Is it Still Too Early for Collective Redress in Arbitration? – The Boundaries and Opportunities in European Perspectives

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Abstract: As has been often stated in judicial practice, collective redress simply reflects the rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs. Although the American opt-out class actions are the first thing that comes to mind when one thinks of collective redress, European legislators have been particularly wary regarding the possibility of the US "toxic cocktail" finding their way into European legislations. On the other hand, arbitration, in its basis, is a private way of resolving disputes which is a creation of the parties in the dispute. In its basis there must be consent of the parties to submit the particular dispute to be resolved in arbitration proceedings. Therefore, the possibility to incorporate collective redress mechanism in arbitration proceedings might raise many questions.

Keywords: Arbitration, class arbitration, collective redress, party autonomy, European legisalation, European perspectives.

1. INTRODUCTORY REMARKS

More than thirty years ago, prof. Miller compared the class action lawsuit as the "Frankenstein monster" for some, or a "knight in shining armor" for others.[1] Many years have passed since, and different European legislators have all in a different manner outgrown the fear, most plastically explained by prof. Taruffo as the possibility of "the Frankenstein monster penetrating the quiet European legal gardens".[2] The developments, especially in the last decade, have gradually shown a modest acceptance of different modalities of collective redress mechanisms within different European legislations. Collective redress can offer (to the parties, as well to the state's adjudication system itself) several advantages, but, in bottom line, their accomplishment in practice will very often be directly interdependent with the specific modalities of the procedural mechanism introduced and the extent to which they are incorporated in the current civil justice system.

On the other hand, arbitration is very often the preferred dispute resolution method, for many different types of disputes. This especially holds true when it comes to disputes with international elements – it offers flexibility, fairness and neutrality, and is especially praised for its ability to meet the expectations of parties and counsels coming from different procedural systems, providing all them an opportunity to feel 'home-based' in the course of the proceedings. Much has been written on the advantages it has to offer as compared to traditional state court adjudication.[3]

However, the possibility to combine the two might cause many different quandaries. On one hand, it might offer best of the two worlds – combining the flexibility, fairness and neutrality of arbitration, with the possibility to effectively vindicate the rights of a large group of people in the course of a single procedure. However, on the other hand, the combination may turn out to be "worst-of-all worlds Frankenstein's monsters because it combines the enormous stakes, formality and expense of litigation … with exceedingly limited judicial review of the arbitrators' decisions".[4]

The article analyzes the basic features of the collective redress procedural mechanisms and their (in) compatibility with arbitration, in an attempt to provide an answer to the question – whether it is viable to expect collective arbitration procedures within Europe any time soon?

2. SEVERAL NOTES ON THE NEEDS FOR COLLECTIVE REDRESS

Contemporary living, which is characterized by continuous improvement of mass production, the

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[1]Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem'", Harvard Law Review, 92, no.3 (1979), p.665.
[2]Michele Taruffo, "Some Remarks on Group Litigation in Comparative Perspective", Duke Journal of Comparative & International Law, 11 (2001), p.414.
[3]For a review of these arguments, see for example Tatjana Zoroska Kamilovska, Arbitrazno pravo, Stobi trejd, Skopje, 2015, p.10-15.
[4]Brief for Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiff-Appellants, Marriott Ownership Resorts v. Sterman, No. 15-10627 at 9 (11th Cir. April 1, 2015).

E-ISSN: 2817-2302/23

existence of international corporations, steady increase of the possible situations in which a number of subjects might suffer adverse consequences due to the use or purchase of any product or service, and clearer recognition of the need to protect the clean environment, all often lead to the existence of a number of disputes based on the same or similar factual and legal basis, brought at the same time before the competent courts in the national system of administration of justice. In fact, globalization accompanied by technological innovation more and more often open up opportunities for the behavior of a player on the market to cause violation for a number of individual subjects, and also leads to increased complexity of disputes that might arise.

This phenomenon is usually called "massification"[5] of disputes - namely, the societies of mass production and mass consumption in which we live in, have become a determining feature not only of economic systems, but also of the entire life style - social relationships, communication and even conflicts arising in our societies are characterized by massiveness. In such circumstances, disputes that are brought before the civil justice system in one country are also characterized by massiveness.

The complexity of disputes can be reflected through different features of the dispute - the number of entities participating in the disputed relationship,[6] the number of issues arising from their substantive law relations, the facts of the case (which may include issues of technical nature or issues requiring particular expertise), the applicable law, territorial and temporal dispersion of the violations and requests for legal protection of all affected parties, the possibility for existence of the jurisdiction of two or more national legal systems, the possibility to initiate a new procedure in which (bigger or lesser) part of the issues that have already been decided in the first procedure might also be brought again in another consecutive procedure.[7] These types of disputes are also called mega-litigations - these are procedures involving a wide range of affected parties, whose resolution would take a long time and produces a huge volume of documents in the case.[8] The aforementioned complexity emphasizes the need to adapt and modify the manner in which the system for protection of civil rights and legally protected interests provides the requested protection in these disputes. However, forcing these mass harm situations to be resolved within the traditional civil litigation system would mean forcing them to comply with a reality that no longer exists – and for these reasons it might not provide the optimal results it might have. In fact, it is undisputable that the rights recognized by the legal system to a specified group of affected parties are only worth as the efficiency of the system in which their protection should be provided.[9] For these reasons, an appropriate method for resolving these disputes should be devised, adapted to their particular specificities.

The basic presumption to allow common, group handling of dozens, hundreds, perhaps even thousands requests for legal protection is the requirement to have some connecting point among all those requests for legal protection belonging to different entities, which is typically reflected in the existence of a common factual or legal basis of the requests for legal protection. Namely, it is undisputed that the facts themselves almost never could absolutely identically be replicated in different situations, but on the other hand, very often there are disputes with very small variations of the disputed issues arising in them.[10] The key feature must be the existence of common features that justify collective handling of all related claims.[11] In fact, collective handling of a greater number of requests for legal protection should be made possible, and allowed, in situations where the resolution of the dispute in one case, and the solutions reached there, could provide the appropriate answer to the questions raised in all other disputes in group.[12]

Basically, the collective handling of a greater number of disputes should substantially enhance the resolution of all disputes in a manner that will resolve

[5]The notion "massiffication" originates from prof. Cappelleti – see MauroCappelletti, "Vindicating the Public Interest through the Courts: A Comparativist Contribution", Buffalo Law Review. 25 (1975), p.646.

[6]More specifically, it should concern a plentitude of parties whose rights have been violated, challenged of threatened in same or similar manner - NeilAndrews, "Multi-Party Litigation In England", *University of Cambridge Faculty of Law Legal Studies Research Paper* 39/2013 (2013), p.3.

[7]Thomas E. Willging, "Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation",*University of Pennsylvania Law Review*. 148(2000), p. 2255-2261.

[8]On the term *mega-litigation* see Ronald Sackville, "Mega-litigation: Towards a new approach", *Civil Justice Quarterly*, 27, no.2 (2008), p.244.

[9]Lilla Farkas, "Limited Enforcement Possibilities under European Anti-Discrimination Legislation-A Case Study of Procedural Novelties: Actio Popularis Action in Hungary", *Erasmus Law Review,* 3 (2010), p.181.

[10]Oliver W. Holmes, Jr., The Common Law (1881), quoted bySamuel Issacharoff, "Assembling Class Actions", *Washington University Law Review,* 90 (2013), p.700.

[11]Richard Marcus, "Still Confronting the Consolidation Conundrum", *Notre Dame Law Review,* 88 (2012), p.562.

[12]In fact, it is usually stated that collective redress should be allowed if they fit the model*,,if as to one, then as to all"* – Samuel Issacharoff, Geoffrey P. Miller, "Will Aggregate Litigation Come to Europe", Vanderbilt Law Review, 62 (2009), p.185.

the central issue that connects all these disputes, and thus, will result in higher efficiency in the functioning of the system for the administration of justice. However, what is even more important in order to allow collective handling of a number of requests for legal protection within a single procedure is not really the very existence of common issues (which are common to all requests for legal protection) raised in those proceedings, but the existence of opportunities to find common answers to these questions, which will allow fast and efficient resolution of the disputes that exist between all affected parties on one side, and the entity that in any way violated, challenged or threatened the rights of all those parties on the other side.[13]

3. THE SPECIFICITIES OF COLLECTIVE REDRESS MECHANISMS

In its basis, collective redress mechanisms (*collective actions, group actions, class actions*) represent a generic term that incorporates various procedural mechanisms (regardless of their denomination), which, for reasons of procedural economy and efficiency of the implementation of protection, allow more of the same or identical requests for legal protection to be grouped in a single proceeding. In a certain manner, it represents accessible, but at times controversial solution, which allows aggregation of dispersed interests of the different entities and their "channeling" into a procedural mechanism in which different stakeholders promote their own interests, but also the wider social interests.[14]

The notion collective redress mechanisms refers to all forms of group or joint procedures relating to the various forms of aggregation of multiple related claims belonging to different entities into a single litigation procedure.[15] This procedural mechanism does not in any way change the existing substantive rights acknowledged by the legal system to the entities, but only allows the creation of a kind of "tool" which allows those rights to be protected in an efficient manner.[16] The process of aggregation creates something of an economy of scale, whereby a large number of claims can be resolved with greater efficiency and greater dispatch than resolving each of the claims individually. It is usually said that without the existence of this procedural model, wrongdoers might escape liability so long as they can spread the harm in small quantities among large groups of people.

This procedural mechanism might strive to achieve several different goals, including the following:

- To increase the efficiency and reduce the costs associated with the adjudication procedures in a way that will allow for the issues that are common to all affected parties to be decided in a single procedure, and the effects of decision that will be rendered will spread to all of those affected parties. Individual litigation in such cases would include a significant increase in the costs of the procedure, not only the direct costs of the proceedings (including the costs for party representation, and the costs for obtaining evidence and proving the merits of the claim), but also increased costs for the functioning of the entire judicial system.[17] Namely, the increase in the case dockets of the courts could seriously compromise the effectiveness of the system for protection of civil rights and interests, on the one hand due to the need for increased engagement of judges and administrative staff, which will lead to delay in the final resolution of these items, but on the other hand, due to the possible obstructions for prompt and timely resolution of all other disputes that are brought before the courts, which directly affects the efficiency of the entire judicial system;
- To avoid the possibility of rendering contradicting decisions on issues arising from the same or from identical factual relations. Given that in civil law legal systems the principle *stare decis* does not apply, and furthermore that the finality of the decision rendered in a particular dispute will be an authoritative and irrevocable regulator of the legal relationship only between the entities that have been involved in the proceedings as parties in that litigation, there are serious chances that in such cases decisions may be rendered that

[13]Richard A. Nagareda, "Class Certification in the Age of Aggregate Proof", *New York University Law Review*, 84 (2009), p.132.
[14]Jürgen G. Backhaus, Alberto Cassone, Giovanni Ramello, "The Law and Economics of class action litigation: setting the research agenda", in: *The Law and Economics of Class Actions in Europe: Lessons from America*, Jürgen G. Backhaus, Alberto Cassone, Giovanni Ramello (eds.), Cheltenham, UK; Northampton, MA: Edward Elgar, 2012, p.4.
[15]Alan Uzelac, "Why No Class Actions in Europe? A View From the Side of Dysfunctional Justice Systems", in: *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Viktoria Harsagi, C.H. van Rhee (eds.), Intersentia, 2014, p.54.
[16]Richard A.Nagareda, "The Preexistence Principle and the Structure of the Class Action",*Columbia Law Review*, 102, no.2(2003), p.174.
[17]Garry D. Watson, "Class Actions: The Canadian Experience", Duke Journal of Comparative & International Law, 11 (2001), p.270.

regulate identical factual and legal affairs in different manners;

- To provide improved access to justice for all entities, especially in disputes where the value of the claim arising from the right whose protection is required is small, so that the pursuit for their protection might be economically unviable. The determination what might be considered to be a dispute of small value cannot be determined generally, but it should be taken that such are the disputes where the fixed costs of the proceedings exceed the amount of the required protection (*negative value suits*).[18] In these cases, it might be unlikely that a person will decide to initiate proceedings for the settlement of his claim, taking into account the fact that the costs of the procedure will exceed the benefits that a person could receive in the event of a positive outcome of litigation procedure for several times, so these entities might effectively be denied the right of access to justice. This is due to the basic assumption that all entities behave rationally, and they will initiate proceedings requesting protection of their rights and legally protected interests only in situations where their personal gain from the initiation of the procedure (i.e. the expected outcome of the procedure, which must not only refer to monetary fee which that entity would have obtained, but also of the circumstance that the defendant will be forced to answer for their actions) is greater than the expenses it incurred from the initiation of the procedure (such as financial expenses and time devoted to the procedure).[19]

- To achieve the effect of deterrence, aimed at preventing an entity from inflicting violations to the rights of the different entities in the system, so that the malfeasor (or the entity which violated, challenged or threatened the rights and interests of a larger group of peoplewith its behavior) will be forced to internalize the social costs of their behavior.[20] In fact, the mere existence of collective redress mechanisms, and the possible amount of costs that they might spend on defense in these procedures that might be initiated against them, is forcing those entities to take on themselves the cost of their own harmful actions, and thus discourage them to take harmful actions.[21] In these situations, the starting point is the assumption that each entity will make an analysis of the potential costs and benefits of their behavior before deciding to take any illegal action, whereas, if the potential costs (understood in terms of the probability for the malfeasor to face criminal liability or obligations for compensation of the damage) exceed the amount of benefits that can get from taking that action, he will refrain from taking unlawful actions.

In order to achieve the goals that this procedural mechanism aims to accomplish, it has to incorporate several derogations from the traditional model of civil litigation. Although it has been held that the existence of a system for settlement of collective actions is not *per se* contrary to Article 6 of the ECHR provided the interests of each individual are safeguarded,[22] collective actions still challenge some of the universal principles of civil procedure – including the 'due process rule', relating to the right of every individual to choose whether to bring legal proceedings or not, and according to which an individual cannot be made a plaintiff without his or her knowledge, that all those involved in a lawsuit must have their identity known (the doctrine of '*nul ne plaide par procureur*'), so members of the class have to be identified before the beginning of the action and be parties to it, and, consequently, that only those persons that actually took participation in the proceedings can be bound by a decision in the case ('*autorité relative de la chose jugée*').

For many years for European legislators it has been troublesome (and for many it still is) that the price of providing a mechanism for the vindication of rights held in common with others may be departure to some extent from the procedures ordinarily applicable in litigation *inter partes*. In these cases especially, it has to be accepted that the rectitude of the decision, which

[18]Brian Anderson, Andrew Trask, *The Class Action Playbook*, Oxford University Press, New York, 2010, p. 13.
[19]Roger Van den Bergh, "Private Enforcement of European Competition Law and the Persisting Collective Action Problem",*Maastricht Journal of European and Comparative Law,* 20 (2013), p.20.
[20]John C. Coffee Jr., "Reforming the Securities class actions: an essay of deterrence and its implementation", *Columbia Law review*, Vol.106, (2006), p.1536.
[21]Coffee, *op.cit* p. 1537.
[22]For a more broader insight on the judicial practice of the European court of human rights regarding the compatibility of Article 6 of ECHR with the possible reduction of some procedural guarantees see Axel Halfmeier, "Recognition of a 'WCAM 'Settlement in Germany", *Nederlands Internationaal Privaatrecht*,2 (2012), p.182.

is usually a paramount philosophy of civil procedure, and the protection of some procedural rights of the parties involved in the dispute, have to give the priority to considerations of timely justice, reasonable costs, and improved access to justice.

4. COLLECTIVE REDRESS - THE CURRENT STATE OF PLAY

Many different characteristics and specific institutes of this procedural mechanism allow differentiation of many diverse types of collective redress mechanisms, including the questions of the entities authorized to initiate the proceedings, their procedural status, the type of protection that can be obtained, and how the decision that will be rendered will affect the rights of other affected parties.

On one hand, possibly the most known type of this procedural mechanism is the model of class actions, established by the Federal Rules of Civil Procedure in the United States from 1966.[23] The most salient feature of the class action is that it operates by virtue of the "opt out" principle, which means that even non-participants can be subjected to the binding effect of a class action judgment or settlement without having taken any positive steps to join those proceedings. All that is required is that the non-participants are given notice of the class action, an opportunity to opt out of the class, and, of course, adequate representation of their interests in the proceedings. In fact, it is usually said that unlike a party in a normal civil suit, an absent class action plaintiff is not required to do anything - he may sit back and let the litigation run its course.

On the other hand, the issue of the admissibility of collective redress mechanisms has a completely different character on European soil. European legislators for a long period have looked upon these procedural mechanisms with disapproval, considering them excesses of American procedural system that does not correspond to the procedural traditions of European civil law. This position in recent years has slowly begun to evolve towards the understanding that the introduction of a procedural mechanism for the collective protection of rights need not necessarily mean complete copying of the American model of class actions, but rather that legislators have full liberty to adapt the characteristic features of this procedural mechanism to the specific procedural traditions in their country, and to regulate the issues in a way that, taking into account the needs of the specific procedural system, will lead to increasing its efficiency.

At EU level the attempt to create a unified collective redress mechanism is carried out with moderate intensity and has marked little progress, due to the limited legislative powers of the Commission in this area, and the fact that the legislations of most of the member States have already introduced some form of this procedural mechanism. The most important development in the EU legislative landscape has been the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers.[24] The Directive sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all Member States, while providing appropriate safeguards to avoid abusive litigation.[25] The purpose of the Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning representative actions. The policy areas covered by this mechanism are wide-ranging, including data protection, financial services, travel and tourism, energy and telecommunications, as well as general consumer law such as rules on unfair contract terms and misleading advertising - both domestic and cross-border infringements. The representative actions under this framework can be brought by qualified entities designated by the Member States for this purpose, which satisfy the following criteria - legal persons that are properly constituted in accordance with national law of the Member State of designation, have a certain degree of permanence and level of public activity, have a non-profit-making character and have a legitimate interest, given their statutory purpose, in protecting the interests of consumers as provided for by Union law.

[23]See Rule 23(b), FRCP, https://www.law.cornell.edu/rules/frcp/rule_23 (last accessed on 26.10.2023).

[24]Directive (EU) 2020/1828 Of The European Parliament and of The Council of November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC,eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828 (accessed 26.10.2023)

[25]For a critical review of this Directive, especially on the issue whether it will serve to improve co-ordination in civil procedure in this area which has traditionally been very diverse at a Member State level.see Duncan Fairgrieve, Rhonson Salim, "*Collective* Redress in Europe : Moving Forward or Treading Water", *International and Comparative Law Quarterly*, 71, 4, (2022), p. 465-479.

However, the current state in European legislations shows a great variety of models, ranging from practically introducing opt-out class actions at the one end of the spectrum, to merely devising a model providing managerial efficiency for the plentitude of cases, at the other end.

At the one end of the spectrum we can certainly find the Portugal's *acçãopopular*, where a right of standing has been granted to any Portuguese citizen exercising civil or political rights, local authorities, as well as associations and foundations acting on behalf of the collective interests of citizens, provided that they have legal existence and the interests at stake are within its objectives.[26]The group is determined upon opt-out basis, meaning that the representative does not need an express mandate from the subjects whose interests it purports to protect, nor do the members of the group have to be identified at the outset of the proceedings, whilst they will be bound by the outcome of the proceedings.

Another specific legislation in European context is the Dutch one,[27] which bears several specific features – unlike other models; it deals only with the settlement of such collective actions, rather than with the commencement and processing of such multi-party disputes. Such settlement, reached for the compensation for damages caused by an event or similar events, agreed by the defendant and a representative organization acting on behalf of the parties affected, if approved by the competent court, will be effective and binding on all affected persons, unless they have opted-out of the agreement.

Somewhere in the middle of the European spectrum of collective redress mechanisms we can find the Nordic model – although any member of the group, and private organizations promoting specific interests which include the cause of action in the group proceedings are empowered to bring actions, traditionally the Consumer Ombudsman has the primary responsibility for enforcement of collective rights in the consumer protection area. The specificity of these systems (namely in Denmark and Norway) is that although they are constructed primarily on opt-in basis, opt-out rules can be applied by exception, if the court decides, that the action relates to claims for which it is evident that due to their small size it may not be expected that they may be furthered in individual proceedings, and that an opt-in collective action with members opting-in would not be a beneficial way to handle the claims.[28]

At the other end of this spectrum, we can find mechanisms devised with the sole purpose of easing the effective management of multiplicity of individual claims – primarily the English Group litigation order, which provides that all claims that give rise to common or related issues of fact or law will be managed together, in the same court, by the same judge, who has wide managerial powers in dealing with these claims, whilst all the claimants who want to join the group must join a register – or simply, opt-in into the procedure.[29]

5. ARBITRATION AND THE SUPREMACY OF AUTONOMY OF WILL OF THE PARTIES

In the past few decades, arbitration has gradually managed to become a backbone in resolving legal disputes, as a viable alternative to litigation. It has already been noted that "during the past 30 years, use of arbitration has expanded both as to the quantity and the nature of the disputes subjected to it".[30] A wide range of contractual and non-contractual claims are referred to arbitration as a fair, effective and less costly binding dispute resolution mechanism.[31] It is usually considered to be a more attractive alternative for resolving disputes connecting parties from two or more different countries as compared to international litigation, primarily due to its flexibility, fairness and neutrality.

When it comes to defining what arbitration in its essence is, generally it is accepted that it is a generic term noting the form of binding resolution of disputes out of the national court system,[32] or a private dispute resolution method selected by the parties themselves as an effective way to end the dispute between them without recourse to court,[33] or a contractual form of

[26]António Pedro Pinto Monteiro, José Miguel Júdice, "Class Actions & Arbitration in the European Union- Portugal", In *Estudos Em Homenagem A Miguel Galvao Teles*, Almedina (2012), p.194.

[27]For detailed information on this procedural mechanism see M. J. Van der Heijden, "Class Actions/les Actions Collectives",*Electronic Journal of Comparative Law*, 14, no.3 (2010), p.3.

[28]Rachael Mulheron, "The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis", Columbia Journal of European Law, 15 (2009), p.423.

[29]Rachael Mulheron, The Class Action in Common Law Legal Systems: A Comparative Perspective, Oxford; Portland, Or.: Hart, 2004, p.98-99.

[30]Matthews, J.M: Consumer Arbitration: Is It Working Now and Will It Work in the Future, in: The Florida Bar Journal, April 2005, Volume 79, No. 4 p. 22.

[31]Tatjana Zoroska – Kamilovska, Tatjana Shterjova, "Why do businesses in Macedonia decide (not) to use arbitration?", Slovenska arbitražna praksa, Letnik V, Številka 2, 2016, p.6;

[32]J. D. M. Lew, L. A. Mistelis,S. Kröll, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 31.

[33]A. Redfern,M. Hunter (with Nigel Blackaby and Constantine Partasides), Law and Practice of International Commercial Arbitration, fourth edition, Sweet and Maxwell, London, 2004, p. 1.

dispute resolution, carried out by persons who are directly or indirectly appointed by the parties, and who have been given the authority to settle the dispute rather than state courts, by rendering a decision which has effects analogous to those of a court decision.[34]All these determinations set out several *differentia specifica* of arbitration – that it is an alternative of state adjudication, it is a private dispute resolution mechanism, it is completed by rendering a decision which is final and binding for the parties in the dispute, and (probably most importantly from the perspective of our analysis) it is a creation of the parties in the dispute.

The will of the parties for their dispute to be exempt from the competence of state judiciary and to be entrusted to arbitration lies in the foundations of the arbitral resolutin of disputes. But, arbitration is much more than that. The authonomy of will of the parties of the dispute is such a striking and remarkable feature of this dispute resoltion method, that there are hardly any issues on which the parties cannot agree upon, and this is not the case with state adjudication, which is usually regulated with imperative provisions, and conventional proceedings (agreed by the parties) are usually not allowed. Thus, there is a inevitable conclussion that arbitration is predominantly a creation of the parties in the dispute.[35]

In fact, the most salient feature of arbitration is precisely the autonomy of the parties to the dispute. Namely, the will of the parties is the main source of rules for arbitration. Not only the parties are free to choose this method of dispute resolution, but they can reach an agreement on most of the issues arising in the proceedings. This autonomy of will is reflected all throughout the arbitration proceedings, starting from the mere using arbitration for resolving disputes arising from a particular contractual relationship, the appointment of the arbitrators, the language of the proceedings, the applicable substantive law, the conducting of the proceedings themselves, including issues on taking evidence and privileges. In fact,

"party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition.[36].

6. CAN THE TWO WORLDS COMBINE?

Joining collective redress procedures with arbitration presents an opportunity to grasp the benefits of both mechanisms in a single proceeding.[37] Given that arbitration in its basis is a creation of the parties in the dispute, and that arbitration draws the basis for performing adjudication in the consent of the parties in that dispute, a question arises whether and in which manner the procedural mechanism for collective protection of rights, which in certain aspects might include a derogation from some of the basic postulates of traditional civil litigation and the protection of procedural rights of the parties therein, might be incorporated in arbitration proceedings. Since the possible combination of the two has until now only been successfully brought to life within the US, the analysis in continuation will refer to the American model of class arbitration.

Usually, the courts start from the premise that these disputes are arbitrable, and in deciding on the (in) validity of arbitration agreements their departing point is the premise *in favorem validitatis*.[38] Due to this, many claim that this position is “misused” by big international corporations, which by inserting arbitration clauses in their standard (most often consumer) contracts they conclude with possible affected parties want to avoid the possibility for a collective redress procedure to be initiated against them.[39] Namely, in such situations, where there are a large number of affected parties who have claims of small, even insignificant value, and who want to pursue their requests for legal protection in a collective manner, the respondent could simply object to the initiation of such proceedings with reference to the existence of a valid arbitration clause concluded

[34] J.F. Poudret, S. Besson, ComparativeLawofInternationalArbitration, 2nd edition, Sweet&Maxwell, London, 2007, p. 3.
[35] Zoroska-Kamilovska, op.cit., p.7.

[36] A. Redfern, M. Hunter, op. cit., p. 365.
[37] M.A.M, “Classwide Arbitration: Efficient Adjudication or a procedural Quagmire”, Virginia Law Review, Vol.67, No.4, (1981), p.814.
[38] Myriam Gilles, “Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action”, *Michigan Law Review,* 104 (2005), p.394.
[39] This even includes situations where in the adhesion contracts international corporations conclude with their consumers, apart from agreeing on arbitration as a method for resolving possible disputes that might arise form that contractual relationship, they also expressly stipulate a waiver on class action lawsuits, class-wide arbitrations, private attorney-general actions, and any other proceeding where someone acts in a representative capacity – see for example article 11 from the Microsoft software license terms - Windows 10 operating system https://www.microsoft.com/en-us/Useterms/Retail/Windows/10/UseTerms_Retail_Windows_10_English.htm (last accessed on 26.10.2023).

with some or all of the affected parties,[40] and in that manner, possibly shield himself from liability on class-wide basis.

In these situations, the only option available to the affected parties for obtaining protection of their rights would be initiating individual arbitration proceedings. There can be two exceptions.

First, the court deciding upon the objection of the respondent may find that the arbitration clause is invalid, due to certain flaws of the arbitration clause, and allow a collective redress procedure to be conducted before that court.[41]

On one hand, for almost a decade, courts gradually started to take the position that those arbitration clauses are invalid, under the unconscionability doctrine, finding that class actions are the only way to "halt and redress consumer exploitation", and arbitration clauses in such disputes may be taken to be a form of an exculpatory clauses that are contrary to public policy. In fact, contractual clauses may be considered to be unenforceable and unconscionable if it is both procedurally and substantively unconscionable: the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results.[42]

On the other hand, courts have found such clauses to be invalid due to the fact that the disputes concerned in mass harm situations usually include high level of complexity, requiring intensive factual analysis, which would create large arbitration costs - in an amount much larger than one individual subject (member of the class) would be able to bear.[43] This is particularly a problem with "negative value suits", concerning disputes where the fixed costs of the procedure exceed the amount of claim itself, where it is unlikely that a person will decide to initiate proceedings, taking into account the fact that the costs of the proceedings will exceed the benefits that a person could receive in the event of a positive outcome of the civil proceedings several times. In these situations a "realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30".[44] These circumstances may cause these entities to be effectively denied the right of access to justice, and precluding them form effectively vindicating their rights. For these reasons, the court may take the position that those individual subjects could not enforce their rights except on a class-wide basis.[45]

Finally, given that the arbitration clause allows the parties to contract away a procedural device that serves the courts' interest in efficiency (which may be one of the primary goals of this procedural mechanism), the court may consider the arbitration clause problematic from a public policy perspective.[46] Additionally, from public policy perspective, another issue may also arise as problematical – it may be questionable whether full enforcement of the law would be feasible in individual suits.[47]

Second, it is possible for the arbitration rules chosen by the parties to contain specific provisions, allowing collective arbitration proceedings (class arbitration)[48], such as the examples of the Supplementary Rules for Class Arbitrations of the American Arbitration association[49] or the JAMS Class Action Procedures.[50] These specific rules usually regulate only a specific set of issues - including the issues on construction of the arbitration clause, class certification, class determination award, notice of class determination, final award or confidentiality. The number of these procedures is not great – and even smaller is the number of decisions on the merits that have been rendered in these procedures. For instance, the Class Action Case Docket of the American Arbitration Association (AAA) shows received filings in a total of 617 class proceedings. However, out of them,

[40]Jean R. Sternlight, Elizabeth J. Jensen, "Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?", *Law and Contemporary Problems*, 67(2004), p.77.In fact, this was precisely what was done in the case*AT&T Mobility v. Concepcion*, concerning the class action initiated by users of the telecom operator, who were promised to get a free cell phone device if they make a two-year contract with the operator, but after the conclusion of the contract were asked to pay a certain amount - on the basis of tax charges - for the telephone, and who had arbitration agreements in the contracts – on the specificities of this case and the much disputed decision of the Supreme Court of the United states see Myriam Gilles, "After Class: Aggregate Litigation in the Wake of At&t Mobility V. Concepcion", *University of Chicago Law Review,* 79 (2012), p. 623-675.

[41]Stephen Ware, "The Case for Enforcing Adhesive Arbitration Agreements-with Particular Consideration of Class Actions and Arbitration Fees," *Journal of American Arbitration,* 5 (2006), p.265-269.

[42]Discover Bank v Superior Court, 113 P3d 1100, 1108 (Cal 2005).

[43]Myriam Gilles, Gary Friedman, "After class: Aggregate litigation in the wake of AT&T Mobility v. Concepcion", The University of Chicago Law Review, 79 (2012), p.634-635.

[44]Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[45]Kristián v Comcast, 446 F3d 25 (1st Cir 2006).

[46]Jean R. Sternlight, Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse, Law and Contemporary Problems, Vol. 67, No. 1/2 (2004), p.81.

[47]Ibid, p.90.

[48]Fred Hagans, Jennifer B. Rustay, "Class Actions in Arbitration", *The Review of Litigation,* 25 (2006), p. 304.

[49]Supplementary_Rules_for_Class_Arbitrations.pdf (adr.org) (last accessed on 26.10.2023)

[50]https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf (last accessed on 26.10.2023)

class certification has been granted in 124 cases, and only 8 have resulted in an award on the merits of the case.[51]

Additionally, the parties themselves may agree for an *ad hoc* collective arbitration procedure to be conducted in the particular dispute.[52] However, conducting collective arbitration proceedings might be problematical from several points – the arbitrability of these disputes, the constitution of the arbitral tribunal, due process in course of the proceedings, the confidentiality of the proceedings.[53] This is especially important since a question may arise whether the arbitration agreement may be considered a valid basis for conducting collective arbitration proceedings (class arbitration), in which protection should be obtained for the rights of a larger group of affected parties, if the parties had not expressly agreed on the admissibility of such arbitration proceedings. Although older jurisprudence expressly advocates a negative answer to this question, this position is gradually changing toward acceptance of the view that the fact that the arbitration agreement does not expressly regulate the matter, should not mean that collective arbitration proceedings is not admissible - this issue will need to be determined in each case individually.[54] However, case law is almost unequivocal in regards to one issue - the decision whether collective arbitration proceedings (class arbitration) is admissible is exclusively within the competence of the arbitral tribunal.[55]

What the history of the development of class arbitration in the United States shows is that the rise of this specific tool is only possible if a combination of three key factors is met - respect for large-scale relief as an appropriate procedural mechanism; trust of arbitration as a procedurally legitimatemeans of resolving both public and private legal disputes; and the need to give effect tocertain substantive laws and policies.[56]

Some isolated actions on field, however, have been present for quite some time, - such as the example of the German Institution of Arbitration ('Deutsche Institution für Schiedsgerichtsbarkeit' or 'DIS')[57], whose Supplementary rules for Corporate law disputes regulate large-scale proceedings involving shareholder disputes. Namely, the Rules state that in disputes requiring a single decision binding all shareholders and the corporation and in which a party intends to extend the effects of an arbitral award to all shareholders and the corporation without having been introduced as a party to the arbitral proceeding (Concerned Others), the Concerned Others shall be granted the opportunity to join the arbitral proceedings pursuant to the Rules as a party or compulsory intervenor in the sense of section 69 German Code of Civil Procedure (Intervenor). This applies *mutatis mutandis* to disputes that require a single decision binding specific shareholders or the corporation. In these cases, The DIS Secretariat delivers the statement of claim to the respondent and the identified Concerned Others and requests the Concerned Others to declare visà-vis the DIS Secretariat within 30 days after receipt of the statement of claim in writing whether they join the arbitral proceedings on claimant's or respondent's side as party or as intervenor, formulating a opt-in approach in regulating this matter. Furthermore, the arbitral tribunal informs identified Concerned Others, which have not joined the arbitral proceedings, on the progress of the arbitral proceedings by delivering copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal to the Concerned Others at their indicated addresses, unless Concerned Others have expressly waived in writing to receive this information.

7. CONCLUSION

Collective arbitration proceedings (class arbitrations) are traditionally associated with the American and Canadian legal system, but more and more often the idea of this specific arbitration mechanism extends its application within Europe. This is partly due to the partial acceptance of European legislators that this procedural mechanism may be the more efficient manner for resolving certain types of disputes, and that it can offer many advantages[58]- it is

[51]Class Action Case Docket (adr.org) (last accessed on 26.10.2023)
[52]S. I. Strong, "From Class to Collective: The De-Americanization of Class Arbitration", *Arbitration International,* 26, no. 4 (2010), p.499.
[53]GabrielleNater-Bass, "Class Action Arbitration: A New Challenge?", *ASA Bulletin* 27, no. 4 (2009), p.679-685.
[54]Lea HaberKuck, Gregory A. Litt, "International Class Arbitration",in:*World Class Actions: A Guide to Group and Representative Actions around the Globe*, Paul G. Karlsgodt (ed.), Oxford University Press, USA, 2012, p.701-713.
[55]Gabrielle St-Hilaire, "La Competence Des Arbitres En Matiere De Litiges Resultant De La Convention Collective: Exclusive Ou Partagee ?", *Revue De La Common Law En Franqais,* 4, no. 1 (2001), p.107.
[56]S. I. Strong, "Collective Redress Arbitration in the European Union", International Arbitration and EU Law, Edward Elgar Publishing Ltd, 2021, p.184.
[57]DIS_Supplementary_Rules_for_Corporate_Law_Disputes_2009_V.pdf (disarb.org) (accessed 26.10.2023).
[58]S. I. Strong, "Class Arbitration Outside the United States: Reading the Tea Leaves", in: *Multiparty Arbitration*, Bernard Hanotiau, Eric A. Schwartz (eds), ICC Publishing,(2010), p.213.

almost certain that legislation that already have at least some experiences with collective redress legislation would be more prone to expand it also to the arbitration field. With the emerging trend for envisioning collective redress procedures in courts throughout Europe, it can very soon be expected that arbitration institutions will seize the trend, and start enacting separate arbitration rules for proceedings with collective features, following the example of the DIS.

The possibility to incorporate collective redress mechanism in arbitration proceedings raises many questions. Taking in consideration that arbitration infers its basis on the agreements of the parties in the dispute, many issues relating to the cornerstones of arbitration have to be thoughtfully detailed and this specific procedure might introduce several specificities – the arbitrability of these disputes, the constitution of the arbitral tribunal, the parties' right of due process, or the confidentiality of the proceedings. Therefore, whether it will turn out to be an effective dispute resolution method adequately combining collective redress and arbitration, or a worst of the two, will mostly depend on the extent this specific procedure will be devised.

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Received on 20-09-2023 Accepted on 17-10-2023 Published on 19-11-2023

https://doi.org/10.6000/2817-2302.2023.02.15