Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?

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Collective redress is a high priority topic in legal circles right now, with lawyers from around the world debating how best to address mass legal injuries.¹ The situation is of particular interest in Europe, given the requirements of various pieces of European Union legislation and the possibility of additional reforms in this area of law in the coming years.²

Although most of the attention to date has been devoted to judicial forms of collective relief, arbitration provides a legitimate alternative for addressing these types of legal injuries. The most well-known example of large-scale arbitral relief³ is class arbitration, which has been in existence in the United States since the early 1980s.⁴ The device – known alternatively as classwide arbitration or class action arbitration – transplants many of the procedures used in judicial class actions into the arbitral context and resolves

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³ In the context of this article, references to large-scale collective arbitration should be taken to mean arbitrations that resolve the claims of multiple persons in a single proceeding. Arbitration has, of course, long been used to resolve mass legal disputes on a bilateral basis, often under the auspices of the Permanent Court of Arbitration. See Permanent Court of Arbitration, Mass Claims Processes, available at http://www.pca-cpa.org/showpage.asp?pag_id=1059.

⁴ The first known class arbitration arose in the early 1980s, although one commentator has suggested that there may be US precedent for representative relief in arbitration dating back to 1918-19, when the National War Labor Board effectively acted as an arbitral tribunal whose decisions affected employees beyond those who were named in the suit before it. See Keating v. Superior Court, 645 P.2d 1192, 1209–10 (Cal. 1982), rev’d on other grounds sub nom. Southland Corp. v. Keating, 465 U.S. 1 (1984); Imre S. Szalai, ‘Aggregate Dispute Resolution: Class and Labor Arbitration’, 13 Harvard Negotiation Law Review 399, 421-25 (2008). Seminal decisions in this area of law include Stolt-Nielsen SA v. AnimalFeeds Int’l Corporation, 130 S.Ct. 1758 (2010), and Green Tree Financial Corporation v. Bazzle, 539 U.S. 444 (2003) (plurality opinion). The United States Supreme Court is currently considering yet another case involving class arbitration, with a decision due in spring or summer 2011. See Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. AT&T Mobility LLC v. Concepcion, 130 S.Ct. 3322 (2010).
anywhere from several dozen to hundreds of thousands of individual claims in a single proceeding.\(^5\) Limited at first to a few US states, the mechanism has experienced unprecedented growth during the last decade.\(^6\) Not only is the device being considered by other countries, most notably Canada\(^7\) and Colombia,\(^8\) for use in domestic disputes, but class claims have already been brought in the context of international investment arbitration.\(^9\)

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ARTICLES
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Commentators have been anticipating this sort of development for some time, although the expanded use of mass arbitration was not expected to be limited to class relief alone. Instead, experts also predicted the creation of entirely new forms of large-scale arbitral relief. These new forms of arbitration, termed “collective arbitration” to mirror the terminology used in judicial forms of collective redress, were expected to be similar in many key respects to the forms of collective relief available in the forum state’s national courts. Interestingly, this is precisely what has happened in Germany.

The catalyst for this development arose in April 2009, when the German Federal Court of Justice (Bundesgerichtshof or BGH) rendered an opinion declaring shareholder disputes arbitrable. Later that same year, the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) drafted a new set of specialized rules known as the Supplementary Rules for Corporate Law Disputes (DIS Supplementary Rules) that describe the procedures to be used in arbitrations involving certain types of shareholder disputes.

Interestingly, the current form of class arbitration arose in very much the same way. Although a common-law form of class arbitration had existed in the United States since the early 1980s, it was not until 2003, when the US Supreme Court handed down its decision in Green Tree Financial Corporation v. Bazzle, that the procedure really took hold at the national level.


11 See Strong, De-Americanization, supra n 10, at 498-508; Strong, Tea Leaves, supra n 10, at 189-205.

12 See Strong, De-Americanization, supra n 10, at 498-508; Strong, Tea Leaves, supra n 10, at 189-205.


Three sets of specialized class arbitration rules were developed as a result of Bazzle: the AAA Supplementary Rules for Class Arbitration (AAA Supplementary Rules), the JAMS Class Action Procedures and the National Arbitration Forum (NAF) Class Arbitration Procedures. Although the NAF has since ceased its administration of class arbitrations, the AAA and JAMS continue to do so, with the AAA Supplementary Rules and JAMS Class Action Procedures reflecting what appear to be the prevailing form of arbitration in the United States.

In addition to this developmental similarity to class arbitration in the US, the DIS Supplementary Rules are remarkable in that they appear to constitute the first known form of non-class collective arbitration. As such, it is useful both to outline their provisions and compare them to what may be the leading rule set for class arbitration, the AAA Supplementary Rules. This will not only have the effect of introducing those who may become potential parties to a collective arbitration under the DIS Supplementary Rules to the provisions contained therein, it will help those who are involved in drafting or amending specialized rules for mass arbitration consider alternate means of addressing relevant issues.

Several issues are discussed herein: the scope and application of both sets of supplementary rules; treatment of individuals who have an interest in the outcome of the dispute but who do not actively participate in the arbitration; privacy and confidentiality; substantive amendments to the statement of claim; appointment of arbitrators; procedures relating to parallel proceedings; issues as to costs; and means of ensuring the finality of the award. Each is considered in turn.

15 See 539 U.S. 444 (2003) (plurality opinion); Buckner, supra n 6, at 301, 320-23; Meredith W. Nissen, ‘Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept’, 11 Dispute Resolution Magazine 19, 19 (2005).
18 See AAA Supplementary Rules, supra n 16; Strong, First Principles, supra n 3. Though similar, the JAMS Class Action Procedures are somewhat less detailed than the AAA Supplementary Rules. See JAMS Class Action Procedures, supra n 16.
19 Class arbitration procedures in the United States may be subject to change following recent developments in the US Supreme Court. See Strong, First Principles, supra n 3. Furthermore, other states or arbitral institutions may be considering whether to adopt class or collective arbitration procedures. See Strong, De-Americanization, supra n 10, at 494-508 (noting new forms of class or collective arbitration may develop through judicial or legislative reform or through adoption of new rules or provisions by arbitral institutions).
1) Scope and Application

a) Supplemental versus comprehensive rules

The first item to note regarding the scope of the two sets of supplementary rules is that neither is intended to be comprehensive. Instead, the DIS Supplementary Rules explicitly state that they are to be read in tandem with the DIS’s general rules on arbitration, with the Supplementary Rules to govern in cases of conflict. This approach is the same as that taken in the AAA Supplementary Rules, although the AAA has a much wider variety of general rules that may apply to any particular dispute.

b) Nature of relevant disputes

Similarity in structure is the perhaps only way in which the two rule sets resemble one another with regard to their scope and application. For example, the AAA Supplementary Rules are available in a wide range of substantive disputes, whereas the DIS Supplementary Rules are only applicable to corporate matters, such as those involving “limited liability companies (GmbH) under German law” and “partnerships (Personengesellschaften).” The DIS Supplementary Rules are further limited by the fact that “[a]rbitration agreements in the statutes of a stock corporation (Aktiengesellschaft) listed on the stock exchange are considered inadmissible.” Since the DIS itself is unclear as to whether this prohibition also extends to “the ‘small’ stock corporation, with a limited number of shareholders and which is not listed on the stock exchange,” parties should take care when attempting to pursue arbitration of such matters.

Interestingly, the way that the two rule sets approach class or collective relief in arbitration very much reflects the way that the two nations approach large-scale relief in their state courts. For example, judicial forms of

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21 See AAA Supplementary Rules, supra n 16, rule 1; see also AAA, Major Arbitration and Mediation Rules and ADR Programs, available at http://www.adr.org/sp.asp?id=28810.
23 Ibid.
24 Ibid.
25 Ibid.
collective redress in Germany tend to be limited to certain specific areas of substantive law, whereas judicial class actions in the United States provide relief on a broad, trans-substantive basis. This sort of consistency between judicial and arbitral forms of relief is useful, in that it can ease the way to domestic enforcement of class and collective awards.

(c) Means of invoking the Supplementary Rules

Not only are the DIS Supplementary Rules applicable to only a small number of disputes, the means by which they can be invoked are also limited. For example, the DIS Supplementary Rules state that they “shall apply if the parties referred to them in their arbitration agreement within or outside the articles of incorporation or have otherwise agreed on their application.”

This is different than the approach taken by the AAA Supplementary Rules. Although an arbitral tribunal would be required to apply the AAA Supplementary Rules in cases where the arbitration agreement included a specific reference to the rules or where the parties otherwise agreed to the use of those rules, the AAA Supplementary Rules specifically state that they can also be adopted implicitly in cases where the parties have invoked any of the AAA’s other rules of arbitration. Thus, the AAA Supplementary Rules apply to a broader range of disputes as a procedural as well as a substantive matter.

d) Applicability of the Supplementary Rules

Although the DIS Supplementary Rules are limited in some regards, they may be broadly applied once they are properly invoked. Indeed, the model arbitration clause provided by the DIS along with the Supplementary Rules suggests that the parties make arbitrable “[a]ll disputes arising between the shareholders or between the corporation and its shareholders in connection with these articles of incorporation or their validity.” The model
The clause also includes language to the effect that “[t]he corporation shall always raise the existing arbitration agreement as defence against any claim that is filed in the ordinary courts of law and that relates to disputes” within the meaning of the arbitration agreement.\(^31\)

The AAA does not provide a model clause regarding the invocation of the AAA Supplementary Rules, quite likely because the AAA Supplementary Rules can be adopted by both explicit and implicit means.\(^32\) However, the AAA recommends broad language in the model clauses associated with its other arbitration rules, which suggests that the AAA Supplementary Rules will be subject to a broad arbitration agreement, at least in most cases.\(^33\)

e) Proper parties to the dispute

Broad language regarding the scope of application of the arbitration agreement does not solve all possible problems regarding the effect of a collective arbitration and any resulting awards. The DIS has anticipated three separate areas of concern in this regard. One potential problem involves former shareholders who might raise objections to the continuing applicability of any arbitration agreement. This issue is resolved by the DIS through language in the model arbitration clause explicitly stating that former shareholders remain bound by the agreement.\(^34\)

Second, concerns can arise with respect to notice to members of the collective. Although the DIS does not make an explicit suggestion as to the appropriate content or means of providing such notice, the comments to the model arbitration clause do state that:

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\text{it is recommended to adopt elsewhere in the articles of incorporation a provision pursuant to which all shareholders are obliged to provide the corporation with a current address of service or a representative for service and that receipt of any written communication at this address will be assumed after the expiry of an adequate time period.}^{35}\]

Third, disputes could arise as to whether an award resulting from an arbitration under the DIS Supplementary Rules should be given \textit{res judicata} effect with respect to persons who did not actively participate in the

\(^{31}\) Ibid., Model Clause.

\(^{32}\) See AAA Supplementary Rules, supra n 16, rule 1(a); see supra n 29 and accompanying text.


\(^{34}\) See DIS Supplementary Rules, supra n 14, Model Clause.

\(^{35}\) Ibid.
This concern is handled through language in both the model clause and in the Rules themselves stating that:

> [t]he effects of an arbitral award extend also to those shareholders, that have been identified as Concerned Others within the time limits provided, irrespective whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor. . . . The shareholders named as Concerned Others within the time limits provided, commit to recognize the effects of an arbitral award rendered in accordance with the [DIS Supplementary Rules].

This language is useful in that it helps provide finality in collective arbitrations by eliminating any possible objections based on the claim that the right to pursue or defend a claim is entirely individual in nature and can only be exercised by the holder of that right. By making the assertion of the Concerned Others’ rights in arbitration a matter of contract, the DIS Supplementary Rules avoid potential difficulties in this regard.

Interestingly, the AAA Supplementary Rules do not contain any special provisions underscoring the applicability of the arbitration agreement to those who were former parties to the underlying contract or who were not actively involved in the resolution of the dispute. In many ways, the AAA’s silence on these subjects reflects a bias toward US conceptions of representative relief, in that judicial class actions have always been considered capable of resolving the rights of persons who were once parties to a contract as well as persons who do not actively participate in the class proceedings.

Nevertheless, a dispute on these issues might arise in the context of a class arbitration proceeding under the AAA Supplementary Rules. In that case, the conflict would likely be resolved through recourse to the governing arbitration law or through analogies to class action procedures in US federal courts. Indeed, the drafters of the AAA Supplementary Rules consciously chose to mirror certain aspects of the class action provisions embodied in

36 Ibid., Model Clause. The language in section 11 varies slightly. Ibid., s 11.
Rule 23 of the Federal Rules of Civil Procedure so as to give courts and arbitrators the opportunity of relying on established case law.38

This is not to say that the AAA Supplementary Rules are entirely silent on matters concerning the proper parties to the dispute. The AAA Supplementary Rules do discuss notice and the res judicata effect of the award, although the AAA frames those issues in a slightly different manner than the DIS does. For example, the AAA Supplementary Rules focus on the content of the notice to class members rather than on the ability to locate potential members of the class.39 Furthermore, the AAA Supplementary Rules’ approach to establishing the res judicata effect of the final award simply requires the award to indicate who is and is not included in the class.40

2) Treatment of Individuals Who Have an Interest in the Outcome of the Dispute

a) Definition of “Concerned Others”

As indicated in the preceding section, the DIS Supplementary Rules make provision for “Concerned Others” who are in some ways analogous to unnamed parties in US class actions and arbitrations. However, there are some significant differences between the two groups.

The term “Concerned Others” is defined in a comment to section 2 as follows:

In disputes requiring a single decision binding all shareholders, . . . it is mandatory not only to introduce the corporation as a party but all shareholders as Concerned Others to the arbitral proceeding. In case the introduction of any Concerned Other is omitted, current jurisprudence does not recognize the “arbitrability” of such disputes.41

Thus Concerned Others can, in the first instance, be considered to include all shareholders of the corporation as well as the corporation itself. However, there are two distinct subgroups within the category of Concerned Others. For example, the DIS Supplementary Rules note that in:

38 See Nissen, supra n 15, at 19; see also ‘The Current State of Class Action Arbitration’, 22 Alternatives to the High Cost of Litigation 63 (May 2004).
39 See AAA Supplementary Rules, supra n 16, rules 6, 8.
40 See ibid., rule 7.
41 DIS Supplementary Rules, supra n 14, at 3.
[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 Supplementary Rules] 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.]

Therefore, a Concerned Other may be considered either a party or an intervenor, with different rights and responsibilities being associated with the two different classifications. This is different than the approach taken under the AAA Supplementary Rules, which treat all parties, named and unnamed, equally.

b) Procedures associated with naming Concerned Others

After defining who constitutes a Concerned Other, the DIS Supplementary Rules go on to describe the procedures to be followed with regard to naming those persons. For example, when filing its statement of claim, the claimant is required to “identify the respondent and any shareholders or the corporation itself to which the effects of the arbitral award shall extend, by providing an address of service and requesting the DIS-Secretariat to deliver the statement of claim also to the Concerned Others.” Respondents are also given the opportunity to identify additional Concerned Others, as are any Concerned Others who join as parties. The procedure for notification is the same in each case, with Concerned Others being given 30 days from the time of receipt of the copy of the statement of claim in which to notify the DIS Secretariat in writing whether they choose to join the proceedings “on claimant’s or respondent’s side as party or as intervenor”.

42 Ibid., s 2.1.
43 See AAA Supplementary Rules, supra n 16, rules 4, 8-9 (recognizing the existence of class counsel but giving every individual party the right to appear at any hearing, including hearings regarding settlements, voluntary dismissals or compromises).
44 DIS Supplementary Rules, supra n 14, s 2.2
45 See ibid., ss 3.2, 4.1.
46 Ibid., s 3.
Failing to opt into the proceeding within the prescribed time period acts as a waiver of a Concerned Other’s right to join the arbitration as either a party or an intervenor. Nevertheless, Concerned Others can join the proceeding even after the notice period has expired, although there are consequences associated with the failure to join the proceeding within the initial 30 day time period. For example, those who wish to join the proceedings after the expiry of the initial time period may only do so “provided that they refrain from raising objections against the composition of the arbitral tribunal and either accept the arbitral proceeding as it stands at the point in time of their joinder, or the arbitral tribunal approves their joinder at its free discretion.” Notably, this provision regarding late joinder applies not only to Concerned Others who were named during the initial notification period but also to Concerned Others who were not identified until after that period has ended.

The DIS Supplementary Rules also distinguish the rights and responsibilities of Concerned Others who have joined as parties from the rights and responsibilities of Concerned Others who have joined as intervenors. For example, Concerned Others who have joined the proceeding as parties “become a party to the arbitral proceeding with all rights and duties pertaining thereto at the moment their declaration of joinder is received by the DIS-Secretariat.” Alternatively, those who join as intervenors “are entitled to the rights of a compulsory intervenor in the sense of section 69 German Code of Civil Procedure.” One of the ways in which the two groups differ is that only those who join as parties are permitted to name additional Concerned Parties.

The most significant difference between the AAA Supplementary Rules and the DIS Supplementary Rules with respect to the naming of additional parties is that the DIS has adopted an opt-in approach, while the AAA has created an opt-out regime. The benefits of opt-in versus opt-out systems have been much debated over the years, with those who favor the opt-in approach taking the view that opt-in regimes do a better job of respecting individual rights regarding the conduct of the case, while those who favor the opt-out approach taking the view that requiring parties to

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47 See ibid., s 4.2.
48 Ibid., s 4.3. This is similar to restrictions on intervention in German courts. See Howard D. Fisher, _The German Legal System & Legal Language_ 94-95 (1999).
49 See DIS Supplementary Rules, supra n 14, ss 2.3, 4.3.
50 Ibid., s 4.1.
51 Ibid.
52 See ibid. Other differences are discussed below. See infra nn 92-95.
53 See AAA Supplementary Rules, supra n 16, rule 4(b)(5).
opt out is more socially beneficial, in that it results in a larger group of claimants and thus acts as more of a deterrent to corporate wrongdoers.\textsuperscript{54} Notably, European states often prefer opt-in regimes while the United States has embraced the opt-out approach.\textsuperscript{55} Thus, the DIS and the AAA again reflect the jurisprudential preferences of their home legal systems.

Other distinctions also exist with regard to how the AAA and the DIS treat parties who have an interest in the outcome of the dispute. For example, unlike the DIS Supplementary Rules, the AAA Supplementary Rules do not create different categories of unnamed parties. Furthermore, the AAA Supplementary Rules do not include any language regarding the waiver of the right to name an arbitrator, quite possibly because the AAA uses an opt-out, as opposed to an opt-in, procedure.\textsuperscript{56}

3) Privacy and Confidentiality

Although the principles of privacy and confidentiality have long been considered a hallmark of arbitration,\textsuperscript{57} the AAA Supplementary Rules explicitly permit limited derogations from both.\textsuperscript{58} (Notably, class arbitrations proceeding ad hoc or under the auspices of other US-based arbitral institutions do not involve any diminution of privacy or confidentiality, so this issue is limited to AAA class arbitrations alone.)\textsuperscript{59} These alterations to the normal presumptions are considered necessary to (1) ensure that potential parties receive notice of the proceedings so that they can decide whether and to what extent they wish to participate and (2) further the deterrent aims of class procedures.\textsuperscript{60}

The DIS Supplementary Rules also deviate from strict application of principles of privacy and confidentiality, but to a much lesser degree than the

\textsuperscript{54} See Hensler, supra n 26, at 15-16; Mulheron, supra n 2, at 431-34; Strong, First Principles, supra n 3.

\textsuperscript{55} See Mulheron, supra n 2, at 412, 431-34.

\textsuperscript{56} In an opt-out proceeding, all parties are present at the initiation of the dispute, which protects their right to name an arbitrator. See Strong, First Principles, supra n 3. Although some concerns might theoretically be raised about the right of parties to name an arbitrator in a class proceeding, these issues have not typically been raised, nor would they likely prevail as a matter of US law. See ibid. (noting potential concerns relating to when the precise identity of each of the unnamed parties becomes known).

\textsuperscript{57} Neither principle appears to be necessary for a procedure to be considered arbitration, however. See ibid. Instead, parties have traditionally been advised to contract expressly for the desired protections in their arbitration agreements. See Born, supra n 10, at 2249-50, 2253.

\textsuperscript{58} See AAA Supplementary Rules, supra n 16, rule 9(a) (stating that “[t]he presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations”).

\textsuperscript{59} See JAMS Class Action Procedures, supra n 16.

\textsuperscript{60} See Strong, De-Americanization, supra n 10, at 513-16.
AAA Supplementary Rules do. For example, confidentiality is diminished under the DIS Supplementary Rules to the extent that the arbitral tribunal is required to inform identified Concerned Others who have not yet joined the arbitral proceeding “on the progress of the arbitral proceeding by delivering copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal to the Concerned Others at their indicated addresses, unless Concerned Others have expressly waived in writing to receive this information.”61

This is in some ways a higher burden than that imposed under the AAA Supplementary Rules, in that the AAA simply requires the posting of the same types of documents on the AAA’s online class arbitration docket.62 However, the difference in approach may be due to the fact that the DIS Supplementary Rules use an opt-in regime. As such, there is a heightened need to keep Concerned Others who have not yet joined the arbitration individually apprised of the proceedings so that they have the opportunity to exercise their right to participate before the award is finalized. Indeed, the same procedure “applies for other communications of the arbitral tribunal to the parties or intervenors,” though “only in so far as it can be reasonably assumed that these are significant for the decision of a Concerned Other on its later joinder to the arbitral proceeding.”63 Conversely, it 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.

The principle of privacy is also somewhat diminished under the DIS Supplementary Rules. For example, the DIS Supplementary Rules state that “Concerned Others, that have not joined the arbitral proceeding, are not entitled to participate in the oral hearing.”65 Although the language is formulated in the negative, the result appears to be that any Concerned Others who have joined the arbitral proceeding may participate in the oral hearing, thus expanding the number of persons who may be present at the

61 DIS Supplementary Rules, supra n 14, s 5.1.
62 See AAA Supplementary Rules, supra n 16, rule 9(b). The type of information that is made public under the AAA Supplementary Rules is similar to that disclosed in proceedings under the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules. See ICSID Cases, available at http://icsid.worldbank.org/ICSIDFrontServlet?RequestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (outlining disclosures required under the ICSID Arbitration Rules); Strong, De-Americanization, supra n 10, at 515.
63 DIS Supplementary Rules, supra n 14, s 5.1.
64 See AAA Supplementary Rules, supra n 16, rules 5-6, 8.
65 DIS Supplementary Rules, supra n 14, s 5.2.
hearing beyond the individuals who filed the arbitration or were initially named as respondents.

The AAA Supplementary Rules take the same view as the DIS Supplementary Rules do toward joined parties, in that they have an absolute right to attend a proceeding that disposes of their legal rights. However, the AAA goes further than the DIS in this regard, stating that “[a]ll class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances.” This provision demonstrates the AAA’s view that large-scale litigation may serve more than mere compensatory purposes. Allowing the public to attend hearings and making the process more transparent fulfills these ends in a way that closed hearings would not. Again, this view of the purpose of representative relief is highly typical of the United States and differs from that taken by many European nations.

4) Substantive Amendments to the Statement of Claim

A major problem in collective dispute resolution involves the question of who has the ability to make decisions regarding the group’s litigation strategy. The DIS Supplementary Rules attempt to stave off any disputes in this regard by making “[a]n extension of claim or a change of the subject-matter (including any possible counterclaims), or in case of a shareholder resolution dispute the extension of the claim to other resolutions, . . . only admissible with consent of all Concerned Others.” However, “[t]he complete or partial withdrawal of claim is admissible without consent of the Concerned Others, unless a Concerned Other objects within 30 days after being informed on the intended withdrawal of claim and the arbitral tribunal acknowledges his legitimate interest in a final decision of the dispute.”

The AAA Supplementary Rules do not include a similar provision regarding the amendment of a claim or counterclaim. Any question that might arise regarding such a procedure under the AAA Supplementary Rules

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66 See AAA Supplementary Rules, supra n 16, rule 9(a) (stating “in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings”).
67 Ibid.
68 For example, class suits also serve deterrent and regulatory goals. See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 49-123, 471-500 (2000); Elizabeth Chamblee Burch, ‘Securities Class Actions as Pragmatic Ex Post Regulation’, 43 Georgia Law Review 63, 70-111 (2008).
69 See Hodges, supra n 2, at 335-38.
70 DIS Supplementary Rules, supra n 14, s 6.
71 Ibid.
would likely be resolved in the same way that it would in a judicial class action under the US Federal Rules of Civil Procedure. However, the AAA Supplementary Rules do include some additional protections for the strategic concerns of unnamed class members. For example, the Rules state that “[a]ny class member may object to a proposed settlement, voluntary dismissal, or compromise,” thus ensuring that unnamed class members have at least some ability to affect the final disposition of the matter. Furthermore, all class members have the right to attend any hearing and can thus presumably make their opinions known to the arbitral tribunal at that time.

5) Appointment of Arbitrators

Appointment of arbitrators in multiparty disputes can be tricky due to the need to respect the parties’ right to name their own panelist. However, the DIS Supplementary Rules avoid potential pitfalls by adopting several of the mechanisms developed by the arbitral community in the early 1990s, following the decision in Dutco.

Thus, for example, the DIS Appointing Committee will nominate the arbitrator in cases where a sole arbitrator is to be appointed, if the parties cannot agree on a neutral within the requisite time. In cases involving three arbitrators, the DIS Supplementary Rules break the parties and intervenors into teams (claimant and respondent) and allow the teams to select the party-appointed arbitrators. If one side cannot agree on an arbitrator within the requisite time, the DIS Appointing Committee appoints two arbitrators, an approach that is also used in the general DIS Arbitration Rules.

Interestingly, the AAA Supplementary Rules do not provide a mechanism for the selection of arbitrators in instances where one party (or

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72 See supra n 38 and accompanying text.
73 AAA Supplementary Rules, supra n 16, rule 8(d). All parties must be given notice of “[a]ny settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration” and the arbitrator must approve such settlement, dismissal or compromise. Ibid., rule 8(a).
74 See ibid., rule 9(a).
76 See DIS Supplementary Rules, supra n 14, s 7.
77 See ibid., s 8(2).
78 See ibid., s 8(3). The dual appointment reflects the recalcitrant team’s appointment and the chair, who otherwise would have been named by the two party-appointed neutrals. See ibid., s 13.
group of parties) is unable or unwilling to name a panelist. In such cases, the procedure will be determined by “any other applicable AAA rules.”

This does not mean that the AAA Supplementary Rules are entirely silent as to issues regarding the appointment of arbitrators in a class proceeding: to the contrary. For example, the Rules state that, “[i]f the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed.” Furthermore, the AAA Supplementary Rules impose some restrictions on who can serve on the arbitral tribunal, stating that “[i]n any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA’s national roster of class arbitration arbitrators.” This requirement helps avoid any objections to class arbitration based on arbitrators’ alleged inexperience with class proceedings.

6) Procedures Relating to Parallel Proceedings

Issues relating to the appointment of arbitrators demonstrate some of the difficulties associated with strategic decision-making in the multiparty context. Another area of concern involves the coordination of related claims brought by different individuals and the possibility of parallel proceedings.

The DIS Supplementary Rules take a uniquely forward-looking view of this particular issue by specifically addressing the possibility that “multiple arbitral proceedings with a subject-matter have been initiated, requiring a single decision binding the parties and the Concerned Others.” In such cases, “[t]he arbitral proceeding that has been initiated first (leading arbitral proceeding) precludes the conduct of an arbitral proceeding initiated at a later point in time (subsequent arbitral proceeding). A subsequent arbitral proceeding is inadmissible.”

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79 AAA Supplementary Rules, supra n 16, rule 1(a). Problems may arise if the AAA Supplementary Rules are adopted independently of any other AAA rules, but in those instances it is likely that the parties would simultaneously select the AAA rules most applicable to their dispute (commercial, healthcare, employment, etc.) to govern additional issues. See AAA, Major Arbitration and Mediation Rules and ADR Programs, available at http://www.adr.org/sp.asp?id=28810.

80 AAA Supplementary Rules, supra n 16, rule 2(b).

81 Ibid., rule 2(a).

82 See Strong, First Principles, supra n 3.

83 DIS Supplementary Rules, supra n 14, s 9.1.

84 Ibid., s 9.2. The priority among the various procedures is described in section 9.3, whereas the timing and circumstances of the joinder of Concerned Others is discussed in section 9.4.
There is no similar provision in the AAA Supplementary Rules. Instead, the issue would likely be resolved through reference to any provisions concerning consolidation of arbitrations that were contained in any general arbitration rules or laws applicable to the dispute.\(^85\) There have also been instances where different class claims have been judicially consolidated prior to the suits’ being ordered into arbitration, although such circumstances are rare.\(^86\)

Interestingly, the difference between the way the DIS and the AAA address this issue reflects the different way in which Germany and the U.S. understand principles of jurisdiction.\(^87\) For example, the DIS’s approach mirrors the European preference for a strict *lis alibi pendens* rule in cases involving parallel court proceedings.\(^88\) Courts and commentators in the United States use a much less formalistic approach when deciding which of several pending judicial actions should take priority and instead rely on individualized determinations regarding procedural fairness to the various parties.\(^89\) Given the US predilection for case-by-case analysis, the absence of a rule of priority in the AAA Supplementary Rules makes perfect sense.

### 7) Issues as to Costs

Another area of concern in collective dispute resolution involves allocation of costs and fees, particularly when loser-pays rules apply.\(^90\) Some commentators have suggested that it might be appropriate to provide a smaller costs award in collective disputes that involve some sort of public interest.\(^91\) This principle may be taken into account in the DIS Supplementary Rules, which deal with the issue of costs through an explicit reference to section 35 of the general DIS Arbitration Rules.\(^92\) Section 35 of the general DIS Arbitration Rules states that:

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\(^85\) See Strong, De-Americanization, supra n 10, at 529-32.
\(^88\) See ibid.
\(^89\) See ibid. at 1008, 1027-52.
\(^90\) See Hensler, supra n 26, at 22-25; Christopher Hodges, ‘What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed?’ in The Annals, supra n 1, at 330, 343.
\(^91\) See Thomas D. Rowe, Jr, ‘Shift Happens: Pressure on Foreign-Attorney Fee Paradigms from Class Actions’, 13 Duke Journal of Comparative & International Law 124, 147 (2003) (limiting the applicability of loser-pay rules in ‘public interest’ type cases, which might include cases involving collective redress); Strong, De-Americanization, supra n 10, at 519.
\(^92\) See DIS Supplementary Rules, supra n 14, s 12.1.
[i]n principle, the unsuccessful party shall bear the costs of the arbitral proceedings. The arbitral tribunal may, taking into consideration the circumstances of the case, and in particular where each party is partly successful and partly unsuccessful, order each party to bear his own costs or apportion the costs between the parties.93

While no guidance exists as to how costs will be split, the DIS Supplementary Rules do indicate that “Concerned Others that have not joined the arbitral proceeding as a party or intervenor are not entitled to reimbursement of costs.”94 Furthermore, the DIS Supplementary Rules indicate that the costs amount is to be calculated pursuant to point number 11 of the Appendix to Section 40.5 of the DIS Arbitration Rules, with any identified Concerned Others being treated as a party.95

In contrast to the DIS Supplementary Rules, the AAA Supplementary Rules contain no provisions regarding allocation of costs or fees between the parties. This is likely because the AAA Supplementary Rules unconsciously reflect a bias toward US conceptualizations of collective relief and thus assume the easy availability of contingent fees and the imposition of the American rule on costs in litigation.96 Nevertheless, the AAA does provide some guidance regarding costs issues.

For example, the AAA Supplementary Rules contemplate the possibility that “[d]isputes regarding the parties’ obligation to pay administrative fees or arbitrator’s compensation pursuant to applicable law or the parties’ agreement” may arise and state that such disputes are to be decided by the arbitrator.97 However, “[u]pon joint application of the parties, . . . an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties’ obligation to pay administrative fees or arbitrator’s compensation.”98

The AAA Supplementary Rules also recognize that fees based on the amount in contention can be prohibitive in cases involving class or collective

93 DIS Arbitration Rules, supra n 20, s 35.2.
94 DIS Supplementary Rules, supra n 14, s 12.1; see also DIS Arbitration Rules, supra n 20, s 35.
95 See DIS Supplementary Rules, supra n 14, s 12.2; see also DIS Arbitration Rules, supra n 20, s 40.5, Appendix to 40.5, point number 11 (indicating that “[i]f more than two parties are involved in the arbitral proceedings [counting any identified Concerned Others as parties], the amounts of the arbitrators’ fees pursuant to this schedule are increased by 20% for each additional party,” but also noting that the arbitrators’ fees are to be increased by “no more than 50% in total”).
96 See Strong, De-Americanization, supra n 10, at 517-18.
97 AAA Supplementary Rules, supra n 16, rule 11(b).
98 Ibid.
disputes, and therefore provide for a reduced preliminary fee to cover administrative expenses through the rendering of the Clause Construction Award, which is a partial final award indicating whether the arbitration agreement in question can support class proceedings. Furthermore, the AAA Supplementary Rules explicitly permit one party to advance the entirety of the deposit for administrative fees and provide for suspension of the proceedings for nonpayment.

8) Means of Ensuring the Finality of the Award

Collective proceedings are brought to resolve mass disputes, and it is important that the finality of the award not be hindered by arguments about who is bound by the proceeding. As indicated above, the DIS Supplementary Rules have identified two possible areas of concern: persons who are no longer shareholders of the corporation that are at the center of the dispute and persons who do not actively participate in the arbitral proceedings.

Former shareholders are addressed through the model arbitration clause, which explicitly states that former shareholders remain bound by the agreement. Inactive individuals are addressed through language in both the model clause and the rules themselves indicating that:

[t]he effects of an arbitral award extend also to those shareholders, that have been identified as Concerned Others within the time limits provided, irrespective whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor. . . . The shareholders identified as Concerned Others within the provided time limits, commit to recognize the effects of an arbitral award rendered in accordance with the [DIS Supplementary Rules].

Again, by making the assertion of the Concerned Others’ rights in arbitration a matter of contract, the DIS Supplementary Rules avoid any potential problems associated with civil law conceptions of litigation rights as individual in nature.

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99 See ibid., rules 3, 11(a). Once the arbitral tribunal decides that the arbitration agreement allows for the possibility of class relief, the arbitrators consider whether class treatment is warranted under the facts of the dispute at hand and issue a second partial final award on that issue. See ibid., rules 4-5.

100 See ibid., rule 11(c)-(d).

101 See supra nn 34-37 and accompanying text.

102 See DIS Supplementary Rules, supra n 14, Model Clause.

103 Ibid., Model Clause. The language in section 11 varies slightly. Ibid., s 11.

104 See supra n 37 and accompanying text.
The AAA Supplementary Rules contain no similar provision regarding the applicability of the award to unnamed party members. Again, this reflects the AAA’s unspoken assumption about the likely applicability of US conceptions of representative relief, since judicial class actions have always be considered capable of resolving the rights of former parties to a contract as well as the rights of inactive unnamed parties.

The AAA Supplementary Rules do, however, take certain steps to clarify to whom the award applies. For example, the final award must “define the class with specificity” and “specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.” 105

Conclusion

Although the DIS Supplementary Rules only apply to a limited number of disputes, the DIS has made major strides towards creating Europe’s first form of collective arbitration. Those who are familiar with class arbitration under the AAA Supplementary Rules will find many of the provisions of the DIS Supplementary Rules unsurprising. However, there are significant differences between the two rule sets, and it cannot be said that arbitration under the DIS Supplementary Rules constitutes a form of class arbitration. Instead, the DIS has created an entirely new dispute resolution mechanism that reflects the kind of jurisprudential policies and preferences that are common in Europe in general and Germany in particular.

Interestingly, the device described under the DIS Supplementary Rules will likely meet with less resistance than class arbitration has. 106 Not only is the DIS procedure more narrowly drawn, it is not tied too closely to an already controversial form of judicial relief. 107 Furthermore, by embracing certain principles of German and European policy and practice, the DIS has created a procedure that conforms with the legal context in which the awards are to be enforced, thereby avoiding potential problems with domestic enforceability. 108

Although the DIS Supplementary Rules – like the AAA Supplementary Rules – appear to have been drafted primarily with domestic disputes in mind, there will likely come a time when cross-border issues

105 AAA Supplementary Rules, supra n 16, rule 7.
106 See Strong, First Principles, supra n 3 (describing types of opposition to class arbitration); Strong, Tea Leaves, supra n 10, at 185-89.
107 See Hensler et al., supra n 68, at 15-47.
108 See Strong, De-Americanization, supra n 10, at 507.
While a more in-depth analysis of the international issues will be needed at that time, it appears on first glance that the DIS has avoided some of pitfalls that may be associated with the international enforcement of class awards. In particular, the DIS’s use of an opt-in procedure in conjunction with other contractual mechanisms to establish the rights of Concerned Others will likely forestall the kind of objections that are expected in cases involving international class awards.\(^{110}\)

Although the DIS drafted the DIS Supplementary Rules in a very short amount of time, the resulting procedures show great promise as a means of resolving collective disputes in both the domestic and cross-border context. As such, the DIS Supplementary Rules bear watching by both the German and the international arbitral community.

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**S.I. Strong, Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?**

**Summary**

A great deal of attention has been paid recently to class arbitration, a US form of large-scale arbitral relief that brings many of the procedures used in judicial class actions into the arbitral context. However, the United States is not the only country to use arbitration to provide collective redress. Germany has recently developed its own form of collective arbitration through the promulgation of the DIS Supplementary Rules for Corporate Law Disputes. This article compares the DIS Supplementary Rules with the American Arbitration Association's Supplementary Rules for Class Arbitration to identify differences and similarities between the two procedural approaches and to consider the extent to which the two rule systems reflect the jurisprudential preferences of Germany and the United States.

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\(^{109}\) See ibid. at 494 (describing three kinds of international class arbitrations).

\(^{110}\) These objections are likely to focus on issues involving public policy and party autonomy. See Strong, Sounds of Silence, supra n 22, at 1083-91; S.I. Strong, ‘Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns,’ 30 *University of Pennsylvania Journal of International Law* 1, 47-93 (2008).