

## OPTING OUT OF THE PROCEDURAL MORASS: A SOLUTION TO THE CLASS ARBITRATION PROBLEM

EMANWEL JOSEF TURNBULL\*

*American class actions are internationally regarded as a procedural form to avoid, and widely criticized in the United States. They have been narrowed and restricted by U.S. statutes and case law. Plaintiffs' lawyers in consumer class actions are portrayed as greedy and fraudulent, while businesses are increasingly acting to avoid class actions through mandatory pre-dispute arbitration clauses. Even class arbitration is criticized as leading to a "procedural morass."*

*This Article proposes that parties and arbitral fora opt out of the American procedural morass (and the attendant long-running disputes about American class actions) by adopting an English procedural rule for aggregation. This Article performs the necessary investigation into the legal contexts of England and America and adjusts the transplant rule to best fit its new home.*

*The proposed arbitral rule is simpler and more flexible, and therefore more suitable, than the existing arbitral rules adapted from the Federal Rules of Civil Procedure. Perhaps more importantly, this new rule does not carry the cultural baggage of the American class action. Where consumers and businesses are vehemently opposed, this new approach to aggregation can bring compromise and co-operation. If adopted, this rule can relieve the consumer-business tensions and breathe new life into the arbitral forum as a setting in which many consumers can obtain a fair hearing of a dispute, even if they need to do so together.*

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\* International and Comparative Law Fellow, University of Maryland Carey School of Law, Adjunct Professor, University of Baltimore, Yale Gordon College of Arts and Sciences, LL.M, 2012, University of Maryland Francis King Carey School of Law, B.A. (Hons) Law, University of Oxford, 2007. This paper would not have been possible without the encouragement and support of Professors Shruti Rana, Joyce Mitchell, and Peter Danchin, of University of Maryland Carey School of Law, to whom I will always be indebted. I am also grateful to Daniel Ghezlbash and other participants at the New Voices in Comparative Law Conference in Indianapolis in April 2013 who were kind enough to comment on this piece.

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## INTRODUCTION

American class actions are in trouble. Widely criticized in the United States (U.S.), and internationally regarded as a procedural form to avoid, class actions have been narrowed and restricted by U.S. statutes and case law. Plaintiffs' lawyers in consumer class actions are portrayed as greedy and fraudulent,<sup>1</sup> while businesses are increasingly acting to avoid class actions through mandatory pre-dispute arbitration clauses.<sup>2</sup> However, contrary to the common perception, mandatory pre-dispute arbitration clauses actually offer an unprecedented opportunity for lawyers and parties to reform the procedure under which their cases are decided, and to adopt a new compromise model for the resolution of group disputes.

This Article proposes a novel compromise; the U.S. should adopt the United Kingdom's (U.K.) procedural rule for aggregate litigation. This Article argues for the introduction of the U.K.'s opt-in, non-representative rule into the traditional, opt-out, representative U.S. context, not through state action, but through the rules of private arbitral fora. Further, this Article argues that the new rule would represent a compromise between the vehemently opposing positions of business leaders and consumer advocates. Part 1 will set out the history and criticisms of class actions, while identifying and examining the present problem of class-waivers through arbitration clauses. Part 2 will set out the context of the proposed transplant. Part 3 will consider the appropriateness of the proposed rule in light of the differences between the legal contexts found in the U.S. and U.K., and the modifications necessary for the rule to be accepted in the U.S. legal context. In order to maximize the utility and effectiveness of the transplanted rule, the finished rule must not only provide an effective means for collective redress, it must also respect existing U.S. legal culture. In addition, for the proposal to stand any chance of being adopted in the U.S., it must also address the concerns of both consumer and business advocates. Thus, Part 4 will set out a draft aggregate arbitration rule to be incorporated into the rules of arbitral fora, with explanatory notes.

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1. *E.g.*, Press Release, Chevron, Chevron Files Fraud and RICO Against Lawyers and Consultants Behind Ecuador Litigation (Feb. 1, 2011), *available at* [http://www.chevron.com/chevron/pressreleases/article/02012011\\_chevronfilesfraudandricocaseagainstlawyersandconsultantsbehindecuadorlitigation.news](http://www.chevron.com/chevron/pressreleases/article/02012011_chevronfilesfraudandricocaseagainstlawyersandconsultantsbehindecuadorlitigation.news); Tom Scott, *Who Benefits from a Class Action Lawsuit - Trial Lawyers!*, FOX & HOUNDS (Jan. 26, 2012), <http://www.foxandhoundsdaily.com/2012/01/who-benefits-from-a-class-action-lawsuit-trial-lawyers/>.

2. *E.g.*, Michael Bobelian, *Microsoft Takes Advantage Of Supreme Court's Limitations Of Class Actions*, FORBES (Sept. 10, 2012, 12:50 PM), <http://www.forbes.com/sites/michaelbobelian/2012/09/10/microsoft-takes-advantage-of-supreme-courts-limitations-of-class-actions/>.

## PART 1: CLASS ACTIONS AND ARBITRATION IN THE UNITED STATES

This Part proceeds as follows: Section 1A discusses the American class action; Section 1B describes recent steps taken to narrow the scope of class actions in the U.S.; Section 1C focuses on the influence of arbitration law on class actions; and Section 1D briefly examines the primary critiques of contemporary arbitration practices.

1A. *The American Class Action*

The Federal Rule of Civil Procedure, Rule 23, sets out four general prerequisites for the certification of a class, followed by the three possible types of class action, each with their own requirements, and provides for the making of class certification orders.<sup>3</sup> The rule governs the notification of class members,<sup>4</sup> judgments,<sup>5</sup> appeals,<sup>6</sup> case management,<sup>7</sup> supervision of settlements<sup>8</sup> and class attorneys,<sup>9</sup> and special provisions for the disposition of attorney's fees.<sup>10</sup>

The four general prerequisites for the certification of a class are numerosity,<sup>11</sup> commonality,<sup>12</sup> typicality,<sup>13</sup> and adequacy.<sup>14</sup> Numerosity “reflects the general theory behind class action lawsuits which is to permit a large group of individuals whose interests are sufficiently related to bring one lawsuit, instead of many lawsuits, so as to conserve judicial resources and increase judicial access.”<sup>15</sup> Numerosity is not strictly concerned with the number of class members, but with the effect of their number on the litigation process in light of the circumstances—whether their number renders non-class resolution impracticable (if not impossible).<sup>16</sup>

The second and third requirements, commonality and typicality, are often considered together, but serve different purposes. Commonality is concerned with the similarity of interests amongst the members of a putative class, while

3. FED. R. CIV. P. 23(a)-(c)(1).

4. *Id.* at 23(c)(2).

5. *Id.* at 23(c)(3).

6. *Id.* at 23(f).

7. *Id.* at 23(d).

8. *Id.* at 23(e).

9. FED. R. CIV. P. 23(g).

10. *Id.* at 23(h).

11. *Id.* at 23(a)(1) (“[T]he class is so numerous that joinder of all members is impracticable[.]”).

12. *Id.* at 23(a)(2) (“[T]here are questions of law or fact common to the class[.]”).

13. *Id.* at 23(a)(3) (“[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class[.]”).

14. *Id.* at 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

15. *Safran v. United Steelworkers of Am.*, 132 F.R.D. 397, 401 (W.D. Pa. 1989).

16. MARCY HOGAN GREER, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 58-61 (2010) (discussing how Circuit Courts have adopted different formulas or tests to determine certifiable class sizes and to help clarify when joinder would be impractical).

typicality is concerned with the relation of the representative parties' interests to the interests of the putative class members.<sup>17</sup> The adequacy requirement also concerns the relation between representatives and class members.<sup>18</sup> It exists to safeguard the rights of class members, who will be bound by any final adjudication or settlement.<sup>19</sup> Within the broad standard that representative parties must "fairly and adequately protect the interests of the class[.]"<sup>20</sup> representatives must not have interests substantially conflicting with those of the class, and must have sufficient willingness and ability to represent the class.<sup>21</sup> The standards that apply to these requirements vary, with different federal circuits placing greater or lesser emphasis on the fourth, adequacy, requirement.<sup>22</sup>

In addition to these four general requirements, a class action must fall into one of three types prescribed by Rule 23(b). Each type has its own additional requirements. Rule 23(b)(1) addresses the problem of inconsistent adjudications regarding common interests and adjudication on common interests without the joinder of an interested party.<sup>23</sup> Rule 23(b)(2) addresses situations in which a defendant justifies his action or inaction by reference to grounds that apply equally to the whole class.<sup>24</sup> These two types of classes are generally used to seek injunctive or declaratory relief.<sup>25</sup>

Rule 23(b)(3) provides for the archetypal class action, used to obtain a monetary remedy.<sup>26</sup> This type of class action requires: (a) a predominance of

17. GREER, *supra* note 16, at 61-68.

18. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001).

19. *Id.* at 481 ("[Adequacy] implicates the due process rights of all members who will be bound by the judgment.").

20. FED. R. CIV. P. 23(a)(4).

21. GREER, *supra* note 16, at 69 ("To meet the adequacy requirement, the class representative must have no significant conflicts of interest with other class members and must zealously represent the class.").

22. *Compare* *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 344-45 (S.D.N.Y. 2004) (holding that a plaintiff with limited English proficiency, who may not have been able to effectively supervise class counsel, to be an adequate class representative), *with* *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 537 (N.D. Tex. 2005) (finding that a plaintiff who lacked "knowledge and understanding," and who heavily relied on counsel, did not carry the burden of demonstrating that she was an adequate class representative).

23. FED. R. CIV. P. 23(b) ("A class action may be maintained . . . if: (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]").

24. *Id.* at 23(b)(2) ("[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]").

25. GREER, *supra* note 16, at 81.

26. *Id.*

class issues (of fact or law) over individual issues; and (b) the superiority of the class action as a means of fairly and efficiently resolving the case.<sup>27</sup>

In 2003, Rule 23 was amended to provide for judicial regulation of class counsel,<sup>28</sup> prior to which adequacy of counsel was a matter of case law.<sup>29</sup> Rule 23(g) regulates the appointment and conduct of class counsel, providing that the court will appoint counsel, listing factors such as: experience; knowledge of the law; and ability to commit resources to the case.<sup>30</sup>

American class actions are rarely disposed of at trial; instead, the majority of cases are settled.<sup>31</sup> A court must approve the substantive terms of a class settlement.<sup>32</sup> To be approved, settlements must be fair, adequate, and reasonable.<sup>33</sup> This broad test has acquired a substantial gloss, compiled by the Federal Judicial Center from case law on the subject.<sup>34</sup> “Fairness” requires that the settlement should not unduly advantage or disadvantage class members in relation to each other, and others similarly situated.<sup>35</sup> “Adequacy” compares the settlement proposed to the relief class members might have obtained without a class action.<sup>36</sup> “Reasonableness” tests the responsiveness of the settlement against the class allegations.<sup>37</sup> The assessment of fairness, adequacy, and reasonableness must account for a wide variety of factors, from the merits of the case to the reasonableness of attorney’s fees.<sup>38</sup>

Class actions established by Rule 23 are usually called “opt-out” classes.<sup>39</sup> In the absence of an opt-out by a class member, a judgment in a certified class action binds all members of the class, including those who took no part in the litigation.<sup>40</sup> A few individuals within the class act as representative parties.<sup>41</sup>

27. FED. R. CIV. P. 23(b)(3) (A class action may be maintained if: (3) “[T]he questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”).

28. *Id.* at 23(g).

29. GREER, *supra* note 16, at 73.

30. FED. R. CIV. P. 23(g)(1)(A).

31. GREER, *supra* note 16, at 171.

32. FED. R. CIV. P. 23(e).

33. *Id.* at 23(e)(2).

34. GREER, *supra* note 16, at 204-06 (quoting FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62, at 315-18 (2004) [hereinafter MANUAL FOR COMPLEX LITIGATION]).

35. MANUAL FOR COMPLEX LITIGATION, *supra* note 34, at 315.

36. *Id.*

37. *Id.*

38. *Id.* at 315-18 (non-exhaustively listing the potential factors and methods used to determine how much weight to give these individual factors).

39. This nomenclature is strictly true only for Rule 23(b)(3) classes because the other two types of class are “mandatory” and class members cannot opt out. GREER, *supra* note 16, at 81 (“Rule 23(b)(1) and (b)(2) are typically referred to as ‘mandatory’ classes because the rule does not allow for class members to opt out of the class.”).

40. FED. R. CIV. P. 23(c)(3) (“Whether or not favorable to the class, the judgment in a class action must: (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.”).

Many states have rules similar to Rule 23;<sup>42</sup> these state classes are uniformly of the “opt-out” or mandatory variety.<sup>43</sup>

### 1B. *The Narrowing of Contemporary Class Actions*

Class actions are a major point of contention between consumer advocates and businesses in the U.S. Highlights of this antagonism are set out below. In particular, the judicial hostility to large classes, the passage of the Class Action Fairness Act of 2005,<sup>44</sup> and the wider contemporary hostility towards class actions and class lawyers, are examined.

Perhaps the most prominent case restricting federal class actions is *Wal-Mart Stores, Inc. v. Dukes*.<sup>45</sup> Class action advocates regard this case as a substantial restriction upon the utility of class actions.<sup>46</sup> The same advocates have long detected a degree of judicial hostility to certain types of class actions.<sup>47</sup> Cases on broad substantive or jurisdictional issues often have consequences for class actions because of their impact on pleading requirements. For example, the appellant in *Edwards v. First American Corp.*<sup>48</sup> questioned whether a mere violation of a statute granting a private right of action was sufficient to confer Article III standing.<sup>49</sup> The importance of the issue to class actions was made clear on appeal to the Supreme Court, by the *amicus* brief of Facebook and other social networking businesses.<sup>50</sup> The *amicus*

41. FED. R. CIV. P. 23(a).

42. AMERICAN BAR ASSOCIATION, SURVEY OF STATE CLASS ACTION LAW 2011 ix (Elizabeth Cabraser et al. eds., 2011).

43. See, e.g., *id.* at 487-88 (noting that class actions under Missouri’s Consumer Merchandise Protection Act were at one time an “opt in” action, but the state legislature found that such classes presented inherent difficulties, prompting it to amend the Act and make classes the “more traditional ‘opt-out’ variety[.]”).

44. Class Action Fairness Act of 2005, 119 Stat. 4 (codified at 28 U.S.C. §§ 1711-1715).

45. 131 S. Ct. 2541 (2011).

46. E.g., Suzette Malveaux, *Money Matters*, N.Y. TIMES (June 21, 2011, 12:21 PM), <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/money-matters>.

47. See generally Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010).

48. *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. dismissed as improvidently granted sub nom.* *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012).

49. See Kevin Russell, *First American Financial v. Edwards: Surprising end to a potentially important case*, SCOTUSBLOG (June 28, 2012, 5:09 PM), <http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/>. See also Christopher Wright, *Argument preview: Standing to challenge kickbacks that do not directly affect price*, SCOTUSBLOG (Nov. 18, 2011, 2:28 PM), <http://www.scotusblog.com/2011/11/argument-preview-standing-to-challenge-kickbacks-that-do-not-directly-affect-price/>; Christopher Wright, *Argument recap: First American Financial Corp. v. Edwards*, SCOTUSBLOG (Nov. 29, 2011, 11:46 AM), <http://www.scotusblog.com/2011/11/argument-recap-first-american-financial-corp-v-edwards/>.

50. Brief for Facebook, Inc. et al. as Amici Curiae Supporting Petitioners, *First Am. Fin. Corp. v. Edwards*, 131 S. Ct. 3022 (2011) (No. 10-708), available at <http://www.american>

were businesses dealing with large numbers of individual consumers, the users of their websites.<sup>51</sup> Their businesses were heavily automated, so that a mistake in an automated process, causing a violation of a consumer's statutory right, would lead to many duplicate violations.<sup>52</sup> In aggregate, statutory damages claims from many similarly affected consumers could lead to very large claims against the *amici*.<sup>53</sup>

Class actions have also been the object of legislative restrictions. The most recent legislative attack on class actions is the Class Action Fairness Act of 2005.<sup>54</sup> The Act was passed in an environment of mistrust towards class action attorneys.<sup>55</sup> One scholar characterized the message of the Act as "in theory, class actions are fine, but in practice, don't trust the class action lawyers."<sup>56</sup> This mistrust of lawyers is a feature of American popular culture.<sup>57</sup> The public's demands on lawyers tend to be contradictory.<sup>58</sup> What regard there is for lawyers is generally directed towards maverick, crusading archetypes, concerned with principles rather than compensation.<sup>59</sup> At the same time, the filing of "unnecessary" lawsuits is a major reason for public

bar.org/content/dam/aba/publishing/previewbriefs/Other\_Brief\_Updates/10-708\_petitioner\_amcufacebookand3ecorps.authcheckdam.pdf.

51. Brief for Facebook, Inc. et al. as Amici Curiae Supporting Petitioners at 1, *First Am. Fin. Corp.*, 131 S. Ct. 3022 (2011) (No. 10-708), available at [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other\\_Brief\\_Updates/10-708\\_petitioner\\_amcufacebookand3ecorps.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-708_petitioner_amcufacebookand3ecorps.authcheckdam.pdf).

52. *See id.* at 3.

53. *Id.* at 5 ("Article III clearly requires that a plaintiff have suffered a concrete and individualized harm to have a cognizable case or controversy within the jurisdiction of the federal courts. This limitation is of particular interest to amici, who are potentially exposed due to the nature of their businesses to very large class action suits, claiming potentially enormous statutory damages for alleged technical violations.").

54. Class Action Fairness Act of 2005, 119 Stat. 4 (codified at 28 U.S.C. §§ 1711-1715).

55. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 (2008) ("CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers' inventing lawsuits and manipulating the system to enrich themselves at others' expense."); *Id.* at 1596-97 ("CAFA's proponents successfully portrayed class action lawyers as opportunistic aggregators who get rich on litigation of their own making, with little control by clients, little remedy for each client, and few clients who even care enough to sue.").

56. *Id.* at 1596.

57. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 809 (1998) ("What we see is not unqualified condemnation of lawyers, but approval for lawyers' care of their clients combined with deep distrust.").

58. Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 52 (1999) ("The same people who are critical of 'Rambo litigators' freely admit that, when they have a problem, they want a lawyer who plays hardball.").

59. *Id.* at 60 ("When people were asked to name the lawyer that they most admire, frequently cited names are Perry Mason and Matlock. . . . [B]ecause Matlock fights for justice, many of the people who watch *Matlock* think more highly of lawyers.").



dislike of lawyers.<sup>60</sup> The “tort reform” movement has built on this public perception.<sup>61</sup> The movement towards restricting class actions strongly represents business interests; consequently, such attacks are representative of those interests rather than public or academic opinion.<sup>62</sup>

Business hostility to class actions is apparent from the responses of two American business groups to the European Commission’s Consultation on Collective Actions. The American Chamber of Commerce to the European Union (AmCham EU) praised the Commission’s rejection of the U.S. class action model, but was disappointed it had not gone further.<sup>63</sup> The United States Chamber Institute for Legal Reform’s (ILR) response was similar, if not more strongly worded.<sup>64</sup> The ambivalence of the American legal profession towards class actions can be seen in the responses of the Antitrust Law and International Law Sections of the American Bar Association (ABA) to the same consultation.<sup>65</sup> As Howard Erichson noted of the Class Action Fairness

60. Rotunda, *supra* note 58, at 60 (stating that 27% of people said that what they most disliked about lawyers was that they file “too many unnecessary lawsuits[ ]”) (quoting Randall Samborn, *Anti-lawyer attitude up; but NLJ/West poll also show more people are using attorneys*, NAT’L L.J., at 1, col. 1 (Aug. 9, 1993)).

61. Press Release, Whitney Thompson, Burgess Reintroduces Legislation to End Unnecessary Health Care Lawsuits (Mar. 3, 2011), *available at* <http://burgess.house.gov/news/documentsingle.aspx?DocumentID=227180> (“[T]he Medical Justice Act . . . would improve patient access to doctors by putting an end to unnecessary lawsuits brought about by trial lawyers. . . . ‘We need national, across-the-board change in the tort reform system . . . .’”). James Nord, *Sen. Ortman, business groups back ‘tort reform’ package*, MINNPOST (Apr. 28, 2011), *available at* <http://www.minnpost.com/political-agenda/2011/04/sen-ortman-business-groups-back-tort-reform-package> (reducing prejudgment interest rates to discourage “unnecessary lawsuits”).

62. See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 471-74 (2006).

63. Letter from American Chamber of Commerce to the European Union to European Commission, AmCham EU’s response to the Commission’s consultation ‘Towards a Coherent European Approach to Collective Redress’ 3 (Apr. 29, 2011) [hereinafter AmCham EU] (on file with author) (“AmCham EU appreciates the Commission’s repeated confirmation that it does not want to introduce US-style litigation to the EU. However, we are missing equally clear statements as to how excesses of private litigation are to be prevented. A clear commitment to enforceable safeguards is needed to make sure that good intentions lead to the right results despite strong economic interests to broaden and abuse collective redress systems.”).

64. Letter from United States Chamber Institute for Legal Reform to European Commission, Response of the United States Chamber Institute for Legal Reform to the Consultation on Collective Redress 1 (Apr. 29, 2011) [hereinafter ILR] (on file with author) (“EU collective actions – like U.S. class actions – would encourage abusive litigation practices precisely because *any* procedure that permits a representative to aggregate the claims of hundreds, if not thousands, of individuals empowers that representative to threaten a defendant with catastrophic loss. As a result, the representative can use this power to extort money from a defendant[ ]. . .”).

65. Letter from American Bar Association Sections of Antitrust Law and International Law to European Commission, Comments of the ABA Sections of Antitrust Law and International Law to the European Commission Staff’s Working Document: Towards a Coherent European Approach to Collective Redress 2 (Apr. 30, 2011) (“Antitrust class action

Act, a substantial part of this hostility is directed not at lay class members, but rather is largely aimed at their legal representatives.<sup>66</sup> Responses to the Commission's consultation show that this attitude is also applied to all of those who are not individual class members suffering harm; AmCham EU and the ILR strongly reject all involvement of consumer organizations,<sup>67</sup> third-party funders,<sup>68</sup> and the use of contingency fees.<sup>69</sup>

Class actions are nevertheless an important element of American legal culture. They are a means by which private individuals, not public bodies, litigate public civil wrongs. As Myriam Gilles and Gary Friedman observe:

One can imagine a world where public agencies assume primary (or even sole) responsibility for the detection, investigation, and litigation of public frauds, as well as the collection of ill-gotten gains and the distribution of compensation to injured persons. But then, as any state attorney general (AG) will tell you, one would be imagining a very different world—one that provides orders of magnitude more resources to state and local enforcement agencies.<sup>70</sup>

Gilles perceives that the fundamental difference between class proponents and class opponents is ideological: the latter believe in justice as private redress for individuated private injuries; the former believe in the use of private actions to redress public wrongs.<sup>71</sup>

Despite public, legislative, and judicial hostility surrounding class actions in the U.S., class actions are still regarded as a useful tool in the public sphere.<sup>72</sup> For example, a class action procedure has recently been proposed to alleviate

litigation is a controversial topic in the United States, with views often sharply diverging. Because the Sections include within their membership many practitioners on both sides of this divide, these comments do not take a position on whether, on balance, the EU states should or should not create rules permitting collective redress in the competition sphere[.]”.

66. Erichson, *supra* note 55, at 1596.

67. AmCham EU, *supra* note 63, at 7 (“Public enforcement of EU law is and should remain the role of the EU institutions and national governments and courts. This cannot be the role of private enforcement and certainly not of private representative organisations.”); ILR, *supra* note 64, at 7 (“In no event, however, should private representative organisations, such as consumer associations or NGOs, be authorized to commence collective actions.”).

68. AmCham EU, *supra* note 63, at 10 (“‘Third party funding’ must not be allowed in collective actions.”); ILR, *supra* note 64, at 6 (“The Commission . . . should encourage Member States to ban [Third Party Litigation Funding] in collective litigation.”).

69. AmCham EU, *supra* note 63, at 10 (“Contingency fees, conditional fees and any other fee dependent on the outcome of the action must not be allowed.”); ILR, *supra* note 64, at 20 (“With respect to contingency fees, ILR . . . believes that their further spread—especially into collective cases—should be discouraged strongly.”).

70. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 626 (2012).

71. Gilles, *supra* note 47, at 308-09; AmCham EU, *supra* note 63, at 5 (“AmCham EU considers that the question posed should be how best to achieve compensation for claimants who have suffered genuine loss.”); ILR, *supra* note 64, at 7 (“First and foremost, ILR points out that the enforcement of EU law, in the sense of public enforcement, should not be ‘privatized.’”).

72. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 530, 549 (2012).

the problems of delay and inconsistency in administrative decisions.<sup>73</sup> The proposal to introduce class actions into the administrative field seeks to obtain, for administrative proceedings, the efficiency and consistency benefits of class actions.<sup>74</sup> The proposal borrows heavily from the existing federal class action rules.<sup>75</sup> More prominently, public bodies have recently used class actions against businesses involved in the sub-prime mortgage bubble.<sup>76</sup> The federal and state governments have recently settled class action suits against several major banks in what has become known as “the National Mortgage Settlement.”<sup>77</sup> While class advocates have long predicted the demise of the class action, it is not dead yet.<sup>78</sup> These class actions, if successfully and publicly settled, may to some degree rehabilitate class action procedure, but this is far from certain. These class actions are primarily actions by state institutional investors or government bodies, whereas the archetype of “bad” class actions is a class of individuals.

### 1C. Arbitration and Class Actions

Apart from legislative and judicial limitations on class actions, businesses have been able to significantly restrict their use through arbitration clauses. The Federal Arbitration Act of 1925 (FAA) pre-empts state laws which disfavor arbitration clauses.<sup>79</sup> Recent Supreme Court decisions have narrowed the use of class procedure in arbitration and increased pre-emptive protection for waivers of class action in arbitration clauses.<sup>80</sup>

*Concepcion* has attracted much academic commentary in the months since the Supreme Court published its decision.<sup>81</sup> *Concepcion* concerned a charge for

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73. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1999-2000 (2012).

74. *Id.* at 2040.

75. *Id.* at 2041.

76. *E.g.*, Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc., 280 F.R.D. 130, 132-33 (S.D.N.Y. 2012); Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3, 825 F. Supp. 2d 1082, 1098-99 (D.N.M. 2011); *In re Wash. Mut. Mortg.-Backed Sec. Litig.*, 276 F.R.D. 658, 662 (W.D. Wash. 2011).

77. See Press Release, Wells Fargo, Wells Fargo Assists More Than 27,000 Customers through National Mortgage Settlement Programs (Aug. 29, 2012), available at [https://www.wellsfargo.com/press/2012/20120829\\_WellsFargoAssitsMorethan27000](https://www.wellsfargo.com/press/2012/20120829_WellsFargoAssitsMorethan27000).

78. See Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 694 (2011); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 (2005).

79. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-13).

80. See, e.g., AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010).

81. *E.g.*, Gilles & Friedman, *supra* note 70; Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L. J. SUPP. 31 (2012); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011);

a tax on a phone advertised as “free.”<sup>82</sup> The individual amount at issue was a little over thirty dollars.<sup>83</sup> The mobile phone contract between the Concepcions and AT&T included a pre-dispute arbitration clause, which prohibited class actions and class arbitration.<sup>84</sup> Nevertheless, the Concepcions sued and sought class certification.<sup>85</sup> AT&T sought to compel arbitration under the terms of the contract with the Concepcions.<sup>86</sup> The California courts declined to compel arbitration on the grounds that the arbitration clause was unconscionable under the *Discover Bank* rule.<sup>87</sup> In a 5-4 split, the *Concepcion* Court held that the *Discover Bank* rule was pre-empted by the FAA.<sup>88</sup> The *Concepcion* decision is an extension of existing FAA jurisprudence, in which the FAA is repeatedly said to represent a “liberal federal policy favoring arbitration agreements[ ] . . . .”<sup>89</sup> Furthermore, judicial skepticism of arbitration in lower or state courts is rejected as part of the “old judicial hostility to arbitration” that the FAA was intended to reject.<sup>90</sup> While the historical accuracy of this reading of the FAA’s legislative intent has long been questioned,<sup>91</sup> it is the present judicial approach.

The crux of *Concepcion* is, therefore, that the *Discover Bank* rule was “anti-arbitration.”<sup>92</sup> In so finding, Justice Scalia, writing for the majority, described

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Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

82. *Concepcion*, 131 S. Ct. at 1744.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1744-45.

87. *Id.* at 1745 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)) (providing that class action waivers in contracts of adhesion are unconscionable where disputes between contracting parties predictably involve small amounts and intent to cheat large numbers of consumer is alleged).

88. *Concepcion*, 131 S. Ct. at 1753.

89. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

90. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406, 412 (2d Cir. 1959).

91. The debate has focused on the issue whether the FAA is purely a federal procedural statute or one which also regulates state law. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting) (arguing that the FAA should not be read to pre-empt state law); *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1985) (O’Connor, J., dissenting) (arguing that the FAA’s legislative history made clear that it was a federal procedural statute not intended to pre-empt state law).

92. Marks, *supra* note 81, at 41 (“[U]nlike a straightforward state rule that prohibits arbitration of a type of claim, the question before it was more complex in that the *Discover Bank* rule purported to be generally applicable, but in effect disfavors arbitration. To illustrate the ruling, the Court hypothesized that an arbitration provision could be struck by a state court as unconscionable because it does not allow judicially monitored discovery, does not abide by the Federal Rules of Evidence, or disallows a panel consisting of anything other than twelve lay arbitrators. Though such rules could appear facially neutral, their effects would clearly discriminate against arbitration, as requirements such as a twelve lay arbitrator panel would be counter to the essential nature of arbitration. Thus, despite the facially neutral appearance of such rules, the Court held that § 2 does not suggest ‘an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.’” (quoting *Concepcion*, 131 S. Ct. at 1748)).

three ways in which class procedure is antithetical to arbitration.<sup>93</sup> The first is the loss of an expeditious means of resolving a dispute.<sup>94</sup> The second is the requirement of formality in class-wide arbitration.<sup>95</sup> The third is the unfavorability of informal arbitration to the defendant in a high-stakes class case, and the concomitant increased risk of *in terrorem* settlements.<sup>96</sup> The dissenting minority rejected these criticisms.<sup>97</sup> The first and second criticisms made by Justice Scalia are regarded, by the dissent, as a comparison of apples with oranges,<sup>98</sup> and inconsistent with the statistics provided by the American Arbitration Association.<sup>99</sup> The third argument—that arbitration is unsuited to the high stakes involved in a class case—is criticized as “lack[ing] empirical support.”<sup>100</sup>

Since *Concepcion*, the Court has further strengthened its holdings against group arbitration, narrowing the doctrine of effective vindication in *American Express Co. v. Italian Colors Restaurant*.<sup>101</sup> Justice Scalia, giving the majority opinion, found that effective vindication does not guarantee a procedural form in which it is possible for a claim to be resolved, and therefore, cannot be used to overcome a class waiver and arbitration clause, even where individual arbitrations are not practically possible.<sup>102</sup> The Court divided 5-3 with the minority dissenting strongly.<sup>103</sup> However, the majority’s hostility to class

93. *Concepcion*, 131 S. Ct. at 1751-52. It should be noted that Justices concurring in Justice Scalia’s opinion were only the majority because Justice Thomas concurred in the outcome, that the arbitration agreement in question was enforceable. Justice Thomas wrote a concurring opinion, so the precedential influence of Scalia’s opinion may be limited.

94. *Id.* at 1751 (“[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

95. *Id.* (“Second, class arbitration *requires* procedural formality. The AAA’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation.”).

96. *Id.* at 1752. (“Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. . . . [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).

97. *Id.* at 1758-62 (Breyer, J., dissenting).

98. *See id.* at 1759 (Breyer, J., dissenting) (“The majority compares the complexity of class arbitration with that of bilateral arbitration. And it finds the former more complex. But, if incentives are at issue, the *relevant* comparison is not ‘arbitration with arbitration’ but a comparison between class arbitration and judicial class actions.”) (citations omitted).

99. *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting) (“AAA statistics suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court.”) (internal quotation marks omitted).

100. *Id.* at 1760 (Breyer, J. dissenting).

101. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

102. *Id.* at 2309 (“[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. . . .”); *id.* at 2311 (“[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

103. Justice Sotomayor took no part in the case. For the minority, Justice Kagan identified the majority’s hostility to class actions as the fundamental premise of the decision. *Id.*

arbitrations failed to overcome deference to arbitrator's decisions in *Oxford Health Plans LLC v. Sutter*, which upheld the decision of an arbitrator allowing class arbitration even though the arbitration clause did not expressly permit class arbitration.<sup>104</sup>

How state and federal courts will read *Concepcion* and subsequent decisions is still an open question.<sup>105</sup> Several state cases have declined to extend the *Concepcion* decision.<sup>106</sup> However, in the recent *AT&T Mobility LLC v. Smith* case, AT&T found a novel application for the *Concepcion* judgment.<sup>107</sup> Smith and over 1,000 similar plaintiffs filed identical demands for arbitration, seeking to enjoin the merger between AT&T and T-Mobile as violative of anti-trust law.<sup>108</sup> AT&T sought to enjoin the plaintiffs from proceeding with their duplicative arbitrations.<sup>109</sup> Smith sought to compel arbitration.<sup>110</sup> In granting a preliminary injunction against Smith, the District Court found that the arbitration clause granted it the power to assess the scope of arbitrability under the clause and said “[t]he *Concepcion* Court discusses several hallmarks of class arbitration, as distinguished from individual arbitration, that are particularly troublesome. We find these hallmarks to be useful guideposts in our effort to properly characterize Smith's claim.”<sup>111</sup> After considering each of the Supreme

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at 2320 (Kagan, J., dissenting) (“The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”).

104. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013) (quoting the arbitration clause in question and rejecting Oxford's complaints about the arbitrator “because, and only because, it is not properly addressed to a court. . . . All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough.”).

105. The impact of *Oxford Health Plans* in particular is doubtful because of the court's footnote 2, which seems to suggest that arbitrability is the correct approach through which to attack an arbitrator's finding in favor of class arbitration. *Id.* at 2068 n.2 (“We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called ‘question of arbitrability.’”). See also Steve Vladeck, *Opinion analysis: Tentatively reopening the (back) door to class arbitration*, SCOTUSBLOG (June 10, 2013, 2:05 PM), <http://www.scotusblog.com/2013/06/opinion-analysis-tentatively-reopening-the-back-door-to-class-arbitration/> (discussing the impact of the *Oxford Health Plans* decision).

106. See, e.g., *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 535 (S.D.N.Y. 2012) (“Although the applicability of *Concepcion* to the Court's March 3, 2011 Order is a close question, the facts before this Court differ significantly from the facts in *Concepcion* because Sutherland, unlike the *Concepcions*, is not able to vindicate her rights absent a collective action.”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493-94 (Mo. 2012) (en banc) (“The evidence in this case is also fundamentally different from that in *Concepcion* because Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims.”). But see *Quilloin v. Tenet Healthsystem Phila., Inc.*, 673 F.3d 221, 232-33 (3d Cir. 2012) (applying *Concepcion*). See generally Michael A. Helfand, *Purpose, Precedent, and Politics: Why Concepcion Covers Less than You Think*, 4 PENN ST. Y.B. ON ARB. & MEDIATION 126 (2012) (discussing why the impact of *Concepcion* will not be as far reaching as many have presumed).

107. *AT&T Mobility LLC v. Smith*, Civil Action No. 11-cv-5157, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011).

108. *Id.* at \*1.

109. *Id.* at \*2.

110. *Id.*

111. *Id.* at \*6.

Court's three criticisms, the court concluded that "Smith's arbitration bears all the hallmarks of 'class arbitration' laid out in *Concepcion*."<sup>112</sup>

*Smith* has little precedential value, but it does raise the question: what are individuals with common claims supposed to do? *Concepcion* prohibits state law policies from preventing waiver of class arbitration.<sup>113</sup> *Smith* extends *Concepcion* to prevent even multiple, concurrent, duplicative individual arbitrations.<sup>114</sup> *Smith* then proceeds to note a major problem created by the class prohibition: "counsel flaunts his ability to 'stop the merger,' even if 99 out of 100 arbitrators agree that the merger should proceed. Permitting one 'anomalous' arbitrator to decide the fate of a \$39-billion merger would do a grave disservice to the public interest."<sup>115</sup> Essentially, *Concepcion* and the pervasiveness of class-waivers have created this problem. Moreover, the problem will continue to arise in the absence of an aggregation procedure.

Taken together, AT&T's arbitration clause and *Concepcion* prohibit the resolution of many similar, but individual, claims in a single arbitral proceeding. When plaintiffs against AT&T adopt the only approach open to them following *Concepcion*, filing multiple, duplicative arbitration demands, AT&T is exposed to precisely the sort of heightened risk the majority found objectionable in *Concepcion*. It appears that the duplicative arbitration approach is prohibited under the analysis of the *Smith* court. Groups of individuals with similar claims are left with a procedural conundrum; under *Smith*'s reasoning, it seems that there is no route by which all of their claims can be resolved in an orderly way.

#### 1D. Arbitration and Its Discontents

Just as business advocates are critical of class actions, consumer advocates are highly critical of mandatory pre-dispute arbitration.<sup>116</sup> Opposition to arbitration is based on diverse grounds.<sup>117</sup> One commentator has argued extensively that such arbitration is unfair and undermines the common law method for the development and interpretation of law.<sup>118</sup> This argument finds

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112. *Smith*, 2011 WL 5924460, at \*7.

113. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

114. *Smith*, 2011 WL 5924460 at \*6.

115. *Id.* at \*11.

116. *E.g.*, Press Release, Nat'l Assoc. of Consumer Advocates, Nat'l Consumer L. Ctr., Pub. Citizen, U.S. P.I.R.G., During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration (Mar. 7, 2013), <http://www.nclc.org/images/pdf/arbitration/pr-ncpw7-mar-2013.pdf>. See also Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 154 (2009) [hereinafter *Why We Really Need the Arbitration Fairness Act*].

117. *Why We Really Need the Arbitration Fairness Act*, *supra* note 116, at 154-55.

118. See Richard M. Alderman, *The Future of Consumer Law in the United States – Hello Arbitration, Bye-bye Courts, So-long Consumer Protection*, in THE YEARBOOK OF CONSUMER LAW 2009, 257, 259 (Deborah Parry et al. eds., 2008); Richard M. Alderman, *Consumer Arbitration: The*

some support from an unusual quarter; Stephen Ware, a proponent of mandatory consumer arbitration, acknowledges the potential for arbitration to create areas of private law under the prevailing jurisprudence.<sup>119</sup> Others argue that the ability of consumers to effectively vindicate their claims through arbitration is impeded, with particular concern for aggregate cases.<sup>120</sup> Arbitration clauses in consumer contracts are regarded by some as little more than a “Trojan horse” for class action waivers.<sup>121</sup> While class-waivers may be a major motivator for businesses to mandate arbitration, criticisms of arbitration extend beyond this issue.<sup>122</sup> They relate to more fundamental aspects of the arbitral procedure, in particular the lack of *de novo* appeals of law and the power businesses have in the selection of arbitration.<sup>123</sup>

The four principle arbitral fora that handle the administration of arbitration in the United States are the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS), the Financial Industry Regulatory Authority (FINRA) and the National Arbitration Forum (NAF). These fora have recognized some of the problems presented by mandatory consumer arbitration, and have taken steps to address them.<sup>124</sup> Under scandalous circumstances, NAF was forced to withdraw from consumer cases,<sup>125</sup> and the remaining fora no longer accept demands by businesses for arbitration against consumers.<sup>126</sup> In 2010, AAA developed a “consumer due process protocol” in an effort to rehabilitate consumer arbitration.<sup>127</sup> However, the AAA’s

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*Destruction of the Common Law*, 2 J. AM. ARB. 1, 11-12 (2003); *Why We Really Need the Arbitration Fairness Act*, *supra* note 116, at 155.

119. Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 707 (1999).

120. *See generally* Gilles, *supra* note 78.

121. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 125 (2000); Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 878, 888 (2008) (“[B]ecause arbitration is often seen as cheaper and simpler than litigation, the company can claim that it is helping rather than hurting its customers.”) (Also noting that their empirical data support the view that the primary goal of mandatory consumer arbitration provisions is to preclude class or aggregate litigation against corporations, rather than to benefit the consumer). *But see* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435 (2010).

122. *See* Sternlight, *supra* note 121, at 44-53.

123. *See* Eisenberg, *supra* note 121, at 872-73.

124. *See, e.g.*, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles*, AMERICAN ARBITRATION ASSOCIATION 3 (Oct. 2010), [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_005016](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005016) [hereinafter *Statement of Principles*].

125. Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BLOOMBERG BUSINESSWEEK (July 19, 2009), [http://www.businessweek.com/investing/wall\\_street\\_news\\_blog/archives/2009/07/big\\_arbitration.html](http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html).

126. *Ten Stunning Practice Implications of NAF Withdrawal from All Consumer Arbitrations*, 28 NCLC REPORTS (July/Aug. 2009), available at <http://www.nclc.org/images/pdf/arbitration/nclc-rpts-udap-jul-aug-2009-web.pdf>.

127. *Statement of Principles*, *supra* note 124, at 2-3.



Consumer Due Process Task Force was deadlocked on the issue of class actions.<sup>128</sup>

To date, these fora have not condemned class arbitration.<sup>129</sup> AAA<sup>130</sup> and JAMS<sup>131</sup> both have class arbitration rules, while FINRA rules prohibit the use of arbitration to prevent class litigation.<sup>132</sup> To the contrary, AAA and JAMS rules follow closely the requirements of Federal Rule of Civil Procedure (FRCP) Rule 23.<sup>133</sup>

The AAA rules combine the four basic requirements and the adequacy of counsel with a requirement that all class members be bound by an arbitration clause which is amenable to class arbitration. In addition to these prerequisites, the AAA rules mirror the predominance and superiority requirements of a Rule 23(b)(3) class as requirements of “maintainability.”<sup>134</sup> The AAA rules also duplicate the Rule 23(e) requirements for the approval of settlements.<sup>135</sup> These rules therefore integrate a classical American class action into the arbitration setting with relatively few fundamental changes.

To accommodate the class within the arbitration system, the AAA rules provide for a special clause construction award to determine whether the arbitration clause is amenable to class arbitration for applications to the court in relation to the class arbitration process, and for a reduction in the usual confidentiality of arbitral proceedings.<sup>136</sup> The JAMS rules follow a similar pattern, by directly referencing the requirements of Rule 23(a) and (b), preserving both the four general requirements and the three types of class action with their own requirements.<sup>137</sup> Class arbitration therefore involves a similar degree of procedural complexity to class action and has a similarly restricted scope.

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128. *Statement of Principles*, *supra* note 124, at 14 (“In light of the strong but opposing views by various members of the Task Force on the subject of class actions, the Task Force was unable to come to a consensus on the issue except to ‘agree to disagree.’”). The task force was convened in response to a scandal involving a major U.S. arbitral forum, the National Arbitration Forum.

129. AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 1 (2003) [hereinafter AAA CLASS RULES], available at 2003 WL 25506488; JAMS, JAMS CLASS ACTION PROCEDURES 2 (2009), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Class\\_Action\\_Procedures-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf).

130. AAA CLASS RULES, *supra* note 129, at § 1.

131. JAMS CLASS ACTION PROCEDURES, *supra* note 129, at 2.

132. FINANCIAL INDUSTRY REGULATORY AUTHORITY, CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES § 12204 (2013), <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117546.pdf>; *Id.* at § 13204, <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117547.pdf>.

133. *Compare* FED. R. CIV. P. 23, with AAA CLASS RULES, *supra* note 129, and JAMS CLASS ACTION PROCEDURES, *supra* note 129.

134. AAA CLASS RULES, *supra* note 129, at § 4.

135. *Id.* at § 8.

136. *Id.* at §§ 3, 9, 12.

137. JAMS CLASS ACTION PROCEDURES, *supra* note 129, at 3.

## PART 2: GROUP LITIGATION ORDERS AND THEIR CONTEXT

Having described the host context in Part 1, this part will examine the donor context. This is necessary to identify the most context-bound elements of the transplant. This part sets out the donor context in three sections: Section A describes the history of group litigation in England; Section B examines the rules proposed to be transplanted; and Section C surveys attitudes towards aggregate litigation in the donor culture.

*2A. The History of Group Litigation in England*<sup>138</sup>

The modern American class action is a descendant of English medieval aggregate litigation.<sup>139</sup> Despite the historical link, modern American class actions have little in common with those early cases.<sup>140</sup> The historical experience of England diverged from that of the U.S. in the early 19th Century and the class action was effectively dead in England by 1850.<sup>141</sup> It did not re-emerge. England was left only with the representative action, which relied upon a litigant representing a class sharing the same (not merely a similar) legal interest.<sup>142</sup> England remained without any other formal procedure for aggregate litigation until the end of the 20th century.

In 2000, English civil procedure was codified as part of a wider legal reform movement under the “New Labour” government.<sup>143</sup> The Civil Procedure Rules (“CPR”) were the result of a report by the then head of the England and Wales High Court, Lord Woolf M.R.<sup>144</sup> The CPR are intended to be read purposively, so as to further their “overriding objective.”<sup>145</sup> The CPR are divided into topical parts, and each part is accompanied by one or more Practice Directions (“PDs”), which expand upon the rules set out in the

138. For brevity I will refer to the jurisdiction of England and Wales simply as “England,” meaning no disrespect to my Welsh compatriots. There is no other available term, which would not blur the distinctions between England and Wales and the other jurisdictional divisions within the United Kingdom.

139. See James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308-09 (1937-1938) (writing of the then-recent codification of FED. R. CIV. P. 23).

140. See generally Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977) [hereinafter *Group Litigation and Social Context: Toward a History of the Class Action*]; STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) [hereinafter FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION].

141. FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, *supra* note 140, at 210-12.

142. See *id.*

143. This movement ranged from constitutional reform through the House of Lords Act 1999 c. 34 (U.K.) and the Human Rights Act 1998 c. 42 (Eng. and N. Ir.), to reform of the wider justice system, for example, the Access to Justice Act 1999 c. 22 (Eng. and Wales).

144. THE RIGHT HONOURABLE THE LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES ch. 20, para. 1, at 272 (The Stationary Office 1996) [hereinafter ACCESS TO JUSTICE].

145. CPR 1.1 (“These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.”).

related part. Finally, the Rules and Practice Directions are glossed in treatises on civil procedure.<sup>146</sup>

Lord Woolf considered the issue of “multi-party” litigation.<sup>147</sup> His report found a need for an aggregate litigation procedure, in part, because of the prohibitive cost of the existing approaches.<sup>148</sup> The new procedure had three objectives: (a) to provide access to justice in cases where a large number of small losses made individual action impractical; (b) to provide a more efficient and proportionate way to resolve larger claims where there were too many claims for conventional procedures to perform satisfactorily; and (c) to balance the rights of the parties involved.<sup>149</sup> The American class action was considered an illustration of errors to be avoided.<sup>150</sup> Lord Woolf’s report did not set out a detailed and final rule, but rather, it left important issues unresolved. For example, the report left open the possibility of “opt-out” litigation, similar to an American class action.<sup>151</sup>

Certain government agencies can bring actions to obtain collective redress for individual consumers, most notably the Competition Commission and the Financial Services Authority. However, those powers are limited by subject and are fundamentally a form of public, rather than private action.

## 2B. CPR and the GLO

Following Lord Woolf’s Report, multi-party litigation rules were codified in CPR Part 19 and its two Practice Directions.<sup>152</sup> The rules provide three approaches: adding parties to an existing action or consolidating claims;<sup>153</sup> representative claims;<sup>154</sup> and the Group Litigation Order (GLO).<sup>155</sup> The rule

146. *E.g.*, CIVIL PROCEDURE (Lord Justice Waller ed., vol. 1, 2008) [hereinafter WHITE BOOK]. This treatise, known as the White Book, is the most authoritative gloss on the English Civil Procedure Rules.

147. ACCESS TO JUSTICE, *supra* note 144, at ch. 17.

148. *See id.* at ch. 17, para. 12, at 226.

149. *Id.* at ch. 17, para. 2, at 223.

150. *Id.* at ch. 17, para. 5, at 224 (The experience of class actions abroad “most notably in the United States, draws attention to problems which should be taken into account in developing new multi-party rules in England and Wales.”).

151. ACCESS TO JUSTICE, *supra* note 144, at ch. 17, para. 36, at 233 (“At this early point the managing judge needs to be pro-active in addressing various key matters with the parties[,] such as considering whether the [litigation] should be managed on an ‘opt-out’ basis[.]”).

152. *See* CPR 19.1-.15; CPR 19 PDA-B.

153. CPR 19.1-.5A.

154. *Id.* at 19.6-.9F.

155. *Id.* at 19.10-.15. Lord Walker described GLOs in *Autologic Holdings Plc. v. Inland Revenue Comm’rs*, [2005] UKHL 54, [2006] 1 A.C. 118 (H.L.) [86] (appeal taken from Eng.):

The key features and normal effect of any GLO are that it identifies the common issues which are a precondition for participation in a GLO; it provides for the establishment and maintenance of a register of GLO claims; it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead

addresses the definition of a GLO,<sup>156</sup> the making of a GLO,<sup>157</sup> its effect,<sup>158</sup> and the case management powers of judges in relation to GLOs.<sup>159</sup> A GLO is defined as “an order . . . to provide for the case management of claims which give rise to common or related issues of fact or law (the ‘GLO Issues’).”<sup>160</sup> GLOs are discretionary orders<sup>161</sup> that can be made when a court faces multiple claims raising similar issues of fact and law.<sup>162</sup> A GLO must, at least, provide for the creation of a register of claims, list the common issues of fact and law which are the subject of the litigation, and name the court which will be managing the action.<sup>163</sup> Claims involving the GLO issues may be added to the register by order, *sua sponte*, or on application.<sup>164</sup> When a judgment is given in a case subject to a GLO, that judgment is binding as to the GLO issues on all the claims recorded on the register.<sup>165</sup> Any party to a claim on the register adversely affected by the judgment may seek permission to appeal the judgment.<sup>166</sup> However, a judgment on the common issues will not determine each individual claim on the register.<sup>167</sup> The rules provide for various case management powers, in particular, the powers to select test claims from the Group Register and try them first,<sup>168</sup> along with the power to appoint a “lead

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solicitor for the claimants or the defendants, as appropriate; it provides for judgments on test claims to be binding on the other parties on the Group Register; and it makes special provision for costs orders.

156. CPR 19.10 (“A Group Litigation Order (‘GLO’) means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the ‘GLO issues’).”).

157. *Id.* at 19.11(1) (“The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.”).

158. *Id.* at 19.12(1)(a) (“Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues – (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise[.]”).

159. *Id.* at 19.13 (“Directions given by the management court may include directions – (a) varying the GLO issues; (b) providing for one or more claims on the group register to proceed as test claims; (c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants; (d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met; (e) specifying a date after which no claim may be added to the group register unless the court gives permission; and (f) for the entry of any particular claim which meets one or more of the GLO issues on the group register.”).

160. *Id.* at 19.10; WHITE BOOK, *supra* note 146, at para. 19.10.1 (“The inclusion of the words ‘common or related issues’ is significant: the interests of the individuals do not have to be the ‘same’ as in Representative Proceedings.”).

161. CPR 19.11(1) (“The court *may* make a GLO . . .”) (emphasis added).

162. *Id.*

163. *Id.* at 19.11(2).

164. *Id.* at 19.11(3).

165. *Id.* at 19.12(1)(a).

166. *Id.* at 19.12(2).

167. Neil Andrews, *Multi-Party Actions and Complex Litigation in England*, 23 EURO. BUS. L. REV. 1, 20 (2012).

168. CPR 19.15.

solicitor.”<sup>169</sup> Notably, absent from the GLO rules are provisions dealing with settlements and the selection of lawyers. The absence of a rule on settlements is a problem, even in the English context.<sup>170</sup> These rules clearly make GLOs very different from American class actions. The two systems are compared in Part 3 below.

Since their creation, GLOs have become the standard formal procedure for the claims of multiple, similarly affected persons.<sup>171</sup> Representative actions remain relatively uncommon.<sup>172</sup> Consolidated actions remain common, and have recently seen some popularity in consumer claims.<sup>173</sup> Associated with the consolidation of claims is the informal use of “test cases,” which are expressly permitted by CPR 19.15 for GLOs, but routine in the absence of a GLO.<sup>174</sup> Test cases are usually chosen as part of an effort by the judiciary to deal with multiple duplicative actions, or a large number of cases raising the same issue.<sup>175</sup> Judges use their discretionary case management powers under the CPR to select test cases, while staying other claims, which raise similar issues, pending the outcome of the test cases.<sup>176</sup> Even though test case judgments may not be binding precedents,<sup>177</sup> and their outcomes may not be dispositive of all the related cases, they can be treated by lawyers as indicative of the approach that will be taken by other courts hearing similar cases.

Only some seventy-eight GLOs appear on the Queens’ Bench Division of the High Court’s register.<sup>178</sup> The principal reason suggested for the small

169. CPR 19.13(c) (The court may “appoint[] the solicitor of one or more parties to be the lead solicitor for the claimants or defendants[.]”). The function of this rule is different from the FED. R. CIV. P. 23(g). ACCESS TO JUSTICE, *supra* note 144, at ch. 17, para. 31, at 231 (“The court’s responsibility is not to ensure that the legal services are adequate but to ensure the efficient conduct of the litigation.”).

170. WHITE BOOK, *supra* note 146, at para. 19.15.1. This absence also creates uniquely English costs-shifting problems, which is beyond the scope of this Article.

171. Andrews, *supra* note 167, at 13 (“However, Group Litigation Order (“GLO”) actions . . . have quickly become the main, although not the exclusive, means of handling claims for compensation involving large groups of similarly affected persons or entities.”).

172. *Id.* at 14.

173. *E.g.*, Carey v. HSBC Bank PLC, [2009] EWHC (QB) 3417 (Eng.) (Several cases were consolidated that raised similar legal questions. The consolidated cases themselves became an unofficial “test case,” the outcome of which affected hundreds, possibly thousands of other similar claims and prospective claims.).

174. *See, e.g., id.*

175. *E.g.*, Sternlight v. Barclays Bank Plc., [2010] EWHC (QB) 1865, [1] (Eng.) (“That central allegation has been made in at least 100 cases issued in the Altrincham County Court . . . . It is thought that many other such claims have also been issued in other County Courts. Following a case management conference on 26 May 2010, these 5 cases were chosen as test cases and transferred to the Manchester Mercantile Court so that this and other related issues could be determined either at trial or summarily.”).

176. CPR 19.14-15.

177. Because there is no formal “test case” procedure, the normal rules of precedence apply.

178. HER MAJESTY’S COURTS AND TRIBUNALS SERVICE, *GROUP LITIGATION ORDERS*, <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders> (last updated Feb. 12, 2013) [hereinafter *GROUP LITIGATION ORDERS*].

number of group litigations is difficulty in “funding” cases.<sup>179</sup> Funding usually encompasses both the willingness of a solicitor to pursue a case and the willingness of an insurer to provide legal expenses insurance.<sup>180</sup> Both of these needs flow from England’s “loser pays” rule.<sup>181</sup> In mass litigation involving individuals, lawyers usually act on a “conditional fee” basis,<sup>182</sup> and obtain “after-the-event” insurance (“ATE”) for individual clients, to pay any adverse costs awarded.<sup>183</sup> Because of the higher stakes of GLOs, ATE insurance is more difficult to obtain.<sup>184</sup> This difficulty may not have been foreseen in Lord Woolf’s report proposing GLOs. Changes in funding systems had not yet taken hold at the time the report was written. One might also posit that GLO-type issues are being dealt with through ADR mechanisms.<sup>185</sup> Since the creation of the GLO, public funding has attracted criticism, with one author describing “several recent English group actions” as appearing to “involve the abuse of public funds.”<sup>186</sup>

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179. See Andrews, *supra* note 167, at 22.

180. *Id.*

181. I will follow the English nomenclature of “costs” as meaning both the administrative costs and the legal fees associated with litigation. See CPR 44.1(2), 44.2(2)(a).

182. A conditional fee agreement is a form of retainer, which makes a lawyer’s fees conditional upon the happening of certain events, usually winning the case. In exchange for foregoing fees in the event of a loss, the lawyer is entitled to a percentage uplift of his fees actually incurred. With the loser-pays rule and after the event insurance conditional fee agreements, individual clients will almost never actually pay their lawyer’s fees. See THE RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT vi (vol. 1 2009) [hereinafter REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT], available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexOJacksonvolume1.pdf>.

183. Community Legal Service Direct, *No-win, No-fee Actions* 6 (July 2004), <http://www.johars.com/cms/document/leaflet12E.0704.pdf>.

184. See Ralph Savage, *ATE: Group Litigation: Collective danger ahead*, PROFESSIONAL BROKING (Apr. 30, 2010), [https://www.google.com/#output=search&client=psy-ab&q=ATE:+Group+litigation&og+ATE:+Group+litigation&gs\\_l=hp.3...950.4189.0.4292.23.21.1.0.0.0.172/1402/19j2.21.0.cpsugrccggm.0.0.0.1.1.17.psyab.1i5\\_ins7bPY&pbx=1&bav=on.2,or\\_r\\_qf.&bvm=bv.47810305,d.dmQ&fp=1e273a23b0904fa&biw=1440&bih=775](https://www.google.com/#output=search&client=psy-ab&q=ATE:+Group+litigation&og+ATE:+Group+litigation&gs_l=hp.3...950.4189.0.4292.23.21.1.0.0.0.172/1402/19j2.21.0.cpsugrccggm.0.0.0.1.1.17.psyab.1i5_ins7bPY&pbx=1&bav=on.2,or_r_qf.&bvm=bv.47810305,d.dmQ&fp=1e273a23b0904fa&biw=1440&bih=775) (follow Ate: group litigation hyperlink) (explaining that insurance providers are weary of providing ATE insurance because of the limited opportunity for profit).

185. For example, payment protection insurance “mis-selling” has only rarely reached the courts. See, e.g., Regina (British Bankers Ass’n) v. Fin. Servs. Auth., [2011] EWHC (Admin) 999, [7], Q.B. (Eng.) (BBA sought judicial review of the Financial Ombudsman Service’s policy on PPI Claims); Black Horse Ltd. v. Speak, [2010] EWHC (QB) 1866 (Eng.); Harrison v. Black Horse Ltd., [2011] EWCA (Civ) 1128 (Eng.). In one year over 100,000 cases about payment protection insurance were referred to the Financial Ombudsman Service. FINANCIAL OMBUDSMAN SERVICE, ANNUAL REVIEW 1 (2011), available at <http://www.financial-ombudsman.org.uk/publications/ar11/ar11.pdf>.

186. David Collins, *Public Funding of Class Actions and the Experience with English Group Proceedings*, 31 MAN. L.J. 211, 212 (2005). The cases include a now-infamous action involving the Measles, Mumps, and Rubella vaccine. *Id.* at 221-23.

### 2C. Attitudes to Collective Redress in England and Europe

Hostility to class proceedings and collective redress in general has crossed the Atlantic to Europe.<sup>187</sup> The European Commission makes clear in its Consultation on Collective Redress that it wishes to avoid the perceived failings of the U.S. class action system.<sup>188</sup> Attitudes do not appear to be as adverse in England as in the U.S.; the response of the British Bankers' Association to the Consultation demonstrates a lower degree of hostility than the American responses noted above.<sup>189</sup>

England's attitude to aggregate litigation is best described as ambivalent. The Civil Justice Council recently proposed the creation of an opt-out class action.<sup>190</sup> While the proposal was "accepted" by the government in 2009, that acceptance was limited and has yet to be acted upon.<sup>191</sup> As noted above, GLOs have attracted academic criticism.<sup>192</sup> However, in March 2012, Mr. Justice Vos threatened to impose a GLO, *sua sponte*, on several litigants, claiming that journalists violated their privacy by illegally obtaining telephone

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187. Tiffany Chieu, *Class Actions in the European Union?: Importing Lessons Learned From the United States' Experience Into European Community Competition Law*, 18 CARDOZO J. INT'L & COMP. L. 123, 140 (2010) ("Many Europeans fear the class action mechanism; the phrase has become synonymous with the litigious culture of the United States.").

188. *Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress* 9 (European Commission, SEC (2011) 173 final, 2011), available at [http://ec.europa.eu/justice/news/consulting\\_public/0054/sec\\_2011\\_173\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf) ("Many stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the US with its 'class actions' system. . . . Any European approach to collective redress (injunctive and/or compensatory) should not give any economic incentive to bring abusive claims.").

189. Letter from Eric Leenders, Exec. Dir., British Bankers' Ass'n, to European Commission, Consultation on Collective Redress 2 (May 12, 2011), available at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/bba\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/bba_en.pdf) ("It is important that any EU initiative on collective redress includes safeguards to avoid the abuses associated with US class actions. Such safeguards should include using opt-in mechanisms[ . . . not allowing representative action as available in the US.").

190. MICHAEL BLACK QC ET AL., IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS 145, 183 (John Sorabji et al. eds., 2008), available at <http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Access+to+Justice+through+Collective+Actions.pdf> (proposing that a new generic representative collective action be created by primary legislation).

191. See ASHURST LONDON, GOVERNMENT'S RESPONSE TO THE CIVIL JUSTICE COUNCIL REPORT: "IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS" (July 2009), available at [www.ashurst.com/page.aspx?id\\_content=4686](http://www.ashurst.com/page.aspx?id_content=4686). Responses to the CJC proposal are canvassed in the "Jackson Report." See THE RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 330-33 (2009) [hereinafter Jackson Report], available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

192. Collins, *supra* note 186, at 231.

messages.<sup>193</sup> The threat was directed at claimants' solicitors.<sup>194</sup> The idea that imposing aggregate litigation would *disadvantage* claimant lawyers may seem a contradiction of the accepted U.S. rhetoric that class actions benefit plaintiff attorneys. The contradiction lies in the "loser-pays" rule, which tends to increase litigation costs.<sup>195</sup> The situation faced by Vos is one of those in which the rule perversely encourages parties to incur costs.<sup>196</sup> Vos appears to suspect that the lawyers involved are deliberately driving up costs by proceeding separately with similar cases.<sup>197</sup> Despite Vos' threat, no GLO has yet been imposed, and there is at least one case that prefers the use of test cases to GLOs.<sup>198</sup>

While English legal culture has generally rejected the American class action, aggregate litigation has gained increasing acceptance. Although GLOs are (in comparison to American class actions) relatively rare, they have been consistently and successfully used in a variety of cases.

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193. Katy Dowell, *Vos J threatens phone-hacking firms with group litigation order as costs spiral*, THE LAWYER (Mar. 19, 2012), <http://www.thelawyer.com/vos-j-threatens-phone-hacking-firms-with-group-litigation-order-as-costs-spiral/1011844.article>.

194. *Id.* ("He [Vos J] is threatening to introduce a GLO. It was first mentioned in April last year, but it never happened. Now it could. It's the sword hanging over the lawyers' heads.") (alteration in original).

195. REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT, *supra* note 182, at 93.

196. Jackson Report, *supra* note 191, at 47-48 ("The costs shifting rule creates perverse incentives in two situations. . . . (ii) Sometimes both parties know that the defendant will be paying costs, for example where there is no defence on liability . . . . In such a situation the claimant has no incentive to control costs."). The defendant had already settled one phone tapping case, and therefore, the cases fell within this situation.

197. *See generally id.* at 330-33 (outlining responses of different groups to no-cost regimes).

198. *See Golden Eye (Int'l) Ltd. v. Telefonica UK Ltd.*, [2012] EWHC (Ch) 723, [142]-[143] (Eng.).



## PART 3: THE TRANSPLANT OPERATION

For any transplant operation to be successful, the donor and the host must be compatible.<sup>199</sup> The American and English legal systems have a unique advantage in that they share a common heritage.<sup>200</sup> Anglo-American legal borrowing is therefore not novel. The class action itself has its historical origins in English law.<sup>201</sup> However, the two systems have diverged substantially and now sit in their own distinct legal and cultural contexts.<sup>202</sup> This Part examines the English GLO rule and the adaptations necessary to make it both suitable and attractive for use in the context of American arbitration. Section A addresses the differences between the GLO rule and FRCP Rule 23 class actions. Section B addresses the differences between English litigation and American arbitration. Section C sets out the anticipated incentives for business advocates, consumer advocates, and arbitral fora, which must accept the transplanted rule as a compromise of their positions.

## 3.A. GLO Versus Class Action

The most important comparison to be made is between the GLO and the American class action. The requirements for a GLO and the nature of a GLO “group” differ substantially from the archetypal American class action.<sup>203</sup> The FRCP 23 class actions are representative and either mandatory or “opt-out.”<sup>204</sup> The GLO is non-representative; the aggregated claims remain distinct individual claims, are simply bound by Group Judgments on Group Issues,

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199. There has been much debate amongst comparative law scholars about the feasibility of legal transplants. At one extreme, Alan Watson holds that legal transplants are the primary source of development in private law. ALAN WATSON, *COMPARATIVE LAW: LAW, REALITY & SOCIETY* 5 (2007). Watson does not believe that transplants (or the law generally) involve a quest to suit social conditions. *Id.* at 12 (“[S]electivity is not to be equated with a search for the most satisfactory rules for the social, economic, political conditions of the borrowing state. Often law is borrowed because it is there.”). At the opposite extreme, Pierre Legrand argues that legal rules lack content independent of their cultural context, so that legal transplants are in reality impossible. See Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 467-70 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (summarizing the Watson-Legrand argument). This article takes the middle ground position, adopted by Gunther Teubner, Otto Kahn-Freund, and others, that legal transplants occur, but that their impact is culturally contingent and their performance in the recipient’s legal system may differ from its performance in the donor legal system. See generally Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11 (1998); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974).

200. *Group Litigation and Social Context: Toward a History of the Class Action*, *supra* note 140, at 867.

201. *See id.*

202. *See supra* Parts 1-2.

203. *See supra* Part 1.A, 2.B.

204. *See supra* Part 1.A.

and opt-in only.<sup>205</sup> This first difference is perhaps one of formality, rather than substance: English “test cases” are informally representative claims and CPR 19.15 explicitly provides for the use of test cases in GLOs.

As noted above, FRCP Rule 23 has four general prerequisites for the certification of a class action, generally referred to as numerosity, commonality, typicality, and the adequacy of the representative parties. GLOs require only commonality,<sup>206</sup> and to a lesser degree numerosity.<sup>207</sup> There are no requirements of typicality or adequacy of representation.<sup>208</sup> Even the requirements of commonality and numerosity are broader.<sup>209</sup> FRCP 23(a)(2) requires “common issues of fact or law;” CPR 19.10 can be satisfied by “related” as well as common issues. FRCP 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable;” CPR 19.11 requires only that “there are or are likely to be a number of claims giving rise to the GLO issues[,]” clearly, a much broader test. Where FRCP 23 provides for three distinct types of class, each with its own requirements, there are no additional formal subdivisions or requirements for a GLO.<sup>210</sup>

The substantial difference between the narrow and detailed requirements of FRCP 23 and the broad and comparatively simple requirements of the GLO is both problematic and useful. The difference is useful in that, in respect of certification, it provides an escape route from the “procedural morass,” which so concerned Justice Scalia in *Concepcion*.<sup>211</sup> The GLO requirements are less technical and, therefore, require less technical competence from arbitrators to apply them. The wider scope of the GLO also provides an incentive for adoption by consumer advocates because it will allow group arbitrations in a wider range of circumstances than under the conventional class action requirements, reducing the need to characterize claims in a general (rather than a specific) manner, which now exists to avoid predominance issues in FRCP 23(b)(3) classes.

Unfortunately, the breadth of the GLO is likely to be a concern for business advocates for the same reason. The broader requirements might permit a proliferation of collective litigation in which businesses would experience settlement pressure. While there has been no such proliferation in England,<sup>212</sup> the reasons for this appear to be dependent on aspects of the English context: (1) the availability of funding and insurance;<sup>213</sup> (2) the differing financial incentives on lawyers;<sup>214</sup> and (3) the widespread use of

205. See *supra* Part 2.B; *infra* Part 3.A.

206. CPR 19.10 (requiring “claims which give rise to common or related issues of fact or law[.]”).

207. *Id.* at 19.11(1) (“The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.”).

208. See *id.* at 19.10-11.

209. *Id.*

210. *Id.*

211. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

212. See GROUP LITIGATION ORDERS, *supra* note 178; *supra* Part 2.B.

213. Andrews, *supra* note 167, at 22.

214. See Jackson Report, *supra* note 191, at 47-48.

informal test cases to resolve issues with GLO potential.<sup>215</sup> These controlling factors are not present in the U.S. context.<sup>216</sup> In the event that a high volume of large groups sought to use the transplanted rule, the arbitral fora would be in a position to react quickly by narrowing the rule in accordance with their needs.

The most fundamental shift in the proposed rule is from an opt-out to an opt-in form of collective action. While the GLO rule is substantially broader in scope, it is an opt-in class, and therefore, unlikely to involve claims on the same scale as FCRP 23's opt-out class. The opt-in approach is likely to lead to smaller, more determinate classes and higher costs for claimant lawyers; each member of the class would necessarily be a client and have an individual claim recorded on the Group Register.

A move to opt-in class actions is not generally favored in the U.S.<sup>217</sup> Even Bronsteen, while arguing for opt-in *settlements* in class cases, believes that an entirely opt-in class would bring about the death of class actions.<sup>218</sup> This belief is not borne out in the U.K. experience; there have been opt-in class actions in the form of GLOs.<sup>219</sup> The number has been small, but this has been attributed primarily to the difficulties in obtaining funding and insurance in GLO cases.<sup>220</sup> It may also be that in an environment of costs shifting, the economic incentives favor duplicative, over group, litigation.<sup>221</sup> The courts may also be dealing with a multiplicity of similar cases through informal case management measures: listing similar cases before the same judge; the selection of test cases for adjudication; and the imposition of stays on non-test cases of the same type.<sup>222</sup>

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215. Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP & INT'L L. 321, 345 (2001).

216. However, the U.S. context would be likely to contain its own factors limiting the use of group actions, such as the costs associated with forming a group, which would be greater per member than those of forming a class, because each Group Claim would require individuated investigation.

217. See John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 909 (2005).

218. *Id.* ("If a class action adjudication bound only the people who opted in by replying to the notice letter, then class litigation would disappear. Because people simply do not reply to notice letters, a lawsuit that includes only the few who reply would be too small to attract a lawyer for the group."). However, Bronsteen assumes a no more active approach by attorneys than the notice letters presently used. See *id.*

219. See GROUP LITIGATION ORDERS, *supra* note 178.

220. Andrews, *supra* note 167, at 22.

221. Jackson Report, *supra* note 191, at 47-48, 91-98.

222. *E.g.*, *Sternlight v. Barclays Bank Plc.*, [2010] EWHC (QB) 1865 (Eng.). This case dealt with 5 test cases out of over 100 duplicative consumer credit cases, which were moved from a local county court to the Manchester Mercantile court and listed together before Mr. Justice Waksman, Q.C., a judge before whom previous and subsequent consumer credit cases *Carey v. HSBC Bank PLC*, [2009] EWHC (QB) 3417 (Eng.), and *Black Horse Ltd. v. Speak*, [2010] EWHC (QB) 1866 (Eng.), were also tried.

### 3B. Civil Procedure Versus Arbitral Procedure

The donor context of the GLO is a code of civil procedure, while the host context is a system of optional procedural rules maintained by arbitral fora. This section will explore four problems created by the difference between these contexts: the privacy of the arbitral forum; the case management roles of arbitrators during a group case; the procedure following a Group Award; and the possibility of appeals.

Arbitration is often a private process, and privacy is one of its advantages.<sup>223</sup> English litigation, on the other hand, is a public process.<sup>224</sup> Even forms of business-related ADR often publicize their general approach to a given issue, if not the details of individual cases.<sup>225</sup> The GLO rule provides for a public register, and publicity is an important part of the opt-in process. Indeed, how will individuals be able to opt-in to a GLO if they do not know that it exists? On the other hand, adverse publicity is a significant element of the class settlement pressure to which businesses object.<sup>226</sup>

The existing class arbitration rules deal with this problem by removing the privacy of arbitral proceedings.<sup>227</sup>

A compromise between these two positions would be to allow access to all current Group Registers when a person files a demand for arbitration. However, such a compromise would impair the efficiency of Group Arbitration as a procedure for resolving many similar underlying disputes, because the possibility of cost-saving through Group Arbitration would only be known once the claimant had already decided to arbitrate. The compromise system would be heavily reliant on attorneys marshaling similar cases prior to demanding arbitration. In light of the well-established suspicion of attorneys in class proceedings, this may not be an attractive feature in the American context.<sup>228</sup> Despite this, the best approach is the one already taken by the arbitral fora. Thus, publication of information about Group Arbitration must be allowed.

Arbitrators and judges perform different case management roles.<sup>229</sup> CPR was intended, in part, to expand the case management role of judges.<sup>230</sup> The

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223. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211-12 (2006).

224. CPR 39.2.

225. The Financial Ombudsman Service routinely publishes anonymous case studies in its newsletter, the Ombudsman News. *E.g.*, Financial Ombudsman Service, *complaints involving cash ISAs*, OMBUDSMAN NEWS, Mar./Apr. 2012, at 3.

226. Brief of Intel Corp. as Amicus Curiae in support of Petitioner at 9, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

227. AAA CLASS RULES, *supra* note 129, at § 9(a) (“The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances.”); JAMS CLASS ACTION PROCEDURES, *supra* note 129, at 4 (closely tracking the notification provisions of FED. R. CIV. P. 23(c)(2)).

228. *See* Erichson, *supra* note 55, at 1596.

229. *See* Robert S. Safi, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1718-20 (2005).

powers of arbitrators are much more limited.<sup>231</sup> Instead, arbitral fora themselves have a substantial role in case administration, more so than Her Majesty's Courts & Tribunals Service.<sup>232</sup> Arbitrators may also be deterred from an active case management approach at interim stages of the arbitration due to concerns about allegations of bias.<sup>233</sup> It must be borne in mind that because of this, arbitrators are less likely to use case management powers *sua sponte*. This is important in the GLO rule because judges are given a variety of discretionary powers.<sup>234</sup> Additionally, there may be some doubt as to the power of arbitrators, as against state or federal courts, to certify classes and approve class settlements and attorneys. The problem has arisen in relation to conventional class certification.<sup>235</sup>

Of these problems, the former is one of culture, which cannot be directly addressed by a written rule. It should simply be acknowledged that American arbitrators would not read the GLO rule as English judges would read it. While a provision directing arbitrators to consider English decisions about the GLO rule might do something to rectify this problem, such a rule would greatly increase the risk that the transplant would be rejected both on cultural and practical grounds. There is at present a degree of hostility to foreign law in U.S. legal culture.<sup>236</sup> Furthermore, such a clause might be overridden by contractual choice of laws. Most importantly, it would impose an impractical burden on arbitrators to read and understand foreign civil procedure. It is therefore better to accept the probable difference in interpretation.

The latter difficulty arises from state and federal interpretation of arbitration law, a context entirely foreign to GLOs. However, the concerns over class certification are less likely to arise in respect to the proposed Group Arbitration.<sup>237</sup> Opt-out classes carry a risk of binding involuntary class members.<sup>238</sup> Opt-in procedures, such as the GLO, are little more than an organized consolidation of similar cases and not subject to the same concerns.<sup>239</sup> For similar reasons, the selection of a class lawyer is a lesser concern in group litigation. Arbitrator review of a party's choice of legal representative would lead to concerns about the rights of the party to the

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230. See ACCESS TO JUSTICE, *supra* note 144, at ch. 1, para. 1, at 14.

231. Safi, *supra* note 229, at 1742-43.

232. See *id.* at 1737.

233. See *id.* n.121.

234. CPR 19.1-15.

235. See Safi, *supra* note 229, at 1718-20 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)) (considering the circumstances of the certification of two class arbitrations).

236. This attitude is best embodied in the views of Supreme Court Justice Antonin Scalia. See Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. ANN. SURV. AM. L. 29, 29 (2007-2008).

237. See Safi, *supra* note 229, at 1739 (discussing issues that arise with "opt-out" classes). GLO, however, is an "opt-in" class.

238. See *id.*

239. See *supra* Parts 2.B, 3.A.

representation of his choice.<sup>240</sup> An arbitral role in attorney-selection might also create the possibility of allegations of bias against the arbitrator, which could slow the arbitration process or subsequent enforcement of the award.

For these reasons, the parties should be left to select their own legal representatives. The opt-in nature of the proposed Group Arbitration procedure would allow parties to avoid involvement in a Group represented by an attorney they consider unsuitable. While this might impact on the efficiency of the procedure, leading to a greater number of smaller Group Arbitrations, the loss of efficiency is the lesser of the potential evils.

The GLO itself presents a unique case management problem in the arbitral context: how should cases proceed after a Group Award? A GLO is not a single case representative of a class, but a group of individual cases temporarily bound together for the purpose of determining the Group Issues.<sup>241</sup> Once those issues are determined, any case not disposed of by the Group judgment can continue to a separate trial and judgment, if, for example, the case involved a common legal issue but required a separate trial on the facts.<sup>242</sup> In the arbitral context, it is not possible to simply transfer the hearing of a case to a different arbitrator. Arbitration clauses may provide special procedures for the selection of an arbitrator or arbitrators, and the rules must be able to accommodate the requirements of party consent to the arbitral panel.

The options for addressing this problem are limited. Because a Group Award may result from the hearing of *any* claim in the Group, it is impractical to require the Group Award to be determinative of all the claims: this would trespass on the non-representative opt-out nature of the GLO.<sup>243</sup> The only viable options are for the Group Arbitrator to conduct all necessary hearings of Group Claims, or for the Group Claims to be disaggregated as and when the Group Issues relevant to each case are determined for further hearing before a fresh arbitrator. In the interests of maintaining the simplicity and efficiency of the arbitral context, the proposed rule below takes the latter approach.

Once a claim has been determined, is there a possibility of an appeal? The FAA recognizes only a handful of essentially procedural grounds for vacatur of an arbitral award,<sup>244</sup> with the courts recognizing a few more, including

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240. AAA recognizes the right of consumers to choose their own counsel. *Consumer Due Process Protocol*, AMERICAN ARBITRATION ASSOCIATION, Principle 9 (Feb. 14, 2012), [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_005014&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased) (“All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing.”).

241. CPR 19.1-15.

242. *Id.* at 19.14(2).

243. Because in the GLO there are no requirements of predominance or representativeness of the claim in which the Group adjudication takes place, each claim can involve distinct issues of fact. To conclusively determine all Group Claims based on the hearing of one claim would in effect make that one claim representative of the rest.

“manifest disregard” of known law.<sup>245</sup> None of these options provides the possibility of a full appeal on a point of law. This generates problems for both consumer and business advocates; on the consumer side, a lack of appeals on law can stunt the development of the common law in relation to transactions which usually contain arbitration clauses, and on the business side, aggregate litigation is high-stakes, perhaps too high to risk a final decision which is wrong on the law. Unfortunately, Supreme Court jurisprudence does not permit a contractual election for a *de novo* appeal or any variation of the standards set by the FAA.<sup>246</sup> While this approach has not met with universal approval in the states,<sup>247</sup> it is beyond the scope of this article to attempt to resolve the problem here. An alternative approach would be the creation of an arbitral appeal panel to review the decisions of first-instance arbitrators, but again, this option is beyond the scope of this article.

### *3C. Motives to Adopt*

This section will describe the considerations, which may encourage adoption of the proposed rule by three groups: businesses; consumer advocates; and arbitral fora.

Businesses generally support and benefit from the status quo. However, there are two general reasons why it would be in the best interest of businesses to adopt a compromise. First, there is a risk that the status quo will prove so objectionable that it will prompt legislative, judicial, or regulatory action to restrict the use of mandatory arbitration clauses. Second, the compromise

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244. 9 U.S.C. § 10(a) (2006):

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

245. William P. Lawler, Jr., *Arbitration Law* – Brabham v. A.G. Edwards & Sons, Inc.: *Non-Statutory Grounds for the Vacatur of an Arbitration Award Under the FAA*, 28 AM. J. TRIAL ADVOC. 253, 253-54 (2004).

246. Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 583-84 (2008) (“The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award[ ]. . . . We now hold that §§ 10 and 11 . . . provide the FAA’s exclusive grounds for expedited vacatur and modification.”).

247. Cable Connections, Inc. v. DIRECTV, Inc., 190 P.3d 586, 595-99 (Cal. 2008).

may provide a more efficient means for resolving multiple similar disputes and therefore reduce costs to business.

The greatest risk of change arises from the Dodd-Frank mandated review by the Consumer Financial Protection Bureau (CFPB) of the use of mandatory arbitration clauses; CFPB has the power to ban class action waivers in a wide range of contracts.<sup>248</sup> Some commentators predicted that mandatory arbitration clauses would be one of the first areas subject to new CFPB regulation.<sup>249</sup> Counsel for the Concepcions, and former CFPB counsel, Deepak Gupta, suggests that regulatory action is a viable avenue to protect the right to a class action.<sup>250</sup> CFPB began the process of consulting on arbitration clauses in April 2012.<sup>251</sup> The National Labor Relations Board, too, may step in to protect class actions. A recent decision, holding that class waivers in employment contracts are an unfair labor practice, is one example of active regulatory pressure on arbitration-based class waivers.<sup>252</sup> The Financial Industry Regulatory Authority has long prohibited class-waivers in arbitration agreements,<sup>253</sup> and further rule making will soon protect collective civil rights actions by employees from waiver through arbitration.<sup>254</sup> The threat of legislative action is less severe. An Arbitration Fairness Act has several times been proposed, but, as yet, has never left the committee stage.<sup>255</sup> State statutes

248. 12 U.S.C. § 5518(b) (Supp. V 2012).

249. Barkley Clark & Barbara Clark, *Historic Wall Street Reform and Consumer Protection Act Changes the Banking Industry*, CLARKS' BANK DEPOSITS AND PAYMENTS MONTHLY, July 2010, at 1, 7, available at [http://www.stinson.com/Publications/Image\\_Files/ClarksDodd-FrankActSpecialReport.aspx](http://www.stinson.com/Publications/Image_Files/ClarksDodd-FrankActSpecialReport.aspx) ("We have no doubt that one of the first rules out of the box will restrict or prohibit pre-dispute arbitration clauses coupled with class action waivers in consumer financial service contracts."). This prediction overestimated the speed of CFPB action.

250. *Inside Concepcion: Consumers' Attorney Discusses Future of Class Actions*, 19 No. 3 WESTLAW J. CLASS ACTION 1, at 1 Apr. 19, 2012.

251. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25,148, 25,148 (Apr. 27, 2012). CFPB is consulting on the scope and nature of the study which it should undertake pursuant to 12 U.S.C. § 5518(a), which requires the Bureau to conduct a study of arbitration clauses. It is not at this stage seeking comments on regulation. It can be anticipated that no rule making will take place on this subject until after any study is complete.

252. *D.R. Horton, Inc.*, 357 NLRB No. 184, 1, at 13 (2012). *But see, e.g., Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("While the NLRB's analysis in *D.R. Horton*, makes a somewhat compelling argument that agreements that require employees to submit to individual arbitration should not be enforced as against public policy, that reasoning does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms.>").

253. CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, *supra* note 132, at § 12204.

254. Notice of Filing of Amendment No. 1, Amending Rule 13024 of the Code of Arbitration Procedure for Industry Disputes To Preclude Collective Action Claims From Being Arbitrated, 77 Fed. Reg. 22,374, 22,374 (Apr. 13, 2012).

255. S. 1782, 110th Cong. (2007), *re-introduced* S. 931, 111th Cong. (2009); S. 987 112th Cong. (2011), *re-introduced* S. 878, 113th Cong. (2013); H.R. 3010, 110th Cong. (2007), *re-introduced* H.R. 1020, 111th Cong. (2009), *re-introduced* H.R. 1873, 112th Cong. (2011), *re-introduced* H.R. 1844, 113th Cong. (2013).



are more likely, but their efficacy is limited by the pre-emptive effect of the FAA.<sup>256</sup> Businesses, therefore, face a real threat that regulations will restrict their use of arbitration, and they will lose all of the advantages they have under the present system. The proposed rule is a compromise in which businesses concede *some* aggregate arbitration to save arbitration as a whole.

While businesses draft and benefit from arbitration clauses, the proposed transplant will be futile if consumer advocates do not think that the group arbitration rule is adequate to address high-volume, low value consumer claims. Consumer advocates' concerns about mandatory pre-dispute arbitration clauses go far beyond the preclusion of class actions. As noted above, they cover issues which range from the potential for arbitrators or even arbitral fora to be corrupted by financial interests to the constitutional significance of the widespread arbitration. If advocates cannot be convinced that arbitration is generally fair, then they are unlikely to use the proposed rule, even if it is available. Despite these problems, the proposed rule offers *some* aggregation of claims and is, therefore, an improvement on the status quo.

Finally, the proposed rule relies upon the acceptance of this alternative form of aggregate arbitration by arbitral fora. Of the four major, domestic arbitral fora, as noted in Part 1, NAF is no longer involved in consumer arbitration; AAA and JAMS have class arbitration rules closely following FRCP 23; and FINRA will not allow arbitration of a dispute subject to class litigation. The two most likely adopters of the transplant are, therefore, AAA and JAMS. For those fora, the transplant has a number of advantages: (a) it is a form of aggregate litigation, which is, to some degree, acceptable to both businesses and consumers, and would lead to more arbitrations under the forum's rules, with fewer challenges to arbitration clauses; (b) the transplanted rule would be substantially simpler than the Rule 23-derived class arbitration rules; and (c) the transplanted rule would involve fewer consumer due process issues because of its opt-in nature.

#### PART 4: THE PROPOSED RULE

Before setting out the proposed rule, its limitations must be described. It is not a panacea, but a compromise between vehemently opposing sides. It does not settle the many remaining substantial issues between consumer advocates and businesses. In particular, it does not address the "repeat player effect," the potential for economic pressure on arbitrators, or the wider concerns about the long-term deleterious effects of arbitration on the development of the law in areas where arbitration dominates. This novel proposal aims to provide a structure for aggregate arbitration, which addresses the legitimate concerns of both sides, and it will have achieved its goal if considered by at least some participants on each side.

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256. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (considering various devices by which states might attempt to suppress arbitration clauses).

I will now set out the proposed Group Arbitration Rule. Each paragraph of the rule is numbered and interspersed with relevant commentary on its origins and intended function.

#### Definition

A “Group Arbitration” means an arbitration conducted under this rule, which involves common or related issues of fact and law (“the Group Issues”).

#### COMMENTARY

*This is a transplant almost verbatim from CPR 19.10, changing only the necessary terminology.*

#### Awarding a Group Arbitration

An Arbitrator may award Group Arbitration of a claim where:

- (a) There are, or are likely to be, a number of claims relating to the Group Issues;
- (b) The Arbitration Agreement permits Group Arbitration,

An Arbitrator may make an Award at the request of any party or on his own initiative. When an Arbitrator awards Group Arbitration he must:

- (c) Notify [forum] within seven (7) days in writing;
- (d) Give a reasoned Award; and
  - i. identify the case in which he made the Award; and
  - ii. identify the Group Issues.

[Forum] will establish and maintain a register of all cases, which are part of the Group Arbitration.<sup>257</sup>

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257. This fills the void in the GLO rule noted by WHITE BOOK, *supra* note 146, at para. 19.11.1, by determining that the arbitral forum will maintain the register, and therefore replaces in part CPR 19.11(2) and CPR 19 PDB paras. 6.1-7.

## COMMENTARY

*This is an adaptation of CPR 19.11, which provides for the making of a Group Litigation Order. The discretionary nature of the group litigation is retained. The requirements for the assignment of a case management court are removed and a requirement that the Arbitration Agreement is permissive of Group Arbitration is added. The obligation for the keeping of the register is assigned to the arbitral fora, rather than being left to the Group's lawyers, as under CPR Part 19 PDB.*

## Selection of a Group Arbitrator

When:

- (a) Demand for a new Group Arbitration is submitted to [forum]; or
- (b) An Award for a new Group Arbitration is made;

and

- (c) An Arbitrator has not yet been selected; or
- (d) The selected Arbitrator is not included in [forum]'s [specialized arbitration roster],

A Group Arbitrator shall be selected consistent with the Arbitration Agreement, and in accordance with the non-group arbitration rules, save that the Group Arbitrator shall be selected from [forum]'s [specialized arbitration roster]. Where the Arbitration Agreement provides for a panel of arbitrators, at least one of the arbitrators shall be so selected. Where the Arbitration Agreement provides for party appointed arbitrators, the Neutral Arbitrator must be so selected.

## COMMENTARY

*This is an optional rule and is not essential for the function of Group Arbitration Rules. This is not a direct transplant from the GLO rules, but mirrors the effect of CPR Part 19 PDB relating to the level of judge who may hear applications for a GLO. The rule is intended to ensure that the arbitrator for the Group is selected from the arbitral forum's specialized Group or Class Arbitration Register, if the forum has such a register. This addresses the concern raised in Concepcion that arbitrators are generally not experienced in class cases.*

### Addition of a Claim to a Group Register

The Group Arbitrator may remove a claim from the Group Register at the request of the claimant in that claim. Group Arbitrator who removes a claim from the Group Register under this rule must inform [forum] within 7 days.

#### COMMENTARY

*This rule closely follows CPR 19.14, allowing parties to remove themselves from the group. In place of CPR 19.14(b), requiring the Management Court to make directions for the continuation of the removed claim, the rule simply requires that the forum is notified so that it can continue to administer the claim on an individual basis.*

### Group Arbitration Award

(a) Where an Award is made in a claim included in the Group Register of Group Arbitration cases, and the Award relates to one or more of the Group Issues, the Award (the “Group Award”) applies to all cases contained in the Group Register.

(b) A Group Award must:

- i. Be a reasoned Award;
- ii. List all the Group Issues which it determines; and
- iii. List all the Claims, which involve those Group Issues.

#### COMMENTARY

*This follows CPR 19.12, which governs the binding effect of the awards. It will be noted that the Group Award is binding only on the Group Issues which it addresses. This rule provides a high degree of procedural flexibility as to how the arbitration will proceed and whether all Group Issues will be determined at once or not.*

### Subsequent Procedure

(a) After a Group Award has been made, the Group Arbitrator will hold any further hearings necessary to determine the remaining issues in individual claims.

(b) The Group Award will be binding in relation to the Group Issues which it determines. Subsequent Final Awards must be consistent with the Group Award.

## COMMENTARY

*This rule is new, addressing the assumption implicit in CPR 19.12 that cases and issues not directly determined will be dealt with in subsequent hearings consistent with the findings on the Group Issues. This rule provides for individual cases in a Group to be disposed of through further hearings before the Group Arbitrator.*

## CONCLUSION

This Article has proposed a novel comparative solution to a distinctly American problem: the transplant of a modified English rule of civil procedure to create a middle way between the exclusion of all aggregation through the pre-dispute arbitration clause, and the powerful counter reaction to abolish pre-dispute consumer arbitration clauses altogether. This Article has considered two very different approaches to aggregate litigation, both the representative, opt-out class, which American businesses decry, and the non-representative, opt-in group. By introducing the latter into the American arbitral forum, the position of consumers can be improved without attracting the antagonism of business advocates.

The proposed rule can be adopted, adapted, and applied by arbitral fora, by parties, or even by legislatures or regulators seeking alternate approaches to aggregation. The rule is simpler and more flexible, and therefore, more suitable than the existing arbitral rules adapted from the Federal Rules of Civil Procedure. Perhaps more important for its adoption, this new rule does not carry the cultural baggage of the American class action. This new approach to aggregation can bring compromise to an area in which consumers and businesses are vehemently opposed. If adopted, this rule can relieve the tension generated by *Concepcion* and its predecessors, and breathe new life into the arbitral forum as a setting in which many consumers can obtain a fair hearing of a dispute, even if they wish or need to do so *together*.