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CHAPTER 9

Why is Class Arbitration Unpopular across the Pond?

Roman Khodykin[1]

Class action, which is understood to be an extraordinary but yet acceptable procedure in the US, remains something which instills a touch of fear in European lawyers. Although there is general agreement across Europe that steps need to be taken in order to encourage responsible conduct on the part of those who might cause "mass harms" to multiple victims on a large-scale, it seems that most, at least outside the United States, agrees that they do not want to adopt US-style class action in their own national legal systems.[2]

Confronted by a widespread and hostile attitude towards class litigation in Europe, it is even more difficult to persuade those across the Pond that they do need some form of class arbitration.[3] The ICC issued a policy statement saying that:

> . . . implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to the Society . . . including exposure to legal blackmail.[4]

Some time ago Michele Taruffo wrote:

1 Ph. D in Law, partner at Berwin Leighton Paisner LLP (London).

2 Janet Walker, *Introduction: Who's Afraid of U.S.-style Class Actions?* in: Civil Procedure in Cross-Cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure, September 18-21, 2012, Moscow, Russia: Conference Book / Ed. by Dmitry Maleshin; International Association of Procedural Law, Moscow, 2012, pp. 413-414.

3 A substantial number of European countries are somewhat negative on the possibility of class action in arbitration. For the attitude of various European countries towards class arbitration see: *"Class Arbitration in the European Union"* / Ed. by Philippe Billiet, Maklu, 2013.

4 ICC Commission on Commercial Law and Practice, Class Action Litigation, Policy Statement, Document No. 460/585 (2005).

> the European rejection of class actions—essentially based upon ignorance—has usually been justified by the necessity of preventing such a monster from penetrating the quiet European legal gardens.[5]

Despite the current European outlook, the concept of class action traces its roots to the "bill of peace", a procedural device first employed by the Courts of Chancery in XVIIth century England.[6]

Although class arbitration provisions are scarce in Europe,[7] I believe there is an appetite for some form of arbitration for mass claims in Europe.

First of all, Europe is a huge market, benefiting from free movement of goods and services, with close to half a billion consumers. While business becomes increasingly international, it is important to have an efficient system in place for resolving mass claims. However, although there are a whole host of ways in which one can imagine a mass harm being caused[8] it remains the case that the opportunity for bringing mass litigation in Europe is extremely limited. By way of illustration:

In Summer 2001, the North Korean leader, the late Kim Jong-il, visited Russia. He travelled across this huge country in his own quirky and exotic way—using his personal 22 carriage ironclad train. Predictably, the combination of the "Dear Leader's" security demands and the irrepressible zeal of the Russian officials who were determined to satisfy the every whim of the visiting Head of State, led to many days of upheaval as an extraordinary array of security measures were taken all along the train's route. Railway stations were closed to passengers hours before the arrival of the train. Regular rail services

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5 Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 Duke J. Const. L. & Pub. Pol'y 405, 414 (2001).

6 Formerly, where the same question had been frequently litigated in the same manner (as where repeated actions of ejectment had been brought for the same land), or where it was likely to be contested in a multiplicity of cases (as where the tenants of a manor had a dispute with their lord) a bill might have been filed in Chancery to restrain the vexatious or unnecessary litigation by perpetual injunction: this was called a bill of peace. See: *Sheffield Waterworks v. Yeoman* (1866) L.R. 2 Ch. 8. Nowadays, the evil at which a bill of peace was aimed is dealt with by way of representative action. For an overview of Class Action's history see, e.g.: Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action, Yale University Press, 1987.

7 For instance, the opt-out class arbitration provisions can be found in Germany, see: DIS-Supplementary Rules for Corporate Law Disputes 09 (in force as of 15 September 2009).

8 One of the most recent examples: Investors Launch £4 billion Compensation Claim Against RBS, available at: http://www.bbc.co.uk/news/uk-scotland-scotland-business-22013724 (last visited on 4 April 2013).

were delayed or cancelled. Across the country, people faced severe disruption as a result and suffered from stress as well as wasted time. The chaos caused led to claims of serious economic loss as, all in all, hundreds of thousands of Russians suffered damage as a result of that one VIP visit. While many of these people considered themselves to be victims of the situation, in the end, only three of them managed to bring claims against the Russian railways. All three of them were awarded damages.[9]

Class action litigation for commercial matters is a concept theoretically available before the Russian courts, but the desire of Russian legislators to create their own group litigation procedure has resulted in a unique hybrid set of rules with both "opt-in" and "opt-out" elements and, as a result, the group litigation provisions are mere 'paper' rules that are not used.[10]

Had there been a class arbitration option, would the victims have been more likely to make use of it?

Obviously, a pre-requisite to class arbitration in Europe will be an arbitration agreement signed by, or consented to by, each class member. As Stacie I. Strong states:

> . . . class arbitrations typically do not arise in cases sounding exclusively in tort, since parties to such disputes seldom have a pre-existing contractual relationship and thus rarely have an arbitration agreement in place at the time the injury arises.[11]

Although post-dispute arbitration agreements are notoriously difficult to obtain,[12] it might be possible to agree to one, but only if all of the alternatives to a class arbitration would be more burdensome, expensive or ineffective. As a result, it is likely that class arbitration would be better suited to the fields of securities disputes, insurance claims or other areas involving multiple parties

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9 Боннер А.Т. Проблемы установления истины в гражданском процессе.—Москва, 2009. С. 6–8 [Alexander T. Bonner, *Problems of Finding the Truth in Civil Procedure*, Moscow, 2009, pp. 6–8].

10 See, for more details: Ходыкин Р.М. *К вопросу о групповом производстве* // Судебная реформа и проблемы развития гражданского и арбитражного процессуального законодательства.—Москва, 2012. С. 381–390 [Roman Khodykin, *On the Issue of Class Litigation*, in: Judicial Reform and Contemporary Problems of civil and arbitrazh procedures development, Moscow, 2012, pp. 381–390.]

11 S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, At&T, and a Return to First Principles*, in: Harvard Negotiations Law Review, Vol. 17, p. 209.

12 Lew, J.D.M., Mistelis, L.A. and Kröll, S.M., *Comparative International Commercial Arbitration*, 2003, ¶6–5.

where identical or, at least, similar arbitration agreements can be put in place effectively. In contrast, one is less likely to encounter tort claims arbitrated by way of class action without an arbitration agreement, though it may still be practicable to convince the parties to sign a submission agreement if they find class arbitration a better option than the national courts.

The second reason why some sort of class arbitration could find a place in Europe is because alternative methods of resolving mass claims—such as joinder or consolidation—do not benefit from efficient mechanisms for ensuring a smooth and effective procedure. In the majority of cases, the arbitration laws of European countries, as well as the arbitration rules of the various European institutions, contain rather ineffective mechanisms for joinder or consolidation of claims. Some of them do not allow for joinder or consolidation at all, for instance, Denmark.[13] Moreover, in those countries and institutions where joinder and consolidation provisions exist, these provisions are usually designed for disputes involving 3–5 parties and are not suitable or, in some cases they are unworkable, for claims involving greater numbers. Jurisdictions across Europe, including France, England, Switzerland, Russia and Germany, take different approaches to joinder rules. For example, in Switzerland, the role played by non-signatories in the performance of the agreement containing the arbitration clause is essential, while in Germany there are only limited instances where non-signatories to an arbitration agreement can be compelled to arbitrate. Under French law, it may be possible for a non-signatory to an arbitration agreement to be joined to the arbitration, either as claimant or respondent, under the "group of companies doctrine"—where the signatory to an arbitration agreement is part of a group of companies, the doctrine allows for the extension of the application of the arbitration agreement to one or more companies in the same group as the signatory. The group of companies doctrine under French law has no counterpart in English law (*Peterson Farms Inc. v. C&M Farming Ltd*).[14] It should be noted that some arbitration institutions have adopted rules for class arbitration. For instance, the leading German institution adopted the class arbitration rules for corporate disputes, which give all concerned shareholders the right to join the proceedings whilst providing for a binding effect of the award on the shareholders.[15]

13 Jeppe Skadhauge, *Class Actions and Arbitration—Denmark*, in: Class Arbitration in the European Union, supra note 3, pp. 83–85.

14 Practical Law Company: Joining non-signatories to an arbitration: recent developments.

15 DIS-Supplementary Rules for Corporate Law Disputes 09 (in force as of 15 September 2009).

The third reason why room should be made for some sort of class arbitration, is that there is no readily available alternative. Across Europe, class litigation provisions are scarce and they are notoriously difficult to take advantage of.

It has been reported that class action is needed in both Italy[16] and Belgium. In respect of Belgium, it is even suggested that there is some room for US-style class action.[17]

In England, the unpredictability and uncertainties surrounding the case of *Brennan v National Westminster Bank plc*[18] appeared to be one of the political motivations for the proposed reform of collective actions via the introduction of a new collective action mechanism in the Financial Services Bill 2010. This regime was intended to apply to financial services claims and contained alternative "opt-in" and "opt-out" class action provisions (depending upon judicial choice). This proposed regime has not yet been promulgated.[19] However, in its December 2008 report, the Civil Justice Council noted that the "*actual and perceived excesses of the United States*" class action model have attracted much adverse comment in England, but such comments must be addressed against a backdrop whereby "*the differences between the two jurisdictions are both numerous and significant*."[20]

All this suggests that there is no mechanism for resolving mass disputes in Europe and that class arbitration could potentially fill the gap. While there are initiatives to design a uniform mass claim procedure in Europe[21] it is going to be difficult to achieve, not least because each Member State has its own liability provisions and these differ significantly between countries. For instance, there is a wide spectrum of views on remedies and there are large discrepancies on limitation periods, which can range from 1 to 30 years.[22]

Some suggest that a modified version of US-style class arbitration should be adopted in Europe; such a mechanism would require implementation via an

16 Elisabetta Silvestri, *Italian National Report*, in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, p. 507.

17 Stefaan Voet, *Belgium National Report on Class Action*, in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, p. 486.

18 [2007] EWHC 2759 (QB).

19 Rachel Mullheron, *English National Report*, in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, p. 495.

20 *Ibid.*, pp. 504–505.

21 See, e.g. European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

22 See: Peter Mattil, *Class Action in Europe: Comparative Law and EC Law Considerations*, in: Journal of International Banking and Financial Law, p. 5.

EU Directive to ensure uniformity across Member States and to avoid possible enforcement problems on public policy grounds under the New York Convention in states that do not allow class actions under domestic law.[23] A more challenging hurdle is presented by the difficulties involved in achieving agreement between Member States and the relevant European bodies as to what form class action proceedings should take. As with all international treaties, it is very difficult to reach agreement on the drafting and, as a result, the treaty is usually only as effective as the compromise reached by all the stakeholders. The question is, therefore, whether the class arbitration option possesses an advantage because it does not require the consent of the European authorities and institutions. Class arbitration procedure in Europe could be designed free from interference by Member States and it could be made available as and when required as an efficient and user-friendly dispute resolution method, which would be voluntarily selected by the relevant parties. There is no reason why class arbitration, if introduced in Europe, could not "*gain momentum*" as happened in the US where, following the introduction of AAA Supplementary Rules, more than 300 class arbitration cases were initiated.[24]. The same logic applies to the UNIDROIT Principles which were produced by a non-governmental body comprising leading experts in the field. The UNIDROIT Principles avoided any political agenda and produced a solid working draft that ultimately gained huge respect among private parties and practicing lawyers.

As one commentator suggested:

> issuers may feel themselves pulled in both directions. They may hesitate to leave the U.S. courts where heightened pleading standards are often strictly enforced by pre-discovery motions to dismiss, but if international arbitration lives up to its promise of much more limited discovery, it might be worth the trade. They may be concerned by the lack of effective appellate review when such large amounts are at stake, but delighted to leave behind the uncertainty of a trial by jury.[25]

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23 Jessica Beess und Chrostin, *Collective Redress and Class Action Arbitration in Europe: Where We Are and How to Move Forward?* in: International Arbitration Law Review, 2011, 118.

24 See: supra note 11, p. 206.

25 Dana H. Freyer, Gregory A. Litt, *Desirability of International Class Arbitration*, in: Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2008 / Ed. by Arthur W. Rovine, Martinus Nijhoff Publishers, 2009, p. 175.

However, it should be borne in mind that there is a flip side to the coin. Although the lack of alternative is a reason why some parties may be seeking a mechanism through which they can resolve mass claims, there must be an incentive for mass claims defendants to agree to such a procedure. So long as there is no class action alternative, defendants stand to benefit because a large number of class members will simply give up while other members will be struggling to have their cases resolved on an individual basis. In a Swedish case *Grupptalan mot Skandia v Forsakringsaktiebolaget Skandia* [Scandia][26], which was resolved through a modified class arbitration mechanism (see below for more detail), it was common ground that the dispute would not have proceeded to arbitration had there been no threat of group litigation.[27] Therefore, the lack of alternative can, in fact, backfire on any plans to promote class arbitration on the continent.

Despite the apparently fertile ground for class arbitration in Europe, it will not be easy to introduce class arbitration into the various European legal systems. Most European nations typically prefer regulatory responses to widespread consumer protection problems and have long rejected the concept of US-style class action as contrary to European conceptions of individualized justice.[28]

If class arbitration were available in Europe, and it were more efficient and user-friendly than class litigation, it could attract support. However, it is going to be difficult to introduce US-style class action in Europe and that is why a distinct European model should be designed and promulgated.

What Form Should Collective Arbitration Redress in Europe Take?

The vast majority of commentators believe that it is against European principles of individualized justice to allow "opt-out" procedures in Europe. In England considerable criticism has been leveled at US-style class actions, which have been decried by the Civil Justice Council as misplaced on the grounds that US litigation operates on a different footing with limited cost-shifting, broad discovery rights, jury trials, percentage-based contingency fees, and punitive

26 2003-10 T6341 (Swed.)

27 Per Henrik Lindblom, *Swedish Report*, in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, footnote 2 on p. 529.

28 Supra note 23, p. 111. For position in France see: Yves Derains, Aurore Descombes, *Class Action and Arbitration in the European Union - France*, in: Class Arbitration in the European Union, supra note 3, pp. 31–48.

damages.[29] European efforts to introduce class action have proceeded on the premise that any European system of collective redress should be based on an "opt-in" model.[30]

As with class litigation, it is common ground that incorporation of elements of US-style litigation into European civil procedure will require considerable ingenuity in process design rather than simple implementation.[31] The same is true with class arbitration—it cannot simply be implemented, it needs to be thoroughly considered and adapted to European legal principles.

Apart from the feasibility of an "opt-out" system on this side of the Atlantic, it will be necessary to consider alternative structures based on an "opt-in" system.

The main concerns about the "opt-out" system have been summarized as follows:

> One of the primary concerns in adopting a collective redress procedure is the fear that class representatives, by exercising their right to bring an action on behalf of an open class of injured parties, may determine and bind the rights of unwilling or unknowing class members without their consent.[32]

It is argued that an "opt-in" procedure is necessary because it would ensure that all participants in the suit are aware of, and have consented to, having their rights bound by the class representatives.[33]

Leaving aside the European concept of individualized justice for the moment, there are a few additional considerations which should be taken into account:

First, a collective redress mechanism based on an "opt-out" model can already be found in some European countries. The Netherlands and Portugal both exclusively permit "opt-out" group actions. Four more countries permit both "opt-in" and "opt-out" procedures, authorizing the trial judge to determine which pro-

29 Janet Walker, *Introduction: Who's Afraid of U.S.-style Class Actions?* in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, p. 453; John Sorabji *et al.* (eds.), Improving Access to Justice Through Collective Actions, 2008, 38–41.

30 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

31 Janet Walker, *Introduction: Who's Afraid of U.S.-style Class Actions?* in: Civil Procedure in Cross-Cultural Dialogue, supra note 2, p. 456.

32 Supra note 23, p. 118.

33 Ibidem.

cedure should be used on a case by case basis.[34] In other words, it would be fair to say that an "opt-out" procedure is inconsistent with the civil procedure of the majority of the EU Member States but it is not something unheard of in Europe.

Second, if the main impediment to introducing an "opt-out" procedure in Europe is fear that some of the participants may not be put on notice about the procedure and may not be able to opt-out of the proceedings, then the foregoing tenet would only be right if the same goal cannot be achieved by any other means. The question here, in fact, is whether the procedure set forth in Article 6 of the AAA Supplementary Rules is good enough to make sure all members of the purported class are properly notified.

In order to be able to notify all members of the purported class, it is vital to identify them with a fair degree of precision. Moreover since the notification standard may be different, e.g. in civil law countries, it is likely that an actual rather than 'reasonable' notice will be required.[35] The ideal method would be to notify class members by directly mailing them what is called a 'Notice of class determination' or by using some other form of communication. In each case, the members of the relevant class would be put on notice about the pending class arbitration proceedings and given information on how to exercise their rights, be it to act in a passive fashion, such that a member of the class is happy for the representative party to proceed on their behalf, or to move for exclusion from the class and, potentially, commence a bilateral arbitration. This procedure can be found in Article 2.2 of the DIS-Supplementary Rules which provides:

> In its statement of claim, Claimant shall identify the respondent and any shareholders or the corporation itself to which the effects of the arbitral award shall extend, by providing an address of service and requesting the DIS-Secretariat to deliver the statement of claim also to the Concerned Others.

However, in serious mass claims, it is very challenging to identify all of the potential victims of a particular wrong and ascertain their contact details. As a consequence, other methods of communication are used, such as publication in local or even national press, etc.

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34 Ibidem, pp. 115–116.

35 See for more detail: Philippe Billiet, Laura Lozano, *General Reflections on the Recognition and Enforcement of Foreign Class Arbitral Awards in Europe* in: Class Arbitration in the European Union, supra note 3, p. 25.

Herein lies a problem. Any publications or public announcements about the arbitration proceedings, the subject matter of the dispute and other relevant details will likely be considered in Europe a breach of confidentiality, because the information will have been published by parties who are not privy to the arbitration agreement. In order to avoid this hurdle, Article 9 was introduced in the AAA Supplementary Rules. Article 9(a) of the Supplementary Rules reads:

> The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

Although it is suggested that none of the proposed definitions of arbitration suggests that the procedure must be private and confidential,[36] it is generally the view taken across Europe that arbitration is confidential and in some jurisdictions like England, an implied duty of confidentiality applies to all arbitrations—in other words, it is more than a view, it is the *lex situs*. Moreover, arbitral institutions often make express reference to duties of confidentiality in their respective rules (for example Article 30 of the LCIA Rules and Article 46 of the SCC Rules). This presents yet another difficulty with introducing the "opt-out" American style of class arbitration.[37] Where contracting parties have agreed to confidential arbitral proceedings, or can expect such proceedings to be confidential (either because of the institutional rules which they have selected or because of the seat of the arbitration), it is hard to imagine European judges and arbitrators doing anything other than respecting that position and refusing any change to the nature of the proceedings as agreed among the parties.

Consequently, if "opt-out" arbitration is to be introduced in Europe, it would only be possible in cases where notice of the class arbitration can be circulated among all of the potential class members in a confidential manner. Realistically, it will be difficult, bordering on impracticable, to notify all of the

36 Supra note 11, footnote 220 at 246.

37 French authors expressly state that any class action in arbitration is inconsistent with the principle of confidentiality: Yves Derains, Aurore Descombes, *Class Action and Arbitration in the European Union—France*, in: Class Arbitration in the European Union, supra note 3, pp. 31–32.

interested class members in such a way and this presents another reason why there is very little room for developing "opt-out" arbitration in Europe.

Next, we need to consider the alternative systems based on an "opt-in" model with a view to establishing whether any of them would stand a better chance of success for arbitrating mass claims in Europe.

Some commentators believe that a hybrid system should be designed and introduced in Europe. It is said that having class arbitration in Europe would ideally require:

(i) an express agreement to arbitrate and an opt-in mechanism to ensure consensual proceedings;
(ii) flexible discovery procedures;
(iii) consumer agency approval before filing to prevent frivolous actions;
(iv) procedural bifurcation between the class certification stage and the hearing on the merits with different arbitrators for each to prevent bias in favour of certifying a class;
(v) fee-shifting provisions (loser pays opposing side's costs) to deter the filing of meritless claims; and
(vi) capped punitive damages for intentional or reckless infliction of harm to deter potential wrongdoers and provide an incentive for small claims plaintiffs to opt-in to class arbitration.[38]

This proposal still contains unpopular provisions and it has been suggested that as a result it should be implemented by way of an EU Directive to ensure enforcement in accordance with EU law. It is difficult to accept, for example, that class arbitration should be approved by a consumer agency as it would imply involvement of a third party which is neither the tribunal nor the court.

There have been a few instances where alternative forms have been used for obtaining collective redress through arbitration. It is believed that these systems are more likely to succeed in Europe in the mid-term frame.

The most well-known example is *Abaclat v the Argentine Republic*, where Task Force Argentina (TFA) was established to represent more than 180,000 claimants.[39] In this particular case, all the bond-holders remained parties in

38 Jessica Beess und Chrostin, *Collective Redress and Class Action Arbitration in Europe*, supra note 23, p. 111.

39 *Abaclat and Ors v the Argentine Republic*, Decision on Jurisdiction and Admissibility of 4 August 2011, Paragraph 4.

the proceedings while they entrusted running the case to the TFA and its legal counsel.

Another example comes from Sweden. In *Grupptalan mot Skandia v Forsakringsaktiebolaget Skandia* [Scandia][40] a non-profit organisation ("Group Action against Skandia") was formed in October 2003 to seek a declaration, on behalf of 1.2 million policyholders, from a subsidiary whose asset management business had been transferred to the parent company. More than 15,000 people paid membership dues of about 15 Euros to cover the running expenses of the organization in pursuing the relief. Although the case started as a class action litigation, in the end the decision was taken to discontinue court proceedings, without prejudice, and proceed with the arbitration. Group Action against Skandia was permitted to attend the existing arbitral proceedings in the capacity of the reporter. The arbitration proceedings were protracted, but the company was eventually ordered to pay Euro 145 million to the subsidiary compensating the policyholders. The stated reasons for choosing arbitration included that the case would be resolved sooner than if the claims were litigated in general court.[41]

Under either of these scenarios, the ultimate class members' rights are sacrificed to procedural efficacy on the grounds that it is hardly possible to obtain consent from every member on all procedural or substantive issues. The difference between the *Scandia* and *Abaclat* cases is that Group Action against Scandia acted as the ideological claimant and, as such, was the only party to the arbitral proceedings. Class members were not named parties and would only be able to obtain relief indirectly through the relief granted to Group Action against Scandia. In *Abaclat* all class members remained parties to the proceedings (albeit passive ones).

It is well established that the key feature of any class dispute resolution procedure is that all class members are represented by one party. However, in the absence of opt-out class arbitration, in order for a representative party to be able to assert claims on behalf of or for the benefit of the underlying class members, all class members must either provide a representative party with a power of attorney or assign their claims as well as their rights under the arbitration agreement to the representative party.

Although the *Abaclat* approach can be used in order to ensure effective dispute resolution, it is going to face serious challenges across Europe because the

40 2003-10 T6341 (Swed.)

41 Per Henrik Lindblom, *Swedish Report*, in: Civil Procedure in Cross-Cultural Dialogue: Eurasia Context, supra note 2, footnote 2 on p. 529.

issue of consolidation of claims may come up, which is not consistent with the majority of provisions regarding consolidation of claims. Representation of various parties under a power of attorney is commonly accepted to be absolutely lawful.

If the claims are to be filed in the names of different claimants and under different arbitration agreements, then it is likely that these claims should be filed separately with the motion to consolidate proceedings.

Under English law, under section 35(2) of the Arbitration Act 1996, neither the tribunal nor the court have the power to consolidate arbitral proceedings or to order concurrent hearings unless the parties so agree. In terms of class arbitration it is argued that this means actual parties to the existing or contemplated proceedings, not persons who are deemed to be parties because they have not opted out as per US class arbitrations.[42] However, it is going to be impossible in England to arbitrate mass claims without the consent of all parties to consolidate the proceedings.

Some arbitration rules are more flexible and allow consolidation if certain criteria are met. For instance, Article 10 of the ICC Rules reads:

> The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
> a) the parties have agreed to consolidation; or
> b) all of the claims in the arbitrations are made under the same arbitration agreement; or
> c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce as in force as of 1 January 2010 allow consolidation of new claims into a pending arbitration between the same parties and concerning the same legal relationship.[43]

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42 Ian Hunter QC, Louis Flannery, *Class Action and Arbitration Procedures—United Kingdom*, in: Class Arbitration in the European Union, supra note 3, p. 198.

43 See, for more detail: Hans Bagner, Sara Ribbeklint & Pontus Ewerlöf, *Class Action and Arbitration Procedures—Sweden*, in: Class Arbitration in the European Union, supra note 3, p. 173 *et seq*.

The situation seems to be even more favourable in the case of assignment, where the ideological plaintiff, having obtained the right to claim under identical assignments, will bring the claim in its own name and, as such, no consolidation of *proceedings* will be required. The only question is whether consolidation of *claims* is allowed under *lex arbitri* or relevant arbitration rules. It is argued that when different claims are assigned to a single party the assignee can enforce multiple claims against the same respondent in one lawsuit, but the claims themselves remain independent and potentially different since they are not merged into one, inseparable and homogeneous claim.[44] However, the claimant who has obtained all the claims could commence one claim under different contracts, in which case the question is whether consolidation of claims is somewhat different from consolidation of proceedings. Parties' autonomy is considered to be the principle which makes it impossible to introduce US-style class arbitration in the UK[45] but this question does not arise with the assignment of claims because each and every claimant consented to assignment.

Article 9 of the ICC Rules provides:

> Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

European countries, as a general rule, allow assignment of claims and consider the arbitration agreement to be valid and binding between the debtor and the new creditor.[46]

In some countries even assignment of claims would not help. Thus in Russia the question of joining claims into one proceeding has been and remains problematic for multi-contract arbitrations. The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (also known as MKAS) usually does not accept statements of claim if they are based on more than one contract, even if all of the contracts contain

44 László Kecskés, Lajos Wallacher, *Class Action and Arbitration Procedures—Hungary*, in: Class Arbitration in the European Union, supra note 3, 2013, p. 90.

45 Ian Hunter QC, Louis Flannery, supra note 42, ¶3.2.

46 Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, Juris Publishing, 2003, p. 47.

identical or similar arbitration agreements and the parties to the contracts are the same.[47]

But for a substantial number of European countries arbitrating mass claims by way of assigning them is probably the best mechanism. It also overcomes the problem of multi-party arbitrations because all claims are brought by one party and there is no need to accommodate multiple counsel.

There is no reason why the assignments of claims to the representative party should not be used in Europe for arbitrating mass claims. It is believed that sole representative actions in arbitration are going to increase in the near future until other forms of mass claims arbitration are made available.

Appointment of Arbitrators

There are concerns about class arbitration and the way in which the arbitrators are rewarded. In particular, it is felt that the arbitrators may be more keen to certify class arbitration if they are paid on the basis of hourly or daily rates, simply to retain their income or, vice versa, upon receipt of a lump sum payment the tribunal may be minded to refuse to certify it. On that premise, the proposal was made to split class arbitration into two stages with two sets of arbitrators for each stage.[48] Although it is an important psychological consideration to have in mind, there are more fundamental issues about the nature of class arbitration and its impact upon the appointment procedure.

One of the key advantages of international arbitration is an entitlement for each party to appoint the arbitrator of their choice. That is why various proposals to limit this entitlement, voiced, for example, by Jan Paulsson, Sundaresh Menon and others, has attracted immediate criticism. As Toby Landau QC put it "*it would cure the disease but kill the patient*."

Therefore, if class action arbitration is to be introduced in Europe, it is of paramount importance to understand whether the nature of class arbitration could affect the procedure for the appointment of arbitrators.

Pursuant to Article 2(b) of the AAA Supplementary Rules:

47 Roman Khodykin, *"Arbitration Law of Russia: Practice and Procedure"*, JurisNet LLC, 2013, p. 105.

48 Jessica Beess und Chrostin, *Collective Redress and Class Action Arbitration in Europe*, supra note 23, p. 121.

> If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed.

In Article 2, "the parties" means the representative party who acts on behalf of a class and the adverse party who can be in a position to agree on a different number of arbitrators, for instance to appoint one arbitrator each with the chairman to be appointed by the AAA or the parties' selected arbitrators.

Professor S.I. Strong effectively argues that the late arrival of class members does not affect their rights:

> The niceties of the opt-in/opt-out process mean that those unnamed parties to class arbitrations who choose to participate in the proceedings can be said to have effectively ratified the choice of arbitrators. These class members, therefore, have no cognizable legal injury vis-à-vis the selection of arbitrators, unlike late-arriving parties in traditional multiparty arbitrations who may not have the same choice as to whether to become part of the arbitration. Furthermore, potential class members who choose not to join a class proceeding do not suffer any cognizable legal injury vis-à-vis their substantive claims, since the determination of a class claim typically does not affect the rights of any non-participating parties.[49]
>
> To some extent, class arbitration can be seen as more similar to arbitrations involving intervention, at least on this point, since interveners have inserted themselves into the proceedings by choice, knowing who the arbitrators are. However, unlike additional class members, interveners can bring significantly different substantive claims or defenses that might cause the existing parties to change their views about the continuing desirability of certain panelists, thus raising arbitrator appointment issues from the reverse perspective.[50]

All in all, Professor S.I. Strong believes that "*class arbitration protects the fundamental right to select one's arbitrators, regardless of whether the procedure is considered more analogous to early-initiated multiparty arbitrations or late-arising multiparty procedures*."[51]

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49 S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration*, supra note 11, pp. 234–235.

50 Ibidem, footnote 159 at 234.

51 Ibidem, p. 235.

However, this approach may face some difficulties in Europe. The appointment of the tribunal takes place at an early stage of the proceedings when the class has not yet been certified and, as a result, class members have not been confirmed. However, once the class has been certified, the choice of the representative party is binding upon all class members. So, on the one hand, it is desirable to give each class member his/her say in the appointment procedure, otherwise the class members could argue that the decision on class certification has been taken by an arbitrator to whom the potential class members never consented. But, on the other hand, there are inherent difficulties in allowing class members to have their say in the appointment proceedings because, until the class is certified, the potential class members are not parties to the proceedings. Consider, what if the arbitrator was appointed on the recommendation of class members who have not been found to be members of the class in the future. Should the tribunal be re-appointed in this case? With that in mind, in Europe it is going to be difficult to succeed with an argument that late-arriving class members should not have their say on appointment of the arbitrator.

Article 4.3 of the DIS-Supplementary Rules reads:

> Identified Concerned Others may join the arbitral proceeding at any point in time, provided that they refrain from raising objections against the composition of the arbitral tribunal and either accept the arbitral proceeding as it stands at the point in time of their joinder, or the arbitral tribunal approves their joinder at its free discretion.

The only possible way forward is to find a way to accommodate both existing class members and late-comers. It is suggested that there should be a two-stage appointment procedure where:

At the first stage, the arbitrator who decides whether the case should proceed as a class arbitration shall be appointed by the institution only.[52] This is because it is the lesser of two evils to have the tribunal appointed by an independent third party than to make it unfair by providing one party with that right while depriving all other parties of that right.

At the second stage, the tribunal should be appointed taking into account opinions expressed by the class members. It goes without saying that certain safeguards must be incorporated into the system to make it fair towards class members. In class arbitration the representative party or the claimant's counsel can still act contrary to some of the class members' desires because in some

52 This approach was adopted in Articles 7.3 and 8 of the DIS Supplementary Rules.

cases it is impracticable or impossible to obtain consent from the entire class on a particular decision. The procedure may prescribe, for instance, that both the representative party and the adverse party are to appoint one arbitrator and the chairman of the tribunal shall be appointed by an arbitration institution or chosen by the two arbitrators thus appointed, or that the representative party is to appoint the arbitrator who gathered 80% of the votes of potential class members and the other class members can either opt-out at this juncture or be estopped from raising any arguments about the appointment.