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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Collective Arbitration

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Abstract
Collective mechanisms serve to effectively protect injured parties from mass harm situations and enable the associated claims to be settled once and for all. Different types of large-scale arbitration systems are used in different jurisdictions to settle mainly domestic disputes. In the United States, class arbitration is the most widely used type of collective arbitration mechanism. The jurisprudence of the US Supreme Court has been instrumental in the development of this system. For example, these mechanisms change the nature of arbitration in accordance with the jurisprudence of the Supreme Court. It can be stated that there are differences between collective arbitration mechanisms and traditional arbitration, which may pose certain problems, particularly regarding the enforceability of awards. In Europe, class actions are not appreciated although the European Union is trying to create collective redress mechanisms. As a result, two models of collective arbitration have been developed in Europe, which differ from class arbitration. Collective arbitration proceedings that may have the benefits of both arbitration and collective proceedings are still in the development phase and will most likely continue to be used for internal disputes.

Keywords
Arbitration, Class action, Class arbitration, Collective arbitration, Collective redress

Kollektif Tahkim

Öz
Kolektif mekanizmalar, kitlesel boyutta zararların meydana geldiği durumlarda zarar görenlerin etkili bir biçimde korunmasını ve ortaya çıkan bütün uyuşmazlıkların bir seferde herkes için çözümlenmesini sağlar. Bu bağlamda tahkimde de yine böyle birçok tarafın mevcut olduğu durumlarda kolektif sistemler ortaya çıkmıştır. Çeşitli hukuk sistemleri daha çok yerel uyuşmazlıkları çözmek için farklı türdeki geniş kapsamlı tahkim sistemlerini kullanıyor. Amerika Birleşik Devletleri'nde, grup tahkimi en yaygın kullanılan kolektif tahkim mekanizması türüdür. ABD Yüksek Mahkemesinin içtihatı, bu sistemin geliştirilmesinde etkili olmuştur. İlk başlarda, Yüksek Mahkemenin grup tahkimi hakkındaki görüşü oldukça olumludur ve grup üyeleri lehinedir. Nitekim grup tahkiminin resmi olarak kabul görmesi de yine Yüksek Mahkeme'nin buna ilişkin ilk kararından sonra olmuştur. Fakat Yüksek Mahkeme'nin bu pozitif tutumu zamanla radikal bir değişime uğramış ve grup tahkimi sisteminin aleyhine dönmüştür. Örneğin Yüksek Mahkeme'nin kararına göre grup tahkimi, tahkimin yapısını değiştiren bir sistem olarak tanımlanmış ve bu da taraflar arasındaki sözleşmenin çok dar bir biçimde yorumlanabileceği anlamına gelmiştir. Böylelikle de grup tahkiminin uygulanma alanı oldukça daralmıştır. Kolektif tahkim mekanizmaları ile geleneksel tahkim arasında, özellikle de kararların tenfizi noktasında belirli sorunlar doğurabilecek farklılıklar olduğu söylenebilir. Avrupa'da, her ne kadar Avrupa Birliği kolektif yargılama mekanizmaları oluşturmaya çalışsa da grup davaları benimsenmemektedir. Sonuç olarak, Avrupa'da grup tahkiminden farklı olarak iki kolektif tahkim modeli geliştirilmiştir. Hem tahkim hem de kolektif yargılamanın avantajlarını bünyesinde barındırma imkanı olan toplu tahkim yargılamaları hala gelişme aşamasındadır ve büyük olasılıkla iç anlaşmazlıklar için kullanılmaya devam edecektir. Bununla birlikte, özellikle Yüksek Mahkeme'nin son kararlarından sonra, grup tahkimi sisteminin kapsamının yerel uyuşmazlıklar için bile çok daralacağı söylenebilir.

Anahtar Kelimeler
Tahkim, Grup davası, Sınıfsal tahkim, Toplu tahkim, Toplu tazminat

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Collective Arbitration

I. Introduction

The European Commission has recently submitted a new proposal which provides for the possibility of a consumer class action lawsuit. The rationale behind this is that economic globalization and digitalization has increased collective interests of consumers. Many consumers in different countries may be affected by the same problem such as a contract term[1]. Therefore, a system is needed that provides an effective protection against mass harm situations under Union law[2].

Why is a collective litigation system more effective for these types of cases? Firstly, it is more practical to resolve once and for all those claims which arise from the same cause[3]. Moreover, there are cases in which the authorities cannot sufficiently sanction the responsible actor or there is a lack of motivation to go to court because of the minor nature of the harm. Therefore, in those cases, an initiative which represents each damaged person can not only compensate for minor harms but also prevent powerful companies from escaping justice[4].

Nowadays, it is inevitable to have these types of disputes in well-functioning markets and industries. Especially in labor and consumer law, one event, contract or product can easily harm many persons[5]. Although legal systems concentrate on bilateral disputes, they also provide some solutions for collective litigation. These different mechanisms vary by jurisdiction and have many differences. For instance, in the United States, class action lawsuits allow representatives to act in court on behalf of the class[6].

A class action is a legal proceeding that determines the claims of a number of people against the same defendant in the same action. In a class action, when one or more people go to the court on behalf of themselves, they also do so for a number of other

1 Commission, 'Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' COM/2018/184.

2 Commission, 'Report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)' COM/2018/40.

3 Deborah R. Hensler, 'Class actions in context' in Deborah R. Hensler and others(eds), *Class actions in context-How culture, economics and politics shape collective litigation* (Edward Elgar 2016) 388.

4 Frederic M. Scherer, 'Class actions in the U.S. experience: an economist's perception' in Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello(eds), *The law and economics of class actions in Europe- Lessons from America* (Edward Elgar 2012) 27.

5 International Labour Office, 'Collective dispute resolution through conciliation, mediation and arbitration: European and ILO perspective' <http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/documents/meetingdocument/wcms_366949.pdf> accessed 19 october 2007.

6 Stacie I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* (Oxford University Press 2013) para 1.3.

people by representing them, in other words, on behalf of the class[7]. There are four conditions for initiating a class action[8]; (i) the number of members of the group must be large enough that it makes the participation of all parties impossible (however, the minimum number of members required for a class action is not specified[9]), (ii) the questions of law or fact must be the same for each member, (iii) the claims of representatives must be typical of those of the class, (iv) an adequate representation of the class must be provided to assure the interests of the members.

The history of class actions in the United States began in the 19th century. However, it was impossible for absent parties to be part of the trial at that time. Therefore, the system did not work effectively[10]. Later, in 1966, the modern class actions system was updated through rule 23 of the Federal Rules of Civil Procedure which provided an opt-out mechanism for class actions[11].

After a while, companies have started to add an arbitration clause to their contracts to avoid a possible class action lawsuit against them. Their aim was to oblige potential class plaintiffs to resolve their conflicts individually. Thus, the number of plaintiffs would have remained limited and the expenditure would also have been lower. However, courts followed another approach and decided to apply collective redress in arbitration[12].

After the start of class arbitration, other types of collective mechanisms in arbitration also appeared. Although large-scale arbitration mechanisms were usually used in the United States, other countries also started to give plaintiffs the possibility of using different types of large-scale arbitration in their jurisdictions[13]. In this study, we will try to understand the different collective mechanisms in arbitration by comparing them across different countries and systems and to find out if it is possible to find a uniform mechanism solving international disputes.

We will start with a historical overview of large-scale arbitration. In this part, we will examine different types of large-scale arbitration by analyzing case law in the United States. Then we will try to compare class arbitration with ordinary arbitration in the United States. In this chapter, we will try to identify the characteristics of class arbitration by examining procedural and contractual issues. Different institutional rules will be also mentioned in this part.

7 Rachael Mulheron, *The Class Action in Common Law Legal Systems* (Hart Publishing 2004) 3.

8 U.S. Federal Rules of Civil Procedures Rule 23.

9 Murat Şahin and Hande Çelik Şahin, 'Toplu Hak Aramada Etkin Bir Yol Olarak Mukayeseli Hukukta ve Türk Hukukunda Sınıf Davaları' (2014) 72 Journal of Istanbul University Law Faculty <http://dergipark.org.tr/iuhfm/issue/9191/115294> accessed 13 June 2014.

10 Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press 1987) 217.

11 ibid 238.

12 Stacie I. Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (2010) University of Missouri School of Law Legal Studies Research Paper No. 2010-16 <https://ssrn.com/abstract=1656511> accessed 11 August 2010 498.

13 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.7.

In Europe, collective redress is still a controversial topic even though different member states have adopted different collective redress systems in their national jurisdiction[14] because these systems may be used in abusive ways and cause some unlawful consequences[15]. In the fourth chapter, we will analyze European approach on large-scale arbitration by examining current systems that allow collective arbitration procedures in certain cases. Finally, we will discuss the possible future of collective arbitration.

II. Different types of large-scale arbitration

There are different types of mechanisms that allow multiple parties to participate in a single proceeding. "Multiparty arbitration" refers to an arbitration in which at least one party is composed of more than one person. Many people could together form one party in a dispute for different reasons [16]. For instance, in the case of a consolidated arbitration, several claims that could be settled separately are tried together by a single court in a consolidated case since there are links between the parties and common issues of law and fact[17]. The characteristic of multiparty arbitration is that each member of the parties is a direct part of the case. However, "multiparty arbitration" will not be examined in this study. We will focus on large-scale procedures in which several legal entities participate indirectly in an arbitration proceeding as one party, such as collective arbitration. In other words, the group members are not direct parts of the case[18]. We will start with the examination of class arbitration.

A. Class arbitration

Class arbitration is a term that designates arbitral proceedings modeled on "class actions" before federal jurisdictions. In class arbitration, one or more applicants identify themselves as representatives of the other members of the group claiming similar claims.

Class arbitration is the first type of large-scale arbitration in the world which developed in the United States. Therefore, it is better to first analyze the history of class arbitration to see how it has developed with different decisions and cases according to the case law[19].

14 Lia Athanassiou, 'Collective Redress and Competition Policy' in Arnaud Nuyts and Nikitas E. Hatzimihail(eds), *Cross-Border Class Actions- The European Way* (Selp 2014) 146.

15 José M. Júdice, 'Collective Arbitration in Europe- The European way might be the best way' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 46.

16 Berk Demirkol, 'Çok Taraflı Tahkim Yargılaması' in Zeynep Derya Tarman(ed), *Genç Milletlerarası Özel Hukukçular Konferansı* (On İki Levha Yayıncılık 2018) 43.

17 William W. Park, 'La Jurisprudence Américaine en matière de « class arbitration » entre débat politique et technique juridique' (2012) Revue de l'Arbitrage 507 <http://www.williamwpark.com/documents/Jurisprudence%20Am%20Class%20Arbitration.pdf> accessed 23 October 2012 9.

18 Pelin Akın, 'Uluslararası Tahkimde Çok Taraflılık' (2014) 4 Gazi Üniversitesi Hukuk Fakültesi Dergisi < http://webftp.gazi.edu.tr/hukuk/dergi/18_3-4_13.pdf> accessed 2014 331.

19 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.12.

1. Keating v Superior Court

Class arbitration began in the United States in the early 1980s with the case *Keating v. Superiour Court*[20]. As mentioned before, companies were using arbitration clauses to avoid possible class actions suits. Courts realized that this could harm the effective protection of interests common to a group. Therefore, the Supreme Court of California proposed a better and more efficient solution in which both class action and arbitration were harmonized[21].

In this case, Richard Keating, a franchisee, filed a class action against his franchisor, Southland, for the violation of the California Franchise Investment Law. Then, Southland referred to an arbitration clause in the franchise agreement and also the other similar individual actions that were opened by other franchisees as a defense. Following this, Keating objected that the arbitration clause was inapplicable because the franchise agreement was a contract of adhesion[22].

The California Supreme Court did not accept this argument. The fact that there was a contract of adhesion was not enough to invalidate the arbitration clause. The important point is to assess whether this clause was oppressive and in this case, the clause was not oppressive taking into account the reasonable commercial expectations of the parties. However, the court also emphasized the importance and advantages of class actions in such cases where large groups of people have been affected. Therefore, according to the court, if a clause eliminates the possibility of any form of class proceedings, in that case it may be oppressive and is not reasonable for the parties[23]. In other words, the court pointed out that if an arbitration clause blocked the claimants' right to file a class action, it would not be valid[24].

Furthermore, the court described the criteria to be part of the group and the options of the members of this group as follows:

> "The members of a class subject to class-wide arbitration would all be parties to an agreement with the party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so[25]."

20 *Keating v. Superiour Court* (1980) 167 Cal.Rptr. 481.

21 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.17.

22 Elizabeth P. Allor, 'Keating v. Superior Court: Opressive Arbitration Clauses in Adhesion Contracts' (1983) 71 Cal. L. Rev. 1239.

23 *Keating (n 16) para 17.*

24 Allor (n 22) 1242.

25 *Keating (n 20) para 19.*

2. Green Tree Financial Corp. v Bazzle

After the decision of the Supreme Court of California, some states (Pennsylvania, South Carolina) decided to follow this approach and allow class arbitration in their own jurisdictions[26]. Meanwhile, there was still no decision from the U.S. Supreme Court; therefore there were also other states who did not accept class arbitration. Furthermore, in 1995, the federal court of appeals for the Seventh Circuit ruled in its decision *Champ v Siegel Trading Co.*[27], that if class arbitration wasn't expressly provided for in the agreement, class arbitration would not be possible[28]. As a result, there was no certainty as to whether class arbitration was possible until the *Green Tree Financial Corp. v Bazzle* U.S. Supreme Court decision of 2003[29].

In this case, the question was whether the parties may file class arbitration instead of an individual arbitration proceeding if the arbitration agreement was silent about class arbitration[30]. The plaintiffs submitted to arbitration with respect to their agreement with Green Tree, the defendant. They claimed that there was a violation of the consumer law of South Carolina. The arbitrator, chosen by Green Tree, surprisingly decided that the case was suitable for a class procedure, and therefore, condemned the company to pay several million dollars to all class members. Thereafter, Green Tree opposed this decision by saying that the arbitration agreement did not authorize class arbitration proceedings[31].

The arbitration provision between parties was drafted as follows: "*all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... shall be resolved by binding arbitration by one arbitrator…"*. So there was no mention of class arbitration. In other words, the contract was silent on the matter of class arbitration. However, the Supreme Court ruled that in those cases, the arbitrator, not the court, must decide whether a contract allows class arbitration or not, by interpreting the state law. The court did not express any rejection of class arbitration even though the contract was silent about it. In other words, the possibility of class proceedings in arbitration was accepted[32].

26 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.19.

27 *Champ v Siegel Trading Co.* (1995) 55 F. 3d 269.

28 Bernard Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law 2005) para 587.

29 *Green Tree Financial Corp. v Bazzle* (2003) 539 U.S. 444.

30 Eric P. Tuchmann, 'The Administration of Class Action Arbitrations' in Permanent Court of Arbitration(ed), *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) para 13.12.

31 *Bazzle* (n 29) chapter 1.

32 Cornelia Pillard, 'Justice on the Move: From Class Action to Class-Wide Arbitration-Remarks' in Nabil Antaki and Emmanuel Darankoum, *La justice en marche: du recours collectif à l'arbitrage collectif, en passant par la mediation* (Thémis 2005) 36.

3. Stolt Nielsen v Animal Feeds

This positive approach of the Supreme Court changed dramatically in seven years. Although, according to the decision above, it was the arbitrator who decides if a contract was silent or ambiguous on class arbitration, the court limited this power of the arbitrator in its judgment in *Stolt Nielsen v Animal Feeds*[33].

In this case, the parties submitted to arbitration for a breach of competition law. For the petitioners, a bilateral procedure would obviously have been less advantageous because it would have had the effect of reducing the cost-benefit ratio of the action brought by each plaintiff. At the beginning of the dispute, the parties therefore decided to establish an arbitration panel to determine whether the various claims could and should be grouped together before the same arbitral tribunal tried the merits of the case. The arbitral tribunal had rendered a unanimous partial award concluding that the terms of the contracts authorized the class arbitration procedure[34].

However, according to the majority of the judges of the Supreme Court, the arbitral tribunal had exceeded its powers by interpreting that the defendants authorized the class arbitration. The Court began with the clarification of its earlier decision in *Bazzle*. The purpose was not to favor class arbitration, but to establish that the parties can agree on class arbitration. The arbitrators cannot therefore decide on a class arbitration process if the contract is silent or ambiguous on that matter[35]. The Court explained its reasoning with this sentence:

> *"This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator*[36]."

The court clarified this approach with another decision, *Oxford Health Plans v Sutter*[37]. In this case, there was also an arbitration contract which was silent on class arbitration. The arbitral tribunal decided that it was possible to proceed to the class arbitration according to the interpretation of the contract between the parties. Then, the defendant filed an application to the Federal Courts to quash the arbitrator's decision, claiming that he had exceeded his powers according to the *Stolt Nielsen* decision. The Supreme Court held that in *Stolt Nielsen*, the arbitrators had not interpreted the contract between the parties, nor had they shown any agreement allowing class proceedings. In other words, the reason they had exceeded their powers was not the misinterpretation of the contract, rather, that they hadn't used

33 Gary Born and Claudio Salas, 'United States Supreme Court and Class Arbitration: A Tragedy of Errors, The Symposium' (2012) J. Disp. Resol. (2012) 33.

34 Nicholas R. Weiskoph, *Commercial Arbitration Theory and Practice* (3rd edn Vandeplas Publishing 2014) 394.

35 Lea H. Kuck and Gregory A. Litt, 'International Class Arbitration' in Paul G. Karlsgodt (ed), *World Class Actions-A guide to group and representative actions around the globe* (Oxford University Press 2012) 706.

36 *Stolt-Nielsen v Animal Feeds International Corp.*, 559 U.S. 662, chapter b.

37 *Oxford Health Plans v Sutter* (2012) 133 S. Ct. 2064.

their interpretive role at all. In contrast, in this case, the arbitrator interpreted the contract and reached a conclusion that the contract authorized class proceedings. The misinterpretation of the arbitrator is not enough for the vacation of his decision unless he didn't arguably interpret the contract. Therefore, the Court rejected the motion of the defendant[38].

4. AT&T Mobility v Conception

After the Stolt Nielsen decision, the Supreme Court issued another decision against class arbitration, *AT&T Mobility v Conception*[39]. In this case, complaints were made by consumers against a telephone manufacturer. Sales contracts allowed bilateral arbitration, but prohibited class arbitration. The plaintiffs nonetheless seized the California Federal District Court instead of arbitration. The Company challenged by showing the arbitration clause. However, the court refused to compel the parties to arbitrate, relying on California jurisprudence, *Discover Bank*[40]. Subsequently, the Court of Appeal also confirmed this decision but the Supreme Court set it aside[41].

Firstly, what was the decision by the California Supreme Court in Discover Bank? In this decision, the court followed the principles founded in the Keating decision and held that; if a contract of adhesion includes a class-action waiver in arbitration, such waivers are inadmissible and should not be applied. The reasoning was that this waiver may allow the powerful party to run away from responsibility for its own fault in this type of cases. California courts were applying this rule to declare arbitration agreements as inadmissible[42].

However, the Supreme Court ruled that the class waivers in the arbitration agreement are admissible. According to the Court, class arbitration changes the main characteristics of arbitration. Arbitration is no longer informal and becomes slower and more costly with class proceedings. Moreover, the risks are higher for defendants in class arbitration. Therefore, the parties can waive class proceedings in their arbitration agreement[43].

After this judgment, the court followed the same approach in its future decisions[44]. It has been emphasized that the waiver of the class action simply limits the arbitration

38 Dua Huanfang and Xu Chuanlei, 'The availability of class arbitration for silent agreements: Contract interpretation theory or arbitrability doctrine? *Frontiers of Law in China'* (2017) Front. Law. China 12/1 <http://dx.doi.org/10.3868/s050-006-017-0005-0> accessed 4 May 2017 84.

39 *AT&T Mobility v Conception* (2011) 563 U.S. 333.

40 *Discover Bank v Superior Court of Los Angeles* (2005) 36 Cal. 4th 148.

41 Thomas E. Carbonneau, *The law and practice of arbitration* (5th edn, Juris 2014) 460.

42 *AT&T Mobility* (n 39) part II.

43 ibid chapter B.

44 *American Express Co. v Italian Colors Restaurant* (2013) 133 S.Ct. 2304, on waivers of class proceedings in arbitration in competition law; *Epic Systems Corporation v Jacob Lewis* (2018) 584 U.S. , on waivers of class proceedings in arbitration in labor contracts.

to both contracting parties. The court refused the argument that class arbitration was required to pursue claims that might otherwise escape the judicial system[45].

5. Outside of the US

Class proceedings in arbitration have not only been adopted in the US, despite it being the best-known advocate of class arbitration. Class arbitration has also been successfully applied in other countries such as the Republic of Colombia and Canada[46]. Meanwhile, some courts and international organizations have taken a stance against class arbitration. As an example, the International Chamber of Commerce (ICC) took a negative position against the US model class arbitration because it undermines the right of defense and creates a risk of legal blackmail[47].

B. Mass Arbitration

Another type of large-scale arbitration is mass arbitration. It has been used only in international investment disputes[48]. Mass arbitration totally lacks the representation element which is one of the key elements of class proceedings. It seems a more complex type of classical multiparty arbitration, in which there are many claims in the same arbitration[49]. Nonetheless, mass arbitration has specific elements which distinguish it from multiparty arbitration[50].

The term "mass" was used by ICSID in its decision *Abaclat v Argentine Republic*[51]. The court described a large number of applicants together as one mass[52]. As will be examined in more detail below, mass arbitration can be considered as a hybrid system containing some characteristics of both aggregate and representative proceedings[53].

1. Abaclat v Argentine Republic

This case was brought on the basis of the investment treaty between Italy and Argentina. An association, the TFA (Task Force Argentina), acted on behalf of 8

45 Weiskoph (n 34) 425.

46 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.26.

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

48 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.29.

49 Luca G. Radicati di Brozolo, 'Class arbitration in Europe?' in Arnaud Nuyts and Nikitas E. Hatzimihail(eds), *Cross-Border Class Actions- The European Way* (Selp 2014) 212.

50 Eloïse Obadia, 'Mass Arbitrations in International Investment Cases' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 106.

51 "The present proceedings are particular insofar as they gathered as of the date of their initiation, on the Claimants' side, over 180,000 individuals and corporations. In the light of this figure, the present proceedings can be qualified as "mass claims" proceedings.", *Abaclat and others v Argentine Republic* (2011) case No. ARB/07/5, Decision on Jurisdiction and Admissibility para 294.

52 ibid para 480.

53 Carolyn B. Lamm and others, 'Mass Claims in Investment Arbitration' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 115.

Italians holding Argentinian sovereign bonds. These were dissatisfied with the debt restructuring measures taken by Argentina after the economic crisis of 2001. The goal of the TFA was to serve the benefits of the Italian bondholders by negotiating with Argentina. After understanding that trying to solve the problem with Argentina was not possible, the TFA obtained a new mandate from other bondholders and applied to ICSID. As a result, approximately 60,000 claimants were individually named in the request for arbitration although the TFA's mandate package was accepted by over 180,000 bondholders[54]. This case was different from class arbitration because it started as aggregate proceedings in which all parties were directly participating in the procedure. However, the fact that there were many parties involved in the case was a problem. The court had to ensure good governance of the proceedings for each party. Therefore, the court determined its own strategy. From the moment all parties participated, it was moved to the representative system[55]. The court explained its reasoning with these words:

> *"…it appears that all these various forms of collective proceedings share a common "raison d'être": collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings were seen as necessary, where the absence of such mechanism would de facto have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism[56]."*

> "*…Although Claimants made the individual and conscious choice of participating to the arbitration, their participation is thereafter limited to a passive participation in the sense that a third party, TFA, represents their interests and makes on their behalf all the decisions relating to the conduct of the proceedings. The high number of Claimants further makes it impossible for the representative to take into account individual interests of individual Claimants, and rather limits the proceedings to the defense of interests common to the entire group of claimants.[57]"*

In consequence, the court held that this procedure was a mixed procedure of aggregative and representative proceedings[58]. However, the court didn't take the risk of defining mass proceeding. After the Abaclat decision, there were also other arbitrations in investment law. However, the courts refused to resort to mass proceedings due to the significantly lower number of claimants without specifying the required number of parties to enforce it. As a result, Abaclat is still the only case where a mass arbitration procedure has been applied[59].

54 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.124.

55 Luca G. Radicati di Brozolo and Flavio Ponzana, 'Representative Aspects of "Mass Claim" Proceedings in Investor-State Arbitration' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 136.

56 *Abaclat* (n 51) para 484.

57 ibid para 487.

58 ibid para 488.

59 Lamm and others (n 53) 115.

C. Collective Arbitration

The last large-scale arbitration is collective arbitration. This term is used to define all collective proceedings in arbitration which do not fall within the scope of class arbitration. In this context, mass arbitration can also be considered as a form of collective arbitration but it is better to distinguish it by considering its unique form[60]. There are three different types of collective arbitration - the American system and the other two systems existing in Europe. There are small differences between the developments of these systems[61].

1. The United States

The only difference between collective and class arbitration in US is the opt-in/out procedure. Instead of directly being a member of the class, applicants must take steps to join the group in collective arbitration. That means their willingness to be part of the proceedings plays the decisive role. This difference was clearly specified in one of the decisions of the federal district court for the Southern District of New York[62]. Therefore, the development of class and collective arbitration are very similar and some courts apply the principles established by the Supreme Court in its decisions on class arbitration by analogy. However, collective arbitration in the United States has only recently started and so it is not yet clear if there will be other differences apart from the opt-in/out procedure[63]. Consequently, there are also other courts that have refused to apply those principles in collective arbitration cases[64].

2. Europe

Collective arbitration also exists in Europe, albeit in a limited way. In Germany, special rules have been drafted by the German Institution of Arbitration for a small number of shareholder conflicts. The Institution decided to create this collective arbitration mechanism as a result of a decision of the German Federal Court of Justice which confirmed the arbitrability of shareholder disputes[65]. The other European

60 Strong, *Class, Mass, and Collective Arbitration in National and International Law*, (n 6) para 2.143.

61 ibid para 1.32.

62 *"….FINRA Rule 13204 prohibits arbitration of "class action claims."…. however, whether that exemption of class action claims from arbitration also applies to plaintiff's .. collective action claims…. Although collective and class actions have much in common, there is a critically important difference: collective actions are opt-in actions, i.e., class members automatically participate in a class action unless they take affirmative steps to opt out of the class action. Collective actions bind only similarly situated plaintiffs who have affirmatively consented to join the action.….this Court finds that .. collective actions are within the scope of the parties' agreement to arbitrate." Velez v Perrin Holden & Davenport Capital Corp.* (2011) 769 F. Supp. 2d 445.

63 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.147.

64 *"Class arbitration and the collective proceedings that the pilots have demanded here are so fundamentally different that Stolt-Nielsen does not dictate the result. In the collective arbitration sought here, unlike in class arbitration, all of the affected pilots are actual parties." JetBlue Airways Corp v Stephenson* (2011) the New York State Supreme Court, Appellate Division 88 A.D.3d 567.

65 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 1.34.

system allowing collective arbitration was developed in Spain. This system has a specialty because it was created by legislation[66]. These systems will both be treated in detail in chapter four.

III. A Comparison between collective arbitration and ordinary arbitration in the US

As already discussed above, collective redress mechanisms offer many advantages (such as consistency between similar cases) if they work properly[67]. However, these systems change the nature of arbitration according to the case law of the Supreme Court[68]. Does a collective proceeding change the nature of arbitration? This chapter discusses some differences between collective proceedings in arbitration, in particular class arbitration, and ordinary arbitration in the US.

A. Contractual Issues

1. Consent

Arbitration is a conventional mode of dispute resolution by individuals (the arbitrators) chosen by the parties and invested with the mission to judge in place of the state courts. It is therefore, above all, a conventional method that relies on the consent of the parties. The arbitration agreement is the cornerstone of arbitration[69]. It also sets the limits of arbitration. Therefore, there is no arbitration outside the limits of the arbitration convention. This is the contractual aspect of the arbitration[70].

The arbitration agreement is a contract. It must therefore express the will of the parties[71]. As in any contract, the will expressed in it must sometimes be clarified by way of interpretation. The applicable rules of interpretation are those which apply to contracts of substantive law[72].

In class arbitration, the question of consent has two aspects. First, we have to look at whether there is an agreement in arbitration. This first step makes no difference to the standard arbitration in which the existence of the arbitration agreement is also examined. Therefore, its principles apply in the same way[73]. Second, it is necessary

66 ibid para 1.35.

67 Christopher R. Drahozal, *Commercial Arbitration: Cases and Problems* (2nd edn LexisNexis 2006) 413.

68 See (n 32).

69 Ziya Akıncı, *Milletlerarası Tahkim*, (4th edn, Vedat 2016) 93.

70 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage International Droit et pratique à la lumière de la LDIP* (2nd edn, Weblaw 2010) para 21.

71 Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 7-34.

72 ibid para 174.

73 Radicati di Brozolo, 'Class arbitration in Europe?' (n 49) 216.

to determine whether this agreement that authorizes arbitration also allows class or collective arbitration. At this stage, an agreement can exclude or authorize class or collective arbitration. Furthermore, an agreement can be silent or ambiguous (neither exclude nor authorize) class arbitration[74].

In the case where the agreement explicitly allows collective proceedings in arbitration, there is no problem with the consent of the parties. However, it is rare to find these types of agreements in practical life. Usually, these agreements explicitly exclude those proceedings or are silent on this subject[75].

When the agreement is silent or ambiguous on collective proceedings, it is not easy to determine whether parties agreed on class or collective arbitration. It remains a question that has been given different answers. As it has been discussed above, the approach of the Supreme Court has changed over time. The Bazzle decision was more pro class arbitration but the approach became more restrictive following the Stolt-Nielsen decision. The reasoning was based on the major changes in the nature of arbitration as explained above[76]. Nonetheless, the agreement between the parties must be interpreted in order to decide about class or bilateral arbitration. As also explained above, the Supreme Court recognizes arbitral decisions on the application of class action proceedings as long as these are an outcome of a duly and properly applied interpretation method on the parties' agreement.[77].

To interpret properly, courts and arbitral tribunal must begin by reviewing the agreement to see if there is implied consent to class arbitration. For instance, broad expressions such as "all disputes" are accepted as an agreement on large-scale arbitration according to courts in the US. Industry custom and practice also may help to demonstrate implied consent of the parties[78]. Furthermore, the parties can give consent implicitly to class arbitration by choosing specific arbitral rules to apply to their proceedings[79].

In addition, the question of who decides (the court or the arbitrator) whether the agreement authorizes class arbitration has not yet been answered. Although arbitrators evaluated the agreement in the Stolt Nielsen and Oxford Health Plans cases, there was a post-dispute agreement between parties that the decision should be left to arbitrators in these cases. The Supreme Court didn't clarify that issue. Therefore, courts have

74 Stacie I. Strong, 'Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles' (2011) University of Missouri School of Law Legal Studies Research Paper 2011/07, 15 < https://ssrn.com/abstract=1791928> accessed 18 May 2011.

75 Christopher R. Drahozal, 'Class Arbitration in the United States' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 24.

76 See (n 32).

77 See (n 33).

78 Strong *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 4.44.

79 ibid para 4.45.

different approaches on that question. Some courts follow the Bazzle decision that gives arbitrators the right to decide, but other courts find it more appropriate to let the courts decide. This question will remain uncertain until the Supreme Court has ruled on it[80].

Lastly, it may also be useful to make a comment about the opt-out system in the United States. The application of the opt-out or the opt-in system does not create any problems for consent issues regarding the class arbitration clause in the agreement itself. Since the arbitral award is expected to have an equal enforceable force to a State court decision, all parties should at least be aware of the proceedings. Later on, parties may choose whether or not to actively participate in the proceedings as in a traditional state proceeding. However, the automatic inclusion of parties in the proceedings regardless of their awareness of the proceedings might be considered unjust. This is also why the European approach does not embrace the opt-out system. Thus, this problem does not lie with consent that allows class arbitration (the clause), but with the consent to participate in the proceedings. There is no problem with the collective arbitration system in the US, since it follows the opt-in principle[81].

2. Class waivers

There is also another scenario in which the parties have expressly agreed to exclude class proceedings in their arbitration. However, this exclusion clause might be invalid for some reason. This is similar to the arbitrability condition because parties cannot arbitrate in certain situations, even if they intend to do so. In fact, arbitrability refers to the suitability of a case for arbitration[82]. However, it will be examined whether the parties can agree on the prohibition of class proceedings in the arbitration. The problematic is not the arbitration part, but the prohibition of class proceedings in certain situations.

The exclusion of class proceedings in arbitration agreements has been the subject of much discussion in the United States, particularly in the area of consumer rights and labor law[83]. However, the decision in *AT&T Mobility v Conception* put an end to them by declaring that class waivers are valid[84]. The issue was the application of a clause of the Federal Arbitration Act (FAA)[85] which declared that arbitration agreements *"are valid, irrevocable and enforceable except for legal or equitable reasons for the revocation of any contract"*[86]. In that case, parties protested against the

80 Drahozal, 'Class Arbitration in the United States' (n 75) 26.

81 Júdice (n 15) 46.

82 Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international* (Bruylant/L.G.D.J/Schulthess 2002) para 326.

83 Drahozal, 'Class Arbitration in the United States' (n 75) 25.

84 See (n 43).

85 [1925] section 2.

86 *Conception* (n 35) part II.

waivers as unacceptable according to state contract law of California which prohibits class waivers[87]. The reasoning of the state law was; first, it can be small amounts of damages in conflicts of consumer contracts of adhesion; second, the powerful party can easily escape responsibility by paying small amounts of money to consumers. In other words, it was illegal to put a class waiver in the arbitration agreement to ensure effective consumer protection according to the California law on contracts[88]. However, the Supreme Court ruled that the California law contradicted the FAA. The purpose of the FAA was to guarantee a simplified procedure. Prohibiting class waivers in arbitration is therefore not inconsistent with the FAA because class arbitration changes the main characteristics of arbitration as explained before[89].

Furthermore, an interesting point of this decision was that the Supreme Court indirectly defined arbitration as a simple and informal bilateral procedure[90]. In addition, the Supreme Court has maintained its position on class exemptions in the area of competition and labor law even if there were legal acts in favor of class proceedings[91].

B. Procedural Issues

Before the examination of the different aspects, it is better to briefly explain the class arbitration procedure. The procedure for class arbitration is not so different from a standard arbitration involving two parties. After the appointment of the arbitral court, parties exchange their submissions, the trial takes place, and the final award is delivered at the end just as in bilateral arbitrations. However, class arbitration has some extra elements that are not found in bilateral arbitration[92].

Firstly, there is a non-rule-based model if parties have not submitted any specific rules. This type of procedure follows a hybrid model in which judges are also responsible for the class action aspects of the procedure[93]. Although it is always possible to have such a non-rule-based procedure in theory, the parties generally choose arbitration rules created for class arbitration proceedings[94]. We will examine the two most popular class arbitration rules; the American Arbitration Association (AAA) Supplementary Rules[95] and JAMS Class Actions Procedures[96].

87 Drahozal, *Commercial Arbitration: Cases and Problems* (n 67) 24.

88 See (n 42).

89 See (n 43).

90 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 4.82.

91 See (n 44).

92 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.25.

93 ibid para 2.26.

94 ibid para 2.33.

95 Supplementary Rules for Class Arbitration [2003].

96 [2009].

1. Arbitration Rules

These two arbitration rules were drafted after the Bazzle decision of the Supreme Court which officially authorizes class proceedings in the US[97]. There is no significant difference between the two procedures.[98] In the first place, they begin with the situations in which the institutional class arbitration rules apply. The procedure will be governed by these rules if; (i) the parties choose one of the institutional rules to administer their procedure and a party applies to arbitration *"on behalf of or against a class or purported class"* or, (ii) a court gives an order by referring to an arbitration rule to govern the procedure[99].

We can divide these procedures into three stages; clause construction, class certification, and final award[100]. However, before the application of these stages by arbitrators, it is better to make a remark on the determination of arbitrators because the whole procedure will be followed by arbitrators. There is slight difference between the rules of two institutions on this subject[101]. However, we will review the selection of arbitrators below.

a) Clause construction

The first duty of arbitrators in class arbitration proceedings is to decide whether the agreement of the parties allows or prohibits class arbitration. After making a decision, arbitrators must draft a written document as a partial final award to declare their decision. This is called "clause construction award"[102]. It might also be noted that both institutions have drafted a rule that shows their neutrality in class arbitration[103]. According to this rule, the existence of these additional rules cannot be considered as a positive or negative factor to determine whether collective arbitration has been authorized. In other words, the justification for the adoption of class arbitration cannot be based on the simple application of institutional rules[104].

After the clause construction award, the two institutions provide different rules. The AAA Supplementary Rules ask the arbitrator to suspend the procedure for 30 days to allow any party to go to court to seek to confirm or annul the clause construction award[105]. The reasoning of this break is to recognize that class treatment necessarily

97 Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions* (n 28) para 606.

98 Strong *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.35.

99 Supplementary Rules (n 95) rule 1; JAMS Class Actions Procedures (n 96) rule 1.

100 Eric P. Tuchmann, 'The American Arbitration Association's Administration of Class Arbitrations and the Supplementary Rules for Class Arbitrations' in Nabil Antaki and Emmanuel Darankoum, *La justice en marche: du recours collectif à l'arbitrage collectif, en passant par la mediation* (Thémis 2005) 45.

101 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.43.

102 Eric P. Tuchmann, 'The Administration of Class Action Arbitrations' in Permanent Court of Arbitration(ed), *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) para 13.18.

103 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.47.

104 Supplementary Rules (n 95) rule 3; JAMS Class Actions Procedures (n 96) rule 2.

105 Supplementary Rules (n 95) rule 3.

involves dealing with the rights of parties who are not personally represented, and therefore, to allow a first possibility of judicial review of the clause construction award. This gives the parties some assurance that the final decision will also be confirmed at the end of the proceedings as clause construction award[106].

The JAMS Class Action Procedures on the other hand, do not provide for an obligatory stay and give no indication of what could be an appropriate period of time to begin a judicial review of the clause construction award. The purpose of the JAMS is to prevent further conflicts over the duration of the stay of judicial review between the relevant arbitration statute and the institution's arbitration rules[107].

b) Class certification

After the clause construction award, if the 30-day period has passed or the decision has been approved by the court, the arbitrator may proceed to the next stage; the determination of class action. At this point, the arbitrator will decide whether the proceedings will take place as class proceedings under the rules of institutions which are quite similar to the rule 23 of the Federal Rules of Civil Procedure regulating class actions[108].

At this point, the rules of the AAA are more specific on the class action criteria. The conditions are listed in detail, although they were technically taken from rule 23 of the Federal Rules of Civil Procedure[109]. These conditions are the basic prerequisites of class actions; numerosity, commonality, typicality and adequacy of representation. In addition, the AAA has another requirement that each member must have the same or a similar arbitration clause in their contract in order to join the class. JAMS, however, instead of listing the different conditions, simply refers to Rule 23 of the Federal Rules of Civil Procedure[110]. However, this makes no big differences in practice[111].

After examining the conditions, if the arbitrators decide to apply a class arbitration proceeding, they must again make another partial final award called a "Class determination award" according to the AAA Supplementary Rules. Once again, the arbitration procedure must wait at least 30 days to allow any party to go to court to seek to confirm or annul that partial final award as provided for in the clause construction award[112]. In contrast, JAMS leaves the choice to the arbitrators[113].

106 Tuchmann, 'The American Arbitration Association's Administration of Class Arbitrations and the Supplementary Rules for Class Arbitrations' (n 100) 45.

107 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.53.

108 Tuchmann 'The Administration of Class Action Arbitrations' (n 30) para 13.19.

109 Supplementary Rules (n 95) rule 4.

110 JAMS Class Actions Procedures (n 96) rule 3.

111 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.57-2.58.

112 Supplementary Rules (n 95) rule 5.

113 Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions* (n 28) para 613.

Following the class determination award, the next task of arbitrators is to prepare a "notice of class determination". The conditions of this notice have been regulated in both institutional rules in a similar manner[114]. The requirements are set out in detail and are once more similar to rule 23 of the Federal Rules of Civil Procedure. According to these rules, the notice must provide the necessary information on the nature of the action, the definition of the class, the class claims, the right of opt-out, the arbitrators and the representatives of the class. In addition, unlike JAMS, the notice must also include the "class arbitration docket" under AAA rules[115]. This will be discussed below.

c) Final award

The final task of the arbitrators is to issue a final award on the merits. This final award must be issued regardless of whether the conclusion is beneficial for the class or not. Furthermore, the class must be defined and those who received the notice must be described. Moreover, the final award must also include the people who opted out of the class[116]. These conditions are very important because future courts and parties can learn any extension of the award through this information[117].

In addition, to give a brief overview of the rest of the world, the major arbitration institutions have not provided rules for class arbitration - although they have accepted multiparty arbitration proceedings outside the United States. As mentioned above, the ICC took a negative position against the US model class arbitration because it undermines the right of defense and creates a risk of legal blackmail[118].

2. Composition of the arbitral tribunal

After looking briefly at the class arbitration procedures, we can move on with the different issues that may be problematic in these types of procedures. We will start with the selection of the arbitrators.

The principle is that the constitution of the arbitral tribunal shall be in accordance with the terms agreed upon by the parties. The selection of arbitrators is of crucial importance because the arbitrators are the central characters of arbitration. Arbitrators are elected by the parties for an ephemeral task which is to settle the dispute that has arisen[119]. Therefore, the right to choose the arbitrator is considered to be one of the fundamental rights in arbitration law[120].

114 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.76-2.77.

115 Supplementary Rules (n 95) rule 6; JAMS Class Actions Procedures (n 96) rule 4.

116 Supplementary Rules (n 95) rule 7; JAMS Class Actions Procedures (n 96) rule 5.

117 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.88.

118 Kuck and Litt (n 35) 725.

119 Jean-Baptiste Racine, *Droit de l'arbitrage* (Presses Universitaires de France 2016) para 416-480.

120 Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (n 12) 535.

The problem of class arbitration is that the determination of class members is made after the constitution of the arbitral tribunal. As explained above, first, the arbitrators must examine the contract to decide whether the contract permits a class procedure. Then, they must evaluate the situation to determine if a class procedure is suitable for that situation. Only after that, can the arbitral tribunal establish the scope of the class and its members. This means that many parties are not present or even defined when the arbitrators are appointed. This may give class arbitrations the impression of being multiparty arbitrations in which some parties have arrived later. However, the problems of multiparty arbitration do not arise because of the different nature of class arbitration[121].

In class arbitration, new parties can always opt out of the procedure if they disagree with the selection of arbitrators. In other words, the fact that they have participated in the proceedings means that they have given their content to the arbitrators. Therefore, class arbitration does not harm the right to appoint arbitrators[122].

3. Confidentially

Confidentiality is generally perceived as one of the main benefits of arbitration. This is one of the reasons why arbitration is preferred to other mechanisms for resolving commercial disputes. By its private nature, the arbitral proceedings are presumed confidential. However, exceptions to the confidentiality principle also exist in some legal systems[123].

In class arbitrations, firstly, the confidentiality will be limited because it is necessary to place a proper notice which contains some information about the dispute to touch the potential members of the class[124]. Secondly, the confidentiality principle does not apply in class proceedings under the AAA Supplementary Rules. Furthermore, a docket must be published by the AAA on its website which gives important information on each class arbitration[125]. In contrast, JAMS does not provide for such a limitation on confidentiality[126].

As mentioned, derogation from this principle is possible in some cases, notably in the public interest. Class arbitration has two aspects regarding the public interest. First, acting for the benefit of the common interest of a large number of people serves the public interest. Moreover, the result of this type of large-scale proceeding benefits the public interest[127].

121 Strong, 'Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles' (n 74) 10.

122 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 3.71.

123 George Burn and Alison Pearsall, 'Les exceptions au principe de confidentialité en matière d'arbitrage international' in ICC, *La confidentialité dans l'arbitrage* (ICC 2009) 25.

124 Gabrielle Nater-Bass, 'Class Action Arbitration: A new challenge?' (2009) 27/4 ASA Bulletin 671.

125 Supplementary Rules (n 95) rule 9.

126 Richard Chernick, 'Class-wide arbitration in California' in Permanent Court of Arbitration(ed), *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) para 14.49.

127 Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (n 12) 514.

4. Partial Final Awards

As mentioned in the institutional procedure of class arbitration, the AAA requests the arbitrators to render two partial final awards during the process: the clause construction award and the class determination award[128]. It's a novelty in the arbitration system that has some advantages. This ensures the avoidance of possible procedural violations regarding the decision to proceed. Also, learning the approach of the court is important for the execution of the final award. It can help to avoid lengthy and expensive procedures if the court does not accept partial final awards[129].

However, arbitrators must wait at least 30 days to allow parties to go to court against these awards according to the AAA Supplementary Rules. This suspension of the process may cause a problem since one of the main reasons for people to choose the arbitration mechanism is the speed of the process. This places a question mark against partial final awards even though they offer certain benefits[130].

5. Costs

The class arbitration procedure contains some elements that are not found in the ordinary arbitral procedure considering class issues. Therefore, the fees of the arbitrators are much higher in class arbitration than in standard arbitration because of the considerably increased commitment of time and attention expected from the arbitrators[131]. However, traditional mechanisms for class actions, such as contingency fees, offset these high costs[132]. On the other hand, in traditional arbitration, the losing party in general pays the costs of the other party. Therefore, if the defendant wins, it is unclear who on the class side would pay his fees[133].

C. Enforceability of awards

Collective proceedings in arbitration can be very useful for cases involving transnational disputes because a single and impartial procedure can bring together geographically diverse parties to resolve their problems[134]. Authorities in other states may, however, impede the enforcement of class arbitration awards[135].

Enforcement of awards is one of the major benefits of international commercial arbitration over international litigation. The arbitration may lose its effect if the final

128 See (n 101, 111).

129 Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (n 12) 510.

130 ibid 511.

131 Kuck and Litt (n 35) 732.

132 Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (n 12) 517.

133 Kuck and Litt (n 35) 732.

134 Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (n 12) 523.

135 Nater-Bass (n 124) 686.

award could not be opposed to the losing party[136]. The New York Convention has played a decisive role in promoting the enforcement of foreign arbitral awards over the last fifty years. However, it was also embodied some grounds that prevent the enforcement of awards[137].

For instance, if notice was not given correctly to the members of the group, the execution of the award may face public policy challenges because receiving an appropriate notice of the procedure is considered as a fundamental right by many countries. In US class proceedings, mass mailings and publications are used as methods to inform class members of the procedure. It is therefore likely not to reach all members of the class[138]. This may violate the public policy of these states since all members of the class will eventually be bound by the result. By contrast, to avoid these problems, an opt-in mechanism can be chosen instead of opt-out to make sure that the members of the class have received the notice[139].

Furthermore, when parties did not explicitly authorize class arbitration, they may challenge the enforcement of the awards due to lack of consent because consent is also another reason why courts refuse to enforce arbitral awards under the New York Convention[140]. Moreover, the arbitrability of some cases - such as consumer disputes - may also be contrary to the public policy of several countries[141].

In conclusion, although the class arbitration mechanism is used for domestic disputes, in a transnational dispute, the enforcement of the arbitral award could be challenged in the enforcement states[142].

IV. European System

Large-scale arbitration mechanisms also exist in Europe, as already mentioned. Before analyzing the various collective arbitration systems, it is preferable to have a brief overview of the general European approach to collective mechanisms, in particular collective redress.

A. General Approach to collective proceedings

As stated in the introduction, the European Union is trying to put in place effective collective redress mechanisms to better protect the rights of citizens, consumers

136 Sundra Rajoo, *Law, practice and procedure of arbitration* (2th edn, LexisNexis 2017) 787.

137 [1958] article V.

138 Alexander Blumrosen, 'The Globalization of American Class Actions: International enforcement of class action arbitral awards' in Permanent Court of Arbitration(ed), *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) para 15.48.

139 Kuck and Litt (n 35) 734.

140 ibid.

141 Nater-Bass (n 124) 683.

142 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 7.1.

in particular. In fact, member states have already provided for different collective mechanisms for domestic cases, but these are different in some aspects[143]. Therefore, the Commission took an initiative and published a recommendation[144] to guarantee the rights of individuals in mass harm situations.

The main difference between the proposed collective redress and the US style class actions was the opt-out mechanism. The European approach does not fit the opt-out system because of the res judicata effect of the decision on uniformed class members. Therefore, it is considered unconstitutional under the law of many countries. It seems more logical to create a system in which only persons who intended to participate in the procedure are represented. However, it decreases the number of people represented. Thus, the collective mechanism may not work properly since one of the main reasons is the representation of many people in the same situations[145].

B. Collective Arbitration

As can be understood from the previous sections, collective arbitration proceedings, in particular class arbitration, were controversial even in the United States, although these proceedings originated there and the class actions have been integrated in the legal system[146]. Therefore, it was almost impossible to provide class arbitration in Europe taking also account of the general European approach on class actions. Therefore, two states provided their own collective arbitration mechanisms for limited cases[147].

1. Germany

Collective arbitration in Germany began with the decision of the German Federal Court of Justice in 2009, in which the court held that shareholders' resolution disputes are arbitrable under certain conditions[148]. According to this decision, the conditions of arbitrability of these cases are: (i) all shareholders must be linked by an arbitration agreement; (ii) all shareholders must have been asked for the participation in the arbitration; (iii) all shareholders must have had the chance to take part in the constitution of the arbitral tribunal; (iv) all disputes involving a single resolution of shareholders must be settled in one arbitral proceeding in order to avoid possible controversial decisions in parallel arbitration proceedings[149].

143 Júdice (n 15) 50.

144 See (n 2).

145 Júdice (n 15) 51-52.

146 Radicati di Brozolo, 'Class arbitration in Europe?' (n 49) 209.

147 See (n 64-65).

148 Stacie I. Strong, 'Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?' (2011) 29 ASA Bulletin 145.

149 Christian Borris, 'Collective Arbitration: The European experience- Germany and the DIS Supplementary Rules for Corporate Law disputes(DIS-SRCoLD)' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 80.

Following this decision, the German Arbitration Institution (DIS) has prepared special rules for litigation concerning any dispute arising between the shareholders or between the company and its shareholders in relation to the articles of incorporation or their validity[150]. As a result, the first type of collective arbitration which is different from class arbitration appeared despite its limited scope of material applicability[151]. Firstly, DIS rules can only be applied if the parties have mentioned them in their agreement. In other words, it is necessary to have an explicit reference to apply this institutional rule. This approach is different from US institutions in class arbitration because, according to the JAMS or AAA rules, an implicit reference is sufficient to apply these rules of procedure. This is also another reason that limits the scope of application of DIS Rules[152].

The determination of the parties to the dispute is also different from class arbitration. The DIS rules gave a definition of "Concerned Others". According to this, all shareholders and the company can also be considered as a concerned other[153]. The specialty of "concerned other" is that they have the right to choose whether they will participate in the proceedings after a proper notification on the procedure made by the institution. In other words, unlike the opt-out system in class arbitration, DIS chose the opt-in mechanism[154].

Privacy and the confidentiality are the key features of arbitration as already mentioned. In this regard, the DIS rules still retain these principles comparing with American class arbitrations. For instance, DIS send the necessary documents to the addresses of concerned others while the AAA puts a class arbitration docket on the internet[155]. Moreover, only those concerned others who have decided to be part of the proceedings can participate in the oral hearing[156].

After notification, the next step is the appointment of arbitrators. Since this choice is made after the participation of concerned others, this system guarantees the right of the parties to appoint the arbitrators. According to the rules of DIS, the parties can appoint their arbitrators. However, if one side of the dispute cannot appoint its arbitrator, the DIS chooses the respective arbitrators of both parties[157]. In addition, the concerned others may decide to participate in the procedure in each step. However, if they decide to participate after the appointment of the arbitral tribunal, they cannot challenge it[158].

150 DIS, Supplementary Rules for Corporate Law Disputes 09 (DIS-SRCoLD) [2009].

151 Strong, 'Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?' (n 148) 148.

152 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.152-2.153.

153 Section 2.

154 Borris (n 149) 85.

155 Strong, 'Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?' (n 148) 157.

156 Section 5.2.

157 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.180.

158 Borris (n 149) 83.

The last step is the final award. The final decision binds all the others that have been determined as "concerned others" whether or not they have chosen to participate in the proceedings[159]. The purpose of this mechanism is to put pressure on the shareholders to join the arbitration proceedings as a party or to agree to be bound by their results[160].

This system is considered to solve those cases where there are more parties. However, it can be difficult to handle the procedure if there is a large participation as in the case of class arbitrations[161]. Nevertheless, the DIS has created a new form of collective arbitration for domestic cases[162].

2. Spain

In Spain, the collective arbitration mechanism is based on legislation. This is very particular because in all other countries, large-scale arbitration was created as a result of a case, a court decision, which tries to combine collective proceeding with the arbitration. This system applies only in cases of consumer disputes. The reason is that legal system aims to protect consumers. Therefore, professionals and businesses cannot apply for this mechanism[163].

The procedure is governed by Consumer Arbitration Boards. The president of the relevant Consumer Arbitration Board decides whether he or she should start the collective arbitration on his or her own initiative or at the demand of local boards or consumers[164]. It should be noted that this demand is possible only for consumers domiciled in Spain. Even if the defendant is domiciled in Spain, foreign consumers can not benefit from this collective mechanism[165].

An explicit consent of parties as in the German system is required. After the decision of the President, the respondents are notified of the proceeding. If they accept collective arbitration, the Board informs consumers via the Official Journal. At this point, the board gives consumers two months to decide whether to participate in the proceeding. This means that the opt-in system is also used in Spain[166].

The arbitral tribunal is appointed by the relevant Consumer Arbitration Board. Then the arbitral tribunal renders an award. This award only binds the consumer

159 Section 11.

160 Borris (n 149) 84.

161 ibid.

162 Strong, 'Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?' (n 148) 164.

163 Laura C. Pineiro, 'Collective Consumer Arbitration in Spain-What's in a Name' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 88.

164 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.197-2.198.

165 Pineiro (n 163) 92.

166 Strong, *Class, Mass, and Collective Arbitration in National and International Law* (n 6) para 2.199.

who chooses to participate in the proceeding. In fact, it is difficult to say that there is collective mechanism in which a representative relief has been used - it is more like consolidating similar cases. In addition, this mechanism has never been used[167].

V. Future of Collective Arbitration

Collective proceedings in arbitration are very new mechanisms that are still in the development phase. In the United States, companies have begun to choose arbitration to avoid class actions against them, as stated. With the evolution of jurisprudence, the courts have begun to apply class actions in arbitration to prevent this escape and to better protect individuals. However, according to a recent Supreme Court approach that allows for class waivers in arbitration, companies still have the option of obliging individuals to arbitrate bilaterally for any dispute. Therefore, class arbitrations in the United States may still be possible in theory, but will not usually be applied in practice[168].

In Europe, the Union is trying to promote collective redress in member states to facilitate access to justice. It is emphasized by the Commission that European collective redresses should be different from American class actions. It should be noted that collective mechanisms ensure better protection of weaker parties and consumers. This indicates that there is a social aspect to these mechanisms[169]. Arbitration is accepted as a mechanism that usually exists for international disputes over investment and trade, and therefore, there is much doubt about whether arbitration, which is completely a private forum, can play this social function[170]. Nevertheless, the benefits of arbitration which are flexibility, neutrality and enforceability may help to resolve collective disputes, in particular international disputes. The existing collective arbitration mechanisms in Europe are tailored to internal conflicts. Therefore, it is necessary for the European Union to provide legislation for collective arbitration. Only after that can an efficient collective arbitration mechanism in Europe be established[171].

VI. Conclusion

In this study, we tried to examine different types of large-scale arbitration. First, class arbitration mechanism was examined with its historical development and its different characteristics. We have seen the evolution of the approach of the Supreme Court. Although class arbitration has many advantages, it also has different aspects that distinguish it from regular arbitration.

167 Pineiro (n 163) 95.

168 Gary B. Born, *International Commercial Arbitration*, Volume I (2nd edn, Wolters Kluwer 2014) 1523.

169 Elie Kleiman, 'The Future of Class, Collective and Mass Arbitrations in Europe-A European Approach to Collective Redress' in Bernard Hanotiau and Eric A. Schwartz (eds), *Class and Group Actions in Arbitration* (ICC 2016) 190.

170 ibid 183.

171 ibid 197.

The European approach is different from American class arbitration. First, the scope of existing systems in Europe is very limited. Therefore, the jurisprudence of collective arbitration in Europe is not very developed. However, the aim of creating collective redress in Europe may also promote collective arbitration mechanisms in Europe.

If we look at the history of arbitration, we can observe many challenges. However, arbitration continues to develop by overcoming these obstacles because of its highly flexible nature. For instance, when disputes involving more than two parties have started to arise over the last decade, many people thought that arbitration was a proper device for small conflicts. However, multiparty arbitration has been accepted and applies today[172].

Collective arbitration mechanisms are one of the current issues for which the arbitration world should find a solution. As mentioned, current systems generally serve domestic disputes. In fact, one of the most important benefits of arbitration is the enforceability of arbitral awards in foreign jurisdictions. However, there is no international consensus on the enforceability of collective arbitral awards[173]. Therefore, it would be very useful to put in place a mechanism that collectively resolve international disputes. Problems arising from conflict of jurisdiction in international disputes may then easily be resolved by arbitration[174].

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