 Evidence and Implications*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303684](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303684), at 12 (as of 2011, India had 1657 publicly traded companies).

<sup>64</sup> Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 *Geo. L.J.* 1795, 1801 (2007).

<sup>65</sup> See Dyck, I.J. Alexander and Morse, Adair and Zingales, Luigi, *How Pervasive is Corporate Fraud?* (February 22, 2013). Rotman School of Management Working Paper No. 2222608. Available at SSRN: <https://ssrn.com/abstract=2222608> or <http://dx.doi.org/10.2139/ssrn.2222608>

If a special court cannot save the Indian securities fraud class action, what can? Professor Khanna suggested arbitration as an answer.<sup>66</sup> As we explain in the next part, we think he is right. Although Professor Khanna did not specify what kind of arbitration he had in mind, the United States has experience with class action arbitration, and we think it could work well in India.

### III. Class Action Arbitration

#### A. Background

Arbitration is a well-established private dispute mechanism in the United States. Parties choose whether to send their dispute to one or more arbitrators and whatever result is reached is respected by our court system and entitled to all the same res judicata effect of a court judgment.

The virtues of arbitration are well known. The parties are allowed to specify their own procedural rules; thus, they can specify rules that streamline litigation and save them money.<sup>67</sup> The cases are handled by

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<sup>66</sup> Khanna, *supra* note 28 at 356-67.

<sup>67</sup> S.I. Strong, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 297 (2013) (“ ‘Runaway juries’ are one reason why U.S. class actions are considered unduly risky and expensive by the corporate community and the elimination of jury trials might well lead to lower awards. Removing the threat of a jury should also have a moderating effect on settlement negotiations, since the parties’ discussions will operate within a much more realistic framework.”); *see also* Sarah Clasby Engel & Sherry Tropin, *Class Action Arbitration: A Plaintiff’s Perspective*, 5 FIU L. REV. 145, 150 (2009) (“Rule 21 of the AAA Commercial Arbitration Rules governs the exchange of information between the parties in commercial arbitration under its auspices: at the arbitrator’s discretion or at the request of the parties, the arbitrator directs document production and identification of witnesses to be called.”); Stephen J. Ware, *The Case For Enforcing Adhesive Arbitration Agreements-with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 258 (2006) (discussing how savings from lower “process costs” of arbitration can be passed down to consumers and employees); *See* Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual*

professionals selected by the parties; thus, the parties do not have to take their chances before an idiosyncratic judge or jury.<sup>68</sup> The proceedings can remain confidential, thus avoiding negative publicity.<sup>69</sup> Arbitrators have greater flexibility in fashioning remedies and applying procedural rules.<sup>70</sup> Arbitration can overcome jurisdictional hurdles and resolve similar disputes

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*Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1210 (2013) (“Wronged stockholders [in individual arbitrations] will receive quicker payment--although the average federal securities class action takes more than four years to settle, studies on arbitration have found it is two to three times faster than similar litigation.”); S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 508 (2010) (“As it turns out, empirical evidence suggests that although U.S. class arbitrations tend to take more time than bilateral arbitrations, class arbitration takes less time than class action litigation. Thus, to the extent that a dispute must be resolved on a collective basis, defendants may be better off in arbitration rather than in court.”).

<sup>68</sup> Strong, *supra* note 67, at 299 (“Indeed, many parties prefer arbitration because they can choose experienced panelists with particular expertise in the subject matter at hand. As a result, a properly selected arbitral tribunal may be less likely to make an error that a judge who does not specialize in the issues at bar.”); Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 51 (2010) (“[T]he central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs.”).

<sup>69</sup> Strong, *supra* note 67, at 300 (“[P]arties, even to large-scale disputes, may prefer to adopt private and confidential procedures so as to avoid negative publicity that could injure their corporate reputation and goodwill.”); Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451, 470 (2005) (“Confidentiality is usually heralded as the biggest advantage of choosing an ADR procedure, including arbitration, over litigation.”).

<sup>70</sup> Blankley, *supra* note 69, at 467 (“Arbitrators are not required to follow the law when making their decisions. One of the ‘benefits’ of arbitration is that an arbitrator is allowed to consider the equities of a case, even if those equities are contradictory to the law”); Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 95-96 (2007) (noting the flexibility arbitrators have in fashioning appropriate remedies and implementing innovative procedures that courts have been hesitant to accept).

in a single forum.<sup>71</sup> Enforcement of arbitration awards tends to be faster and less costly and many awards are complied with voluntarily.<sup>72</sup>

There are, of course, downsides to arbitration as well. If one party has more bargaining power than the other, they may select procedural rules and a pool of arbitrators that are biased in one party's favor.<sup>73</sup> In addition, because the parties must pay the arbitrators, arbitration can be more expensive than litigation in some respects.<sup>74</sup> Moreover, confidential proceedings undermine the deterrent value of litigation by hiding wrongdoing from the public.<sup>75</sup> Finally, if too many cases go to arbitration, it can retard the evolution of the law in the court system.<sup>76</sup>

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<sup>71</sup> Strong, *supra* note 67, at 289, 298 (“Arbitration provides an appealing alternative to problems associated with jurisdiction, since parties to an arbitration agreement grant jurisdiction over the matter to the arbitral tribunal as a matter of consent.”).

<sup>72</sup> See Strong, *supra* note 67, at 301 (a bigger advantage in international arbitration).

<sup>73</sup> Theodore Eisenberg et. al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 872-73 (2008); See Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1216-17 (2013) (“Some critics have cited arbitration and other forms of alternative dispute resolution as having an industry bias....”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005); see also Christopher R. Drahozal, *Unfair “Arbitration Clauses”*, 2001 U. ILL. L. REV. 695, 732 (2001) (surveying arbitration clauses in franchisor agreements and specific provisions governing selection of arbitrators). This concern has not appeared to come to fruition in securities arbitration.

<sup>74</sup> Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 335.

<sup>75</sup> Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (2004); Laurie Kratky Dore, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine In On Alternative Dispute Resolution*, 81 CHI. KENT L. REV. 463.

<sup>76</sup> Bruce Hay, Christopher Rendall-Jackson, and David Rosenberg, *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1944-46.

Nonetheless, the growing popularity of arbitration in the United States shows that many people see arbitration as, on balance, a net positive. Many consumers, employees, and business now enter into contracts that say in the event a dispute arises with the counterparty, the dispute will be sent to arbitration if either party so chooses.

Although most of the disputes that go to arbitration are one-on-one disputes, it is possible to bring class-wide disputes to arbitration, and, for a time, it was done regularly in the United States. It is not done much anymore in the United States because the Supreme Court has ruled that companies are allowed to ban class actions in their arbitration proceedings if they want to, forcing plaintiffs who sue them into one-on-one arbitration.<sup>77</sup> Because one-on-one arbitration is less threatening to companies than class-wide arbitration, companies are now rewriting their arbitration clauses to ban class actions.<sup>78</sup> We have decried this practice because it basically insulates companies from class action liability, neutering the private enforcement of the law.<sup>79</sup> But before the Supreme Court allowed companies to do this, there were many years of experience with class arbitration in the United States. We describe that experience here and explain why it might be the best solution to the concern with sluggish courts in India.

## B. Class Arbitration in the United States

Class arbitration is basically a class action that takes place in arbitration rather than court. Like a class action in a court, a class representative seeks to assert claims on her own behalf as well as on the behalf of absent class members.<sup>80</sup> Yet, a neutral arbitrator or panel of arbitrators selected and paid

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<sup>77</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>78</sup> Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress*, March 2015, [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>79</sup> Brian Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015).

<sup>80</sup> See Strong, *supra* note 67, at 150 (quoting another source) (“[A]rbitration is a process by which parties consensually submit a dispute to a non-governmental decision maker, select by and for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.”); see also S.I. Strong, *Does Class Arbitration “Change the*

for by the parties typically makes all the decisions that would be entrusted to a judge.<sup>81</sup> Class arbitration first emerged in the United States in the 1980's<sup>82</sup> and received its blessing from the U.S. Supreme Court in 2003.<sup>83</sup>

Although the parties can specify their own rules for class arbitration by contract, the large arbitration organizations like the American Arbitration Association (“AAA”) have adopted their own default class arbitration rules, and these rules are modeled on the rules that govern in federal court.<sup>84</sup> The following are the three phases of a class arbitration under the AAA’s rules:

- **Clause Construction Award.** The arbitrator first determines as a “threshold matter” whether the applicable arbitration clause permits the arbitration to proceed as a class proceeding.<sup>85</sup> After this “award” is rendered, the arbitrator must stay proceedings for at least thirty

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*Nature" of Arbitration? Stolt-Nielsen, at&t, and A Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 211 (2012) (distinguishing class arbitration from other multiparty proceedings and proving a “working definition” of class arbitration).

<sup>81</sup> See Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1103 (2012).

<sup>82</sup> See Strong, *supra* note 67, at 9; see also Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 21-22 (2012).

<sup>83</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion).

<sup>84</sup> AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003) [hereinafter AAA Rules], available at <https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf>; JAMS, Class Action Procedures (effective May 1, 2009) [hereinafter JAMS Procedures], available at [http:// https://www.jamsadr.com/rules-class-action-procedures/](http://https://www.jamsadr.com/rules-class-action-procedures/) (last visited July 6, 2018). The National Arbitration Forum (NAF) once had its own procedures but has since stopped administering class arbitrations. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 72 (2000) (“Indeed, one arbitration provider, the National Arbitration Forum (NAF), has marketed its rules to corporations in part with the assurance that its rules do not allow for class actions.”).

<sup>85</sup> AAA Rules, *supra* note 84, rule 3.

days to “permit any party to move a court of competent jurisdiction to confirm or to vacate the [award].”<sup>86</sup>

- **Class Determination Award.** The arbitrator then determines whether to certify the proposed class using criteria that parallel Fed. R. Civ. P. 23 for numerosity, commonality of questions of law and fact, typicality, and adequacy of representation.<sup>87</sup> In addition to these criteria, the arbitrator may certify a class only if “each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.”<sup>88</sup> The arbitrator’s class certification determination must be set forth in a “reasoned, partial final award.”<sup>89</sup> And again, the rules provide for another thirty day stay of all proceedings to permit any party to seek judicial review of this “award.”<sup>90</sup>
- **Final Award.** After notice “given to all members who can be identified through reasonable effort” is given, the arbitration moves to the merits phase.<sup>91</sup> Whether favorable to the class or not, the final award must define the class with specificity, state to whom notice was sent, and identify who (if anyone) elected to exclude herself

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<sup>86</sup> AAA Rules, *supra* note 84, rule 3.

<sup>87</sup> AAA Rules, *supra* note 84, rule 4. For a detailed discussion comparing the language of the AAA Rules, the JAMS Procedures, and Fed. R. Civ. P. 23, see Strong, *supra* note 1, at 50.

<sup>88</sup> AAA Rules, *supra* note 84, rule 4(a)(6).

<sup>89</sup> AAA Rules, *supra* note 84, rule 5; *see also* Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031, 1040 (2017) (“The Rules require that class arbitration dockets and decisions be public and set out a series of three decisions that the arbitrator must issue. These decisions are known as awards. The first two are procedural decisions. These awards are known as ‘partial awards’ rather than ‘full’ awards, which would decide the merits. If the arbitrator does not plan to revisit a decision, an award is called a ‘final award,’ so a final procedural decision would be a ‘partial final award.’”).

<sup>90</sup> AAA Rules, *supra* note 84, rule 5(d).

<sup>91</sup> AAA Rules, *supra* note 84, rule 6(a).

from the class.<sup>92</sup> The arbitrator must approve any settlement or voluntary dismissal and conduct a fairness hearing.<sup>93</sup> The arbitrator also rules on requests for exclusion from and objections to the settlement.<sup>94</sup> Judicial review of the final award is permitted as well.

The two main costs of class arbitration are filing/administrative fees and arbitrator compensation. The AAA rules provide for a “preliminary filing fee of \$3,350” to be paid by the party bringing the class arbitration.<sup>95</sup> If the arbitration proceeds beyond the clause construction phase, that party shall pay a “supplemental fee . . . calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule in [commercial cases].”<sup>96</sup> For example, if the amount of the claims in the class arbitration ranges from \$1 million to less than \$10 million, an additional \$8,475 fee is incurred.<sup>97</sup> Arbitrator compensation and hearing room rental fees are not included in these administrative fees.<sup>98</sup> Anecdotal evidence<sup>99</sup> suggests that AAA arbitrators can charge anywhere from \$350 to \$1,150 per hour.<sup>100</sup> The arbitrator has discretion to shift fees based on the arbitration agreement or applicable law.<sup>101</sup>

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<sup>92</sup> AAA Rules, *supra* note 84, rule 5(d).

<sup>93</sup> AAA Rules, *supra* note 84, rule 8(a)(3).

<sup>94</sup> AAA Rules, *supra* note 84, rule 8(d).

<sup>95</sup> AAA Rules, *supra* note 84, rule 11.

<sup>96</sup> *Id.*

<sup>97</sup> AAA, Commercial Arbitration Rules and Mediation Procedures: Administrative Fee Schedules (amended and effective May 1, 2018), *available at* [https://www.adr.org/sites/default/files/Commercial\\_Arbitration\\_Fee\\_Schedule\\_0.pdf](https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_0.pdf)

<sup>98</sup> *Id.*

<sup>99</sup> Neither AAA nor JAMS publishes its rosters of arbitrators and their fees.

<sup>100</sup> Deborah Rothman, *Trends in Arbitrator Compensation*, DISPUTE RESOLUTION MAGAZINE (Spring 2017), [https://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/spring2017/3\\_rothman\\_trends\\_in\\_arbitrator\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator_authcheckdam.pdf).

<sup>101</sup> AAA Rules, *supra* note 84, rule 11(b) (“Disputes regarding the parties’ obligation to pay administrative fees or arbitrator’s compensation pursuant to applicable law or the parties’ agreement may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator

The AAA requires at least one arbitrator to be selected from a special roster of arbitrators experienced in class proceedings.<sup>102</sup> AAA arbitrators in general have a minimum of 10 years of senior-level business or professional experience or legal practice.<sup>103</sup> Many are former federal and state judges.<sup>104</sup>

The AAA is the largest arbitration association in the United States and it keeps an online docket of all class arbitrations it has administered.<sup>105</sup> As of July 6, 2018, the docket contains 517 total class arbitrations composed of 75 pending and 442 closed arbitrations.<sup>106</sup> The earliest class arbitration is dated Dec. 18, 2002. The most recent is dated May 31, 2018.<sup>107</sup>

Table 1 presents detailed summary statistics on the 283 AAA class arbitrations filed from 2003 to sometime in 2009.<sup>108</sup> Table 1 shows that in the 135 class arbitration where a clause construction award was rendered, class proceedings were permitted 70% of the time. Table 1 also shows that of the

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appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.'').

<sup>102</sup> AAA Rules, *supra* note 84, rule 2(a) (requiring at least one arbitrator to come from the class arbitrator roster).

<sup>103</sup> AAA, Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, [https://www.adr.org/sites/default/files/document\\_repository/Qualification\\_Criteria\\_for\\_Admittance\\_to\\_the\\_AAA\\_National\\_Roster\\_of\\_Arbitrators.pdf](https://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf).

<sup>104</sup> AAA, Arbitrators & Mediators, <https://www.adr.org/aaa-panel> (last visited July 6, 2018).

<sup>105</sup> AAA, Class Action Case Docket, <https://tinyurl.com/yactk68u> (last visited June 29, 2018). Even though the online docket is publically available, an arbitration-level analysis would be time consuming as each case docket contains PDFs of awards and demands sorting and filtering is allowed by only a few fields (case type, case status, date received, etc.). I am yet to find a study in the literature that has the same type of granular summary statistics on a larger, more up-to-date sample of AAA class arbitration than the 283 the AAA analyzed in its amicus brief.

<sup>106</sup> *Id.*; see also Gregory A. Litt & Tina Praprotnik, *After Stolt-Nielsen, Circuits Split, but AAA Filings Continue*, 27 MEALEY'S INT'L ARB. REP. 1, 1 (2012) (charting AAA class arbitrations filed between 2003 and 2012 on an annual basis).

<sup>107</sup> AAA, *supra* note 105.

<sup>108</sup> See the notes accompanying Table 1 on the uncertainty of the end date of the analysis.

48 class arbitrations where a class certification award was rendered, roughly half granted class certification.<sup>109</sup> The data also show that, although there were a good number of business-to-business class arbitrations, the most common class arbitrations were consumers suing businesses.

Interestingly, very few of these arbitrations reach the final stage. As of July 6, 2018, there have been only 8 “merits awards,” with 4 of them approval of settlements or partial settlements.<sup>110</sup> We do not know what happened to the other arbitrations where class certification was granted; they may still be ongoing.

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<sup>109</sup> See Engel & Tropin, *supra* note 67, at 151 (“The AAA’s brief filed in *Stolt-Nielson* appears to indicate a greater likelihood of class certification in arbitration than in class action litigation. Once class certification is granted, corporate defendants have a greater incentive to enter into serious settlement negotiations. While class action arbitration may not be the expeditious procedure contemplated when arbitration law was developed, a faster resolution than in litigation may still be likely.”).

<sup>110</sup> AAA Class Action Case Docket, *supra* note 105 (filtered for award type as “merits awards”).

**Table 1**  
**Summary Statistics of 283 AAA Class Arbitrations**  
**Filed from Oct. 8, 2003 to Sometime in 2009\***

<u>Criteria</u> (1)	<u>Count</u> (2)	<u>% of Category</u> (3)
<b><u>Clause Construction Awards</u></b>		
Permitting Class Proceedings	95	70%
Denying Class Proceedings	7	5%
Stipulation That Agreement Permitted Class Proceedings	<u>33</u>	24%
<b>Total</b>	<b>135</b>	
<b><u>Class Determination Awards</u></b>		
Granting Class Certification	24	50%
Denying Class Certification	18	38%
Stipulation to Certify A Class	<u>6</u>	13%
<b>Total</b>	<b>48</b>	
<b><u>When Arbitrations Were Settled/Withdrawn/Dismissed</u></b>		
Pre-Clause Construction Award	97	60%
Post-Clause Construction and Pre-Class Determination	40	25%
Post-Class Determination Award	23	14%
Consolidated into Other Class Arbitration	<u>2</u>	1%
<b>Total</b>	<b>162</b>	
<b><u>Number of Arbitrators</u></b>		
One Arbitrator	190	83%
Three Arbitrators	<u>38</u>	17%
<b>Total</b>	<b>228</b>	
<b><u>Type of Dispute</u></b>		
<b><i>Business to Business</i></b>		
Franchise	21	26%
Healthcare	20	25%
Financial Services	9	11%
Other	<u>31</u>	38%
<b>Subtotal</b>	<b>81</b>	
<b><i>Business to Individual</i></b>		
Consumer	106	52%
Employment	<u>96</u>	48%
<b>Subtotal</b>	<b>202</b>	

**Source:** Data obtained from Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 8-1198), 2009 WI 2896309.

\* The AAA's amicus brief is unclear on the exact start and end date of its analysis: "In the nearly six years that the Class Rules have been in effect, the AAA has administered 283 class arbitrations, 121 of which remain active." The AAA class arbitration rules went into effect on October 8, 2003 and the amicus brief was filed on Sept. 4, 2009.



### C. Special Concerns with Class Arbitration

One of the reasons the Supreme Court let companies escape class actions in arbitration is because the Court thought that class arbitration did not reap many of the benefits of individual arbitration.<sup>111</sup> As we noted, although the parties could create their own rules, the AAA's rules largely mirror the class action rules in federal court. It is not clear whether this makes class arbitration any cheaper or quicker. For example, the AAA reported for the cases in Table 1 "[t]he median time from the filing of an arbitration to the Clause Construction Award [was] 281 days and a mean of 313 days. The median time from the Clause Construction Award to the Class Determination Award [was] 416 days and a mean of 501 days. For all 162 closed cases, the median time frame from filing to settlement, withdrawal, or dismissal [was] 583 days with a mean of 630 days."<sup>112</sup> These durations may not be any quicker than class actions in court, which are settled in less than three years, on average.<sup>113</sup>

Another example is confidentiality. Under the AAA's rules, class arbitrations are not entirely confidential proceedings.<sup>114</sup> It is not clear how they could be. After all, class members must be notified of the proceedings in order to have a chance to protect their rights. This makes class arbitration very different from individual arbitration.

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<sup>111</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration--its informality").

<sup>112</sup> AAA Brief cited in Table 1 at \*24.

<sup>113</sup> See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010).

<sup>114</sup> AAA Supplementary Rules for Class Arbitrations R-9, available at <https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf> (last visited June 29, 2018); see also *Stolt-Nielsen*, 559 U.S. at 686 (noting that one of the critical differences between class arbitration and bilateral arbitration is the presumption of privacy). But see S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 46 (2008) (noting that, unlike the AAA, JAMS does not remove the presumption of confidentiality in class arbitrations and does not maintain a public docket of class arbitrations).

A separate concern is that, per a federal statute, judicial review of arbitration decisions is very constrained. Although the AAA rules allow for appeals at three different points, judges can't do much on these appeals. Under the Federal Arbitration Act, judges can overturn arbitration awards only if there has been fraud or other misconduct perpetrated on the arbitrator; mistakes by the arbitrator are not grounds for reversal.<sup>115</sup> This is concerning because one of the most important roles that judges play in class actions is to protect absent class members from exploitation by class counsel and the defendant. Absent class members do not have a role in selecting arbitrators<sup>116</sup>—arbitrators are selected before class certification, and, in any event, absent class members are, well, absent—and some commentators worry the arbitrators will not look out for absent class members like judges do.<sup>117</sup> This concern is magnified if the arbitrators' compensation comes from

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<sup>115</sup> Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 502 (2011) (“The primary criticisms of class arbitration are that it...requires courts to use a more deferential standard to review class certification decisions and class arbitration awards than the abuse of discretion standard used to review trial court decisions...”); Peter B. Rutledge & Christopher R. Drahozal, *“Sticky” Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 973 (2014) (“For franchisors, the lack of an appeals process is a very serious cost of using an arbitration clause and an arbitral class waiver.”); Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 436 (2013) (“Arbitration awards are hard to reverse, and intentionally so. Three of the four grounds for vacatur are basic rules of fairness, as much process as Congress has seen fit to impose on arbitration.”).

<sup>116</sup> Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1772-73 (2006). Professor Weston is likely referring to the preliminary “clause construction” phase of AAA class arbitrations pursuant to Rule 3 of the AAA Supplementary Rules for Class Arbitrations. In this phase, the arbitrator must rule whether the arbitration can proceed as a class arbitration based on the parties' agreement before reaching class certification issues. *See* note 10 and accompanying text.

<sup>117</sup> Weston, *supra* note 116, at 1772-73; *see also* Sternlight, *supra* note 84, at 111-12 (“In a nonclass arbitration, the arbitration clause typically will allow plaintiff and defendant jointly to select the arbitrator. Yet, in a class action, presumably the named plaintiff, or more likely the class attorney, will choose an arbitrator or arbitrators on behalf of the absent class plaintiffs.”).

the defendant and class counsel.<sup>118</sup> If courts could more meaningfully review the decisions critical for absent class members—certification, settlement, attorneys’ fees—commentators would be less concerned. But that review is not possible under American law.

The lack of meaningful judicial review is a concern not just for absent class members but for defendants as well. Class action cases tend to be very high stakes because the size of class-wide damages can threaten companies will substantial liability. If the arbitrators make a million- or billion-dollar mistake, defendants rest more easily if they can get the mistake fixed. But, again, that is not possible. This is one of the facts that led the Supreme Court to deem arbitration as incompatible with class actions.<sup>119</sup> Commentators, too, have been skeptical companies would ever prefer class arbitration to class action litigation in court.<sup>120</sup>

#### **IV. Class Arbitration in India?**

Despite the shortcomings listed in the previous Part, we think securities fraud class arbitration can solve many of the problems with the Indian court system that have made commentators pessimistic about the new securities fraud class action.

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<sup>118</sup> Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309, 310 (2011); *see also* Thomas A. Doyle, *Protecting Nonparty Class Members in Class Arbitrations*, 25 ABA J. LAB. & EMP. L. 25, 30 (2009) (discussing the same two potential conflicts of interest) (“Imagine an arbitrator facing a similar contest over who will be class counsel--after adding the complicating facts that one of the candidates for class counsel helped select the arbitrator and has advanced arbitrator fees for the proceeding. The situation is rife with potential conflicts of interest.”).

<sup>119</sup> *AT&T*, 563 U.S. at 350-51 (“The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect....”).

<sup>120</sup> Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. on Disp. Resol. 433, 450 (2010); *see also Concepcion*, 563 U.S. at 351 (“We find it hard to believe that defendants would bet the company with no effective means of review....”).

First, consider the inefficient procedural rules in the Indian court system. In arbitration, the parties will be free to devise their own procedural rules, including rules allowing for more flexible pleadings as well as to prohibit plentiful adjournments and delays caused by litigants who fail to appear in person. Although class arbitration may not be any faster than class action litigation in the United States, that is because the rules in arbitration largely mirror those in court. India, by contrast, can use arbitration to avoid its inefficient court rules.

Second, consider the shortage of judges in Indian courts. There will be no shortage of arbitrators because the parties will select as many arbitrators as they need and compensate them for whatever time they need to spend on their cases.

We are less sure that arbitration can significantly change how Indian lawyers are compensated in order to encourage them to speed cases along. We assume it would be unlawful to pay lawyers who arbitrate with contingency fees any more than it would be to pay lawyers who litigate in court. Nonetheless, as we noted above, we think India should rescind its prohibition on contingency fees.

Moreover, we do not believe the concerns with class arbitration in the United States should discourage India from trying it for itself. We have already said that we believe arbitration will be faster than litigation in India if the parties tweak the rules in arbitration. In addition, it should be remembered that, unlike the court system, arbitration is not free to the parties: they have to pay the arbitrator by the hour in the United States. We think this will make it especially unlikely sclerosis will set it.

Nor are we concerned about the lack of confidentiality in class arbitration; there is probably too much confidentiality to begin with in arbitration; it is good that class members and the public can see what is going on in class arbitration.

Finally, if the lack of judicial review in the United States is deemed a problem, then the solution in India is simply not to adopt the constrained judicial review of the Federal Arbitration Act. But we think India should be careful here: much of the gain of using arbitration to avoid the Indian court system will be lost if India reintroduces the court system on appeal. Thus, whatever judicial review is allowed, it should be something less than the

ordinary review of the Indian court system. As we noted above, some appeals take six years to resolve in that court system.

Our bigger concern is that Indian companies will have no reason to agree to class arbitration because the Indian court system is so slow that it deters shareholders from filing securities fraud class actions at all; why would companies wish to facilitate securities fraud actions against them by agreeing to arbitration? They probably won't, which means that India may have to enact legislation that gives *either side* of a securities dispute the right to invoke arbitration. If the parties know that either side can invoke arbitration, this will give both of them the incentive to specify the terms of any arbitration beforehand. In this regard, we are recommending a different path from the one taken in the United States where both sides must agree to arbitration. Nonetheless, we think the difference will be necessary to bring corporations along.

And that is not the only difference we recommend. Unlike the United States, India may not wish to give the parties complete *carte blanche* in fashioning procedural rules. In the United States, companies used this *carte blanche* to insulate themselves from class actions altogether; it would obviously defeat the purpose of this entire line of inquiry if Indian companies could do the same. Thus, Indian legislation may need to require that any arbitration for securities fraud violations includes access to the class action device specified in the 2013 Act.

## **V. Conclusion**

Although, as we have explained, India has now enacted one of the most robust private enforcement devices for shareholder-management disputes in the world, commentators are very pessimistic that it will do much good because the Indian court system is notoriously unhurried. Indeed, very few shareholder class actions have been filed in the five years since the Companies Act of 2013 has become law. We believe the solution to this problem is not to try to reform the Indian court system but to send the actions to private arbitration. Indeed, until our Supreme Court allowed companies to evade class actions altogether through arbitration clauses, the United States had a great deal of experience resolving class disputes through arbitration.

We believe that, with some tweaks, this experience points a way forward in India toward fertile use of Section 245 of the Companies Act.