

Harvard Law School

The Future of Collective Redress in Europe:
Where We Are and How to Move Forward

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April 2011

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INTRODUCTION

With close to half a billion consumers¹ and the gradual opening up of its internal borders to the free movement of goods and people under the Schengen Agreement,² Europe is increasingly recognizing the need for some form of collective redress in the consumer protection context. In the United States justice system, consumer class actions and, since at least 1982,³ class arbitrations have been firmly established to address this need. Most European nations, on the other hand, typically prefer regulatory responses to widespread consumer protection problems and have long rejected the concept of U.S. style class actions as contrary to European conceptions of individualized justice.⁴ Nevertheless, in recent years, modified versions of class actions have mushroomed across Europe and in February 2011, the European Commission issued a Public Consultation Working Document noting the need for a coherent European approach to collective redress and soliciting comments on how to structure such a mechanism.⁵ This paper focuses on collective redress in the consumer rights context and argues that the adoption of a modified version of class arbitration could effectively address European criticisms of

¹ KEY FACTS AND FIGURES ABOUT EUROPE AND THE EUROPEANS, *available at* http://europa.eu/abc/keyfigures/index_en.htm.

² The Schengen Agreement, originally signed in Luxembourg in 1985 and subsequently absorbed into European Union law with the 1999 Amsterdam Treaty, creates a single market among its signatories. The territory currently covered by the Schengen rules includes 25 European countries, including three non-EU members (Norway, Switzerland and Iceland).

³ *Keating v. Superior Court*, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd on other grounds, sub nom* *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (noting that the decision whether or not to order class arbitration proceedings was within the trial court's discretion).

⁴ *See, e.g.* SCHWEIZER BUNDESBLATT, BOTSCHAFT ZUR SCHWEIZERISCHEN ZIVILPROZESSORDNUNG [ZPO], FEDERAL LAW GAZETTE OF SWITZERLAND [BBL], June 28, 2006, 7221-7412. "In der Tat ist es dem europäischen Rechtsdenken fremd, dass jemand ungefragt für eine grosse Zahl von Menschen verbindlich Rechte wahrnehmen darf, ohne dass sich die Berechtigten als Parteien am Prozess beteiligen." *Id.* at 7290. *Author's translation* "Indeed, it is foreign to European legal thought, that someone could, without being asked to, exercise binding rights on behalf of a large number of parties without direct participation of the concerned parties in the legal proceedings."

⁵ *Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011) (hereinafter Commission Report), *available at* http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf.

U.S. style class actions and provide adequate protections for both potential class members and potential defendants.⁶ In order to achieve this balance and to assuage European critics, it is suggested that a European system of collective redress should 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) a procedural division between the class certification stage and the hearing on the merits with different arbitrators for each to prevent bias in favor of certifying a class, (v) fee-shifting provisions (loser pays opposing side's costs) to deter the filing of merit-less 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. This hybrid U.S./European approach would provide sufficient incentives for potential plaintiffs to bring a group proceeding (or to opt-in to an ongoing action) while discouraging excessive claim filings and ensuring that potential defendants have an incentive not to recklessly or intentionally cause harm to consumers.

For the purposes of this paper, collective redress means any kind of group action brought by a plaintiff class member (as opposed to a consumer agency or other professional or charitable organization) that is not the result of regular party joinder or claim consolidation. In collective dispute resolution, as defined herein, group members agree to have their claims represented on their behalf while in the latter two categories all parties remain direct participants in the proceedings who get their proverbial day in court.

⁶ As this paper discusses class arbitration in the consumer rights context, the likely, or at least most common, scenario envisioned is that of a class of consumers bringing an action as plaintiffs against a defendant company or business. Hence, for the remainder of the paper, any examples given will presume that the plaintiff is a group of consumers.

The terms aggregate dispute resolution, collective redress, collective dispute resolution, and group claims will be used synonymously for present purposes. Additionally, it should be noted that this paper focuses on procedural suggestions for international class arbitrations in Europe; it is not concerned with class arbitrations filed by international plaintiffs in the U.S. under the class arbitration rules of the AAA or JAMS,⁷ or with the enforcement in Europe of international class arbitrations decided in the U.S.⁸ As the 2011 European Commission consultation paper seeks to gauge interest in and solicit suggestions for a uniform collective redress mechanism for the European Union member states, this paper treats Europe as comprising the nations of the EU but additionally includes Norway and Switzerland.⁹ Finally, this paper is concerned primarily with cross-border disputes, meaning disputes filed in the European Union that involve either a class of consumers from more than one state and/or a defendant who does business in, and violates the laws of, more than one state.

⁷ American Arbitration Association Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), available at <http://www.adr.org/sp.asp?id=21936>; JAMS Class Action Procedures (effective May 1, 2009), available at <http://www.jamsadr.com/rules-class-action-procedures/>

⁸ For an instructive discussion of enforcement issues in international class arbitration, *see, e.g.* S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1 (2008-2009) (arguing that international class arbitration does not violate international norms of due process or public policy and should therefore be treated by enforcing courts like regular arbitration awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention)); S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017 (2008-09) (arguing that U.S. methods of construing arbitration clauses in the absence of express class arbitration provision is consistent with international norms and that U.S. based class arbitration awards should therefore not face blanket rejection abroad); Michael Haravon, *Enforcement of Annulled Foreign Arbitration Awards: The French Supreme Court Confirms The Hilmarton Trend*, MEALEY'S INT'L. ARB. REPORT, Vol. 22, Iss. 9 (Sept. 2007) (discussing the risk of enforcement of inconsistent foreign arbitration awards in Europe).

⁹ Norway is included in the definition of Europe due to its inclusion in the area covered by the Schengen Agreement and its relatively advanced class action procedures that offer an interesting perspective on how to structure a modified version of U.S. style class actions. *See infra* Table 2. Switzerland is included because it too is covered by the Schengen Agreement and because of its increasingly dominant role as a locus arbitrandi in the centre of Europe. As of 2011, the European Union Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

Section I briefly discusses class actions and arbitrations in the United States today to provide basic background information relevant to understanding European criticisms thereof.¹⁰ Section II focuses on sketching the current landscape of collective redress mechanisms in Europe and notes the increasing shift towards a recognition of the need for some form of collective redress, at least in the consumer rights protection context. At the same time, the general consensus seems to remain that any type of uniform European aggregate dispute resolution would need to differ substantially from U.S. style class actions. Finally, section III addresses European criticisms of class actions and suggests that class arbitrations specifically tailored to address European concerns about, inter alia, over-litigation and settlement coercion could provide an adequate mechanism for collective dispute resolution in Europe.

I. COLLECTIVE REDRESS IN THE UNITED STATES: FROM CLASS ACTION TO CLASS ARBITRATION

The federal class action device was first adopted in 1937 in Federal Rule (FRCP) 23 and, in spite of the enduring controversy surrounding class action practice,¹¹ its use has greatly expanded since the 1966 amendments.¹² In 1982, the Supreme Court opened the door to the further expansion of class action practice by holding that it was at the trial court's discretion to order class arbitration where neither party contended that such a

¹⁰ For a more detailed discussion of U.S. class actions and class arbitration procedures, *see, e.g.* RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* (2009).

¹¹ *See, e.g.* John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003); Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007); Geoffrey P. Miller & Jonathan R. Macey, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

¹² Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 665-66 (1979).

procedure was preempted by the rules of the Federal Arbitration Act (FAA).¹³ Although it did not pass judgment on the desirability of class arbitration proceedings in general,¹⁴ the Supreme Court's decision in *Keating* effectively led to the extension of class proceedings into the arena of private dispute resolution. A long line of cases, most notably the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,¹⁵ has since confirmed the legitimacy of class arbitrations and two leading U.S. based arbitration associations, the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service (JAMS), have each adopted procedures specifically for class arbitrations.¹⁶ Under both the AAA and JAMS rules, class arbitrations proceed in two stages: (1) the clause construction stage in which the arbitrator determines whether class arbitrations are permitted by the underlying contractual arbitration clause, and (2) the class certification and hearing on the merits stage.

The AAA's policy on Class Actions states that a claim will pass stage 1 where the underlying agreement contains an arbitration clause that requires disputes to be resolved under the AAA's rules, even if the clause does not expressly mention class arbitration. As the parties are deemed to be aware of the AAA's rules, they have consequently consented to them and since the AAA's rules include class arbitration provisions, the parties have

¹³ *Southland Corp. v. Keating*, 465 U.S. 1 (1984)

¹⁴ A discussion of the relative benefits of class actions and class arbitrations, and of the legitimacy of the class arbitration procedure in general lies outside the scope of this paper. For an interesting discussion *see, e.g.* Carole J. Bucker, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006); David S. Clancy & Matthew Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55 (2007-08); Michael P. Daly, *Come One, Come All: The New and Developing World of Non-signatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95 (2007-08); Sarah Engel & Sherry Tropin, *Class Action Arbitration: A Plaintiff's Perspective*, 5 FIU L. REV. 145 (2009); STUART T. ROSSMAN ET AL., CONSUMER CLASS ACTIONS (National Consumer Law Center ed., 7th ed. 2010).

¹⁵ *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) ("if we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.").

¹⁶ *See supra* note 7 and accompanying text.

consented to class arbitrations too.¹⁷ The JAMS has a similar standard that construes an arbitration clause as permitting class arbitrations where it does not expressly exclude them and where the arbitration clause provides for disputes to be resolved under JAMS' rules.¹⁸ Whether these stage 1 guidelines will withstand the tide of the Supreme Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*,¹⁹ remains to be seen. (*See* discussion, *infra*, and footnote 23.)

As the AAA and JAMS rules for stage 2 closely mirror FRCP 23, class arbitrations take essentially the same form as class actions once an arbitration clause passes the construction stage. In a nutshell, therefore, in order to achieve class certification, a potential class of plaintiffs wishing to bring a class arbitration must satisfy the four standards set out in FRCP 23 - numerosity, commonality, typicality, and representativeness. In addition, AAA and JAMS standards mandate that class counsel must fairly and adequately represent the interests of the class and that each class member has entered into an agreement containing an arbitration clause that is substantially similar to that signed by the class representative and each of the other class members.²⁰ These procedural rules seem to combine opt-in and opt-out procedures as they require that a potential class member opted-in by signing the contract containing the arbitration clause construed to permit class arbitrations while reserving the right of a party to opt-out of the

¹⁷ American Arbitration Association Policy on Class Arbitrations (Jul. 14, 2005), *available at* www.adr.org/classarbitrationpolicy.

¹⁸ JAMS, Class Action Procedures R. 1, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

¹⁹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

²⁰ AAA, Supplementary Rules for Class Arbitrations Rules 4(a), (5)-(6), *available at* www.adr.org/sp.asp?id=21936; JAMS, Class Action Procedures R. 3.

potential class should they wish to do so. As of 2011, over 300 class arbitrations were filed with the AAA alone.²¹

The Supreme Court's 2010 decision in *Stolt-Nielsen*, however, has thrown much existing precedent into question and seems to indicate that the Court's heretofore generally pro-class arbitration stance might be on the decline. In *Stolt-Nielsen*, the Supreme Court overturned an arbitration decision that allowed a class arbitration to proceed where the arbitration clause was silent on the question of whether such a procedure should be available. According to the majority opinion, the arbitration panel exceeded its power by deciding the question of whether to allow class arbitration based on its own perception of sound public policy rather than on the parties' intentions. The *Stolt-Nielsen* opinion has given rise to much speculation about the future of class arbitration in the U.S., a detailed discussion of which lies outside the scope of this paper.²² For present purposes, suffice it to say that it is this author's opinion that *Stolt-Nielsen* does not sound the death knell for class arbitration, although it might lead to arbitrators being more circumspect in their arbitration clause interpretations and finding fewer implicit agreements to arbitrate class claims.²³ Regardless, the Court's opinion in

²¹ Rule 9(b) of the AAA Supplementary Rules for Class Arbitrations provides that the AAA shall maintain a Class Arbitration Docket on its website containing basic information on class arbitrations filed under its rules. As of April 21, 2011, the AAA docket listed 302 class arbitration filings. Available at www.adr.org/sp.asp?id=25562 (last visited April 21, 2011). Since the AAA docket does not include *ad hoc* class arbitrations and the JAMS does not provide a class arbitration docket, this number is likely under-inclusive.

²² For a more detailed discussion of the possible implications of *Stolt-Nielsen*, see, e.g. Alan S. Kaplinsky et al., Jr., *Arbitration Developments: Has the Supreme Court Finally Stepped In?*, 66 BUS. LAW. 529 (2011); Joel D. Rosen & James B. Shrimp, *Yes to Arbitration, But Did I Also Agree to Class Action and Consolidated Arbitration?*, 30-WTR FRANCHISE L.J. 175 (2011); Keerthi Sugurmaran, *Arbitration – United States Supreme Court Sounds the Death Knell for Class Arbitration – Stolt-Nielsen S.A. V. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010), 16 SUFFOLK J. TRIAL & APP. ADVOC. 147 (2011); S.I. Strong, *Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen and First Principles*, 17 HARV. NEGOT. L. REV. (forthcoming 2011).

²³ The majority opinion in *Stolt-Nielsen* was careful not to overrule *Bazze* by emphasizing (1) that the present case had a crucial maritime law dimension for which the Federal Arbitration Act has special

Stolt-Nielsen did not purport to criticize or outlaw class arbitrations and should therefore not be interpreted as a U.S. rejection of the procedure in general.

II. CHANGING CONCEPTIONS OF COLLECTIVE DISPUTE RESOLUTION IN EUROPE

Ironically, in spite of Europe's apparent distaste for collective dispute resolution, the concept of a class action actually traces its roots to a procedural device utilized by the Courts of Chancery, the "bill of peace," in seventeenth century England.²⁴ Since this procedure fell into disuse, however, European scholars and lawmakers have not shied away from criticizing U.S. style class actions and expressly rejecting the possibility of their expansion into the European legal system. The following section notes that in recent years there has been a marked shift in European perceptions of collective redress from

provisions and (2) that the parties before the arbitrator in *Stolt-Nielsen* had stipulated that their contract was silent on whether class arbitration was permitted. Silent in this context does not mean merely the absence of an express class arbitration clause, but rather that the parties to the contract had not decided whether class arbitration should be an available procedure. In the absence of such a decision, arbitration cannot be mandated by an arbitration panel based on the arbitrators' notions of sound public policy. Arbitration is a purely consensual dispute resolution mechanism that is only available upon all the parties' consent. However, the Court in *Stolt-Nielsen* seems to wish to expressly leave open the window for class arbitration even where the contract does not explicitly provide for class arbitration, so long as the parties' *intentions* to make class arbitration available can be inferred: "It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. *See* *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79, 84, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002). But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer *solely from* the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption..." (emphasis added). *Stolt-Nielsen* at 1769. The Court here seems to suggest that such an inference may be permissible where there is more evidence of the parties' intentions than a generic arbitration clause. Indeed, Justice Alito's majority opinion expressly criticizes the arbitrators for focusing their opinion on explaining pro-arbitration public policy rather than framing it in terms of the parties' intentions. In effect, this means that the default interpretation of an arbitration clause without express class arbitration provision is that class arbitration is not allowed and that the arbitrator must find some affirmative indication that class-wide relief is permitted by the arbitration clause of the underlying contract. As a result, it can be assumed that class arbitrations will still be possible in the future, but that arbitrators will need stronger evidence of the parties' intentions before issuing a clause construction that would allow the parties to proceed to seek class-wide relief through arbitration.

²⁴ For a detailed history of class actions, *see* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987). *See also* Thomas D. Rowe Jr., *A Distant Mirror: The Bill of Peace in Early Modern American Mass Torts and Its Implications for Modern Class Actions*, Duke Law Faculty Scholarship, Paper 107 (1997). Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1084&context=faculty_scholarship.

condemnation to guarded acceptance. Indeed, many countries across Europe have already adopted some form of collective dispute resolution mechanism²⁵ and the European Commission recently issued a consultation document acknowledging the need for a uniform European collective redress procedure in the context of consumer rights and protection. Nevertheless, the general European consensus remains that U.S. style class actions are undesirable and contrary to European legal principles and that any uniform collective redress mechanism for Europe would hence require specific tailoring to assuage European fears of U.S. class litigation.

A. The Current State of Class Actions and Collective Dispute Resolution Mechanisms in Europe

As the European Justice Forum (EJF) declared in its response to a 2008 Consumer Collective Redress Green Paper, “it is clear that no one wants to replicate in Europe the American class action system.”²⁶ This opinion rests at least partially on the generally perceived shortcomings of U.S. style class actions including, inter alia, excessive litigation, intense pressure to settle, exorbitant discovery costs, and the streamlining of individual claims that effectively denies plaintiffs their proverbial day in court.²⁷ In spite of these fears, however, a significant number of European states have adopted some form of class action. Table 1, *infra*, provides a snapshot of which countries (1) have enacted class action related legislation, (2) permit claims by class members (named plaintiffs or

²⁵ See *infra* Tables 1 and 2. See also Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame Law Review (2010); Richard Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism*, 62 Vanderbilt Law Review 1 (2009).

²⁶ European Justice Forum, Response to the Green Paper on Consumer Collective Redress (Feb. 25, 2009), p. 4, available at http://ec.europa.eu/consumers/redress_cons/responses/pract_EU_Justice_forum_en.pdf.

²⁷ Commission Report at 9. See also Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

class representatives), (3) permit claims by associations, charitable organizations, or public bodies, (4) provide an opt-in procedure or (5) an opt-out procedure. Table 2, *see* Appendix A *infra*, provides further details on each country’s class proceeding provisions.

TABLE 1 SUMMARY OF EUROPEAN COLLECTIVE ACTION PROVISIONS

Country	Legislation on Class Proceedings	Claims by Named Plaintiffs	Claims by Associations	Opt-in Provision	Opt-Out Provision
Austria			X		
Belgium			X		
Bulgaria	X	X	X	X	X
Cyprus					
Czech Republic					
Denmark	X	X	X	X	X
Estonia					
Finland	X		X	X	
France	X		X	X	
Germany	X	X	X	X	
Greece	X		X		
Hungary					
Ireland		X		X	
Italy	X		X	X	
Latvia					
Lithuania	X	²⁸	-	-	-
Luxembourg					
Malta					
Netherlands	X		X		X
Norway	X	X	X	X	X
Poland	X	X	X	X	
Portugal	X	X	X		X
Romania					
Slovakia					
Slovenia					
Spain	X	X	X	X	X
Sweden	X	X	X	X	
Switzerland					
England & Wales	X	X	X	X	
Total	15	10	16	12	6

²⁸ Although Lithuania’s Civil Procedure Act permits class actions in general, it lacks specification of the procedures to be used and is therefore ineffective. *See* TABLE 2 *infra* Appendix 1, note 85.

As TABLE 1 indicates, 18²⁹ of the 29 European countries considered in this paper currently permit some form of class action. Of these 18, ten permit individuals who are also class members to represent the group in court proceedings while a total of 16 countries permit a public body or association to litigate a claim on behalf of a class. Interestingly, of all the countries that permit some form of collective redress, only one (Ireland) allows such redress to be sought by class members but not by associations or organizations. At the same time, seven countries that do not permit class members to bring collective redress proceedings do permit public bodies or associations to bring such claims. This suggests that Europe's historical preference for a regulatory rather than citizen driven litigious response to widespread wrongdoing remains strong despite recent developments in collective redress legislation.

Within the group of countries that permits some form of collective dispute resolution, probably the most widely adopted modification of U.S. style class actions concerns the opt-in/opt-out procedure. While in the United States individuals who do not wish to be part of the class proceedings carry the burden of opting-out, in Europe, only two countries chose to exclusively permit opt-out group actions (Netherlands and Portugal) while four countries permit both opt-in and opt-out procedures, authorizing the trial judge to determine which procedure should be used on a case by case basis. The majority of countries (eight) permit only opt-in class actions. The remaining three countries that allow representative actions provide neither opt-in nor opt-out provisions and permit only associations or public bodies to bring a class action. This again suggests

²⁹ Since Lithuania has enacted legislation permitting class actions, it is counted as one of the 18 countries permitting some form of collective redress. For the remainder of the discussion, however, Lithuania will not be included in the analysis due to the lack of procedural provisions regarding how class actions would work under Lithuanian law.

the strong preference for regulatory responses to widespread wrongdoing. However, considering that a total of 12 countries permit class actions on an opt-in basis, it appears that the opt-in procedure is likely more in concert with European legal jurisprudence than the opt-out procedure.

Overall, these legislative developments, almost all of which have taken place within the last decade, provide strong support for the proposition that European nations are slowly, but surely recognizing the need for class action procedures and that this need can be met without adopting the full-scale U.S. style class action.

B. Calls for a Unified EU Collective Dispute Resolution Mechanism in the Consumer Rights Context

In February 2011, the European Commission seemed to confirm the above proposition when it issued a Public Consultation Working Document expressing the need for a coherent European approach to collective redress.³⁰ As the Commission points out, “the number of cases requiring enforcement [of European Union (EU) law on consumer rights] has increased substantially because of the larger territorial scope of application of EU law,”³¹ especially since the expansion of the territories covered by the Schengen Agreement.³² At the same time, the Commission recognizes that where the same breach of EU law causes harm to a large number of consumers or businesses, individual lawsuits frequently do not provide an effective means of redress, either to stop unlawful practices or to obtain adequate compensation.³³ Additionally, although the Commission notes that

³⁰ *See supra* note 5.

³¹ Commission Report at 2.

³² *See supra* note 2.

³³ Commission Reports at 3.

every EU member state has a national system of redress, a number of which include procedures for collective redress,³⁴ the procedural laws of “many Member States often leave the courts ill-equipped to deal with the case load efficiently and within a reasonably delay.”³⁵ As Article 47 of the Charter of Fundamental Rights of the European Union provides that everyone subject to the laws of the EU has the right to effective and efficient redress,³⁶ the Commission concludes that a unified collective redress mechanism is necessary to complement national laws.

In spite of this recognition, it appears firmly established that the importation of U.S. style class actions is not an option and that any framework for collective redress should be tailored to comport with common principles of European legal tradition.³⁷ In particular, the predominant European fear in adopting a mechanism for collective redress is the possibility of the kind of widespread abuses of the system observed in the U.S.³⁸ The main force underlying this system abuse, the Commission posits, is the strong economic incentive for parties to bring, or threaten to bring, a class action even if the claim is not well founded on the merits.³⁹ These strong economic incentives are, at least in part, caused by a combination of factors including the availability of punitive damages that promise multi-million dollar recoveries should a claim succeed, contingency fees that provide an incentive for plaintiffs’ lawyers to seek out claims to litigate on behalf of injured classes even when the individual harm to each class member is negligible, the

³⁴ *Id.* at 4.

³⁵ *Id.* at 2.

³⁶ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364), art. 47(1).

³⁷ Commission Report at 5. *See also supra* notes 4, 26 and accompanying text.

³⁸ *Id.* at 9. *See also* Dana H. Freyer & Gregory A. Litt, *Desirability of International Class Arbitration*, 2 CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 171, 175-80 (Arthur W. Rovine ed., 2008); John H. Beisner & Charles E. Borden, *Expanding Private Causes of Action: Lessons from the US Litigation Experience*, presented at the U.S. Chamber Institute for Legal Reform 2006 Legal Reform Summit (Washington, D.C., October 2006).

³⁹ Commission Report at 9.

enormous costs of wide-ranging discovery procedures even before litigation commences, and the absence of limitations as to standing that allow virtually anyone to bring a class action on behalf of an open class of injured parties. The mere possibility that a defendant business might find itself entangled in this kind of costly and lengthy public relations nightmare arguably coerces businesses into settling even merit-less claims simply to avoid the burden of having to defend against such claims in court.⁴⁰ As a consequence of recognizing these perceived shortcomings in the U.S. class action system, the European Commission has emphasized that particular attention must be paid to creating a collective redress system with strong safeguards sufficient to preserve the balance between preventing abusive litigation on the one hand, and preserving effective access to justice for potential class members on the other.⁴¹

With this goal in mind, a uniform collective redress mechanism for Europe should be efficient, avoid costly and lengthy litigation, provide effective safeguards against abusive over-litigation of merit-less claims, and take into account Europe's long tradition of embracing the role of representative bodies in remedying large-scale violations of the law. The following section argues that a modified form of U.S. style class arbitration offers the balance that Europe seeks while ensuring that the principles of justice underlying European jurisprudence are protected.

⁴⁰ *See, e.g.* In re Rhone-Poulenc, Rorer, Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (Judge Posner decertified class to protect defendants from “blackmail settlements”); Newton v. Merrill Lynch, 259 F.3d 154, 164 (3d Cir. 2001) (Judge Scirica noted the “hydraulic pressure on defendants to settle”); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (arguing that class actions force defendants into “blackmail settlements”). *Cf.* Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378 (2000) (expressing doubt that class actions really blackmail defendants into settling); Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003) (arguing the fear of settlement blackmail is exaggerated).

⁴¹ Commission Report at 10.

III. HOW TO MAKE IT WORK

Given European priorities and goals in establishing a system for collective redress in the consumer rights context, it appears that a modified version of U.S. style class arbitration could provide an efficient and effective mechanism for protecting consumer rights while preventing excessive litigation. This mechanism should adopt the following features. First, it would necessitate an express arbitration agreement as well as an opt-in procedure. This would ensure that all parties to the class arbitration are knowing and voluntary participants. Second, flexible discovery procedures currently used by, for example, the International Centre for Dispute Resolution (ICDR)⁴² should be adopted to strike a balance between the broad pre-trial discovery allowed in U.S. courts and the relatively limited discovery permitted in most European nations. Third, before filing a claim with an arbitrator, an EU regulatory consumer agency should review and approve the claim to ensure that only non-frivolous claims proceed to arbitration. Fourth, the arbitration procedure should be divided into two stages – the class certification stage and the hearing on the merits. Each stage should be presided over by different arbitrators to ensure that the persons deciding whether class certification is appropriate have no incentive to certify a class simply to retain their source of income. Fifth, European style loser-pays procedures should be imposed where an arbitrator determines that the claim was filed for improper purposes such as coercing a settlement or harassing the defendant company. Finally, capped punitive damages should be allowed in cases where an arbitrator finds that the defendant intentionally or recklessly caused harm to consumers. The following section expands on each of these propositions and shows how class

⁴² ICDR Guidelines for Arbitrators Concerning Exchanges of Information (hereinafter ICDR Guidelines) (effective May 31, 2008), *available at* <http://www.adr.org/si.asp?id=5288>.

arbitrations that follow this framework would effectively address European criticisms of U.S. style class actions while providing an appropriate form of redress for consumers.

A. Arbitration Agreement and Opt-In Procedure

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.⁴³ This would arguably violate European notions of individualized justice⁴⁴ and would therefore be unacceptable in any European collective redress mechanism.

As the Supreme Court pointed out most recently in *Stolt-Nielsen*, arbitration is a purely consensual private means of dispute resolution.⁴⁵ As such, it requires that all parties to the arbitration have consented to having their claims defended in an arbitral procedure. Having a collective redress mechanism that takes the form of class arbitrations with an opt-in procedure would hence comport with European notions of individualized justice 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. There might, however, still be concerns that even if an individual opted-into a class arbitration voluntarily, a class representative (or the plaintiffs' attorney) might act contrary to the

⁴³ See *supra* note 4.

⁴⁴ See, e.g. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998) (arguing that class identity subsumes individual identity in class actions). See also Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791 (1997); Carrie J. Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

⁴⁵ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1763 (2010).

class member's wishes, for example, when it comes to settlement values or litigation strategies. In order to ensure that the individual class member's rights are adequately protected, the class representative or plaintiffs' attorney should issue a brief statement to potential class members (either through public notice or by personal mail) detailing the objectives to be achieved by the class suit, a general description of priorities (e.g. injunctive relief versus damages) and a brief description of the named plaintiffs' claim. This will ensure that individuals opting-into a class proceeding feel that the named plaintiffs' injuries and outcome-priorities are representative of their own complaint and priorities. Finally, in order not to bind the representatives' hands if they should find the need to revise their list of priorities or their litigation strategy, or if they should reach a settlement agreeable to the defendant and named plaintiffs but previously unknown to other class members, such a modification or settlement should require an 80% approval by the class members. As each class member will have provided their contact information when they opted-into the class, they should be easily reachable.

In addition to its consensual nature and its procedural flexibility that facilitates the protection of individuals' rights, arbitration is a desirable means of collective dispute resolution in the European cross-border consumer redress context because "arbitral awards are almost universally easier to enforce internationally than court judgments."⁴⁶ Generally speaking, most, if not all, European countries strongly endorse international arbitration. In France, for example, recent cases from both the Court of Appeal and from the *Cour de Cassation* (the French Supreme Court) highlight the strong support and

⁴⁶ S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1053 (2008-09). See also GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 7-10, 19 (2001).

deference the French courts give to arbitrators.⁴⁷ In the *Putrabali* case, for example, the *Cour de Cassation* affirmed that an international arbitration award was “not anchored in any national legal system” which in essence “qualifies the arbitral award as an *international judicial decision*... [The *Putrabali* holding hence] confirms the existence of an arbitral legal order which is independent from national legal orders.”⁴⁸ On this basis, the *Cour de Cassation* decided that an international arbitral award does not need to be affirmed by any national court to be recognized and enforced. Additionally, the French Supreme Court recently decided in *SNF v. Cytec*⁴⁹ that there can be virtually no review on the merits of a case decided in arbitration. Such review would only be granted if the arbitrators flagrantly violated principles of international public policy. This decision is significant because it imposes a very high standard of review, but also because it measures that standard by international as opposed to domestic public policy thereby giving arbitrators more flexibility and leeway in rendering their decisions,⁵⁰ especially as public policy “is a concept characterized by relativity in time and space,”⁵¹ meaning that it is always evolving.

Similarly, Germany, although still highly skeptical of collective dispute resolution, seems to strongly endorse international arbitration. For example, even though appeals of arbitral awards to the *Bundesgerichtshof* (German Supreme Court) are possible,⁵² the court very rarely accepts such cases for review. At present, the ratio is approximately 5 to 1 against acceptance, which means that the *Bundesgerichtshof* accepts

⁴⁷ Philippe Pinsolle, *Recent Significant French Judicial Decisions Involving International Arbitration*, 2 CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, 109 (2008).

⁴⁸ *Id.* at 117.

⁴⁹ *Société SNF v. Société Cytec Industries BV*, Cass. Civ. 1, June 4, 2008, No. 06-15.320.

⁵⁰ *See supra* note 47, at 121.

⁵¹ Natalya Shelkopyas, *THE APPLICATION OF EC LAW IN ARBITRATION PROCEEDINGS*, 197 (2003).

⁵² German Code of Civil Procedure (GZPO), § 1062(1) (1)-(4).

only three to five international arbitration cases annually for reconsideration.⁵³ This suggests that strong deference is given to arbitrators and their competency in deciding disputes. Most notably, however, all 29 countries discussed in section II.A. *supra* have signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) that requires countries to enforce international arbitral awards granted outside their home-state unless the party opposing enforcement proves a set of very limited conditions such as proven incapacity of one or more parties to the arbitration or invalidity of the arbitration clause in the underlying agreement.⁵⁴ This indicates a generally pro-arbitration stance taken by European countries, especially with regards to the international arbitration of cross-border disputes.⁵⁵ Given the advantages offered by arbitration's flexible procedures and its consensual nature as well as the generally favorable attitude of Europe toward arbitration, class arbitrations are likely to be an acceptable means of collective redress suitable to protecting the rights of consumers in the EU.

B. Discovery

While the U.S. rules of civil procedure generally permit fairly broad pre-trial discovery, European nations have traditionally imposed much more stringent

⁵³ Hilmar Raeschke-Kessler, *Recent Austrian, German and Swiss Judicial Decisions Involving International Arbitration*, 2 CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, 125 (2008).

⁵⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the “New York” Convention (1958), Art. V, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/1958_NYC_CTC-e.pdf.

⁵⁵ S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1053-54 (2008-09) (noting the increasingly pro-arbitration stance of countries across the world as evidenced by the “widespread adoption of enforcement mechanisms such as the New York Convention and increasing acceptance of liberalizing legislation... The scope of arbitrable issues has also expanded steady over the years, suggesting that States now put more trust in arbitrators’ ability to handle complex issues...”).

limitations.⁵⁶ The flexibility of discovery procedures offered by arbitration hence provides a further reason in favor of adopting class arbitration as the predominant mechanism for collective redress in Europe. As the various international arbitration associations have slightly varying provisions concerning the scope of discovery permitted,⁵⁷ arbitration would give the parties to the proceeding the option to choose the set of discovery rules that seems best suited to their needs. As it is likely, however, that parties might disagree as to which arbitration association provides the most favorable discovery guidelines, the European class arbitration mechanism here proposed should have a fall-back discovery provision similar to that provided by the ICDR.

The ICDR guidelines state that it is their primary goal to provide a dispute resolution mechanism that is “simpler, less expensive and more expeditious”⁵⁸ than resort to litigation in national courts. In this vein, the guidelines instruct arbitrators to manage the exchange of information between parties with a view to maintaining efficiency and economy. The ICDR further requires that arbitrators “endeavor to avoid unnecessary delay and expense while at the same time balancing goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly.”⁵⁹ The ICDR’s guidelines for discovery, or “exchanges of information,” hence appear to strike a desirable balance between permitting discovery that is extensive

⁵⁶ John H. Beisner & Charles E. Borden, *Expanding Private Causes of Action: Lessons from the US Litigation Experience*, presented at the U.S. Chamber Institute for Legal Reform 2006 Legal Reform Summit (Washington, D.C., October 2006), p. 1.

⁵⁷ For a comprehensive summary of the discovery procedures provided by various international arbitration associations including among others the ICDR, the International Bar Association (IBA), United Nations Commission on International Trade Law (UNCITRAL), and the International Institute for Conflict Prevention and Resolution (CPR), see Irene C. Warshauer, *Electronic Discovery and Arbitration: A Shortcut Through E-Discovery*, 2 CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 255 (2008).

⁵⁸ ICDR guidelines, at 1.

⁵⁹ *Id.* at 1.

enough to meet the parties' needs and ensuring that such discovery does not become exorbitantly expensive. Especially today, when electronic discovery is becoming increasingly common, the costs of discovery procedures appear to be sky-rocketing⁶⁰ and a focus on economical yet practical discovery is hence crucial to any successful system for collective dispute resolution, especially one that depends on the voluntary agreement of all parties concerned.

Additionally, the ICDR guidelines provide that arbitrators only grant requests by one side for documents in the possession of the opposing party if those documents are reasonably believed to exist and to be relevant and material to the outcome of the case. "Requests for documents shall contain a description of specific documents... along with an explanation of their relevance and materiality to the outcome of the case."⁶¹ These requirements ensure that discovery will likely be more limited than in the U.S. and therefore less costly and more similar to European discovery procedures. This is especially advantageous should a party to an arbitration need to request a local European court to enforce the discovery order, a likely scenario should the opposing side refuse to comply with the arbitrators' orders. The necessity for such enforcement procedures, however, should be minimal given that the ICDR guidelines provide that the arbitrators may draw adverse inferences from a party's refusal to comply with discovery orders and may take such refusal into account in allocating costs.⁶²

Such a flexible procedure admittedly gives the arbitrators broad discretion in determining the scope of appropriate discovery. However, given that the guidelines

⁶⁰ Irene C. Warshauer, *Electronic Discovery and Arbitration: A Shortcut Through E-Discovery*, 2 CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS at 255 (2008).

⁶¹ ICDR Guidelines at 2.

⁶² *Id.* at 3.

provided under the ICDR procedures are likely no less detailed than discovery rules for judges hearing a case in a local court, it is unlikely that the parties will be adversely affected by these provisions, especially since the parties are free to choose the arbitrators hearing their case. Additionally, should a party believe that the arbitrators' discovery orders are genuinely unfair or in violation of the discovery guidelines, that party is still free to defend their position should the opposing side decide to seek enforcement in a local court. In sum, this flexible approach to discovery provides pragmatic guidelines that allow for sufficiently broad discovery to ensure that each side can adequately present their case while striving to keep discovery costs as low as possible.

C. Consumer Agency Approval

As noted in Table 1, *supra*, 18 of the 29 European states under consideration currently permit agencies, associations, or other public bodies to bring claims to protect the rights of consumers, even in countries that do not allow individuals to bring claims on behalf of a class. This comports with the general European tradition of preferring regulatory solutions over individual litigation. Given the importance of regulatory schemes in European legal jurisprudence and the need for effective funding solutions,⁶³ a collective redress mechanism that incorporates an element of regulatory supervision might be more acceptable to those European nations that are currently still skeptical of a uniform system of collective dispute resolution (e.g. Germany⁶⁴) than one that has no place for regulatory involvement. The following structure would give consumer agencies

⁶³ Commission Report at 11.

⁶⁴ Resolution of the Bundesrat (Federal Council), Green Paper from the Commission of the European Communities on Consumer Collective Redress, COM(2008) 794 final, Council document 16658/08, *esp.* ¶¶ 4-5, *available at* http://ec.europa.eu/consumers/redress_cons/responses/MS_Bundesrat_en.pdf.

a place in the collective dispute resolution mechanism while ensuring that individuals are still free to defend their own rights in class proceedings should they prefer to do so.

For cases in which the underlying contract(s) contains an arbitration clause that is construed to permit class arbitrations or where all parties agree to arbitrate their claim, a regulatory government branch such as a national or EU consumer agency should be required to approve a claim before a class representative or plaintiffs' attorney proceeds to arbitration. In this scenario, the agency does not decide whether a claim is likely to succeed on the merits or whether an arbitrator is likely to certify the plaintiff class; the approval procedure should focus solely on whether the claim appears to be frivolous.⁶⁵ This is a very low standard of review, but one that provides a safeguard against abusive filing of claims to harass or coerce a defendant business into settling. To assuage fears that consumer agencies might, consciously or subconsciously, (dis-)approve claims based on the perceived merits of the case, the agency's decision should be appealable in court where the decision should be reviewed de novo.

For cases in which there is no arbitration clause and the parties affected by the claim cannot unanimously agree to class arbitration, the consumer agency should decide whether a regulatory response would effectively address the problem and redress the harm. If so, a regulatory response to the problem should be adopted to save the cost of litigation. However, where a regulatory response will either be less effective in rectifying the wrong or deterring future wrongdoing, or where such a response will not adequately compensate the harmed consumers, the claim should proceed to class action litigation.

While this structure would give consumer agencies significant leeway in deciding how to

⁶⁵ For present purposes a "frivolous" claim is defined as a claim that is utterly without merit either because of a lack of factual basis or of a supporting legal argument for the claim.

respond to large-scale wrongdoing, such a scheme would simply follow the already existing tradition of preference for regulatory responses while simultaneously at least opening the door for the option of class actions where such a procedure would be superior.⁶⁶

D. Procedural Division Between Class Certification and Hearing on the Merits

One concern that might frequently arise in the class arbitration context to dissuade a defendant from agreeing to class arbitration is the fear that arbitrators are likely to certify a class even where unwarranted simply to retain their source of income, at least where arbitrators are paid per day. Conversely, if arbitrators are paid a lump-sum for the entire course of the proceedings, plaintiffs might fear that arbitrators will refuse to certify a class to avoid having to hear the case on the merits without additional compensation. One way to avoid this dilemma is to split the class arbitration procedure into two separate stages with different arbitrators for each. In the first stage, arbitrators decide whether class certification is appropriate based on rules similar to those set out in the AAA and JAMS rules for class arbitration, *see supra* at 6. If so, the arbitration proceeds to the second stage – the hearing on the merits.

While there might be some fear of escalation of costs where different arbitrators need to be employed for each stage, this fear is not necessarily well founded as the parties, as is usual in arbitration proceedings, are largely free to structure payments and

⁶⁶ The precise structure of a uniform European class action lies outside the scope of this paper, but it is suggested that it should loosely follow the same format suggested for class arbitrations. The opt-in procedure would ensure that only willing and knowing class members are bound by the outcome of the class action, the “loser-pays” mechanism will deter potential plaintiffs from abusive or frivolous litigation, and capped punitive damages for cases of intentional or reckless infliction of harm on consumers will both deter potential defendants and provide an incentive for potential plaintiffs with a genuine claim to file suit even if the value of each individual claim would be negligible.

appoint arbitrators of their choosing, the criteria for which could include the amount of the arbitrators' fees. Additionally, the parties to the arbitration might find that the advantage of being able to exert some influence over the time-frame of the proceedings and the option to choose the arbitrator(s), as opposed to the uncertainty over which judge will be assigned to hear the class action case in court or what type of regulatory sanction the consumer agency might enforce, outweighs the cost of financing the two-stage arbitration proceeding. How the burden of financing the arbitration should be divided among the parties remains largely a contractual matter to be agreed upon by the contracting parties, but, in cases where the consumer agency determines that the class plaintiffs might have a valid claim but insufficient funds to proceed, there should be a method for obtaining agency funding. This would not put additional financial burdens on the agency. Without recourse to arbitration, the agency would likely have to implement expensive procedures – be they regulatory or litigious – to redress the harm done to the consumers where it finds a claim to be meritorious and even where the agency finds the claim lacking on the merits, it would have to expend substantial sums in investigating the matter. The agency would hence likely incur little to no *additional* costs by subsidizing a plaintiff class's arbitration proceedings.

E. Fee-Shifting Provision - Loser Pays

The “loser pays” principle provides that the losing party pays the opposing side's costs. While this procedure does not apply in U.S. class actions, it is a common feature of civil law jurisdictions and should be adopted in the class arbitration context with one significant modification – it should only apply where the arbitrators determine that a

claim was so merit-less that it could only have been brought for improper purposes like harassing the defendant company. In essence, this procedure complements the agency approval stage and provides a further safeguard against abusive litigation. In the approval stage, the agency is only permitted to disapprove a claim if it finds the claim frivolous. In reaching its decision, the agency is limited to a consideration of the basic allegations and facts of the case as alleged by the plaintiff class.⁶⁷ As this means that the agency has no recourse to independent investigation of the veracity of the factual allegations or to the defendant's side of the case, it is possible that merit-less and/or maliciously motivated claims might proceed to arbitration. Providing that the loser pays the opposing side's costs where the arbitrator determines that a claim was filed for abusive purposes will dissuade such claims.

One might argue that this determination could simply be made by the agency ex-ante to avoid unnecessary costs. This, however, is not advisable because in the majority of cases the most significant or even only proof of malicious intent in roping a defendant into class arbitration proceedings will be the utter and complete lack of evidentiary support for the plaintiff class's claims. If the agency were permitted to make a determination of malicious intent, it would need to consider the plaintiffs' claim on the merits which would shift the entire procedure to a hearing on the merits in front of the agency rather than a qualified, neutral, and party-appointed panel of arbitrators. This shift would sacrifice many of the advantages of class arbitration while likely not reducing the discovery and other costs incurred by the parties in the arbitration proceedings.

⁶⁷ As the agency's approval is required before a class arbitration proceeding is commenced, the defendant will not have had an opportunity to present their legal counterarguments or to disprove the potential plaintiffs' factual assertions.

Should an arbitrator determine that the plaintiffs' claim was filed to harass the defendant company and therefore order the plaintiffs to pay the defendant's costs, the question remains who will be responsible for the payment – the plaintiff class, the plaintiffs' attorneys, or the agency that approved the claim for filing? The solution to this problem proposed here is to divide the costs among the plaintiffs' attorneys and the class members with the former paying 75% and the latter 25%. The reasoning supporting this conclusion applies almost exclusively to the consumer redress context. Usually, consumers will know whether or not they have been harmed by a business's products or practices and should therefore be aware that they are opting into a class that demands compensation for a harm its members did not suffer. In some cases, however, it is possible that consumers are unaware of the harm they are incurring because business schemes that have minimal negative impact on individual consumers are too complex or too well hidden to be discovered by the average victim. The plaintiffs' attorneys on the other hand should have the capacity and overview to analyze all the available information and make a judgment call on whether or not a claim is more than "utterly without merit." Given the extremely high threshold for finding an abusive claim filing in the absence of express evidence to that effect, these determinations should be extremely rare. But where they are made, it is highly likely that an educated, qualified attorney would have realized just how merit-less the claim was. Given these logical implications and the inefficiency of equitable apportionment hearings in each case of abusive claim filing, it seems that a 75/25 distribution of the costs provides a workable compromise.

F. Capped Punitive Damages

Although punitive damages have traditionally not been available in most European countries, they should be introduced in the consumer class arbitration context for intentional or reckless wrongdoing for two reasons. First, widespread harm to consumers might frequently involve small claims that would not be worth litigating individually. In the U.S., where class actions involve an opt-out procedure, the value of the individual claim is less problematic because the onus is on the class member to opt-out, an unlikely event if the individual has no incentive to litigate the claim on their own. In the European scheme here proposed, however, the value of the claim might be so small as to render it not worth the paperwork involved in opting-into a class proceeding. In order to ensure that small but widespread wrongs, that in the aggregate likely greatly benefit the wrongdoing company, are redressed by the system, punitive damages should be permitted where the defendant has acted either intentionally or recklessly in causing harm to the group of consumer plaintiffs. Second, punitive damages should be permitted as an additional deterrent against defendant misconduct.

Recognizing, however, that punitive damages are not part of the European legal tradition and that the frequency of exorbitant punitive damages awards in class action litigation in the U.S. is perceived as one of the sources of abusive litigation,⁶⁸ the availability of such damages should be strictly limited in Europe. The cap should allow punitive damages high enough to provide an incentive for individuals with valid claims to bring a class arbitration to hold a wrongdoing defendant accountable, but not high enough for a potential plaintiff to assume the risk of triggering the fee-shifting loser pays provision described above. The cap on damages could take two forms – either a

⁶⁸ Commission Report at 9.

percentage of the damages award or a lump-sum cap. The former method is preferable where the class is large and the claims are medium sized while the latter method is preferable in cases with smaller classes regardless of the value of individual claims. As each method might either be advantageous or disadvantageous based on the value of the claim and the size of the plaintiff class, the choice of the method of cap-determination should be left to the consumer agency that will likely have better access to relevant statistics that would indicate how large the typical class size would be and how great the value of a typical claim can be expected to be. Depending on the outcome of such a comparative analysis, the agency should choose the method that will strike the best balance between deterrence of wrongdoing and inducement to file meritorious claims.

CONCLUSION

In the United States, there have already been at least three instances of international class arbitration filings under the AAA Supplementary Rules for Class Arbitration⁶⁹ and at least one instance of a federal court declining to invalidate an arbitral award permitting such proceedings. In *Harvard College v. JSC Surgutneftegaz*,⁷⁰ the defendant, a Russian oil and gas company, claimed that class arbitration should not be permitted in cases involving international parties because it is a “uniquely American form of collective action” that “is fully at odds with the principles of international arbitration.”⁷¹ When the arbitral tribunal rejected this line of argument and noted that JSC

⁶⁹ See Searchable Class Arbitration Docket, *available at* <http://www.adr.org/sp.asp?id=25562> (searching for CBR Enter., LLC v. Blimpie Int’l, Inc.; Harvard College v. JSC Surgutneftegaz; Bagpeddler.com v. U.S. Bancorp).

⁷⁰ President and Fellows of Harvard College Against JSC Surgutneftegaz [Case Number 11 168 T 01654 04], 770 PLI/Lit 127.

⁷¹ *Id.* at 8.

Surgutneftegaz identified no principle or norm of international arbitration to that effect,⁷² JSC refused to comply with the arbitrators' holding and instead filed a petition for stay of arbitration. On appeal, the United States Court of Appeals for the Second Circuit refused to overrule the lower court's denial of the petition for stay, holding that the arbitration clause in the underlying agreement clearly evinced the parties' intent to authorize the arbitrators to decide the question of arbitrability.⁷³ Although the court did not expressly address the question, its refusal to grant JSC's petition indicates that U.S. courts, at least in the Second Circuit, do not find that class arbitrations necessarily violate established principles of international arbitration.

The attitude of European courts towards international class arbitration, on the other hand, has yet to be determined as there are currently no known cases of parties requesting European courts to enforce such arbitral awards. However, as discussed above, it is apparent that Europe is increasingly recognizing the need for a uniform collective redress mechanism and, considering European criticisms of the U.S. class action system, the EC should take advantage of the relative novelty of the concept of *international* class arbitration to structure a mechanism of collective redress that will prove to be efficient, effective, and consistent with European legal jurisprudence. The procedural malleability permitted in arbitration proceedings is especially suitable for pragmatic system design and the combination of features proposed above provides a set of guidelines tailored to meet Europe's needs and priorities. However, while the EC has clearly indicated a will to adopt a uniform collective redress mechanism, whether it will follow through remains to be seen.

⁷² *Id.* at 12.

⁷³ JSC Surgutneftegaz v. President & Fellows of Harvard Coll., 167 F. App'x 266 (2d Cir. 2006).

APPENDIX A

TABLE 2. KEY FEATURES OF EUROPEAN COLLECTIVE DISPUTE RESOLUTION MECHANISMS

Country	Statute; Year of Enactment	Key Features of Aggregate or Collective Dispute Resolution Mechanism
Austria	N/A	<ul style="list-style-type: none"> • Austria does not currently have a general class or group action procedure • Note: in competition law cases, Austrian consumer associations have successfully brought claims on behalf of large groups of consumers⁷⁴
Belgium	N/A	<ul style="list-style-type: none"> • Belgium does not currently have a general class or group action procedure • Note: Collective actions for injunctive relief brought by professional and charitable organizations is permitted⁷⁵
Bulgaria	Civil Procedure Code (Chapter 33 “Proceedings in Class Actions”); ⁷⁶ 2007	<ul style="list-style-type: none"> • Permits class actions for (i) non-monetary relief and (ii) mass torts • In option (i), the class may only seek declaratory judgment on the basis of which each member is entitled to individual proceeding • Class action may be brought by individuals or representative organizations • Requires financial steadiness of representative and adequacy of representation • Opt-in and Opt-out procedures
Cyprus	N/A	<ul style="list-style-type: none"> • Cyprus does not currently have a general class or group action procedure⁷⁷
Czech Republic	N/A	<ul style="list-style-type: none"> • The Czech Republic does not currently have a general class or group action procedure • Note: joinder of independent actions is permissible and legal counsel may represent more

⁷⁴ Global Legal Group, International Comparative Legal Guide to: Class and Group Actions 2009, A practical insight to cross-border Class and Group Actions work, ch. 7 (2009), *available at* <http://www.iclg.co.uk/khadmin/Publications/pdf/2314.pdf>.

⁷⁵ *See* MATTHIAS E. STORME & EVELYNE TERRY, THE GLOBALIZATION OF CLASS ACTIONS OXFORD CONFERENCE OF 13 & 14 DECEMBER 2007: BELGIAN REPORT ON CLASS ACTIONS, *available at* http://globalclassactions.stanford.edu/sites/default/files/documents/Belgium_National_Report.pdf.

⁷⁶ CIVIL PROCEDURE CODE (BULGARIA), *available at* http://www.vks.bg/english/vksen_p04_02.htm.

⁷⁷ Country Fiche: Cyprus, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/cyprus_en.pdf.

		than one client with the same claim in the proceedings ⁷⁸
Denmark	Danish Class Action Act; 2007	<ul style="list-style-type: none"> • Permits class actions by individual plaintiffs, private associations and public bodies⁷⁹ • Class certification requires common claims, adequate representation & notice, and procedural superiority • Opt-in or Opt-out procedure at judge's discretion
Estonia	N/A	• Estonia does not currently have a general class or group action procedure ⁸⁰
Finland	Act on Class Actions (Rhyhmäkannelaki 444/2007); ⁸¹ 2007	<ul style="list-style-type: none"> • Permits group actions in consumer cases • Only the government-funded "Consumer Ombudsman" may bring claims on behalf of consumers • Requires common claims against common defendant, superiority of procedure, and adequate precision in class definition • Opt-in procedure
France	Actions Taken in a Collective Interest (art. L. 421-1 to L. 421-8 of the Consumer Code); Joint Representative Actions; ⁸² 1990s	<ul style="list-style-type: none"> • Permits associations to bring group claim on behalf of consumers or investors • Permits monetary damages rewards • Plaintiff class members must have injury of common origin • Opt-in procedure
Germany	Act on the Initiation of Model Case Proceedings in Respect of Investors in the	<ul style="list-style-type: none"> • Opt-in procedure • Permits common issues of law or fact to be tried in model proceedings • Applies only to mass capital markets transactions • Applies only to parties who have already filed suit

⁷⁸ Country Fiche – Czech Republic, p. 4, available at

http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/czech_republic_en.pdf.

⁷⁹ See Erik Werlauf, *Class Actions in Denmark*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 202 (2009), available at <http://ann.sagepub.com/content/622/1/202.full.pdf>.

⁸⁰ Green Paper on Consumer Collective Redress – Questions and Answers – The national different systems in place (country fiches Estonia), p. 8, available at http://ec.europa.eu/consumers/redress_cons/countryfichesmemonumber.pdf

⁸¹ RYHMÄKANNELAKI [ACT ON CLASS ACTIONS] (ACT NO. 444/2007), *English version available at* <http://www.finlex.fi/fi/laki/kaannokset/2007/en20070444.pdf>.

⁸² See Veronique Magnier & Ralf Alleweldt, *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – Country Report France* (Sept. 25, 2008), available at http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf.

	Capital Markets (Kapitalanleger-Musterverfahrensgesetz); 2005 ⁸³	and does not permit claims on behalf of an unknown group of claimants <ul style="list-style-type: none"> • Note: in spite of recent developments in class action law, the most common form of collective redress remains group complaint by associations or interest groups (Verbandsklage) adopted in 1896 in the Act against Unfair Competition for Associations whose Purpose is to Promote Commercial Interests (Verbände zur Förderung gewerblicher Interessen)⁸⁴
Greece	Law 2251/1994, Law 3587/2007	<ul style="list-style-type: none"> • Collective actions are permitted by approved consumer organizations on behalf of injured consumers⁸⁵ • Injunction, declaratory judgment and damages may be claimed
Hungary	N/A	<ul style="list-style-type: none"> • Hungary does not currently have a general class or group action procedure • Note: upcoming reforms of the Civil Procedure Rules in Hungary may introduce some form of class action⁸⁶
Ireland	N/A	<ul style="list-style-type: none"> • Ireland does not currently have a general class or group action procedure • In exceptional cases representative actions may be permitted, but these cases are very rare; they allow one action to be brought on behalf of numerous parties with the same interest⁸⁷ • Parties must consent to representative action (opt-in procedure)

⁸³ Kapitalanleger-Musterverfahrensgesetz [Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets] (2005), *available at* <http://www.gesetze-im-internet.de/bundesrecht/kapmug/gesamt.pdf> (original Sunset Clause mandating automatic expiration on November 1, 2010, extended to November 1, 2012). *English translation available at* http://globalclassactions.stanford.edu/sites/default/files/documents/Germany_Legislation_1.pdf.

⁸⁴ Dietmar Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation – Germany*, *available at*

http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf.

⁸⁵ Civic Consulting, Country Report Greece, *available at* http://ec.europa.eu/consumers/redress_cons/gr-country-report-final.pdf.

⁸⁶ *See* Press Release, Wolf Theiss, *Increasing Appetite For Litigation – Class Action Lawsuits to be Introduced in Hungary* (Mar. 1, 2010),

http://www.wolftheiss.com/index.php/archiv_detail_2010/items/730.html.

⁸⁷ Global Legal Group, International Comparative Legal Guide to: Class and Group Actions 2009, A practical insight to cross-border Class and Group Actions work, ch. 16 (2009), *available at* <http://www.iclg.co.uk/khadmin/Publications/pdf/2332.pdf>.

Italy	Class Action Law 2007; Consumers' Code (Codice Del Consumo [C. Consumo] art. 140); ⁸⁸ 2009	<ul style="list-style-type: none"> • Permits class action (azione collettiva risarcitoria) by qualified organizations (16 accredited consumer associations as well as ad hoc committees) • Permits award of compensatory damages in consumer cases • Opt-in procedure
Latvia	N/A	<ul style="list-style-type: none"> • Latvia does not currently have a general class or group action procedure • Series or group related claims are handled according to standard provisions of the law⁸⁹
Lithuania	Lithuanian Civil Procedure Code (art. 59); 2003	<ul style="list-style-type: none"> • Group actions may be brought to “protect public interest” • Note: in practice art. 59 on group actions is ineffective due to a legislative gap regarding the filing of group claims⁹⁰
Luxembourg	N/A	<ul style="list-style-type: none"> • Luxembourg does not currently have a general class or group action procedure⁹¹
Malta	N/A	<ul style="list-style-type: none"> • Malta does not currently have a general class or group action procedure⁹²
Netherlands	Collective Settlement of Mass Damages Claims (WCAM); 2005	<ul style="list-style-type: none"> • Group actions may be brought by a foundation or association acting on behalf of class members⁹³ • Opt-out procedure
Norway	Act Relating to	<ul style="list-style-type: none"> • Permits class actions by individual plaintiffs,

⁸⁸ CODICE DEL CONSUMO [CONSUMERS' CODE] art. 140, *English version available at* <http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf>.

⁸⁹ While Civil Procedure Law in Latvia permits actions to be brought by several plaintiffs against one defendant, each co-plaintiff acts independently and his/her actions do not bind other co-plaintiffs. *See* Country Fiche: Consumer Redress – Latvia, *available at* http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_Latvia.pdf.

⁹⁰ Lithuania's Civil Procedure Code lacks regulation on the specific procedures to be used in group actions, inter alia, whether an opt-in or opt-out model should apply, what type of notice is required, whether there is a minimum number of claims required. *See* Global Legal Group, International Comparative Legal Guide to: Class and Group Actions 2011, a practical cross-border insight into class and group actions work, ch. 18, p. 114 (2011), <http://www.iclg.co.uk/khadmin/Publications/pdf/3980.pdf>.

⁹¹ Country Fiche, Consumer Redress – Luxembourg, *available at* http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_Luxembourg.pdf.

⁹² Global Legal Group, International Comparative Legal Guide to: Class and Group Actions 2010, a practical insight to cross-border Class and Group actions work, ch. 19, p. 113 (2010), <http://www.iclg.co.uk/khadmin/Publications/pdf/3177.pdf>.

⁹³ *See* Willem H. Van Boom, *Collective Settlement of Mass Claims in the Netherlands*, in AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE? 171-92 (Matthias Casper et al. eds., 2009).

	Mediation and Procedure in Civil Disputes 2005; Mediation and Civil Procedure Act; 2008	public bodies or private organizations <ul style="list-style-type: none"> • Opt-in or Opt-out procedure at judge's discretion • Class certification requires common issues of law or fact, adequacy of representation and procedural superiority⁹⁴
Poland	Act on Pursuing Claims in Group Proceedings (Ustawa o dochodzeniu roszczen w postepowaniu grupowym); ⁹⁵ 2009	<ul style="list-style-type: none"> • Opt-in procedure • requires certification of litigation and certification of the group • representation by lawyer is mandatory (not usually mandatory in Poland) • lawyer's compensation may be no more than 20% of award • loser pays
Portugal	Constitution of the Portuguese Republic, Seventh Revision (art. 52); ⁹⁶ 2005	<ul style="list-style-type: none"> • Permits group actions (Acção Popular) for a variety of sectors, including consumer rights • Individuals, associations, and local authorities may bring class/group proceedings • Opt-out • All types of damages are recoverable • Proceedings may be brought before an arbitrator if the counterparty consents
Romania	N/A	<ul style="list-style-type: none"> • Romania does not currently have a general class or group action procedure⁹⁷
Slovakia	N/A	<ul style="list-style-type: none"> • Slovakia does not currently have a general class or group action procedure⁹⁸
Slovenia	N/A	<ul style="list-style-type: none"> • Slovenia does not currently have a general class or group action procedure⁹⁹

⁹⁴ Camilla Bernt-Hamre, *Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts* (2007), available at

http://globalclassactions.stanford.edu/sites/default/files/documents/Norway_National_Report.pdf.

⁹⁵ Dziennik Ustaw (Journal of Laws) of 2010, no 7; item. 44 p. 1, *English summary available at*

<http://europeanjusticeforum.org/storage/0311%20-%20EJF%20note%20on%20Poland%20public.pdf>.

⁹⁶ *English version available at*

http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf.

⁹⁷ Commercial Dispute Resolution, Romania, *available at* <http://www.cdr-news.com/component/content/article/551-romania-product-liability>.

⁹⁸ Global Legal Group, *The International Comparative Legal Guide to: Competition Litigation 2011, A practical cross-border insight into competition litigation work*, ch. 28,156 (2009), *available at* <http://www.iclg.co.uk/khadmin/Publications/pdf/3920.pdf>.

⁹⁹ Country Fiche: Slovenia, p. 7, *available at*

http://ec.europa.eu/consumers/overview/country_profile/SL_web_country_profile.pdf.

Spain	Civil Procedure Act (Ley de Enjuiciamiento Civil, art. 11); ¹⁰⁰ 2000	<ul style="list-style-type: none"> • Permits group actions for consumers • Class certification requires common claims • Group action brought by associations of consumers on behalf of class where class members are not readily identifiable and or because they have diverse interests (i.e. are linked by circumstances but not by means of legal relationship with defendant)
Sweden	Group Proceedings Act; ¹⁰¹ 2002	<ul style="list-style-type: none"> • Permits private, individual class action by class members, organizations and public actors • Permits recovery of damages as well as injunctive relief • Opt-in procedure • Group representative has authority to make settlement but also bears risk of having to pay opponent's costs if group loses the case
Switzerland	N/A	<ul style="list-style-type: none"> • Switzerland does not currently have a general class or group action procedure • Note: In 2006, the government proposed a new Federal Code of Civil Procedure that included a class action mechanism, but this was rejected as alien to European legal thought¹⁰²
England & Wales	Group Litigation Order; 1999	<ul style="list-style-type: none"> • Allows representative actions where group members have the same interest in claims with one or more acting as representative¹⁰³ • Claims must concern common or related issues of fact or law • Opt-in procedure • Losing side pays prevailing party's costs

¹⁰⁰ Ley de Enjuiciamiento Civil [Civil Procedure Act], Law 1/2000, art. 11 (2000). For discussion and summary, *see, e.g.*

http://www.twobirds.com/English/News/Articles/Pages/Collective_actions_Spanish_law.aspx

¹⁰¹ Group Proceedings Act (2002), SFS 2002:599, *available at* <http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf>.

¹⁰² *See supra* note 4 and accompanying text.

¹⁰³ Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J.COMP. & INT'L L. 249, 250-57 (2001).