O crescimento da mediação é um movimento sem volta, e deve ser um aprendizado bastante interessante. Grande parte do crescimento pode vir pela disseminação das cláusulas escalonadas, em especial as cláusulas med-arb. Mediação e arbitragem funcionarão como sistemas complementares para a resolução de litígios.

Ainda é muito cedo para saber o que vai acontecer neste campo, mas tenho certeza de que em alguns anos muitas coisas vão mudar significativamente. Se for organizado um painel similar a este, no XX Congresso do Centro, em 2026, quase tudo o que eu disse aqui soará velho e ultrapassado.

SOME FIRST STEPS ON THE DIFFICULT ROAD TO A COHERENT CLASS OR COLLECTIVE ARBITRATION REGIME IN EUROPE? PORTUGAL'S UPCOMING SHAREHOLDER DISPUTE REGIME

ANTÓNIO PEDRO PINTO MONTEIRO
Senior Associate in PLMJ Arbitration. PhD in Procedural Law / Arbitration.

JOANA MACEDO
Trainee in PLMJ Arbitration.

1. Introduction

For years, the possibility of combining class actions or others means of collective redress with arbitration (class arbitration)[1]–[2] has been a controversial subject – a subject that has furthermore demonstrated that the complexity inherent to multi-party arbitration is an ongoing issue and is far from being over. Its difficulties have given it the status of a truly hot topic.

The problems are many[3]. The solutions are difficult to find.

[1] 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, pages 6 ff.

[2] Regarding this subject matter, we will closely follow what the first author has previously written in several articles, such as António Pedro Pinto Monteiro, "Anotação ao acórdão Green Tree Financial Corp. v. Bazzle, Supreme Court of the United States, 23/06/2003 – class arbitration", in 100 Anos de Arbitragem – os casos essenciais comentados, Coleção PLMJ, no. 9, Coimbra Editora, Coimbra, 2015, pages 239-252, 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 189-205, "Class Actions and Arbitration Procedures – Portugal", in Class Arbitration in the European Union, Maklu, Antwerpen, 2013, pages 137-152, and "Collective Arbitration in Europe. The European Way Might Be the Best Way", in Class and Group Actions in Arbitration, Dossiers – ICC Institute of World Business Law, Paris, 2016, pages 46-57.

[3] As the United States Supreme Court held (concerning the combination of class actions with arbitration), "class-action arbitration changes the nature of arbitration" [Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010)]; see also Mauro Rubino-

So far, this topic has been mainly addressed in the United States of America and, in recent years, it has faced some twists and turns in American case law. Currently, as some authors put it, "the future of class arbitration in the United States remains unsettled"[4].

Nevertheless, with the growing interest in collective redress in the European Union (particularly after the 11 June 2013 Commission Recommendation[5]), and the popularity of arbitration, it is natural to wonder whether it is conceivable to combine class or collective redress with arbitration.

As a matter of fact, some first steps appear to have already been taken in Germany. We refer to the "Ergänzende Regeln für gesellschaftsrechtliche Streitigkeiten" (Supplementary Rules for Corporate Law Disputes) created in 2009 by the Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration – DIS).

Portugal could be next. As we will see in the present article, Portugal's upcoming shareholder dispute regime (similar to the DIS Rules) might represent another step towards a collective arbitration regime.

2. The main problems with class arbitration in the USA

I – As the leading country in the area of group actions[6], it comes as no surprise that it was in the USA that this interesting topic of class arbitrations first arose. To be more precise, it arose in the early eighties with Keating v. Superior Court[7] (considered, by many authors, as the origin of "class arbitration"[8]).

Sammartano, International Arbitration: Law and Practice, 3rd edition, Juris, New York, 2014, pages 183-184.

[4] Gary Born, International Commercial Arbitration, vol. I, 2nd edition, Kluwer Law International, Alphen aan den Rijn, 2014, page 1523.

[5] 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).

[6] See, for instance, Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Kluwer Law International, The Hague, 2005, page 258.

[7] Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), available in http://www.leagle.com/decision/198261531Cal3d584_1586.xml/KEATING%20v.%20SUPERIOR%20COURT.

[8] See S. I. Strong, Class, Mass and Collective Arbitration..., cit., page 7. Regarding the origin and the historical evolution of class arbitration, see S. I. Strong, Class, Mass and Collective

Still, it was particularly in 2003, after the famous Green Tree Financial Corp. v. Bazzle case[9], that this subject acquired a significant importance in the USA and erupted onto the international scene[10]. As a matter of fact, from then on there was a significant increase in the number of "class arbitrations" in the USA[11]. It is therefore not surprising that Green Tree Financial Corp. v. Bazzle is usually viewed as the leading case[12], i.e., the decision that opened the doors to class arbitration[13].

For this to happen, certain Arbitration centres played an important role: such as the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS). By providing

Arbitration..., cit., pages 6-16, and "Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration", in Hague Yearbook of International Law – Annuaire de la Haye de Droit International, vol. 23 (2010), Martinus Nijhoff Publishers, Leiden, 2011, pages 121-122, as well as Gary Born, International Commercial Arbitration, vol. I, cit., pages 1507 ff., Gary Born / Claudio Salas, "The United States Supreme Court and Class Arbitration: A Tragedy of Errors", in Journal of Dispute Resolution, University of Missouri School of Law, vol. 2012, no. 1, Columbia (Missouri), 2012, pages 23 ff., Lea Haber Kuck / Gregory A. Litt, "Will Stolt-Nielsen Push Consumer, Employment and Franchise Disputes Back Into the Courts?", in NYSBA – New York Dispute Resolution Lawyer, vol. 4, no. 1, 2011, page 16, and David S. Clancy / Matthew M. K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History", in The Business Lawyer, American Bar Association, vol. 63, no. 1, 2007, pages 55-79.

[9] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), available in https://supreme.justia.com/cases/federal/us/539/444/case.pdf. Regarding this case, see, for instance, António Pedro Pinto Monteiro, "Anotação ao acórdão Green Tree Financial Corp. v. Bazzle...", cit., pages 239-252.

[10] Vide S. I. Strong, "Class and Collective Relief in the Cross-Border Context...", cit., page 121.

[11] Cfr. 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 335, Gary Born, International Commercial Arbitration, vol. I, cit., page 1511, and Gary Born / Claudio Salas, "The United States Supreme Court and Class Arbitration...", cit., page 30.

[12] Bernard Hanotiau, Complex Arbitrations..., cit., page 259.

[13] Vide Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, Redfern and Hunter on International Arbitration, 6th ed., Oxford University Press, Oxford, 2015, pages 154 e 155; see also Marc Orgel, Class Arbitration – Von der Gruppenklage zum Gruppenschiedsverfahren und zurück? Eine Untersuchung zum U.S.-amerikanischen Schiedsverfahrensrecht, Mohr Siebeck, Tubinga, 2013, pages 161-163.

special rules on class arbitration[14], these centres had an important effect on the growth of class arbitration in the US[15].

Nevertheless, despite the fast growth that class arbitration enjoyed after Green Tree Financial Corp. v. Bazzle, the truth is that this issue is still seen as an American issue[16], with few effects known outside US borders[17].

On the other hand, even in the USA, class arbitration is still a controversial issue. This is demonstrated by the several twists and turns that the American case law has been facing[18]. We refer particularly to: (i) Stolt-Nielsen S.A. v. 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[19]. As a result,

[14] Cfr. Bernard Hanotiau, Complex Arbitrations..., cit., page 277, Eric P. Tuchmann, "The administration of class action arbitrations", cit., pages 329-331, and Richard Chernick, "Class-wide arbitration in California", in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration, Oxford University Press, Oxford, 2009, page 342. We refer particularly to the "Supplementary Rules for Class Arbitrations" and to the "JAMS Class Actions Procedures". It is also important to emphasize that, at one point, the National Arbitration Forum (NAF) also established a set of rules on class arbitration (see S. I. Strong, Class, Mass and Collective Arbitration..., cit., pages 35, 69-74).

[15] See 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 678, and Philippe Billiet, "Introduction", in Class Arbitration in the European Union, Maklu, Antuérpia, 2013, page 12. Regarding these rules, see, for instance, S. I. Strong, Class, Mass and Collective Arbitration..., cit., pages 35, 36, 43 ff., Bernard Hanotiau, Complex Arbitrations..., cit., pages 277-279, Eric P. Tuchmann, "The administration of class action arbitrations", cit., pages 325-336, Richard Chernick, "Class-wide arbitration in California", cit., pages 337-351, and Philippe Billiet, "Introduction", cit., pages 16-18.

[16] Vide Gary Born, International Commercial Arbitration, vol. I, cit., pages 1523-1524, and Julia Mair, "Equal Treatment of Parties in the Nomination Process of Arbitrators in Multi-Party Arbitration and Consolidated Proceedings", in Austrian Review of International and European Law, vol. 12, no. 1, Martinus Nijhoff Publishers, Leiden, 2007, page 61.

[17] On the (few) effects outside US borders, particularly in Colombia and Canada, see S. I. Strong, Class, Mass and Collective Arbitration..., cit., pages 31-32. Regarding the possible effects in Europe, see Philippe Billiet (editor), Class Arbitration in the European Union, Maklu, Antuérpia, 2013, and the discussion on the recent interest in the European Union with collective redress, mentioned below.

[18] See S. I. Strong, Class, Mass and Collective Arbitration..., cit., page 361.

[19] Regarding these cases, see, for instance, Gary Born, International Commercial Arbitration, vol. I, cit., pages 1514-1523, S. I. Strong, Class, Mass and Collective Arbitration..., cit.,

and as some authors put it, the future of class arbitration "remains unsettled"[20].

II – The reasons for these problems and for the uncertainty in the American case law are quite understandable. It is not difficult to see the conceptual difficulties that may arise here.

As several authors correctly observe, at first sight, arbitration and class actions do not seem compatible with one another[21]. In fact, they seem to be mutually exclusive processes, in the sense that they seem to mutually exclude one another.

Some of the main features of arbitration appear to reveal a certain incompatibility with a system of class actions such as the American one[22].

The incompatibility starts with the consensual nature of arbitration. As is well known, consent is the cornerstone of arbitration, the pierre angulaire de l'arbitrage[23]. This is quite obvious and yet, when

pages 12-14, 106-110, 206 ff., 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 517 ff., and Marc Orgel, Class Arbitration – Von der Gruppenklage zum Gruppenschiedsverfahren..., cit., pages 317 ff.

[20] Gary Born, International Commercial Arbitration, vol. I, cit., page 1523.

[21] See Eric P. Tuchmann, "The administration of class action arbitrations", cit., page 327, António Pedro Pinto Monteiro, "Anotação ao acórdão Green Tree Financial Corp. v. Bazzle...", cit., pages 248-251, António Pedro Pinto Monteiro / José Miguel Júdice, "Class Actions & Arbitration in the European Union – Portugal", cit., page 200, Luca G. 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, 2014, page 105.

[22] Regarding the (many) difficulties that arise when one tries to combine arbitration with a class or a collective arbitration regime, see Ana Montesinos García, "Últimas tendencias en la Unión Europea...", cit., pages 105 ff., and José Miguel Júdice / António Pedro Pinto Monteiro, "Collective Arbitration in Europe...", cit., pages 48 ff.

[23] 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, Inter-

addressing class or collective arbitration, many authors seem to forget it (particularly concerning the so-called opt-out system)[24].

As a matter of fact, the opt-out system appears to contravene 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 well-known difficulties in doing so or even in becoming aware of that possibility in due time.

Furthermore, the opt-out system is at the centre of the many procedural problems that class or collective arbitrations 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/she has not opted out[25];

national Chamber of Commerce, Paris, 2010, pages 25 and 72, Bernard Hanotiau, Complex Arbitrations..., cit., 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, pages lvii, 3-4, Ousmane Diallo, Le consentement des parties à l'arbitrage international, Presses Universitaires de France, Paris, 2010, page 7, and Andrea Marco Steingruber, Consent in International Arbitration, Oxford International Arbitration Series, Oxford University Press, Oxford, 2012, page 1.

[24] 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" (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). All individuals will be bound by the judgment, 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 judgment. This is the model the majority of European countries are familiar with (Portugal is one of the few exceptions) – vide European Commission Communication [COM(2013) 401 final], page 11, and also 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, page 119.

[25] See Ana Montesinos García, "Últimas tendencias en la Unión Europea...", cit., pages 105-106.

b) confidentiality – the opt-out system seems to compromise one of the most important advantages of arbitration[26]. Potential class members must have the opportunity to opt-out, which implies some (relevant) degree of public disclosure. This need for 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"[27]. Hence the reason why providing adequate notice to potential claimants is so vital in an opt-out proceeding[28]; and
c) recognition and enforcement uncertainties under the New York Convention[29] – 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(1)(b)

[26] 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, Artur Flamínio da Silva / António Pedro Pinto Monteiro, "Confidentiality in Portuguese Sports Arbitration: what lessons can we learn from CAS", in YAR – Young Arbitration Review, year V, no. 21, Lisboa, 2016, pages 59 ff., and A. Ferrer Correia, "Da arbitragem comercial internacional", in Temas de Direito Comercial e Direito Internacional Privado, Almedina, Coimbra, 1989, pages 174-175.

[27] 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, no. 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.

[28] See Michael D. Hausfeld / Brian A. Ratner, "Prosecuting class actions and group litigation", cit., pages 547-548.

[29] 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?", cit., page 686.

> [the non-present class member can always argue that he was not given proper notice of the arbitration]; ii. article V(1)(d) [there can also be problems with lack of consent, when interpreting the agreement of the parties]; and iii. article V(2)(b) [public policy can always be tricky on this subject, particularly on a continent, such as Europe, where class actions or collective redress do not have a strong tradition and where the majority of countries follow an opt-in model][30].

III – As we can see, and as stated in the introduction, the problems with class arbitration are indeed many. Nevertheless, despite these problems, and the pessimism that followed the above-mentioned case law, it is important to recall that "class arbitration is not dead"[31]. As a matter of fact, "class arbitrations in the United States have gone forward, and new cases continue to be filed"[32] (although in lesser numbers than in the past).

That being said, would it possible (and desirable) to have a coherent class (or collective) arbitration regime in Europe? This is the key question we will address next.

3. Class or collective arbitration in Europe?

I – The question makes sense. After all, collective redress is an important means of access to justice and has been on the agenda of the European Commission from quite some time[33].

[30] 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.

[31] James H. Carter, "Class Arbitration In the United States: Life After Death?", in Class and Group Actions in Arbitration, Dossiers – ICC Institute of World Business Law, Paris, 2016, page 13.

[32] James H. Carter, "Class Arbitration In the United States...", cit., page 15.

[33] 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..., cit., pages 9 ff., 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.

[34] 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.

[35] See Lukasz Gorywoda, "The Emerging EU Legal Regime for Collective Redress...", cit., page 186, and José Miguel Júdice / António Pedro Pinto Monteiro, "Collective Arbitration in Europe...", cit., pages 49-51. Regarding the common types of collective redress in the EU, see Philippe Billiet, "Collective Redress and Class Arbitration in the EU", in Class and Group Actions in Arbitration, Dossiers – ICC Institute of World Business Law, Paris, 2016, pages 59 ff.

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

The question makes even more sense due to the reference that the European Commission made to alternative dispute resolution procedures – in which arbitration clearly fits – in the above-mentioned Recommendation (see paragraph 16 of the preliminaries and paragraph 26 of the Recommendation).

To some authors, collective redress is "the EU answer to the US class action"[34]. Apart from of this, it is important to retain that collective redress is different from the American class action[35]. 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 11 June 2013, the Commission unequivocally stated that "the European approach to collective redress clearly rejects the US style system of class actions."[36]

But that is not all. The aversion towards US class actions[37] is also quite clear under the above 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".

> "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. 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' procedures 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, US 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."[38]

[36] 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.

[37] See Philippe Billiet, "Collective Redress and Class Arbitration in the EU", cit., pages 60-61.

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: (i) prohibition of punitive damages[39]; (ii) limits on contingency fees, which are not accepted as a general rule[40]; (iii) limits on third party funding[41].

II – Despite being different, the truth is that the possibility of combining collective redress with arbitration faces similar problems to the ones that we have previously mentioned.

Particularly, and in addition to those problems, it must be emphasized that there is no uniformity in the EU Member States regarding the procedural mechanisms to deal with mass claims. National mechanisms vary considerably on this subject[42]. It is therefore quite understandable that the Commission felt the need to recommend collective redress principles to Member States.

That being said, and while the European Commission is still assessing the implementation of the Recommendation[43], it would be

[38] European Commission Communication [COM(2013) 401 final], pages 3 and 8.

[39] Paragraph 31 of the European Commission Recommendation (2013/396/EU).

[40] Paragraph 30 of the European Commission Recommendation (2013/396/EU) – see also paragraph 29.

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

[42] 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.

[43] According to paragraph 41 of the European Commission Recommendation (2013/396/EU): "the Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust.

easy to take a negative approach to the subject. Surprisingly, however, some first steps towards collective arbitration appear to have already been taken in Germany, more specifically by the DIS. We refer to the "Ergänzende Regeln für gesellschaftsrechtliche Streitigkeiten" (Supplementary Rules for Corporate Law Disputes) created in 2009[44].

As we will see in the next chapter, it appears that Portugal will soon take the same path. If the upcoming shareholder dispute resolution regime (similar to the DIS Rules) goes forward, this might represent a step towards a collective arbitration regime.

4. Shareholders Disputes[45]

The possibility to subject corporate law disputes to arbitration in Portugal has been a widely discussed issue[46]. With the entry into force of Law

The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed."

[44] Regarding these Rules, see Christian Borris, "Collective Arbitration: The European experience. Germany and the DIS Supplementary Rules for Corporate Law Disputes (DIS-SRCoLD)", in Class and Group Actions in Arbitration, Dossiers – ICC Institute of World Business Law, Paris, 2016, page 80-87, S. I. Strong, Class, Mass and Collective Arbitration..., cit., pages 35, 36, 86-101, "Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?", in ASA Bulletin, Association Suisse de l'Arbitrage, vol. 29, no. 1, Kluwer Law International, Alphen aan den Rijn, 2011, pages 145-165, "Class and Collective Relief in the Cross-Border Context...", cit., pages 122- 123, Mauro Rubino-Sammartano, International Arbitration: Law and Practice, cit., page 182. In what specifically concerns arbitration of corporate law disputes in Germany, see also Christian Duve / Philip Wimalasena, "Arbitration of Corporate Law Disputes in Germany", in Karl-Heinz Böckstiegel / Stefan Michael Kröll / Patricia Nacimiento (coordenadores), Arbitration in Germany: The Model Law in Practice, 2nd edition, Kluwer Law International, Alphen aan den Rijn, 2015, pages 927- 961.

[45] Note: the considerations made in this chapter are based in the current draft versions of the "Legal Regime of Corporate Arbitration" and the "Rules for Corporate Arbitration" promoted by the Portuguese Arbitration Association (APA). Therefore, the comments regarding the articles of the drafts versions may not be in line with the final versions of these legal instruments.

[46] See António Menezes Cordeiro, Tratado da Arbitragem. Comentário à Lei 63/2011, de 14 de dezembro, Almedina, Coimbra, 2015, pages 98-101, Paulo de Tarso Domingues "A arbitrabilidade dos litígios societários", in IV Congresso do Direito das Sociedades em Revista, Almedina, Coimbra, 2016, pages 247-257, Rui Pereira Dias, "Alguns problemas práticos da arbitragem de litígios societários (e uma proposta legislativa)", in II Congresso do Direito das Sociedades em Revista, Almedina, Coimbra, 2012, pages 291-304, António Sampaio Caramelo, "Arbitragem de litígios societários", in Revista Internacional de Arbitragem e Conciliação, ano 4, Associação Portuguesa de Arbitragem, Almedina, Coimbra, 2011, pages 7-64, Paula Costa e Silva, "Arbitrabilidade e tutela colectiva no contencioso das deliberações sociais", in Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida, vol. IV, Almedina, Coimbra, 2011, pages 357-391, and Diogo Costa Gonçalves, "Notas breves sobre a socialidade e a parassocialidade", in Revista de Direito das Sociedades, ano V (2013), no. 4, Almedina, Coimbra, 2013, pages 796-799.

No. 63/2011[47], one of the greatest barriers to the arbitrability of some corporate disputes has fallen: the freedom of the parties to waive their right as the general criteria of arbitrability was eliminated and replaced by the criteria of the pecuniary nature of the dispute[48].

Today, the hot topic is no longer the arbitrability of corporate law disputes, but rather in what terms those disputes can be subject to arbitration. In fact, the Portuguese Law on Voluntary Arbitration has introduced the possibility, but does not provide for specific rules regarding corporate disputes.

4.1. Corporate Arbitration Regime

On 6 May 2016, the Portuguese Arbitration Association (APA) released the draft versions of two important future legal instruments – the Legal Regime of Corporate Arbitration and the Rules for Corporate Arbitration[49]. This regime, which was inspired by the DIS-Supplementary Rules for Corporate Law, of the German Institution of Arbitration[50], contains provisions regarding, for example:

- Corporate disputes that can be subject to arbitration;
- the arbitration agreement requirements;
- the establishment of the arbitral tribunal;
- the way of appointing the arbitrators;
- the res judicata effect of the award.

Under Article 1(2) of the Legal Regime of Corporate Arbitration, the following can be subject to arbitration:

[47] Lei da Arbitragem Voluntária (Law on Voluntary Arbitration).

[48] Rui Pereira Dias , "Alguns problemas práticos...", cit., pages 292-293. See also Paulo de Tarso Domingues, "A arbitrabilidade...", cit., pages 248-249.

[49] Versions available in http://www.arbitragem.pt/projetos/.

[50] DIS-Supplementary Rules for Corporate Law, in force since 15 September 2009, available in http://www.disarb.org/en/16/rules/overview-id0.

a) Disputes, between the company and its shareholders, regarding the validity, interpretation or enforcement of the articles of association;
b) Disputes between the company or its shareholders and the members of the corporate bodies, such as the disputes regarding the directors' liability (Articles 72 to 80 of the Portuguese Commercial Companies Code);
c) Disputes regarding the validity of corporate bodies resolutions;
d) Disputes between the company and its shareholders or between the shareholders regarding the shareholders' corporate rights and duties;
e) Disputes regarding the exercise of corporate rights: the request for an inquiry to the company; the appointment or removal of members of corporate bodies; the calling for a general meeting; the reduction of share capital, etc.

Disputes concerning shareholders' agreements or any other dispute to which the company is not a party, are excluded from the scope of this regime. This does not mean that those disputes are not arbitrable, but rather that they are subject to the Portuguese general arbitration rules.

Unlike the DIS Supplementary Rules, which are limited by the fact that "[a]rbitration agreements in the statues of a stock corporation listed on the stock exchange are considered inadmissible", the Portuguese corporate arbitration regime contains no such limitation.[51]

For this regime to be applicable, the arbitration clause must be included in the company's articles of association, and must expressly mention the scope of the disputes covered by it[52].

Article 2(4) of the Legal Regime of Corporate Arbitration[53] states that all shareholders and members of corporate bodies are bound by the arbitration clause set in the company's articles of association, from the moment it becomes effective.

[51] Rui Pereira Dias proposed the inclusion of an Article regarding Corporate Arbitration in the Law on Voluntary Arbitration, which excluded the application of this special regime to share companies listed on the stock exchange. See "Alguns problemas práticos...", cit., pages 301 ff.
[52] Article 2(1) of the Legal Regime of Corporate Arbitration.
[53] See also Article 3(3) of the Rules for Corporate Arbitration.

The inclusion of the arbitration clause in the articles of association, or any further amendment, can only occur if the majority required by law or by the articles of association is achieved. Given that there is currently no specific rule in the Commercial Companies Code on the majority required, it is not clear if it needs to be a unanimous decision, or if a qualified majority will be enough. Assuming the latter option is chosen, the law and the articles of association should set rules that allow the shareholders to exercise a right of withdrawal when they vote against the adoption or the amendment of an arbitration clause.

It is also mandatory to designate the arbitration centre that will have jurisdiction over any disputes in the arbitration clause. This requirement is intended to prevent any potential disagreement between the parties regarding this issue.

4.2. The collective nature of the Portuguese corporate arbitration regime

As already mentioned, the Portuguese corporate arbitration regime was inspired by the DIS-Supplementary Rules for Corporate Law, which, in the words of Professor Strong, "appear to constitute the first known form of non-class collective arbitration"[54]. This conclusion is based on the fact that third parties – "concerned others" – have the right to join the arbitral proceedings as a party or intervenor; but, regardless of whether they participated in the proceedings, the award also has res judicata effect against or in favour of those concerned others[55].

The Portuguese corporate arbitration regime provides for a similar set of rules. Article 6(3) of the Rules for Corporate Arbitration states that: "in disputes regarding the validity of corporate bodies resolutions or any other dispute whose decision, under the substantive law, should

[54] S. I. Strong, "Collective Arbitration Under the DIS Supplementary Rules...", cit., page 148.
[55] "Section 2 "Inclusion of Concerned Others" – 2.1 Disputes requiring a single decision binding all shareholders and the corporation and in which a party intends to extend the effects of an arbitral award to all shareholders and the corporation without having been introduced as a party to the arbitral proceeding (Concerned Others), the Concerned Others shall be granted the opportunity to join the arbitral proceeding pursuant to the DIS-SRCoLD as a party or compulsory intervenor in the sense of section 69 German Code of Civil Procedure (Intervenor). This applies mutatis mutandis to disputes that require a single decision binding specific shareholders or the corporation."

bind other persons beyond the initial parties of the dispute, such as the members of corporate bodies or other shareholders ("Relevant Persons") the Request for Arbitration shall contain the identification of the persons concerned who are known to the claimant, who shall be admitted to arbitration if they so wish."

A) Relevant Persons

I – The references to the concept of Relevant Persons and other related provisions are fragmented in the two legal instruments and, therefore, in order to understand the conditions in which these persons take action (or not) in the arbitration proceedings, it is necessary to analyse several articles.

The starting point is to understand who can be considered as a Relevant Person.

There is no clear definition of this concept in either of the two legal instruments. Nevertheless, it is possible, by reading the above mentioned Article 6(3), to define Relevant Persons as the shareholders and members of corporate bodies who, under the substantive law, will be bound by the arbitral court decision.

First, the concept of Relevant Persons does not concern the initial parties to the dispute. Naturally, those parties participate in the arbitral proceedings and are bound by the tribunal's award on the dispute.

Secondly, it is only in disputes requiring a single decision binding "other persons beyond the initial parties of the dispute" that these Relevant Persons need to be identified in the Request for Arbitration.

The identification of the Relevant Persons can be made by:

- The claimant(s), in the request for arbitration[56];
- The respondent(s), in the reply[57];
- The shareholders and members of corporate bodies already identified as Relevant Persons in the request for arbitration[58];
- The company, when it is a party in the proceedings and the dispute requires a single decision binding other persons beyond the initial parties of the dispute[59];

[56] Article 6(3) of the Rules for Corporate Arbitration.
[57] Article 7(2)(b), of the Rules for Corporate Arbitration.
[58] Idem.
[59] Article 4(2) of the Legal Regime of Corporate Arbitration.

Any person who proves his/her capacity as shareholder or member of the corporate bodies and is bound by the arbitration clause, but which has not previously been identified, can also apply to join as a Relevant Person.[60]

All Relevant Persons are "admitted to participate in the arbitral proceedings"[61], but it is not mandatory for them to do so.

This means that the Portuguese corporate arbitration regime has adopted an opt-in system, at least regarding the participation of these persons in the arbitral proceedings.

When the publication of the Secretariat of the Arbitration Centre is required to publish the arbitration proceedings[62], the Relevant Persons have 15 days to consult the Request for Arbitration and the related documents[63]. After the expiry of the time limit, the Relevant Persons can request to be served within 5 days.

In the other cases, the Relevant Persons who have not been identified have 15 days from the final registration of the arbitral procedure in the Commercial Register to request to be served[64].

The absence of this request does not exclude the possibility for these persons to join the proceedings at a later stage, but by requesting their participation, they automatically accept the arbitral proceedings as they stand [65]. This applies not only to the Relevant Persons who were identified as such during the initial notification period, but also to those who were identified later on. Although it seems to be a more burdensome solution for the latter, it is understandable, given the fact that all arbitration proceedings and final awards are subject to registration at the Commercial Registry[66]. Therefore, all shareholders and members of corporate bodies of a particular company, who are not claimants or respondents, are able to know whether arbitration

[60] Article 4(3) of the Legal Regime of Corporate Arbitration.
[61] Article 9(1) of the Rules for Corporate Arbitration.
[62] Article 3(2) and Article 4 of the Legal Regime of Corporate Arbitration.
[63] Article 9(2) of the Rules for Corporate Arbitration.
[64] Article 9(4) of the Rules for Corporate Arbitration.
[65] Article 9(5) of the Rules for Corporate Arbitration.
[66] Article 3(1) of the Legal Regime of Corporate Arbitration. Article 9 of the Commercial Registration Code already provides for registration, as a general rule, of any judicial proceedings regarding corporate matters.

proceedings concerning corporate disputes have started[67], and to join if they wish to have an active role in those proceedings. Moreover, the mandatory registration introduced in the corporate arbitration regime is precisely the way to ensure that all shareholders can have access to that information, even if they are not involved in or aware of the day-to-day life of the company.

However, up to the point the arbitral tribunal is constituted, the tribunal or the chairman of the arbitration centre can reject any request to join the arbitral procedure at a later stage[68]. It is not clear where the Relevant Persons can appeal this decision to, or if it is even possible to appeal.

Since the concept of Relevant Persons, according to Article 6(3) of the Rules for Corporate Arbitration, extends to members of corporate bodies or other shareholders who, in some disputes, should be bound by the award, beyond the initial parties, "it may become procedurally and technically unmanageable if the number of parties [...] is too large"[69]. And this potential scenario is aggravated by the fact that, in addition to current shareholders and members of governing bodies, former shareholders and members of governing bodies also remain bound by the arbitration agreement[70].

II – The Shareholders who choose to not intervene in the arbitration have the right to receive all the information they require regarding the status of the arbitration proceedings, including the content of the procedural documents and arbitration awards[71], a similar option to the one stated in Section 5.5.1 of the DIS Supplementary Rules, with two important differences: under the Portuguese rules, only the shareholders who request that information will be provided with it and it is the company, and not the arbitral tribunal, which should provide the information to those shareholders[72]. It is only if the company does

[67] Paulo de Tarso Domingues, "A arbitrabilidade..., cit., page 256.
[68] Article 9(6) of the Rules for Corporate Arbitration.
[69] Christian Borris, "Collective Arbitration: The European experience...", cit., page 84.
[70] Article 2(6) of the Legal Regime of Corporate Arbitration.
[71] Article 6(1) of the Legal Regime of Corporate Arbitration.
[72] Article 6(2) of the Legal Regime of Corporate Arbitration.

not make any information requested available within 30 days that the that the arbitration centre will provide it.

It is interesting to point out that, under the DIS Supplementary Rules, only the "Concerned Others" who "have expressly waived in writing to receive [this] information" will not have access to "copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal". Professor Strong, when comparing the DIS Supplementary Rules with the AAA Supplementary Rules, interpreted the reasons underlying this option as follows: "the difference in approach may be due to the fact that the DIS Supplementary Rules use an opt-in regime. [...] [I]t is less problematic to put the burden on unnamed parties to keep themselves apprised of proceedings in a AAA proceeding, since the right to opt out under the AAA Supplementary Rules is triggered by individualized notices sent at specific times during the arbitration, and there are therefore fewer legal consequences that attach to any interim decisions or actions".[73]

The Portuguese regime would be expected to seek a similar solution, that is, to inform all Relevant Persons of the progress of the arbitral proceedings. However, while the DIS Supplementary Rules only requires the information to be automatically provided to "identified Concerned Others", Article 6(1) of the Legal Regime of Corporate Arbitration extends the right to be informed to all shareholders, including those identified as "Relevant Persons" as well as those who were not. Thus, it is our opinion that the right to information is broader and more effective under the Portuguese regime.

The right to information stated in the corporate arbitration regime represents a derogation from the principles of privacy and confidentiality that "have long been considered a hallmark of arbitration[74]", but it is consistent with the collective nature of the corporate arbitration regime and the shareholders' right to information as it is laid down in the Portuguese Commercial Companies code[75].

[73] S. I. Strong, "Collective Arbitration Under the DIS Supplementary Rules...", cit., page 157.
[74] Idem, page 156.
[75] See Article 181, Articles 214 et seq.; Articles 288 et seq. and Article 480.

III – In "disputes regarding the validity of corporate bodies resolutions or any other dispute whose decision, under the substantive law, should bind other persons beyond the initial parties of the dispute", it is the responsibility of the chairman of the arbitration centre to appoint all the arbitrators or the sole arbitrator[76]. This option is reasonable given the fact that Relevant Persons can join the proceedings at a later stage, after the arbitral tribunal has already been constituted and, consequently, after the arbitrators have already been appointed. This can also be considered a way to prevent future challenges to the arbitral award. The DIS Supplementary Rules also adopted a different solution regarding the appointment of the arbitrators[77].

B) Res judicata effect

The Relevant Persons who join the arbitral proceedings become a party to those proceedings and they are, therefore, bound by the final arbitral award.

But the award has res judicata effect not only against the initial parties and the Relevant Persons who chose to join the arbitral proceedings, but also against all shareholders and corporate bodies, irrespective of their participation in the arbitration proceedings[78]. While there is an opt-in system with regard to participation, there is no option concerning the res judicata effect of the final award, whether in or out.

This provision of the Legal Regime of Corporate Arbitration follows Article 61 of the Portuguese Commercial Companies Code, which states that "a court decision declaring a resolution null and void, or annulling it, generates effects in relation to all the shareholders and corporate bodies of the company, even if they have not been party to or have not intervened in the litigation."

Although it represents a departure from the general regime of arbitration, the corporate regime, as it exists in Portugal, requires the extension of the res judicata effect when the procedure is filed in favour

[76] Article 5(3) of the Rules for Corporate Arbitration.
[77] See Sections 7 and 8 of the DIS Supplementary Rules.
[78] Article 8(1) of the Legal Regime of Corporate Arbitration.

of or against the company. The only way for a shareholder or member of the corporate body to safeguard his/her position is by actively intervening in the proceedings.

There are other corporate disputes, however, in which the company is not a party and which, in our opinion, do not justify the extension of the res judicata effect beyond the parties. According to Article 79, for example, it is possible for the shareholders to file an action against a member of the board of directors for damages that, in the exercise of his functions, he has directly caused to them. If shareholder "A" initiates an arbitral proceeding against director "X" due to a certain agreement entered into "X", in his capacity as director of the company, and a third party, which shareholder "A" understands that caused damages directly to him, and the arbitral tribunal decides against shareholder "A", there is no reason to extend the effect of the award to other shareholders. In fact, it is possible that the director, by entering into the above mentioned agreement, caused damages directly to shareholders "B", "C", and "D", but not to shareholder "A". So, the final award against shareholder "A" can coexist with others awards in favour of "B", "C" and "D", in different arbitral proceedings. The extension of the res judicata effect of the decision against shareholder "A" to all shareholders of the company has no grounds and, therefore, the fundamental principles such the party autonomy shall prevail.

Article 8 of the Legal Regime of Corporate Arbitration should be limited to the "disputes regarding the validity of corporate bodies resolutions or any other dispute whose decision, under the substantive law, should bind other persons beyond the initial parties of the dispute." Only those justify an opt-in system regarding the participation in the proceedings, and the extension of the res judicata effect of the award to all parties and non-parties.

In conclusion, arbitrations under the Portuguese corporate arbitration regime, like those under the DIS Supplementary Rules, appear to be "a form of collective or group arbitration, though not a 'class' arbitration in the ordinary sense".[79]

[79] Christian Borris, "Collective Arbitration: The European experience...", cit.,., page 85.

X Congresso do Centro de Arbitragem Comercial

INTERVENÇÕES

Centro de Arbitragem Comercial

Juliette Fortin
Jesús Almoguera
Denys Hickey
José Joaquín Caicedo Demoulin
Christopher R. Seppälä
Rodrigo Garcia da Fonseca
António Pedro Pinto Monteiro
Joana Macedo
Ana Montesinos García
João Lima Cluny
Ángel Sánchez Freire

CENTRO DE ARBITRAGEM COMERCIAL
Câmara de Comércio e Indústria Portuguesa

ALMEDINA