

ADR AS A SUPERIOR MECHANISM FOR REDRESSING CONSUMER HARMS IN EUROPE

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Introduction

For a number of years, European countries have been debating both internally and collectively whether introducing class action litigation procedures would benefit their consumers and society-at-large. The European Commission's Directorate-General for Competition¹ and the French Attali Commission,² to name but two examples, have each recently recommended the adoption of some form of such procedures.

Class actions, prominent within the U.S. legal system, allow representative plaintiffs to bring legal actions on behalf of a large group of individuals unified by common interests. Perceived benefits of class actions include increased access to the justice system for those with limited means or small claims, time and cost savings through the unification of individual suits and the coherency of the resulting decisions, increased consumer empowerment, and the encouragement of corporate accountability.³

Notwithstanding the perceived benefits, U.S. class actions have a number of proven disadvantages. For instance, class actions can lead to abuses such as "ambulance chasing" or can encourage plaintiffs' lawyers to bring cases of questionable merit in hopes of generating higher fees.⁴ Moreover, class actions oftentimes actually benefit the claimants' attorneys, more than those seeking redress.⁵ Other drawbacks to class actions include the "proliferate[ion of] weak claims," the flooding of court systems, "exposure to broader discovery of representative and counsel on class issues," and undue pressure on parties to litigate and settle claims.⁶

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¹ White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 (Apr. 2, 2008).

² Rapport de la Commission pour la Libération de la Croissance Française (Jan. 2008).

³ See e.g., Emmanuele Lutfalla & Veronica Magnier, *French Legal Reform: What is at Stake if Class Actions are Introduced in France?* 73 DEFCJ 301, 306-09 (2006); John Heaps & Simon Jackson, *Will the American style of litigation and regulation take over in Europe*, The Times (London) at 6 (Feb. 6, 2007)

⁴ John Heaps & Simon Jackson, *supra* n.3; Gordon Schnell, *Class Action Madness in Europe – a call for a More Balanced Debate*, European Competition Law Review at 618 (2007)

⁵ John Heaps & Simon Jackson, *supra* n.3

⁶ *Id.*; Alba Conte & Herbert B. Newberg, *ClassAct* §§18:22, 15:2 (4th ed.)

Many European countries already offer some form of group litigation, though the terminology and procedures vary.⁷ The collective procedures already in place in most European countries are arguably sufficient to protect consumers and any efforts should focus on improving those systems, rather than introducing new ones.⁸

Nevertheless, citing the perceived advantages of the class action system, European consumer groups – and a number of U.S. plaintiffs’ law firms that seek to expand their practices overseas – advocate the incorporation of class actions into the European legal systems.⁹ Although most advocates profess a committed desire to avoid the recognized disadvantages of the U.S. class action system, experience has shown that these disadvantages are inherent in the U.S. system and cannot be easily avoided.

In view of the many disadvantages of class actions, the U.S. Chamber’s Institute for Legal Reform commissioned this Paper to study alternatives that could better serve the interests of European consumers. Fortunately, several alternatives already exist that, with minor adjustment, can respond to the concerns of those who advocate the adoption of U.S.-style class actions in Europe. Small claims procedures, arbitration and mediation are but some of the possible alternatives. Moreover, if the European Community or its individual members were unfortunately to decide to adopt a class actions system, then at least one of the proposed alternatives – mediation – should be made a mandatory part of any class-action system at an early stage in the proceedings.

Alternatives to Class Actions

European Small Claims Procedures

Regulation (EC) No 861/2007 of the European Parliament and of the Council (July 11, 2007) established a European Small Claims Procedure (“ESCP”). The ESCP will become effective January 1, 2009 and will apply to all Member States, except Denmark, as an alternative to existing national procedures.¹⁰ The ESCP is limited to cross border claims not exceeding €2,000. The goal of the ESCP is to “facilitate access to justice, by simplifying, speeding up and reducing costs of small claims litigation.”¹¹ It will be available for use in civil

⁷ Louis Degos & Geoffrey V. Morson, *The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves*, 29 NOV LA LAW 32 (2006); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130 (2003).

⁸ See e.g., Emmanuele Lutfalla & Veronica Magnier, *supra* n.2 at 309-11; John Heaps & Simon Jackson, *supra* n.2; *European class Actions: a growing movement?* National Underwriter Property & Casualty, Vol. 110 at 50 (Nov. 6, 2006).

⁹ *Class Action: une pétition signée par 100.000 personnes réclame l’adoption d’une loi*, La Tribune (Sept. 27, 2007); Katrin Bennhold, *Law Firm Seeks Publicity for Société Générale Class-Action Suit*, N.Y. Times (July 31, 2008).

¹⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 199/1.

¹¹ Sandra E. Kramer, *The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation*, *Zeitschrift für europäisches Privatrecht* 2008, no 2, 353-373, available at

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and commercial matters, but not in tax, customs or administrative matters or in matters involving “the liability of the State for acts and omissions in the exercise of State authority.”¹²

The ESCP will increase European consumers’ access to their local courts. For instance, small claims courts are widespread and thus convenient for consumers. In addition, small claims procedures are much less complicated than regular court procedures such that consumers will be less intimidated by the process. Among other things, the ESCP uses simple, standard forms and does not require that a party be represented by an attorney.¹³

As noted above, the ESCP is limited to cross-border claims. However, given its many advantages, including ease of access and efficiency, it would be beneficial to develop and publicize similar, intra-state procedures, to the extent that none exist. As a result, the small claims courts could meet a broader range of consumer needs and serve as an effective alternative to class actions.

Alternative Dispute Resolution

Out-of-court alternative dispute resolution schemes (“ADR”), including arbitration and mediation, exist throughout Europe to assist individuals with consumer disputes particularly for cross-border and internet-based issues. The European Commission’s website recognizes that ADR “helps to avoid the worry, time and cost associated with court-based litigation and so assists citizens in a real way to secure their legal rights.”¹⁴

ADR mechanisms typically involve a third-party arbitrator, mediator, or the use of an ombudsman.¹⁵ The process is generally cheaper, faster, and more informal than ordinary court procedures. While ADR appears to be an increasingly popular form of dispute resolution for consumers, many people are still not aware of its availability. Moreover, many countries have different ADR processes and gaps in coverage.¹⁶

Arbitration

Although arbitration of commercial disputes is commonplace, arbitration of consumer disputes is less widespread. In arbitration, parties agree that a private tribunal composed of one or more arbitrators will resolve an existing dispute. Arbitration is similar to

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http://publishing.eur.nl/ir/repub/asset/13143/2008%20ZeuP%20European%20Small%20Claims%20Procedure_Kramer.pdf.

¹² *Id.*

¹³ Dr. J. Stuyck, *An analysis an evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, A Study for the European Commission (Jan. 2007).

¹⁴ European Judicial Network in Civil and Commercial Matters, Alternative Dispute Resolution- Community Law, available at http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm.

¹⁵ European Commission website, ADR, available at http://ec.europa.eu/consumers/redress_cons/adr_en.print.htm

¹⁶ Dr. J. Stuyck, *supra* n.13.

litigation before state courts in that it is an adversarial process that leads to a binding judgment, but it differs in that arbitration is generally quicker and less costly.¹⁷

Because arbitration is binding, both parties must consent to participate, either by entering into a written contract that includes an arbitration clause or by specially agreeing in writing to arbitrate once a dispute has arisen. In the case of consumer disputes, E.U. Directive 93/13/EC allows Member States to deem mandatory arbitration clauses to be presumptively unfair, and some countries have done so or at least discouraged their use.¹⁸ For this reason, arbitration of consumer disputes in Europe is sometimes only possible if parties agree to arbitrate an existing dispute.

Nevertheless, arbitration of consumer disputes offers distinct advantages over class actions. For one thing, the express consent required in arbitration avoids the public policy problems posed in France and other countries if an opt-out class-action system *à l'américaine* is enacted.¹⁹ Also, arbitration procedures can be streamlined and tailored to favor a speedier, and thus less costly, resolution of consumer complaints. Furthermore, a number of arbitral institutions have developed special programs for consumer disputes that reduce or waive costs.²⁰ Thus, arbitration of consumer disputes remains a superior alternative to class-action litigation and Member States have a strong interest in encouraging its use.

Mediation

Mediation is also a very efficient and cost effective tool for ensuring effective consumer redress.²¹ In mediation, a neutral third party – a mediator – helps the parties to come to an agreed settlement of their dispute without the need for resort to the courts or other adversarial systems.

The European Commission encourages the use of mediation and has worked in recent years to create uniform practices and standards among countries. For instance, in 2004 the European Commission created the Code of Conduct for Mediators which was subsequently approved by many mediation experts and in May 2008 the European Parliament and the Council adopted a Directive on mediation to further its use and establish legal standards.

The European Commission's Interest in ADR

The European community has demonstrated its interest in ADR through various instruments and proposals. For instance, in 2002, the European Commission published a Green Paper discussing the growing interest in alternative dispute resolution in civil and commercial law. The paper provided an overview of current ADR mechanisms in Member States and the

¹⁷ See *Arbitration: Simpler, Cheaper, and Faster Than Litigation*, U.S. Chamber Institute for Legal Reform (Harris Interactive Survey, Apr. 2005).

¹⁸ The practical effect of E.U. Directive 93/13/EC is that many consumer disputes are unfortunately not arbitrated.

¹⁹ See *Decision and Order, In re ALSTOM SA Sec. Lit.*, No. 03 Civ. 6595, (S.D.N.Y. Aug. 28, 2008).

²⁰ See, e.g., the AAA Consumer-Related Disputes Supplementary Procedures.

²¹ *Nice Numbers Encourage Deeper and Wider ADR Research*, Alternatives, p. 136 (CPR, July/Aug. 2008).

Community and considered a broad range of questions in an effort to familiarize the public with the various means of dispute resolution.²² Furthermore, in January 2003, the Council of the European Union adopted a Directive on legal aid for cross-border disputes in order to increase access to ADR.²³ As a further reflection of the general movement in favor of ADR, the Commission took further steps to encourage ADR by creating Regulation (EC) 2201/2003 regarding the jurisdiction, recognition, and enforcement of judgments pertaining to matrimonial matters.²⁴

To facilitate the use of ADR to resolve cross-border consumer disputes, the Commission created two networks, The Financial Dispute Resolution Network (“FIN-Net”) and The European Consumers Network (the “ECC-Net”). FIN-Net handles disputes between consumers and financial service industries such as banks and investment firms by providing consumers with access to complaint procedures.²⁵ The ECC-Net assists EU citizens with cross-border shopping complaints and disputes.²⁶ The network has 29 Centres, including in the 27 member States, as well as Iceland and Norway. The ECC-Net provides information and advice to consumers regarding both EU and national rules on cross-border shopping and helps consumers dealing with disputes through the ADR process.²⁷

Given the many benefits of ADR, it already plays a meaningful role in resolving consumer disputes. However, with the European Commission’s recent and extensive efforts to regulate and expand the process across Europe, ADR can have a greater impact. For example, with ADR’s rising success, individual countries and the EU should explore its potential in solving purely intra-state legal issues. Then, as consumers face national, international and internet-based disputes, they can more easily turn to ADR for assistance – altogether avoiding in-court mechanisms such as class action litigation which tend to be more costly and time-consuming.

Conclusion

Europe’s hesitance to open its doors to the uniquely American class action mechanism is justified. While class actions play a significant role in the United States, they also lead to widespread abuses and unwanted results. As Europe contemplates how best to address the need for effective consumer redress, it should recognize that class actions, in whatever form, do not, on balance, offer consumers the protections they deserve and they will likely lead to a mass influx of suits that European courts are ill-equipped to handle. Other alternatives exist that will provide more effective solutions for all parties to the debate.

²² Commission of the European Communities, Green Paper, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0196:FIN:EN:PDF>.

²³ Council Directive, 2002/8/EC (Jan. 27, 2003) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:026:0041:0047:EN:PDF>.

²⁴ Council Regulation (EC) 2201/203 (Nov. 27, 2003) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>.

²⁵ Financial Dispute Resolution Network website, http://ec.europa.eu/internal_market/fin-net/index_en.htm.

²⁶ The European Commission website, ECC-Net, http://ec.europa.eu/consumers/redress_cons/index_en.htm.

²⁷ *Id.*