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The Potential Implementation of Collective Arbitration in Europe

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Abstract: This article analyses the feasibility and the potential implementation of collective arbitration in Europe. Although arbitration has reached a significant success in Europe, up to this date this mechanism has not been used to settle collective disputes yet, as there are many barriers hindering its implementation. But class arbitration is being successful in other parts of the world (especially in the United States) and, therefore, its feasibility should not be rejected. In fact, the EU bodies recommend the Member States to consider the possibility to settle collective disputes by out-of-court proceedings. This article considers both the obstacles and the benefits of this kind of arbitration, and includes some proposals. This work concludes with the only two sorts of collective arbitration systems implemented in Europe: the Spanish Consumer Collective Arbitration System and the German Corporate Arbitration System ruled by the German Arbitration Institution (DIS).

Résumé: Cet article analyse la faisabilité et le potentiel de mise en œuvre de l'arbitrage collectif en Europe. Bien que l'arbitrage ait atteint un succès significatif en Europe, jusqu'à présent aucun recours n'a été fait à ce mécanisme pour régler des différents d'ordre collectif, en raison des nombreux obstacles empêchant sa mise en œuvre. Cependant l'arbitrage collectif fonctionne avec succès dans d'autres parties du monde (particulièrement aux États-Unis) et, de par ce fait, le bien-fondé du recours à ce procédé ne peut être écarté. D'ailleurs, les institutions Européennes recommandent que les États Membres étudient les possibilités de résoudre les différends de nature collective hors des tribunaux. Cet article considère à la fois les obstacles et les bénéfices de ce type d'arbitrage. Ce travail présente en conclusion les deux seules formes d'arbitrage collectif en exercice en Europe: le Système d'Arbitrage Collectif à la Consommation Espagnol et le Système d'Arbitrage des Sociétés règlementé par L'Institut d'Arbitrage Allemand (DIS).

Zusammenfassung: Der Beitrag analysiert die Umsetzbarkeit und mögliche Implementierung von Schiedsverfahren bei Sammelklagen in Europa. Auch wenn die Schiedsgerichtsbarkeit einen signifikanten Erfolg in Europa erreicht hat, wurde dieser Mechanismus bis heute nicht dazu verwendet, Sammelstreitigkeiten zu lösen, da insoweit viele, die Implementierung hindernde Barrieren bestehen. In anderen Teilen der Welt hingegen (insbesondere in den Vereinigten Staaten) sind Schiedsverfahren bei Sammelklagen erfolgreich und daher kann eine Umsetzbarkeit nicht von der Hand gewiesen werden. Tatsächlich empfehlen die EU-Einrichtungen den Mitgliedsstaaten die Möglichkeit der außergerichtlichen Beilegung von Sammelstreitigkeiten zu

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erwägen. Der Beitrag eruiert sowohl die Schwierigkeiten als auch die Vorteile dieser Art der Schiedsverfahren sowie einige Vorschläge. Abschließend werden die beiden einzigen in Europa eingeführten Arten von Schiedssystemen bei Sammelklagen behandelt: das spanische Schiedsverfahren für Verbraucherfragen und die vom Deutschen Institut für Schiedsgerichtsbarkeit e.V. (DIS) verfasste Verfahrensordnung für gesellschaftsrechtliche Streitigkeiten.

Keywords: arbitration, collective actions, class actions, ADR, consumers.

1. Introduction

1. Collective actions are alien to the European legal tradition. It must be recognized, however, that a significant shift has occurred in Europe over the last years, as this type of actions has started to be considered differently, resulting in legislative initiatives adopted by both different EU Member States and the European institutions.

Even though the prevailing scepticism against the US *class actions*[1] has been overcome, there is still a long way to go. This type of actions is not provided for in the legislation of all the European States yet. Besides, the countries' laws where these actions are provided for have some dysfunctions that render their implementation and development difficult. In this context, discussing collective arbitration in Europe is not only surprising, but especially early.

2. Arbitration is one of the forms of alternative dispute resolution achieving the highest degree of success in practice. Nevertheless, up to date, arbitration has not been used for the collective protection of rights and interests in Europe, since there are multiple difficulties that hinder its implementation in this field.

The increasing use of arbitration clauses in standard-form contracts has encouraged the debate about the potential incorporation of collective actions into arbitration. Many have spoken out against the recognition of the possibility to file collective actions in arbitration, arguing that these actions do not comply with the principles characterizing this institution, especially its quickness, its informality, its voluntary nature and its flexibility. It cannot be obviated, however, that this

1 The terminology used in this article must be clarified. Terms such as US *class actions* and *European collective actions* have been chosen in order to make a difference between these two types of actions. This article mentions both US class arbitration and European collective arbitration, respectively. However, please note that the term used by the European institutions is *collective redress.*

On the distinction between 'class arbitration', 'mass arbitration' and 'collective arbitration', see Stacie Strong, *Class, Mass and Collective Arbitration in National and International Law* (New York: Oxford University Press 2013).

On the topic of terminology, see Duncan Fairgrieve & Geraint Howells, 'Collective Redress Procedures: European Debates Source', 58. *ICLQ* 2009(2), pp 379-409.

practice is being successful in other parts of the world (especially in the United States[2]) and, therefore, its feasibility and implementation should not be rejected. In fact, the EU bodies urge the Member States to consider the possibility to settle collective disputes by out-of-court proceedings.

3. It may occur that Europe finally echoes the advantages of the US *class action arbitration* in the mid or long term. But it may also happen that the significant obstacles hindering its application in Europe finally render its development impossible. Therefore, considering the uncertain future of this legal mechanism, this article aims to analyse the feasibility and the potential implementation of collective arbitration in this continent. To begin with, this article presents a brief legislative overview of collective actions in Europe and the most recent initiatives the

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2 It should be recalled that the emergence of collective arbitration in the United States is due, to a large extent, to the businesses' reluctance to court class actions. By the late 1980s, in fear of judicial class actions that may be brought against them, businesses started to include arbitration clauses in their agreements, believing that arbitration would prevent the filing of class actions and forcing claimants to individually solve their disputes by arbitration procedures. However, this belief proved to be wrong, since arbitral tribunals started to accept class actions. Stacie STRONG, 'Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared', 37. *N.C.J. Int'l L. & com. Reg.* 2011-2012, p (921) at 936.

See Daniel R. HIGGINBOTHAM, 'Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers', 58. *Duke Law Journal* 2008(1), pp 103–137; Jean R. STERNLIGHT, 'As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?', 42. *William & Mary L. Rev.* 2000–2001, pp 1–127; Gary BORN & Claudio SALAS, 'The United States Supreme Court and Class Arbitration: A Tragedy of Errors', 19. *Maastricht J. Eur. & Comp. L.* 2012, pp 21–48; Michael P. DALY, 'Come One, Come All: The New and Developing World of Non-Signatory Arbitration and Class Arbitration', 62. *U. Miami Law Rev.* 2007–2008, pp 95–128; Jean R. STERNLIGHT & Elizabeth J. JENSEN, 'Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?', 67. *Law and Contemporary Problems* 2004(1–2), issue on Mandatory Arbitration, pp 75–103, also @ scholarship.law.duke.edu/lcp/vol67/iss1/4/.

In Europe, collective actions have not spread yet, as European businesses do not face the same situation and fears as American companies. Therefore, it is unlikely that European businesses will establish arbitration clauses in their standard-form contracts in order to avoid this type of actions.

Besides, it must be also considered that, in accordance with the Council Directive 93/13/EEC, on unfair terms in consumer contracts, pre-dispute arbitration clauses in consumer contracts are forbidden. This is not the case of the United States, since the Federal Arbitration Act does not make a difference between consumer disputes and other types of disputes, accepting pre-dispute arbitration agreements in consumer contracts.

Outside the United States, the most important cases on collective arbitration that have been reported are: one issued by a Colombian arbitral institution (Tribunal Arbitral de la Cámara de Comercio de Bogotá, in *Valencia / Bancolombia*). See Stacie STRONG, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns', 30. *University of Pennsylvania Journal of International Law* 2008, p 1, and another one by a Canadian arbitral institution (*Kanitz / Rogers Cable Inc.,* [2002] 58 O.R. (3d) 299, 21 B.L.R. (3d) 104. See Stacie STRONG, 'Class Arbitration Outside the United States: Reading the Tea Leaves', Legal Studies Research Paper Series, Research Paper No. 2009-36, University of Missouri, @ ssrn.com/abstract=1517272.

European institutions have adopted. Then the potential acceptance of collective arbitration in the European context will be discussed, considering both the obstacles hindering its adoption and the advantages that may result from its implementation, including some proposals. Finally, two existing *sui generis* collective arbitration examples from Spain and Germany will be presented.

2. Collective Actions in Europe

4. Before analysing the potential implementation of collective arbitration in Europe, it is essential to present a brief overview of judicial collective actions.

Individual court actions are the usual means or proceedings intended to settle conflicts, to avoid damage and to claim compensation in Europe. Besides these proceedings, several Member States have started to introduce different types of collective or group actions, both to prevent and to put an end to illegal practices, as well as to ensure the granting of a compensation in case of mass damage, in fields such as the protection of consumers, competition, financial services and the protection of the environment.[3]

5. Unlike US *class actions*, which can be used in any type of civil proceedings without any sector restriction, the field of implementation of collective action mechanisms in many European States is restricted to very specific sectors. By way of example, in Germany, collective redress mechanisms are only used to recover losses resulting from capital investments, whereas their use is restricted to consumer-related proceedings in countries such as Finland or Spain.[4] In turn, in other countries such as Sweden, Norway and the Netherlands, collective redress has a wider scope of application.

Almost all the EU Member States are aware of the injunctive collective redress mechanisms, which spread after the adoption of Directive 1998/27/

3 Based on the objectives and claims sought, collective actions in Europe comprise two categories: collective actions seeking the cessation of illegal practices or behaviours (injunctive collective redress) and collective actions seeking a compensation for any loss and damage caused (compensatory collective redress). Both types of actions can be filed in the event that a mass damage has been caused.

See Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Oxford: Hart 2008). Sonja E. Keske, *Group Litigation in European Competition Law, A Law and Economics Perspective* (Antwerpen: Intersentia 2010); Tiana L. Russell, 'Exporting Class Actions to the European Union', 28. *B.U. Int'l L.J.* 2010, p 141; Hans-Jürgen Ahrens, 'Injuctive and Compensatory Collective Redress Mechanism Against Restraints of Competition and Unfair Trade Practices', 6. *Journal of European Tort Law* 2015 (2), pp 145–162; Stacie Strong, 'Cross-border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation', 45. *Arizona State Law Journal* 2013, pp 233–279, @ ssrn.com/abstract=208550; Rebecca Money-Kyrle & Christopher Hodges, 'European Collective Action: Towards Coherence?', 19. *Maastricht J. Eur. & Comp. Law* 2012, pp 477–504.

4 For a detailed study of judicial collective actions, consulting Andrea Planchadell Gargallo, *Las acciones colectivas en el ordenamiento jurídico español. Un estudio comparado* (Valencia: Tirant Lo Blanch 2014) is highly recommended.

EC, currently applicable as Directive 2009/22/EC, on injunctions for the protection of consumers' interests. However, not all the EU Member States are aware of the compensatory collective redress mechanisms, as they are only provided for in approximately the half of the Member States. Besides, these States have significant legislative differences and this is the reason why the harmonization of these legislative measures is being sought.[5] Their differences are remarkable, especially in terms of the type of collective action available and their main features, such as their admissibility, the legal standing of the parties involved,[6] the use of opt-in or opt-out approaches,[7] the role of the judge, the requirements for the provision of information, the funding and the distribution of the compensations.

6. As a result of these inconsistent criteria, the European Union institutions have included in their political agenda the need to implement a collective redress system based on the European legal practices. After the European Commission adopted a Green Paper on antitrust damages actions[8] and the appropriate White Paper,[9] including proposals on specific collective redress mechanisms, in 2008, the Commission published the Green Paper on consumer collective redress[10] and, in 2011, the public consultation 'Towards a more coherent European approach to collective redress'[11] was carried out.

On 2 February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union.[12] And on 11 June 2013 the Commission issued a Communication 'Towards a

5 The quick acceptance of injunctive collective redress actions is self-evident. However, this quick acceptance clashes with the resistance to the compensatory collective redress mechanisms. See Laura Carballo Piñeiro, 'La construcción del mercado interior y el recurso colectivo de consumidores', in Esteban de la Rosa (ed.), *La protección del consumidor en dos espacios de integración: Europa y América* (Valencia: Tirant Lo Blanch 2015), p 1059.

6 The legal capacity required to bring these actions varies in the Member States. In some countries, the power to file collective actions has been granted to public authorities only (e.g. the Ombudsman in Finland), whereas, in other countries, private organizations such as a consumer associations (Bulgaria) and both individuals and legal entities (Sweden) are entitled to bring collective redress actions.

7 A first group of countries including Austria, Sweden and Italy has implemented the *opt-in* model, whereas a second group including Portugal and the Netherlands has established an *opt-out* approach.

8 eur-lex.europa.eu/legal-content/ALL/?uri=COM:2005:0672:FIN.

9 eur-lex.europa.eu/legal-content/ALL/?uri=COM:2008:0165:FIN.

10 eur-lex.europa.eu/legal-content/ALL/?uri=COM:2008:0794:FIN.

11 ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf.

12 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN.

European Horizontal Framework for Collective Redress',[13] which took stock of the actions to date and presented the Commission's position on some central issues regarding collective redress. This Communication was also supported by the so-called Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.[14] In these last documents, the EU institutions urge all the Member States to implement collective redress mechanisms at the national level for both injunctive and compensatory relief, with respect to the basic principles set out across the Union, while taking into account the legal traditions of the Member States and safeguarding against abuse.[15]

7. To get an idea of the trend that intends to become established in the European Union for the regulation of collective actions, a brief presentation into the most relevant principles considered in the Recommendation is required.

- For the legal standing required to bring a collective redress action, the Member States are urged to specify the entities that are entitled to file such actions, subject to some given criteria. Amongst the criteria considered, in order to ensure the entity's legal standing to defend and represent a specific group of claimants, the entity must be non-profit organization, there must be a direct relation between the entity's main goals and the rights that have been breached, and the entity must have sufficient financial and human resources, as well as legal knowledge.[16]
- It must be also ensured that the representing entity or the group of claimants spread information to any potential claimants on the alleged violation of rights, as well as their intention to file an action, always keeping a balance between the right of access to information and the protection of the defendant's reputation.
- Based on the application of the 'loser pays principle', the funding of these proceedings is a key aspect to be considered. For this purpose, third parties not involved in the proceeding can provide the financial

13 eur-lex.europa.eu/legal-content/ALL/?uri=COM:2013:0401:FIN.

14 eur-lex.europa.eu/legal-content/ALL/?uri=celex:32013H0396. The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest.

15 Unfortunately, the European Commission has not adopted a Regulation or a Directive on this matter. It is well known that communications and recommendations are not binding and may not be sufficient to ensure the necessary, consistent implementation in the Member States.

16 These requirements ensure an evident control of the entities allowed to bring such type of actions. Representative actions can only be brought by entities which have been officially designated in advance or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.

resources required for the collective redress action, putting forward certain measures intended to prevent abusive litigation and any conflicts of interest that may arise.[17]

- The Commission supports the constitution of the claimant party by the *opt-in* model, in contrast to the *opt-out* approach. However, the opt-out approach is exceptionally considered in the event that, based on specific legal provisions or judgments, it is justified for the sound administration of justice.
- For the lawyers' professional fees, the Member States should ensure that the method established to calculate the lawyers' fees does not result in an incentive to file actions that are unnecessary from the perspective of the parties' interests, in order to prevent the so-called *pactum de quota litis*. Furthermore, punitive damages are also forbidden.[18]
- The Commission acknowledges that alternative dispute resolution procedures can be an effective means of obtaining redress in mass harm situations and, therefore, these procedures should be always available, along with the judicial collective redress or as an element that may be voluntarily used alongside judicial claims. Hence, the Commission Recommendation urges the Member States to encourage the parties involved in legal actions resulting from mass harm cases to settle any issue related to compensations by reaching consensus or an out-of-court agreement, both at the pre-trial stage and during the civil trial. For this purpose, the Member States should ensure that the judicial collective redress mechanisms include the possibility to allow the parties involved, both before and throughout the procedure, to access the alternative dispute resolution mechanisms available. The use of these of these alternative means will depend on the consent of the parties involved.[19]

3. Collective Arbitration in Europe?

8. It has been proven that, on the one hand, collective actions have started to be incorporated into the different legal systems of the EU Member States and that the

17 The claimant party should declare to the court, upon the start of the proceeding, the origin of the financial resources that will be used to fund the legal action. Furthermore, the Recommendation contains a list of causes that result in the stay of the proceeding and some prohibitions on the behaviour of such third party.

18 The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions.

19 The Commission Communication also states that the parties involved in collective proceedings should have the possibility to solve their collective disputes by out-of-court procedures, whether with the intervention of a third party (e.g. by a mechanism such as arbitration or mediation) or without such intervention (e.g. by agreements reached by the parties).

European institutions are promoting their use, provided that these actions adhere to several harmonizing common principles based on European legal tradition. On the other hand, arbitration is an alternative dispute resolution mechanism widely spread in Europe[20] and in constant evolution.[21]

Thus, it is not surprising that we wonder whether these two approaches can be combined, i.e. whether collective actions can be submitted in an arbitration proceeding. The following sections present an analysis about this possibility. As mentioned above, although arbitration has reached a significant success in Europe, this mechanism has not been used to settle collective disputes yet, as there are many barriers hindering its implementation.

3.1. Barriers Hindering the Acceptance of Collective Arbitration

9. When assessing the possibility to protect or defend collective interests or rights through arbitration proceedings, several obstacles emerge. Neither the arbitration laws nor the Regulations of the arbitration institutions established in the Member States have specifically dealt with this issue (except for two specific cases that will be discussed below). Therefore, in practice, the acceptance of collective arbitration is hard to be achieved.

10. Firstly, the voluntary, consensual nature of arbitration (its main difference from jurisdiction) must be emphasized. Only the parties that voluntarily decide to resort to arbitration will be subject to this mechanism. This is one of the reasons why we consider that, in the event that collective arbitration is finally accepted in Europe, the participation in the proceeding should be established through the voluntary participation (*opt-in*) model, in such a way that those who have not decided to settle their dispute by this mechanism do not become affected by the arbitral proceeding.

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20 It may even be stated that 'arbitration is trendy', as reflected in the emergence of a significant number of legislative measures that have tried to provide a new perspective of arbitration, as well as to promote its use by the harmonization of the Arbitration Rules in a significant number of European countries. See Silvia Barona Vilar, 'El arbitraje en el marco del impulso de las ADR como cauces no jurisdiccionales de resolución de conflictos. Referencias a la conciliación y a la mediación', in Barona Vilar (dir.), *Tratado de arbitraje, Análisis del derecho español y del derecho boliviano* (Cohabamba (Bolivia): Kipus 2014), p 43.

21 José MiguelJúdice, specifically deals with arbitration's evolution and ongoing capacity to surprise legal experts. According to Júdice, arbitration has managed to continuously adapt to the new realities and changes. For instance, 20 years ago, no one could imagine that arbitration may solve disputes over matters such as competition, taxes, intellectual property, bankruptcy, etc. Especially, no one would think that arbitrators would be able to adopt precautionary measures or *ex parte* preliminary orders. The acceptance of third parties in arbitration procedures was not even considered either (Bernard Hanotiau & Eric A. Schwartz, 'Collective Arbitration in Europe: The European Way Might Be the Best Way', *ICC Dossier XIV- Class & Group Actions in Arbitration*, ICC Product No. 771E, 2016, pp 46-57).

11. Secondly and in direct relation to the paragraph above, the extension of the *res judicata* in the award must be considered. In fact, the binding force of an arbitral award is the major obstacle for collective actions in arbitration. An arbitral award has an *inter partes* effect, which is not compatible with the *erga omnes* effect of court decisions, which put an end to collective actions and do have a *res judicata* effect in connection with all the harmed parties, regardless whether they have participated in the proceeding or not.

In the case that the provisions established for judicial actions were applicable to collective actions in arbitration, it may occur that those consumers wishing to solve a same dispute by an arbitral proceeding would be forced to act through the collective arbitration proceeding, without the possibility to resort to the courts of justice.[22] This would result in a clear violation of the right of due process. Hence, we reckon that, in the case that collective actions become accepted in arbitration, individual consumers should be also allowed to defend their rights and interests through the courts of justice.[23]

12. Confidentiality is another aspect that must be taken into account, as this is one of the most highlighted features of arbitration and one of the main reasons why this dispute resolution mechanism is used. For collective arbitration, we wonder how a potential action may be disclosed in order to attract any harmed parties while respecting the characteristic confidentiality of this mechanism. The solution to this issue has proven to be difficult. Thus, to achieve the effectiveness of collective arbitration, confidentiality seems to be a feature that needs to be to some extent abandoned and reduced.[24]

13. A fourth barrier can be added up: the recognition and enforcement of an award rendered on a collective action in a foreign country. It would not be unusual that an award rendered to settle a collective action would need to be enforced in several countries. In such a case, one should wonder how an award rendered in a collective proceeding could be recognized and enforced in a country where this mechanism is not accepted. As it can be seen, there are many doubts to be cleared up. A further obstacle would be the objection to the recognition of the arbitral award. It must be taken into account that Article V.1.b of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) establishes that the recognition and the enforcement of the award may be refused, upon the request of the party against whom the award is invoked, in the case that such party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the party against whom the award is invoked was not given proper notice of the

22 If we accept collective arbitration, we will face the risk that someone can be bound by the award without even being aware of its existence.

23 Manuel Jesús Marín López, 'Objeto y límites del arbitraje de consumo', *Revista Jurídica de Castilla La Mancha* 2005(39), p 183.

24 This is the case of the *American Arbitration Association* (AAA), since, with the acceptance of class arbitration actions, confidentiality was no longer protected. In fact, most of the awards rendered by the AAA are available on its website.

appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Therefore, in the situation where the arbitration was not opt in, any member of the group that has not been properly notified about the collective arbitration action may object to the recognition of the award.[25]

14. Filing collective actions in arbitration raises many other questions, including the arbitrability of the dispute,[26] the effective compliance with the call to and provision of the summons, the validity of the collective arbitration clause,[27] etc. For space limitations, these issues will not be discussed in this article, although special attention should be paid to these barriers.

3.2. Positive Aspects

15. Despite the reluctance discussed in the previous section, arbitration may offer several advantages in collective actions. Although collective arbitration is not free from objections, the potential of this mechanism to solve collective disputes should be considered. For instance, the feasibility of class arbitration can be seen in the US legal system, even though this practice is not exempt from criticism.

Amongst the virtues of arbitration, the specialization of arbitrators should be emphasized, as specialization will be helpful to effectively and more quickly solve the difficult legal issues that may arise in these proceedings. The possibility to choose an expert on the dispute ensures the fairest and the most appropriate resolution for the parties' expectations. Specialization also leads to solutions

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25 For a similar provision, refer to Antonio Pinto monteiro & José Miguel Júdice, 'Class actions & Arbitration in the European Union- Portugal', *Estudos em Homenagem a Miguel Galvão Teles*, volumen II (Coimbra: Almedina 2012), p 203.

This is not the only provision in the Convention that may be claimed to object to the recognition and enforcement of an award. Objections may be also raised in accordance with Art. V.1.d): '(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place' or Art. V.2.b): 'The recognition or enforcement of the award would be contrary to the public policy of that country.'

26 Especially in those countries where judicial collective actions are not even provided for in their civil procedure regulations.

27 In the event of dealing with an arbitration clause in a standard-form contract, one should firstly analyse whether collective arbitration is considered as a possibility, is prohibited or is not even mentioned. A detailed analysis about this type of clauses in US class arbitration can be found in Bernard Hanotiau, *Complex Arbitrations (Multiparty, Multicontract, Multi-issue and Class Actions)* (Kluwer International 2005), pp 266-274. Please, refer also to the fourth chapter of the outstanding monograph by Stacie Strong, *Class, Mass and Collective Arbitration in National and International Law*, pp 169-227.

See also Marci A. Eisenstein, 'Enforcing Arbitration Clauses in Consumer Class Actions: An Uncertain Future', 35. *Brief* 2005-2006, pp 30-40 and Thomas A. Doyle, 'Protecting Nonparty Class Members in Class Arbitrations', 25. *ABA Journal of Labor and Employment Law* 2009-2010, pp 25-36.

adapted to the case with a higher pragmatism and with the possibility to directly apply the solution to the practice.

Furthermore, arbitration will solve many of the issues that usually arise when determining a competent tribunal for an international collective dispute, since the parties will be able to choose the tribunal based on their specific needs. In arbitration, the parties are not only entitled to freely appoint the arbitrators, but to even choose the place of arbitration, the language and the governing law. Not to mention the very nature of arbitration, which in many cases reveals the parties' wish to reach an agreement.

Although it should be recognized that collective arbitration may misrepresent the quickness or swiftness characterizing arbitration, a collective action will be likely to be settled sooner by an arbitral tribunal than in a court of justice. Besides, we should also take into account that, in comparison to court proceedings, arbitration offers significant advantages to settle transnational disputes, since the recognition and enforcement of arbitral awards in other countries is easier than for court judgments, for which there is no international instrument similar to the New York Convention of 1958.

16. To these advantages, the pros of collective procedures should be also added, including, for instance, the cost reduction resulting from conducting a single arbitration proceeding instead of multiple arbitration actions; the avoidance of parallel arbitration proceedings with similar claims and, as a result of them, the possibility of receiving contradicting awards. In any case, the advisability or appropriateness of resorting to arbitration or to a court of justice in order to settle disputes affecting a group of claimants should be determined based on the nature and the circumstances of the rights and interests affected by each specific case.

3.3. Proposals for the implementation of Collective Arbitration in Europe

17. The flexibility of arbitration makes us wonder, at least, whether the acceptance of collective arbitration in Europe is desirable. If so, we should also consider the parameters that would be required to establish and implement collective arbitration in this continent.

We firstly wonder whether the amendment of the procedural and arbitral laws in the different European countries and the incorporation of collective arbitration and its legal regime into such laws would be required or, on the contrary, whether the regulation of this type of arbitration and its specific features in the Regulations to be established by the European arbitration institutions would suffice. As far as we are aware, collective arbitration is neither specifically provided for nor prohibited by the current European laws. However, these laws do not seem to consider collective arbitration as a possibility either.[28] Therefore, without affecting

28 Except for the *sui generis* collective arbitration approaches implemented in Spain and Germany, as discussed in the fourth section of this article.

the incorporation and the thorough implementation of this possibility in the Regulations of any arbitration institutions that may decide to conduct collective arbitration, it would be advisable to establish the feasibility of collective arbitration in the procedural regulations of each State. Until such a time as this legislative measure is taken, there are many difficulties hindering this type of arbitration. [29]

18. In any case and according to the European perspective, we find that collective arbitration in Europe will be only feasible under an *opt-in* system. In fact, most of the EU Member States that provide for some sort of judicial collective actions in their legislation are using the voluntary participation (opt-in) approach..[30]

The opt-in principle preserves to a larger extent the individuals' rights to decide whether they wish to participate in a collective arbitration proceeding or whether, on the contrary, they intend to settle the dispute by individual arbitration or even by judicial proceedings. Hence, only those individuals really wishing to settle their dispute by arbitration and in a collective manner will be affected by the award that will be finally rendered. This will be the only means to ensure that an award granted on a collective arbitration proceeding will not bind other potentially entitled claimants that have not joined such action. Thus, those who have not specifically and voluntarily decided to join this dispute resolution mechanism will not be affected by the eventual award, an effect more in keeping with the principles established in the constitutions of most European countries and in the Charter of Fundamental Rights of the European Union (Art. 47).[31]

In contrast to the *opt-out* model, the *opt-in* system ensures that all the members of a group in a collective arbitration proceeding are aware of the fact that the dispute affecting their rights and interests will be settled in a collective proceeding, jointly with the rights and interests of the other members of the

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29 Some of the aspects that should be regulated include the criteria that should be established to accept collective arbitration, the entity responsible for deciding on its acceptance, the party that is responsible for notifying the members of the group and the manners to serve the notices, as well as the party responsible for the costs incurred in the process. To take such decisions, the same criteria established for the courts of justice may be used and adapted to the arbitration mechanism: This has been the methodology used by some of the major arbitration institutions in the United States, since they have taken class actions, as provided for in the *Federal Rules of Civil Procedure,* as a basis, taking advantage of the extensive case-law on the construction of such rules. However, considering the flexibility allowed in arbitration, innovative approaches on certain issues that are restricted in the courts of justice may be well taken in arbitration.

30 In turn, the voluntary exclusion (opt-out) model is used in Portugal, Bulgaria and the Netherlands (in collective transactions), as well as in Denmark, (in clearly defined representative actions for the protection of consumers).

See Emanwel Josef Turnbull, 'Opting Out of the Procedural Morass: A Solution to the Class Arbitration Problem', 20. *Widener Law Review* 2014, pp 43-79, @ ssrn.com/abstract=2196921.

31 For a detailed study on the *opt-in* model, see Scott Dodson, 'An Opt-In Option for Class Actions', 115. *Michigan Law Review* 2016, @ michiganlawreview.org/wp-content/uploads/2016/11/115MichLRev171_Dodson.pdf.

group.[32] Regarding this subject (although for judicial proceedings), we should remember that the European Commission sets out in the Recommendation of 2013 that, in accordance with the European horizontal framework of collective redress, the claimant party should be formed on the basis of the opt-in principle and any exception to this principle should be established in the law or in a court order and should be duly justified by reasons of sound administration of justice.

19. Besides incorporating an opt-in model, clear, univocal criteria should be established on the representative entities' capacity to file a collective arbitration claim. For this purpose, the minimum requirements established by the European Commission in the Recommendation of 2013 may be applied to arbitration for the entities intending to represent harmed individuals in collective actions.

Europe should try to avoid the same errors the US *class arbitration* system has made and should also prevent any possibility of abusive litigation. To achieve this goal, several safeguards must be included. For instance, any *pactum de quota litis* for the provision of legal services, uncharacteristic of the legal tradition of most Member States, should be avoided. Additionally, by adopting the 'loser pays principle', the filing of unjustified claims may be prevented.

20. Finally, we consider that collective arbitration may be supported by the development of alternative dispute resolution mechanisms carried out online (the well-known *Online Dispute Resolution or* ODR). The *online* system may become an optimal forum for the settlement of mass disputes with harmed individuals located in different countries, a circumstance that is more and more common as a result of the consumers' business transactions performed on the Internet. Hence, the existing European networks (ECC, FIN-Net, RLL, etc.), already helping consumers to individually access the alternative dispute resolution mechanisms available in other countries, may also assist those consumers with similar claims to access the appropriate alternative collective dispute resolution mechanisms available in other Member States.

4. Two *Sui Generis* Examples of Collective Arbitration in Europe

21. As repeatedly mentioned above, arbitration is not used in Europe to settle collective disputes (yet). Only two Member States have provided for a sort of collective arbitration system, although it is significantly different from the US class arbitration system. These two mechanisms implemented in Europe are the Spanish consumer collective arbitration system and the German corporate arbitration system, discussed throughout the following pages.[33]

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32 It should be recognized, however, that the voluntary exclusion (opt-out) approach is safer for the defendant, since only those who specifically choose not to join the action will be entitled to file a new action.

33 Other European States have considered their potential suitability but these systems were not finally adopted. This is the case of Luxembourg, where the Minister for the Treasury and the Budget

4.1. The Spanish Collective Consumer Arbitration Scheme

22. The Spanish Royal Decree *231/2008*, of 15 February, which establishes the Consumer Arbitration System, has implemented 'collective consumer arbitration' in the Spanish legal system.[34] However, despite the name, injunctive or compensatory collective actions cannot be filed through this mechanism.

4.1.1. Introduction: Main Features

23. The name 'collective consumer arbitration' refers to the fact that the claims of a group of consumers can be submitted to arbitration but those consumers file their actions individually. Therefore, the collective consumer arbitration governed by this Royal Decree can be understood just as a mechanism intended to settle the individual claims of several consumers, based on the same facts or cause of action, within the framework of a single arbitration proceeding and through a single proceeding that is established for this purpose. However, any collective or diffuse rights and interests of the group of consumers are not protected, even when the potential harmed parties have been determined or may be easily determined. In accordance with this system, consumers must file their arbitration actions individually. As such, only those consumers that have taken part in the arbitration procedure will be entitled to be compensated in the case that a favourable award is rendered.[35]

24. This collective consumer arbitration is administered by a Consumer Arbitration Board (*Junta Arbitral de Consumo*) that has jurisdiction over the territory where the consumers and users whose rights and economic interests may have been harmed reside. In the event that the consumers and users affected reside in more than one Autonomous Community, the competence falls upon the National Arbitration Board (*Junta Arbitral National*).[36]

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analysed the option of collective arbitration in order to solve the multiple claims filed by the investors involved in Madoff's case.

Stacie STRONG also states that Ireland and its 'Deputy matter' provides an intriguing example of how large-scale arbitration can develop in a jurisdiction that does not offer large-scale relief in its national courts. 'Large-Scale Resolution in Jurisdictions Without Judicial Class Actions: Learning from the Irish Experience', 22. *Ilsa Journal of International & Comparative law* 2016(4).

34 The Spanish consumer arbitration system is a free administrative service to solve disputes between consumers and professionals or businesses on consumer matters setting aside those cases dealing with intoxication, injury, death or that show reasonable indications of a criminal offence.

35 Pursuant to s. 56 of the Spanish Royal Decree, the object of collective consumer arbitration is the resolution in a single consumer arbitration of those conflicts that, based in the same factual presumptions, would have the power to injure the collective interests of consumers and users and that affect a determined or determinable number of such persons.

36 It must be briefly specified that, in Spanish consumer arbitration, several different bodies deal with consumer arbitration cases. The most important ones are:

25. For this type of arbitration, the standing to sue is only direct. Thus, the indirect or representative standing used to defend collective or diffuse interests in a judicial proceeding is not allowed. It must be taken into account that, even though these cases deal with collective interests, the award will only have an impact on the rights and interests of the group of consumers that have taken part in the arbitration proceeding. Hence, any other consumers that have been also harmed by the same facts or practices but have not participated will not be affected by the award that will be eventually rendered and, as a result, such consumers will be fully entitled to file an 'ordinary' arbitration proceeding or a judicial proceeding in order to claim their individual rights. In such a case, the arbitrator or the judge will not be bound to the award made in the collective arbitration proceeding.[37]

4.1.2. The Arbitral Procedure

26. The collective consumer arbitration procedure, provided for in sections 56 to 62 of the abovementioned Spanish Royal Decree, mainly consists of the following steps[38]:

(1) The president of the competent Consumer Arbitration Board is the one to decide whether to arbitrate on a collective basis or not. This

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(1) The Consumer Arbitration Boards, which are responsible for the management of arbitration. These boards comprise of a chairman and a secretary and such positions fall upon public servants. These boards may have jurisdiction over a municipality, an association of municipalities, a province or an autonomous community. Besides, there is a National Arbitration Board, attached to the Spanish National Consumer Institute, and hears any arbitration actions the scope of which goes beyond the jurisdiction of an Autonomous Community, provided that the consumers and users are affected by disputes that also go beyond such scope.

(2) Arbitral Tribunals: they are appointed for each specific case, hear the dispute and render an award. Arbitral tribunals comprise one or three arbitrators. For tribunals made up of three arbitrators, they are appointed as follows: an arbitrator representing the consumers, an arbitrator representing the industry involved in the action, and a chairman of the arbitral tribunal, appointed by the Administration to which the Consumer Arbitration Board is attached.

On the general features of the Spanish consumer arbitration system, see Manuel Jesús Marín López, 'La nueva regulación del arbitraje de consumo: el Real Decreto 231/2008, de 15 de febrero', *Diario La Ley* 2008(6905) and Diana Marcos Francisco, *El arbitraje de consumo y sus nuevos retos* (Valencia: Tirant Lo Blanch 2010).

37 Raquel Bonachera Villegas, 'El Real Decreto 231/2008, la anhelada modificación del sistema arbitral de consumo', *Diario La Ley*, Sección Doctrina, 30 October 2008(7045), XXIX, Ref. D-307.

38 An English translation of this articles can be found in Stacie Strong, 'Collective Consumer Arbitration in Spain: A Civil Law Response to US-Style Class Arbitration', 30. *Journal of International Arbitration* 2013(5), pp 495–510.

> decision can be taken on his/her own initiative or, alternatively, upon the request of the associations representing the consumers in the territory where the consumers' collective interests have been harmed or upon the request of the arbitration boards with a lower territorial scope.[39]

Once the agreement to initiate the proceeding has been adopted, the board will ask the company or the professional responsible for the facts claimed to answer, within a term of fifteen days, whether such company or professional agrees to submit the dispute to collective consumer arbitration and, if so, to propose a settlement agreement to fully or partially satisfy the consumers potentially affected. In the case that the company or professional agrees to submit the dispute to arbitration, a public announcement to all the consumers affected will be issued, so that such consumers can join and defend their rights. This announcement will be published in the Official Gazette of the appropriate territory.[40] The announcement will remain in force for a two-month term after the date of publication. After such term, the president will appoint the arbitration tribunal responsible for hearing the case and the later shall proceed pursuant to the general rules applicable to arbitral proceedings. The consumers intending to settle their disputes through the collective proceeding must file their claims within the said period.[41] After this term, only the claims submitted before the hearing will be accepted, provided that they do not have a retroactive effect on the claims already submitted.[42]

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39 It must be clarified that the consumers affected are not entitled to file the proceeding but this proceeding must be filed by the consumer associations representing them. It does not mean, however, that such associations have an extraordinary standing to file the collective action, since their intervention is confined to this possibility, i.e. to request the commencement of the collective consumer arbitration proceeding in which the consumers affected will necessarily enter an appearance.

40 The president of the consumer arbitration board also has the power to undertake other means of publicizing the notice (Art. 59.1).
According to the RD, the notice must indicate that the consumers can protect their individual rights and interests through the collective proceeding; where the consumers and users may go to access the terms of any proposed settlement; and the consequences of a failure to join the action in a timely manner.

41 As it can be observed, the identity and the number of consumers involved in the action can be known only after the proceeding has commenced. These circumstances clash with the European Parliament resolution of 2 February 2012, 'Towards a Coherent European Approach to Collective Redress', para. 20, which estates: 'for a representative action to be admissible there must be a clearly identified group, and identification of the group members must have taken place before the claim is brought'.

42 It must be noted that this is a sort of accumulation of individual actions, rather than a collective claim.

The company's acceptance to submit to collective arbitration results in the stay of any individual arbitration proceeding based on the same facts that may be filed at the time being – except proceedings that have already been initiated in front of an arbitral tribunal- and transfers the procedures to the Arbitral Board that is competent to coordinate the collective arbitration within fifteen days from the notice of the businesses' or professionals' acceptance. Furthermore, the Spanish Royal Decree also stipulates that the defendant will be entitled to file an objection at any time during individual arbitration proceedings, including the hearing, and, in such a case, the arbitral tribunal will decline jurisdiction to hear the case and will submit the case to the appropriate consumer arbitration board that has jurisdiction to deal with such proceeding.

(2) The award must be rendered within a term of six months after the two-month term starting on the date of publication of the public announcement to the harmed parties (s. 62). Although it is not specifically established in the Royal Decree, the award will only have an impact on the consumers that have participated in the arbitral proceeding, either because they filed their claim after the public announcement or because their claim was being processed separately and was incorporated into the collective arbitration proceeding. Hence, other consumers affected by these facts but who did not file an action after the announcement will be not entitled to benefit from the award, since, for such consumers, the award will be neither considered as res judicata nor have an *ultra partes* (beyond the parties) effect. Accordingly, such consumers will be entitled to start the judicial or arbitral proceedings that may be relevant.

4.1.3. Is the Spanish Collective Consumer Arbitration Really 'Collective'?

27. In short, the Spanish consumer arbitration system can hear individual and even collective claims of consumers and users, provided that they take part in the arbitral proceeding. The collective arbitration system established in the Spanish law is not an actual collective procedure by which a single subject acts and defends the rights and interests of several consumers through such proceeding in the terms used in the judicial way. This is, however, a sort of subjective accumulation of arbitration claims against a same business or professional based on a similar *causa petendi* or cause of action that is settled through a single proceeding.[43]

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43 According to Laura Carballo Piñeiro, a vehicle to aggregate claims is all that can be found in the name 'collective consumer arbitration' (Bernard Hanotiau & Eric A. Schwartz, 'Collective Consumer Arbitration in Spain', in *ICC Dossier XIV- Class & Group Actions in Arbitration*, p 88).

Although the Spanish Royal Decree on consumer arbitration has several defects and lacks courage regarding the recognition of collective arbitration actions, this system is a first step that offers the possibility to settle, through arbitration, the disputes of a large number of individuals. Therefore, we celebrate the progress made by this law. This is a unique type of arbitration that may enlighten the arbitral institutions wishing to incorporate mass dispute resolutions into their regulations.[44]

28. It must be recognized, however, that the Spanish collective consumer arbitration mechanism has been seldom used. In fact, it seems that the spread of this mechanism is not being promoted at all. For instance, this trend has been observed in the disputes resulting from the trade of preference shares by some bank entities, since the parties (especially bank entities) have chosen to file thousands of individual arbitration claims instead of promoting a collective arbitration action.

4.2. The German Corporate Arbitration Scheme

29. The judgment delivered on the 6th of April 2009[45] ('Arbitrability II') by the Federal Court of Justice of Germany (*Bundesgerichtshof – BGH-*) established that corporate disputes may be settled by arbitration, subject to several requirements:

(1) The arbitration agreement must be incorporated in the articles of association with the consent of all shareholders. If the arbitration clause is agreed upon in a separate agreement, the consent of all shareholders is necessary. All shareholders are bound by the arbitration agreement.
(2) Each shareholder must be informed about the commencement of the arbitration proceedings and thus be invited to participate in the arbitral proceedings, at least as an intervening party.
(3) All shareholders must be able to participate in the constitution of the arbitrators unless the arbitrators are appointed by a neutral institution.

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44 This Royal Decree provides parties with a number of benefits, including the ability to establish collective arbitration through what is in effect a post-dispute submission agreement. This technique successfully overcomes one of the primary obstacles to large-scale consumer arbitration outside the United States, namely, the prohibition on pre-dispute arbitration agreements in cases involving consumers. Stacie Strong, 30. *J Int'l Arb.* 2013, p 498.

45 BGH (German Federal Court of Justice) 6 April 2009, II ZR 255/08, juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=47949&pos=0&anz=1 = BGHZ 180, 221.

(4) It must be guaranteed that all disputes regarding shareholder resolutions relating to the same subject matter are concentrated in one tribunal in order to avoid contradicting or inconsistent decisions.

4.2.1. The DIS Supplementary Rules

30. Shareholder disputes are only arbitrable if the articles of association contain an arbitration clause and if the arbitration clause complies with the requirements set out in the decision of the BGH. Due to the high standards set by the BGH it can be assumed that hardly any of the arbitration clauses currently used in articles of association meet these requirements. Thus, most articles of association will need to be amended before disputes among shareholders will be arbitrable.[46]

To facilitate the use of arbitration in shareholder disputes, that same year – 2009-, the German Arbitration Institution (*Deutsche Institution für Schiedsgerichtsbarkeit*, DIS) prepared an arbitration model clause and adopted the Supplementary Rules for Corporate Disputes (*Ergänzende Regeln für gesellschaftsrechtliche Streitigkeiten*), by which this institution regulates a sort of *sui generis* collection arbitration mechanism intended to settle this type of disputes.[47]

The scope of these Rules is remarkably reduced. The rules are confined to corporate disputes, especially those concerning limited liability companies Gesellschaft mit beschränkter Haftung (GmbH[48]) or partnerships that may arise amongst the shareholders of a company or between a company and its shareholders in connection with the statutes or articles of association of such company.[49]

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46 Thomas Lennarz, 'Germany: GmbH Shareholder Disputes Now Arbitrable', 76. *International Journal of Arbitration, Mediation and Dispute Management* 2010, p 305 ff.

47 This regulation is applied alongside the DIS Arbitration Rules (*DIS-Schiedsgerichtsordnung*) adopted in 1998.

The DIS Supplementary Rules for Corporate Disputes provide a sensible framework for corporate disputes. Shareholders who wish to submit their disputes to arbitration should consider applying these rules rather than developing their own set of rules in order to prevent the risk that such self-made rules may fail to meet the very strict requirements set out by the Federal Supreme Court (Jan Kraayvanger & Mark C. Hilgard, 'Arbitrability of Shareholders' Disputes Under German Law', 26. *International Litigation Quarterly* 2009(1), www.mayerbrown.com/files/Publication/e19d0046-f67e-44bc-9f8a-bb6a455cb262/Presentation/ PublicationAttachment/a6512dcc-8b5e-4602-8fad-e37557005e22/Mark-Hilgard-Article.pdf.

48 The 'GmbH' is the most popular legal form of a limited liability company in Germany. Almost one million of them are registered in Germany. Typically, they have between one and perhaps 10 shareholders. In contrast, the legal form of an 'AG' (stock corporation) is better suited for and often chosen by companies with a larger number of shareholders and the legal form required for companies listed on a stock exchange in Germany. In order to understand the nature of shareholder disputes, see the briefly explanation of certain elements of German law governing GmbHs by Christian Borris, 'Collective Arbitration: The European Experience', in Bernard Hanotiau & Eric A. Schwartz(eds), *ICC Dossier XIV- Class & Group Actions in Arbitration*, pp 80–87. ICC Product No 771E, 2016.

49 It must be taken into account that, in accordance with the German law, introducing an arbitration clause in the statutes or articles of association of corporations listed on the stock exchange is not

4.2.2. Corporate Arbitration´s Special Features

31. The special features of this type of corporate arbitration regulated by these Rules stem from the concept of the so-called 'Concerned Others' *(Betroffener).* The concerned others may be all the shareholders of the company (former or current shareholders), or even the company itself, who may be affected by the award that will be finally made. All the concerned others must be granted the opportunity to join the arbitration proceeding, either as a party or as an intervenor (*Nebenintervenient*), with their appropriate rights and duties, as the case may be.[50]

In order to identify the concerned others, the claimant must specify in the statement of claim the shareholders (or the company itself) to whom the effects of the arbitral award must be extended. For this purpose, the claimant must provide the DIS Secretariat with an address of service and must request the DIS Secretariat to also deliver the statement of claim to the Concerned Others. On the other hand, the defendants will be also entitled to identify further concerned others.

Upon the delivery of the statement of claim to the concerned others, such concerned others will have a term of thirty days following the receipt of the statement of claim to specify, in writing, whether they want to join the proceeding, their position (on the claimant's or on the defendant's side) and whether they intend to join the proceeding as a party or as an intervenor.[51] In the event that a Concerned Other fails to declare its joinder within the said term, this shall be deemed to be a waiver of participation in the arbitral proceeding..[52] Therefore, we can conclude that, even though it is not specifically stated, this is a voluntary participation (*opt in*) approach that is fully in keeping with the European parameters.

32. For the appointment of the arbitral tribunal, the Rules provides for several guidelines. For a proceeding with a sole arbitrator, the DIS Appointing Committee will be responsible for nominating the arbitrator in the event that the parties have failed to reach an agreement regarding such appointment within the appropriate term. For proceedings to be settled by three arbitrators, each of the parties and

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allowed. Therefore, these Rules do not apply to this type of companies. In turn, the Rules set out that the Federal Court of Justice of Germany has not decided yet whether this prohibition also applies to 'small' corporations with a limited number of shareholders and not listed on the stock exchange.

50 For instance, those joining the proceeding as a party will participate with all the rights and duties pertaining thereto at the moment their declaration of joinder is received by the DIS Secretariat. On the contrary, those joining the proceeding as intervenors will be entitled to the rights of a compulsory intervenor in the sense of s. 69 German Code of Civil Procedure.

51 A concerned other will be entitled to join the arbitral proceeding at a later moment, but its capacity to participate in the proceeding will be significantly reduced.

52 In any case, the arbitral tribunal will keep the concerned others updated regarding the progress of the arbitral proceeding, providing them with copies of certain relevant documents.

intervenors (the claimant and the defendant) will be entitled to choose an arbitrator. In the case that either party fails to reach an agreement within the appropriate term, the DIS Appointing Committee will be responsible for nominating the arbitrators. The two arbitrators appointed by the parties or by the Appointing Committee will nominate the Chairman of the Arbitral Tribunal.

33. Section 9 of the Rules specifies that the existence of parallel arbitral proceedings with a similar purpose are not allowed and stipulates that the arbitral proceeding that has been initiated first (main arbitral proceeding) precludes the conduct of an arbitral proceeding initiated at a later point in time (subsequent arbitral proceeding).[53] Therefore, in the case that a statement of claim is filed in a subsequent proceeding within the term established for the concerned others to join the main proceeding, it will be deemed that this new concerned other joins the main proceeding, unless this concerned other refuses to join. On the contrary, in the event that a concerned other has not filed the statement of claim within the appropriate term or has refused to join the main proceeding, he/she will be treated as if he/she had not joined the main proceeding. Thus, it is understood that such concerned other may join the main proceeding (at that moment or at a later point in time) [54] or otherwise he/she would not be entitled to defend his/her claim by another arbitral proceeding, since the DIS Supplementary Rules clearly provide for that a subsequent arbitral proceeding is not admissible.

34. For the costs of the arbitral proceeding, the 'loser pays principle' is applicable. However, considering the specific circumstances of each case, the arbitral tribunal may share the costs between both parties or allocate the appropriate proportion of the costs to each party.[55]

35. One should wonder who will be bound to the award that will be finally rendered. As set out both in section 11 of the Rules and in the model clause, the effects of an arbitral award extend to those Concerned Others that have been identified as Concerned Others within the provided time limits, regardless of whether they made use of their opportunity to join the arbitral proceeding as

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53 The fourth paragraph of this section specifically sets out the order of priority amongst such proceedings.

54 Please, note that any concerned others may join the proceeding either within a term of thirty days after the filing of the statement of claim or within a subsequent term but subject to some limitations on their rights. These limitations include, for instance, the impossibility to raise any objections against the composition of the arbitral tribunal (s. 4.3).

55 Yet, the Rules clarify that any concerned others who have not joined the proceeding will not be entitled to claim the reimbursement of the costs.

party or intervenor.[56] The arbitral award has binding effect on all shareholders.[57]

Hence, we can come to the conclusion that the DIS corporate arbitration system, with its special features, may be a sort of *sui generis* collective arbitration with an *opt-in* approach that allows to settle the conflicts of a group of individuals.

5. Conclusion

36. Considering the increasing success that collective actions have experienced over the last years alongside the deeply rooted tradition of arbitration in Europe (despite the barriers that this alternative dispute resolution mechanism is currently facing), we reckon that the possibility to submit collective actions to arbitration will be a matter a time. For instance, even though the countries of the European Union have long had a sceptical position regarding the US class actions, the increasing use of standard-form contracts over the last decades has made those countries finally reconsider their reluctance towards this powerful tool. Furthermore, the success of arbitration has become consolidated throughout this period. Accordingly, it is very likely that these two institutions (collective actions and arbitration) will finally meet each other, although there still may be a long way to go.[58]

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56 The truly innovative effect of the 'Arbitrability II' decision rendered by the Federal Supreme Court, unprecedented in German arbitration law, is that the award rendered by an arbitral tribunal in arbitral proceedings, where all these requirements have been met, has binding effect on all shareholders regardless of whether they have opted to become a party to the arbitral proceedings. Thus, for purposes of this type of dispute all shareholders of a GmbH are regarded to form a 'group' that is collectively bound by the outcome of the arbitration, regardless of whether they have chosen to participate in the proceedings. This indeed appears to be a characteristic feature of a 'class', 'group' or 'collective' arbitration, however one wants to call it (Christian Borris, in *ICC Dossier XIV- Class & Group Actions in Arbitration*, p 83).

57 The ultimate purpose of the mechanism established by the DIS Supplementary Rules is to force shareholders to either join the arbitral proceedings as a party (or intervenor) or else accept to be bound by their outcome, i.e. an extension of the res judicata effect of an arbitral award to non-parties to the arbitration (Christian Borris, in *ICC Dossier XIV- Class & Group Actions in Arbitration*, p 85).

58 In any case, for the development of this type of arbitration in the Member States, policies favouring arbitration must be firstly implemented. As observed above, this first step has been already taken in Europe, where most States have their own arbitration regulations, showing a clear trend in favour of this institution. Secondly, collective actions should be accepted in courts of justice. This practice starts to become gradually incorporated into the European legal systems, even though it is not fully spread yet. Starting from these two first premises, we will be able to begin to discuss collective arbitration.

The United States have given green light to the applicability of *class action arbitration.* Thus, considering that Europe is no longer objecting to collective actions, the decision to implement collective arbitration in Europe may be just a matter of time. See Gabrielle Nater-Bass, 'Class Action Arbitration: A New Challenge?', in Ch. Müller & A. Rigozzi (eds), *New Developments in International Commercial Arbitration* (Genève: Schulthess 2008).

The current legal systems in Europe do not provide for the possibility to resort to collective arbitration and, therefore, extending the collective protection of rights to arbitration entails taking a step forward for which we are not ready yet. However, nothing precludes the Member States from starting to develop a sort of collective arbitration such as, for instance, the Spanish and German systems. Even though such systems are not exactly arbitration systems intended to settle collective actions as these are understood in the courts of justice, these systems may somehow settle disputes affecting a group of individuals. The arbitration institutions may play a key role in this mission, as in the United States, where the major arbitration institutions have been the ones to establish class arbitration in their Regulations.

In any case, collective arbitration should be implemented in accordance with the European Union's own parameters. The principles supporting collective arbitration should fit in with the legal system of the EU and with the legal systems of its twenty-seven Member States. Europe cannot establish a US-like class arbitration system that does not adhere to its legal traditions. Additionally, the adoption of a voluntary participation (opt-in) system is essential. The European approach should also deeply consider the need to prevent the adverse effects of the US class arbitration and abusive litigation. For this purpose, the appropriate safeguards should be established.

To sum up, the US class arbitration has been very controversial and, accordingly, there is a great deal of reluctance towards the implementation of this system in Europe. We should be aware, however, that this alternative dispute resolution mechanism may play a significant role in the scenario of collective actions. As pointed out by Professor S.I. Strong, one of the major experts on this subject, 'it is usually impossible to put the genie back into the bottle once it has escaped'.[59] Thus, the best option will be to try to adapt this mechanism to the European parameters.

59 Stacie Strong, 'Class Arbitration Outside the United States: Reading the Tea Leaves', Legal Studies Research Paper Series, Research Paper No. 2009-36, University of Missouri, @ssrn.com/abstract=1517272.