Class Arbitration: A Solution for Collective Redress in Europe

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Introduction

As the number and the scope of the cross border transactions increase and expand every year, it is highly expected that the amount of mass injuries will continue to increase in the near future in parallel with the rise of large-scale claims.

It is because cross border transactions do not happen only between large commercial entities but also between commercial entities and end users who might have similar, if not identical, claims against one service or goods provider arising from their dissatisfaction.

In order to respond to this trend, legal systems around the world seek to adopt adequate mechanisms to provide the most efficient, cost effective and fair procedures to redress the claimants in mass injuries.

In very broad terms, the aggregation of claims is accepted to be useful due to various grounds: first, it is more efficient in terms of time and cost when compared to initiating separate claims by each claimant individually. Second, as the amount of claim is also aggregated, group claims usually eliminate the risk of small claimants not to be able to initiate actions due to the small amount of claim. Third, all members of the group are equal during the proceedings and lastly, the risk of the courts to render conflicting decision is ruled out (1).

Again, in general, group actions can be divided into two types: injunctive or remedial group actions. As their names suggest, in injunctive group actions, the plaintiffs seek injunctive relief whereas the remedial group actions seek money damages (2).

In particular, in certain areas, namely with regard to financial services and securities industries, product safety and product liability, collective redress mechanisms are considered essential. (3)
Having said that group actions by their nature come with problems regardless of where they are initiated. Indeed, the number of claimants raise questions of eligibility, procedural difficulties, representation problems, jurisdiction and merit issues as well as enforcement concerns.

In this context, the issue of having a sufficient collective redress model constitutes a higher importance for the European Union either through the courts of member states or as a result of reliable alternative dispute resolution mechanism.

As known, the European single market (4), allowing the free movement of goods, services, capital and persons within the European territory is considered as one of the most important achievement of the European Union. Accordingly, the right to an effective remedy to be provided for anyone whose rights are guaranteed by the European Union are breached, is recognized under the Charter of Fundamental Rights of the European Union. (5)

However, under the current collective regimes which are in place in the European Union, it is difficult to say that there is one uniform mechanism that is applied among the members of European Union. A majority of the courts of member states do recognize the collective redress mechanism but the way in which they do varies within the Union.

A proposal for a European wide uniform mechanism in relation to collective redress could sound quite impertinent but given the area within which goods and services are circulated as well as the individuals and legal entities affected such a uniformity would have been an ideal solution.

Therefore, it seems that an alternative way addressing the redress mechanism in the form of alternative dispute resolution looks more attainable in the near future in the European Union so as to be able to provide a better and equal standard for individuals and entities who can be party to cross-border transactions.

It can be proposed that class arbitration as an alternative solution for the current problems of collective redress mechanisms in Europe which would provide a level but alternative playing field for the injured mass negatively affected as a result of the disputes arising from goods or services moving freely in the European Union.

Background

To better understand the current issues and the existing legislative framework of the collective redress in the European Union and to be able to comment on the dynamics which could influence the future of the class arbitration in the European Union, an analysis of the evolution of collective redress mechanisms in the European Union as well as the review of history of class arbitration in the United States is needed.

It is interesting to see how the terminology has been evolving on both sides of Atlantic Ocean at different pace. As the U.S. jurisdiction is ahead of Europe in this respect, terminology is settled there which is likely to be followed by European practice. Briefly, all of these analyses aim to set a broad framework of the evolution of the collective redress and class arbitration.
A. Definitions

*Collective redress*

Collective redress can be defined as "a cost-sharing and procedure-consolidating mechanism by which the claims of a group of claimants with similar factual and legal issues are congregated together in one action." (6)

In other words, collective redress brings together claimants who have similar, if not identical, claims against one or multiple parties which is recognized in all civil law jurisdictions in Europe with a by and large procedural requisite. Alternatively, in a number of papers prepared by the European Commission, the collective redress has been defined as "a concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices". (7)

Although the definitions of collective redress with minor changes may be suggested, usually all comprise the concepts of multitude of claimants and the unification of the action.

Also, it is noteworthy that the terminology used in the European Union has been changed from class actions to collective actions and subsequently from collective actions to collective redress. (8) This suggests that this area of law is still developing particularly at the European level.

The first change in the terminology reflects the intention of the European Commission to distance itself from the US class action. The second change implicated a re-examining of all available options after being realized that the judicial procedure was not the only method. (9)

Class arbitration and collective arbitration are usually classified under large-scale arbitration which is a broader term. Large scale arbitration involves, mass, class arbitration and collective arbitration. Since the definitions of these terms may vary, for present purposes, it is suffice to give short explanations on each type of large-scale arbitration.

*Mass arbitration*

The first type of large-scale arbitration is mass arbitration. It can be said that the case of Abaclat and Others v. The Argentine Republic (ICSID Case No. ARB/07/5) has opened the way to large-scale arbitration in the investment context. (10) In this dispute between Italian bondholders and the Argentine Republic, the tribunal has determined that there is no impediment to mass claims under the ICSID Convention and Arbitration Rules. (11) Interestingly, the tribunal has allowed mass arbitration where governing treaties and procedural rules were silent about the possibility of joint claims. (12)

*Collective arbitration*

The second type of large-scale arbitration is collective arbitration. In general, private mechanisms that do not have the characteristics of U.S. style class arbitration are classified under the term collective arbitration.
Examples of collective arbitration can be found in a number of common and civil law jurisdictions. (13)

In the United States, collective arbitration has been developed to distinguish the kind of opt-in procedures from the type of opt-out procedures. (14) Among civil law countries, collective arbitration can be seen in Germany and Spain.

In Germany, collective arbitration has developed following a decision rendered by the German Federal Court of Justice where the German Federal Court of Justice has stated that shareholder disputes were arbitrable. (15)

Subsequently, in 2009, the procedures to be followed in arbitrations that have arisen due to a limited number of shareholder disputes were implemented by the German Institution of Arbitration (16)(17). Finally in Spain, collective arbitration has evolved with the efforts of the legislature. More detailed information with regard to collective arbitration in Spain can be found under the Section "The Member States' National Legislation on Collective Redress".

Class Arbitration

Class arbitration can be defined as "a mix of two efficiency mechanisms in dispute resolution - class action that allows the joining of multiple parties who have suffered similar injuries (usually by the same defendant) in a financially feasible fashion; and arbitration, which offers binding results and a plethora of advantages over litigation." (18) Strong states that "the paradigmatic form of class arbitration involves one or more "named" or "lead" claimants who assert legal claims on behalf of a group of "unnamed" claimants in a representative capacity". (19)

B. Brief history of class arbitration in the United States

In the mid-1960s, the Federal Rules of Civil Procedure has been amended and thus the modern version of class action litigation was born in the United States. (20)

When it comes to the origins of class arbitration, it is generally accepted that class arbitration has been emerged in the early 1980s with the seminal case Keating v Superior Court where the California Supreme Court authorized the certification of plaintiffs by a California trial court to proceed in arbitration. (21)

As the Federal Arbitration Act was entered into force before the emergence of modern class action, the Federal Arbitration Act did not include any provision about class arbitration either a regulation with regard to the form of arbitration agreements which enable class arbitration. Despite this absence, the aim of the Federal Arbitration Act is clear. In Prima- paint Corp. v. Flood &Conklin, the Supreme Court has stated that the Federal Arbitration Act's aim is to "make arbitration agreements as enforceable as other contracts". (22)

In Keating v Superior Court, franchisees of a chain convenience store has challenged the validity of an adhesive arbitration clause included in their franchise agreement and initiate individual and class suits (23). The opinion of the court was that the franchise agreements were adhesion contracts. Nevertheless, the Court has rendered a decision stating that it would be erroneous to conclude that arbitration clauses are invalid due to the mere fact that arbitration clauses are included in adhesion contracts. The Court on the other hand, concluded that because
of the adhesive nature of the contracts, the contracts should be reviewed with regard to the "the special problems of unfair advantage which may appear in an adhesion setting when individual arbitration agreements are invoked to block an otherwise appropriate class action". (24)

After almost a decade, Pennsylvania state appellate court took a step forward in its decision Dickler v Shearson Lehman Hutton, Inc. by granting the trial court jurisdiction over class certification and not referring to likelihood of prejudicing the rights of the defendant. (25)

_Green Tree Finance Corp v Bazzle_

In 2003, the United States Supreme Court implicitly recognized class arbitration in Green Tree Finance Corp v Bazzle. (26) In Green Tree Finance Corp v Bazzle, the underlying dispute concerned two group of homeowners ("Bazzle" and "Lack and Buggs") which have entered into contracts with Green Tree Financial Corp. acting as their mortgage lender. The agreements included an arbitration clause (27) and the violations in respect of consumer protection violations were raised by the plaintiffs. (28)

Both South Carolina class actions which are initiated by homeowners against Green Tree Financial acting as their mortgage lender, proceeded to arbitration and those awards in relation to class damages and attorney fees exceeding USD 10 million were confirmed by South Carolina trial courts. (29)

In this decision, the U.S. Supreme Court held that an arbitrator, rather than a court, must decide whether the arbitration agreement allows class arbitration or not. The reasoning of Green Tree Finance Corp v Bazzle led to conflicting decisions. Courts that had previously taken the view that in case an arbitration clause is silent on class arbitrations, class arbitration is permitted. Likewise, courts that had limited class arbitration by arguing that silence on class arbitration signifies lack of consent. (30)

The decision of Green Tree Finance Corp v Bazzle paved the way of class arbitration within two leading arbitration institutions in the United States. To be more specific, American Arbitration Association (AAA) (31) and the Judicial Arbitration and Mediation Service (JAMS) (32) have implemented class arbitration rules.

After an almost a decade of application of class arbitration, the Supreme Court of the United States has limited the availability of class arbitration claims in AT&T Mobility v Concepcion. In this decision, the Supreme Court has upheld an arbitration agreement by which the consumer's right to start a class action arbitration has been waived. (33)

_Stolt-Neilsen v Animalfeeds Int'l Corp._
Another phase has started in 2010 with the Supreme Court's decision of Stolt-Neilsen v Animalfeeds Int'l Corp. In this decision, the Court held that in case the parties have not explicitly agreed to refer the dispute to the class arbitration, parties cannot be forced to be involved in class arbitration. In this case, the arbitration clause was silent on class arbitration and therefore the Supreme Court held that arbitration panel cannot interpret the parties' intention. According to the Supreme Court, in such case, authorizing the class-wide arbitration would be excess of the powers of the arbitration panel. (34)

**Oxford Health Plans LLC v Sutter**

In 2013, the US Supreme Court rendered another decision on class-action arbitration. In the case of Oxford Health Plans LLC v Sutter, the Supreme Court upheld an arbitral decision where it was rendered that class-action arbitration was permitted by the parties' arbitration clause. Thus, it may be argued that Oxford represents a change in the Court's approach. (35)

Early cases of class arbitration are originated from judicial action rather than party autonomy. The decision rendered by the Supreme Court has been criticized heavily by some scholars due to the confusion it has created. It has been suggested that the conflicting views of the United States Supreme Court has created an inconsistent and unpredictable arbitration environment harmful to business world along with the courts. (36)

Although they are not compulsory features of class actions; contingency fees, punitive damages and discovery are heavily associated with U.S. type class actions. As it will be discussed further under the subsection arbitrability, due to these elements, European legislator has been hesitant to adopt any mechanism bearing similarities with U.S. style class arbitration or class action. These features are not necessary elements of class arbitration which proceeds on an opt-out basis. It is against this background that the possible future of class actions in United States should be analysed.

**C. Brief history of collective redress in Europe**

The policy of European Union on collective redress has been dominated by public enforcement models for many years. Such public enforcement models usually include state authorities which are granted with special powers. These authorities are empowered to operate special procedures to detect and penalize infringements, if necessary. (37)

However, the lack of adequacy of Member States' public enforcement models used in consumer collective redress and competition damages have been in the centre of discussions and criticism in recent years. For instance, as for the competition claims, the enforcement was mainly limited to issuing fines and the frequency of claims were not sufficient. (38)

This inadequacy leads to a number of initiatives to develop private rights of action and to establish a European policy on collective redress. (39)

*Steps taken by the European Union with regard to collective redress*
At the EU level, origins of collective redress date back to discussions with regard to consumer collective actions in 1980s. (40)

In the history of the development of collective redress, three Directorate Generals, DG SANCO, DG COMP and DG JUST are noteworthy. These Directorate Generals were persistent on the establishment of collective actions. DG SANCO conducted studies with regard to consumer protection. DG COMP who came into office in (the date will be inserted) aimed to facilitate the payment of competition damages. Lastly, DG JUST has conducted the efforts to harmonize civil procedure legislations. (41)

In 1984, Directive 84/450/EEC obliged the Member States to implement collective representative action with the aim of combating advertising which could mislead consumers through redress mechanisms. Subsequently, similar terms regarding unfair terms in consumer contracts and distance selling have been adopted by Directive 93/13/EEC and Directive 97/7/EC respectively. (42)

Until late 2000s, the European Commission has made efforts to strengthen private enforcement by forcing Member States to facilitate the access to justice. (43) In addition to that, the European Commission has encouraged the Member States to increase the legal aid funds. However those funds used for legal aid failed to satisfy the needs of the Member States by late 2000s. (44)

Similarly, in 2001, in the Court of Justice's decision of Courage and Crehan (45), with regard to violation of EU competition law, it has been stated that private parties are entitled to compensation under EU law. (46) Apart from the efforts of the European Commission, another fundamental institution of the European Union, the European Court of Justice, in its judgment Manfredi (47), has outlined the need for an effective redress for the injured parties of competition law infringements. (48)


In broad terms, the objective of the Green Paper which was published on December 19, 2005, was to trigger the existing debate on private enforcement of antitrust law (49). The Green Paper clearly shows that the European Commission prefers to underscore private enforcement to public enforcement. (50)

In the 2008 White Paper, two mechanisms including group action which are initiated by two or more individuals and representative action initiated by a qualified entity on behalf of aggrieved parties were mentioned. (51) In addition to that, in the White Paper, the European Commission introduced proposals such as standing to bring claims, collective actions, disclosure/discovery rules, and the quantification of damages. (52)

The European Commission has issued a 2008 Consultation on benchmarks. (53) There has been criticism about the benchmarks due to the assumption that a judicial solution is necessary. (54) This was followed by a Green Paper on consumer collective redress published in 2008. (55) The Green Paper has included Questions and Answers document along with a Problem Study and an Evaluation Study which assessed the customers' problems in the process of obtaining redress and the efficiency of collective redress mechanisms in the EU. However, the
Green Paper did not include any comment with regard to the consultation in relation to benchmarks. (56)

Briefly, the Green Paper on Consumer Collective Redress included four alternatives. First, it was suggested that EC takes no action considering that EC measures and national would be sufficient. Second option was establishing a cooperation between European Union Member States who have already implemented collective redress mechanisms in order to expand the collective redress mechanisms in the rest of the Member States who have not adopted any collective redress mechanism. Thirdly, it was suggested that the out-of-court dispute resolution mechanisms enhance the existing collective redress procedures. Lastly, the forth option advises that a single European Union measure to be implemented in the totality of the Member States which will enable the consumers to have access to adequate redress. (57)

In 2011, the European Commission conducted a public consultation titled "Towards a more coherent European approach to collective redress". (58)

In this consultation document, European Commission sets forth a number of features to be implemented when establishing a European collective redress mechanism. The most outstanding features are the following: First of all, a representative person or body, entitled to decide on behalf of the group should lead the collective action. Secondly, representative body should be able to communicate with group members. Thirdly, in a collective redress mechanism, the alternative dispute resolution should have an important role. In addition to the above, costs- shifting rule (59) should be applied whilst the member of the group are protected from possible financial risks which may occur during litigation. (60)

Subsequently, in 2012, the European Parliament adopted the resolution "Towards a Coherent European Approach to Collective Redress". In this resolution, the European Parliament underscored the importance of the legal traditions of the Member States and improving the coordination of good practices among Member States. (61)

This resolution was followed by a Communication titled "Towards a European Horizontal Framework for Collective Redress" where the Commission has stated its view on key issues with regard to collective redress. (62)

In 2013, The European Commission issued a number of documents, namely the Communication titled "Towards a European Horizontal Framework for Collective Redress" (63) and the "Recommendation on Common Principles that should guide Member States in regulating collective redress mechanisms in the Member States concerning violations of rights granted under Union Law". The Communication included an overview of previous debates on collective redress and also described the position of the Commission with regard to the European Parliament's 2012 Resolution. (64)

In addition to the above, the Commission implemented the "Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union". (65)

According to the European Commission, while it is essentially the duty of the public enforcement to prevent and penalize the violations of rights recognized under Union Law, the claims initiated by private persons have a supplementary function. Within the Recommendation, the violations of rights refer to all violations of rules
which cause prejudice to persons or creates the likelihood to cause prejudice. The Commission enumerates consumer protection, environment protection, protection of personal data, financial services legislation and investor protection as the fields where the private enforcement through collective redress is crucial. (66)

In Commission Recommendation of 11 June 2013 on "common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law", collective redress was defined as "(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)" (67). This definition clarifies that collective redress covers both injunctive and compensatory mechanisms. (68)

The Recommendation sets forth a number of principles to be applied for both injunctive and compensatory collective actions, representing minimum standards which are designated to improve the judicial protection offered to group rights. Such principles mainly include standing, admissibility of actions, adequate information to potential claimants and funding of collective actions. (69)

To conclude, the work conducted by the European Commission with regard to collective redress mechanisms seems to be dispersed and it can be said that the approach of the European Commission has changed in time. First, the European Commission has adopted a more sectorial approach. Subsequently, the European Commission has implemented a horizontal approach in order to introduce a more comprehensive approach. (70)

After having enumerated the steps taken by the European Commission, the way the European Parliament interprets the general features of U.S. type class action will be analysed in the next subsection. The European Parliament's Approach on General Features of US Type Class Action In order to comment more accurately on the features of a proposed class arbitration model as a solution for collective redress mechanism in Europe, the European Parliament's approach with regard to the general features of U.S. type class actions which are generally considered as problematic in Europe is important to understand. This approach is closely connected to the guiding principles of the European Commission which have been identified following previous consultations. In the "Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress" (71), the European Commission identifies the following principles to guide any possible European Union initiatives with regard to collective redress: "(1) the need for effectiveness and efficiency of redress; (2) the importance of information and of the role of representative bodies; (3) the need to take account of collective consensual resolution as a means of alternative dispute resolution; (4) the need for strong safeguards to avoid abusive litigation; (5) availability of appropriate financing mechanisms, notably for citizens and SMEs; (6) the importance of effective enforcement across the EU." (72)

In order to understand why a special model of class arbitration for the European countries is needed, it is also helpful to understand European fears with regard to U.S. style class actions. To be more specific, European Commission identifies the likelihood of abuses in the U.S. style class actions and fears that an adoption of U.S. style class actions as collective redress in Europe would create an economic incentive for parties to initiate
actions although the merits of the claims are not well established. To be more specific, usually, the punitive damages in big amounts, contingency fees and high costs of discovery procedures may be considered as economic incentives which push the claimants and the attorneys to bring class actions. (73)

With regard to collective litigation costs, the European Commission recommends that the Member States implement loser pays principle where winning party's legal costs are compensated by losing party. (74) In addition, with regard to third-party funding (75), the European Parliament sets forth various safeguards to be adopted by the Member States (76). To be more concrete, the European Parliament states that third party funding should be "designed in a way that serves in a proportionate manner the objective of ensuring access to justice. (77) In addition, the European Commission aims to prevent any abuse that may be occurred with regard to attorney fees. Accordingly, the European Commission recommends the Member States not to allow contingency fee agreements unless the interests of both parties to the dispute are protected. (78)

As for the punitive damages, under paragraph 31, the European Commission prohibits the punitive damages. Even the title of paragraph 31 which is "the prohibition of punitive damages" reflects the strict approach of the European Commission toward punitive damages. (79)

Section V "Specific principles relating to compensatory collective redress" of the Recommendation addresses the highly debated issue of opt-in/opt-out principle. The pros and cons of both of the procedures have been the subject-matter of many discussions among scholars and practitioners. In an opt-in procedure, the lead plaintiff's representation is constituted on a clear mandate which is based on the opt-in declaration of each group member.

In principle, the European Commission prefers, opt-in procedure over opt-out procedure. One of the rationale behind this choice is that in an opt-in procedure, before the court renders its final decision, the represented group should be identified and this is possible when the class members take part in the proceedings voluntarily (80). Also, in an opt-in procedure, it is easier to determine the value of the dispute. In addition to that, the merits of the case can be more easily identified by the court. Lastly, in principle, the opt-in model protects the parties' autonomy and the freedom of an individual to participate in the proceedings (81). On the other hand, one can argue that in a scenario in which the case involves small damages, the number of the individuals who will spare time to be involved in the opt-in procedure may not be very high (82). In addition to that, in general, opt-out procedures give the defendant the opportunity to settle with all the plaintiffs in one single action while in an opt-in procedure, it is difficult, if not impossible, to detect all the individuals which are entitled to be included in the class. Due to this deficiency, certain defendants may refrain from settling. (83)

The Current State of Collective Redress in Europe

To understand the existing state of the collective redress in the European Union from the Member States' perspective, the main features of each Member State's collective redress legislation will be identified in the next section. In particular, how the features usually associated with the U.S. type class actions are reflected in the Member States' existing national legislation will be reviewed. In this respect, under this Section, a brief outline of
each national legislation is given with a focus on the problematic issues identified under U.S. law. This analysis will help to predict more easily on the future of class arbitration in the Europe.

A. Member States' Collective Redress Legislation

In Sweden, various forms of class action exist. Prior to the adoption of the Group Proceedings Act (84), as it might be expected, certain academics and defence attorneys as well as business circles have opposed to the reform whereas it was supported by the majority of labour unions and consumer lawyers and environmentalists (85). In addition to organizations, private individuals are also entitled to start a class action. Injunctions and/or monetary damages may be claimed during the proceedings. (86) With regard to costs, loser-pays rule is applicable. Although earlier proposals included an opt-out proceeding, the 2003 reform implements an opt-in model. (87) Accordingly, the individual who wish to join the group must apply to the court in order to join. Also, any individual who falls under the description of the group must be informed by the court in a way the court deems adequate. (88)

In 2008, Denmark (89) has implemented a set of rules on group actions. Under Danish law, there are three types of collective redress mechanisms which are general group action, the representative action which could be triggered by the Consumer Ombudsman and competition group action. (90) The opt-in procedure is the principal model whereas opt-out procedure can be triggered in special circumstances. (91) With regard to costs, loser pays rule has been adopted. (92)

In Finland, although class action legislation (93) has been delayed due to the resistance of the business community, it came into force in 2007. Unlike the rest of the Scandinavian countries, the Consumer Ombudsman has been designated as the principal plaintiff whereas individuals can only initiate actions in case the Consumer Ombudsman does not start an action. In addition to this restriction, the scope of the claims have also been limited to a certain number of disputes (94)(95). With regard to the costs, under Finnish law, although it is not very common in practice, the contingency fees are available. (96)

In Netherlands, collective settlement was implemented in 2005. (97) The collective redress mechanism covers two types of models which are group actions and mass settlements. (98) Unlike the majority of the collective redress mechanisms in Europe, the law on collective settlement in principle sets forth an opt-out procedure (99).

In Lithuania, two types of collective redress mechanisms exist which are group actions and representative actions. (100) The scope of application of the existing collective redress mechanisms include the protection of public interest. As for the costs, contingency fees are valid. (101)

In Portugal, in 1995, the law (102) recognized a group of person's right to initiate actions collectively in certain fields such as public health, environment and consumer protection. In addition to the individuals, associations may also bring actions. (103) As for the costs, contingency fees are not permitted. (104)

In France, three collective redress mechanisms, namely action for financial reparation of consumer collective interests, joint representative action for consumers and joint representative action for investors are in place.
A non-profit registered association is entitled to initiate actions. After having confronted with various mass claims in the 21st century, Belgium was in the pursuit of implementing an efficient tool of redress of collective harms. In Belgium, a consumer class action act was entered into force on 1 September 2014. The Act has introduced a consumer collective redress action in the Code of Economic Law.

In Austria, an association or an institution which represent the claimants is entitled to bring action on behalf of the claimants. As the majority of the Member Countries, the Austrian model adopts an opt-in procedure. As for the remedy, it is accepted that the merely monetary damages is available.

In Italy, the mechanism of group action is available. As for the costs, loser pays rule is applicable and contingency fees are permitted. With regard to opt-in/opt-out procedures, Italian legislation prefers an opt-in procedure over an opt-out approach.

In Germany, collective redress mechanisms have become a hot topic following the Deutsche Telekom case where the Frankfurt Regional Court had to hear claims of 15,000 individuals. Under German law, there are three types of collective redress mechanisms which consist of model case procedure, representative actions and the procedure of skimming off the profits. As for the costs, contingency fees can be valid under limited circumstances.

In the United Kingdom, similar to Germany, Oppen litigation has triggered the development of collective redress mechanisms. It can be said that as the common law countries, England and Wales have much more experience than the European jurisdictions with regard to compensatory damages to be claimed within the scope of group actions. There are three types of collective redress mechanisms: representative action, group litigation order and competition action. The types of remedies can be classified as ordinary remedies and damages to be collected by the represented consumers. Contingency fees also named as damage-based agreements are permitted.

In Greece, two types of collective redress mechanisms, including group action and declaratory action for damages are in place. The collective redress mechanism grants a consumer protection with regard to a number of provision such as general terms and distance selling. Consumer associations which meet certain criteria defined in the law are entitled to initiate actions. With respect to the costs, consumers have no liability.

In Bulgaria, three types of collective redress mechanism exist: general group action procedure, collective action for damages to the collective consumers' interests and collective action for damages suffered by consumers. Similar to many Member States the loser pays rule has been adopted.
In Poland, a general group action model with regard to consumer protection, product liability and infringements is available. (129) The Polish model stipulates an opt-in proceeding. The collective action can be initiated by a member of the group who represent the rest of the group or a local consumer ombudsman. As for the type of remedies, any kind of damage including monetary and in-kind compensation is possible. (130)

In Hungary, group actions to be initiated under competition law is available. (131) The Hungarian Competition Authority is entitled to bring actions in cases where a competition proceeding has been initiated already with regard to the possible infringement. (132) Under Hungarian law, contingency fees are available under the condition that the attorney takes clearly the risk of the outcome. (133)

In Spain, certain types of individual interests and collective consumer interests are protected by the collective redress mechanisms. (134) Under this model, all types of damage can be claimed. As for the costs, the loser pays principle is valid and the contingency fees are applicable. (135) In addition to that, the Spanish legislature has created a collective consumer arbitration in 2008 (136) by enacting the law numbered 213/2008 which aims to resolve consumer disputes that arise out of a common factual basis through collective arbitration. Under the law numbered 213/2008, the acts are defined as "acts to have the power to injure the collective interests of consumers and users and "affect a determined or determinable number of such persons". Due to the wording "determinable", one can argue that new members may join the claimants after the initiation of the arbitration. This is a feature departing from the usual collective redress mechanisms in the European Union. The Law creates multiple Consumer Arbitration Boards having jurisdiction over consumers in its territory whereas National Arbitral Board's jurisdiction covers parties from different territorial regions. The role of the Consumer Arbitration Board is essential in that it makes the initial determination about the adequacy of a collective proceeding. Subsequently, the respondents must agree to collective treatment. In addition, it provides that in case the respondent decided to pursue collective arbitration, any pending individual arbitrations regarding the same dispute will be automatically suspended unless an arbitral tribunal has already been formed. (137)

After having enumerated the basic features of each Member States' national legislation on collective redress, it seems to be useful to analyse the situation with regard to collective redress in Europe from a broader and comparative perspective.

**B. Overall Analysis of Member States' Collective Redress Legislation**

The data given under the section above reveals that seventeen Member States (138) of twenty-eight Member States have adopted collective redress mechanisms in their legislative system.

When it comes to the similarities and differences between such collective redress mechanisms, it can be interpreted that certain similarities exist in Member State's national legislation which enable to classify the existing collective redress mechanisms under the following four subheadings: group actions, representative actions, test case procedures and procedures for skimming off profits. (139)

However, despite of a number of similarities, it seems that each Member State's national legislation on collective redress differentiate from each other extensively, in particular with regard to establishment and application of
such collective redress mechanisms. (140) As mentioned above, this variety can be interpreted as an obstacle restricting the European Union citizens' easy access to adequate redress mechanisms.

Having reviewed the essential features of the national legislation of each member state on collective redress mechanisms, a number of common characteristics can be extracted: the majority of the Member States have adopted in principle, an opt-in procedure whereas an opt-out procedure has not totally been ruled out in the overall of the Member States. Again, in the majority of the Member States, a protective approach which aims to protect the claimants in terms of high costs has been adopted. With regard to the loser pays principle, in general, the Member States have implemented the loser pays principle. (141)

As it can be seen from the analysis given under the Section titled "Member States' Collective Redress Legislation", in certain European countries such as Germany and the United Kingdom, the introduction of collective redress mechanism has been triggered by class claims which showed explicitly the need to a legislative background to address such claims.

In addition to that, the multitude of models obstruct the harmonization of Member States' national legislation. Furthermore, considering the timeframe of the efforts devoted to the development of an adequate collective redress mechanism, it can be said that the efforts to establish a unified redress mechanism is hard to achieve in the very next future.

Class Arbitration: A Solution for Collective Redress in Europe

As previously stated under the introduction, one of the most important characteristics of the European Union is European single market where free movement of goods, services, capital and persons is assured (142). In the European single market where goods and services move freely, the users of such goods and services could be subject to different rules and procedures depending on the country in which the disputes arise as there is yet no unified redress mechanism amongst the European Union member states. This diversity constitutes a drawback to the free movement principle of European Union as users of goods and services moving freely are not protected by the same redress mechanism and possibly at the same standards which gives rise to inequality and likelihood of injustice.

This is in fact exact opposite of what the principle of free movement and goods stands for. Without having the same standard of rules governing disputes which might arise whilst the goods and services are moving, the users of those in reality would be forced to go through different set of procedures with a varying duration. The lack of uniform court system in this respect affects mostly the individual users who might have used the same goods or services but be residing in different member states.

It might be said that this issue did not cause a serious problem because the individual users of such goods and services, who could be regarded as end-users or more generally consumers are well protected across Europe regardless of different degrees of protection mechanisms set forth by the member states of European Union.

Nevertheless, this argument is not entirely convincing as equality and foreseeability in the redress mechanism
across Europe is an integral part of what is called as free movement of goods or services. The principal of free movement of goods and services should create equal opportunities and rights to each and every citizen of member states at all levels. Otherwise, the cost of moving goods and services would differentiate within the Union which would hinder the essential reason why the principle was established in the first place.

While the solution provided by courts do seem to differentiate, alternative dispute resolution methods do not seem to have provided a good response to the problem in question either. Majority of arbitration institutions in Europe have not come up with a solution.

In this context, as uniforming the procedural and substantive rules of state courts seems unachievable in the shorter term which requires multiple levels of political involvement, establishing a method within the auspices of alternative dispute resolution could be more attainable.

This is why class arbitration can be proposed as a method which is more unified for injured individuals in respect of collective redress that could help users circumvent different collective redress mechanisms set by European Union member states.

The role of the class arbitration as a solution to the current problems of collective redress in Europe will be analysed below. In this respect, first, the possible drawbacks to the development of class arbitration identified in the literature (the issues of arbitrability, validity of class arbitration clause, due process and public policy issues together with confidentiality) will be touched on. Under each subheading, recommendations for such issues will be provided. Second, a relatively recent collective arbitration model from Germany will be reviewed. Third, possible impacts of the current discussions in the USA about class arbitration to the European context will be briefly analysed. Lastly, some remarks on the development of class arbitration in Europe will be given.

Arbitrability

One could argue that, at the initial stage, the issue of arbitrability could deteriorate the development of class arbitration. (143)

In some of the European Union member states, it is, to a certain extent, disputable whether or not class claims are arbitrable. As known, arbitrability (144) deals with the question of which issues can be referred to arbitration. (145) In this regard, antitrust and competition laws, securities transactions, insolvency law, intellectual property rights, illegality and fraud, bribery and corruption have been among problematic matters with regard to arbitrability in international arbitration.

Having said that, over the years, with the enhancement of arbitration and pro-arbitration policies of the countries, the expansion of the scope of the arbitrable issues has been witnessed in international arbitration. Considering such an evolution in the approach towards arbitrability, one can predict that the debate on arbitrability of class claims will also be diminished in the coming years.

In addition to the natural evolution of the arbitration, in order to expedite the process, it may also be suggested that the European Parliament takes a pro-class arbitration position and recommends the European Union
member states to implement an express provision allowing the arbitrability of class arbitration in the national arbitration laws of member states. Thus, a European wide agreement on the arbitrability of class claims, to be initiated most likely by the European Parliament, seems to be needed so as to avoid the claims of inarbitrability of class arbitrations.

Validity of the class arbitration clause

The problems concerning the validity of class arbitration usually start with the validity of the arbitration clause. The arbitration clause referring the dispute to class arbitration, therefore, should be in a form and wording reflecting fully the consensus of the parties to refer the dispute to class arbitration. Such a clarity of the arbitration clause will more easily allow its validity.

Taking into consideration the oppositions arising from the validity of the class arbitration clauses either with regard to the scope of formal prerequisites or consensus of the parties, it may be suggested that a legislative push is needed. It may be advised that the European Union member states insert rules into their national arbitration laws to facilitate the validity of the class arbitration clauses. In order to put such a pressure on the Member States, a recommendation which will be issued by the European Parliament could be more efficient in terms of time and pressure rather than waiting for an initiative to be triggered by the Member States.

As for the discussions about opt-in and opt-out procedures, it seems that an opt-in procedure may be more easily implemented in the European Union Member States rather than an opt-out mechanism considering validity concerns. In fact, the tendency of the Member States towards the opt-in procedure is already reflected with regard to collective redress mechanisms.

In addition, standard form contracts that include arbitration agreements may be particularly problematic considering consumer cautious approach of European Member States jurisdictions. This concern arises particularly with regard to arbitration clauses which adopt on opt-out system. This is why the solution seems to lie in an opt-in system.

Due process and public policy issues

When it comes to the enforcement of class arbitration awards, due process and public policy concerns may arise. Before addressing the possible objections that could be raised within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") (146), it is useful to touch on the applicability of the New York Convention in the enforcement of class arbitration awards. In this regard, two elements of the New York Convention can be used by a party seeking to prevent the enforcement of the award.

First, one could argue that class arbitration cannot be considered as an arbitration that can be classified under the New York Convention therefore, the award cannot be enforced. (147) This would be a weak argument to prevent enforcement of class arbitration awards given that there is no substantial difference between class and traditional arbitration.
Second, it can be argued that since the application of the New York Convention can be limited to commercial proceedings (148) by the signatories, the class arbitration awards can be excluded from the scope of application of the New York Convention. (149)

This argument could be negated since the big portion of signatory countries have not come up with such an opposition to that effect so far. As for the remaining signatory states which claim to have taken a pro-arbitration position and which have limited the scope of application of the New York Convention, the notion of commerce should be interpreted widely.

As known, violation of due process is one of the grounds of refusal of recognition and enforcement enumerated in Article V (1) (b) of the New York Convention. (150) The ground of due process has two pillars: proper notice and the ability of the parties to present their case. It is also noteworthy that the scope of application of public policy and international public policy defences which is stipulated in the same Article of the New York Convention (151) can intercept in the majority of the cases.

With regard to due process, three opinions stand out. First, it can be argued that judicial involvement is needed to administer due process. Second, some scholars argue that the judicial review should intervene following the end of the arbitral proceeding, if necessary. (152) As a third option, an alternative which does not foresee any judicial intervention may be suggested. In such a model, the judicial intervention is eliminated and a voluntary due process protocol is provided. (153)

Although the third model can be considered as the ideal one, considering the preoccupations of European lawmakers with regard to possible due process violations in class arbitration, in particular, the need to provide due process in consumer related collective redress, the intervention of judicial review can be tolerated at the initial stage. The more arbitral tribunals will render awards that do not violate due process, the more lawmakers' and other stakeholders' confidence in arbitral tribunals seems to increase.

Last but not least, it is important to remember that the courts of signatory countries have discretion to accept the enforcement of the arbitral awards while the grounds to refuse enforcement stipulated under Article V (1) of the New York Convention have been justified. In other words, even though the party seeking to block the enforcement of the award justifies the ground of refusal of the enforcement, the court is entitled to enforce the arbitral award.

Also, it is noteworthy to see the position of the enforcing state with regard to large-scale litigation in general. In case the enforcing state allows large-scale litigation, this could be interpreted as a positive approach to large-scale arbitration too. (154)

More specifically, under the due process issue, the appointment of arbitrators in respect of absent class members who could not choose their arbitrators may be a problem. The appointment of an arbitrator by a sole party has been discussed by scholars. As known, the traditional approach with regard to the appointment of arbitral tribunal was the appointment of the arbitration tribunals by the parties. However, following the reform in multi-party proceedings in the 1990s, national laws and arbitral rules started to allow a neutral party to
appoint the arbitral tribunal. This development clearly shows that a valid and already applicable alternative to the traditional approach of the appointment of the arbitration tribunals exist. Such an alternative can also be convenient and used in the appointment of arbitrators in the class arbitration. (155)

In Siemens AG and BKMI Industrienlagen GmbH v Dutco Construction Co, usually referred as Dutco case (156), Cour de Cassation ruled that appointment of only one party-arbitrator by an arbitral institution violates the principle of equality which requires that each party to an arbitration have the same rights in appointing its arbitrator. The approach of Cour de Cassation contrasts with the interpretation of Swiss Federal Court as it has taken the view that due process is not violated even if the arbitral institution is appointed only for one side. This example shows the different views among European judicial authorities preventing a settled approach.

The problem arises because on behalf of absent class members, usually, class representatives or their legal counsel appoint arbitrators. A uniform approach is needed for this problem in the sense that the decision of Cour de Cassation in the Dutco case creates a serious obstacle. For class arbitration to be relived from due process concerns in Europe, Cour de Cassation and its equivalents having the same view on due process should revise their stance. Otherwise, some jurisdictions will remain to be risky regarding the enforcement of class arbitrations.

It can also be argued that the higher the number of participants in the class arbitrations, the bigger the hesitation of the member states would be. Of course, while doing that, member states could intent to rely on the argument that such arbitrations could give rise to the violation of due process and eventually public policy. Some judges in Europe could come up with the argument that class actions are unknown to their jurisdiction which could be seen as a sufficient reasoning to raise public policy opposition. For example the Eastern European Countries are known to be less arbitration friendly. Having this perspective, these countries could tend to set side class arbitration awards based on public policy. In such a case, class arbitration in Europe as an alternative of existing collective redress mechanism would lose its appetite.

An additional issue may arise in case the non-party class members have filed a separate proceeding which covers the same matter subject to the dispute. To overcome conflicting arbitral awards that may be rendered by different arbitral institutions or decisions given by courts, it would be helpful to implement a mechanism addressing the issue. (157)

Confidentiality

The confidentiality in a class arbitration is another aspect that should be addressed. Confidentiality of the arbitration proceedings has been one of the most debated issues in arbitration circles for many years. Some have argued that the legal basis of confidentiality is the consensus of the parties on confidentiality which is reflected in the arbitration agreement. Others have argued that confidentiality should be stipulated within the applicable law to the arbitration proceeding through the rules of the arbitration institution or the arbitration law chosen by the parties. Separately, under English law, confidentiality has been considered as an implicit provision in an agreement due to business efficacy or arising from law. (158)
Given these different approaches towards confidentiality, it may not be very straightforward to comment on the confidentiality of an arbitration procedure in class arbitration. Confidentiality is a general concern when it comes to class arbitration as it is inevitable that notices in the mass media would make it almost impossible to maintain it.

However, this concern can largely be ignored given the benefits of class arbitration and in that less confidentiality would not harm plaintiffs in any way. To the contrary, a certain degree of compromise in confidentiality might help the plaintiff reach settlement in a shorter time as corporate defendants usually do not prefer long term exposure to public monitoring in such disputes. Therefore, in Europe, the confidentiality concern has a lower level of significance given that it is raised generally by the defendant corporations and not by the plaintiff consumers.

**DIS Supplementary Rules, a collective arbitration model in Germany**

Currently, two leading arbitration institutions include class arbitration rules in the United States of America. These are JAMS Class Action Procedures and American Arbitration Association. It could be argued that this lead has been, in a way, followed by an arbitration institution in Europe too. DIS is the first arbitration institution in Europe to have adopted rules for large scale arbitration. While Jams Class Action Procedures and AAA are known to have mainly focused on class arbitration, DIS introduced rules for collective arbitration.

The scope of application of DIS Supplementary Rules is restricted with two limitations. First, it is limited to corporate matters including limited liability companies and partnerships. Second, the arbitration agreements included in the companies listed in the stock exchange are deemed invalid (159).

The DIS stipulates a model arbitration clause and the Supplementary Rules. Accordingly, all the disputes between the company and the shareholders together with the disputes among shareholders may be referred to arbitration. With regard to the notice of the members, which has been considered as a potential issue above under subheading "due process", the DIS does not provide a suggestion in this regard.

Another interest point in the DIS is with regard to individuals who did not take part in the collective but have an interest in the award to be rendered. These individuals are defined as "concerned others" (160). There are two types of concerned others: party and intervener. A party and an inventor have different rights and liabilities.

As for the opt-in/opt-out choice, DIS has implemented an opt-in regime. This preference can be interpreted as the efforts of the German Arbitration Institution to protect the individual rights of the claimants.

As discussed above, in class arbitration, deciding the member who will be entitled to decide on the group's strategy has been one of the most debated issues with regard to the due process. In this regard, the DIS requires the consent of all concerned others in order to extend or change the subject-matter and a counterclaim (161).

**Reflections of discussions in USA to the European context**

Under the US system, although still debated in some circles, it appears that currently, the enforceability of an
arbitration agreement having a class arbitration provision is common practice.

However, one of the most important unsettled issues under the current US system arises on deciding the authority entitled to interpret the agreement of the parties where the parties have not agreed on class arbitration. In other words, in cases where the parties have not agreed on referring the dispute to class arbitration, the question of whether an arbitrator or a court should authorize the class arbitration by interpreting the agreement between the parties is unsettled for now. In Europe, this debate may be considered irrelevant at this stage because, as explained below, in the proposed European class arbitration model, it is highly suggested that the arbitration agreement shows the parties clear intention to refer the dispute to class arbitration.

Final remarks on the development of class arbitration

Having seen the arguments against class arbitration in Europe, it is obvious that it will take a number of years for class-arbitration to take off in Europe despite arguments which are in support of class arbitration.

Nater-Bass has argued that collective arbitration may not develop in Europe because laws on collective redress in Europe do not put the corporate defendants in a risky position which was the case in U.S. class actions. (162)

However, the class arbitration should not be judged by considering the origins of the class arbitration in the USA and the rationale behind its emergence. It can be said that class arbitration in Europe, at least as a concept, was already born but it is still at its very early stages. Practitioners, academicians, lawmakers and users of arbitrations have been discussing class arbitration at an increasing speed. This signals the demand for class arbitration in Europe. The development of class arbitration in Europe however would be different from the US example due to historical as well as cultural reasons at the least. Having said that, the US experience would help European counterparts draw lessons and pave the way for class arbitration to evolve in a more secure way at the European level to the benefit of likely users of such arbitrations.

To that effect, a joint and holistic approach by the European Parliament and arbitration institutions located in Europe regulating class arbitration could be an ideal start so that class arbitration could have a reliable presence in Europe. This may sound unconventional but given the difficulties to have a uniform legislation binding member states, alternative dispute resolution venues could take the lead under these circumstances.

Arbitration institutions located in Europe operate independently. Nevertheless, the arbitration world witnessed a coherent approach with regard to emergency arbitration (163). In less than a decade, the leading arbitration institutions have implemented emergency arbitration provisions. Such an initiative may also be triggered with regard to class arbitration.

It can be said that this trend has already started. DIS has taken the lead and adopted supplementary rules for class arbitration. Even though those are limited in number and scope and implemented under the influence of AAA Supplementary rules, it is a suggestion that an alternative dispute resolution venue has seen the need, lack of legislative uniformity and coherence among member states in this respect and which is why took the lead. Should similar actions are taken by the London Court of International Arbitration or International Chamber of
Commerce, the suggested revolution could start which eventually could affect legislation concerning the courts of member states too.

In addition to the efforts of the arbitration institutions, the European Parliament should encourage the member states to improve their national arbitration laws to ease enforcement of class arbitration awards because it should be borne in mind that without solving the problems that could arise during the enforcement stage such as public policy and due process obstacles in member states, the efficiency of the positive approach of arbitral institutions would diminish.

The combined steps that are taken by member states and the arbitration institutions would improve the situation in respect of the protection of the injured parties who are in search of a venue to seek damages. Alternative dispute resolution mechanisms and state court solutions would provide options to the injured which would work for the rights of those individuals or entities seeking a solution in particular and for the common good of carriage of justice in the European Union.

**Conclusion**

Over the past several decades, there has been considerable debate in Europe with regard to the adequacy of collective redress mechanisms existing both in Member State level and the Union level.

It is not difficult to presume that the number of large-scale cross border disputes will continue to increase. (164) According to the data included on the website of the AAA, in 2013 more than 20 new class arbitrations were before AAA in 2013 and currently sixty-one class arbitrations are being administered. (165)

While the status and development of U.S. class arbitrations could be a good indicator as to where class arbitrations should be and will be in the European Union, there are systematic problems associated with the U.S. style class arbitration which should be addressed considering Europe specific needs, priorities and culture.

Class arbitration is an alternative model to the problems of collective redress in the European Union which will help provide a more uniform method whereby citizens of member states can have equal access to justice by going through similar procedures without being hindered by their national courts the degree of which varies amongst member states.

This way, class arbitration stands out also as a tool to provide a mechanism in achieving one of the core principles of European Union. As touched on several times above, the free movement of goods and services is amongst the principal aims of European Union for which the current system was established. Without a closest degree of uniformity, collective redress mechanism, the unequal application of such principles will continue to threat European individuals and entities and the operation of this principle will not reach the expected standard. The problem of not having such a collective redress mechanism seems to have been ignored by certain circles until recent years. Therefore, it is class arbitration that could address the current problem.

In this regard, arbitrability, due process concerns and enforcement issues should be addressed in such a way
that class arbitrations could turn into a reliable alternative method in the European Union. To address the above stated issues in order, first the validity of arbitration agreements should be answered. A second set of drawbacks are mainly related to procedural issues. These include the risk of appeal and confidentiality. Also, the issue of appointment of arbitrators should be addressed broadly (166). Because eligible parties of a class arbitration may not take part in the proceedings in which case the problem as to how the appointment of arbitrators will be made should be addressed.

On the other hand, the enforcement of class arbitrations seems to create certain degree of ambiguity which should be addressed too. It is essential to ensure that class arbitrations awards will not be set aside in the member states of the European Union. Otherwise, it will be difficult to establish a model centred by the class arbitration. This is why, a change in the current European policy is needed to make sure that no obstacle will be ahead on the way to the enforcement of class arbitrations.

Considering the protective approach of Europe towards consumer rights it would be naïve to presume that the development of class arbitration will be achieved without those being addressed. Class arbitration however depending largely on whether and to what extent those issues are addressed will have a good presence in the European Union sooner or later. According to the data provided by the International Chambers of Commerce, nearly third of its cases consist of multiparty disputes. (167) This figure clearly shows that a good portion of arbitrations have more than two parties which suggests that arbitrations with multiple parties are already have an important place in the European Union. Class arbitration will help improve the level and broaden the scope of multi-party arbitrations in a way that principles behind European Union will be strengthened.

Above all, the most challenging drawbacks seems to be the issues to be raised with regard to opt-in/opt-out models together with the enforceability of class arbitration awards.

While many details have yet to be determined, it is certain that a new perspective should be embraced by the European Union with regard to the establishment of a more uniform collective redress mechanism. Considering the advantages and opportunities that class arbitration may offer, it can be said that the class arbitration as a powerful tool should be integrated into the current system.

Because as it seems, advantages of class arbitration will outweigh its possible drawbacks in time since class arbitration is still in the development stage and solutions will emerge as the time, understanding in relation to collective redress and class arbitration progresses. Ultimately, therefore, class arbitration will be a positive inclusion into the dispute resolution sphere of European Union.


(2) Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (Kluwer Law International 2006) 258

(4) As stated in European Commission, (European Commission Growth Single Market and Standards The European Single Market) <http://ec.europa.eu/growth/single-market/index_en.htm> accessed 31 July 2015, The Single Market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services. A functioning Single Market stimulates competition and trade, improves efficiency, raises quality, and helps cut prices. The European Single Market is one of the EU's greatest achievements. It has fuelled economic growth and made the everyday life of European businesses and consumers easier.


(8) Kai Purnhagen, ‘United we stand, divided we fall?: collective redress in the EU' [2013] 21(2) European review of private law 499

(9) ibid

(10) SI Strong, Class, Mass, and Collective Arbitration in National and International Law (Oxford University Press 2013) 16

(11) Jeff Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International 2012)

(12) Strong (10)

(13) Strong (10) page 17

(14) Strong (10), page 18

(15) Strong (10) page 18

(16) Deutsche Institution für Schiedsgerichtsbarkeit, or commonly referred in the literature as "DIS"

(17) Strong (10) page 17

Racheal Kent, Availability of Class Arbitration Under US Law. in Albert Jan van den berg (ed), Legitimacy: Myths, Realities, Challenges (Kluwer Law International 2015) 855

Lea Haber Kuck, International Class Arbitration. in Paul G Karlsgodt (ed), World Class Actions: A Practitioners Guide to Group and Representative Actions Around the Globe (Oxford University Press 2012) 701

Kent (20) page 855

Elizabeth P Allor, 'Oppressive arbitration clauses in adhesion contracts' [1983] 71(4) California law review

Kuck (21) page 702

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Powell Bales (18) page 309

Mariel Dimsey, The Resolution of International Investment Disputes: Challenges and Practical Solutions (Eleven International Publishing 2008) 197

Kuck (21) page 707

Kuck (21) page 707

Kuck (21) page 709

American Arbitration Association has adopted Supplementary Rules for Class arbitrations has entered into force on October 8, 2003, available at https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail;jsessionid=RML101G1SzHgllEegz_fXDYAFZj697iLONYM4XrNWCW840870450?doc=ADRSTG_004129&_afrLoop=973609187108476&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowMode%3Dihus9jd7y_4, the American Arbitration Association Policy on Class Arbitrations has been entered into force on July 14, 2005 available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840

The Judicial Arbitration and Mediation Service Class Action Procedures has been entered into force on May 1, 2009, available at http://www.jamsadr.com/rules-class-action-procedures/


Sutherland asbill & brennan llp, " (Stolt-Nielsen v AnimalFeeds: US Supreme Court Holds that Class
Arbitration Cannot be Imposed on Parties Whose Agreements Are Silent on the Issue, )

(35) Strong (10)


(37) Kai Hüschelrathnd, Public and Private Enforcement of Competition Law in Europe- Introduction and Overview. in Kai Hüschelrathnd and Heike Schweitzer (eds), Public and Private Enforcement of Competition Law in Europe Legal and Economic Perspectives (ZEW Economic Studies 2014) 1

(38) Christopher Hodges, ‘Current discussions on consumer redress: collective redress and ADR' [2012] 13(1) ERA Forum 16

(39) British institute of international and comparative law, " (ADR and collective redress, )

(40) Christopher Hodges, ‘Collective Redress: A Breakthrough or a Damp Sqibb?' [2013] 37(1) Journal of Consumer Policy 68

(41) ibid

(42) Purnhagen (8) page 498

(43) In Access to Justice and Collective Actions, Stefan Wrbka, Steven Van Uytsel, And Mathias M. Siems define access to justice as "the ideal that everybody, regardless of his or her capabilities, should have the chance to enjoy the protection and enforcement of his or her rights by the use of law and legal system.

(44) Collective Redress, A Breakthrough or A Damp Squibb, C.Hodges, pg. 69


(46) Hodges (40) page 71

(47) Available at
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de1860a3f7dc7c4b9e9611860d402ddc88.e34KaxiLc3eQc40L

(48) Eddy de Smijter and Denis O'sullivan, ‘The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions ' [2006] 3(-) Competition Policy Newsletter 23

(50) ibid (51) page 312

(51) Hodges (40) page 71

(52) ChristopherJ Cook, EU Member State Court Experience in Applying EU Competition Law under Modernization. in Gordon Blanke and Phillip landolt (eds), EU and US antitrust arbitration: a handbook for practitioners (Wolters Kluwer Law & Business 2011) 831

(53) Purnhagen, (8) page 498

(54) Hodges (40) page 69

(55) The European Commission (5) page 5

(56) Purnhagen (8) pages 498- 499

(57) Tang (6) page 104

(58) Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ 2 201/60/01

(59) In "The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England, Neil Andrews defines costs-shifting rule as “victorious party (“the receiving party”) should recover his "standard basis" costs from the opponent (“the paying party”).

(60) Smith Vincent, "Toward a coherent European approach to collective redress': more questions than answers?' [2011] 32(8-9) Business law review (London) 206

(61) Commission Recommendation (60)

(62) ibid


(64) Hodges (40) page 68


(66) Commission Recommendation (60)

(67) Commission Recommendation (60)
Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy Overview of Existing Collective Redress Schemes in EU Member States [2011] 8


Commission Recommendation (60)

In Third-Party Funding in International Arbitration, Shannon and Bench Nieuwveld (2012), "Chapter 1: Introduction to Third-Party Funding", Third party funding has been defined as the following: “Third-party funding is a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both. The agreement between the funder and the funded party may also include paying another party's attorney fees if the funded party loses the case or the decision-maker (i.e., an arbitrator or panel of arbitrators, a judge or panel of judges, or a jury) orders the funded party to pay the attorney fees of another party.”

Commission Recommendation (60)

Commission Recommendation (60)


Astrid Stadler, ‘A test case in Germany: 16 000 private investors vs Deutsche Telekom’ [2009] 10 (1) ERA-Forum 47


(87) ibid

(88) Lindblom (89) page 235

(89) The legal basis of collective redress mechanisms in Denmark consists of the Administration of Justice Act, Marketing Practices Act and Danish Competition Act

(90) Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 17

(91) Fairgrieve Howells (90) page 385

(92) Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 18

(93) In Finland, the legal basis of the collective redress mechanism is Finnish Group Action Act which has been entered into force in 2007.

(94) The scope of the Finnish Group Action Act is limited to the disputes relating to defects in consumer goods, the interpretation of contract terms or disputes between consumers and entrepreneurs regarding the sale and marketing of investment products can be the subject-matter of the claims.

(95) Fairgrieve Howells (90) page 386

(96) Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 19

(97) The legal ground of the collective redress mechanism in Netherlands includes Dutch Civil Code and Dutch Class Action Act 2005.

(98) Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 29

(99) Fairgrieve Howells (90) page 388

(100) The legal basis of the collective redress mechanism includes Lithuanian Civil Procedure Code and Law on Consumer Protection.

(101) Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 28

In France, Consumer Code and Monetary and Financial Code are the legal basis of the collective redress legislation.


The Act of 28 March 2014 was entered into force on September 1, 2014.

Voet (111) page 121

GeorgE Kodek, "(Focus on Collective Redress Austria, )<http://www.collectiveredress.org/collectiveredress/reports/austria/generalcollectiveredressmechanism> accessed 1 August 2015


The Collective Redress Action in the Italian Legal System, Remo Caponi, June 2009, Volume 10, Issue 1, pg. 65

Deutshce Telekom case is considered as the first real mass litigation in Germany. The plaintiffs have alleged that the prospectus issued for the initial public offering has included wrongful information with regard to the value of Telekom's real estate. (A Test Case in Germany: 16000 Private Investors vs. Deutsche Telekom, Astrid Stadler, ERA Forum (2009) 10, pg 38 and 39)

The legal basis of collective redress mechanisms in Germany include Legal Services Act and the Law of Unfair Competition.

Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 21 and 22
In the abstract of the Opren-Problems, Solutions and More Problems, Journal of Consumer Policy, Guy Dehn gives a brief analysis of Opren case as follows: Opren case concerned an anti-arthritic drug licensed in the UK between 1980 and 1982. While a number of drug users died, the most common adverse reaction was photosensitivity. The main legal action involved almost 1,500 plaintiffs and seven defendants. In the early summer of 1987 a court ruling on the funding of the action meant that 500 of the plaintiffs might have to withdraw. With the help of a multimillionaire and a media campaign, the parties reached a controversial settlement at the end of 1987.

Hanotiau (2)

The legal basis of the collective redress mechanisms in the UK consists of the Civil Procedure Rules and Competition Act.

Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 25

The contingency fee has been introduced on April 1, 2013 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Allen&Overy, " (Directors' Liability Blurring the Lines, )

<http://www.allenover.com/SiteCollectionDocuments/directors-liabilityreport.pdf> accessed 1 August 2015

The Law no 2251/1994 on Consumer Protection is the legal basis of collective redress mechanism in Greece.

Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) pages 21-25

The legal ground of the collective redress mechanism consists of Articles 188 and 189 of the Law on Consumer Protection 2006 together with the Code of Civil Procedure.

Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 15

The Act on Class Actions was published on January 18, 2010 and entered into force on July 18, 2010.

Directorate General For Internal Policies, Policy Department A: Economic and Scientific Policy (74) page 31

The legal basis of the collective redress mechanism in Hungary is Hungarian Competition Act.

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The legal basis of the collective redress mechanism is the Civil Procedure Act numbered 1/2000.
The law numbered 213/2008 titled and dated Ley 213/2008


Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and UK.

The single market was created in 1993.

Bass (1)

In the United States, in general, the term arbitrability implicates the arbitration tribunal's jurisdiction. Thus, often, arbitrability is a broader term in the United States of America.

JulianDM Lew and others, Comparative International Commercial Arbitration (Kluwer Law International 2003) 1

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") has been entered into force on June 7, 1959

Article I (3) of the New York Convention states that "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration".

Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that: 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have
subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or .......

(151) Article V (1) of the New York Convention 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

(152) Carole J. Buckner, 'Due process in class arbitration' [2006 ] 58(1) Florida law review 256

(153) Buckner (153) page 256

(154) Strong (10) page 357

(155) Strong (10) page 131


(157) Thomas A Doyle, 'Protecting Nonparty Class Members in Class Arbitrations' [2009] 25(1) ABA journal of labor & employment law 12

(158) Ileana M. smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International 2011)


(160) Concerned others has been defined as "in disputes requiring a single decision binding all shareholders, ....it is mandatory not only to introduce the corporation as a party but all shareholders as Concerned Others to the arbitral proceeding. In case the introduction of any Concerned Other is omitted, current jurisprudence does not recognize the arbitrability of such disputes."

(161) Article sets forth that "an extension of the claim or a change of the subject-matter (including any possible counterclaims), or in case of a shareholder resolution dispute the extension of the claim to other resolutions... only admissible with consent of all Concerned Others.

(162) Strong (10) page 687

Related Practices

- Commercial Arbitration and Mediation
- Investment Arbitration and Treaty Protection
- Corporate and Commercial Litigation

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