

Class actions & Arbitration in the European Union – Portugal

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Introduction

I. It is well known that class actions and arbitration are two realities that do not combine in the European Union. At least, not yet...

Nevertheless, some authors seem to believe that it could only be a matter of time before Europe will be convinced of the advantages of the US class action mechanism as an effective procedural tool. Others, quite the opposite, don't see the advantages....

That being said, what is the situation in Portugal? Does Portuguese law provides for any form of collective redress? Is there a class action mechanism in Portugal?

If so, who may come forward to represent groups of claimants and in what circumstances? And how does the representation works? Does Portugal have an opt-out or an opt-in system?

Finally, and most importantly, is there any chance of a class action arbitration being admitted? Does the new Portuguese Arbitration Law provide any clarification on the matter? And is there any arbitral institution foreseeing class action arbitrations?

II. These are some of the many questions we will analyze in the present paper. In short, our purpose is to determine if there is (or if there will be) a connection between class action and arbitration in Portugal, to the point where we could have a so called “class action arbitration”. For that matter, we will start with an overview of the Portuguese law on the subject, after which we will address arbitration, reaching our conclusion.

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2. Portuguese System Of Class/Group Actions – The Popular Action

I. Portugal has what might be called a class action mechanism: the so called popular action (“*acção popular*”).¹

In fact, and as some authors correctly observe, the Popular Action Law was in some points influenced by the American class actions² – particularly, as we will see, in the special regime of representation contemplated in articles 14 and 15 (*opt-out principle*).

But before that, we must start by pointing out that popular actions are very old and have a long tradition in Portuguese law³. Their origins are rooted in Roman Law (the “*actio popularis*” or the “*pro populo*” action), where they were defined as actions that, although were meant to protect the interest of the community, could be filed by anyone.

¹ Law no. 83/95, of 31 August 1995 (Popular Action Law) and article 52, § 3, of the Portuguese Constitution.

² See ANTÓNIO PAYAN MARTINS, *Class Actions em Portugal? Para uma análise da Lei nº 83/95, de 31 de Agosto – Lei de Participação Procedimental e de Acção Popular*, Edições Cosmos, Lisboa, 1999, page 26, MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, Lex, Lisboa, 2003, page 119, Luís SOUSA FÁBRICA, “A Acção Popular no Projecto de Código de Processo nos Tribunais Administrativos”, in *Cadernos de Justiça Administrativa*, nº 21, Maio/Junho 2000, page 17, and ADA PELLEGRINI GRINOVER, “A ação popular portuguesa: uma análise comparativa”, in *Lusitana – Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusitana – Porto, Porto, 1996, page 246. For an analysis of the Popular Action Law, see also HENRIQUE SOUSA ANTUNES, “Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)”, paper presented at “The Globalization of Class Actions” conference, December 2007, Centre for Socio-Legal Studies, University of Oxford, England - http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf, TITO ARANTES FONTES / JOÃO PIMENTEL, “Portugal”, in *The International Comparative Legal Guide to Class & Group Actions 2011. A practical Cross-Border Insight into Class and Group Actions Work*, Global Legal Group, London, pages 123-128, and LISA TORTELL, “Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal”, 2008, available online at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

³ Regarding the historical evolution of the popular action in Portugal, see JOSÉ ROBIN DE ANDRADE, *A Acção Popular no Direito Administrativo Português*, Coimbra Editora, Coimbra, 1967, pages 6-14, MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 70 and 107-110, PAULO OTERO, “A ação popular: configuração e valor no actual Direito português”, in *Revista da Ordem dos Advogados*, ano 59, nº 3, Dezembro de 1999, pages 872-874, ANTÓNIO PAYAN MARTINS, *op. cit.*, pages 101-103, Luís SOUSA FÁBRICA, *op. cit.*, pages 16-17, MÁRIO JOSÉ DE ARAÚJO TORRES, “Acesso à justiça em matéria de ambiente e de consumo – legitimidade processual”, in *Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 172-173, and MARIANA SOTTO MAIOR, “O direito de acção popular na Constituição da República Portuguesa”, in *Documentação e Direito Comparado*, n.º 75/76, 1998, pages 247-249 and 251-253.

The popular action was first contemplated in the Portuguese “*Ordenações Manuelinas*” (beginning XVI Century) and “*Ordenações Filipinas*” (XVII Century) and, much later, in the Constitutional Chart of 1826⁴. This is also a mechanism that long existed in Administrative Law, which distinguished between a popular action of a corrective nature and a popular action of a subsidiary nature.

However, it was in the Portuguese Constitution of 1976 (particularly after its 1989 revision) that the popular action was recognized as a fundamental right. As leading Portuguese scholar Gomes Canotilho states, the Constitution proceeded to a reinforcement of the traditional popular actions and to the introduction of popular actions particularly (but not exclusively) destined to the defense of diffuse interests.⁵

As a result, according to article 52, paragraph 3, of the Portuguese Constitution (in its current wording):

“Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for the corresponding compensation, *in such cases and under such terms as the law may determine*, in particular to:

- a) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and cultural heritage;
- b) safeguard the property of the State, the Autonomous Regions and local authorities”.

As we can see, the Constitution refers to cases and terms “as the law may determine”. These cases and terms were generally determined by Law no. 83/95 of 31 August (Law of Popular Action), which we will now analyze in its main provisions.⁶

⁴ “*Ordenações Manuelinas*”, livro I, título 46, § 2º, “*Ordenações Filipinas*”, livro I, título 66, § 11º, and Constitutional Chart of 1826, article 124.

⁵ See J. J. GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7ª edição, Almedina, Coimbra, 2003, page 510.

⁶ The Popular Action Law was preceded by an intense parliament debate with many projects of law being presented by the different political parties. Regarding this matter, see ANTÓNIO PAYAN MARTINS, *op. cit.*, pages 103-110, MIGUEL TEIXEIRA DE SOUSA, “A protecção jurisdiccional dos interesses difusos: alguns aspectos processuais”, in *Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 237-245, ANTÓNIO FILIPE GAIÃO RODRIGUES, “Acção Popular”, in *Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 251-253, MÁRIO JOSÉ DE ARAÚJO TORRES, *op. cit.*, pages 176-180, M. MANUELA FLORES FERREIRA, “Acesso colectivo à Justiça e protecção do meio ambiente”, in *Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 359-362, and RUI CHANCERELLE DE MACHETE, “Algumas notas sobre os interesses difusos, o procedimento e o processo”, in *Estudos em memória do Professor*

II. First of all, it is important to note that Popular Action Law primarily aims to protect such interests as public health, environment, quality of life, consumption of goods and services, cultural heritage and the public domain – these are the main interests envisaged by the law.⁷

The object of a popular action is especially the *diffuse interests*, that is the sharing by each subject of interests that belong to the community⁸. “Especially” but not exclusively, because it is clear that the Popular Action Law also extended its protection to *homogeneous individual interests and rights* (individual interests and rights shared by a certain number of individuals).⁹

This is one of the points that we can actually see an influence of the American class actions model and of the Brazilian law.

III. Regarding the types of popular action that we may have, Popular Action Law distinguishes between: (i) the right of popular participation in administrative procedures and (ii) the right of popular action to promote prevention, cessation or judicial prosecution of the offences referred to in the above-mentioned article 52, paragraph 3, of the Portuguese Constitution.¹⁰

The first of these rights aims to guarantee to citizens and certain associations or foundations (promoters of public health, environment, quality of life, consumption of goods and services, cultural heritage and the public domain) a series of participation rights in administrative proceedings such as development plans, urban development plans, master plans and land use planning, location

Doutor João de Castro Mendes, Lex, Lisboa, 1993, pages 651-662. Regarding the birth of the Popular Action Law, see, particularly, RUI CHANCERELLE DE MACHETE, “Acção procedimental e acção popular – Alguns dos problemas suscitados pela lei nº 83/95, de 31 de Agosto”, in *Lusíada – Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada – Porto, Porto, 1996, pages 263-270.

⁷ Article 1, § 2, Popular Action Law.

⁸ See J. J. GOMES CANOTILHO / VITAL MOREIRA, *Constituição da República Portuguesa Anotada*, volume I, 4ª edição, Coimbra Editora, Coimbra, 2007, pages 697-698.

⁹ See ANTÓNIO PAYAN MARTINS, *op. cit.*, pages 115-118, HENRIQUE SOUSA ANTUNES, *op. cit.*, pages 6-7, footnotenº. 16, JOSÉ DE OLIVEIRA ASCENSÃO, *Direito Civil. Teoria Geral*, vol. III, Coimbra Editora, Coimbra, pages 113-114, “A acção popular e a protecção do investidor”, in *Cadernos do Mercado de Valores Mobiliários*, nº 11 (2001), CMVM, Lisboa (available online at <http://www.cmvm.pt/CMVM/Publicacoes/Cadernos/Documents/7be560856f0844b2975f863cf9c2cb4bAccaoPopular.pdf>), pages 3-10 and “A protecção do investidor”, in *Direito dos Valores Mobiliários*, volume IV, Coimbra Editora, Coimbra, 2003, pages 22-29, Lúfs SOUSA FÁBRICA, *op. cit.*, page 17, and JORGE MIRANDA / RUI MEDEIROS, *Constituição Portuguesa Anotada*, tomo I, 2ª edição, Coimbra Editora, Coimbra, 2010, pg. 1039. See also ANTÓNIO FILIPE GAIÃO RODRIGUES, *op. cit.*, page 249, and M. MANUELA FLORES FERREIRA, *op. cit.*, page 358.

¹⁰ Article 1, § 1, Popular Action Law. See J. J. GOMES CANOTILHO, *op. cit.*, pg. 511.

decisions and public works with relevant impact on the environment or on the economic and social conditions of the population.¹¹

The second right (popular action) covers two different actions: an administrative popular action and a civil popular action.¹²

The administrative popular action comprehends the action to protect the interests mentioned in article 1 (namely public health, environment, quality of life, consumption of goods and services, cultural heritage, public domain) and the judicial review of any administrative action affecting the same interests on grounds of illegality. It is also possible to resort to provisional remedies/interim measures when they prove to be adequate in ensuring the usefulness of the decision pronounced in the administrative popular action. The action must be filed in an administrative court, against public entities (particularly, the State).

The civil popular action can take any of the forms set out in the Civil Procedure Code: declaratory, condemnatory or constitutive. There is also the possibility of requesting provisional remedies/interim measures (article 26-A of the Civil Procedure Code). In any case, the action must be filed in a civil court, against private individuals or public entities acting outside of the administrative function.

According to article 25 of the Popular Action Law, those who have a popular action right can also make a denunciation, complaint or participation to the Public Prosecutor if the interests included in Article 1 (which are criminal in nature) are violated, as well as join proceedings.¹³⁻¹⁴

A popular action can be injunctive or remedial. As we have seen in article 52, paragraph 3, of the Portuguese Constitution, it seeks not only to promote the prevention, cessation or judicial prosecution of the offences regulated in paragraph 3 a), but also to provide due compensation to the aggrieved party or parties.¹⁵

¹¹ Articles 4 to 11, Popular Action Law.

¹² Article 12, Popular Action Law. Regarding the administrative and the civil popular action, see JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", in *Estudos sobre Direito Civil e Processo Civil*, volume I, 2ª edição, Coimbra Editora, Coimbra, 2009, pages 221-223, PAULO OTERO, *op. cit.*, pages 880-882, MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 132-141, and HENRIQUE SOUSA ANTUNES, *op. cit.*, pages 7 and 25.

¹³ As Professors MIGUEL TEIXEIRA DE SOUSA (*A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 132-133) and HENRIQUE SOUSA ANTUNES (*op. cit.*, page 7) correctly observe, this does not mean, however, that there is a "criminal popular action" – the referred denunciation, complaint or participation does not influence the criminal procedure.

¹⁴ Another controversial issue, is whether or not a "constitutional popular action" is possible. Denying such possibility, see J.J. GOMES CANOTILHO / VITAL MOREIRA, *op. cit.*, page 697. In the affirmative, see PAULO OTERO, *op. cit.*, page 879, footnote no. 16.

¹⁵ See J.J. GOMES CANOTILHO / VITAL MOREIRA, *op. cit.*, page 699, MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, page 149, and HENRIQUE SOUSA ANTUNES, *op. cit.*, page 25.

IV. We have already seen the types of popular action that we can have in Portuguese law. However, who can file a popular action?

According to article 2 of the Popular Action Law (as well as the above-mentioned article 52, paragraph 3, of the Portuguese Constitution), the answer is: *any citizen* in the enjoyment of their civil and political rights and *any association and foundation* which defend the interests referred to in Article 1, *whether or not they have a direct interest in the claim*. The municipalities/local authorities can also file a popular action when the litigation relates to interests held by those who are residents in the corresponding district.^{16 – 17}

In any case, associations and foundations must have legal personality, they must expressly include in their assignments or in their statutory objectives the defense of interests related to the action in question and they cannot exercise any kind of professional activity concurrent with the activity of companies or independent professionals.¹⁸

Regarding this matter, it is also important to emphasize the role of the Public Prosecutor (“Ministério Público”). According to article 16, the Public Prosecutor is responsible for protecting legality and representing the State (when it is a party), absent parties, minors and other persons with lack of capacity (whether they are plaintiffs or defendants), as well as other public legal persons in the situations provided for in the law. The Public Prosecutor may also replace the claimant in the case of withdrawal from the suit, settlement or behavior that is harmful to the interests in question.¹⁹

As we can see, the right to file a popular action is quite broad – any citizens (...), “whether or not they have a direct interest in the claim” (article 2, paragraph 1). It is also important to note that there is no mechanism of previous certification regarding the legitimacy to take action²⁰. The law does not foresee a test to the popular action like the one contemplated in the Rule 23, (a), of the American Federal Rules of Civil Procedure²¹. Nevertheless, some Authors sustain that there must be a connection to the object of the popular action and to the right/interest harmed, and that parties must have been affected by the same or similar conduct.²²

¹⁶ Article 2, § 2, Popular Action Law.

¹⁷ According to some Authors, the reference to “citizens” in article 2, § 1, of the Popular Action Law, also include foreigners – see J.J. GOMES CANOTILHO / VITAL MOREIRA, *op. cit.*, page 701, MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos, op. cit.*, page 178, and JORGE MIRANDA / RUI MEDEIROS, *op. cit.*, pages 1034-1035.

¹⁸ Article 3, Popular Action Law.

¹⁹ Article 16, § 3, Popular Action Law.

²⁰ See TITO ARANTES FONTES / JOÃO PIMENTEL, *op. cit.*, page 123, § 1.6.

²¹ See HENRIQUE SOUSA ANTUNES, *op. cit.*, page 23.

²² See MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos, op. cit.*, pages 215-220, JOSÉ DE OLIVEIRA ASCENSÃO, *Direito Civil. Teoria Geral, op. cit.*, pages 116-117, and TITO ARANTES FONTES / JOÃO PIMENTEL, *op. cit.*, page 123, § 1.6.

V. One of the most important and controversial matters of the Popular Action Law is the special regime of representation contemplated in articles 14 and 15 (*opt-out principle*), as well as the *res judicata* effect in article 19. There is a clear influence of the American class actions model here.

According to article 14, the claimant represents on his own initiative – without the need for a mandate or express authorization by all the other holders of the rights or interests in question who have not exercised the right to exclude themselves, provided for in article 15 (*opt-out principle*). Therefore, if someone does not want to take part of the proceedings and be represented by the plaintiff they must declare so. Otherwise, they will be bound by the result of the litigation (with the few exceptions provided for in article 19, as we will see).

Portugal has, therefore, adopted an *opt-out* principle; which is not the standard situation of many other countries (European and non-European) that have followed an *opt-in* approach.²³

The *opt-out* principle works as follows: after the popular action has been submitted to the court, the judge will summon the interested parties so that, within the time frame fixed, (i) the parties confirm if they want to join the proceedings (accepting the proceedings at whatever stage they are at) and (ii) if they accept being represented by the claimant. The silence of the parties will be interpreted as acceptance of the representation. Still, it is important to note that the interested parties can refuse representation up until the end of the production of evidence, or an equivalent stage, by an express declaration in the proceedings.²⁴

The summons will be made via one or various announcements made public by the media or by public notice, whether referring to general or geographically localized interests. In any case, the law does not require personal identification of those to whom the advertisement is directed. It is sufficient for the summons to refer to them as holders of the interests at stake, mentioning, also, the action in question, the identity of the claimant, or at least of the first claimant where there are several, the identity of the defendant or defendants, and sufficient reference to the claim and the reason behind it. Where it is not possible to specify individual holders, the summons use the circumstance or characteristic that is common to all of them, such as the geographical area in which they reside or the group or community that they make up.²⁵

²³ See GABRIELLE NATER-BASS, “Class Action Arbitration: A New Challenge?”, available online at http://www.homburger.ch/fileadmin/publications/CLASSACT_01.pdf, page 14 (paragraph II, B). For a distinction between the *opt-in* and the *opt-out* principles, see MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 209-211.

²⁴ Article 15, § 1 and 4, Popular Action Law.

²⁵ Article 15, § 2 and 3, Popular Action Law.

Finally, the key point in all of this is the *res judicata* effect, which differs from the general regime of civil procedure. According to article 19, paragraph 1, the final decisions rendered in administrative actions or appeals or in civil actions have “general effects” (*erga omnes* – towards all), except if they are dismissed for insufficient evidence or when the judge should decide differently considering the actual motivations of the case. In any case, the holders of interests or rights who have exercised the right to exclude themselves from representation (*opt-out*) will not be bound by the “general effects” of the *res judicata*.

After the decisions have become *res judicata* they will then be published at the expense of the losing party in two newspapers that interested parties are presumed to read, to be chosen by the judge. The judge can also decide that publication is restricted to the essential aspects of the case, when the extension of the decision suggests that.²⁶

This special regime of representation (*opt-out*), combined with the *res judicata* effect (*erga omnes*), has been heavily criticized by some authors²⁷. Of course that an *inter partes* effect would compromise the effectiveness of the popular action²⁸. However, as Lebre de Freitas observes, this regime can have severe consequences to the holder of the interest (particularly in case of a diffuse interest) since in principle he will not be able in to file another action with the same object, if the defendant is acquitted.

The main problem is that the law does not require personal identification of those to whom the writ of summons is directed (which, of course, would be very difficult or even impossible). As we have seen, the summons is made via one or various announcements made public through the media or through public notice, which may not be sufficient to reach its intended recipients... And the risk is even higher since anyone (any citizen, as well as certain associations and foundations) can file a popular action²⁹ – the legitimacy criterion is quite broad. Therefore, there is the possibility that someone is being represented in a popular action without even knowing it, with the relevant consequence of being bound by the judgment, since he hasn’t opted out. It is also important to recall that the

²⁶ Article 19, § 2, Popular Action Law.

²⁷ See JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, pages 215-219 and “A acção popular ao serviço do ambiente”, in *Luslada – Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Luslada – Porto, Porto, 1996, pages 238-241, ANTÓNIO PAYAN MARTINS, *op. cit.*, pages 112-117 and 128, JOSÉ DE OLIVEIRA ASCENSÃO, *Direito Civil. Teoria Geral*, *op. cit.*, pages 117-118, and LUÍS SOUSA FÁBRICA, *op. cit.*, pages 17-18.

²⁸ See MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, page 273.

²⁹ See JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, page 217.

Popular Action Law does not foresee an adequacy of representation criteria like the one contemplated in the Rule 23, (a), of the American Federal Rules of Civil Procedure.³⁰

As Lebre de Freitas also sustains, it is true that (i) the Public Prosecutor may replace the claimant in the case of withdrawal from the suit, settlement or behavior which is harmful to the interests in question and (ii) the judge can collect evidence on his own initiative (within the key issues defined by the parties)³¹. However, as the Author affirms, these kind of precautions may not take place and may reveal themselves insufficient to protect the interests at stake.³²

VI. As we have previously stated, a popular action can be injunctive or remedial. Regarding the liability of the agent³³, it should be emphasized that the law distinguishes between: (i) subjective civil liability, (ii) objective civil liability and (iii) criminal liability.

According to article 22 (subjective civil liability), the party who, in a deliberate or negligent way, breaches the interests referred to in article 1 will have to indemnify the injured party or parties for damages. The law establishes here a distinction between compensation for injury of the interests of unidentified holders (which are globally fixed) and of identified holders (calculated under the general terms of civil liability)³⁴. In any case, the right to compensation shall lapse three years after the final judgment that has recognized it.³⁵

There is also an obligation to indemnify for damages, regardless of fault, when an action or failure to act by an agent breaches the relevant rights and interests or results from dangerous activity (objective civil liability).³⁶

Finally, those who have a popular action right can also present a denunciation, complaint or participation to the Public Prosecutor if the interests referred to in

³⁰ See ANTÓNIO PAYAN MARTINS, *op. cit.*, page 112, HENRIQUE SOUSA ANTUNES, *op. cit.*, page 23, and ADA PELLEGRINI GRINOVER, *op. cit.*, page 250.

³¹ Article 16, § 3, and article 17, Popular Action Law.

³² See JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", *op. cit.*, page 218 and "A acção popular ao serviço do ambiente", page 240.

³³ See JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", *op. cit.*, pages 219-221, and MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 153 and following, ANTÓNIO PAYAN MARTINS, *op. cit.*, pages 118-124, and TITO ARANTES FONTES / JOÃO PIMENTEL, *op. cit.*, page 124, § 1.10.

³⁴ Article 22, § 2 and 3, Popular Action Law. Regarding this controversial distinction, see HENRIQUE SOUSA ANTUNES, *op. cit.*, pages 26-27, and MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 165-175.

³⁵ Article 22, § 4, Popular Action Law.

³⁶ Article 23, Popular Action Law.

Article 1 (which are of criminal nature) are violated, as well as join proceedings (criminal liability).³⁷

VII. Regarding the costs of popular action, first of all it is important to take notice that prepayment of costs is not required. Also, in the event that the claim only partially proceeds, the plaintiff is exempt from the payment of costs. If, however, there is a total failure of the claim, the plaintiff is responsible for an amount to be determined by the judge, somewhere between 10% and 50% of the costs that would normally be due, depending on his financial situation and on the material or procedural reason for dismissing of the action.³⁸

Also, according to Article 21, the judge in the case will decide on the legal costs, depending on the complexity and the amount in question.

VIII. So far, we have been describing the popular action law in its main features. But what is the situation as to its application by the courts? Are there many popular actions being filed?

The truth is that this mechanism is not very common in Portugal and has been little used in practice³⁹. The majority of the popular actions brought refer to the protection of environmental rights, public works or goods of the public domain. Nowadays, most consumer litigation has been brought before consumer arbitration centers. As a matter of fact, the institute of class actions was born out of a political agenda and it introduced a system very distant from the traditions of the civil law jurisdictions, and therefore it has not been very strongly assimilated in our system of justice⁴⁰.

IX. Finally, it is important to notice that, although Law no. 83/95 (Popular Action Law) contains the general provisions applicable to the popular action, this does not mean, however, that there can-not be other specific provisions

³⁷ Article 25, Popular Action Law.

³⁸ Article 20, § 1, 2 and 3, Popular Action Law.

³⁹ See TITO ARANTES FONTES / JOÃO PIMENTEL, *op. cit.*, page 124, paragraph 1.9, JOSÉ LEBRE DE FREITAS, "A Acção Popular no Direito Português", *op. cit.*, pages 227-228, and LISA TORTELL, *op. cit.*, pages 2-3.

⁴⁰ One of the relevant points that can explain this lack of success is the illegality for the Portuguese lawyers to act on a pure contingency fees model, as this is not allowed by the Portuguese Bar Association rules. It is not easy to have a system of class actions without lawyers prepared to be in a way part of an industry of class action litigation and paying the quite often huge costs of litigation in exchange for a large percentage of the outcome. See JOSÉ MIGUEL JÚDICE, "Três reflexões e uma conclusão (em vez de prefácio)", in ANTÓNIO PAYAN MARTINS, *op. cit.*, pages XI-XIII.

(of procedural nature) contemplated in special legislation that also regulate collective protection⁴¹. This is the case, for example, of:

- i) Law no. 24/96, of 31 July (Consumer Protection);⁴²
- ii) Law no. 11/87, of 7 April, subsequently amended (Framework Law on the Environment);⁴³
- iii) Decree-Law no 446/85, of 25 October, subsequently amended (General Contractual Terms);⁴⁴
- iv) Law no. 107/2001, of 8 September (Protection of the Cultural Heritage)⁴⁵; and
- v) Decree-Law no. 486/99, of 13 November, subsequently amended (Securities Code).⁴⁶⁻⁴⁷

3. Class Action Arbitrations in Portugal?

I. After analyzing the Portuguese own system of class/group actions, the question that we should now ask ourselves is whether or not it is possible to have a “class arbitration” in Portugal – also known as “class action arbitration”, a “procedure, which combines elements of US-style class actions (i.e., large-scale law-

⁴¹ See JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, page 208. As a matter of fact, article 27 of the Popular Action Law expressly provides that “the popular action cases not covered by the provisions of this Act shall be governed by the rules that apply to them”.

⁴² Regarding this law, see, for instance, JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, pages 208 and 224-226, and HENRIQUE SOUSA ANTUNES, *op. cit.*.

⁴³ See, for example, HENRIQUE SOUSA ANTUNES, *op. cit.*, and JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, page 226.

⁴⁴ See, for example, ANTÓNIO PINTO MONTEIRO, “Contratos de adesão e cláusulas contratuais gerais: problemas e soluções”, in *Estudos em Homenagem ao Prof. Doutor Rogério Soares*, Boletim da Faculdade de Direito da Universidade de Coimbra, *Stvdia Ivridica*, n° 61, Coimbra Editora, Coimbra, 2001, pages 1103-1131, HENRIQUE SOUSA ANTUNES, *op. cit.*, and JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, pages 225-226.

⁴⁵ See HENRIQUE SOUSA ANTUNES, *op. cit.*, and JOSÉ LEBRE DE FREITAS, “A Acção Popular no Direito Português”, *op. cit.*, page 226.

⁴⁶ See JOSÉ DE OLIVEIRA ASCENSÃO, “A acção popular e a protecção do investidor”, *op. cit.*, and “A protecção do investidor”, *op. cit.*, pages 13-40, SOFIA NASCIMENTO RODRIGUES, *A Protecção dos Investidores em Valores Mobiliários*, Almedina, Coimbra, 2001, pages 57-67, MARIA ELISABETE GOMES RAMOS, *O seguro de responsabilidade civil dos administradores (entre a exposição ao risco e a delimitação da cobertura)*, Almedina, Coimbra, 2010, pages 236-240, and HENRIQUE SOUSA ANTUNES, *op. cit.*.

⁴⁷ It should also be emphasized that there was a preliminary project for a Consumer’s Code, which would simplify the provisions regarding collective protection of the consumer and would revoke the statutes on general contractual terms and consumer protection. The Draft Bill, however, has not yet been approved. See HENRIQUE SOUSA ANTUNES, *op. cit.*, pages 29-31.

suits seeking representative relief in court on behalf of hundreds to hundreds of thousands of injured parties) with arbitration”.⁴⁸

In other words (more appropriate to Portuguese Law), can we have a popular action in arbitration? Although the question is simple, the answer is certainly not...

II. Being the leading country in the area of group actions⁴⁹, it comes as no surprise that it was in the United States that this interesting topic of class arbitrations first arose. Nevertheless, this was and still is a controversial issue, both in as well as outside the US; which is perfectly understandable since, as Eric P. Tuchmann rightfully put it, class actions and arbitration seem at first sight to be mutually exclusive processes⁵⁰. On the one hand, we have class action litigation, a large, complex judicial process, sometimes heavily criticized for permitting abusive lawsuits⁵¹. On the other hand, we have arbitration, an alternative dispute resolution method characterized by its consensual nature (party autonomy), confidentiality, informality and flexibility.

Despite the controversy, the truth is that class actions made their way into arbitration and it seems that they are here to stay⁵². However, up until now this has been seen more as an “American issue”. And, as far as we know, there are certainly no “class arbitrations” in Europe.⁵³

⁴⁸ S. I. STRONG, “Class arbitration outside the United-States: reading the tea leaves”, in *Multiparty Arbitration*, Dossiers VII, International Chamber of Commerce, Paris, 2010, page 183.

⁴⁹ See, for instance, BERNARD HANOTIAU, *Complex Arbitrations – Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International, the Hague, 2005, page 258.

⁵⁰ ERIC P. TUCHMANN, “The administration of class action arbitrations”, in *Multiple Party Actions in International Arbitration*, edited by the Permanent Court of Arbitration, Oxford, 2009, page 327.

⁵¹ On the criticism that it is sometimes made to the American class actions, see GABRIELLE NATER-BASS, *op. cit.*, pages 6-7 (paragraph II, A., 4.).

⁵² As it is well known, although class action arbitrations already existed in the United States earlier, it was particularly with the famous *Green Tree Financial Corp. v. Bazzle* that they became a reality. Regarding this case and its famous Supreme Court’s 2003 decision, see, for example, BERNARD HANOTIAU, *op. cit.*, pages 264-266, NIGEL BLACKBAY / CONSTANTINE PARTASIDES / ALAN REDFERN / MARTIN HUNTER, *Redfern and Hunter on International Arbitration*, fifth edition, Oxford, 2009, pages 154-156, and ERIC P. TUCHMANN, *op. cit.*, pages 327-329.

⁵³ Although it is true that there are no “class arbitrations” in Europe, it must be emphasized that collective redress seems to be on the agenda of the European Commission. As some Authors correctly observe, there is a recent interest on collective redress “not only on Member State level, but also on the European supranational level” – PHILIPPE BILLIET, “Recent collective redress initiatives in Belgium; what is the role of arbitration?”, unpublished, page 1. We refer, particularly, to the Consumer Policy Strategy 2007-2013 in which the Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers. The first conclusions can be found on http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm. Regarding this matter,

What about Portugal? Portugal is no exception. So far, there is not a single case of a popular action in arbitration. This topic has never even been really discussed by scholars or arbitration experts. Still, is this even possible?

III. Approved on December 14 2011, and entered into force on March 14 2012, the new Portuguese Arbitration Law says nothing on the matter⁵⁴. In any case, there are some aspects in the new law with relevance to the class arbitration topic that are worth emphasizing.

First of all, the new arbitration law is clearly the result of a friendlier environment in Portugal towards arbitration, which can be seen at various levels: political, jurisprudential, practical, academic, etc.

The law also confirms that Portugal is an “UNCITRAL country”, since it draws heavily from the UNCITRAL Model Law. Still, the new legislation also attempts to incorporate lessons learned from other countries’ recent legislative changes, as well as past Portuguese experience.

That being said, two innovations deserve a reference here. One of them concerns the criterion of arbitrability. According to the previous arbitration law, this criterion was the disposability of the rights⁵⁵. With the new law, it has clearly become wider, since it is now possible to submit any dispute concerning patrimonial rights to arbitration. Yet even non-patrimonial rights may be subjected to arbitration, as long as the parties are able to settle over them.⁵⁶

see particularly PHILIPPE BILLIET, “Recent collective redress initiatives in Belgium; what is the role of arbitration?”, *op. cit.*, pages 1-2 and “Class arbitration in the Netherlands, Belgium and the US: a comparative overview”, unpublished, pages 1-2, and also S. I. STRONG, “Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration”, in *Hague Yearbook of International Law*, volume 23 (2010), Martinus Nijhoff Publishers, Leiden-Boston, 2011, pages 113-114 and 122-124.

⁵⁴ Law no. 63/2011, of 14 December. For a commentary on the new law, see JOSÉ MIGUEL JÚDICE, “The new Portuguese Arbitration Law”, in *ASA Bulletin*, volume 30, no. 1, Kluwer Law International, 2012, pages 7-12, JOSÉ MIGUEL JÚDICE / DIAGO DUARTE DE CAMPOS, “The new Portuguese arbitration law”, in *International Bar Association*, vol. 17, no. 1, March 2012, pages 55-57, and ARMINDO RIBEIRO MENDES / DÁRIO MOURA VICENTE / JOSÉ MIGUEL JÚDICE / JOSÉ ROBIN DE ANDRADE / PEDRO METELLO DE NÁPOLES / PEDRO SIZA VIEIRA, *Lei da Arbitragem Voluntária Anotada*, Almedina, Coimbra, 2012. An unofficial English translation of the law is available at <http://arbitragem.pt/legislacao/index.php>

⁵⁵ According to this previous criterion, arbitration could not apply to disputes concerning non-disposable rights and any arbitration agreement to that effect would be invalid. Nonetheless, there was still some case law and academic opinion which sustained that in such cases the invalidity of an arbitration agreement relates only to those rights which are absolutely non-disposable, not to those which are relatively non-disposable, such as rights that involve an economic interest – these would be arbitrable. See, JOSÉ MIGUEL JÚDICE / ANTÓNIO PEDRO PINTO MONTEIRO, “Court rules on objective arbitrability and non-disposable rights”, in *International Law Office*, March 2011.

⁵⁶ Article 1, § 1 and 2, Portuguese new Arbitration Law.

The second innovation that should be particularly emphasized here is the multi-party arbitration provision. According to article 11, all claimants and/or all respondents should by common agreement choose a common arbitrator, after which the arbitrators thus chosen will designate a presiding arbitrator or chairperson. If, however, the interests of an individual claimant or respondent are in conflict with those of its co-claimant(s) or co-respondent(s), the appointment of these parties or all the arbitrators shall revert to a state superior court (appeal court). In any case, these are only default rules – the parties are free to decide otherwise in their arbitration agreement.⁵⁷

IV. We have seen that Portugal has what might be called a class action mechanism (the popular action). It also has a new arbitration law which reflects the friendlier environment in Portugal towards arbitration. Can these two combined factors be sufficient to have class action arbitration?

The truth is there are some obstacles that lead us to the conclusion that, if not impossible, the admission of a popular action in arbitration is highly unlikely – at least, under current legislation.⁵⁸

The first problem, in our opinion, is always the consensual nature of arbitration. Consent is the cornerstone of arbitration. With the special regime of representation contemplated in articles 14 and 15 (*opt-out principle*), and the *res judicata* effect in article 19 of the Popular Action Law, it will be very difficult to admit a class action arbitration (or popular action in arbitration). There is the serious risk that someone would be represented without him being aware of it, with the relevant consequence of being bound by the judgment, since he hasn't opted out. We can-not just close our eyes to the question of consent.

It is also not clear that under the current Popular Action Law this could be possible. The law just refers to an administrative and a civil popular action – not an arbitral popular action⁵⁹. So without special legislation on the subject, it is clearly difficult to sustain the possibility of a popular action in arbitration. Furthermore, as far as we know, there are no arbitral institutions in Portugal foreseeing class action arbitrations or discussing such possibility.

⁵⁷ The new law also foresees third party intervention on article 36. However, these third parties must have signed the arbitration convention. Regarding this matter, see MIGUEL GALVÃO TELES, "Addition of Parties: a vacuum left by the Model Law in need of internationally approved Rules", in *Revista Internacional de Arbitragem e Conciliação*, Associação Portuguesa de Arbitragem, ano III (2010), Almedina, Coimbra, 2010, pages 45-62.

⁵⁸ Regarding the obstacles that are usually pointed out to European class action arbitration, see GABRIELLE NATER-BASS, *op. cit.*, pages 23-31 (paragraph IV).

⁵⁹ See article 12. Also, on article 19, paragraph 1 of the Popular Action Law, reference is made to the "final decisions rendered in administrative actions or appeals or in civil actions", without considering the possibility of an arbitral action.

There are usually also problems of arbitrability and due process (particularly, in what concerns the appointment or arbitrators). Nonetheless, as previously referred, in light of the wide arbitrability criterion and of the special multi-parties provision contemplated in the new arbitration law⁶⁰, this might not constitute a particular problem in Portugal.

The obstacles referred so far are already sufficient for us to anticipate that a popular action in arbitration *per se* would provide many possibilities to appeal or to present an application for setting aside the arbitral award (annulment). For instance, under the current Portuguese opt-out system, the party who did not receive notice of the popular action will probably challenge the award claiming that there was a violation of his right to be heard.⁶¹

Furthermore, as Gabrielle Nater-Bass correctly observes, there are also recognition and enforcement uncertainties, particularly in the New York Convention⁶². Article V, paragraph 1 (b), for example, could present some difficulties in an opt-out system like the Portuguese one – the non-present class member could always argue that he was not given proper notice of the arbitration.

There are also other reasons to presume that it is not likely to have a popular action in arbitration. It is well known that in the United States class arbitration arose “after corporate entities that were concerned about being named as defendants in judicial class actions began including arbitration provisions in their contracts so as to force individual claimants to pursue relief in arbitration”⁶³. By doing this, they thought that they could avoid class actions, because class actions and arbitration did not seem compatible with each other. As we all know, they thought wrong... The important point that must be emphasized is that in Portugal – at least at this moment – there is simply not this concern. As previously referred, popular action is not very common in Portugal and has been little used in practice. So Portuguese corporate entities (at least for now) are probably not worried about this. It is unlikely that we might see arbitration provisions in standard agreements with the intent of avoiding popular action.

⁶⁰ Article 1, paragraphs 1 and 2, and article 11, respectively, of the Portuguese new Arbitration Law.

⁶¹ Article 46, paragraph 3, a), (ii) combined with article 30, paragraph 1, Portuguese new Arbitration Law. On this subject, see GABRIELLE NATER-BASS, *op. cit.*, page 29 (paragraph IV, C.).

⁶² See GABRIELLE NATER-BASS, *op. cit.*, page 29 (paragraph IV, C.). On this subject, see also S. I. STRONG, “From Class to Collective: The De-Americanization of Class Arbitration”, in *Arbitration International*, vol. 26, no. 4, 2010, Kluwer Law International, pages 523-547.

⁶³ S. I. STRONG, “Class arbitration outside the United-States: reading the tea leaves”, *op. cit.*, page 197. See also, for instance, BERNARD HANOTIAU, *op. cit.*, page 264, and S. I. STRONG, “From Class to Collective: The De-Americanization of Class Arbitration”, *op. cit.*, page 498.

There are also some cultural legal differences between Portugal and the United States that discourage the practice of collective litigation in Portugal⁶⁴, therefore reducing the chances of having a class action arbitration. We refer particularly to the prohibition of remuneration for lawyers according to the system of *quota litis* (the no win, no fee agreement) and, in some point, the extensive limits on lawyers' advertising⁶⁵. It is also important to notice that punitive damages are not available.

V. Considering the above-mentioned, we are not very optimistic – even if we thought that class action through arbitration would be a good improvement... – on the possibility of class action arbitration in Portugal.

The situation could be different; however, if there was special legislation on the subject. As previously indicated, Popular Action Law contains general provisions applicable to the popular action. Alongside this law there is special legislation that also regulates collective protection. As a matter of fact, article 27 of the Popular Action Law expressly provides that “the popular action cases not covered by the provisions of this Act shall be governed by the rules that apply to them”. So, special legislation is the best way to prepare the way for the first popular action in arbitration.⁶⁶

Institutional arbitral centers (particularly in consumer disputes) can also play an important role. By providing special rules, they could boost “class action arbitrations” like the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS) did in the United States.⁶⁷

⁶⁴ See HENRIQUE SOUSA ANTUNES, *op. cit.*, pages 1 and 14.

⁶⁵ Articles 101 and 89 of the Bar Association Statute – Law 15/2005, of 26 January, with the subsequent amendments and JOSÉ MIGUEL JÚDICE, “Três reflexões e uma conclusão (em vez de prefácio)”, in ANTÓNIO PAYAN MARTINS, *op. cit.*, pages XI-XIII.

⁶⁶ Following article 52, paragraph 3, of the Constitution, it can be said that the Constitution allows a popular action to be filed in “any court” (see J.J. GOMES CANOTILHO / VITAL MOREIRA, *op. cit.*, page 697, and ANTÓNIO FILIPE GAIÃO RODRIGUES, *op. cit.*, page 250). Since an arbitral tribunal is a court (and is expressly considered as such in article 209, paragraph 2 of the Constitution), there seems to be no constitutional obstacle to considerer the possibility of a popular action being filed in an arbitral tribunal. On the constitutional nature of the arbitral tribunal, see MIGUEL GALVÃO TELES, “Recurso para o Tribunal Constitucional das decisões dos tribunais arbitrais”, in *III Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa*, Almedina, Coimbra, 2010, pages 209-213 and “Processo equitativo e imposição constitucional da independência e imparcialidade dos árbitros em Portugal”, in *Revista de Arbitragem e Mediação*, year 7, no. 24 (January-March 2010), coordination: Arnaldo Wald, Editora Revista dos Tribunais, São Paulo – Brasil, pages 129-130, and ANTÓNIO PEDRO PINTO MONTEIRO, “Do recurso de decisões arbitrais para o Tribunal Constitucional”, in *Revista Themis*, ano IX, nº 16 (2009), Almedina, Coimbra, 2009, pages 194-201.

⁶⁷ On the subject, see, for example, ERIC P. TUCHMANN, *op. cit.*, pages 329-331, RICHARD CHERNICK, “Class-wide arbitration in California”, in *Multiple Party Actions in International*

Therefore, although at the moment it does not seem possible to file a popular action in an arbitral tribunal, in the future – with specific legislation on the subject – the situation might be different.

In any case, the class action issue is already controversial enough in civil law jurisdictions to handle an additional controversy – the use of arbitration to settle class action disputes. Arbitration of a global system of dispute resolution is still very much in its first phase, at least in Portugal. To force the arbitral institution to adapt to this new world before it grows enough to develop, will probably be a mistake that can jeopardize the arbitral system as such. The best advice to be given is probably that arbitration must stay away from class action litigation, at least for now.

Arbitration, edited by the Permanent Court of Arbitration, Oxford, 2009, pages 342 and 345-350, BERNARD HANOTIAU, *op. cit.*, pages 277-279, and GARY B. BORN, *International Commercial Arbitration*, volume I, Wolters Kluwer, Alphen aan den Rijn, 2009, page 1231.