

Opting Out of the Procedural Morass: A Solution to the Class Arbitration Problem

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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 Federal Rule 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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Table of Contents

Introduction	3
Part 1: Class Actions and Arbitration in the United States.....	4
The American Class Action	4
Narrowing of Contemporary Class Actions.....	7
Arbitration and Class Actions	13
Arbitration and its Discontents	17
Part 2: Group Litigation Orders and Their Context	19
History of Group Litigation in England.....	19
CPR & the GLO.....	21
Attitudes to Collective Redress in England and Europe.....	25
Part 3: The Transplant Operation	27
GLO Versus Class Action	27
Civil Procedure Versus Arbitral Procedure.....	30
Motives to Adopt	34
Part 4: The Proposed Rule.....	37
Definition.....	37
Awarding a Group Arbitration	37
Selection of a Group Arbitrator	38
Addition of a Claim to a Group Register.....	39
Group Arbitration Award	39
Subsequent Procedure.....	39
Conclusion.....	40

Introduction

American class actions are in trouble. Widely criticized in the United States 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,¹ while businesses are increasingly acting to avoid class actions through mandatory pre-dispute arbitration clauses.²

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 transplant into the U.S. system of a procedural rule for aggregate litigation from the United Kingdom. This Article argues for the introduction of the U.K.'s opt-in, non-representative rule into the traditionally 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 and consumer advocates. Part 1 will set out the history and criticisms of class actions and identify and examine 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 transplant in light of the differences between the legal contexts in the U.S. and U.K., and the modifications necessary for the rule to be accepted into the U.S. context. In order to maximize the utility and effectiveness of the transplanted

¹ E.g. *Chevron Files Fraud and RICO Against Lawyers and Consultants Behind Ecuador Litigation*, Chevron, Press Release, Feb. 1st, 2011 http://www.chevron.com/chevron/pressreleases/article/02012011_chevronfilesfraudandricocaseagainstlawyersandconsultantsbehindecuadorlitigation.news and Tom Scott, *Who Benefits From a Class Action Lawsuit? Trial Lawyers*, Fox & Hounds, Jan. 26th, 2012

<http://www.foxandhoundsdaily.com/2012/01/who-benefits-from-a-class-action-lawsuit-trial-lawyers/>.
²E.g. Michael Bobelian, *Microsoft Takes Advantage of Supreme Court's Limitations of Class Actions*, FORBES, Sept. 10, 2012 (available <http://www.forbes.com/sites/michaelbobelian/2012/09/10/microsoft-takes-advantage-of-supreme-courts-limitations-of-class-actions/> visited 9/18/2012).

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 adoption 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 for incorporation into the rules of arbitral fora, with explanatory notes.

Part 1: Class Actions and Arbitration in the United States

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

The American Class Action

The Federal Rules 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.³ The rule provides for the notification of class members,⁴ judgments,⁵ appeals,⁶ case management,⁷ the supervision of settlements⁸ and class attorneys⁹ and special provisions for the disposition of attorney’s fees.¹⁰

The four general prerequisites for the certification of a class are numerosity,¹¹ commonality,¹² typicality¹³ and adequacy.¹⁴ Numerosity “reflects the general theory behind class action lawsuits which

³ Fed. R. Civ. Pro. Rule 23(a),(b) & (c)(1).

⁴ *Id.* 23(c)(2).

⁵ *Id.* 23(c)(3).

⁶ *Id.* 23(f).

⁷ *Id.* 23(d).

⁸ *Id.* 23(e).

⁹ *Id.* 23(g).

¹⁰ *Id.* 23(h).

¹¹ *Id.* 23(a)(1)(“the class is so numerous that joinder of all members is impracticable”).

¹² *Id.* 23(a)(2)(“there are questions of law or fact common to the class”).

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.”¹⁵

Numerosity is not strictly concerned with the number of class members but with effect of their number on the litigation process in light of the circumstances: whether their number renders non-class resolution impracticable (if not impossible).¹⁶

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

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) classes address the problem of inconsistent adjudications regarding common interests and adjudication on common

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

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

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

¹⁶ MARCY HOGAN GREER, A PRACTITIONER’S GUIDE TO CLASS ACTIONS, 58-61 (2010).

¹⁷ *Id.* 61-62 & 64-68.

¹⁸ *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001)(“[adequacy] implicates the due process rights of all members who will be bound by the judgment.”)

¹⁹ See 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.”)

²⁰ *C.f. Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330 (S.D.N.Y. 2004), *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 537 (N.D. Tex. 2005).

interests without the joinder of an interested party.²¹ Rule 23(b)(2) classes concern situations in which a defendant justifies its action or inaction by reference to grounds that apply equally to the whole class.²²

These two types of classes are generally used to seek injunctive or declaratory relief.²³

The archetypal class action, used to obtain a monetary remedy, is the Rule 23(b)(3) class.²⁴ This type of class action requires (a) a predominance of 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.²⁵

The court's regulation of class counsel is a 2003 addition to Rule 23, prior to which adequacy of counsel was a matter of case law.²⁶ New 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.²⁷

American class actions are rarely disposed of at trial; instead, the majority are settled.²⁸ The substantive terms of a class settlement must be approved by the court. To be approved they must be fair, adequate and reasonable.²⁹ This broad test has acquired a substantial gloss, compiled by the Federal Judicial Center from case law on the subject.³⁰ "Fairness" requires that the settlement should not unduly

²¹ Fed. R. Civ. Pro. Rule 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.")

²² Fed. R. Civ. Pro. Rule 23(b)(2) ("the 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.")

²³ Greer, *supra* note 16 at 81.

²⁴ *Id.*

²⁵ Fed. R. Civ. Pro. Rule 23(b)(3) ("... the 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").

²⁶ Greer, *supra* note 16 at 73.

²⁷ Fed. R. Civ. Pro. 23(g)(1)(A).

²⁸ Greer, *supra* note 16 at 171.

²⁹ Fed. R. Civ. Pro. Rule 23(e)(2).

³⁰ Greer, *supra* note 16 at 204-206, quoting FEDERAL JUDICIAL CENTRE, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62 (2004).

advantage or disadvantage class members in relation to each other, others similarly situation.

“Adequacy” compares the settlement proposed to the relief class members might have obtained without a class action. “Reasonableness” tests the responsiveness of the settlement against the class allegations.³¹ 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.³²

The class action established by Rule 23 is usually called an “opt-out” class.³³ 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.³⁴ A few individuals within the class act as representative parties. Many of the states have rules similar to Rule 23,³⁵ these state classes are uniformly of the “opt-out” or mandatory variety.³⁶

Narrowing of Contemporary Class Actions

Class actions are a major point of contention between consumer advocates and businesses in the U.S.

The highlights of this antagonism are set out below. In particular, the judicial hostility to large classes,

³¹ FEDERAL JUDICIAL CENTRE, MANUAL FOR COMPLEX LITIGATION (FOURTH), 315 (2004).

³² *Id.* 315-318 (listing non-exhaustively the potential factors).

³³ This 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. *Id.* 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.”)

³⁴ Fed. R. Civ. Pro. Rule 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.”)

³⁵ *See generally, American Bar Association Survey of State Class Action Law*, AMERICAN BAR ASSOCIATION, (2011)

³⁶ *Id.* at Missouri §6. (noting that class actions under Missouri’s Consumer Merchandise Protection Act was at one time an “opt in” action, “Previously, classes certified under the MMPA were “op-in” classes only, meaning that in order to be a member of a certified class under the MMPA, class members had to take affirmative steps to “opt-in” to the class. Realizing the inherent difficulties of “op-in” classes the Missouri legislature recently amended the MMPA to make classes certified under the MMPA the more traditional “op-out” variety”).

the passage of the Class Action Fairness Act of 2005³⁷ and the wider contemporary hostility towards class actions and class lawyers are examined.

The most prominent case restricting federal class actions is *Dukes v. Walmart*.³⁸ The case is regarded by class action advocates as a substantial restriction upon the utility of class actions.³⁹ The same advocates have long detected a degree of judicial hostility to certain types of class actions.⁴⁰ 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 *First American Title, Inc., v. Edwards*⁴¹ questioned whether mere violation of a statute granting a private right of action was sufficient to confer Article III standing.⁴² The importance of the issue to class actions was made clear by the *amici* brief of Facebook and other social networking businesses.⁴³ The Amici were businesses dealing with large numbers of individual consumers, the users of their websites. Their businesses were heavily automated, so that a mistake in an automated process which caused a violation of a consumer's statutory right,

³⁷ Pub. L. 109-2, Feb. 18, 2005, 119 Stat. 4 *codified* 28 U.S.C. §1711 *et seq.*

³⁸ 131 S. Ct. 2541(2011).

³⁹ *E.g.*, Suzette Malveaux, *Money Matters*, N.Y. TIMES, June 21, 2011, available <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/money-matters> (retrieved 7/6/2012)(One of several opinion pieces regarding *Dukes v Walmart*).

⁴⁰ *See generally* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DE PAUL L. REV. 305 (2010).

⁴¹ 131 S. Ct. 3022 (Mem) (2012) (dismissing cert. as improvidently granted). *See also* Kevin Russell, *First American Financial v. Edwards: Surprising end to a potentially important case*, SCOTUSblog (Jun. 28, 2012, 5:09 PM), <http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/>.

⁴² *See* 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/> (accessed 7/18/2012) and 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/> (accessed 7/18/2012).

⁴³ Brief for Facebook Inc. et al. as Amici Curiae supporting Petitioners, 131 S. Ct. 3022 (No. 10-708) available http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-708_petitioneramcufacebookand3ecorps.authcheckdam.pdf (accessed 7/18/2012).

would lead to many duplicate violations. In aggregate, statutory damages claims from many similarly effected consumer could lead to very large claims against the *amici*.⁴⁴

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 2005.⁴⁵ The Act was passed in an environment of mistrust towards class action attorneys.⁴⁶ One scholar characterizes the message of the Act as “in theory class actions are fine, but in practice, don’t trust the class action lawyers.”⁴⁷ This mistrust of lawyers is a feature of American popular culture.⁴⁸ The public demands on lawyers tend to be contradictory.⁴⁹ What regard there is for lawyers is generally directed towards maverick, crusading archetypes, concerned with principles rather than compensation.⁵⁰ At the same time, the filing of “unnecessary” lawsuits is a major reason for public dislike of lawyers.⁵¹ The “tort reform” movement

⁴⁴ Brief for Facebook Inc. et al. as Amici Curiae supporting Petitioners, at 13, 131 S. Ct. 3022 (No. 10-708) available

http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-708_petitioneramcufacebookand3ecorps_authcheckdam.pdf (accessed 7/18/2012) *Id.* at 13 (“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.”)

⁴⁵ Pub. L. 109-2, Feb. 18, 2005, 119 Stat. 4 (codified 28 U.S.C. §1711 *et seq.*).

⁴⁶ 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”) *see also id.* at 1596-1597. (“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.”)

⁴⁷ *Id.* at 1593.

⁴⁸ 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.”)

⁴⁹ Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers* 23 J. LEG. PROF. 51, 52 (1993) (“The same people who are critical of ‘Rambo litigators’ freely admit that, when they have a problem, they want a lawyer who plays hardball.”)

⁵⁰ *Id.* at 60 (“When people were asked to name the lawyer that they most admire, frequently cited names are Perry Mason and Matlock... because Matlock fights for justice, many of the people who watch *Matlock* think more highly of lawyers.”)

⁵¹ *Id.* 27% of people said that what they most disliked about lawyers was that they “file ‘too many unnecessary lawsuits’” *citing* Randall Samborn, *Anti-Lawyer Attitude Up, But NLJ/West Poll Also Show More People Are Using Attorneys*, NAT’L L.J. Aug. 9, 1993, at 1, col. 1.

has built on this public perception.⁵² The movement towards restricting class actions strongly represents business interests and such attacks are consequently representative of those interests rather than public or academic opinion.⁵³

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 in the European Union (“AmCham EU”) praised the Commission’s rejection of the US class action model, but was disappointed it had not gone further.⁵⁴ The United States Chamber of Commerce Institute for Legal Reform (“ILR”) response was similar, if more strongly worded.⁵⁵ The ambivalence of the American legal profession towards class actions can be seen in the responses of the ABA to the same consultation.⁵⁶ As Erichson noted of the Class Action Fairness Act, a substantial part of this

⁵² E.g. Whitney Thompson, *Burgess Reintroduces Legislation to End Unnecessary Health Care Lawsuits*, Mar. 3, 2011 <http://burgess.house.gov/news/documentsingle.aspx?DocumentID=227180> (“[T]he Medical Justice Act, which 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’”) (quoting Congressman Burgess) see also James Nord, *Sen. Ortman, business groups back ‘tort reform’ package*, MINN. POST, April 28, 2011 available <http://www.minnpost.com/political-agenda/2011/04/sen-ortman-business-groups-back-tort-reform-package> (accessed 7/14/2012) (reducing prejudgment interest rates to discourage “unnecessary lawsuits”).

⁵³ See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 471-474 (2006).

⁵⁴ Letter from American Chamber of Commerce in the European Union to European Commission, 2, April 29th, 2011, (on file with author). (“AmCham EU” hereinafter) (“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.”)

⁵⁵ Letter from United States Chamber of Commerce Institute for Legal Reform to European Commission, 1, April 29th, 2011 (on file with author) (“ILR” hereinafter) (“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.”)

⁵⁶ Letter from American Bar Association to European Commission, *Comments of the ABA Sections of Antitrust Law and International Law to the European Commission Staff’s Working Document: Towards*

hostility is directed not at lay class members, but rather is largely aimed at their legal representatives.⁵⁷

Responses to Commission’s consultation show that this attitude is also applied to all those who are not individual class members suffering harm: AmCham EU and the ILR strongly reject all the involvement of consumer organizations,⁵⁸ third-party funders⁵⁹ and the use of contingency fees.⁶⁰

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 Gilles and Friedman observe “[O]ne can imagine a world where public agencies assume sole (or even primary) 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 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.”⁶¹ Gilles perceives that the fundamental difference between class proponents and class opponents is ideological: the latter believe

a Coherent European Approach to Collective Redress, April 30th 2011, ABA Sections of Antitrust Law and International Law, at 2 (“Antitrust class action 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.”)

⁵⁷ Erichson *supra*, note 46.

⁵⁸ AmCham EU *supra* note 54 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.”) *accord* ILR *supra* note 55 at 7 (“In no event, however, should private representative organisations, such as consumer associations or NGOs, be authorized to commence collective actions.”)

⁵⁹ AmCham EU *supra* note 54 at 10 (“‘Third party funding’ must not be allowed in collective actions.”) *accord* ILR *supra* note 55 at 6 (“The Commission ... should encourage Member States to ban [Third Party Litigation Funding] in collective litigation.”)

⁶⁰ AmCham EU *supra* note 54 at 10 (“Contingency fees, conditional fees and any other fee dependent on the outcome of the action must not be allowed.”) *accord* ILR *supra* note 55 at 20 (“With respect to contingency fees, ILR... believes that their further spread – especially into collective cases – should be discouraged strongly.”)

⁶¹ Myriam E. Gilles and Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion* 79 U. CHI. L. REV. ___, 2 (forthcoming 2012) available at SSRN: <http://ssrn.com/abstract=1928071>.

in justice as private redress for individuated private injuries and the former believe in the use of private actions to redress public wrongs.⁶²

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.⁶³ For example a class action procedure has recently been proposed to alleviate the problems of delay and inconsistency in administrative decisions.⁶⁴ The proposal to introduce class actions into the administrative field seeks to obtain for administrative proceedings the efficiency and consistency benefits of class-actions.⁶⁵ The proposal borrows heavily from the existing federal class action rules.⁶⁶ More prominently, public bodies have recently used class actions against businesses involved in the sub-prime mortgage bubble.⁶⁷ The Federal and State governments recently settled class action against several major banks in what has become known as “the national mortgage settlement.”⁶⁸ While class advocates have long predicted the demise of the class action, it is not dead yet.⁶⁹ These class suits, if successfully and publicly settled, may to some degree

⁶² Myriam E. Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small Claims Consumer Class Actions* (2009) 59 DE PAUL L. REV. 305 (2010) at 9-11. This perception is borne out by some of the response to the European Commission Consultation on Collective Actions: AmChan EU at 5. (“AmCham EU considers that the question posed should be how best to achieve compensation for claimants who have suffered genuine loss”). IRL at 7. (“First and foremost, ILR points out that the enforcement of EU law, in the sense of public enforcement, should not be ‘privatized.’”)

⁶³ E.g. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General* 126 HARV. L. REV. ____ (forthcoming 2012).

⁶⁴ See generally, Michael D. Sant'Ambrogio and Adam S. Zimmerman, *The Agency Class Action* 112 COLUM. L. REV. ____ (forthcoming 2012) Available at SSRN: <http://ssrn.com/abstract=1997421>.

⁶⁵ *Id.* at 31-32.

⁶⁶ *Id.* at 32.

⁶⁷ E.g. *Genesee County Employees' Retirement System v. Thornburg Mortg. Securities Trust 2006-3* No. Civ 09-0300 JB/KBM, 2011 WL 5840482, (D. Mn. Nov. 12, 2011); *In Re Washington Mutual Mortgage-Backed Securities Litigation* 276 F.R.D. 658, (2011) and *Public Employees' Retirement System of Mississippi v. Goldman Sachs Group, Inc.*, No. 09 CV 1110(HB), 2012 WL 336146, (S.D. N.Y. Feb 3, 2012).

⁶⁸ E.g. *Wells Fargo Assists More Than 27,000 Customers Throuh National Mortgage Settlement Programs*, N.Y. TIMES, Aug. 30,2012, referring to *U.S. v. Bank of America Corp.*, 1:12-cv-00361-RMC (D. D.C., settled Mar. 13, 2012).

⁶⁹ E.g. Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665 (2011); Gilles, Myriam E., *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action* 104 MICH. L. REV. 373 (2005) available at SSRN: <http://ssrn.com/abstract=624002> or <http://dx.doi.org/10.2139/ssrn.624002>.

Cases like these may, rehabilitate class actions procedure, but this is far from certain: they are primarily actions by state institutional investors, or government bodies, whereas the archetype of “bad” class actions is a class of individuals.

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. Recent Supreme Court decisions have narrowed the use of class procedure in arbitration and increase pre-emptive protection for waivers of class action in arbitration clauses: *Stolt-Nielson v Animal Feeds International*,⁷⁰ *Rent-A-Center, West v. Jackson*⁷¹ and *AT&T Mobility, LLC. v. Concepcion*.⁷²

Concepcion has attracted much academic commentary in the months since the Supreme Court published its decision.⁷³ *Concepcion* concerned a charge for tax on a phone advertised as “free”. The individual amount in issue was a little over \$30.00. The mobile phone contract between the Concepcions and AT&T included a pre-dispute arbitration clause, which prohibited class actions and class arbitration. The Concepcions nevertheless sued and sought class certification. AT&T sought to compel arbitration under the FAA. The California courts declined to compel arbitration on the grounds

⁷⁰ 130 S. Ct. 1758 (2010).

⁷¹ 130 S. Ct. 2772 (2010).

⁷² 131 S. Ct. 1540 (2011).

⁷³ E.g. 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), available at SSRN: <http://ssrn.com/abstract=1946328>; Gilles & Friedman *supra* note 61, Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice* (October 20, 2011). OREGON L. REV., (Forthcoming 2012) available at SSRN: <http://ssrn.com/abstract=1924365>; Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 INDIANA L. J. 31 (2011); Ian D. Mitchell & Richard A. Bales, *Concepcion and Preemption Under the Federal Arbitration Act* PENN. STATE YB. OF ARB. & MED., (Forthcoming 2012) available at SSRN: <http://ssrn.com/abstract=2000183>.

that the arbitration clause was unconscionable under the *Discover Bank* rule.⁷⁴ In a 5 to 4 split, the *Concepcion* Court in *Concepcion* held the *Discover Bank* rule pre-empted by the FAA. The *Concepcion* decision is an extension of existing FAA jurisprudence, in which the FAA is repeatedly said to represent a “liberal policy in favor of arbitration” and 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.⁷⁵ While the historical accuracy of this reading of the FAA’s legislative intent has long been questioned,⁷⁶ it is the present judicial approach.

The crux of *Concepcion* is therefore that the *Discover Bank* rule was “anti-arbitration”.⁷⁷ In so finding, Justice Scalia writing for the majority described three ways in which class procedure is antithetical to arbitration.⁷⁸ The first is the loss of an expeditious means of resolving a dispute.⁷⁹ The second is

⁷⁴ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)(California doctrine 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).

⁷⁵ *E.g. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (C.A.2 1959).

⁷⁶ The debate has focused on the issue whether the FAA is purely a federal procedural statute or one which also regulates state law. *E.g. Southland Corp. v. Keating*, 465 U.S. 1, 25 (1985)(Justices O’Connor and Rehnquist dissenting, that the FAA’s legislative history had clear that it was a federal procedural statute not intended to pre-empt state law) and *Allied Bruce Terminix Cos. Inc., v. Dobson* 513 U.S. 265 (1995)(Justices Thomas and Scalia dissenting, that the FAA should not be read to pre-empt state law).

⁷⁷ Marks, *supra* note 73 at 41 (“unlike 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).

⁷⁸ 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.

requirement of formality in classwide arbitration.⁸⁰ The third is unfavorability of informal arbitration to the Defendant to a high-stakes class case and the concomitant increased risk of *in terrorem* settlements.⁸¹ These criticisms were rejected by the dissenting minority and many academic commentators. The first and second are regarded by the dissent as a comparison of apples with oranges⁸² and inconsistent with the statistics provided by the American Arbitration Association.⁸³ The third argument – that arbitration is unsuited to the high stakes involved in a class case is criticized as “lacking empirical support.”⁸⁴

How *Concepcion* will be read by state and federal courts is still an open question. Several state cases have declined to extend the *Concepcion* decision.⁸⁵ However, in the recent *AT&T Mobility v. Smith*⁸⁶

⁷⁹ *Concepcion*, 131 S.Ct. at 1751 (“the 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”).

⁸⁰ *Id.* at 1751. (“Second, class arbitration requires procedural formality. The AAA’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation.”)

⁸¹ *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.”)

⁸² *Id.* at 1759. (“The majority compares the complexity of class arbitration with that of bilateral arbitration... [a]nd it finds the former more complex... [b]ut, if incentives are at issue, the relevant comparison is not ‘arbitration with arbitration’ but a comparison between class arbitration and judicial class actions.”) (internal citations omitted).

⁸³ *Id.* at 1759. (“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.’”)

⁸⁴ *Id.* at 1760.

⁸⁵ *E.g. Brewer v. Missouri Title Loans Co.*, 2012 WL 716878, (March 6th, 2012, No. SC 90647. Mo. S.Ct.) (“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.”); *Sutherland v. Ernst & Young LLP*, 10 CIV. 3332 KMW MHD, 2012 WL 130420, (S.D.N.Y. Jan. 17, 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.”) and *see generally* Michael A. Helfand *Purpose, Precedent, and Politics: Why Concepcion Covers Less than You Think*, 4 YEARBOOK ON ARBITRATION & MEDIATION ____ (forthcoming, 2012) but *see Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232-233 (3d. Cir. 2012)(applying *Concepcion*).

⁸⁶ 2011 WL 5924460 (October 7th, 2011)(U.S. Dist. Ct. E.D. Penn. Civil Action No. 11–cv–5157) (unreported).

case, AT&T found a novel application for the *Concepcion* judgment. 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.⁸⁷ AT&T sought to enjoin the plaintiffs from proceeding with their duplicative arbitrations. Smith sought to compel arbitration. 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: “The *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.”⁸⁸ After considering each of the Supreme Court’s three criticisms, the court concludes: “Smith's arbitration bears all the hallmarks of “class arbitration” laid out in *Concepcion*.”⁸⁹ *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 preventing waiver of class arbitration. Smith extends *Concepcion* to prevent even multiple, concurrent, duplicative individual arbitrations. Smith then proceeds to note a major problem created by the class prohibition: “[C]ounsel 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.”⁹⁰ This problem is essentially one created by *Concepcion* and the pervasiveness of class-waivers. 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

⁸⁷ *Id* at 1.

⁸⁸ *Id* at 6.

⁸⁹ *Id* at 7.

⁹⁰ *Id* at 11.

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 their claims can be resolved in an orderly way.

Arbitration and its Discontents

Just as businesses advocates are critical of class actions, consumer advocates are highly critical of mandatory pre-dispute arbitration. Opposition to arbitration is based on diverse grounds. Richard Alderman has argued extensively that such arbitration is unfair and undermines the common law method for the development and interpretation of law.⁹¹ This argument finds 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.⁹² Others argue that the ability of consumers to effectively vindicate their claims through arbitration is impeded, with particular concern for aggregate cases.⁹³ Arbitration clauses in consumer contracts are regarded by some as little more than a “Trojan horse” for class-action waivers.⁹⁴ While class-waivers may be a major motivator for businesses to mandate arbitration, criticisms of arbitration extend beyond this

⁹¹ See generally Alderman, Richard M., *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers* (May 29, 2009). 12 J. OF CONSUMER & COM. L. 151, (2009) Available at SSRN: <http://ssrn.com/abstract=1411868>; Alderman, Richard M., *Consumer Arbitration: The Destruction of the Common Law*. 2 J. OF AMERICAN ARBITRATION 1, Available at SSRN: <http://ssrn.com/abstract=923462>; Alderman, Richard M., *The Future of Consumer Law in the United States - Hello Arbitration, Bye-Bye Courts, So-Long Consumer Protection* (September 19, 2007). U. of Houston Law Center No. 2008-A-09. Available at SSRN: <http://ssrn.com/abstract=1015517> or <http://dx.doi.org/10.2139/ssrn.1015517>.

⁹² See generally, Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MN. L. REV. 703 (1999).

⁹³ See generally Gilles, *Opting Out*, *supra* note 62.

⁹⁴ Jean M. Sternlight *As Mandatory Binding Arbitration Meets Class Action Will Class Action Survive?*, (2000), 42 WM. & MARY L. REV. 1 at 31; Theodore Eisenberg, Geoffrey P. Miller, Emily L. Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* 41 U. MICH.J. L. REFORM 871, 878, (2008) available SSRN: <http://ssrn.com/abstract=1076968> or <http://dx.doi.org/10.2139/ssrn.1076968> (“the empirical data support the view that the primary goal of mandatory consumer arbitration provisions is to preclude aggregate litigation against corporations”) *but see* Stephen J. Ware, *Why Do Businesses Use or Not Use Arbitration Clauses?* 25 OHIO STATE J. ON DISPUTE RESOLUTION 2 (2010).

issue. 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.

Most arbitrations are administered by arbitral fora. These fora have recognized some of the problems presented by mandatory consumer arbitration and have taken steps to address them. The four principle arbitral fora 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). Under scandalous circumstances, NAF was forced to withdraw from consumer cases⁹⁵ and the remaining fora no longer accept demands by businesses for arbitration against consumers. In 2010, AAA developed a “consumer due process protocol” in an effort to rehabilitate consumer arbitration.⁹⁶ However, the AAA’s Consumer Due Process Task Force was deadlocked on the issue of class actions.⁹⁷

To date, these fora have not condemned class arbitration. AAA⁹⁸ and JAMS⁹⁹ both have class arbitration rules, while FINRA rules prohibit the use of arbitration to prevent class litigation.¹⁰⁰ To the contrary, AAA and JAMS rules follow closely the requirements of FRCP Rule 23.

The AAA rules combine the four basic requirements and the adequacy of counsel with a requirement that all class members entered into an agreement including a similar arbitration clause as

⁹⁵ Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUSINESSWEEK, Jul. 19, 2009.

⁹⁶ *Consumer Due Process Protocol*, American Arbitration Association, October, 2010.

⁹⁷ *Id.* 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).

⁹⁸ *Supplementary Rules for Class Arbitration*, American Arbitration Association, October 8th 2003 (“AAA Class Rules” hereinafter).

⁹⁹ *JAMS Class Arbitration Procedures*, JAMS, May 1st 2009 (“JAMS Class Rules” hereinafter).

¹⁰⁰ Financial Industry Regulatory Authority, *Code of Arbitration Procedure for Customer Disputes*, Rule 12203, June 6, 2011.

<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117546.pdf> and Financial Industry Regulatory Authority, *Code of Arbitration procedure for Industry Disputes*, Rule 13024, June 6, 2011.

<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117547.pdf>.

“prerequisites” for arbitration, and mirrors the predominance and superiority requirements of a Rule 23(b)(3) class under “maintainability”.¹⁰¹ The AAA rules also duplicate the Rule 23 requirements for the approval of settlements.¹⁰² 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 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.¹⁰³ The JAMS rules follow a similar pattern, by directly reference to 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.¹⁰⁴ Class arbitration therefore involves a similar degree of procedural complexity to class action and has a similarly restricted scope.

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.

History of Group Litigation in England¹⁰⁵

The modern American class action is a descendant of English medieval aggregate litigation.¹⁰⁶ Despite the historical link, modern American class actions have little in common with those early cases.¹⁰⁷ The

¹⁰¹ AAA Class Rules *supra* note 98 §4.

¹⁰² *Id.* §8.

¹⁰³ *Id.* §§3, 9 & 12 respectively.

¹⁰⁴ JAMS Class Rules *supra* note 99 § 3.

¹⁰⁵ 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.

historical experience of England diverged from that of the US in the early 19th Century and the class action was effectively dead in England by 1850.¹⁰⁶ 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ The rules are intended to be read purposively, so as to further their “overriding objective.”¹¹² CPR is 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 related Part. Finally, the Rules and Practice Directions are glossed in treatise on civil procedure.¹¹³

Lord Woolf considered the issue of “multi-party” litigation.¹¹⁴ His report found a need for an aggregate litigation procedure, in part because of the prohibitive cost of the existing approaches. The new procedure had three objectives: (a) to provide access to justice in cases where a large number of small

¹⁰⁶ James W. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308-9 (1937-1938) (writing of the then-recent codification of Fed. R. Civ. Pro. 23).

¹⁰⁷ See Generally, Stephen C. Yeazell, *Group Litigation and Social Context: Towards a History of the Class Action* 77 COLUMBIA L. REV. 866 (1977) and STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

¹⁰⁸ STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, 210-212 (1987).

¹⁰⁹ *Id.*

¹¹⁰ This movement ranged from constitutional reform through the House of Lords Act 1999 c.34 (Eng.) and the Human Rights Act 1998 c.42 (Eng.) to reform of the wider justice system, for example Access to Justice Act 1999 c.22 (Eng.).

¹¹¹ Lord Woolf, *Access To Justice – Final Report* (1996) (“Access to Justice” hereinafter).

¹¹² Civil Procedure Rules (Eng.), r.1.1 (“CPR” hereinafter) (for ease of reference, CPR rules are here cited as they will appear in English materials) (“These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.”)

¹¹³ CIVIL PROCEDURE, ED. LORD JACKSON, VOL. 1 (2008) (“White Book” hereinafter) (This treatise, known as the White Book, is the most authoritative gloss on the English Civil Procedure Rules).

¹¹⁴ *Access to Justice*, *supra* note 111 ¶ 17.

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.¹¹⁵ The American class action was considered an illustration of errors to be avoided.¹¹⁶ Access to Justice did not set out a detailed and final rule and left important issues unresolved, for example, the report left open the possibility of “opt-out” litigation, similar to an American class action.¹¹⁷

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.

CPR & the GLO

Following Woolf’s Report, multi-party litigation rules were codified in CPR part 19 and its two practice directions. The rules provide three approaches: adding parties to an existing action or consolidating claims,¹¹⁸ representative claims¹¹⁹ and the Group Litigation Order (GLO).¹²⁰ The rule addresses the definition of a GLO,¹²¹ the making of a GLO,¹²² its effect¹²³ and the case management

¹¹⁵ *Id.*

¹¹⁶ *Id.* ¶ 17.5 (“[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.”)

¹¹⁷ *Id.* ¶ 17.36 (“At this early point the managing judge needs to be pro-active in addressing various key matters with the parties... (c) considering whether the [litigation] should be managed on an 'opt-out' basis.”)

¹¹⁸ CPR r.19.1-5.

¹¹⁹ CPR r.19.6-9F.

¹²⁰ CPR r.19.10-15. Lord Walker described GLOs in *Autologic Holdings, Plc. v. Commissioners of Inland Revenue* [2005] UKHL 54, [2006] 1 AC 118, ¶ 86 *per* Lord Walker (“The key features and normal effect of any GLO are that it identifies the common issues which are a pre-condition 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 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.”)

¹²¹ CPR r.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’)”).

powers of judges in relation to GLOs.¹²⁴ 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)”¹²⁵ GLOs are discretionary orders¹²⁶ that can be made where a court faces multiple claims raising similar issues of fact and law.¹²⁷ 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.¹²⁸ Claims involving the GLO issues may be added to the register by order, *sua sponte* or on application. 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.¹²⁹ Any party to a claim on the register adversely affected by the judgment may appeal the judgment.¹³⁰ However, a judgment on the common issues will not determine each individual claim on the register.¹³¹ The rules provide for various case management powers, in particular the powers to select test claims from the group register and try them first¹³² and the power to appoint a “lead solicitor.”¹³³ Notably absent from the GLO rules are provisions

¹²² CPR r.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.”)

¹²³ CPR r.19.12 (“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.”)

¹²⁴ CPR r.19.13(1) (“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.”)

¹²⁵ CPR r. 19.10 distinguishes GLOs from representative actions. White Book *supra* note 113 ¶ 19.10.1 (“The inclusion of the words “common or related issues” is significant: the interests of the individual do not have to be the “same” as in Representative Proceedings.”)

¹²⁶ CPR r. 19.11(1) (“The court **may** make a GLO”) (emphasis added).

¹²⁷ CPR r.19.11(1).

¹²⁸ CPR r.19.11(2).

¹²⁹ CPR r.19.12(1)(a).

¹³⁰ CPR r.19.12(1)(b).

¹³¹ Neil H. Andrews, *Multi-Party Actions and Complex Litigation in England*, 23 EURO. BUS. L. REV. 1, 22 (2012).

¹³² CPR r.19.15.

dealing with settlements and the selection of lawyers. The absence of a rule on settlements is a problem even in the English context.¹³⁴ 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 effected persons.¹³⁵ Representative actions remain relatively uncommon.¹³⁶ Consolidated actions remain common and have recently seen some popularity in consumer claims.¹³⁷ Associated with the consolidation of claims is the informal use of “test cases”, expressly permitted by CPR 19.15 for GLOs but routine in the absence of a GLO. Test cases are usually chosen as part of an effort by the judiciary to deal with multiple duplicative actions or large numbers of cases raising the same issue.¹³⁸ Judges use their discretionary case management powers under CPR to select test cases, while staying other claims which raise similar issues, pending the outcome of the test cases. Even though test case judgments may not be binding precedents,¹³⁹ and their outcomes may not be dispositive of all the related cases, they are treated by lawyers as indicative of the approach which will be taken by other courts hearing similar cases.

¹³³ CPR r19.13(c). The function of this rule is different from the FED. R. CIV. P. 23(g). Access to Justice *supra* note 111 ¶ 17.31 (“The court's responsibility is not to ensure that the legal services are adequate but to ensure the efficient conduct of the litigation.”)

¹³⁴ White Book *supra* note 113 ¶ 19.15.1 (2008) (This absence also creates uniquely English costs-shifting problems which it is unnecessary to address here).

¹³⁵ Andrews, *supra* note 131 at 15 (“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.”)

¹³⁶ *Id.* at 16.

¹³⁷ *E.g.* Carey & Ors. v. HSBC & Ors., [2009] EWHC 3417 (QB) (2009) (itself an unofficial test case on points of law effect hundreds, possibly thousands of other similar claims).

¹³⁸ *E.g.* Sternlight v. Barclays Bank Plc. [2010] EWHC 1865 (QB) (2010) ¶ 1. (“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.”)

¹³⁹ Because there is no formal “test case” procedure, the normal rules of precedence apply.

Only some 79 Group Litigation Orders appear on the Queens’ Bench Division of the High Court’s register.¹⁴⁰ The principle reason suggested for the small number of group litigations is difficulty in “funding” cases.¹⁴¹ Funding usually encompasses both the willingness of a solicitor to pursue a case and the willingness of an insurer to provide legal expenses insurance. Both of these needs flow from England’s “loser pays” rule.¹⁴² In mass litigation involving individuals, lawyers usually act on a “conditional fee” basis¹⁴³ and obtain “after-the-event” insurance¹⁴⁴ for individual clients, to pay any adverse costs awarded. Because of the higher stakes of GLOs, ATE insurance is more difficult to obtain.¹⁴⁴ This difficulty may not have been foreseen in the Access to Justice 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.¹⁴⁵ Since the creation of the

¹⁴⁰ Her Majesty’s Courts and Tribunals Service, *Queen’s Bench Group Litigation Orders*, March 20th 2011, <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>.

¹⁴¹ Andrews, *supra* note 131 at 16.

¹⁴² I will follow the English nomenclature of “costs” as meaning both the administrative costs and the legal fees associated with litigation. *see* CPR r.43.2(1)(a).

¹⁴³ 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 mean that individual clients will almost never actually pay their lawyer’s fees. *See* RUPERT JACKSON L.J., REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT, MINISTRY OF JUSTICE (2009) Vol. 1, Chpt 14.

¹⁴⁴ *See* Ralph Savage, *ATE: Group Litigation: Collective Danger Ahead* PROFESSIONAL BROKING April 30, 2010 available <http://www.insuranceage.co.uk/professional-broking/analysis/1603869/ate-group-litigation-collective-danger-ahead> (accessed 7/18/2012) (discussion of insurers attitudes to ATE for GLOs in which industry participants express interest in some areas, but wider concern about the risks of such cases).

¹⁴⁵ *For example* payment protection insurance “mis-selling” has only rarely reached the courts. *E.g.* R (British Bankers Association) v. Financial Services Authority [2011] EWHC 999 (Admin) (2011)(BBA sought judicial review of the Financial Ombudsman Service’s policy on PPI Claims), *Black Horse Ltd., v. Speak* [2010] EWHC 1866 (QB) (2010) and *Yates & Anor. v. Nemo Personal Finance Ltd.*, (unreported), Manchester County Court, May 14, 2010 (*criticized* *Harrison & Anor. v. Black Horse Ltd.*, [2011] EWCA Civ. 1128 (2011), ¶ 30.) (individual claims). In one year over 100,000 cases about payment protection insurance were referred to the Financial Ombudsman Service. FINANCIAL OMBUDSMAN SERVICE, ANNUAL REVIEW 2010/2011, 1 (2011) available <http://www.financial-ombudsman.org.uk/publications/ar11/ar11.pdf> (accessed 7/19/2012).

GLO, public funding has attracted criticism, with one author describing “several recent English group actions which appear to involve abuse of public funds.”¹⁴⁶

Attitudes to Collective Redress in England and Europe

Hostility to class proceedings and collective redress in general has crossed the Atlantic to Europe.¹⁴⁷

The European Commission makes clear in its Consultation on Collective Redress that it wishes to avoid the perceived failings of the US class action system.¹⁴⁸ Attitudes do not appear to be as adverse in England as in the US: the response of the British Bankers’ Association to the Consultation demonstrates much less a degree of hostility than the American responses noted above.¹⁴⁹

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.¹⁵⁰ While the proposal was “accepted” by the government in 2009, that acceptance was limited and has yet to be acted upon.¹⁵¹ The responses of

¹⁴⁶ David Collins, *Public Funding of Class Actions and the Experience with English Group Proceedings*, 31 MAN. L. J. 211 (2005) (the cases include a now-infamous action involving the Measles Mumps and Rubella vaccine for which Andrew Wakefield was intended to be an expert witness. Wakefield’s research was subsequently denounced and Wakefield himself struck off the Medical Register. He received some £800,000.00 in legal aid funds for his work on the case).

¹⁴⁷ 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.”)

¹⁴⁸ European Commission, *Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 (Feb. 4, 2011) ¶ 21-22 (“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.”)

¹⁴⁹ Letter from British Bankers Association to European Commission Consultation on Collective Redress, (May 12, 2011) (on file with author) (“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... and not allowing representative action as available in the US.”)

¹⁵⁰ MICHAEL BLACK ET AL, CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS, (Ed. John Sorabji et al) (2008) (proposing that a new generic representative collective action be created by primary legislation.)

¹⁵¹ See ASHURST LLP, GOVERNMENT’S RESPONSE TO THE CIVIL JUSTICE COUNCIL REPORT: “IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS” (2009). Responses to the CJC proposal are canvassed in the Jackson Report. RUPERT JACKSON L.J., REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, MINISTRY OF JUSTICE, 331-333 (2009).

England's legal professions to the European Commission Consultation indicated general satisfaction with existing procedures.¹⁵² As noted above GLOs have attracted academic criticism.¹⁵³ 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 messages.¹⁵⁴ The threat was directed at claimants' solicitors.¹⁵⁵ The idea that imposing aggregate litigation would *disadvantage* claimant lawyers may seem a contradiction of the accepted US rhetoric that class-actions benefit plaintiff attorneys. The contradiction lies in the "loser-pays" rule, which tends to increase litigation costs.¹⁵⁶ The situation faced by Vos J. is one of those in which the rule perversely encourages parties to incur costs.¹⁵⁷ Mr. Justice Vos appears to suspect that the lawyers involved are deliberately driving up costs by proceeding separately with similar cases. Despite Vos' threat, no GLO has yet been imposed and there is at least one case which prefers the use of test cases to GLOs.¹⁵⁸

While English legal culture has generally rejected the American class action, aggregate litigation generally 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.

¹⁵² Letter from the Bar Council of England and Wales to European Commission, (May 2011)(on file with author) and Letter from Association of Personal Injury Lawyers to European Commission, (April 19, 2011)(on file with author).

¹⁵³ Collins, *supra* note 146.

¹⁵⁴ Katy Dowell, *Vos J threatens phone-hacking firms with group litigation order as costs spiral*, THE LAWYER, 19th March 2012.

¹⁵⁵ *Id.* ("the source said '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.'")

¹⁵⁶ JACKSON, PRELIMINARY REPORT, *supra* note 143 Vol. 1, at 93 (2009) (citing G. Marshall *The Literature of the Loser Pays rule: an Analysis of the Alternatives within the Ambit of the CFA with the Effect on Settlement Strategies* 27 CIV. JUST. Q. 507 (2008)).

¹⁵⁷ JACKSON, FINAL REPORT, *supra* note 151 at 47 ("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.") (One phone tapping case had already been settled by the defendant, the cases therefore fell within this situation).

¹⁵⁸ *E.g.* Golden Eye (International) Ltd. v. Telefonica UK Ltd [2012] EWHC 723 (Ch) ¶ 142-143.

Part 3: The Transplant Operation

For any transplant operation to be successful, the donor and the host must be compatible. The American and English legal systems have a unique advantage in that they share a common heritage. Anglo-American legal borrowing is therefore not novel. The class action itself has its historical origins in English law.¹⁵⁹ However, the two systems have diverged substantially and now sit in their own distinct legal and cultural contexts. 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 and section B, the differences between English litigation and American arbitration. This part will conclude by setting out the anticipated incentives for three stake-holders in this area: business- and consumer- advocates and arbitral fora, to accept the transplanted rule as a compromise of their positions, in section C.

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. The FRCP Rule 23 class actions are representative and either mandatory or “opt-out.”¹⁶⁰ The GLO is non-representative: the aggregated claims remain distinct individual claims and are simply bound by group judgments on group issues, and opt-in only.¹⁶¹ This first difference is perhaps one of formality rather than substance: English “test cases” are informally representative claims and CPR r.19.15. explicitly provides for the use of test cases in GLOs.

As noted above FRCP Rule 23 has 4 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 commonality¹⁶² and to a lesser degree numerosity.¹⁶³ There are no

¹⁵⁹ Yeazell, *Group Litigation and Social Context*, *supra* note 107.

¹⁶⁰ *See* Part I § B *supra*.

¹⁶¹ *See* Part II § B *supra*.

¹⁶² CPR r.19.10 (“...claims which give rise to common or related issues of fact or law.”)

requirements of typicality or adequacy of representation. Even the requirements of commonality and numerosity are broader. FCRP 23(a)(2) requires “common issues of fact or law”, CPR r19.10 can be satisfied by “related” as well as common issues. FCRP 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable”, CPR r.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 Rule 23 provides for three distinct types of class, each with its own requirements, there are no additional formal subdivisions or requirements for a GLO.

The substantial difference between the narrow and detailed requirements of FCRP 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*. Clearly, 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 and reduce the need to characterize claims in a general, rather than a specific manner which now exists to avoid predominance issues in Rule 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 England¹⁶⁴ the reasons for this appear to be dependent on aspects of the English context: (1) the availability of funding and insurance,¹⁶⁵ (2) the differing financial incentives on lawyers¹⁶⁶ and (3) the

¹⁶³ CPR r.19.11 (“...where there are or are likely to be a number of claims giving rise to the GLO issues.”)

¹⁶⁴ See *supra* note 140 and accompanying text.

¹⁶⁵ Andrews, *supra* note 131 at 16.

¹⁶⁶ JACKSON, FINAL REPORT *supra* note 157.

widespread use of informal test cases to resolve issues with GLO potential.¹⁶⁷ These controlling factors would not be present in the US context.¹⁶⁸ 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 US. 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.¹⁶⁹ This belief is not borne out by the UK experience: there have been opt-in class actions in the form of GLOs.¹⁷⁰ The number has been small, but this has been attributed primarily to the difficulties in obtaining funding and insurance in GLO cases.¹⁷¹ It may also be that in an environment of costs-shifting, the economic incentives favor duplicative over group litigation.¹⁷² The courts may also be dealing with a multiplicity of similar cases through informal case management measures: listing similar

¹⁶⁷ Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP & INT'L L. 321, 344 (2001).

¹⁶⁸ 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).

¹⁶⁹ John Bronsteen, *Class Action Settlements: An Opt-In Proposal* U. ILL. L. REV. 903, 909 (2005) (“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).

¹⁷⁰ See Queens Bench Group Litigation Orders *supra* note 140.

¹⁷¹ Andrews, *supra* note 131 at 22-24.

¹⁷² JACKSON, FINAL REPORT *supra* note 157.

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.¹⁷³

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.¹⁷⁴ English Litigation, on the other hand, is a public process.¹⁷⁵ Even forms of business-related ADR often publicize their general approach to a given issue, if not the details of individual cases.¹⁷⁶ The GLO rule provides for a public register and publicity is an important part of the opt-in process: 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.¹⁷⁷

The existing class arbitration rules deal with this problem by removing the privacy of arbitral proceedings.¹⁷⁸

¹⁷³ For example *Sternlight & Ors v. Barclays Bank & Ors* [2010] EWHC 1865 (QB) dealt with 5 test cases out of over 100 duplicative consumer credit cases 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 & Ors. v. HSBC & Ors.*, [2009] EWHC 3417 (QB) (2009) and *Black Horse Ltd. v. Speak & Anor.*, [2010] EWHC 1866 (QB)) were also tried.

¹⁷⁴ On the extent and merits of privacy in arbitration *see generally* Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 KAN. L. REV. 1211 (2006).

¹⁷⁵ CPR r.39.2.

¹⁷⁶ The Financial Ombudsman Service routinely publishes anonymous case studies in its' newsletter, the Ombudsman News, for example, Financial Ombudsman Service, *Complaints Involving Cash ISAs*, OMBUDSMAN NEWS 101, March 29, 2012.

¹⁷⁷ Brief of Intel Corp. as Amicus Curiae supporting Petitioners, 9, *Wal-Mart Stores, Inc., v. Dukes*, 603 F.3d 571 *rev'd* 131 S. Ct. 2541 (2011) (No. 10-277).

¹⁷⁸ AAA Class Rules *supra* note 98, Rule 9(a) ("The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings

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.¹⁷⁹ Despite this, the best approach is the one already taken by the arbitral fora: publication of information about group arbitration must be allowed.

Arbitrators and judges perform different case management roles. CPR was intended, in part, to expand the case management role of judges.¹⁸⁰ The powers of arbitrators are much more limited. Instead, arbitral fora themselves have a substantial role in case administration, more so than HMCTS.

Arbitrators may also be deterred from an active case management approach at interim stages of the arbitration due to concerns about allegations of bias. 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. 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.¹⁸¹

Of these problems, the former is one of culture, which cannot be directly addressed by a written rule. It should simply be acknowledged that the GLO rule will not be read by American arbitrators as it would

may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances.”) and JAMS Class Rules *supra* note 99, Rule 4 (closely tracking the notification provisions of FED. R. CIV. PRO. Rule 23(c)(2)).

¹⁷⁹ See Erichson *supra* note 46.

¹⁸⁰ See generally Access to Justice *supra* note 111.

¹⁸¹ Robert S. Safe, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, TEX. L. REV., 1718-1719 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)(considering the circumstances of the certification of two class arbitrations).

be read by English judges. 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 US legal culture¹⁸², such a clause might be overridden by contractual choice of laws and 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 of the proposed group arbitration. Opt-out classes carry a risk of binding involuntary class members. Opt-in procedures such as the GLO are little more than an organized consolidation of similar cases and not subject to the same concerns. 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 representation of his choice.¹⁸³ 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.

¹⁸² This attitude is best embodied in the views of Supreme Court Justice Antonin Scalia, *see generally* Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. ANNUAL SURVEY OF AM. L. 29 (2007).

¹⁸³ AAA recognizes the right of consumers to choose their own counsel in *Consumer Due Process Protocol*, American Arbitration Association, October, 2010, Principle 9: (“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.”)

The GLO itself presents a unique case management problem in the arbitral context: how cases should 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. 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. 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.¹⁸⁴ 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,¹⁸⁵ with the courts

¹⁸⁴ 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.

¹⁸⁵ 9 U.S.C. §10(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,

recognizing a few more, including “manifest disregard” of known law.¹⁸⁶ 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 indeed any variation of the standards set by the FAA.¹⁸⁷ While this approach has not met with universal approval in the states, it is beyond the scope of this article to attempt to resolve the problem here.¹⁸⁸ 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.

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.

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

or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”)

¹⁸⁶ 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 (2004)

¹⁸⁷ *Hall Street Associates, LLC. v. Mattel Inc.*, 552 U.S. 576, 583 (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.”)

¹⁸⁸ *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (Ca. 2008).

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.¹⁸⁹ Some commentators predicted that mandatory arbitration clauses would be one of the first areas subject to new CFPB regulation.¹⁹⁰ Counsel of the Concepcions and former CFPB counsel Deepak Gupta suggests that regulatory action is a viable avenue to protect the right to a class action.¹⁹¹ CFPB began the process of consulting on arbitration clauses in April 2012.¹⁹² The National Labor Relations Board, too, may step in to protect class actions. A recent decision, that class waivers in employment contracts are an unfair labor practice is one example of active regulatory pressure on arbitration-based class waivers.¹⁹³ The Securities and Exchange Commission and the Financial Industry Regulatory Authority have long prohibited class-waivers in arbitration agreements,¹⁹⁴ and further rule-making will soon protect collective civil rights actions by employees from waiver through arbitration.¹⁹⁵ 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

¹⁸⁹ 12 U.S.C. § 5518(b).

¹⁹⁰ Barkley Clark & Barbara Clark, Winston & Strawn LLP, *Prediction: Likely First Targets of Bureau Rulemaking*, July 2010, CLARK'S SEC. TRANS.MONTHLY 3 (2010) available <http://www.winston.com/siteFiles/Publications/ArbitrationClientBriefing.pdf> (“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 services contracts.”) (This prediction overestimated the speed of CFPB action. See note 185, *infra*, and accompanying text).

¹⁹¹ Westlaw, *Inside Concepcion: Consumers' Attorney Discusses Future of Class Actions* 19/2 WESTLAW J. CLASS ACTION 1 (2012).

¹⁹² *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Bureau of Consumer Financial Protection, April 25, 2012, available http://files.consumerfinance.gov/f/201204_cfpb_rfi_predispute-arbitration-agreements.pdf (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).

¹⁹³ *Id.* at 2.

¹⁹⁴ See *supra* note 100.

¹⁹⁵ Filing of Amendment and Order Granting Accelerated Approval of a Proposed Rule Change, Amending Rule 13024 of the Code of Arbitration Procedure for Industry Disputes, 77 Fed. Reg. 22374 (April 13, 2012).

stage.¹⁹⁶ State statutes are more likely but their efficacy is limited by the pre-emptive effect of FAA.¹⁹⁷

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 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 I, NAF is no longer involved in consumer arbitration, AAA and JAMS have class arbitration rules closely following FRCP Rule 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) a form of aggregate litigation which is to some degree acceptable to both businesses and consumers would lead to more arbitrations under the forum's rules and fewer challenges to arbitration clauses, (b) the transplanted rule would be substantially simpler than the Rule 23 derived class-arbitration rules and (b) the transplanted rule would involve fewer consumer due process issues because of its opt-in nature.

¹⁹⁶ S. 1782, 110th Cong. (2007) *re-introduced* S.931, 111th Cong. (2009), S.987 112th Cong. (2011), H.R. 3010, 110th Cong (2007), *re-introduced* H.R. 1020, 111th Cong. (2009), *re-introduced* H.R. 1873, 112th Cong. (2011) (*referred to committee* May 12, 2011).

¹⁹⁷ See *AT&T Mobility, LLC., v. Concepcion*, 131 S. Ct. 1740, 1747 (considering various devices by which states might attempt to suppress arbitration clauses).

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.

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 the CPR r.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 a 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 7 days in writing;
- (d) give a reasoned award;
 - i. identifying the case in which he made the award and,

- ii. identifying the Group Issues.

[Forum] will establish and maintain a register of all cases which are part of the Group Arbitration.¹⁹⁸

COMMENTARY

This is an adaption of CPR r.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

¹⁹⁸ This fills the void in the GLO rule noted by White Book *supra* note 113 ¶ 19.11.1 by determining that the arbitral forum will maintain the register, and therefore replaces in part CPR r.19.11(2) and CPR 19 Practice Direction B ¶ 6.

has such a register. This addresses the concern raised in Concepcion that arbitrators are not generally 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 follows closely CPR r.19.14, allowing parties to remove themselves from the group. In place of CPR r.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 a Group Arbitration 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
 - iii. List all the Claims which involve those Group Issues

COMMENTARY

This follows CPR r19.12 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, 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 r.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: 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 Federal Rule of Civil Procedure. Perhaps more important for its adoption, 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. 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*.