DESIGN EARLY OR INHERIT THE CRISIS: MASS ARBITRATION IN THE UNITED STATES AND COLLECTIVE ARBITRATION IN BRAZIL

Bruno Meyerhof Salama* and Flávio Luiz Yarshell**

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Abstract. When legal systems suppress collective litigation without addressing the conditions that generate collective claims, aggregation pressures do not disappear — they migrate. The rise of mass arbitration in the United States illustrates this dynamic: judicial enforcement of class action waivers displaced formal aggregation without eliminating its underlying drivers, producing coordinated waves of individualized arbitration demands that strained institutions designed for bilateral dispute resolution. This was not a retreat from arbitration doctrine, but an institutional stress test under conditions of scale.

This Article uses that experience to examine Brazil, where analogous pressures are emerging — particularly in corporate and capital markets contexts where mandatory arbitration clauses bind dispersed investors — but have not yet produced systemic strain. Three conclusions follow. First, aggregation pressures can arise even where doctrinal foundations remain stable, as prevailing doctrine displaces rather than accommodates collective claims. Second, while arbitral institutions can mitigate coordination and capacity problems through procedural design, questions of representation and the binding effects of arbitral awards turn on issues of authority that institutional practice alone cannot resolve. Third, in a pre-crisis setting such as Brazil's, these limits create an opportunity for institutional planning, allowing responses to scale to be considered in advance rather than improvised under stress.

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1. Introduction

In recent years, arbitration systems originally designed for bilateral dispute resolution have increasingly been confronted with large-scale aggregation pressures. Nowhere has this tension been more visible than in the United States, where the widespread enforcement of class action waivers prompted a strategic adaptation by claimants: the coordinated filing of thousands of individualized arbitration demands against a single respondent. This phenomenon, commonly described as mass arbitration, did not alter the doctrinal foundations of arbitration, but it fundamentally reshaped its institutional functioning, exposing the fragility of arbitral frameworks ill-equipped to manage collective dynamics without formal mechanisms of aggregation.

The rapid expansion of mass arbitration in the United States generated significant operational strain for arbitral institutions, imposed substantial front-loaded cost burdens on corporate respondents, and triggered a wave of reactive procedural redesigns by arbitral providers and contract drafters. These developments reveal a broader institutional lesson: when legal systems suppress formal aggregation without addressing the underlying economic and structural drivers of collective claims, aggregation may re-emerge through procedural workarounds that destabilize dispute resolution systems. More fundamentally, aggregation pressures in arbitration expose unresolved questions of authority and representation, including who may legitimately aggregate claims and under what conditions arbitral awards may bind parties beyond those formally before the tribunal.

Brazil offers a contrasting vantage point. While collective arbitration remains formally underdeveloped, the increasing use of mandatory arbitration in capital markets and corporate governance, particularly in disputes involving dispersed shareholders of listed companies, suggests that similar aggregation pressures may arise. Unlike the United States, however, Brazil remains at a pre-crisis stage, where legal and institutional design choices can still be made before collective dynamics overwhelm arbitral systems built for individualized adjudication.

This paper contributes to the literature on arbitration[1] by examining how collective claims re-enter arbitral systems designed for bilateral disputes, and by assessing the

* Bruno Meyerhof Salama, Lecturer, UC Berkeley School of Law and Professor of Law, FGV Law School in São Paulo. Arbitrator and legal expert.
** Flávio Luiz Yarshell, Full Professor at the University of São Paulo Law School. Attorney and arbitrator.

practical and institutional consequences of that re-entry. Rather than treating these developments as purely descriptive, the paper argues that aggregation pressures call for proactive institutional design and, where issues of representation and binding effects arise, for calibrated legislative clarification. The U.S. experience is used not as a model to be replicated, but as a cautionary reference illustrating the institutional costs of delayed or improvised responses to aggregation pressures. Brazil, in turn, provides a context in which anticipatory institutional design remains feasible, highlighting both the possibility—and the limits—of proactive regulation of collective dynamics in arbitration.

The analysis proceeds in five parts. Part 2 examines the emergence of mass arbitration in the United States and its institutional consequences. Part 3 situates Brazil's evolving framework for collective arbitration. Part 4 explores comparative tensions and the limits of legal transfer. Part 5 advances policy and institutional design considerations. The concluding section reflects on the importance of institutional preparedness in arbitration systems facing the resurgence of collective claims.

2. Mass arbitration in the United States

In contemporary U.S. arbitration practice, the term "mass arbitration" denotes a procedural configuration in which a large number of individual claimants, most commonly consumers or employees, simultaneously initiate separate arbitration proceedings against a single corporate respondent, based on substantially identical factual and legal theories.

The legal architecture that produced this configuration was shaped by a sequence of Supreme Court decisions that progressively narrowed the availability of collective proceedings while strengthening the enforceability of arbitration agreements. Together, these decisions illustrate how doctrinal rules intended to preserve arbitration's bilateral character displaced formal aggregation without eliminating the conditions that generate collective claims.

[1] Thomas E. Carbonneau, Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform, 5 Ohio St. J. on Disp. Resol. 231 (1990); Catherine A. Rogers, Arbitrator Accountability, 92 Minn. L. Rev. 475 (2008); Jan Paulsson, Arbitration in Three Dimensions, 60 Am. J. Comp. L. 291 (2012); Stavros Brekoulakis, The Arbitrability of Competition Law Claims, 8 J. Int'l Econ. L. 647 (2005); Gary B. Born, *International Commercial Arbitration* ch. 1 (3d ed., Kluwer Law International 2021).

Three decisions in particular—*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, *AT&T Mobility v. Concepcion*,[2] and *Epic Systems Corp. v. Lewis*[3]—set the basic architecture of aggregation in U.S. arbitration by requiring affirmative contractual consent for class procedures, enforcing class action waivers, and foreclosing statutory escape routes from individualized dispute resolution.

In *Stolt-Nielsen*, the Court held that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration absent a contractual basis for concluding that the party agreed to do so. The agreement at issue contained no provision authorizing class procedures, and the Court rejected the view that silence could be treated as implicit consent. Emphasizing the fundamental differences between bilateral and class arbitration, the Court treated class arbitration as a distinct mechanism requiring affirmative agreement. In doing so, it narrowed the procedural space that had remained uncertain after *Green Tree Financial Corp. v. Bazzle*[4] and re-centered arbitration doctrine on consent-based bilateralism as the governing baseline.

In *Concepcion*, the Court addressed the enforceability of arbitration clauses requiring bilateral arbitration and waiving participation in class litigation.[5] Consumers nonetheless initiated a class action, which AT&T sought to compel into individual arbitration.[6] The Court held that the Federal Arbitration Act preempted California's *Discover Bank* rule—a state-law doctrine that treated certain class action waivers in consumer contracts as unconscionable—on the ground that it impermissibly interfered with the fundamental attributes of arbitration by effectively requiring the availability of class procedures. In so holding, the Court confirmed that class action waivers are valid and enforceable under the FAA—even where individual arbitration may be economically

[2] 563 U.S. 333 (2011).
[3] 138 S. Ct. 1612 (2018).
[4] 539 U.S. 444 (2003). *See also* Gary B. Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, Kluwer Arbitration Blog (July 6, 2011), https://arbitrationblog.kluwerarbitration.com/2011/07/06/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/ (last visited Aug. 11, 2025), and Mauricio Almeida Prado & Pedro Schilling, Class Arbitration no Direito Comparado, in *Arbitragem Coletiva Societária* RB-21.2 (André Luís Monteiro, Guilherme Setoguti J. Pereira & Renato Beneduzzi eds., São Paulo, Revista dos Tribunais 2021) (electronic version).
[5] 563 U.S. 333 (2011). See generally David Rochelson, *Is This the End of Mandatory Arbitration?*, 36 Antitrust 63 (Fall 2021), https://www.americanbar.org/groups/antitrust_law/resources/magazine/2021-fall/is-this-the-end-of-mandatory-arbitration/ (last visited Aug. 12, 2025).
[6] 563 U.S. 333 (2011), at 337–38.

impracticable—, and emphasized that arbitration's informality, efficiency, and bilateral character cannot be displaced by state-law doctrines favoring aggregation.[7]

By enforcing express waivers of class procedures, *Concepcion* operationalized the consent-based baseline articulated in *Stolt-Nielsen*. Following *Concepcion*, the routine inclusion of class action waivers in consumer and employment arbitration clauses eliminated the contractual silence that had previously left room for dispute. As a result, class arbitration remained theoretically permissible under the FAA, but became practically unavailable—not by doctrinal prohibition, but through the widespread private ordering of bilateral arbitration.[8]

The Court's holding in *Epic Systems* reinforced this trajectory in the employment context.[9] In that case, the arbitration agreements required individualized proceedings and expressly waived collective claims.[10] Employees nonetheless sought to pursue a collective action under the Fair Labor Standards Act (FLSA), arguing that such waivers violated the National Labor Relations Act (NLRA)'s protection of "concerted activities".[11] The Court rejected this contention, holding that the NLRA does not confer a right to class or collective litigation and that the FLSA permits, but does not mandate, collective actions.[12] In the absence of a clear congressional command to the contrary, the FAA therefore required enforcement of the arbitration agreements according to their terms.

Taken together, these decisions substantially narrowed the procedural space for aggregation within arbitration. *Stolt-Nielsen* established that class procedures require affirmative contractual consent; *Concepcion* ensured that express waivers of such procedures would be enforced; and *Epic Systems* foreclosed reliance on federal statutory rights as a basis for preserving collective mechanisms. The result was a doctrinal framework that preserved arbitration's bilateral baseline while sharply limiting the

[7] Id. at 352 (holding that the FAA preempts state-law rules invalidating class arbitration waivers as unconscionable).
[8] See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 627–29, 631–32 (2012) (describing *Concepcion* as a "game-changing edict" that permits firms to opt out of aggregate litigation through standard-form class action waivers, predicting the widespread adoption of such waivers in consumer and employment contracts, and explaining how private ordering renders aggregate procedures functionally unavailable notwithstanding their formal permissibility).
[9] 138 S. Ct. 1612 (2018).
[10] Id. at 1619–20.
[11] Id. at 1620–21; see also Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018); National Labor Relations Act, 29 U.S.C. §§ 151–169 (2018).
[12] *Epic Systems*, 138 S. Ct. at 1624–25.

institutional pathways for aggregation. Subsequent decisions further clarified that class arbitration requires clear contractual authorization and increasingly treated threshold questions concerning aggregation as matters for judicial determination.[13]

Initially, this line of decisions was heralded as a decisive victory for corporate defendants; over time, however, it prompted a strategic response from the plaintiffs' bar.[14] Specialized firms began to deploy large-scale, simultaneous filings of individual arbitration demands against single corporate respondents.[15] In so doing, they effectively reconstituted the procedural fragmentation mandated by the Supreme Court into a potent mechanism of collective leverage.[16]

The consequences for corporate respondents were significant. Companies such as Uber, Amazon, and DoorDash—having embraced arbitration clauses with class waivers on a large scale—found themselves exposed to massive, front-loaded administrative fee obligations imposed by arbitral institutions, thereby creating strong settlement incentives for claimants.[17] This inversion of the intended economic deterrent effect transformed what had been a shield against aggregate litigation into a litigation risk of a scale not previously associated with individualized arbitration.[18]

Abernathy v. DoorDash illustrates these dynamics.[19] Over 5,000 delivery drivers alleged misclassification as independent contractors rather than employees.[20] Their

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[13] See *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569–73 (2013) (holding that where the parties expressly delegate interpretive authority to the arbitrator, judicial review under FAA § 10(a)(4) is limited to determining whether the arbitrator was arguably construing the contract, even if the interpretation authorizing class arbitration is contestable); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 187–90 (2019) (holding that contractual ambiguity is insufficient to establish consent to class arbitration and that, absent clear delegation, the availability of class arbitration is a threshold question for courts). Residual uncertainty persists as to whether the availability of class arbitration is a question for the court or the arbitrator. *See also* Gary B. Born, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, *Kluwer Arb. Blog* (July 6, 2011), https://arbitrationblog.kluwerarbitration.com/2011/07/06/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/ (last visited Aug. 11, 2025); James H. Carter, *Class Arbitration in United States: Life After Death?*, in *Class and Group Actions in Arbitration* 14–15 (Bernard Hanotiau & Eric Schwartz eds., Dossiers of the ICC Institute of World Business Law, Vol. 14, Int'l Chamber of Commerce 2016).

[14] See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice,* 90 Or. L. Rev. 703 (2012).

[15] Id.; see also Myriam Gilles, *Arbitration's Unraveling*, 172 U. Pa. L. Rev. 1063, 1067–68 (2024).

[16] See Myriam Gilles, *Arbitration's Unraveling*, 172 U. Pa. L. Rev. 1063 (2024).

[17] See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice,* 90 Oregon Law Review 703 (2012). See also Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133 (2025).

[18] See Kevin S. Ranlett, Zachary D. Miller & Rachel R. Friedman, *Mass Arbitration Update: The Battlefield Expands*, 80 Bus. Law. 557 (2025).

[19] Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020).

[20] Id. at 1065.

agreements contained bilateral arbitration clauses with class waivers, administered by the American Arbitration Association (AAA).[21] Filing fees alone exceeded $1 million.[22] When DoorDash refused to pay its share, the AAA closed the cases, prompting plaintiffs to seek judicial compulsion of arbitration.[23] The Northern District of California ordered DoorDash to immediately commence arbitration in accordance with its contractual commitments, underscoring the irony of corporate respondents resisting the very arbitral processes they had contractually imposed as an alternative to class litigation.[24-25]

The sudden proliferation of mass arbitration exposed structural vulnerabilities in U.S. arbitral institutions.[26] Originally designed to administer limited volumes of individualized claims, these bodies were ill-equipped to manage the administrative and logistical burdens associated with thousands of contemporaneous filings.[27] By 2022, mass arbitration filings reportedly constituted over 80% of the docket administered by the two largest U.S. providers.[28]

Institutional responses varied considerably. The American Arbitration Association (AAA) promulgated its *Mass Arbitration Supplementary Rules* (MAS Rules) in an effort to mitigate administrative overload and preserve procedural efficiency.[29]

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[21] Id.
[22] Id. at 1066.
[23] Id. at 1067-68.
[24] Id. at 1066, 1068–69 (granting plaintiffs' motion to compel arbitration under the FAA).
[25] In this vein, one commentator has observed that "Judge William Alsup of the District Court for the Northern District of California opined that it is a paradox that ridesharing companies that imposed arbitration agreements, touted as being a more efficient and cheaper alternative to litigation, eschewed the obligation once they were faced with paying millions in fees. This raises the question of whether the companies had properly calculated the true economic value of the arbitration agreement. Indeed, the companies may have stipulated individual arbitration opportunistically, relying on the improbability of actually being subject to arbitration, only to later renege on their agreements." Annick Masselot & Martha Ceballos, *Mass Arbitration Trumps Waiver of Class Action: Is Arbitration Good Business for Businesses?*, 68 Loy. L. Rev. 41 (Fall 2021).
[26] See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice,* 90 Oregon Law Review 703 (2012).
[27] Id.
[28] Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 152–53 (Jan. 2025).
[29] Scholarly commentary has observed that leading U.S. arbitral institutions were initially slow to promulgate rules tailored to address the challenges posed by mass arbitration, thereby creating an opening in the market for less prominent providers to expand their presence. As one commentator explains: "For a long time, the arbitration provider market has been dominated by a small number of providers: the AAA, JAMS, and the now-defunct National Arbitration Forum. As mass arbitration emerged, the AAA and JAMS were slow to develop specific rules related to mass to address mass arbitration. Smaller arbitration providers jumped into this new market by adapting their rules arbitration. In addition to the AAA and JAMS, providers such as NAM, New Era ADR, ADR Services, FedArb, and the International Institute for Conflict Prevention and Resolution ('CPR') have adopted mass arbitration protocols. These providers have taken various approaches in amending their rules to address mass arbitration. Some providers offer to significantly reduce the fees and cost of arbitration, others apply a bellwether process, while yet others focus on new models for fee payments. Many provider rules also allow for aggregate decision making on

These measures included default reliance on virtual hearings during evidentiary phases, standardized arbitrator appointment protocols where the parties failed to agree, and mechanisms enabling respondents to challenge mass filings perceived as coercive litigation tactics.[30] The MAS Rules further defined "mass arbitration" for AAA purposes as the filing of more than twenty-five related consumer or employment cases—or more than one hundred other related cases—against the same respondent within a reasonably close temporal proximity. These institutional interventions primarily address coordination, cost allocation, and case management, but they do not address questions of authority, representation, or the binding effect of outcomes in large-scale filings.

Judicial Arbitration and Mediation Services, Inc. (JAMS) adopted a distinct approach, triggering its *Mass Arbitration Procedures and Guidelines* upon the filing of seventy-five or more similar demands against the same respondent. Meanwhile, the International Institute for Conflict Prevention and Resolution (CPR) implemented its own *Mass Claims Protocol*, which, among other provisions, reduced employer arbitration fees in certain employment-related mass filings.[31] Predictably, the divergence in institutional thresholds and procedural designs has given rise to new litigation over the propriety and enforceability of such regimes.[32]

A salient example of litigation arising from divergent institutional frameworks is *Heckman v. Live Nation Entertainment, Inc.*[33] In that case, Live Nation, a global live-events and entertainment company, amended its standard arbitration clause to substitute JAMS for New Era ADR as the designated arbitral forum. Plaintiffs alleged that this change conferred a material advantage upon Live Nation by lowering its cost exposure in potential mass arbitration scenarios and by adopting a "bellwether" process in which the

common issues that span the individual cases within mass arbitration, thus replicating the class action process that arbitration clauses prohibit." Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 189–91 (Jan. 2025). This account highlights how market dynamics and institutional innovation have reshaped the arbitration landscape in response to the mass arbitration phenomenon. By introducing new procedural frameworks—ranging from cost-reduction measures to aggregate decision-making—these providers have, in effect, replicated certain functional elements of class actions within the arbitral sphere, notwithstanding the formal prohibition of such mechanisms in most arbitration agreements.

[30] Kevin S. Ranlett, Zachary D. Miller & Rachel R. Friedman, *Mass Arbitration Update: The Battlefield Expands*, 80 Bus. Law. 557 (2025).

[31] Annick Masselot & Martha Ceballos, *Mass Arbitration Trumps Waiver of Class Action: Is Arbitration Good Business for Businesses?*, 68 Loy. L. Rev. 41 (Fall 2021).

[32] Matthew H. Adler, *Mass Arbitration Clauses: How Have They Fared So Far?*, 42 Alternatives to High Cost Litig. 182 (Dec. 2024).

[33] *Heckman v. Live Nation Ent., Inc.*, 686 F. Supp. 3d 939 (C.D. Cal. 2023), aff'd, 120 F.4th 670 (9th Cir. 2024); see also Heckman v. Live Nation Ent., Inc., 2025 U.S. Dist. LEXIS 69885 (C.D. Cal. Apr. 11, 2025) (addressing post-appeal proceedings).

outcomes of the first three arbitrations would bind all subsequent related claims. They further argued that such procedural architecture, as incorporated into Live Nation's arbitration agreement, restricted the production of documents (written evidence), limited the ability to challenge appointed arbitrators, and effectively predetermined case outcomes in a manner unfavorable to consumers.

The U.S. District Court for the Northern District of California agreed with the plaintiffs that these provisions posed a substantial risk to procedural fairness, rendering both the delegation clause and the arbitration agreement as a whole unconscionable under California law. On appeal, the Ninth Circuit affirmed, holding that the contractual mechanism's combination of binding bellwether awards, discovery restrictions, and limited arbitrator challenges was "unconscionable and unenforceable under California law."[34] This outcome underscores that, notwithstanding the strong federal policy favoring arbitration, judicial oversight persists where arbitral agreements impose structural disadvantages that undermine fundamental fairness.

The mass arbitration phenomenon demonstrates that procedural architectures originally designed to restrict aggregate litigation can, under conditions of strategic adaptation, be repurposed to furnish claimants with significant leverage.[35] In the wake of escalating mass arbitration filings, many corporate actors have engaged in a new wave of contractual drafting aimed at neutralizing the economic and procedural risks revealed by this trend.[36]

One prevalent approach has been the incorporation of express "mass arbitration waivers" into consumer and employment agreements, designed to preclude the coordinated filing of large volumes of individual claims in arbitral fora.[37] In parallel, some drafters have turned to multi-tiered dispute resolution clauses, requiring sequential processes such as mandatory pre-arbitration negotiation, mediation, or other filtering mechanisms before arbitration may be initiated.[38] In certain instances—ironically reversing years of corporate preference for arbitral over judicial fora—companies have

[34] *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670, 690 (9th Cir. 2024).
[35] See Matthew H. Adler, *Mass Arbitration Clauses: How Have They Fared So Far?*, 42 Alternatives to High Cost Litig. 182, 183 (Dec. 2024).
[36] Id.; see also Kevin S. Ranlett, Zachary D. Miller & Rachel R. Friedman, *Mass Arbitration Update: The Battlefield Expands*, 80 Bus. Law. 557, 560–62 (2025).
[37] See Matthew H. Adler, *Mass Arbitration Clauses: How Have They Fared So Far?*, 42 Alternatives to High Cost Litig. 182, 184 (Dec. 2024).
[38] See Kevin S. Ranlett, Zachary D. Miller & Rachel R. Friedman, *Mass Arbitration Update: The Battlefield Expands*, 80 Bus. Law. 557, 560–62 (2025).

restored the availability of judicial class actions, perceiving them as a less costly or less procedurally volatile alternative to mass arbitration.[39]

Notable examples include Amazon and TikTok, both of which reportedly amended their terms of service to reintroduce the possibility of class action litigation in court, thereby circumventing the dynamics and cost structures of mass arbitration altogether.[40] Such developments underscore that corporate dispute resolution strategies remain fluid, adapting in iterative fashion to the interaction between arbitral procedure, judicial doctrine, and the cost incentives facing claimants and respondents.[41]

It bears emphasis that the emergence of mass arbitration in the United States did not require any revision of arbitration doctrine. The core doctrinal commitments of U.S. arbitration law remained stable throughout this period: arbitration continued to operate as a bilateral mechanism grounded in party consent; class and collective procedures remained unavailable absent explicit contractual authorization; and arbitration agreements, including class action waivers, were enforced according to their terms under the Federal Arbitration Act. What changed was not the content of these rules, but the scale and coordination of claims brought within their confines. Mass arbitration thus reflects the institutional consequences of doctrinal continuity rather than a retreat from it, as aggregation pressures re-entered arbitration through coordinated individualized proceedings rather than through any doctrinal accommodation of collective adjudication.

From a design perspective, this trajectory shows how arbitration clauses intended to foreclose aggregate litigation can, under prevailing procedural and cost structures, produce the opposite effect.[42] It underscores the importance of administrative capacity when large numbers of related claims are pursued within frameworks designed for bilateral arbitration.[43] Rather than eliminating the economic and structural conditions that give rise to collective claims, this doctrinal settlement displaced aggregation pressures

[39] See Annick Masselot & Martha Ceballos, *Mass Arbitration Trumps Waiver of Class Action: Is Arbitration Good Business for Businesses?*, 68 Loy. L. Rev. 41, 62–63 (Fall 2021).
[40] See Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 152–53 (Jan. 2025); see also Jean R. Sternlight, *Tsunami: Mass Arbitration and the End of Arbitration*, 2022 J. Disp. Resol. 1, 12–13.
[41] See Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 198–99 (Jan. 2025).
[42] Id. at 200-01
[43] Id. at 201-02.

into procedural form, channeling them away from formal collective mechanisms without extinguishing the underlying demand for coordinated dispute resolution.

3. The Brazilian context

The Brazilian experience presents a distinct institutional configuration from that described in the United States. Unlike the U.S. case, where aggregation pressures re-entered arbitration only after doctrinal pathways for collective litigation had been progressively closed and under conditions of acute institutional strain, Brazil remains in a pre-crisis setting.

In Brazil, aggregation pressures are perceptible, but they have not yet imposed systemic stress on arbitral institutions designed for bilateral dispute resolution. This difference in timing matters. In Brazil, arbitration has long been integrated into capital markets and corporate governance through mandatory clauses binding dispersed investors, creating the conditions for aggregation to arise within arbitration while leaving unresolved questions of how collective interests may be represented and bound. The Brazilian context thus does not offer an alternative doctrinal response to aggregation. Rather, it presents a setting in which aggregation pressures are emerging gradually, before crisis-driven procedural adaptations have taken hold.

At the same time, it is important to be precise about the scope of aggregation risks in the Brazilian context. Unlike the United States, Brazil is not currently exposed to a generalized risk of large-scale coordinated arbitration across consumer or employment markets, and its arbitral system remains structurally insulated in most settings. The more plausible locus for scale-related stress lies in securities and corporate disputes subject to mandatory arbitration, particularly before the B3 Market Arbitration Chamber (CAM-B3), where standardized arbitration clauses bind a large and dispersed base of investors.

In such settings, a single market event—such as alleged failures in disclosure or corporate governance—may give rise to a high volume of substantively similar claims sharing a common factual nucleus, creating incentives for coordinated filings of individual arbitrations. The relevance of the U.S. experience for Brazil thus lies not in predicting an imminent replication of mass arbitration, but in illustrating how aggregation pressures can emerge rapidly in institutional environments characterized by mandatory arbitration and dispersed claimants, reinforcing the value of addressing coordination and authority questions in advance.

To understand why aggregation pressures arise within arbitration in Brazil, it is necessary to consider the structural role arbitration plays in the country's capital markets. This institutional configuration reflects the long-standing integration of arbitration into Brazil's capital markets, where mandatory arbitration clauses in corporate bylaws bind listed companies, controlling shareholders, managers, and dispersed investors to arbitral resolution of corporate and securities disputes.[44] As a result, aggregation pressures in Brazilian arbitration have so far manifested primarily in shareholder litigation, rather than in consumer or employment contexts where arbitration plays a far more limited role.[45]

In this setting, the available evidence suggests that collective arbitration in Brazil remains exceptional rather than systemic. To the extent that information is publicly available—necessarily limited by the confidentiality inherent in arbitration—only a small number of proceedings involving large corporations and alleged shareholder losses have come to light. These early institutional encounters have drawn increased scrutiny within Brazilian arbitration practice and, in the absence of a dedicated statutory framework, have required arbitral institutions, tribunals, and, in limited instances, courts to articulate ad hoc procedural responses to attempted aggregation of shareholder claims.[46]

Available public disclosures indicate that collective arbitrations in Brazil remain relatively rare, notwithstanding the highly relevant interests involved and the potentially substantial amounts in dispute. In one disclosed instance, the respondent announced a "final arbitral award in its favor, in one of the arbitrations pending before the B3 Market Arbitration Chamber (CAM)," noting that the claim "had been initiated by an association and sought to proceed collectively,"[47] attempting to encompass all shareholders who had acquired shares on the B3 within a specified period.

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[44] See Bruno Meyerhof Salama and Viviane Muller Prado, Legal Protection of Minority Shareholders of Listed Corporations in Brazil: Brief History, Legal Structure and Empirical Evidence, 4 J. Civ. L. Stud. 147, 184-5 (2011). See also Francisco Satiro & Bruno Meyerhof Salama, What U.S. Can Learn from Brazil's Securities Arbitration Model, Law360 (Dec. 9, 2025).

[45] See Flávio Luiz Yarshell, *Arbitragem Coletiva no Brasil e Mass Arbitration nos EUA: O Que Acontece Lá Pode Acontecer Aqui?*, Conjur (Apr. 21, 2025), https://www.conjur.com.br/2025-abr-21/arbitragem-coletiva-no-brasil-e-mass-arbitration-nos-eua-o-que-acontece-la-pode-acontecer-aqui/ (last visited Dec 16, 2025).

[46] Id.

[47] Agência Petrobras, *Petrobras Informa Sobre Decisão Favorável em Arbitragem*, Petrobras (Dec. 17, 2019), https://agencia.petrobras.com.br/w/institucional/petrobras-informa-sobre-decisao-favoravel-em-arbitragem (last visited Aug. 11, 2025).

In other reported proceedings involving similar collective claims, arbitral tribunals admitted the claims but ultimately dismissed them on the merits. In those cases, tribunals concluded that the company bore no direct liability to shareholders for damages allegedly caused by its directors, who under Brazilian law may be held liable only vis-à-vis the company itself, either directly or through shareholder derivative actions. This outcome is consistent with the absence of publicly reported liquidations or enforcement proceedings based on generic or non-liquidated arbitral awards rendered in favor of shareholder representatives.[48]

There are likewise no reports of collective arbitrations brought on behalf of consumers or employees, although individual arbitrations in these fields have been reported with increasing frequency. Taken together, these features suggest that, while aggregation pressures are perceptible in Brazil, they have thus far been channeled or contained within existing procedural frameworks rather than translated into large-scale collective arbitral proceedings.

This relative containment, however, is unlikely to persist uniformly across all sectors. In the securities market in particular, the initiation of new proceedings is more likely, given that arbitration is mandatory in certain corporate governance tiers.

This is reflected in the rules governing Brazil's capital markets arbitration framework. Article 22 of the B3 Market Arbitration Chamber (CAM-B3) Rules requires companies listed on the Novo Mercado and other enhanced governance segments to include in their bylaws an arbitration clause designating the Chamber as the forum for resolving disputes involving the company, its shareholders, officers, and members of the fiscal council. In the same vein, Article 1.2 defines "Participants" broadly to include not only issuers and corporate actors, but also investors and intermediaries in transactions involving listed securities. Similarly, the Brazilian Code of Corporate Governance for Publicly-Held Companies, published by the Brazilian Institute of Corporate Governance (IBGC), recommends the inclusion of arbitration clauses for the resolution of corporate disputes.

[48] See Flávio Luiz Yarshell *Arbitragem Coletiva no Brasil e Mass Arbitration nos EUA: O Que Acontece Lá Pode Acontecer Aqui?*, Conjur (Apr. 21, 2025), https://www.conjur.com.br/2025-abr-21/arbitragem-coletiva-no-brasil-e-mass-arbitration-nos-eua-o-que-acontece-la-pode-acontecer-aqui/ (last visited Dec 16, 2025).

At the same time, Brazil lacks a dedicated statutory framework governing collective arbitration, a feature that further characterizes its current pre-crisis setting. This legislative gap reflects not only regulatory caution, but also a temporal mismatch: Brazil's general framework for collective litigation was developed before the enactment of the Arbitration Act and before arbitration became structurally embedded in capital markets, leaving collective arbitration outside the original scope of legislative design.

In the absence of specific legislation, uncertainty persists as to whether, and to what extent, rules drawn from Brazil's system of collective relief—notably the Public Civil Action Act (Law No. 7,347/1985) and the Brazilian Consumer Protection Code (Law No. 8,078/1990)—could apply on a supplementary basis in arbitration, or whether collective proceedings must instead be regulated by arbitral institutions and tribunals on a case-by-case basis.[49] That uncertainty is reflected in ongoing legislative initiatives, such as Federal Bill No. 2,925/2023, which proposes amendments to Brazil's corporate and securities laws, including limited regulation of collective corporate arbitration and the grant of extraordinary standing to groups of investors—an approach that remains unsettled and departs from prevailing practice.

These uncertainties become most acute when aggregation intersects with Brazil's distinctive treatment of collective rights. In this setting, and notwithstanding recent institutional efforts toward procedural innovation, the current regulatory framework for collective arbitration in Brazil remains fragmented and marked by significant procedural bottlenecks. One such bottleneck arises from Brazil's traditional treatment of homogeneous individual rights within its system of collective relief.[50]

At this point, the constraints on collective arbitration are no longer merely institutional or procedural, but concern the authority to represent and bind absent parties. Under Brazilian law, *homogeneous individual rights* refer to individual claims that are substantively divisible but share a common factual origin —such as investors affected by the same misleading disclosure or consumers charged the same unlawful fee—, allowing them to be addressed collectively for procedural purposes. The collective protection of such rights has traditionally been conceived as statutorily structured and governed by a

[49] *See* Flávio Luiz Yarshell & Viviane Siqueira Rodrigues, Fundamentos e Esboço de uma Futura Arbitragem Coletiva no Brasil, in *O Processo Civil: entre Itália, Brasil e Argentina (Uma Homenagem)* 60,62 (Teresa Arruda Alvim & Daniel Mitidiero, eds., São Paulo, Thomson Reuters Brasil 2024).
[50] Arnoldo Wald & Marcela Melichar Suassuna, *A Corte Suprema Norte-Americana e a Evolução da Class Arbitration*, Rev. de Arb. e Mediação, Oct./Dec. 2019, at 5–6 (electronic version).

distinct procedural regime, rather than as a matter of party autonomy. As Brazilian scholarship has long emphasized, such rights are collective in form but individual in their ultimate purpose, and are treated as collective for procedural purposes because of the scale of affected interests.[51]

For that reason, their collective treatment has been associated with an autonomous branch of civil procedure, characterized by heightened safeguards and judicial oversight, rather than by party autonomy.[52] This conception creates structural tension when disputes involving homogeneous individual rights are channeled into arbitration, where collective treatment would ordinarily depend on contractual consent rather than on legislative design and judicial control.

Under Brazilian law, collective treatment of homogeneous individual rights generally depends on statutory authorization and, where such authorization is not explicit, on judicial approval of adequate representation.[53] In other words, it is not party agreement that enables one claimant to act on behalf of others, but the law and, in some cases, the court. For example, a shareholder or investors' association seeking to pursue claims on behalf of a dispersed group of investors affected by the same corporate event must derive its authority from statutory standing and may be subject to judicial scrutiny of representational adequacy; such authority does not arise solely from the existence of an arbitration clause binding individual investors. This feature reflects the concern that allowing a party to represent the interests of absent rights-holders carries significant legal consequences and therefore warrants heightened scrutiny—a logic that fits poorly with arbitration's consent-based structure.

These characteristics place limits on what arbitral institutions can achieve through procedural coordination alone, because the legitimacy of collective adjudication depends on sources of authority external to arbitration. A further structural constraint arises from the possibility that "extraordinary" representatives—such as public prosecutors or qualified associations empowered to act in defense of collective interests—may bring collective actions before the Judiciary notwithstanding the existence of arbitration clauses

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[51] José Carlos Barbosa Moreira, *Tutela Jurisdicional dos Interesses Coletivos ou Difusos*, in *Temas de Direito Processual Civil – Terceira Série* 197 (Saraiva 1984) (free translation).
[52] Viviane Siqueira Rodrigues, *O Processo Coletivo para a Defesa dos Direitos Individuais Homogêneos* 30 (M.Sc. dissertation, Universidade de São Paulo 2012) (free translation).
[53] Flávio Luiz Yarshell, *Processo arbitral coletivo: breve reflexão sob a ótica da segurança e da confiança*, in *Arbitragem Coletiva Societária* 177, 180 (André Luís Monteiro, Guilherme Setoguti J. Pereira & Renato Beneduzi eds., São Paulo, Revista dos Tribunais 2021).

individually signed by consumers or employees. First, such actions are possible because these representatives are not parties to the arbitration agreements and therefore are not bound by them, preserving their ability to litigate in court.

Second, where the collective treatment of homogeneous individual rights is deemed non-waivable—precisely because of the indivisibility of the protected object, which requires a uniform decision for all beneficiaries and stems from its broader social relevance affecting a multitude of individuals (for example, claims arising from the same misleading market disclosure affecting all shareholders within a defined period)—[54] and collective arbitration is unavailable to such representatives, judicial collective proceedings remain permissible.

In the same vein, arbitration operates as a largely self-contained procedural system, grounded in party autonomy and distinct from the Brazilian Code of Civil Procedure. For that reason, it sits uneasily with the unmodified application of procedural norms developed for collective judicial proceedings—such as judicial control over adequacy of representation and the *erga omnes* binding effects of judgments—, which are designed for disputes with different structural features and decision-making logics than those ordinarily contemplated in arbitration.

Taken together, these features place Brazil in a position structurally different from that observed in the United States, where institutional responses to aggregation emerged only after procedural stress had already materialized. In Brazil, by contrast, the challenge is not to manage a crisis in progress, but to confront—in advance—the design constraints that aggregation imposes on arbitral authority and governance.

4. Comparative tensions in aggregation

A comparison between the United States and Brazil helps clarify how similar aggregation pressures can generate different institutional responses, and why those responses encounter structural limits even before questions of doctrine or policy arise. In both systems, aggregation pressures have been mediated through different institutional arrangements governing collective dispute resolution, particularly with respect to the forums in which collective claims are expected to be addressed. In the United States,

[54] Rodolfo de Camargo Mancuso, *Ação Civil Pública* RB-6.3 (electronic version) (3rd ed., Thomson Reuters Brasil 2019) (free translation).

limits on class actions shifted collective claims toward private initiative, allowing aggregation strategies to develop within arbitration itself. In Brazil, by contrast, collective disputes have traditionally been addressed through public or semi-public mechanisms outside arbitration, while arbitral proceedings—particularly in corporate and capital markets matters—have largely remained individualized. As a result, aggregation pressures have tended to surface in different forums in each system.

This divergence matters because, once collective claims are displaced from courts into arbitration—as in the United States—aggregation pressures have no institutional outlet other than procedural recomposition within arbitration itself, whereas in Brazil those pressures remain channelled toward public or semi-public fora external to arbitration.

These differences turn on how authority to aggregate claims is allocated. In the United States, the legitimacy of aggregation within arbitration has emerged largely from private initiative—through the interaction of arbitration agreements, institutional rulemaking, and coordinated action by the plaintiffs' bar. In Brazil, by contrast, the authority to aggregate claims has historically been grounded in statutory design and judicial or quasi-public oversight, rather than in private procedural innovation within arbitration.

That allocation of authority is reflected, in turn, along a second dimension: the structure of the arbitration market itself. In the United States, arbitration operates in a decentralized and competitive environment, with multiple providers and arbitrators competing for cases and able to adjust their procedures with relative speed.[55] When mass arbitration emerged in response to restrictions on class actions, the administrative and financial burden of handling thousands of filings fell primarily on arbitral institutions and respondents, creating strong incentives for rapid procedural adaptation.[56]

In Brazil, by contrast, arbitral institutions tend to be more centralized and closely identified with their institutional reputation. That orientation has encouraged stability and predictability in ordinary cases, which has been a central feature of Brazil's arbitration

[55] Edward Brunet, Richard E. Speidel, Jean R. Sternlight & Stephen J. Ware, *Arbitration Law in America: A Critical Assessment* 8 (Cambridge Univ. Press 2006).
[56] Conversely, certain scholars have identified the regulatory lacuna as facilitating the dissemination of so-called "frivolous claims" within consumer arbitration in the United States, which they contend exemplify inherent deficiencies of mass arbitration. For a detailed analysis, see: Kyte T. Cutts & Victoria L. Weatherford, Could Bellwether Trials Be Answer to Onslaught of Mass Arbitrations, 43 No. 6 W. J. Automot. 13 (2023).

model, but it also means that large-scale procedural or financial shocks raise different operational challenges. As a result, the institutional setting in which arbitration operates in each country affects not only how aggregation is managed, but whether arbitration is expected, in practice, to accommodate it at all.

A third point of divergence lies in the way collective representation is organized in practice. In the United States, a segment of the plaintiffs' bar has developed the capacity to identify, finance, and coordinate large numbers of individual claims, including in arbitration, and to pursue them in a coordinated manner.[57] That capacity made it possible, once class actions became less available, for aggregation strategies to take the form of mass arbitration. In Brazil, there is no comparable pattern of practice. Collective disputes have traditionally been pursued through public or quasi-public mechanisms, and law firms have generally not been structured to assemble and manage thousands of parallel arbitral claims. As a result, the professional environment in which arbitration operates in Brazil has not, to date, supported the type of large-scale claimant coordination observed in the United States. This difference helps explain why mass arbitration in the United States could emerge as a repeatable litigation strategy driven by private actors, while in Brazil the absence of comparable claimant-side coordination constrains the translation of dispersed harms into large-scale arbitral proceedings.

Taken together, differences in institutional design, professional practice, and the allocation of authority over collective claims limit the direct replication in Brazil of the mass arbitration strategies observed in the United States.[58] This conclusion does not rest on any claim of exceptionalism or empirical prediction, but on the fact that arbitration is not socially or legally authorized to perform the same collective functions in each system. The conditions that authorized and enabled mass arbitration to emerge in the United

[57] Numerous scholars underscore the pivotal role of American law firms in the genesis and proliferation of mass arbitrations, identifying such firms as principal actors within this domain. For instance, see Richard F. Freer, Rational Actors, Class Action Waivers, and the Emergence of Mass Individual Arbitration Demands, 84 U. Pitt. L. Rev. 359, 391-392 (2022).

[58] Scholars in Brazil have undertaken a close examination of the distinct regulatory architecture governing mass arbitration in the United States, paying particular attention to the multiplicity of sources from which procedural norms emerge. As one commentator explains: "In the United States, there is no statute specifically authorizing collective arbitration—much like the absence of explicit provisions on non-class arbitration in the Federal Arbitration Act (FAA). In addition to the rules set forth in institutional arbitration regulations, state-court jurisprudence has assumed a prominent role in shaping collective arbitration frameworks, with California courts providing perhaps the most salient example." Marcela Melichar Suassuna, *A arbitragem coletiva como instituto propulsionador do acesso à justiça arbitral para proteção de investidores no mercado de valores mobiliários,* 79 Rev. de Arbitragem e Mediação 4 (Oct.–Dec. 2023) (electronic version) (free translation).

States—restrictions on class actions, a decentralized arbitration market, and a plaintiffs' bar capable of coordinating large numbers of claims—are closely tied to that specific institutional trajectory. In Brazil, arbitration has evolved within a different legal and institutional setting, in which collective disputes have largely been addressed through other channels and arbitration has not been vested with comparable authority to resolve claims on a collective basis.

At the same time, the U.S. experience cannot be dismissed as irrelevant for Brazil. It illustrates how aggregation pressures may re-enter arbitration when alternative collective mechanisms are constrained, and how quickly those pressures can strain frameworks designed for bilateral dispute resolution. These dynamics underscore a critical distinction: while institutional design can mitigate problems of coordination, scale, and administrative capacity, questions of representation and the binding effects of arbitral outcomes implicate issues of authority that institutional practice alone cannot resolve.

5. Institutional design and the limits of arbitral self-regulation

Experience from the United States illustrates that, once aggregation pressures materialize, arbitral institutions are effectively compelled to assume a rule-making role. Faced with large volumes of coordinated filings, institutions such as the AAA and JAMS were compelled to clarify administrative fees, filing mechanics, and arbitrator appointment procedures under conditions of acute operational strain. These interventions were not the product of ex ante institutional planning, but of crisis-driven adaptation prompted by the sudden scale of coordinated filings.

The U.S. experience thus reveals a central design lesson: when arbitration frameworks are constructed around bilateral disputes, the absence of anticipatory procedural guidance can transform arbitral institutions into ad hoc regulators under pressure, with potentially destabilizing effects for both parties and the arbitral system. This reactive trajectory provides a useful point of contrast for assessing the range of institutional responses available in settings where aggregation pressures are emerging but have not yet produced systemic stress.

Within these limits, arbitral institutions are well positioned to address a significant portion of the pressures generated by aggregation through procedural and administrative design, particularly in pre-crisis settings where coordination mechanisms can be specified in advance. Matters such as the allocation of administrative fees, filing mechanics, the appointment of arbitrators,[59] and the sequencing or coordination of related proceedings fall squarely within the domain of institutional governance.

By contrast, Brazil remains in a position where similar aggregation pressures have not yet crystallized into institutional crisis. This timing allows procedural coordination to be addressed through anticipatory institutional design rather than reactive adjustment. Specifically, in the Brazilian context, institutions could proactively adopt a dedicated set of rules for coordinated proceedings (or an appendix to existing rules), triggered by objective criteria—such as a minimum number of arbitrations tied to the same underlying event within a defined time window. Such rules could prescribe filing and intake mechanics, allocate and stage administrative fees and deposits, establish institutional arrangements for appointment and case management, and make limited adjustments concerning confidentiality, notice, and information flows.[60]

The rules could also incorporate sequencing and coordination tools that absorb much of aggregation's complexity without diluting core procedural protections: a mandatory initial case management conference to identify common issues, streamlined procedures for recurring questions, the selection of bellwether cases to resolve threshold and merits-defining issues (jurisdiction, disclosure obligations, evidentiary standards, causation), and a stay of the remaining matters pending stabilization of those parameters, followed by an individualized damages phase where appropriate. It would also be prudent to specify up front the standards and process for consolidation—or, where consolidation is not feasible, for coordination among arbitral tribunals (including mechanisms for calendar alignment, harmonized deadlines, and avoidance of inconsistent awards)—as

[59] Recently, the São Paulo Court of Justice (TJSP) set aside a CAM-B3 decision in which the institution's President removed the respondent's party-appointed co-arbitrator and proceeded to appoint the entire arbitral tribunal. The court found that Article 3.6 of the CAM/B3 Arbitration Rules had been misapplied: the claimants' unsuccessful nominations resulted from individual withdrawals, not internal disagreement among them. It further held that the measure infringed the respondent's statutory right under Article 13 of Brazil's Arbitration Act (Law No. 9,307/1996). In reviewing the CAM/B3 President's act, the TJSP ordered the reinstatement of the respondent's co-arbitrator and declared the unilateral appointment of the tribunal null and void. Appeal No. 1129029-43.2024.8.26.0100, TJSP, 2nd Reserved Chamber of Corporate Law, Rapporteur Judge Sérgio Shimura (Nov. 18, 2025) (Braz.).

[60] *See* Flávio Luiz Yarshell & Viviane Siqueira Rodrigues, *Fundamentos e esboço de uma futura arbitragem coletiva no Brasil*, in *O Processo Civil: entre Itália, Brasil e Argentina (Uma Homenagem)* 61-63 (Teresa Arruda Alvim & Daniel Mitidiero, eds., São Paulo, Thomson Reuters Brasil 2024); and Flávio Luiz Yarshell & Viviane Siqueira Rodrigues. *Um novo capítulo da arbitragem societária coletiva: o PL 2925/2023*. *JOTA* (October 17, 2023), https://www.jota.info/opiniao-e-analise/artigos/um-novo-capitulo-da-arbitragem-societaria-coletiva-o-pl-2925-2023 (last visited Jan. 27, 2026).

well as minimum transparency guidelines (to permit timely intervention or opt-in by interested parties) and conflict-management requirements in third-party funding scenarios.[61]

These coordination tools delineate the outer boundary of what arbitral institutions can legitimately achieve through procedural and administrative design.

Elements of this coordination-oriented architecture are already emerging in Brazilian institutional practice. For instance, CAM-CCBC's Corporate Arbitration Rules (Norma Complementar 02/2023) create a notice-and-participation framework for "Affected Third Parties" (including a defined opt-in window) while binding all notified stakeholders to the award's effects, and they empower the institution to assess consolidation/related-case management in the corporate setting. CAM-B3's Arbitration Rules currently in force (2011) also address multi-party dynamics through joinder (including third-party requests to join/intervene, decided at the institutional level at the outset) and consolidation of related proceedings. In addition, CAM-B3 has adopted specific governance measures on third-party funding (mandatory disclosure aimed at conflict-checking) and on compliance with CVM disclosure duties in corporate disputes; and its draft revised Rules released for public consultation (Dec. 17, 2024) further strengthen front-end filing/standing and representation checks, require disclosure of interested third parties and third-party funding, formalize third-party intervention windows (including a 30-day window linked to the issuer's CVM disclosure), and expand the standards and procedure for consolidation of connected disputes.[62]

Taken together, these measures demonstrate the capacity of arbitral institutions to manage aggregation at the level of coordination and administration. They address front-end intake and standing verification, provide mechanisms for joinder and consolidation, align procedural calendars across related proceedings, and mitigate risks of inconsistent outcomes through institutional oversight of related-case management.

[61] *See* Flávio Luiz Yarshell & Viviane Siqueira Rodrigues, *Fundamentos e esboço de uma futura arbitragem coletiva no Brasil*, in *O Processo Civil: entre Itália, Brasil e Argentina (Uma Homenagem)* 61-63 (Teresa Arruda Alvim & Daniel Mitidiero, eds., São Paulo, Thomson Reuters Brasil 2024); and Flávio Luiz Yarshell & Viviane Siqueira Rodrigues. *Um novo capítulo da arbitragem societária coletiva: o PL 2925/2023*. *JOTA* (October 17, 2023), https://www.jota.info/opiniao-e-analise/artigos/um-novo-capitulo-da-arbitragem-societaria-coletiva-o-pl-2925-2023 (last visited Jan. 27, 2026).

[62] *See* CAM-CCBC Corporate Arbitration Rules (Norma Complementar 02/2023), Arts. 3–8 (esp. Arts. 4–7); CAM-B3 Arbitration Rules (2011), Sections 6.1–6.2; CAM-B3 Resolution No. 02/2024 (Third-Party Funding) and Resolution No. 04/2024 (CVM Res. 80/22, Annex I); CAM-B3 Draft Revised Arbitration Rules (public consultation, Dec. 17, 2024), Arts. 6, 9–10.

At the same time, these institutional procedural initiatives stop short of resolving questions of representation and the binding effects of arbitral awards on non-participating or non-consenting absent parties. They do not purport to determine who may legitimately act on behalf of a broader group of shareholders, nor to substitute institutional coordination for the legal authorization required to bind non-participating rights-holders.

Furthermore, in the context of Brazilian corporate collective arbitration, the transindividual nature of minority-shareholder claims—where multiple investors are affected by the same corporate conduct—supports the need for a statutory baseline governing the consolidation of related proceedings. Such a framework should address both cases involving formal connection and those involving substantively related claims, in order to reduce the risk of inconsistent awards in a setting where the Code of Civil Procedure does not apply by default. On this view, institutional rules should be supplemented by securities-regulatory guidance.[63]

Clarifying these issues in advance can mitigate operational strain, reduce inconsistent ad hoc responses, and preserve the workability of arbitration under conditions of scale, including through targeted rule adjustments on confidentiality, notice, and information flows.[64] In this sense, institutional rule-making is neither anomalous nor problematic: it falls within the legitimate administrative authority of arbitral institutions over the organization of proceedings and operates as a first line of response to aggregation pressures.

At this point, the analysis moves from questions of institutional capacity and coordination to questions of authority that institutional self-regulation cannot resolve. Issues concerning who may represent multiple claimants, under what conditions absent parties may be bound, and what safeguards are required for adequate representation exceed the scope of arbitral self-regulation.[65] Where arbitration is asked to produce effects

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[63] *See* Flávio Luiz Yarshell & Viviane Siqueira Rodrigues, *Fundamentos e esboço de uma futura arbitragem coletiva no Brasil*, in *O Processo Civil: entre Itália, Brasil e Argentina (Uma Homenagem)* 61-63 (Teresa Arruda Alvim & Daniel Mitidiero, eds., São Paulo, Thomson Reuters Brasil 2024); and Flávio Luiz Yarshell & Viviane Siqueira Rodrigues. *Um novo capítulo da arbitragem societária coletiva: o PL 2925/2023*. *JOTA* (October 17, 2023), https://www.jota.info/opiniao-e-analise/artigos/um-novo-capitulo-da-arbitragem-societaria-coletiva-o-pl-2925-2023 (last visited Jan. 27, 2026).
[64] See Marcela Tarré Berrini, *Confidencialidade na Arbitragem e Class Arbitration,* in *Arbitragem Coletiva Societária* RB-16.2 (André Luís Monteiro, Guilherme Setoguti J. Pereira & Renato Beneduzzi eds., São Paulo, Revista dos Tribunais, 2021) (electronic version).
[65] See Flávio Luiz Yarshell, *Controle jurisdicional da representatividade adequada de minoritários em demandas de indenização por atos de administradores e de controladores*, in *Direito empresarial e suas interfaces: homenagem a Fabio Ulhoa Coelho*, vol. IV (Ana Frazão, Rodrigo R. Monteiro de Castro & Sérgio Campinho eds., São Paulo: Quartier Latin 2022).

beyond the formally constituted parties, institutional rule-making alone is insufficient, and legislative intervention becomes a necessary complement.[66]

These limits are most clearly exposed in cases involving representation of multiple claimants and the potential binding of non-participating parties, where the authority constraints identified above become dispositive.

Legislative intervention should therefore concentrate on clarifying, in explicit and systematic terms, the conditions under which collective or representative claims may proceed in arbitration. In particular, statutory rules are required to define who may act as a legitimate representative of multiple claimants, the scope of authority such representatives may exercise, and the circumstances in which arbitral awards may bind absent parties.[67] Conversely, legislative intervention need not—and should not—extend to the detailed regulation of arbitral procedure, which remains better addressed through institutional rule-making and case-specific management. By addressing these constitutive questions of authority—rather than procedural detail—legislation can provide a stable normative foundation for the operation of collective arbitration without undermining arbitral autonomy.[68]

In the Brazilian context, the need for legislative clarification follows not from policy preference but from existing doctrinal constraints. Under Brazilian law, claims involving homogeneous individual rights have traditionally been subject to collective treatment only where representation is expressly authorized by statute and accompanied by non-waivable safeguards designed to protect absent rights-holders. Because these

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[66] In that regard, one commentator has noted that "although it is a stimulating subject, the adoption of arbitration in collective claims is an idea that must be debated and carefully developed, especially considering the existence of third-party interests that do not directly participate in the procedural acts and, therefore, must not be prejudiced. Ideally, a more detailed regulation of the procedure would be established without creating undue obstacles to the inherent flexibility of arbitration, thereby preserving constitutional guarantees while simultaneously ensuring the effectiveness of the process." Marcela Kohlbach de Faria, *A Possibility of Instituting Arbitration in Collective Claims – Bill 5,139/2009: An Analysis of the U.S. Experience*, 34 Rev. Arb. & Mediation 8 (2012).

[67] It is advisable that any legislative intervention in the field of collective arbitration focus, first and foremost, on defining, among other matters: (i) who may act as a representative (or class/collective representative) in collective arbitral proceedings; (ii) which minimum standards of adequacy of representation must be subject to case-specific scrutiny; (iii) under what conditions, and to what extent, arbitral awards and settlements may bind absent parties; (iv) the baseline publicity/transparency requirements; and (v) whether an opt-out regime should be adopted.

[68] *See* Flávio Luiz Yarshell & Viviane Siqueira Rodrigues, *Fundamentos e esboço de uma futura arbitragem coletiva no Brasil*, in *O Processo Civil: entre Itália, Brasil e Argentina (Uma Homenagem)* 62, 64, 65, 66 (Teresa Arruda Alvim & Daniel Mitidiero, eds., São Paulo, Thomson Reuters Brasil 2024); and Yarshell, Flávio Luiz & Rodrigues, Viviane Siqueira. *Um novo capítulo da arbitragem societária coletiva: o PL 2925/2023*. *JOTA* (October 17, 2023), https://www.jota.info/opiniao-e-analise/artigos/um-novo-capitulo-da-arbitragem-societaria-coletiva-o-pl-2925-2023 (last visited Jan. 27, 2026).

safeguards are grounded in public-law conceptions of legitimacy rather than in party autonomy, they cannot be recreated through institutional rule-making or inferred from individual consent within arbitration. Legislative intervention is therefore required to reconcile arbitration with Brazil's established framework for collective adjudication, rather than to innovate beyond it.

Central to any such legislative framework is the articulation of clear standards for adequate representation, coupled with oversight mechanisms capable of preventing conflicts of interest. Consent alone is insufficient where claims are aggregated on behalf of absent parties.[69] Regulation must therefore address the selection of representatives, the alignment of their incentives with those of the represented group, and mechanisms for supervision of representative conduct.

The importance of legislative clarification also bears on predictability and enforceability in markets where arbitration is routinely used. Uncertainty regarding the legitimacy or binding effects of collective arbitral outcomes may undermine reliance on arbitration and increase the risk of inconsistent or inefficient dispute resolution strategies. Legislative clarification strengthens confidence in arbitration as a mechanism capable of handling coordinated disputes without compromising consent-based limits, including in capital markets.[70]

Effective implementation of this framework depends on coordination among arbitral institutions, lawmakers, and regulatory authorities, particularly the Brazilian Securities and Exchange Commission (CVM) in capital markets disputes.[71] The U.S. experience underscores the costs of delayed or improvised responses, where aggregation pressures forced arbitral institutions into crisis-driven procedural adaptation under conditions of acute strain. Brazil, by contrast, retains a clear timing advantage. Because aggregation pressures are emerging but have not yet produced systemic stress, coordination can occur *ex ante*, allowing institutional design and legislative clarification

[69] *See* Marcelo A. Muriel & Aline Dias, *Controle de Representatividade Adequada nas Arbitragens Coletivas*, in *Arbitragem Coletiva Societária* RB-17.6 (André Luís Monteiro, Guilherme Setoguti J. Pereira & Renato Beneduzzi eds., São Paulo: RT 2021) (electronic version).

[70] One commentator argues that dispute resolution is an underappreciated mechanism of market regulation. If parties cannot trust that breaches will be handled fairly and effectively, they will either transact only with highly trusted counterparties or adopt costly, socially undesirable enforcement substitutes—so market functioning requires a baseline of "instrumental/functional" dispute-resolution quality. *See* Jeffrey W. Stempel, Mandating Minimum Quality in Mass Arbitration, 76 U. Cin. L. Rev. 383, (2008).

[71] *See* Marcelo Barbosa & Guilherme Melchior da Silva Franco, *A Atuação da CVM como Amicus Curiae*, in *Arbitragem Coletiva Societária* RB-18.4 (André Luís Monteiro, Guilherme Setoguti J. Pereira & Renato Beneduzzi eds., São Paulo: RT 2021) (electronic version).

to be aligned in advance rather than assembled reactively. This capacity for preemptive coordination offers a path to accommodate scale without reproducing the destabilizing dynamics observed in the U.S. experience.

6. Conclusion

The experience of mass arbitration in the United States illustrates how aggregation dynamics can re-enter arbitration systems through strategic adaptation when formal mechanisms of collective resolution are constrained. Aggregation pressures in arbitration are not eliminated by doctrinal commitments to bilateralism, but displaced, such that systems designed for individualized adjudication may experience significant institutional stress even as their formal legal foundations remain unchanged. In this sense, mass arbitration in the United States functioned as an institutional stress test under conditions of scale, revealing capacity, coordination, and cost-allocation limits that were not addressed by—and did not require any alteration of—prevailing arbitration doctrine.

The U.S. case therefore serves less as a model than as an extreme illustration of the institutional tensions that arise when scale, coordination, and cost allocation collide with procedural frameworks built around individualized claims. While institutional rulemaking can mitigate problems of coordination, scale, and administrative capacity under conditions of aggregation, it cannot by itself resolve questions of authority, representation, or the binding effects of arbitral outcomes beyond the formally constituted parties. For that reason, questions of representation and the binding effects of arbitral awards turn on sources of authority that lie beyond institutional self-regulation, making some form of legislative clarification difficult to avoid.

Brazil occupies a different position, particularly in temporal terms. In Brazil, such aggregation risks remain localized and contingent, with their most plausible manifestation arising in securities and corporate disputes subject to mandatory arbitration involving dispersed investors. Aggregation pressures are emerging within arbitral proceedings—particularly in settings involving dispersed claimants—but they have not yet generated the kind of systemic strain observed in the United States.

This difference in timing matters. Where aggregation pressures have already materialized at scale, institutional responses tend to emerge reactively, under conditions of crisis and improvisation. By contrast, in a pre-crisis setting, procedural coordination mechanisms and the allocation of decision-making authority can be considered in advance, before aggregation dynamics force ad hoc adjustments. The comparative lesson is therefore not one of institutional superiority, but of choice under conditions of timing: where aggregation pressures are addressed only after they materialize at scale, responses tend toward crisis-driven procedural adaptation, whereas in the Brazilian context the combination of *ex ante* institutional design and legislative clarification can still be considered before stress forces improvisation.

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