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PART X

COLLECTIVE LITIGATION

CHAPTER FIVE

MASS CLAIMS, ADR AND REGULATORY REDRESS*

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1 ARBITRATION OF MASS CLAIMS

1 The paradigmatic arbitration case, like the paradigmatic lawsuit, involves one or a few parties on each of two sides. As a consequence, the emergence of mass claims poses a challenge to arbitration, just as it has to litigation. Representative collective proceedings in arbitration are extremely rare, but arbitration providers in the United States have experimented with *class arbitration* for domestic disputes and there have been two high profile class action-like proceedings in investor-state arbitration. Moreover, contractual barriers to collective arbitration proceedings in the United States have led to the adoption of new arbitration procedures for mass claims, akin to aggregation procedures discussed in Chapter 4 of this publication. Although the future is always difficult to predict, it seems likely that pressure to provide specialized arbitral procedures for mass claims will grow over time. ‘ ’

1.1 Class Arbitration in Domestic Disputes in the United States

2 Representative collective arbitration – ie, ‘class arbitration’ – for domestic disputes was approved by a few US state courts in the 1980s and 1990s,[1] and a US Supreme Court decision in 2003 that seemingly paved the way for class arbitration[2] sparked the development of rules for class arbitration by the two leading arbitration providers in the United States.[3] However, after an early take-up of the option of class arbitration,[4] corporations were able to shut down the phenomenon by including class action waivers in consumer and employment contracts that explicitly precluded plaintiffs from proceeding in *any* collective proceeding, either in court or arbitration. Although many national jurisdictions deny enforcement of clauses that waive rights to litigate disputes when included in form (ie, adhesive) contracts, the US Supreme Court has long held that such clauses are enforceable.[5] Starting in the early 2000s, large corporations used this doctrine to include language in arbitration clauses waiving any right to proceed

[1] J R Sternlight, ‘As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?’ (2000) 42 (1) William and Mary Law Review, fn 149-151 (reporting interviews with attorneys who represented parties in classwide arbitrations in California and Pennsylvania). The earliest reference to class arbitration is *Keating v Superior Court* (California Court of Appeals, US), Decision 28 August 1980 [167 Cal Rptr 481], reversed on other grounds by *Southland Corp v Keating* (Supreme Court, US), Judgment 23 January 1984 [465 US 1, 16 (1984)]. *Southland* was notable for holding that under the Federal Arbitration Act of 1925, federal arbitration law trumped state arbitration law, which previously determined the application of arbitration to most civil lawsuits.

[2] *Greentree Financial Corp v Bazzle* (Supreme Court, US), Judgment 23 June 2003 [539 US 444 (2003)].

[3] D Clancy and M Stein, ‘An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History’ (2007) 63 Business Lawyer, 55 (reporting that the American Arbitration Association (AAA) issued Supplementary Rules for Class Arbitration in 2003 and that JAMS (the Judicial Arbitration and Mediation Service) followed suit soon after.

[4] Ibid 56, reporting that by September 2007 the American Arbitration Association was administering ‘more than 190 class arbitrations’.

[5] D Hensler and D Khatam, ‘Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication’ (2017) 18 Nevada Law Journal, 381.

collectively, in court or in arbitration.[6] In 2011, in *AT&T Mobility LLC v Concepcion*[7], a case that arose out of a consumer contract dispute, the US Supreme Court held that such waivers are enforceable, and subsequently extended this doctrine to other contractual domains.[8]

3 In *ATT Mobility v Concepcion*, the majority opined that arbitration is unsuitable for class actions, which in the United States require substantial judicial decision-making, including certification (ie, permitting an action to proceed in class form and approving the definition of the class), overseeing notice to class members, and – in the event of settlement – holding a public hearing on the fairness, adequacy and reasonableness of the settlement and approving (or not) the settlement.[9] Consistent with the majority's concerns, Sternlight found that the small number of class arbitrations held in state courts in the 1990s used hybrid approaches, relying on a judge to certify a class and to oversee notice before the case was shifted to arbitration.[10] A judge would sometimes also review a proposed settlement and oversee settlement administration. Across the small number of class arbitration cases that Sternlight was able to identify, it appears that arbitrators were most likely to be assigned the responsibility of reaching a judgment on the merits that would bind (non-opt-out) class members.[11] The American Arbitration Association's and Judicial Arbitration and Mediation Service (JAMS) special class arbitration rules[12] currently emulate the federal class action rules, with the arbitrators making all the decisions a judge would otherwise make.[13] Because of defendants' success in enforcing class action waivers, these rules do not appear to have been tested frequently enough to produce court decisions on their appropriateness.

1.2 Collective Proceedings in International Arbitration

4 Class arbitration in the international domain has been equally infrequent and the results equally inconclusive from a policy standpoint. Globalization has produced more complex disputes, leading to more complex (and expensive and time-consuming) arbitration

[6] Ibid.

[7] *AT&T Mobility LLC v Concepcion* (Supreme Court, US), Judgment 27 April 2011 [563 US 333].

[8] *Epic Systems Corp. v Lewis* (Supreme Court, US), Judgment 21 May 2017 [544 US __ (2018)]; *Lamps Plus, Inc. v Varela* (Supreme Court, US), Judgment 24 April 2019 [587 US ___ (2019)]. But see *New Prime Inc. v Oliveira* (Supreme Court, US), Judgment 15 January 2019 [586 US ___ (2019)] holding that because the Federal Arbitration Act of 1925 excluded transportation workers from its remit, independent truck drivers could not be bound to an arbitration clause prohibiting class actions.

[9] The federal class action rules also require the court to appoint class counsel and, if the class prevails, award class counsel fees.

[10] J R Sternlight (n 1).

[11] Ibid.

[12] American Arbitration Association, 'Supplementary Rules for Class Arbitrations' (adopted 2003; amended 2010) https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf accessed 29 August 2024; JAMS, 'Class Action Procedures' (adopted 2009) https://www.jamsadr.com/rules-class-action-procedures/ accessed 29 August 2024.

[13] The AAA rules, but not the JAMS rules, provide a pause in the process for a party to challenge the appropriateness of a class proceeding before a judge.

proceedings.[14] Although comprehensive statistics on international commercial arbitration are lacking, 2019 statistics from the International Chamber of Commerce (ICC), the leading international commercial arbitration forum, show that of approximately 2,500 new filings, one-third involved multiple parties on one or both sides.[15] Multi-party arbitrations may result when there were multiple parties to a single contract governing the transaction that gave rise to a dispute or when there were multiple contracts between and among parties to a transaction that led to a dispute. Anecdotal data suggest that these situations are increasingly common in international commerce and investment.[16]

5 The ICC has long provided for joinder of parties and consolidation of multi-party disputes,[17] in limited circumstances and with consent of parties, and the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) rules for arbitrating investor-state disputes similarly provide for consolidation with the consent of parties. In recent years, some other arbitration providers have adopted joinder and consolidation rules for multi-party disputes, as discussed further below. However, in two instances, international arbitration tribunals presiding over investor-state arbitration have gone further, announcing their intention to decide thousands of mass claims arising out of a single set of facts and law in a proceeding akin to a class action.[18] In 2011, in *Abaclat v Argentina,* a massive dispute over debt restructuring between 60,000 Italian

[14] R Gerbay, 'Is the End Night Again? An Empirical Assessment of the 'Judicialization' of International Arbitration' (2014) 25 (2) The American Review of International Arbitration, 223 (arguing that increasing complexity of international arbitration proceedings reflects increasing complexity of the arbitration caseload).

[15] S Menon and C Tian, 'Joinder and Consolidation Provision Under ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Complex Disputes' (2021) Kluwer Arbitration Blog https://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ accessed 29 August 2024. The majority of multi-party cases involved multiple respondents, but a significant fraction involved multiple claimants and respondents. Ibid.

[16] J Lew, L Mistelis and S Kroll, 'Multiparty and Multicontract Arbitration' in J Lew, L Mistelis and S Kroll (ed), *Comparative International Commercial Arbitration* (Kluwer 2003). Sometimes an arbitration proceeding may also include a non-contracting party, although the validity of arbitration in such instances may be contested.

[17] See S Menon and C Tian (n 15); ICSID: 'Conventions Regulations and Rules, ICSID Arbitration Rules' (International Centre for Settlement of Investment Disputes, 2022), Chapter VI, Rule 46 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf accessed 29 August 2024.

[18] The different varieties of international arbitration are supported by different international conventions. The enforcement of international commercial arbitration of disputes among private parties is granted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as 'the New York Convention'. Arbitration of investment disputes between private investors and states, usually contracted for in bi-lateral investment treaties, is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Convention established the International Centre for the Settlement of Investment Disputes (ICSID), which issues arbitration rules for investor-state disputes and administers arbitration tribunals. Parties to investor-state disputes may choose to arbitrate their disputes in an *ad hoc* (ie, non-ICSID) process under the United Nations Commission on International Trade Law (UNCITRAL) rules or may choose to have ICSID administer their arbitration under UNCITRAL rules. Although there are differences between ICSID and UNCITRAL rules, they are quite similar in most respects.

bondholders and Argentina, a three-person arbitration tribunal held, two-to-one, that it had jurisdiction to decide the dispute in a single proceeding.[19] The tribunal was sitting under the aegis of ICSID, which had been named as the arbitration forum for future disputes in a bi-lateral investment treaty between Italy and Argentina.[20] The ICSID rules (like other similar rules for investor-state arbitration) make no provision for mass claims, but the *Abaclat* tribunal found a basis for its jurisdiction in rules that authorized it to adopt special procedures to resolve claims when a 'gap' exists in the rules. In this instance, the tribunal viewed the lack of a provision for mass claims as such a gap. (Interestingly, in asserting its jurisdiction, the tribunal noted that the Italian bondholders had no practical recourse to Argentina's courts because Argentina lacked a collective litigation procedure, and it would be practically infeasible for the courts to resolve 60,000 claims.) The tribunal also seems to have viewed the association that many (although not all) of the bondholders had signed up with to represent them as akin to a class representative.[21]

[19] The factual background of this dispute is extremely complex. It is but one of multiple disputes relating to Argentina's efforts to re-position itself in the bond market after its 2001 fiscal crisis. Briefly, the 60,000 bondholders were mainly individual investors who had declined Argentina's offer to restructure its bond debt at a substantially discounted price; when the arbitration was initiated there were 180,000 such bondholders but by the time the tribunal issued its jurisdictional decision, the vast majority had accepted Argentina's offer of payment and withdrawn from the case. See J Permisly and M Craven, 'Where Are We Now? Investment Treaty Arbitration, Sovereign Debt and Mass Claims in the Post-Abaclat Era' (2018) 15 Transnational Dispute Management, 1 https://www.skadden.com/-/media/files/publications/2018/01/where_are_we_now_investment_treaty_arbitration.pdf accessed 29 August 2024.

[20] The bi-lateral investment treaty between Italy and Argentina that governed resolution of this dispute specified that the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('the ICSID Convention') and its rules would apply. See ICSID, 'Conventions Regulations and Rules', ICSID, 'Rules and Regulations' (2022) International Centre for Settlement of Investment Disputes https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf accessed 29 August 2024.

[21] The association, labelled 'Task Force Argentina' in English, represented bondholders in negotiations with Argentina for many years after the republic defaulted. Prior to filing its arbitration claims with ICSID, the association asked the bondholders to agree to it representing them in a prospective arbitration. In the information packet the association sent to bondholders it informed them that it would be pursuing the arbitration in their interests, represented by a single law firm, and asked the bondholders to sign a power of attorney. Argentina objected to the association's filing, arguing that ICSID rules did not provide for claims by 'groups of people' or a 'class action'. The association claimed in response that each investor was initiating a claim on its own behalf; it declined the term 'class action' and instead referred to the claims as a 'joint action'. The tribunal itself used the term 'mass arbitration'. The background of the *Abaclat* arbitration and the tribunal's decision on jurisdiction can be found at Trans-Lex, 'ICSID Decision on Jurisdiction and Admissibility, Abaclat and others v The Argentine Republic, ICSID Case Number ARB/07/05' https://www.trans-lex.org/291300/_/icsid-decision-on-jurisdiction-and-admissibility-abaclat-and-others-vs-the-argentine-republic-icsid-case-no-arb-07-5/ accessed 29 August 2024.

6 The *Abaclat* decision was hugely controversial.[22] In addition to the fundamental questions of whether the tribunal had the authority to declare a collective proceeding and if so, whether the individual investors were properly represented, it raised practical questions such as how evidence would be collected and assessed. Subsequent to its jurisdictional (admissibility) ruling[23], the tribunal appointed a special master to devise a process for collecting and assessing evidence from the individual claimants. Argentina objected to the special master's appointment, arguing that a case-by-case assessment of evidence for each of the 60,000 claimant-bondholders was necessary, thereby defeating the notion of a collective proceeding. The expert-led process proceeded over Argentina's objection, with individualized evidence collection, but within the context of the collective proceeding.[24]

7 Because the *Abaclat* dispute was settled in 2016 after a change in Argentina's national government, the fundamental question of whether the ICSID (or any other) investment arbitration rules authorize what the tribunal at first termed a class proceeding and later termed a 'mass claim proceeding', was never answered. However, in 2020, a different ICSID tribunal declared that it had jurisdiction over another mass claim proceeding, this one comprising about 1,000 Greek bondholders, mostly individual investors, suing the Republic of Cyprus.[25] As was true of the *Abaclat* dispute, the *Adamakopoulos* dispute arose from a national financial crisis, in this instance the effects of a Greek economic crisis on Cypriot banks that had issued financial instruments to the Greek investors. And,

[22] After dissenting from the majority's decision to take jurisdiction over a 'mass claim' proceeding, the dissenting arbitrator stepped down from the tribunal and was replaced, and the proceeding moved into preparation for the merits phase. See JusMundi, 'Abaclat and Others v Argentina' https://jusmundi.com/fr/document/decision/en-abaclat-and-others-formerly-giovanna-a-beccara-and-others-v-argentine-republic-consent-award-under-icsid-arbitration-rule-43-2-thursday-29th-december-2016#decision_404 accessed 29 August 2024.

[23] The *Abaclat* tribunal used both 'jurisdiction' and 'admissibility' to refer to its authority to decide claims *en masse*. As the dispute settled, whether either or both were appropriate bases for its decision was never tested.

[24] *Abaclat and others v The Argentine Republic*, Case No ARB/07/05 (ICSID), Procedural Order 15, http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C95/DC8316_en.pdf accessed 29 August 2024. The procedure initially proposed by Special Master Norbert Wuhler relied on statistical sampling. In the face of objections, and at the request of the tribunal, Dr Wuhler proposed an alternate approach in which each claim would be verified, requiring triple the amount of money (for a total of USD 270,000) and additional time. The tribunal approved this alternate approach. See Investor State Law Guide, 'Abaclat and others v The Argentine Republic, ICSID Case Number ARB/07/05, Procedural Order 17' available at https://www.investorstatelawguide.com/documents/documents/IC-0103-22-%20Abaclat%20v%20Argentina%20-%20PO17.pdf accessed 29 August 2024.

[25] *Theodoros Adamakopoulos v Republic of Cyprus*, Case No ARB/15/49 (ICSID) https://www.italaw.com/sites/default/files/case-documents/italaw11238.pdf accessed 19 November 2024. The application for arbitration was submitted while the *Abaclat* proceeding was still ongoing. The *Adamakopoulos* arbitration was complicated by dispute over the effect of *Slovak Republic v Achmea*, C-284/16 (CJEU), Judgment 6 March 2018 [ECLI:EU:C:2018:158], a 2018 CJEU ruling holding that EU law pre-empts intra-EU bilateral investment treaties. Ibid para 50-63. See also C Fouchard and M Krestin, 'The Judgment of the CJEU in Slovak Republic v Achmea: A Loud Clap of Thunder on the Intra-EU BIT Sky' (2018) Kluwer Arbitration Blog https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ accessed 29 August 2024. Ultimately, the ICSID arbitration tribunal held that *Achmea* did not preclude the tribunal's jurisdiction over the dispute.

as in the *Abaclat* dispute, the defendant (Cyprus) objected to treating the claims in a single mass proceeding, on the grounds that such a proceeding was not contemplated under the Cyprus-Greece bi-lateral investment treaty that provided the basis for ICSID arbitration or under the ICSID rules, and that the parties had not given consent for such a proceeding.

8 In 2020, the *Adamakopoulos* tribunal rejected Cyprus' objections to the mass proceeding. Noting that the claimants had referred to the procedure they sought as 'multi-party proceedings', the tribunal wrote:

> The claim here is a 'mass claim' in the sense that it is a claim brought by a large number of claimants within the scope of a single case against the Respondent. But this does not imply that it is a representative claim, a class action, or a consolidation of claims, or that it is anything other than what it is – a substantial number of individuals bringing their claims against the Republic of Cyprus within a single case against the Republic […] the Tribunal does not see that any consequence flows from the use of the term 'mass claims' to describe this case and that the questions of jurisdiction and admissibility are to be decided on the basis of the substantive nature of the claims that are brought and their relevant elements and not on the basis of terminology. Hence, it simply uses the term 'mass claims' as a convenient shorthand expression.[26]

9 Noting the *Abaclat* tribunal's decision as a precedent, the *Adamakopoulos* tribunal held that it did have jurisdiction over mass claims under the ICSID rules. At the time of this writing, the arbitrators are holding hearings on the merits of the dispute.

1.3 Aggregate Arbitration

10 The *Abaclat* arbitration tribunal seemed ambivalent as to whether its decision to take jurisdiction over the 60,000 bondholders' claims was equivalent to authorizing a representative collective proceeding – a class arbitration – or some other sort of mass claim proceeding. The more recent *Adamakopoulos* tribunal asserted that it did not matter what the procedure was formally labelled: as a practical matter the tribunal had decided to address a large number of claims in a single proceeding. By inference, neither tribunal thought the proceeding could properly be termed a joinder, consolidation or coordinated procedure, the latter two of which are provided for in Chapter VI, Rule 46 of the ICSID Arbitration Rules.[27] And not surprisingly: Rule 46 applies to merging (consolidating) claims that were initially filed separately or treating such claims together for certain but not all purposes (coordination). Under ICSID rules, both consolidation and

[26] *Theodoros Adamakopoulos v Republic of Cypru*s, Case No ARB/15/49 (ICSID) para 190-191 https://www.italaw.com/sites/default/files/case-documents/italaw11238.pdf accessed 19 November 2024.

[27] ICSID, 'Conventions Regulations and Rules, ICSID Arbitration Rules' (2022) International Centre for Settlement of Investment Disputes, Chapter VI, Rule 46 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf accessed 19 November 2024.

coordination should be proposed and consented to by the parties. In *Abaclat* and *Adamakopoulos,* the respondents (defendants) objected to the tribunal addressing the claims collectively.

11 To date, there has been no move in the international arbitration community to emulate the assertions of the *Abaclat* and *Adamakopoulos* ICSID tribunals that they have authorization to decide large numbers of claims arising out of the same facts and law, without party consent, in a single proceeding. And the US Supreme Court's endorsement of waivers of any form of collective proceeding in contractual arbitration clauses has stymied the development of representative collective arbitration in that country. However, just as US Supreme Court decisions limiting the use of class actions in the United States have given rise to mass claims aggregation, recent large-scale disputes involving gig workers and others whose contracts include waivers of class proceedings have led several US domestic arbitration providers to experiment with aggregate arbitration modelled after the Multidistrict Litigation (MDL) procedure described in Chapter 4 of this publication.

12 The gig worker disputes that began in the United States but have now spread globally turn on a substantive legal question: are such workers properly categorized as employees, and hence due whatever benefits and protection are accorded by the relevant national or state law, or are they instead properly categorized as independent contractors and hence outside the protection of such laws? In the United States, when gig workers sought to contest employers' treatment of them as independent contractors, most were bound by pre-dispute mandatory arbitration clauses including class action waivers that seemingly made disputing this treatment impractical. The workers could not litigate and arbitrating individual claims required paying a non-derisory fee. With compensation uncertain at best, individuals in similar situations historically found it difficult to find lawyers to represent them (and arbitration procedures are not generally designed to facilitate claiming by unrepresented individuals or entities). Because of concerns about perceived unfairness of mandating arbitration in adhesive employment and consumer contracts, the leading arbitration providers in the United States several decades ago adopted fee rules that imposed the bulk of administrative filing fees and expenses on corporate defendants, rather than claimants. As a result, claimants filing for arbitration might pay a few hundred dollars (still not an inconsequential amount for low-income workers), while corporations defending claims would pay a few thousand per claim.[28] Starting in the mid-2010s, some plaintiff attorneys began agreeing to represent massive numbers of individual worker and consumer claimants in arbitration, reasoning that the cost to defendants of paying aggregate filing fees in the millions would give the plaintiff lawyers substantial leverage

[28] The maximum fee charged by the American Arbitration to an individual employee filing for arbitration is USD 350. In contrast, employers must pay a combined fee of USD 2,850 for responding to the employee's claim and for 'case management'. See AAA, 'Employment/Workplace Fee Schedule Costs of Arbitration' (2023) https://go.adr.org/employmentfeeschedule accessed 29 August 2024.

to achieve mass settlements, *prior to filing for arbitration*.[29] Notably, these plaintiff lawyers were *not* seeking to proceed in class form; rather, their settlement leverage relied on defendants' need – under the contracts *they* had drafted – to contest the claims individually in an arbitration process designed explicitly for such individual dispute resolution.[30]

13 The story of what some have termed *mass arbitration* is still playing out in the United States. But an early response by some arbitration providers has been to establish special procedures for consolidating claims that arise out of the same factual and legal circumstances. The leading examples share two features: (1) they emulate the multidistrict litigation procedure (MDL) described elsewhere in this volume in one or more respects; and (2) they reduce the upfront costs of arbitration in an obvious attempt to solve corporate defendants' financial dilemma derived from contracting for individual arbitration and reduce the plaintiff attorneys' settlement leverage that in turn derives from the defendants' dilemma. For example, Federal Arbitration (FedArb) offers an agreement with a company defendant to establish a framework for deciding common issues in arbitration claims when 20 or more claims arising out of the same factual circumstances are filed by the same law firm or several firms coordinating with each other. Under FedArb's special 'Mass Arbitration: ADR-MDL' rules, individual claimants pay a USD 50 filing fee (less than the fees normally charged by competitor American Arbitration Association for individual arbitration) and defendants pay USD 150 (far less than routine AAA fees) to answer those claims up to a total of 1,000 claims, at which point per claim fees to defendants are reduced. A panel of three arbitrators titled the 'ADR-MDL' panel decides common issues, after an expedited process that limits discovery and briefing.[31] The new FedArb protocol is designed explicitly to address the new mass arbitration filings.[32]

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[29] The complex socio-legal dynamics driving this development have been well described in J M Glover, 'Mass Arbitration' (2022) 74 Stan L Rev, 1283. Here, I focus on the response of arbitration fora.

[30] The American Arbitration Association (AAA), the provider specified in a large number of the gig workers' contracts, has a long history of expeditiously arbitrating and mediating mass claims on an individual basis. See https://www.adr.org/sites/default/files/document_repository/Mass-Claims-and-Federal-Programs-ADR.pdf accessed 29 August 2024. In the gig workers' dispute, defendants did not reject the likelihood that the AAA could handle a large number of workers' claims; rather, they balked at paying fees for thousands of claims under the lopsided fee schedule that the AAA had adopted years earlier to make the prospect of enforcing mandatory pre-dispute arbitration in employment disputes more palatable to the public. Turning the usual table on defendants, plaintiff attorneys responded by filing motions to compel arbitration, which many (albeit not all) all judges granted. See J M Glover (n 29).

[31] FedArb, 'ADR-MDL Framework for Mass Arbitration Proceedings' https://www.fedarb.com/framework-for-mass-arbitration-proceedings-adr-mdl/ accessed 29 August 2024. Additional fees are charged for hearings that (by inference) would consider common issues, meaning that such fees could be minimized. If the Panel fails to resolve all issues and claims do not settle, then claimants and defendants could proceed to individual arbitration.

[32] K Hagan, 'Another Arbitration Service – FedArb – Establishes New Mass Arbitration Protocol' (2020) FedArb https://www.fedarb.com/another-arbitration-service-fedarb-establishes-new-mass-arbitration-protocol/ accessed 29 August 2024.

14 The International Institute for Conflict Prevention and Resolution (CPR) offers a more distinctive protocol for the new mass arbitration filings arising from employment disputes that incorporates elements of multidistrict litigation and class action practice. The new protocol applies to situations where 30 or more arbitration claims are filed by a single firm or collaborating firms.[33] Taking a leaf out of the federal MDL playbook, which frequently uses 'bellwether' trials to help parties set a value on aggregate litigation, the CPR procedure begins with a series of randomly selected 'test' arbitration cases. After these individual claims are decided and reasoned decisions are issued by the arbitrators, their outcomes (anonymized) are shared with a mediator who then has 90 days to work with the parties' lawyers to negotiate a 'global solution'. If the parties reach such a global agreement, any individual claimant who is unhappy with it can opt out and proceed to individual arbitration. If a global agreement cannot be reached, the defendant can decide (unilaterally) to file all of the claims either in court or in arbitration; if the latter, an individual claimant may nonetheless take their dispute to court. Unlike a traditional arbitration process (and the special FedArb mass claims protocol), CPR charges a single fee to initiate the process that does not cover the full costs that would ultimately be due, which would apparently depend on how far the process proceeds.[34] Holding back full fees would presumably attract defendants who under traditional arbitration would pay fees to contest each claim that is filed, when it is filed; it would also much diminish plaintiff attorneys' settlement leverage.

15 The American Arbitration Association (AAA) special rules for mass filings contains elements of both the FedArb and CPR protocols.[35] Like the FedArb protocol, the AAA rules mimic an aspect of the federal MDL process: the appointment of a single adjudicator (termed a 'process arbitrator') akin to an MDL transferee judge to decide how the claims shall be administered prior to an attempt to resolve them. Such decisions would apparently relate to discovery and statute of limitations issues. Like the CPR protocol, the AAA rules call for appointment of a single mediator to attempt a 'global' resolution of the claims. Although it does not establish separate rules for arbitrating the claims or returning them to court thereafter, it encourages parties to group claims and

[33] CPR, 'Employment-Related Mass Claims Protocol (Version 2.1)' (2022) https://static.cpradr.org/docs/ERMCP%20V2.1%20September%202022.pdf accessed 29 August 2024. See also A Frankel, 'The Problem with Outsourcing Justice to Mass Arbitration Services' (2020) Reuters https://www.reuters.com/article/world/the-problem-with-outsourcing-justice-to-mass-arbitration-services-idUSKCN20M00Y/ accessed 29 August 2024 (reporting on whether CPR's protocol was deliberately designed to appeal to DoorDash, which, having specified AAA in its gig workers' contracts attempted summarily to switch its ADR provider to CPR).

[34] I have not been able to find information on what these fees might ultimately amount to. On my reading of the protocol, parties would pay the arbitration fees associated with the ten test cases, and then a single mediation fee for that stage of the process. By inference, arbitration fees would be imposed if and when the mediation fails, and individual arbitration proceedings commence. CPR's 'due process' protocol require that parties not be required to pay fees larger than fees that would apply if the claim were to proceed in court in the relevant jurisdiction.

[35] American Arbitration Association, 'Supplementary Rules for Multiple Case Filings' (2021) https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf accessed 29 August 2024.

assign claims within a group to a single arbitrator. Finally, like both FedArb and CPR, AAA adjusts fee schedules, but in a way that seems intended to appeal to both claimants and defendants: for the first 500 cases, claimants' per case filing fee is USD 100 (rather than the USD 300 usually charged) and defendants' per case filing fee is USD 300 (rather than USD 1,900). For the next 1,000 cases, the claimants' filing fee is reduced to USD 50 and the defendants' to USD 250. For successive tranches of claims, defendants' (but not claimants') filing fees are further reduced.[36]

16 To date, it appears that few if any corporations have taken advantage of these new arbitration protocols in response to mass arbitration filings. For now, they are useful more for illustrating how elements of representative collective litigation (class action) and aggregate procedures (such as the English GLO and the US MDL) may be incorporated into contract-based domestic arbitration in the future.[37]

2 EUROPEAN ALTERNATIVES TO COLLECTIVE LITIGATION

17 In the European orbit, a number of new approaches of enforcement have emerged. In some Member States, and in some sectors, they are utilized in offering collective redress, as an alternative to collective litigation. Two of these alternatives are discussed below: Consumer Dispute Resolution (CDR) and regulatory redress.

18 Although one may criticize these changes, and despite the existence of a number of caveats, these techniques are here to stay. In many jurisdictions CDR and regulatory redress were not the consequence of a well-targeted European or even national policy but were developed and implemented by the sectors and actors themselves, making them market driven and thus unstoppable.[38]

2.1 Consumer Dispute Resolution

19 Consumer Dispute Resolution (CDR) uses the traditional ADR techniques (arbitration, conciliation and mediation) but within the context of a dispute resolution structure that is entirely separate from the courts.[39] The CDR architecture encompasses a number of possible structures: arbitration, sometimes with mediation as a first stage; official quasi-

[36] American Arbitration Association, 'Employment/Workplace Fee Schedule' (2020) https://adr.org/sites/default/files/Employment_Fee_Schedule.pdf accessed 29 August 2024. The reduced rates appear to apply solely to the first filing stage. Before an arbitrator can be selected, additional fees of USD 100 per claimant and USD 1,750 per defendant is due. Whether this is meant to apply to the appointment of a 'process arbitrator' is unclear to me.

[37] For a more extensive discussion of how mass arbitration filings may shape arbitration protocols and forums in the future, see J M Glover (n 29).

[38] S Voet, 'Where the Wild Things Are. Reflections on the State and Future of European Collective Redress' in A Keirse and M Loos (ed), *Waves in Contract and Liability Law in Three Decades of Ius Commune* (Cambridge Intersentia 2017) 105, 137-138.

[39] For a historical overview see N Creutzfeldt, 'The origins and evolution of consumer dispute resolution systems in Europe' in C Hodges and A Stadler (ed), *Resolving Mass Disputes. ADR and Settlement of Mass Claims* (EE 2013) 223.

arbitration but non-binding adjudication; regulated arbitration; complaint functions within public regulatory authorities; private sector ombudsmen, sometimes regulated; and statutory ombudsmen. CDR also encompasses Online Dispute Resolution (ODR), which uses technology (the internet) to facilitate CDR.[40] The model here is usually binding arbitration, although the process, arbitrators, and systems are not always transparent. However, online platforms also usually provide a direct communication channel between the consumer and trader, which has a high success rate of negotiated and voluntary redress where the platform includes a self-regulatory feedback feature.

20 In 2013, the EU adopted a Consumer ADR Directive and a Consumer ODR Regulation.[41] The Regulation establishes a free and interactive pan-European ODR platform through which consumers and traders can initiate CDR in relation to disputes concerning online transactions (offline transactions are excluded).[42] National CDR entities receive the complaint electronically and seek to resolve the dispute through CDR.

21 The Consumer ADR Directive promotes CDR by encouraging the use of approved DR entities that ensure the following minimum quality standards: the entities should be impartial and provide transparent information, offer their services at no or nominal cost, and hear and determine complaints within 90 days of referral. The Directive applies to domestic and cross-border disputes concerning complaints by a consumer resident in the EU against a trader established in the EU.

22 All Member States have implemented the Consumer ADR Directive.[43] In some Member States, CDR functions effectively, such as the Netherlands, the UK,[44] and the Scandinavian countries. They have a long history of well-established and good functioning CDR bodies. CDR has become the mainstream method for resolving small consumer disputes. Other countries had to set up new CDR bodies. These established and new CDR schemes are low-cost, quick, and user-friendly. The majority are free or of minimal cost to consumers, and issues are settled within a short duration.

23 Recital 27 of the Consumer ADR Directive states:

[40] E M van Gelder, *Consumer Online Dispute Resolution Pathways in Europe. Analysing the Standards for Access and Procedural Justice in Online Dispute Resolution Procedures* (Eleven 2022).
[41] Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013/11 of 21 May 2013 (EU) and Regulation on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 524/2013 of 21 May 2013 (EU).
[42] EU Commission, 'Online Dispute Resolution' https://webgate.ec.europa.eu/odr accessed 1 December 2022.
[43] For an overview see P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016).
[44] See L S Smith and M Vickers, 'Does CDR 'Get It'?' in X Kramer, S Voet, L Ködderitzsch, M Tulibacka and B Hess (ed), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges* (Hart 2022) 177.

> this Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.

24 A holistic approach to cooperation between competent national and European authorities and ADR entities cannot overlook collective claims.

25 An individual consumer complaint may result from an individual experience, but, in the context of mass production and consumption, the experience of one consumer may be the same for many others. The primary function of CDR schemes is to deliver individual redress, but even effective individual redress is insufficient to provide adequate consumer protection. Not everybody raises a claim, and most consumers do not go beyond complaining to the trader. In other words, the cases heard before CDR entities are just a fraction of the total and are not necessarily representative of all the problems consumers face.[45]

26 Moreover, if competing CDR entities operate in the same sector, there is the risk of obtaining competing decisions, especially considering that CDR outcomes are generally not public[46] and, even when they are binding, they do not deploy their effect further than the parties to the case, differently from in-court collective proceeding.[47]

27 CDR and collective litigation could be 'two-track' policies that should be developed to effectively address collective damages. However, this form of collective ADR could be seen 'a surrogate of justice'. A compromise solution could result from the considerate use of collective litigation that facilitates consumer access to justice and ultimately provides judicial awards and CDR proceedings, which could base their decisions on the courts' previous interpretations.[48]

28 Some CDR proceedings are better placed than others when it comes to collective redress. Sectoral consumer ombudsmen have access to aggregated data from traders and individual complaints or information requests, providing them with a global view of market trends, and they collaborate closely with the regulators, which they can involve for an efficient solution to mass disputes. Additionally, sectoral ombudsmen are easy for

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[45] C Graham, 'Consumer ADR and Collective Redress' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016) 429.

[46] For this reason, some countries introduced limits to the confidentiality rule when mediators detect repetitive and severe misconducts.

[47] C Graham, 'Consumer ADR and Collective Redress' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016) 429.

[48] G Gioia, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 Revista Ítalo-española de Derecho procesal 3, 44.

consumers to identify, and they hold a position of authority in the market, making their opinions more persuasive.[49]

29 For example, in the Netherlands the Consumer Complaint Commissions regularly allocates a series of similar cases for hearing on the same day, thereby providing consistency of adjudication. The results of these cases are then communicated to the parties of other (suspended) cases and these parties are invited to settle their case.[50] Similar examples exist in the UK, with the Financial Ombudsman being the leading example.[51]

30 Therefore, it is argued that the ombudsman model better serves the regulation function of CDR, which also includes identifying traders' misbehaviours and nudging them towards better compliance.[52] This is already the case in the UK, where ombudsmen play a *quasi-regulatory* role complementary to public regulators'.[53]

31 The Consumer ADR Directive pays particular attention to the cooperation between CDR entities and national public consumer enforcers.[54] In addition to the exchange of information on practices in specific business sectors about recurring consumer complaints, national authorities should provide technical assessment and information to CDR entities. According to Hörnle, complaints data, collected by an ODR system, should be used not only for the purpose of private dispute resolution, but simultaneously for public enforcement:

> such a provision would be important, as many complaints relate to large-scale consumer scams, fraud or unfair commercial business practices (and not merely an individual, single breaches of contract) and valuable time is wasted by consumers attempting ADR with fraudsters who can only be dealt with by public (criminal) enforcement.[55]

32 Currently, the European Commission is carrying out a public consultation to help assess the implementation of Consumer ADR Directive. The idea has come with a proposal in

[49] C Hodges, 'Consumer Alternative Dispute Resolution' in B Hess and S Law (ed), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 182-183, and A Biard and C Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 8.
[50] F Weber and C Hodges, 'The Netherlands' in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Oxford Hart 2012) 148-149.
[51] C Graham, 'Consumer ADR and Collective Redress' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016) 427-446.
[52] A Biard and C Hodges, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1, 7.
[53] C Hodges, 'Consumer Alternative Dispute Resolution' in B Hess and S Law (ed), *Implementing EU consumer rights by national procedural law* (CH Beck 2019) 182-183.
[54] Art 17.1 and 17.2 Consumer ADR Directive.
[55] J Hörnle, 'Encouraging online alternative dispute resolution (ADR) in the EU and beyond' (2012) 38 European Law Review 202.

the course of 2023 to amend the Directive.[56] One of the issues that is on the table is facilitating some sort of cross-border collective ADR. In developing such instruments, the following questions arise:[57] which (public or private) intermediary should play a key role in collective (cross-border) ADR proceedings? How do consumers consent to collective (cross-border) ADR proceedings? Should there be a pre-dispute consent or post-dispute (explicit or implicit) consent? Should (collective) ADR be made mandatory? How should ADR outcomes be recognised and enforced across the border? In which sense is the Brussels Ibis Regulation apt to deal with this?

2.2 Regulatory Redress[58]

33 A second example is regulatory redress, which is redress that is ordered or brought about by the intervention of public enforcers.[59] Its strength is the combined weight of public/regulatory enforcement tools and civil/compensatory tools. The advantage, and simultaneous incentive, for businesses is that all aspects of a (mass) harm situation are resolved in one process, thereby avoiding sequential public (ie, criminal and/or regulatory) and private procedures and costs. Doing the right thing in providing redress can be incentivized by leniency in enforcement policies or by the advantage of maintaining high commercial reputation.

34 Therefore, the effective functioning of regulatory redress requires sufficient resources, and more importantly, safeguards to protect the independence of public enforcement agencies (such as publication of enforcement policies, fair procedural rules, a predictable and transparent process, ministerial and stakeholder oversight, the possibility for courts to impose more serious sanctions and a mechanism for appeals, etc).[60]

35 A leading example is the Danish Consumer Ombudsman, a public enforcer who has exclusive standing to initiate an opt-out class action.[61] She uses the tool as a threat to

[56] EU Commission, 'Alternative dispute resolution for consumers' https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en accessed 30 December 2022.

[57] These questions were discussed during the Cross-Border ADR Roundtable that was organized by the European Commission and the ECC-Net on 21 June 2022. See S Voet, 'Cross-Border ADR Roundtable - Simplifying Cross-Border ADR' (2022) KU LEUVEN https://commission.europa.eu/system/files/2022-08/cross-border_collective_adr.pdf accessed 30 December 2022.

[58] See S Voet, 'Europe's Collective Redress Conundrum' (2018) 61 Japanese Yearbook of International Law 205, 227-229.

[59] For a typology, see C Hodges, 'Mass Collective Redress: ADR and Regulatory Techniques' (2015) 23 European Review of Private Law 841-845 (removing illicit profits; ordering redress to be paid; bringing a collective action; piggybacking civil claimants in public enforcement proceedings; referring assessment of loss to the court; ordering an infringer to create a restoration scheme; ordering an infringer to propose a compensation scheme; approving a compensation scheme proposed by one or more parties; referring a proposed compensation scheme to a court for approval; ordering an infringer to negotiate etc).

[60] Ibid 870-871.

[61] Forbrugerombudsmanden, 'Consumerombudsman' https://forbrugerombudsmanden.dk/consumer-ombudsman accessed 30 December 2022.

compel wrongdoers into settlements that include all aspects, such as an agreement to cease infringements, an undertaking not to repeat, the repayment of consumers and the imposition of public sanctions. Companies that sometimes approach the Ombudsman voluntarily appear to prefer to resolve the redress issues first, in order to seek lower public sanctions or reputational benefits.

36 Another example is the UK, which has increasingly paid attention to regulatory redress. The Macrory Principles have been pivotal in that evolution.[62] Macrory developed a set of six Penalty Principles that should underlie a modern regulatory sanctioning system. The two most important ones are that the purpose of a regulatory sanction is not to punish per se but to get the business back into compliance, and that a sanctioning system should ensure that no financial profit is made from non-compliance. All major UK regulatory authorities have been required to issue enforcement policies that conform to and take into account the Macrory Principles. For example, the 2008 Regulatory Enforcement and Sanctions Act[63] gave regulators the possibility to apply for extended powers to impose civil sanctions, which can include fixed or variable monetary penalties, compliance notices (requiring the offender to come back into compliance), restorations notices (requiring the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm), stop notices, and enforcement undertakings (legally binding voluntary agreements offered by those who may have committed an offence and accepted by the regulator). A 2015 recodification of enforcement powers has extended policy and powers on securing redress and changes in behaviour, giving enforcers extensive powers and discretion to customize the appropriate redress to the particular situation.

37 A third example can be found in the Italian Consolidated Law on Banking.[64] The law provides that the *Banca d'Italia*, Italy's central bank and a public institution, can issue orders to redress, which order regulated entities (ie, financial institutions) to redress customers. This is usually done when consumer law provisions are violated. Although these orders do not provide any detail on how redress should be provided, they typically force the regulated entity to provide details on the number of consumers to be redressed and the sums involved. The orders can be published on the website of the *Banca d'Italia*. A fine can be imposed if the order is not complied with.

38 On the European level, there is currently no policy regarding regulatory redress. However, this was considered as an option in the discussions about the new Consumer

[62] R Macrory, 'Regulatory Justice: Making Sanctions Effective, Final Report' (November 2006) http://webarchive.nationalarchives.govuk/20121212135622/http:/www.bis.govuk/files/file44593.pdf accessed 30 December 2022.
[63] Legislation.gov.uk, 'Regulatory Enforcement and Sanctions Act 2008' (2008) https://www.legislation.gov.uk/ukpga/2008/13/contents accessed 30 December 2022.
[64] Legislative Decree No 385/1993, https://www.bancaditalia.it/compiti/vigilanza/intermediari/Testo-Unico-Bancario.pdf accessed 30 December 2022.

Protection Co-Operation (CPC) Regulation. The old CPC Regulation[65] lays down a cooperation framework to allow national enforcement authorities from all Member States to jointly address breaches of consumer rules when the trader and the consumer are established in different countries. The European Commission coordinates the cooperation between these authorities to ensure that consumer rights legislation is applied and enforced in a consistent manner across the Single Market.

39 In 2016, the European Commission proposed a new Regulation.[66] Art 8 Sec 2(n) of the proposal stipulated that each competent authority shall have the power to 'order the trader responsible for the intra-Union infringement or widespread infringement to compensate consumers that have suffered harm as a consequence of the infringement […]'. At the end, this power was strongly toned down. Art 9 Sec 4(c) of the new CPC Regulation[67] simply states that competent authorities shall have

> the power to receive from the trader, on the traders' initiative, additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation, or, where appropriate, to seek to obtain commitments from the trader to offer adequate remedies to the consumers that have been affected by that infringement.

The power for authorities to *order* regulatory redress has been replaced by the possibility for traders to voluntarily *offer* regulatory redress.

[65] Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws, 2006/2004 of 27 October 2004 (EC).

[66] Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM (2016) 283 final of 25 May 2016.

[67] Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, 2017/2394 of 12 December 2017 (EU).

ABBREVIATIONS AND ACRONYMS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
Art	Article/Articles
CDR	Consumer Dispute Resolution
ch	Chapter
CPC	Consumer Protection Co-Operation
CPR	Conflict Prevention and Resolution
ed	editor/editors
eg	*exempli gratia* (for example)
etc	et cetera
EU	European Union
FedArb	Federal Arbitration
ff	Following
GLO	Group Litigation Order (England)
Ibid/id	*Ibidem/idem* (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
ie	*id est* (that is)
JAMS	Judicial Arbitration and Mediation Service
MDL	Multidistrict Litigation
no	number/numbers
ODR	Online Dispute Resolution
para	paragraph/paragraphs
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNCITRAL	United Nations Commission on International Trade Law
US / USA	United States of America
USD	United States Dollar
v	versus

LEGISLATION

International/Supranational

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) (Text with EEA relevance).

Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (Text with EEA relevance).

Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance).

National

Federal Arbitration Act of 1925 (US).

Supplementary Rules for Class Arbitration (2003) (US).

Legislative Decree No 385 of September 1, 1993 - Testo unico delle leggi in materia bancaria e creditizia (Italy).

Regulatory Enforcement and Sanctions Act 2008 (United Kingdom).

CASES

National

Abaclat and others v The Argentine Republic, Case No ARB/07/05 (ICSID) http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C95/DC8316_en.pdf

AT&T Mobility LLC v Concepcion (Supreme Court, US), Judgment 27 April 2011 [563 US 333].

Epic Systems Corp v Lewis (Supreme Court, US), Judgment 21 May 2017 [544 US __ (2018)].

Greentree Financial Corp v Bazzle (Supreme Court, US), Judgment 23 June 2003 [539 US 444 (2003)].

Keating v Superior Court (California Court of Appeals, US), Decision 28 August 1980 [167 Cal Rptr 481].

Lamps Plus, Inc v Varela (Supreme Court, US), Judgment 24 April 2019 [587 US ___ (2019)].

New Prime Inc v Oliveira (Supreme Court, US), Judgment 15 January 2019 [586 US ___ (2019)]

Slovak Republic v Achmea, C-284/16 (CJEU), Judgment 6 March 2018 [ECLI:EU:C:2018:158].

Southland Corp v Keating (Supreme Court, US), Judgment 23 January 1984 [465 US 1, 16 (1984)].

*Theodoros Adamakopoulos v Republic of Cypru*s, Case No ARB/15/49 (ICSID) https://www.italaw.com/sites/default/files/case-documents/italaw11238.pdf.

BIBLIOGRAPHY

American Arbitration Association, 'Employment/Workplace Fee Schedule' (2020) https://adr.org/sites/default/files/Employment_Fee_Schedule.pdf accessed 29 August 2024.

-------- , 'Supplementary Rules for Class Arbitrations' (adopted 2003; amended 2010) https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf accessed 29 August 2024.

-------- , 'Supplementary Rules for Multiple Case Filings' (2021) https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf accessed 29 August 2024.

Biard A and Hodges C, 'Médiation de La Consommation: Un Bilan, Des Défis, Des Pistes de Réflexion Pour l'avenir' (2019) 2 Contrats Concurrence Consommation 1.

Clancy D and Stein M, 'An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History', (2007) 63 Business Lawyer 55.

Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016).

CPR, 'Employment-Related Mass Claims Protocol (Version 2.1)' (2022) https://static.cpradr.org/docs/ERMCP%20V2.1%20September%202022.pdf accessed 29 August 2024.

Creutzfeldt N, 'The origins and evolution of consumer dispute resolution systems in Europe' in Hodges C and Stadler A (ed), *Resolving Mass Disputes. ADR and Settlement of Mass Claims* (EE 2013) 223.

FedArb, 'ADR-MDL Framework for Mass Arbitration Proceedings' https://www.fedarb.com/framework-for-mass-arbitration-proceedings-adr-mdl/ accessed 29 August 2024.

Fouchard C and Krestin M, 'The Judgment of the CJEU in Slovak Republic v Achmea: A Loud Clap of Thunder on the Intra-EU BIT Sky' (2018) Kluwer Arbitration Blog https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ accessed 29 August 2024.

Frankel A, 'The Problem with Outsourcing Justice to Mass Arbitration Services' (2020) Reuters, https://www.reuters.com/article/world/the-problem-with-outsourcing-justice-to-mass-arbitration-services-idUSKCN20M00Y/ accessed 29 August 2024.

Van Gelder E M, *Consumer Online Dispute Resolution Pathways in Europe. Analysing the Standards for Access and Procedural Justice in Online Dispute Resolution Procedures* (Eleven 2022).

Gerbay R, 'Is the End Night Again? An Empirical Assessment of the 'Judicialization' of International Arbitration' (2014) 25 (2) The American Review of International Arbitration 223.

Gioia G, 'L'uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori' (2018) 1 Revista Ítalo-española de Derecho procesal 3.

Glover J M, 'Mass Arbitration' (2022) 74 Stan L Rev 1283.

Graham C, 'Consumer ADR and Collective Redress' in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford OUP 2016).

Hagan K, 'Another Arbitration Service – FedArb – Establishes New Mass Arbitration Protocol', (2020) FedArb https://www.fedarb.com/another-arbitration-service-fedarb-establishes-new-mass-arbitration-protocol/ accessed 29 August 2024.

Hensler D and Khatam D, 'Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication' (2017) 18 Nevada Law Journal 381.

Hodges C, 'Consumer Alternative Dispute Resolution' in Hess B and Law S (ed), *Implementing EU consumer rights by national procedural law* (CH Beck 2019).

Hodges C, 'Mass Collective Redress: ADR and Regulatory Techniques' (2015) 23 European Review of Private Law.

Hörnle J, 'Encouraging online alternative dispute resolution (ADR) in the EU and beyond' (2012) 38 European Law Review 202.

Trans-Lex, 'ICSID Decision on Jurisdiction and Admissibility, Abaclat and others v The Argentine Republic, ICSID Case Number ARB/07/05' https://www.trans-lex.org/291300/_/icsid-decision-on-jurisdiction-and-admissibility-abaclat-and-others-vs-the-argentine-republic-icsid-case-no-arb-07-5/ accessed 29 August 2024.

ICSID, 'Conventions Regulations and Rules, ICSID Arbitration Rules' (2022) International Centre for Settlement of Investment Disputes https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf accessed 29 August 2024.

-------- , 'Conventions Regulations and Rules, ICSID: Rules and Regulations' (2022) International Centre for Settlement of Investment Disputes https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf accessed 29 August 2024.

JAMS, 'Class Action Procedures' (adopted 2009) https://www.jamsadr.com/rules-class-action-procedures/ accessed 29 August 2024.

JusMundi, 'Abaclat and Others v Argentina' https://jusmundi.com/fr/document/decision/en-abaclat-and-others-formerly-giovanna-a-beccara-and-others-v-argentine-republic-consent-award-under-icsid-arbitration-rule-43-2-thursday-29th-december-2016#decision_404 accessed 29 August 2024.

Lew J, Mistelis L and Kroll S, 'Multiparty and Multicontract Arbitration' in Lew J, Mistelis L and Kroll S (ed), *Comparative International Commercial Arbitration* (Kluwer 2003).

Macrory R, 'Regulatory Justice: Making Sanctions Effective, Final Report' (November 2006) http://webarchive.nationalarchives.govuk/20121212135622/http:/www.bis.govuk/files/file44593.pdf accessed 30 December 2022.

Menon S and Tian C, 'Joinder and Consolidation Provision Under ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Complex Disputes', Kluwer Arbitration Blog https://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-

provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ accessed 29 August 2024.

Permisly J and Craven M, 'Where Are We Now? Investment Treaty Arbitration, Sovereign Debt and Mass Claims in the Post-Abaclat Era' (2018) 15 Transnational Dispute Management 1 https://www.skadden.com/-/media/files/publications/2018/01/where_are_we_now_investment_treaty_arbitration.pdf accessed 29 August 2024.

Smith L S and Vickers M, 'Does CDR 'Get It'?' in Kramer X, Voet S, Ködderitzsch L, Tulibacka M and Hess B (ed), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges* (Hart 2022) 177.

Sternlight J R, 'As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?' (2000) 42 (1) William and Mary Law Review.

Voet S, 'Europe's Collective Redress Conundrum' (2018) 61 Japanese Yearbook of International Law 205.

-------- , 'Where the Wild Things Are. Reflections on the State and Future of European Collective Redress' in Keirse A and Loos M (ed), *Waves in Contract and Liability Law in Three Decades of Ius Commune* (Cambridge Intersentia 2017) 105.

-------- , 'Cross-Border ADR Roundtable - Simplifying Cross-Border ADR' (2022) KU LEUVEN https://commission.europa.eu/system/files/2022-08/cross-border_collective_adr.pdf accessed 30 December 2022.

Weber F and Hodges C, 'The Netherlands' in Hodges C, Benöhr I and Creutzfeldt-Banda N, *Consumer ADR in Europe* (Oxford Hart 2012).