Collective arbitration in Europe: the European way might be the best way

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1. Introduction

Collective redress is an important means of access to justice and has been on the agenda of the European Commission from quite some time[1].

As it is well known, the modern economy can sometimes create situations where a large number of people are harmed by the same illegal practices (mass harm situation). By allowing "many similar legal claims to be bundled into a single court action", collective redress promotes greater access to justice (particularly in cases where the individual damage is low and potential claimants would not consider it would be worth pursuing an individual claim) and contributes to the efficient administration of justice (following reasons of procedural economy)[2].

However, at the same time, collective redress can potentiate abusive law suites, as evidenced by the American system of class actions. Hence the reason why class actions are usually viewed in the United States has a synonym of controversy: in an highly controversial way, they are as criticized by some as they are acclaimed by others.

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[1] See LUKASZ GORYWODA, "The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features", *in Cross-Border Class Actions. The European Way*, SELP - sellier european law publishers, Munich, 2014, pages 173-188, LAUREL HARBOUR / JOHN EVANS / ERWAN POISSON / CAMILLE FLÉCHET, "Representative actions and proposed reforms in the European Union", *in World Class Actions. A Guide to Group and Representative Actions around the Globe*, Oxford University Press, New York, 2012, pages 144-168, STEFAN WRBKA, "European consumer protection law: Quo vadis? - thoughts on the compensatory collective redress debate", STEVEN VAN UYTSEL, "Collective actions in a competition law context - reconciling multilayer interests to enhance access to justice?", both articles published *in Collective Actions - Enhancing Access do Justice and Reconciling Multilayer Interests?*, Cambridge University Press, Cambridge, 2012, pages 23-56 and 57-92, and FLAVIA MARISI, *Il Class Action Arbitration - La sua evoluzione negli Stati Uniti e la sua possibile introduzione nell'Unione Europea*, Grin Verlag, München, 2011, pages 200-211. Regarding the evolution of collective redress mechanisms in Europe, see CHRISTOPHER HODGES, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Studies of the Oxford Institute of European and Comparative Law, vol. 8, Hart Publishing, Oxford, 2008, pages 9 and following, and JÖRG LUTHER, "The constitutional impact of class actions in European legal systems", *in The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, Cheltenham, 2012, pages 309-313.

[2] European Commission Communication [COM(2013) 401 final], page 4.

Given the advantages and popularity of arbitration, it is natural to wonder whether it is conceivable to combine collective redress with arbitration (the so-called "*collective arbitration*"[3]); particularly in the wake of the reference that the European Commission made to alternative dispute resolution procedures – where arbitration clearly fits – in its Recommendation of 11 June 2013 on collective redress (see paragraph 16 of the preliminaries and paragraph 26 of the Recommendation)[4].

Two questions are generally posed when addressing the possibility of combining class actions or collective redress with arbitration. First, is it possible? Second, how should it be organized and conducted?

These are the two main questions we will analyse in the present article, from an European perspective on the subject.

2. Is collective arbitration possible? An optimistic view on the subject, given the flexibility and evolution of arbitration

This is the first question and it is a question that makes sense, because as the United States Supreme Court held (in what concerns the combination of *class actions* with arbitration), "class-action arbitration changes the nature of arbitration"[5].

Given the controversy of the subject, the easiest and more conservative solution would be to take a negative approach and, as we will see, there are certainly many reasons for that. We prefer, however, a more optimistic view, considering the well known flexibility and evolution of arbitration.

It is important to recall that, throughout the years, arbitration has proven itself to be a *very flexible dispute resolution method*. Constantly facing new realities and challenges, arbitration managed to adapt to certain situations that, at first sight, would seem impossible to adjust to.

Being a very old form of dispute resolution, we can say that arbitration has come a long way. From its very distant roots (so remote they seem almost impossible to trace) to more recent years, the *evolution of arbitration* is absolutely astonishing and undeniable[6].

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[3] On the distinction between "class arbitration", "*mass arbitration*" and "*collective arbitration*", see S. I. STRONG, *Class, Mass and Collective Arbitration in National and International Law*, Oxford University Press, New York, 2013.

[4] Commission Recommendation 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).

[5] *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). See MAURO RUBINO-SAMMARTANO, *International Arbitration: Law and Practice*, 3rd edition, Juris, New York, 2014, pages 183-184.

Such evolution, of course, was not (and is not) easy. There have been many obstacles along the way, some roads going to nowhere, which sometimes makes us wonder about the efficiency of arbitral tribunals to handle certain disputes. Nevertheless, the truth is arbitration has constantly kept pushing its boundaries to new territories, defying those who have less or no faith in the arbitral system.

For instance, twenty years ago many people certainly didn't think that arbitration was able to face and solve issues of competition, tax or labor law, intellectual property, bankruptcy or insolvency, bribery and corruption, etc., could be submitted to arbitration. In many civil law jurisdictions even national public law issues are not arbitrable. And today – albeit with a few limits – we have seen that, in several countries, some of these disputes can be arbitrable.

And what about the possibility of arbitral tribunals to order interim measures and *ex parte* preliminary orders? What about third party intervention, consolidation, etc.?

Twenty years ago, many authors believed this could *never* be possible in arbitration. Well, the passing of time has proven otherwise.

When confronting the possibility of combining class actions or collective redress with arbitration, we should not simply exclude such possibility. Of course, given the many difficulties on the subject, it would be easy to have a negative approach. However, as mentioned above, that might not be the wisest approach.

One thing that the (long) evolution of arbitration has demonstrated is that we should never say "never" in arbitration; we should not underestimate the flexibility of this dispute resolution method and its constant capacity to surprise us. The American case law has already proven this, demonstrating that class arbitration is possible – despite the many difficulties the subject has lately been facing in the United States (we refer, particularly to i. *Stolt-Nielsen S.A. v.*

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[6] Regarding the historical origins of Arbitration and its evolution through the years, see, for instance, GARY BORN, *International Commercial Arbitration*, vol. I, 2nd edition, Kluwer Law International, Alphen aan den Rijn, 2014, pages 6-70, NIGEL BLACKABY / CONSTANTINE PARTASIDES / ALAN REDFERN / MARTIN HUNTER, *Redfern and Hunter on International Arbitration*, 5th edition, Oxford University Press, Oxford, 2009, pages 4-7, LUIZ OLAVO BAPTISTA, *Arbitragem Comercial e Internacional*, Lex Magister, São Paulo, 2011, pages 21-26, and ARMINDO RIBEIRO MENDES, "A uniformização do direito da arbitragem através da adopção da Lei-Modelo da CNUDCI sobre a arbitragem comercial internacional", *in V Congresso do Centro de Arbitragem Comercial - Intervenções*, Almedina, Coimbra, 2012, pages 223 and following. Despite the very distant roots of arbitration, it can be said that it was particularly after the end of the Second World War that arbitration began its fast growth until today (PIERO BERNARDINI, *L'arbitrato nel commercio e negli investimenti internazionali*, 2nd edition, Giuffrè Editore, Milano, 2008, page XI) – this evolution was, without a doubt, more accentuated in the last thirty years (see PHILIPPE FOUCHARD / EMMANUEL GAILLARD / BERTHOLD GOLDMAN, *Fouchard Gaillard Goldman On International Commercial Arbitration*, Kluwer Law International, Haia, 1999, page 1).

AnimalFeeds International Corp., ii. *AT&T Mobility LLC v. Concepcion*, iii. *Oxford Health Plans LLC v. Sutter*, and iv. *American Express Co. v. Italian Colors Restaurant*)[7].

Therefore, the main question at this moment should not be *if* class or collective arbitration is possible, but *how* it should be organized and conducted. This is clearly the key question and that which we will try to answering in the next chapter, by focusing on the "opt-in" - "opt-out" distinction.

3. How should collective arbitration be organized and conducted? The "opt-in" vs. "opt-out" system

As stated above, this is the key question. This is where class or collective arbitration face major difficulties.

Among the different issues that could be analysed, we will focus on its main topic: the "opt-in" vs. "opt-out" system. As a matter of fact, and in our opinion, choosing one or the other might hold the key to truly unlock collective arbitration in Europe.

As is well known, in an *"opt-out" system* (like the American class action model) "victims of a defendant's conduct are *automatically included* in litigation over that conduct, unless they take steps to exclude themselves from that lawsuit"[8]. All individuals will be bound by the judgement, except for those who expressly opted out.

Differently, in an *"opt-in" system*, claimants will have to take affirmative steps to be represented in the group, meaning that only those who opted-in will be bound by the judgement. This is the model which the majority of the European countries are familiar to (Portugal is one of the few exceptions)[9].

This distinction is important because, as we will see below, the "opt-in" system might be the decisive factor in construing a reliable and efficient collective arbitration model.

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[7] Regarding these case law, see, for instance, GARY BORN, *International Commercial Arbitration*, vol. I, *cit.*, pages 1514-1523, S. I. STRONG, *Class, Mass and Collective Arbitration…*, *cit.*, pages 12-14, 106-110, 206 and following, 361-362, WILLIAM W. PARK, "La jurisprudence américaine en matière de «class arbitration»: entre débat politique et technique juridique", *in Revue de l'Arbitrage*, Comité Français de l'Arbitrage, volume 2012, no. 3, Paris, 2012, pages 507-538, and MARC ORGEL, *Class Arbitration - Von der Gruppenklage zum Gruppenschiedsverfahren und zurück? Eine Untersuchung zum U.S.-amerikanischen Schiedsverfahrensrecht*, Mohr Siebeck, Tübingen, 2013, pages 317 and following.

[8] MICHAEL D. HAUSFELD / BRIAN A. RATNER, "Prosecuting class actions and group litigation", *in World Class Actions. A Guide to Group and Representative Actions around the Globe*, Oxford University Press, New York, 2012, page 546. See also MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, Lex, Lisboa, 2003, page 209.

[9] European Commission Communication [COM(2013) 401 final], page 11. See also CHRISTOPHER HODGES, *The Reform of Class and Representative Actions in European Legal Systems…*, *cit.*, page 119.

3.1. The consensual nature of arbitration and the problem with the "opt-out" system

Consent is the *cornerstone of arbitration*, the "*pierre angulaire de l'arbitrage*"[10]. This is quite obvious and yet, when addressing the subject, many authors that analyse this kind of issues seem to forget it.

When analysing the possibility of combining class actions or collective redress with arbitration, this is something that cannot just simply be ignored[11]. After all, consent is a "prerequisite" for arbitration[12] and its importance should never be underestimated[13]. The consensual nature of arbitration is at the heart of the arbitral system and represents the fundamental difference from state court proceedings[14] (this is the reason why many authors consider, for instance, that mandatory or compulsory arbitration is not real arbitration[15]).

That being said, it is not difficult to see the conceptual difficulties that may arise here. As some authors correctly observe, at first sight arbitration and class actions do not seem compatible with one another[16]. In fact, they seem to be mutually exclusive processes, in the sense that they seem to mutually exclude one another.

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[10] These are among the several expressions that many authors usually refer to describe the importance of consent in arbitration. See, for example, FERNANDO MANTILLA-SERRANO, "Multiple parties and multiple contracts: divergent or comparable issues?", and KARIM YOUSSEF, "The limits of consent: the right or obligation to arbitrate of non-signatories in group of companies", both articles published *in Multiparty Arbitration*, Dossier VII, International Chamber of Commerce, Paris, 2010, pages 25 and 72, BERNARD HANOTIAU, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International, Haia, 2005, pages 32-33, W. LAURENCE CRAIG, "Introduction", and WILLIAM W. PARK, "Non-signatories and international contracts: an arbitrator's dilemma", both articles published *in Multiple Party Actions in International Arbitration*, Permanent Court of Arbitration, Oxford University Press, Oxford, 2009, page lvii and pages 3-4, DAVID D. CARON / LEE M. CAPLAN, *The UNCITRAL Arbitration Rules - A Commentary*, 2nd edition, Oxford University Press, Oxford, 2013, page 54, ANDREA MARCO STEINGRUBER, *Consent in International Arbitration*, Oxford International Arbitration Series, Oxford University Press, Oxford, 2012, page 1, and OUSMANE DIALLO, *Le consentement des parties à l'arbitrage international*, Presses Universitaires de France, Paris, 2010, page 7.

[11] As the United States Supreme Court clearly stated in the referred *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, "*arbitration is a matter of consent*".

[12] NIGEL BLACKABY / CONSTANTINE PARTASIDES / ALAN REDFERN / MARTIN HUNTER, *Redfern and Hunter on International Arbitration*, *cit.*, page 99.

[13] *Vide* OUSMANE DIALLO, *Le consentement des parties à l'arbitrage international*, *cit.*, page 7.

[14] See NATHALIE VOSER, "Multi-party disputes and joinder of third parties", *in 50 Years of the New York Convention*, *ICCA Congress Series*, no. 14, Kluwer Law International, Alphen aan den Rijn, 2009, page 350, and PHILIPPE FOUCHARD / EMMANUEL GAILLARD / BERTHOLD GOLDMAN, *Fouchard Gaillard Goldman On International Commercial Arbitration*, *cit.*, page 1.

[15] *Cfr.* CHARLES JARROSSON, "L'arbitrage et la Convention européenne des droits de l'Homme", *in Revue de l'Arbitrage*, Comité Français de l'Arbitrage, vol. 1989, no. 4, Paris, 1989, pages 581 and following, SÉBASTIEN BESSON, "Arbitration and Human Rights", *in ASA Bulletin*, Association Suisse de l'Arbitrage, vol. 24, no. 3, Kluwer Law International, Alphen aan den Rijn, 2006, page 398, and ARTUR FLAMÍNIO DA SILVA, *A Resolução de Conflitos Desportivos em Portugal: entre o Público e o Privado*, PhD thesis, Faculdade de Direito da Universidade Nova de Lisboa, academic version, Lisboa, 2015, and "A arbitragem desportiva em Portugal: uma realidade sem futuro? - anotação ao acórdão n.º 230/2013 do Tribunal Constitucional", *in Desporto & Direito*, ano X, no. 28 (Setembro/Dezembro), Coimbra Editora, Coimbra, 2012, pages 68 e 69.

[16] See ERIC P. TUCHMANN, "The administration of class action arbitrations", *in Multiple Party Actions in International Arbitration*, Permanent Court of Arbitration, Oxford University Press, Oxford, 2009, page 327, LUCA G.

This is mainly due to the "opt-out" system, which contravenes the consensual nature of arbitration. It is difficult to sustain that someone could be bound by an arbitration agreement and be automatically included in the arbitration process, due to the sole fact that such person did not expressly opt out, with all the known difficulties to do that or even to be aware of that possibility in due time.

The "opt-out" system is, in our opinion, the center of the many procedural problems that class or collective arbitration are facing. We refer not only to the problem concerning the consensual nature of arbitration, but also to three other related issues:

a) the res judicata effect – with the "opt-out" system there is a risk that someone would be represented without him being aware of it, with the relevant consequence of being bound by the judgment, since he hasn't opted out[17];

b) confidentiality – the "opt-out" system seems to compromise one of the most important advantages of arbitration[18]. Potential class members must have the opportunity to opt-out, which implies some (relevant) degree of *public disclosure*. This need of disclosure is much higher in an "opt-out" system, because as Professor Strong rightly observes "failure to opt out leads to the extinguishment of a claim, whereas failure to opt in allows an individual claim to survive, even if the party cannot take advantage of a positive result arising out of the initial proceeding"[19]. Hence the reason why providing adequate notice to potential claimants is so vital in an "opt-out" proceeding[20]; and

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RADICATI DI BROZOLO, "Class Arbitration in Europe?", *in Cross-Border Class Actions. The European Way*, SELP - sellier european law publishers, Munich, 2014, page 214, and ANA MONTESINOS GARCÍA, "Últimas tendencias en la Unión Europea sobre las acciones colectivas de consumo. La posible introducción de fórmulas de ADR", *in REDUR* - Revista electrónica del Departamento de Derecho de la Universidad de La Rioja, no. 12, Logroño, 2014, page 105.

[17] See ANA MONTESINOS GARCÍA, "Últimas tendencias en la Unión Europea...", *cit.*, pages 105-106.

[18] Although not an absolute principle, confidentiality is usually considered one of the biggest advantages of arbitration – see JEAN-FRANÇOIS POUDRET / SÉBASTIEN BESSON, *Comparative Law of International Arbitration*, Sweet & Maxwell, London, 2007, pages 315-320, JENS-PETER LACHMANN, *Handbuch für die Schiedsgerichtspraxis*, 3rd edition, Verlag Dr. Otto Schmidt, Köln, 2008, pages 41-45, DIDIER MATRAY / GAUTIER MATRAY, "La rédaction de la convention d'arbitrage", *in La convention d'arbitrage. Groupes de sociétés et groupes de contrats - Arbitrageovereenkomst. Vennootschapsgroepen en groepen overeenkomsten*, Actes du colloque du CEPANI du 19 novembre 2007, no. 9, Bruylant, Bruxelles, 2007, page 23, and A. FERRER CORREIA, "Da arbitragem comercial internacional", *in Temas de Direito Comercial e Direito Internacional Privado*, Almedina, Coimbra, 1989, pages 174-175.

[19] S. I. STRONG, "From Class to Collective: The De-Americanization of Class Arbitration", *in Arbitration International*, The Journal of the London Court of International Arbitration, vol. 26, n.º 4, Kluwer Law International, Alphen aan den Rijn, 2010, page 513. Regarding this mater, see also LEA HABER KUCK / GREGORY A. LITT, "International Class Arbitration", *in World Class Actions. A Guide to Group and Representative Actions around the Globe*, Oxford University Press, New York, 2012, page 729, and ANA MONTESINOS GARCÍA, "Últimas tendencias en la Unión Europea...", *cit.*, pages 106-107.

[20] See MICHAEL D. HAUSFELD / BRIAN A. RATNER, "Prosecuting class actions and group litigation", *cit.*, pages 547-548.

c) recognition and enforcement uncertainties under the New York Convention[21] – with an "opt-out" system, a variety of objections could be invoked to oppose the recognition and enforcement of a class or collective arbitration award, such as: i. article V, paragraph 1 (b) [the non-present class member can always argue that he was not given *proper notice* of the arbitration]; ii. article V, paragraph 1 (d) [there can also be problems with *lack of consent*, when interpreting the agreement of the parties]; and iii. article V, paragraph 2 (b) [*public policy* can always be tricky on this subject, particularly in a continent, such as Europe, where class actions or collective redress do not have a strong tradition and where the majority of countries follows and "opt-in" model][22].

All things considered, it is really not surprising that the future of class arbitration remains unsettled in the United States and it could soon become a "relatively unusual creature", "theoretically possible, but rare as a practical matter"[23].

In our opinion, as we will see in the next chapter, if Europe wants to create a reliable and efficient collective arbitration model it must avoid the referred problems and try another approach, an "opt-in" approach.

3.2. The "opt-in" system as the key to unlock collective arbitration in Europe

3.2.1. European collective redress: a different answer to the American class actions

As mentioned before, *collective redress* has been on the agenda of the European Commission for quite some time.

The recent development consists of the 11 June 2013: a) Communication "Towards a European Horizontal Framework for Collective Redress" [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 401 final]; and the b) Commission Recommendation on

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[21] See S. I. STRONG, *Class, Mass and Collective Arbitration…*, *cit.*, pages 346-357, LEA HABER KUCK / GREGORY A. LITT, "International Class Arbitration", *cit.*, pages 732-736, and GABRIELLE NATER-BASS, "Class Action Arbitration: A New Challenge?", *in ASA Bulletin*, Association Suisse de l'Arbitrage, vol. 27, no. 4, Kluwer Law International, Alphen aan den Rijn, 2009, page 686.

[22] Regarding the importance and role of public policy in arbitration, see ANTÓNIO PEDRO PINTO MONTEIRO, "Da ordem pública no processo arbitral", *in Estudos em Homenagem ao Prof. Doutor José Lebre de Freitas*, vol. II, Coimbra Editora, Coimbra, 2013, pages 589-673.

[23] GARY BORN, *International Commercial Arbitration*, vol. I, *cit.*, page 1523.

common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

To put it in a few words, collective redress is "the EU answer to the U.S. class action"[24] and, with all due respect, it is a better answer.

First of all, it is a *necessary answer*, because there is no uniformity in the Member States regarding the procedural mechanisms to deal with mass claims. National mechanisms vary considerably on this subject[25]. It is therefore quite understandable that the Commission felt the need to recommend collective redress principles to Member States.

It is also a *different answer*. Perhaps the most distinct feature of the emerging EU regime is the distance from the American class action[26]. The European Commission has made it clear that it took no inspiration from US-style class actions. On the contrary.

In a Memorandum issued on the 11th June 2013, the Commission unequivocally stated that "*the European approach to collective redress clearly rejects the US style system of «class actions»*"[27].

But that is not all. The aversion towards US class actions is also quite clear under the referred Communication and Recommendation (likewise from 11 June 2013). In the first one, for instance, we can read that:

> "For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them".
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> "'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation.

[24] LUKASZ GORYWODA, "The Emerging EU Legal Regime for Collective Redress…, *cit.*, page 173. On the concept of collective redress, see CHRISTOPHER HODGES, *The Reform of Class and Representative Actions in European Legal Systems…*, *cit.*, page 3.

[25] See SAMUEL ISSACHAROFF / GEOFFREY P. MILLER, "Will aggregate litigation come to Europe?", *in The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, Cheltenham, 2012, pages 48-65, and LUKASZ GORYWODA, "The Emerging EU Legal Regime for Collective Redress…, *cit.*, pages 181-184.

[26] See LUKASZ GORYWODA, "The Emerging EU Legal Regime for Collective Redress…, *cit.*, page 186.

[27] European Commission Memo, available at http://europa.eu/rapid/press-release_MEMO-13-530_fr.htm;%20http://europa.eu/rapid/press-release_IP-13-525_en.htm.

Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded. Such features are for instance *contingency fees* of attorneys or the *discovery* of documents procedure that allows 'fishing expeditions'. A further important feature of the US legal system is the possibility to seek *punitive damages*, which increases the economic interests at stake in class actions. This is enhanced by the fact that US class actions are legally *'opt-out' procedure*s in most cases: the representative of the class can sue on behalf of the whole class of claimants possibly affected without them specifically requesting to participate. In recent years, U.S. Supreme Court decisions have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation"[28].

The Recommendation further develops the above-mentioned ideas, creating a different model that clearly distinguishes itself from class actions. Many of the collective redress principles recommended by the Commission prove this. We refer particularly to the:

a) *prohibition of punitive damages* ("the compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited")[29];

b) *limits on contingency fees*, which are not accepted as a general rule ("the Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party")[30].

c) *limits on third party funding* ("the Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on

[28] European Commission Communication [COM(2013) 401 final], pages 3 and 8.
[29] Paragraph 31 of the European Commission Recommendation (2013/396/EU).
[30] Paragraph 30 of the European Commission Recommendation (2013/396/EU) – see also paragraph 29.

the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties")[31].

Among the different features that mark the difference between the European collective redress model and the American class actions, one assumes particular relevance in the context of this article: the "opt-in" system.

3.2.2. The European way: "opt-in" system

The European Commission has chosen an "opt-in" system[32], which is quite understandable if we consider the fact that the "opt-out" system does not work well in EU jurisdictions. Take the Portuguese case for instance.

Portugal has what might be called a class action mechanism (the so-called popular action - "*acção popular*")[33] and, as referred before, is one of the few European countries that actually follows an "opt-out" procedure. Such procedure, however, combined with the *res judicata* effect (*erga omnes*), has been heavily criticized by some authors[34] – the regime can have severe consequences to the holder of the interest (particularly in case of a diffuse interest) since in principle he will not be able in to file another action with the same object, if the defendant is

[31] Paragraph 32 of the European Commission Recommendation (2013/396/EU) – see also paragraphs 14, 15 and 16.

[32] Paragraphs 21 to 24 of the European Commission Recommendation (2013/396/EU).

[33] Law no. 83/95, of 31 August 1995 (Law of Popular Action) and article 52, paragraph 3, of the Portuguese Constitution. As some authors correctly observe, the Popular Action Law was in some points influenced by the American class actions. *See* ANTÓNIO PAYAN MARTINS, *Class Actions em Portugal? Para uma análise da Lei n.º 83/95, de 31 de Agosto - Lei de Participação Procedimental e de Acção Popular*, Edições Cosmos, Lisboa, 1999, page 26 (and also the Forward of JOSÉ MIGUEL JÚDICE), MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *cit.*, page 119, LUÍS SOUSA FÁBRICA, "A Acção Popular no Projecto de Código de Processo nos Tribunais Administrativos", *in Cadernos de Justiça Administrativa*, n.º 21, Maio/Junho 2000, page 17, and ADA PELLEGRINI GRINOVER, "A ação popular portuguesa: uma análise comparativa", *in Lusíada - Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada - Porto, Porto, 1996, page 246. For an analysis of the Popular Action Law, *see* also ANTÓNIO PEDRO PINTO MONTEIRO / JOSÉ MIGUEL JÚDICE, "Class Actions & Arbitration in the European Union - Portugal", *in Estudos em Homenagem a Miguel Galvão Teles*, vol. II, Almedina, Coimbra, 2012, pages 190-199, MARIANA FRANÇA GOUVEIA / NUNO GAROUPA, "Class Actions in Portugal", *in The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, Cheltenham, 2012, pages 342-350, and JOÃO PIMENTEL / JOSÉ MARIA JÚDICE, "Portugal", *in The International Comparative Legal Guide to Class & Group Actions 2014. A practical Cross-Border Insight into Class and Group Actions Work*, 6th edition, Global Legal Group, London, pages 140-145.

[34] *See* JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", *in Estudos sobre Direito Civil e Processo Civil*, vol. I, 2nd edition, Coimbra Editora, Coimbra, 2009, pages 215-219 and "A acção popular ao serviço do ambiente", *in Lusíada - Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada - Porto, Porto, 1996, pages 238-241, ANTÓNIO PAYAN MARTINS, *cit.*, pages 112-117 and 128, JOSÉ DE OLIVEIRA ASCENSÃO, *Direito Civil. Teoria Geral*, vol. III, Coimbra Editora, Coimbra, pages 117-118, and LUÍS SOUSA FÁBRICA, "A Acção Popular no Projecto...", *cit.*, pages 17-18.

acquitted[35]. The main problem is that the law does not require personal identification of those to whom the writ of summons is directed (which, of course, would be very difficult or even impossible). The summons is made via one or various announcements made public through the media or through public notice, which may not be sufficient to reach its intended recipients. And the risk is even higher since anyone (any citizen, as well as certain associations and foundations) can file a popular action[36] – the legitimacy criterion is quite broad. Therefore, there is the possibility that someone is being represented in a popular action without even knowing it, by lawyers not really trustworthy, with the relevant consequence of being bound by the judgment, since he hasn't opted out. It is also important to recall that the Popular Action Law does not foresee an adequacy of representation criteria like the one contemplated in the Rule 23, (a), of the American Federal Rules of Civil Procedure[37].

As a result, the "opt-out" procedure has received many critics in Portugal and after so many years does not work well at all. The same can be said about the popular action *per se*, which is not very common in Portugal and has been little used in practice[38].

The "opt-in" choice by the European Commission is therefore quite understandable and was to be expected. Still, it was a thoughtful decision.

As the Commission reasoned, "a significant number of stakeholders, in particular businesses, strongly oppose the 'opt-out' model, arguing that it is more prone to abuse and that it may be unconstitutional in some Member States, or at least incompatible with their legal traditions. On the other hand, some consumer organisations argue that 'opt-in' systems may fail to deliver effective access to justice for all consumers who have been harmed. In their view, the availability of 'opt-out' is therefore desirable, at least as an option in appropriate cases and subject to approval by the court. (…) The 'opt-in' system respects the right of a person to decide whether to participate or not. It therefore better preserves the autonomy of parties to choose whether to take part in the litigation or not. In this system the value of the collective dispute is more easily determined, since it would consist of the sum of all individual claims. The court is in a better position to assess both the merits of the case and the admissibility of the collective action. The 'opt-in' system also guarantees that the judgment will not bind other potentially qualified claimants who did not join. The 'opt-out' system gives rise to more fundamental questions as to

[35] As a matter of fact, a group defined by quickness and lack of skills (let alone opportunism), may take the lead and jeopardize alternative class actions better prepared and supported by more specialized teams of professionals.

[36] *See* JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", *cit.*, page 217.

[37] *See* ANTÓNIO PAYAN MARTINS, *Class Actions em Portugal…*, page 112, and ADA PELLEGRINI GRINOVER, "A ação popular portuguesa…", *cit.*, page 250.

[38] As some authors observe, "the effectiveness of class action litigation in Portugal is dubious to say the least" (MARIANA FRANÇA GOUVEIA / NUNO GAROUPA, "Class Actions in Portugal", *cit.*, page 349).

the freedom of potential claimants to decide whether they want to litigate. The right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not. In addition, an 'opt-out' system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them"[39].

All things considered, the Commission chose the "opt-in" approach. And it has chosen wisely.

It is true that an "opt-out" system permits to aggregate (at least formally) a more significant number of persons. This has traditionally been an important advantage of this model, compared to the "opt-in" principle[40]. However, in this era of information that we (fortunately) live in, where many people have easy access to the internet and social networks, and where potential claimants are much more well informed of their rights, the advantages of the "opt-out" system, in our opinion, are not as significant as they once might be.

An "opt-in" system, today, can also gather a significant number of persons and potentiate an effective access to justice for all consumers who have been harmed, avoiding, at the same time, litigation abuse.

More importantly, the "opt-in" system is more coherent with the possibility of combining collective redress with arbitration and may also prevent some of the problems class arbitration faces in the United States.

For instance, with an "opt-in" model there is no risk that someone would be represented without him being aware of it. The res judicata is, therefore, not an obstacle.

There are also fewer problems with confidentiality. The need to provide adequate notice to potential claimants is not as vital as in "opt-out" proceedings. If someone did not opt in, there is still a possibility to file an individual claim.

The same can be said about the recognition and enforcement of collective arbitration awards under the New York Convention. The problems previously described as a consequence of the "opt-out" system simply do not apply to an "opt-in" model.

Finally, and most importantly, an "opt-in" system is more consistent with the consensual nature of arbitration and with arbitration *per se*.

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[39] European Commission Communication [COM(2013) 401 final], pages 11 and 12.

[40] On the distinction between the "opt-in" and "opt-out" system, see CHRISTOPHER HODGES, *The Reform of Class and Representative Actions in European Legal Systems…*, *cit.*, pages 118-130, MICHAEL D. HAUSFELD / BRIAN A. RATNER, "Prosecuting class actions and group litigation", *cit.*, pages 545-551, SAMUEL ISSACHAROFF / GEOFFREY P. MILLER, "Will aggregate litigation come to Europe?", *cit.*, pages 59-65, and MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *cit.*, pages 209-214.

Therefore, it is time to answer the question we posed on the title of this third chapter: "how should collective arbitration be organized and conducted?" The answer is: by an "opt-in" system.

The "opt-in" principle might be the necessary key to unlock collective arbitration in Europe and to create a reliable and efficient model of collective arbitration[41]. A model that can have a real future and not an uncertain future, as class arbitration is facing in the United States at the moment.

4. Conclusion

The conclusion of this text is favorable to a system (the opt-in one) that it is better suited for the arbitration process when compared with the alternatives. It assumes that arbitration may be more efficient and better prepared as the choice of a skilled Tribunal for the complexities of this system suits better the needs than the traditional national courts.

However, this conclusion does not mean that the use of arbitration in collective redress/class actions case is not a land to be discovered and only afterwards organized. One may by optimistic and even revolutionary about the beauties of arbitration, and this is our case. But one way of killing the conditions for the spread of a culture that favors optimism and innovation, is not to be naïf to the point of forgetting the complexities of the application of the model to a very different kind of dispute, where the consent is not always absolutely clear, the rules of the process need to be tailored and the role of public entities (like, for instance, the Public District attorneys in Portugal) is difficult to be integrated as their experience in relation to arbitration is very limited, to say the least.

Another problem that appears in the critical path of the system is the relation between situations in which responsibility is born from a contract and other in which "responsabilité délictuel" or tort is the source of the problem.

This, and others equivalent problems, certainly exist. But as with multiparty situations, "group of companies" issues, tax arbitration, even public law arbitration, the experience shows that (as the dawn smog gradually collapses when the sun comes stronger and warmer) also pessimism can be been dissipated.

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[41] Demonstrating its preference for an "opt-in" system, see also ANA MONTESINOS GARCÍA, "Últimas tendencias en la Unión Europea...", *cit.*, page 105, and PHILIPPE BILLIET / ASSOCIATION FOR INTERNATIONAL ARBITRATION (AIA), "General Conclusion", *in* PHILIPPE BILLIET (editor), *Class Arbitration in the European Union*, Maklu, Antwerpen, 2013, page 233.