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# New Ways of Protecting Collective Interests: Italian Class Litigation and Arbitration Through a Comparative Analysis

*Marcello Gaboardi\**

## I. INTRODUCTION

Collective interests can be defined as interests that are common to all members of a particular group or collectivity. Collective interests have increased in relevance in modern times, and their legal protection raises serious challenges grounded in both collective entities and the structure of representative litigation. The standardization of productive and commercial activities is enough to call into question the need for protecting substantive interests beyond individual expectations. Individual litigation is ill-suited to the context of collective interests, creating excessive individual costs and diluting the benefits of a stable judicial decision. A plurality of individual lawsuits evidences the difficulties inherent in the management of different, yet similar, cases.

The standardization of disputes impedes courts from managing similar disputes through the joinder of additional parties or consolidation of separate proceedings. When the parties are numerous, such that it is impractical for them to pursue their claims individually, joinder of claims and consolidation of proceedings do not necessarily carry the typical benefits of decisional efficiency and consistency. The reason for seeking alternative solutions is that conventional methods of joinder or consolidation, as compared to class litigation, significantly increase the amount of energy and time necessary to resolve cases that come before the court. Legal systems have gradually infused their procedural rules with a preference for representative litigation in order to reduce the costs of individual litigation and the risks of decisional inconsistency.

The very nature of collective interests requires a conceptual move away from an individual approach to litigation toward a representative system of judicial protection. Legal systems must overcome qualms about representative litigation to permit a party to bring a lawsuit on behalf of other members of a group or collectivity. To the extent collective interests represent a synthesis of individual interests of the group's members with respect to a given event or good, group activism is a legitimate reason for affording legal protection to collective interests. Collective interests can also be served by acknowledging that a member of a collectivity can fulfill collective interests on behalf of other members. In such a case, the activism of the representative member affords collective interests, and thus the interests of other group members, the legal protections they are due.

First, Section II of this Article analyzes the various components of the protection of collective interests and the relationships among them. Such an

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analysis reveals the rightful role of the *representative claimant* as a means of enhancing protection of collective interests. The role of the representative claimant is comprised of various factors ranging from the nuanced relationship between the group or collectivity and its individual members to the impact of collective interests as an overarching synthesis of individual expectations. Thus, the representative claim reveals itself as the most palatable solution to the problem of protecting collective interests. The attention collective interests receive from interested parties has empowered legal systems to craft, by virtue of the Anglo–American system, varying tools to manage the representative protection of collective interests. Legal systems have invested time and resources to allow *representative entities*, such as environmental or consumer organizations, to protect collective interests on behalf of an entire group or collectivity, demonstrating the legal regard for the importance of representative litigation as a means of prohibiting or impeding unfair practices against the group or collectivity as a whole. The same systems have authorized each member of the group or collectivity to bring civil lawsuits on behalf of other members, thereby reflecting the belief that representative litigation is a suitable means of protecting those individual interests that are commonly intertwined with the interests of a group or collectivity. Therefore, the path of representative litigation has developed not only around the need for *preventive measures*, implying that unfair practices are repeated over time, but also around *derivative* or *class actions* to protect individual interests of stakeholders that cannot be undermined by a common event without compensation.

Next, Section III this Article outlines a proposal for enhancing the existing Italian system of protection of individual interests that are intertwined with collective interests. The first step is an analysis of the *Italian class action* under existing legal rules, which provide the basis for determining the scope and operation of class actions within the Italian legal system. By comparing the Italian class action with other legal systems of class litigation, the analysis brings advantages and disadvantages of the Italian collective action to the forefront. The second (and more challenging) step is the creation of an interpretative framework for assessing whether class actions can be submitted to domestic arbitration under Italian procedural law on class actions and the intervention of third parties in proceedings. The focus on *class arbitration* has implications for the scope of protection of individual and collective interests. If a class–wide arbitration increases the likelihood that stakeholders’ expectations receive serious consideration and protection notwithstanding the consensual basis of arbitration, it creates several problems by altering the usual legal approach to multiparty disputes within arbitral proceedings. Admitting a class action arbitration under existing Italian law provides a foundation for a full appreciation of the Italian legal system and its potential.

## II. THE PROTECTION OF COLLECTIVE INTERESTS: A CRITICAL ANALYSIS OF THE ITALIAN LEGAL SYSTEM

The process of protecting collective rights in Italy while resolving multiparty litigation has undergone crucial changes in recent times. The traditional approach to judicial protection is constructed around individual rights and individual access to justice rather than collective interests and collective litigation. So well

established is the relevance of individual rights<sup>1</sup> that even when they are linked to collective situations or are widely shared, the judicial protection afforded by legal rules and remedies depends on the possibility that stakeholders claim their expectations as individuals. The reason for favoring such doctrines comes from a tradition in civil law countries of emphasizing an inherent link between individual rights and their claims of protection.<sup>2</sup>

Traditional concepts and practices have become less important and less acceptable when economic and social developments have necessitated relevant changes in the procedural rules. Italian law is moving to protect individual rights at large, meaning remedying those collective offenses which derive from legal or commercial actions intended to produce collective results. Thus, it is perfectly appropriate for the modern Italian legal system to pay careful attention to collective or representative interests<sup>3</sup> and to the common law tradition of class and derivative

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1. In this Article, the term “right” means “legal right,” or a substantive claim expressly justified by the legal system. See generally Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 128 (2004) (“A legal right is an entitlement or justified claim that a legal system recognizes according to the correct interpretation of its own rules and principles, though a legal system or actors within it may incorrectly fail to recognize a legal right in particular circumstances.”). Further, the difference between “interest” and “right” as discussed here revolves around the recognition of the legal system. A claim is said to be an “interest” when it exists in practice as a subjective aspiration to an economic or noneconomic advantage, regardless of whether the legal system has recognized it as a legal right. See *id.* at 129–30 (“[A]n interest is a relation specifying something (an object, being a description of an alteration to the state of the world) that makes someone’s life (the subject’s) go better overall. Interests, then, are not subjective preferences but objective relations between a subject and an object describing what objects make the subject’s life go better overall” (emphasis and footnote omitted)). Alternatively, a claim is a “right” or “legal right” when it is entitled to legal protection. According to the civil law tradition, when a claim is legally relevant, it shows its nature in the fact that the claimant has effective remedy for his claim (*ubi ius, ibi remedium*: where there is a right, there is a remedy). Conversely, the common law tradition is historically most compatible with a view of “legal right” that contemplates its judicial assertion (*ubi remedium, ibi ius*: where there is a remedy, there is a right). See, e.g., J.A. Jolowicz, *Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law*, 42 CAMBRIDGE L.J. 222, 225 (1983); see also Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 127–30 (2006).

2. See, e.g., Thomas D. Jr. Rowe, *Debates Over Group Litigation in Comparative Perspectives: What Can We Learn from Each Other?*, 11 DUKE J. COMP. & INT’L L. 157, 159 (2001) (“In civil law countries there is a powerful doctrinal emphasis on the individual nature of a legal claim of right, going beyond a presumption in favor of proceeding on one’s own. . . . Restrictive standing doctrines, governing who is entitled to bring various types of claims, can impede collective litigation by associations on behalf of their members.”); MAURO CAPPELLETTI & JOSEPH M. PERILLO, *CIVIL PROCEDURE IN ITALY* 42 (1965) (noting that “the private dispositive nature of the substantive rights protected by civil courts required that parties be permitted to select the facts to be presented for adjudication, to abandon litigation, and to refrain from appeal.”); Douglas L. Parker, *Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact”*, 33 COLUM. J. TRANSNAT’L L. 259, 272–82 (1995); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT’L & COMP. L.J. 217, 264–92 (1992). Similarly, the common law tradition has characterized the individual approach to litigation as a basic legal principle. See, e.g., Jolowicz, *supra* note 1, at 226 (noting that “a ‘right’ is coextensive with its protection through the actions of the law, that is with the availability of a legal remedy from the courts.”); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561 (1987) (“From the perspective of the common law tradition of individual justice, class actions are a necessary evil, but an evil nonetheless.”); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (stating that “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979))).

3. See David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44, 45 (1992) (“Interest groups sometimes represent the interests of their members; at other times, they claim to be advancing interests which go beyond those of their immediate membership.”); Newman, *supra* note 1, at 140 (noting that “[g]iven that an interest is something that

actions. The redesigned approach to judicial protection in matters of consumer contracts and commercial transactions has already reached the result of serving and achieving collective interests in a more effective way than in the past.<sup>4</sup> Nevertheless, a gap remains. For several decades, the Italian legal system has described collective interests as legally irrelevant unless they can be viewed through a lens of individual rights.<sup>5</sup>

### A. Historical Premises

The protection of individual rights is an essential feature of the European legal tradition.<sup>6</sup> The idea is that the relevance of substantive rights is strictly correlated with a constitutional right to process that is exclusively individual.<sup>7</sup> Such an idea depends on a large number of factors that align with the basic and original meaning of judicial protection in civil law countries. The political philosophy of European countries embraced the protection of individual interests as a governing principle and, in turn, shaped the ways in which litigants came before the courts: individually. The reason for the individual focus, which developed during the Nineteenth

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makes someone's life go better, then, a collective interest is something that makes a collectivity's life go better. That life, consisting of the collectivity's flourishing as it contributes to the lives of its members and their purposes in coming together in the collectivity, can guide us toward a concept of collective interest.”).

4. See, e.g., Jules Stuyck, *Public and Private Enforcement in Consumer Protection: General Comparison EU–USA*, in *NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT* 63 (Fabrizio Cafaggi & Hans–W. Micklitz eds., 2009); Norbert Reich & Hans–W. Micklitz, *Economic Law, Consumer Interests, and E.U. Integration*, in *EUROPEAN CONSUMER LAW 6* (Norbert Reich et al. eds., 2nd ed. 2014) (noting that “[t]he consumer rights as an individual and as a collective supplement the principle of private autonomy which is generally recognised by E.U. law.”).

5. See Parker, *supra* note 2, at 280 (noting that “the civil law tradition of individual rights as the basis for litigation has created problems where the rights alleged have been collective or diffuse in nature . . . and where the courts have not been comfortable finding that the right claimed has an individual ‘owner.’”). For the English law tradition, see Jolowicz, *supra* note 1, at 227 (“At least according to English ideas, if no available criteria [for the judicial resolution of disputes involving diffuse or fragmented interests] are to be found in the law, then an issue is not justiciable.”); see also Newman, *supra* note 1, at 151–52 (“In an account based on an aggregation of individual interests, it is unclear what would differentiate an interest ‘as a member’ from any other interest. We can make this concept clear when we accept the possibility of a collective interest.”).

6. See, e.g., CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* 88 (2008) (“European legal systems have been based on the paradigm that the disputes that are to be resolved arise between individuals. If a mechanism is introduced into such a system that individual cases are not to be permitted to proceed, but will be resolved, at least in part, by deciding an issue which the court selects, and (more importantly) in which all individuals cannot be represented, an issue of individual rights and representation will obviously arise.”); BJARTE THORSON, *INDIVIDUAL RIGHTS IN E.U. LAW* 89 (2016) (noting that “it is inherent in the idea of judicial protection that the remedy must correspond to the right.”); Thomas Eilmansberger, *The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link*, 41 *CML REV.* 1199, 1203 (2004) (arguing that “[f]rom the very beginning[,] . . . a close connection between the concepts of individual rights protection on the one hand, and direct applicability [of EC law] on the other, was established.”).

7. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN THE COMPARATIVE PERSPECTIVE* 268 (1989); Feldman, *supra* note 3, at 70 (“The extent to which public law systems accommodate litigation in support of public rights and interests is an indication of underlying notions of citizenship, particularly the relationship set between public and private interests and the public rights and capacities of individuals.”); see also Art. 24(1) Costituzione [Cost.] [hereinafter Italian Constitution], *translated and reprinted in ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT* app. I (Vittoria Barsotti et al. eds., 2016).

Century's codification debate in Europe, was that the legislature infused the law with qualities of certainty, clarity, and reliability. Codification—the historical process of collecting and restating the unworkable and confusing laws in force in several European countries until the Eighteenth Century (e.g., the Roman law, the customary law, and legal opinions)<sup>8</sup>—facilitated the pursuit of those qualities and reflected a vision of legal relationships among citizens as separate from relationships between citizens and public powers. Because such a vision emphasized the role of private property and contract rights in the new legal landscape,<sup>9</sup> there was a need to afford judicial protection to individual or personal interests relating to such rights.

While this vision was valid in the post-codification era, it proved unsatisfactory in modern times. In the context of industrial activity and contractual standardization, the value of individual subjectivity decreased. The new role of judicial protection is, in large part, defined by the need to assess how economic and social interests might be affected by increased industrial production and the crucial consequences of contractual standardization.<sup>10</sup> The effect is a gradual move away from an exclusively individual approach to substantive rights and toward their conceptual enlargement. As new economic activities began to involve industrial products, and as new social and economic needs came to be served by the same types of large-scale businesses, the legal debate shifted in a meaningful way. A conceptual shift from individual interests was required to warrant a wider view of judicial protection. Accordingly, the shift created new categories of substantive rights relating to specific groups of people and not to individuals or organizations.<sup>11</sup>

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8. Cf. CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* (1764) reprinted in *ON CRIMES AND PUNISHMENT AND OTHER WRITINGS* 3 (1995) (“A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters—this is what makes up the tradition of opinions that passes for law across a large portion of Europe.”).

9. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 206 (1992) (“The modern civil rights laws should be understood as collective and misguided efforts to limit the normal bundle of rights associated with property, without identifying any of the problems of bargaining breakdown that might justify a different form of property rights.”); Maria Lee, *The Public Interest in Private Insurance: Collectives and Communities in Tort*, 74 CAMBRIDGE L.J. 329 (2015) (“The place of public interests is at the core of some of the most central divisions in the way we understand tort law.”).

10. See, e.g., Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, 25 BUFFALO L. REV. 643, 645 (1976) (emphasizing “the emergence and growth of such phenomena, practically unknown in pre-industrial societies, as the massive organization of labor, the unprecedented dimension of class conflicts, the rise of the mass-oriented ‘welfare state’ government, and the often frightening development of a mass psychology, molded by modern mass media.”); Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT’L ORG. 595, 597 (1995).

11. See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); see also George Rainbolt, *What are Group Rights?*, in *GROUPS AND GROUP RIGHTS* 78 (Christine Sistare et al. eds., 2001); James Griffin, *Group Rights*, in *RIGHTS, CULTURE AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ* 161 (Lukas H. Meyer et al. eds., 2003) (“Group rights—at least the most interesting form of them—are supposed not to be reducible to the individual rights of their members. They are supposed to be rights that groups have as groups.”); Newman, *supra* note 1, at 130 (describing the concept of a collective interest as “the interest of a collectivity.”). On the role of collective interests in the realm of human rights, see generally Margo Kaplan, *Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility*, 79 N.Y.U. L. REV. 1902 (2004).

Consider, for example, the fact that many industrial processes produce various pollutant emissions and cause damage to people living in nearby areas.<sup>12</sup> If the need for inhabitants to eliminate or reduce the risk of collective injuries is both reasonable and entitled to judicial protection, there exists an opportunity to reconsider the *scope* of compensable damages. When the question arises as to whether the courts are called upon to grant special protection to the natural environment beyond the individual harms caused by the pollutant emissions, the answer must move beyond the category of individual interests and toward the interest of a qualified collectivity. The initial step toward a new perspective on compensable damages in these cases is to recognize that the status of relevant interests should be reconstituted around the individual–collectivity dichotomy. While the meager economic resources of stakeholders place meaningful limits on individual litigation, the qualified collectivity’s claim for relief gives stakeholders the assurance that the group’s interest is collectively, though not individually, protected. Ultimately, the premise of the individual–collectivity dichotomy suggests the need for representative lawsuits. When the representative claimant brings an individual lawsuit for money damages on behalf of other stakeholders, the interests of the group’s members are individually satisfied without the need for individual claims.

### B. *The Structure of Collective Interests*

Judicial protection of individual rights is crucial on both theoretical and practical grounds. There are several situations in which a given type of substantive interest is related to all members of the same group or collectivity.<sup>13</sup> To continue the above scenario, legal systems allow individuals to bring suits against the polluter when the emissions have caused personal injuries. The expectations of individuals of a pollution–free environment, however, are usually dismissed because there is no individual right to a pollution–free environment; the interest in environmental conservation is a public interest.<sup>14</sup> Thus, when such an interest is invoked to defend the environment as a public good, the government is called upon to tailor its regulations and prosecute the polluter to serve that interest, and when it is invoked to defend the expectations of those who live in the polluted area, it is commonly described as the interest of a qualified group or collectivity. Similar situations have provided the basis for shaping functional doctrines of collective interests in several

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12. See Cerny, *supra* note 10, at 612 (“[T]he most salient new sector of redistributive public goods, environmental protection, is especially transnational in character; pollution and the depletion of natural resources do not respect borders.”).

13. See Newman, *supra* note 1, at 128–29 (“A collectivity is a collection of persons such that we would still identify it as the same collectivity were some or all of the persons in the collectivity to change (provided that the collectivity continued to meet some other conditions) and such that the persons who are in the collectivity identify themselves in some non–trivial way as members of this collectivity. It is thus a number of persons gathered together and reasonably perceived in at least some way and for some purposes as forming a single unit.”).

14. See, e.g., Jenny Steele, *Private Law and the Environment: Nuisance in Context*, 15 LEGAL STUD. 236, 242 (1995) (enumerating the “ways in which developments in environmental law, or the growing realisation of the importance of environmental policy, might impact on the way that private law rights are understood and enforced.”).

civil law countries that ultimately increase the procedural safeguards of substantive interests by adopting a broader view of their legal relevance.<sup>15</sup>

While it is foreseeable that public powers may fail to effectively protect the public interest in environmental conservation, it is possible to view the collective interest in conserving a given environment as an alternative and efficient way of protecting individual interests. The governmental failure to protect a public good or prevent damaging situations from coming to pass depends on considerations of public inefficiencies and costs.<sup>16</sup> To the contrary, groups or communities can be viewed as qualified to serve collective interests when their members are directly involved in cases concerning such groups or communities. If the members of a group take their collective interests into account, and if they believe that such interests are gravely harmed, then they are highly likely to act on their own initiative in order to warrant some degree of protection for their common interests. The fact that collective interests are best served by the members of the group largely depends on the direct impact of wrongdoing upon the group identity. The pollution of a given area upsets the expectations of its inhabitants independently of their individual damages. For instance, pollution could harm not only their individual health, but also the wellness and wealth of their group.<sup>17</sup> Evaluating how useful or harmful it would be to defend such a collective interest requires the speed of private decision-making and the expenditure of resources, economic and otherwise, to warrant protection on judicial grounds.

This pragmatic approach is markedly different from the limited capacity of the government to serve a public interest. Attention to public interests often requires government officials to balance competing concerns and outweigh the uncertainty and slowness created by administrative procedures.<sup>18</sup> It is sensible for public

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15. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664, 668 (1979) (“[I]t is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded.”); B. Hazard, *The Effect of the Class Action Device Upon Substantive Law*, 58 F.R.D. 299, 309 (1972) (“Whereas our traditional ideas of substantive and procedural law derive from contemplating and reacting to ‘A. v. B.’ as a single transaction, the world in which we must today make our legal concepts work is a world of many A’s and B’s and many transactions.”); Edward H. Cooper, *Mass and Repetitive Litigation in the Federal Courts*, 38 S. C. L. REV. 489, 493 (1987) (noting that at the level of mass litigation, “the transaction costs of adversary litigation . . . are a source of deep discomfort” while “[the] ability to achieve like treatment of like cases seems yet more uncertain.”). For a comparative analysis, see John L. Taylor & John W. Head, *Representing Collective Interests in Civil Litigation: A Comparative Synopsis*, 58 U. DET. J. URB. L. 587 (1981).

16. See, e.g., Mancur Olson, *Evaluating Performance in the Public Sector*, in *THE MEASUREMENT OF ECONOMIC AND SOCIAL PERFORMANCE* 358–59 (Milton Moss ed., 1973) (noting that “governments . . . are most often called upon to supply public or collective goods, or to control the production of those with externalities, whereas the private sector is almost never paid . . . to deal with such goods. Those goods or services that in almost every country are provided mainly by government (e.g., law and order, defense, pure research, pollution control) are certainly collective goods or goods with more than average externalities.”).

17. The implications of a pollutant event can be complex, but it is possible to make a general distinction between individual damages and collective damages. The former are damages posed by the pollutant event in the private realm of every inhabitant. The latter are damages relating to the collective sphere of the environmental conservation. It does not necessarily follow that lawsuits for collective damages should preclude lawsuits for individual damages. Such actions are commonly described as *competing* instruments for reinforcing the judicial protection of a given substantive interest. In practice, however, the collective actions tend to prevail as more efficient than the individual ones.

18. See ROLAND N. MCKEAN, *EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS* (1958); see also Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 911 (1993) (“The costs are not only the direct



powers to carefully consider any countervailing interests the law authorizes them to evaluate. It is even more sensible for them to comply with those procedural requirements necessary to warrant deference to administrative rules, such as requiring independent agencies to submit information or making public expenditure estimates before proposing an administrative act. It is in a group's best interest for its members to promote the collective interest. Collective interests engender collective reliance by encouraging group members to behave as though they are an individual.<sup>19</sup> Viewing the collective interest through the lens of individual subjectivity is consistent with the possibility of full and rapid protection of a collective interest. Expectations about collective protection depend not only on the fact that the group may count on the expenditure of more economic resources than an individual, but also on the fact that the group tends to inherently pay closer attention to the interests of its members than do public powers.<sup>20</sup>

The first explanation challenges the assumption that stakeholders have several possibilities to obtain protection of their individual or collective interests. As a practical matter, the possibility that individual members may advocate for effective protection of their collective interests is dwarfed by their usually limited financial resources. However, even if limited resources present a significant obstacle to individual initiatives, stakeholders can pool their resources together to protect their collective interest(s) even when each of them would individually find it economically disadvantageous. The increase in stakeholders' confidence resulting from the treatment of individual resources as a common means of bolstering collective initiatives is a strong rationale for relying on the group's abilities.<sup>21</sup>

As noted above, the importance of collective initiatives may also stem from another relevant factor grounded in the relationship between the structure of the

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costs of government regulation, such as bureaucrats' salaries, etc., but also the indirect costs in the form of the rigidities and barriers to entry caused by government regulation.”); Daniel A. Farber & Anne Joseph O’Connell, *Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1141 (2014) (noting that it is necessary to “give weight to the traditional administrative law values such as transparency and fidelity to law, even though these goals may sometimes involve tradeoffs with agency efficiency and ability to maximize social welfare. For instance, Congress may have had other goals than welfare maximization, or the sole goal of efficiency may involve excessive sacrifices of fairness to individuals.”).

19. See Newman, *supra* note 1, at 141 (“The collective interests of a particular collectivity are those factors corresponding to its common good. They are not unrelated to members’ individual interests, for the collectivity’s moral existence depends on its ability to provide a collective interest that improves the lives of its individual members. At the same time, the collective interest is not simply reducible to, or even an aggregative function of, its members’ individual interests. It is, rather, a set of factors facilitating the fulfillment of the individual interests of diverse members at the same time.”).

20. See, e.g., Judith Reskin, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 151 (2011) (noting that “group litigation did work for the state, as ‘the king and barons . . . called’ groups into existence via incorporation so as to govern them, and group solidarity emerged from sharing conditions on the ground (literally and metaphorically).” (quoting STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 83 (1987))); see also Fabrizio Cafaggi & Hans-W. Micklitz, *Collective Enforcement of Consumer Law: A Framework for Comparative Assessment*, 16 EUR. REV. PRIVATE L. 391, 402 (2008) (noting that “consumer organizations play a less important role in countries with a strong consumer agency, and vice versa.”).

21. Cf. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 266 (1972) (stating that class actions “may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”). See Cappelletti, *supra* note 10, at 660 (arguing that “modern solutions [to the problem of protecting collective interests] consist of (a) utilizing the initiative and zeal of private persons and organizations by allowing them to act in court for a general or group interest . . . and (b) combining and integrating this private zeal with the initiative of, and/or control by, government bodies.”).

group and the nature of the collective interest. Because the collective interest can be described as the *synthesis* of its members' interests, it is best served when the stakeholders decide together to protect it. When stakeholders attempt to protect the group's interest, they take care of their own individual interest.<sup>22</sup> This can occur when the stakeholders operate through a representative mechanism—for example, when the legal system authorizes a derivative or class action. It can also occur when a group, such as an organization or an association, is entitled to sue (or be sued) on behalf of all stakeholders. Thus, if it is economically preferable for the group's members to take one collective initiative rather than one or more individual initiatives, a collective action is also more effective at garnering rapid protection of the collective interest than a public action initiated by public powers, primarily because a collective interest is *common* to all the members of a given group.

Moreover, such an interest is commonly intertwined with the personal interests of the group's members.<sup>23</sup> The example of environmental pollution remains instructive, as one or more collective interests, meaning those interests that belong equally to each inhabitant of the polluted area (i.e., an interest in environmental conservation or the prevention of pollution-related illness), are implicated by the pollutant event. This, however, is not a justification for ignoring the individual harms caused by the pollutant event, including the effect of the pollution on victims and their families. The members of the group could potentially pursue two different courses of action against the polluter: one results from the common environmental violation, while the other depends on individual damages.<sup>24</sup> Because the impact of the pollutant event is collective, stakeholders are not individually entitled to sue the polluter for the environmental harms caused by the event. By contrast, they *are* entitled to sue the wrongdoer for compensation of their individual damages (e.g., a particular instance of cancer stemming from exposure to carcinogenic pollutants). This scenario reveals the very reason why a collective interest is relevant in the aggregate, even across individual situations.<sup>25</sup>

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22. See, e.g., Scott Dodson, *An Opt-in Option for Class Actions*, 115 MICH. L. REV. 171, 189 (2016) (“The class itself is in the best position to know its needs and the mechanism that best suits it.”).

23. See, e.g., Newman, *supra* note 1, at 131 (arguing that “a collectivity itself has individual members, and its collective life is connected with their individual lives, so we might wonder if there is some relation between their individual interests and the collective interest.”); see also William B. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51, 60 (1979); Issacharoff & Samuel, *supra* note 4, at 50. For an application to consumer interests, see Reich & Micklitz, *supra* note 4, at 7 (“The interests promoted and protected . . . could be described as ‘diffuse’ as they are not restricted to specific interest groups or a clearly definable set of people; they potentially apply to any citizen or resident whatever their nationality.”).

24. See Lee, *supra* note 9, at 343; see also Philip Alston, *Representative Class Actions in Environmental Litigation*, 9 MELB. U.L. REV. 307, 308 (1973) (“The main factor deterring an individual from taking action against a polluter frequently is cost. The expense involved in environmental litigation, which often involves lengthy scientific investigation and evidence as well as prolonged legal proceedings, would be prohibitive in many cases unless a class action was available.”).

25. See, e.g., Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3191 (2013) (“As society becomes more complex, the simpler solutions of town meetings in the public domain and one-to-one contracts in the private domain become unwieldy, and a host of intermediary institutional arrangement needs to be created.”); Newman, *supra* note 1, at 131 (defining the collective interest as “a factor that contributes toward the continued collaboration of the members of a community as viable and reasonable.”); Lee, *supra* note 9, at 345 (“[I]t is plausible that the group might also represent something greater than, or distinct from, the sum of its parts, some version of the local or community interest.”); *Hawaii*, 405 U.S. at 266 (emphasizing the “psychological advantage in coming before the court . . . not alone, as the representative of one, but on behalf of many.”).

The traditional conception of public powers presupposes a duty on the modern administrative state to provide legal protection of public interests such as environmental preservation. If safeguarding public and environmental health is one of the most relevant concerns of a given community, it is a fundamental duty of administrative agencies in the first place.<sup>26</sup> Nevertheless, the fact remains that environmental preservation requires some degree of procedural solicitude, so that it is reasonable to assume that a community tends to be more solicitous for protection of *its own interest* than a public authority for protection of the corresponding *public interest*. If the time, expense, and uncertainty created by the operation of public offices pose relevant obstacles to the efficacy of public action, collective interests force stakeholders to expend energy and resources to effectively achieve a collective protection of their group's interest.<sup>27</sup> The conceptual departure from the protection of individual interests toward the protection of collective interests constitutes a safeguard against the limited activism of public powers. Finally, there is much more reason to expect that any member of the group will advocate for consideration of the collective interest than to expect the public power to pursue it.

A similar matter, relevant in cases involving *social* behaviors like pollution, is visible in a variety of other cases concerned with certain *legal* behaviors.<sup>28</sup> The same social behavior tends to cause similar harm to all members of a given group when the damages occur in the same factual context. When legal behaviors such as product liability or breach of standard contractual clauses arise,<sup>29</sup> the result is similar to that of social behaviors. Much the same is true of the application of tort law to unfair competitive practices when they engender unjust results such as the formation of contracts or allocation of investments stemming from misleading advertising.<sup>30</sup> In such cases, stakeholders (consumers) play a role in serving

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26. See generally William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Mauro Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793 (1975); Macey, *supra* note 18, at 911; Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217, 218 (1993); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1275–76.

27. See, e.g., Cappelletti, *supra* note 26, at 882 (noting that an “important method [of protecting collective interests] has been to encourage individuals and/or spontaneously organized groups to represent vital community interests in court, conferring upon them the role of individual and organizational ‘private attorneys general.’” (footnotes omitted)); Issacharoff & Samuel, *supra* note 23, at 50 (arguing that “private actors are largely responsible for seeking redress of their own injuries.”).

28. The distinction between *social* and *legal* behavior is used here to suggest that sometimes unlawful behaviors are those that derive directly from violations of general rules of legal protection independently of legal activities, and at other times it is those that derive from (or are related to) activities in which legal affairs (such as the formation of contracts, allocation of investments, and organization of business operations) are involved. Such a distinction emphasizes the heterogeneity of situations in which the protection of collective interests becomes relevant in practice.

29. See generally William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1934 (2010); CHRISTOPHER HODGES, EUROPEAN REGULATION OF CONSUMER PRODUCT SAFETY 27–37 (2005); Lee, *supra* note 9, at 346 (“The issue of collective production is another way of thinking about collective interests.”); Joshua A. T. Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401 (2009); Hans–W. Micklitz, *Liability for Defective Products and Services*, in EUROPEAN CONSUMER LAW 242 (Norbert Reich et al. eds., 2d ed. 2014).

30. See generally Hans–W. Micklitz, *Unfair Commercial Practices and Misleading Advertising*, in EUROPEAN CONSUMER LAW 70 (Norbert Reich et al. eds., 2d ed. 2014); see also Cafaggi & Micklitz,

collective interests similar to that of pollution (or product) victims. If the latter type of interest derives its collective nature from the uniqueness of the pollutant event (or the injury caused by a given product), the former type similarly derives its nature from the similarity of legal activities such as unfair competitive practices or breaches of contractual clauses.

### *C. Collective Interests and Collective Subjects*

The problem with collective interests is that, in civil law countries, they are embedded within a tradition of *individual subjectivity*. Under traditional rules of civil procedure, the grounds supporting either a plaintiff's claim for relief or a defendant's opposition to a complaint only include individual rights, such as property or contractual rights, that are clearly established by law. This does not permit a single member of the group to bring suits *on behalf of* the group, even if the bar means leaving collective interests without any form of legal protection. Instead, in all cases involving collective interests, the civil law tradition tends to characterize the plaintiff as an individual subject. In other words, the initial step toward a solution is to recognize that the plaintiff should be reconstituted around the ideal of a *collective subject*. If stakeholders are not entitled to promote judicial protection of a given collective interest individually or derivatively,<sup>31</sup> a specific collective subject can achieve judicial goals that would otherwise be unattainable. In any case, this focus on collective subjects should not be viewed as minimizing the importance of collective interests because it simply reflects the traditional civil law approach to judicial protection of substantive interests.

Subjects like labor unions, environmental organizations, and consumer organizations were the principle mediums that allowed the Italian legal system to include the paradigm of collective subjects within the protection of collective interests. Such collective subjects are legally entitled to represent collective issues before the courts. Thus, factors such as limited economic resources of stakeholders<sup>32</sup> and their informational or experiential weaknesses<sup>33</sup> are overcome through the creation of subjects economically and socially stronger than single stakeholders. Indeed, unions and organizations are characterized by complex structures, significant resources, and stable knowledge and familiarity with the events surrounding a given collective interest. Yet, even though unions and

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*supra* note 20, at 393 (noting that "in Europe collective litigation has . . . affected some aspects of contract law and unfair competition.").

31. See *infra* Section III(B).

32. For an analysis of the impact of economic resources on contract law, see Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005); see also Reich & Micklitz, *supra* note 4, at 46, 48 (noting that the European approach to consumer concepts tends to include situations in which the consumer "run[s] the risk of being isolated from social and economic life, be it by over-indebtedness, illness or a lack of possibilities to communicate" and situations in which the consumer is viewed as "weaker party" to a contract (emphasis and footnote omitted)).

33. See Archibald Cox, *Strikes, Picketing, and the Constitution*, 4 VAND. L. REV. 574, 588 (1951) ("Employees have no bargaining power as a group unless they can withhold their labor as a group."); Reich & Micklitz, *supra* note 4, at 23 (emphasizing the "(collective) restrictions of the flow of information against consumers, for example by standard business conditions which are not materially justified." (emphasis omitted)). For a useful illustration of the approach of the Court of Justice of the European Union ("ECJ"), see generally Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577, at para. 120; Case C-438/08, *Int'l Transp. Fed'n & Finnish Seamen Union v. Viking*, 2007 ECR I-10779.

organizations represented a break from the past, their capacity to protect collective interests long remained consistent with the civil law tradition of individual subjectivity.

In the Italian legal system, the formal move toward the protection of collective interests through collective subjects occurred in 1970. Legislators recognized that violations of crucial workers' rights (i.e., the right to organize, bargain collectively, and strike) were worthy of judicial protection through the claims of a labor union.<sup>34</sup> Similarly, in 1986, Italian law authorized certain national associations for environmental protection to intervene in proceedings to uphold a suit the Italian Department for the Environment brought against the polluter.<sup>35</sup> Later, the Italian legislature considered consumer organizations well-suited to bring damages suits or seek interim orders against unfair trade practices or abusive contractual clauses even where consumers did not intend to pursue any course of action for the individual harms caused by careless or wrongful conduct.<sup>36</sup> Such rules are confirmed and reinforced in today's legal framework. In particular, the salience of these rules is bolstered by their connection with the legal protection that European Union ("E.U.") law afforded to collective interests.

The Italian legal debate undoubtedly relied on E.U. law throughout the years it spent developing the Italian Consumer Code of 2005 ("Consumer Code").<sup>37</sup> The European community has significantly devoted its attention to the role of collective interests in advancing the protection of consumer interests. For example, since 1984, European law has recognized the importance of "protect[ing] consumers, persons carrying on a trade or business or practising [sic] a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof."<sup>38</sup> Some ten years later, the same type of approach applied to the legal protection of consumers against "unfair terms in contracts concluded between a seller or supplier and a consumer."<sup>39</sup>

The E.U.'s reinforcement of collective interests influenced all branches of Italy's national government through normative adaptation. The existing legal principles of the Italian consumer law represent, in large part, many applications of the corresponding E.U. law.<sup>40</sup> For example, the provisions of the Consumer Code

34. See L. 20 maggio 1970, n. 300 art. 28(1) (It.) (Italian Workers Statute of 1970, Pub. L. No. 300, art. 28(1)) (amended 1977 and 1990).

35. See L. 8 luglio 1986, n. 349 arts. 13–e 18(1) (It.) (Italian Law of 1986, Pub. L. No. 349, arts. 13 and 18(1), (5)) (concerning the institution of the Italian Environment Minister and environmental damages); see also Parker, *supra* note 2, at 288–95. Cf. Italian Environmental Code of 2006, Pub. L. No. 152 (It.).

36. See D.P.R. 24 maggio 1988, n. 244 (It.) (Italian Law of 1988, Pub. L. No. 224) (concerning the liability for damages caused by defective products); D.P.R. 3 novembre 1998, n. 58 (It.) (Italian Law of 1998, Pub. L. No. 58) (concerning financial intermediation activities).

37. See Codice del Consumo 2005, Pub. L. No. 206 (It.) [hereinafter Consumer Code] (note the Consumer Code has been amended several times). See Giacomo Pailli & Cristina Poncibò, *In Search of an Effective Enforcement of Consumer Rights: The Italian Case*, in ENFORCEMENT AND EFFECTIVENESS OF CONSUMER LAW 349 (Hans-W. Micklitz & Geneviève Saumier eds., 2018).

38. Directive No. 84/450/EEC of 10 September 1984 on misleading advertising, Pub. L. No. 250/17, art. 1 (It.).

39. See Directive No. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Pub. L. No. 95/29, art. 1(1) (It.).

40. See generally Reich & Micklitz, *supra* note 4, at 7 (noting that the Treaty on European Union "lists the internal market and consumer protection as areas of 'shared competence' between the Union and the Members States."). For a useful illustration of the European harmonization of consumer legal protection, see *id.* at 40 (noting that the approach to harmonization has followed certain policy changes

governing commercial advertising and consumer information policy in Italy derive their particular content from the general norms of E.U. law.<sup>41</sup> The same is true of many other legal rules, such as those that protect fair terms of contracts with consumers or fair business-to-consumer commercial practices.<sup>42</sup> A central feature of the E.U.'s approach is the protection of consumer interests through organizations and representative subjects. While litigation could impose relevant costs on individual stakeholders, organizations can effectively mitigate such costs and the risk of unfavorable judicial decisions. The most important effect of empowering a consumer organization to protect collective interests is that judicial decisions become crucial to *individual consumers* even if the judge is asked to decide a case involving a consumer organization. It might be the case that consumers are best served, for example, by a representative lawsuit aimed at prohibiting unfair commercial practices or invalidating unfair terms of standard contracts. This fact emphasizes the vision of consumer organizations and other representative subjects as an instrument for achieving wide-ranging objectives,<sup>43</sup> moving beyond the interests of a given organization to protect the collective interest of consumers.

### III. REPRESENTATIVE ACTIONS: THE AMERICAN AND EUROPEAN LEGAL EXPERIENCE

While individual subjectivity plays a significant role in judicial protection of substantive rights,<sup>44</sup> a general opinion in the European legal debate is that representative subjects are able to promote collective interests—that is, the diffuse

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over time, ranging from “certain *minimum standards*” to “the principle of *complete or full harmonization*”); Stuyck, *supra* note 4, at 70, 74; Hannes Unberath & Angus Johnston, *The Double-Headed Approach of the ECJ Concerning Consumer Protection*, 44 CML REV. 1237, 1257–81 (2007).

41. Cf. Directive No. 84/450/EEC, *supra* note 38, art. 4(1) (repealed in 2006) (It.) (providing that Member States shall authorize “persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising [to]: (a) take legal action against such advertising; and/or (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.”). Cf. *now* Directive No. 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising, Pub. L. No. 376/21, art. 5(1) (It.). Cf. Consumer Code, *supra* note 37, art. 27(2). See also Micklitz, *supra* note 30, at 97.

42. Cf. Directive No. 93/13/EEC of 5 April 1993, *supra* note 39, art. 7(2) (providing that Member States shall authorize “persons or organizations, having a legitimate interest under national law in protecting consumers, [to] take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.”); cf. Consumer Code, *supra* note 37, arts. 37(1), 66(1). See also Case C-240/98 to 244/98, *Océano Grupo Editorial v. Rocio Murciano Quintero*, 2000 ERC I-4941, at para. 27 (stating that, under E.U. law, Member States were called upon “to implement adequate and effective means to prevent the continued use of unfair terms, [and to pay careful attention to the fact that] those means [we]re to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts.”); Case, C-372/99, *Commission of the European Communities v. Italian Republic*, 2002 ERC I-819, at para. 14.

43. For an illustration of the difference between individual and collective disputes, see Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 178 (2003).

44. See CAPPELLETTI & PERILLO, *supra* note 2, at 42; Rowe, *supra* note 2, at 159; Parker, *supra* note 2, at 280; Cappalli & Consolo, *supra* note 2, at 264.

and common interests of a group<sup>45</sup>—but are subject to serious limitations or challenges. First, the existence of representative subjects depends on the initiative of stakeholders. The formation of representative entities can be a complex and daunting procedure.<sup>46</sup> A number of stakeholders must come together around their common ground; for example, by agreeing that their common interest in environmental conservation should be enhanced and protected. Stakeholders must also invest some resources to craft an appropriate governance structure and provide legal capital.

Second, organizations are usually entitled to protect collective interests *within a constraining framework* of legal remedies. National legislatures of a large number of European countries intended to provide legal protection of collective interests through the framework of E.U. law. These legislatures essentially provided substantive remedies for unfair practices involving certain groups of stakeholders (i.e., consumers or users). Such remedies were, and still are, limited. As such, they are relevant as a safeguard of stakeholders' expectations only because they provide a means of preventing the future use of unfair practices.<sup>47</sup> By contrast, the limited capacity of those remedies to secure compensatory relief or the reversal of unjust enrichment reduces the role of representative entities. What organizations can do under existing European legal rules is only promote a form of legal protection that could be described as *prospective* and *indirect*.<sup>48</sup> This system serves collective interests by ensuring that those stakeholders who are harmed by a given unfair practice enjoy the benefit of judicial elimination of the consequences of such a practice.<sup>49</sup> Moreover, because unfair practices are commonly repeated over time, the European system of protection also forbids such practices in the future,<sup>50</sup>

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45. See Griffin, *supra* note 11, at 161; Newman, *supra* note 1, at 131. For the analysis of consumer right to association within the European legal system, see Reich & Micklitz, *supra* note 4, at 27.

46. See, e.g., Macey, *supra* note 18, at 911.

47. Cf. Directive No. 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests, Pub. L. No. 166/51, art. 2(1)(a) (repealed in 2009) (It.) (requiring a legislative harmonization in order to facilitate the judicial "cessation or prohibition of any infringement" against the collective interests of consumers). Cf. now Directive No. 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests, Pub. L. No. 110/30, art. 2(1)(a) (It.); Consumer Code, *supra* note 37, art. 140(1). See also Cafaggi & Micklitz, *supra* note 20, at 407 (noting that "judicial enforcement in Europe employs remedies to prevent firms from introducing or selling unsafe products or unsafe or improper services, and to force firms to remove them if they are already on the market."); Norbert Reich, *Legal Protection of Individual and Collective Consumer Interests*, in *EUROPEAN CONSUMER LAW* 378 (Norbert Reich et al. eds., 2d ed. 2014).

48. See generally Fabrizio Cafaggi & Hans-W. Micklitz, *Introduction*, in *NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 2* (Norbert Reich et al. eds., 2d ed. 2014) ("An integrated strategy to combine remedies to deter and remedies to compensate is . . . needed.").

49. Cf. Directive No. 93/13/EEC, *supra* note 39, art. 7(2)–(3) (authorizing courts and administrative bodies to apply, under national law, "appropriate and effective means to prevent the continued use of [unfair] terms . . . against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms."); Consumer Code, *supra* note 37, arts. 37(1), 66(1), 140(1). See also Cafaggi & Micklitz, *supra* note 20, at 408 ("In . . . areas, such as unfair contract terms and deceptive advertisements, injunctions may have both functions: to cause unlawful conduct to cease, and to take corrective action."); Hans-W. Micklitz, *Unfair Terms in Consumer Contracts*, in *EUROPEAN CONSUMER LAW* 127 (Norbert Reich et al. eds., 2d ed. 2014).

50. See Directive No. 93/13/EEC, *supra* note 39, art. 7(2)–(3).

imposing the payment of compensation for breaches of that duty, thereby discouraging wrongdoers from using such practices in future cases.<sup>51</sup>

### *A. The Role of European Union Law: From Preventive Measures to Compensation*

These limitations have significantly reduced the impact of consumer protection over a long period of time. They suggest that while organizations can impede wrongdoers from repeating their illegal conduct, they cannot require payments to compensate stakeholders for the damage to their collective interests. Under E.U. law, the relationship between judicial protection and individual subjectivity has impeded organizations and other representative entities from bringing a lawsuit for individual money damages against the wrongdoer (serving the wrongdoer with a request through the court that seeks a compensation order to be paid to stakeholders directly).<sup>52</sup> The right to individual compensation exceeds the ability of organizations, which are entitled to protect collective interests through a judicial preclusion of future unfair practices and serve a given collective interest only by preserving it in the future and minimizing risks from new deceptive activities.<sup>53</sup>

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51. See Issacharoff & Samuel, *supra* note 23, at 50 (stating that the European consumer protection “can either try to anticipate the likely sources of harm and either prohibit certain forms of conduct or prescribe the precautionary steps necessary for avoidance of harm.”); Reich, *supra* note 47, at 381.

52. It is worth reiterating that E.U. law does not pose formal obstacles to representative litigation. European legal provisions require that Member States warrant judicial or administrative protection of consumers and users through the claims of “persons or organizations.” See Directive No. 84/450/EEC, *supra* note 41, art. 4(1); Directive No. 2006/114/EC, *supra* note 41, art. 5(1); Directive No. 93/13/EEC, *supra* note 39, art. 7(2); Directive No. 2009/22/EC of 23 April 2009, *supra* note 47, arts. 2, 3. According to E.U. law, the judicial protection of consumers and users depends on the choices of national legislators and is generally viewed as a set of preventive and injunctive measures aimed at impeding future reiterations of unfair practices or unjust contractual terms. Both individual stakeholders and organizations may avail themselves of such measures to protect their own interests or the interests of represented stakeholders. By contrast, Member States do not authorize organizations to bring damages lawsuits on behalf of individual stakeholders over a long period of time. This approach to the protection of consumers and users has significantly changed over time as the European legal system has introduced representative and class actions. These measures have afforded individual compensatory remedies against the wrongdoer, regardless of whether the lawsuit has been brought by an individual stakeholder or an organization. The E.U. Parliament and E.U. Council recently presented a Proposal of Directive on representative actions for the protection of the collective interests of consumers, 2018/0089/COD [hereinafter Proposal], available at [https://eur-lex.europa.eu/procedure/EN/2018\\_89](https://eur-lex.europa.eu/procedure/EN/2018_89). The Proposal authorizes Member States to “ensure that representative actions can be brought before national courts or administrative authorities by qualified entities.” The Proposal defines the scope of representative actions in a targeted fashion. It includes not only those types of request for the court that seeks “an injunction order . . . for stopping . . . [or] prohibiting the practice” or “establishing that the practice constitutes an infringement of law,” but also those types of request for the court that seeks “a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid” (emphasis added). See Proposal, arts. 5, 6. The Proposal demonstrates the active role for Member States in promoting the protection of consumer interests through representative litigation. Over the past two decades, representative mechanisms have been introduced into some European legal systems, allowing Member States to anticipate the E.U. law. See, e.g., HODGES, *supra* note 6, at 9–49.

53. See Issacharoff & Samuel, *supra* note 23, at 50; Cafaggi & Micklitz, *supra* note 20, at 408 (“When courts are asked to issue injunctive relief, they are dealing with measures aimed at affecting the likelihood of future harm, together with the removal of harmful effects that have already occurred.”); Reich, *supra* note 47, at 381.



Under E.U. law and many other European legal systems, organizations are not authorized to require compensation on behalf of stakeholders.<sup>54</sup> From the beginning, E.U. law exerted strong influence on national legal backdrops within the E.U.<sup>55</sup> Even if civil law countries<sup>56</sup> are influenced by the legal framework of the E.U., the legal rule by which organizations were prohibited from requiring compensation on behalf of stakeholders was always depicted as a core feature of the civil law tradition. Such a limitation reflects a view firmly embedded within the ancient civil law tradition that individuals and organizations can promote only the judicial protection of their *individual* interests.<sup>57</sup> Thus, what initially appears to be an adjustment to E.U. law reveals itself as something different under proper analysis: the respect that E.U. law accords to the civil law tradition.<sup>58</sup> Among other things, the civil law approach imposes a strict relationship between rights and legal interests on the one hand and judicial protection on the other. Therefore, changes in E.U. law and the core principles of civil law tradition inevitably go hand in hand, embedded within each other.<sup>59</sup>

To summarize the most relevant points discussed above with respect to the recent evolution of European legal systems:

- i. The European legal changes adopted a capacious view of the judicial protection of consumers and users, focusing attention on their collective interests.<sup>60</sup>
- ii. This broad view nevertheless remained rigorously consistent with the idea of individual subjectivity as a requirement of judicial protection, so only those organizations that represented the common interests of a given group of people were entitled to promote judicial protection of the group's collective interests.

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54. For the Italian legal system, see Consumer Code, *supra* note 37, art. 140(1). Under this legal provision, those associations of consumers and users that are legally registered are entitled to protect the collective interests of consumers or users at large. They can bring a request to the court that seeks an injunctive order against unfair practices and their detrimental effects. For the German legal system, see German Federal Nature Conservation Act, Dec. 20, 1976, BGBL. I S. 3573, § 64 (Ger.); German Act on Injunctive Relief, Nov. 29, 2001, BGBL. I S. 3138, § 1 (Ger.); German Act against Unfair Competition, Mar. 3, 2010, BGBL. I S. 254, § 8 (Ger.).

55. *See, e.g.*, Reich & Micklitz, *supra* note 4, at 7; Unberath & Johnston, *supra* note 40, at 1257.

56. Most European countries are civil law countries. Mary Ann Glendon, *Civil Law*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/civil-law-Romano-Germanic/Succession-and-gifts> (last visited Jan. 11, 2020).

57. *See, e.g.*, HODGES, *supra* note 6, at 88; THORSON, *supra* note 6, at 89; Eilmansberger, *supra* note 6, at 1203.

58. *See, e.g.*, CAPPELLETTI, *supra* note 7, at 268.

59. *See* Cafaggi & Micklitz, *supra* note 20, at 405 (“Individual judicial enforcement has always played a strong role, as the [European Court of Justice] instrumentalized private individuals to foster the European integration process by granting individual rights and even particular remedies.”).

60. *See* Unberath & Johnston, *supra* note 40, at 1255 (arguing that “the very nature of consumer ‘protection’ . . . [is] normally limited to correction of market failures. Hence, if consumer-protective laws are uniform then the consumer knows about his rights of redress in relation to market deficiencies. In a ‘healthy’ market environment the consumer may not need such extra protection and, consequently, laws on consumer protection may impose extra costs without in fact improving the position of consumers.”); Reich & Micklitz, *supra* note 4, at 11 (“Consumer protection has . . . gained autonomous importance within the system of legal protection under Community law and legitimises both measures taken by Member States and the Community.”).

- iii. The central reason for asserting this limited extension was the correlation of collective interests among stakeholders as a group that reflected the stable core of judicial protection under the civil law tradition. While stakeholders can individually promote judicial protection of their own individual interests, they are not entitled to bring individual lawsuits in order to protect the collective interest even if both individual interests and the collective interest manifest themselves within the same case.
- iv. Organizations and other representative subjects were entitled to bring lawsuits on behalf of stakeholders only when they sought injunctive measures against unfair practices by the wrongdoer. Even if individual expectations usually reflect the broader view of consumers about their legal protection, redress orders were viewed as inapposite to the mechanism of representative litigation.

Though the legal framework summarized here remained in force over a long period of time, it eventually was found to be unsustainable. Specifically, the absence of any representative lawsuits resulted in a strong limitation on private damages actions against violations of collective interests. Both *individual* lawsuits against the wrongdoer to impede future unfair practices and *individual* damages lawsuits against violations involving individual interests proved to be economically burdensome and, in many cases, altogether unbearable. Even if organizations are authorized to bring lawsuits to prevent future unfair practices, they are not entitled to promote damages actions on behalf of stakeholders. As a result, the civil law tradition offered an incomplete solution to the problem of compensation; it only permitted individual stakeholders to bring individual damages suits against the wrongdoer in national courts. In other words, it authorized only lawsuits for individual damages in light of the underlying rationale on which the judicial protection of rights is based in the civil law tradition. Furthermore, it did so at the expense of increasing the possibility of situations in which collective interests can be undermined and leave group members without compensation.

The evolution of the European legal system demonstrates that such situations are not solely the product of stakeholders' often limited financial means, they are also the result of *legal limitations*. Individual stakeholders can expend their limited economic resources to bring individual damages lawsuits, but individual resources are insufficient to promote judicial protection of collective interests.<sup>61</sup> Within the civil law system, no substantive right is beyond individual subjectivity, and the legislatures consistently limit the forms of judicial protection that can be promoted on behalf of stakeholders.

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61. See Cappelletti, *supra* note 10, at 660.

*B. The American and European Legal Experience:  
From Derivative to Class Actions*

The legislatures of many European countries anticipated the E.U. would make changes to representative litigation. In the event of legal inadequacy, it is incumbent upon legal systems to overcome their traditional approach or, at the very least, adjust it to take new, pragmatic considerations into account. National legislators were urged to reduce limitations on representative disputes by stakeholders who found such limitations unacceptable. For example, the Italian Civil Code (“Civil Code”)<sup>62</sup> was amended in 2003 to authorize derivative lawsuits to obtain damages on behalf of a corporation against directors who are alleged to have breached their fiduciary duties to the corporation itself.<sup>63</sup> Until driven to do so by the need to protect minority shareholders, Italian legislators never attempted to increase judicial protection of corporations through the possibility of derivative actions aimed at compensating damages suffered by the corporation. The initial skepticism towards derivative actions resulted in reduced protection of corporate interests. Controlling shareholders are not inclined to bring damages lawsuits against the board of directors because corporations’ boards are often comprised of a selection of the controlling shareholders.<sup>64</sup>

Such a derivative action must be properly viewed as *reinforcing* the protection afforded to Italian corporations through legal remedies. Before it was amended in 2003, the Civil Code provided for derivative actions. This type of action was not aimed at compensating damages, but it allowed minority shareholders to sue in a corporation’s name in order to obtain a judicial replacement of the board of directors following relevant breaches of their fiduciary duties.<sup>65</sup> This legal remedy is still in force and provides another useful illustration of the traditional civil law approach to representative litigations: an approach that allows the representative party to sue in the form of derivative action only where the judicial protection afforded to stakeholders does not directly affect their individual interests and rights. Instead, where derivative actions provide a suitable vehicle for assuring individual rights (such as rights to damage awards), they are not accepted as an integral part of the legal system. A comparable approach is visible when legal rules authorize organizations or other representative entities to bring derivative lawsuits in order to preclude future unfair practices. Even this type of remedy shows itself as so unfit to directly affect the individual rights of stakeholders that civil law systems allow organizations to bring lawsuits on behalf of stakeholders. To the contrary, damages lawsuits are forbidden by civil law systems as derivative actions because they are intended to assure individual rights. Once again, this selective approach is

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62. See Codice civile, marzo 16, 1942, n.262 G.U. Ap. 4, 1942, n.79 (It.) (Italian Civil Code of 1942, Publ. L. No. 262) [hereinafter Civil Code].

63. See Civil Code, *supra* note 62, art. 2393–bis. This legal provision, art. 2393–bis., has been translated in English and reprinted in ITALIAN COMPANY LAW (Valerio Piacentini ed., 2014) [hereinafter Abstract of the Civil Code].

64. See FED. R. CIV. P. 23.1. For a recent analysis of derivative actions within the pattern of entrepreneurial litigation, see generally JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 33 (2015).

65. See Civil Code, *supra* note 62, art. 2409 (translated and reprinted in Abstract of the Civil Code, *supra* note 63, art. 2409).

consistent with the principle of individual subjectivity that characterizes litigation within the civil law tradition as unrepresentative.

In the years since the Consumer Code was enacted,<sup>66</sup> the Italian legislature has been forced to ponder a new question: must a modern legal system make a commitment to reforms in order to increase the judicial protection of individual and collective interests through derivative actions or class actions?<sup>67</sup> If increasing the possibility of bringing derivative actions did not represent a dramatic legal change, integrating the paradigm of class actions into civil law tradition was problematic for many reasons. In short, when class actions are viewed through the lens of American law (the traditional model of class actions),<sup>68</sup> they appear inconsistent with bedrock principles founded in the civil law tradition. There is not only the problem of bringing a lawsuit on behalf of a class,<sup>69</sup> but there is also the question of whether or not class members must opt to participate in the lawsuit brought by the class representative.

It is well-known that in the American legal system, class actions proceed on an opt-out basis.<sup>70</sup> To opt out is to declare that he or she, a potential class member, will not be bound by any judgment. While the opt-out procedure implies the automatic involvement of all class members in the binding effects of judicial decision,<sup>71</sup> the complex regulatory system based upon Federal Rule of Civil Procedure (“FRCP”) 23 distinguishes situations where “the court *may* direct appropriate notice to the class”<sup>72</sup> once the class action is certified from situations where “the court *must* direct to class members the best notice that is practicable under the circumstances.”<sup>73</sup> The distinction implies that in “*may*” situations, the

66. See Consumer Code, *supra* note 37.

67. See, e.g., Jolowicz, *supra* note 1, at 233 (noting that “the action brought by a representative of a group or class of persons would appear on its face to provide the most obvious procedural technique for the protection of the rights or interests of the group or class.”).

68. Even though the origins of class action are deeply rooted in English law, the American tradition has engendered the most relevant and practiced model of class-wide litigation. See, e.g., Zechariah J. Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932); YEAZELL, *supra* note 20; Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Actions*, 52 DEPAUL L. REV. 401 (2002); RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEM: A COMPARATIVE PERSPECTIVE* 9 (2004). See also JACK H. FRIEDHENTAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 753 (12th ed. 2018) (“For many years the class action was viewed as a uniquely American device, unlikely to take root abroad. However, forms of collective action increasingly are being adopted outside of the United States, influenced by, but not fully embracing, the American form.”).

69. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

70. See generally BARBARA ALLAN BABCOCK ET AL., *CIVIL PROCEDURE: CASES AND PROBLEMS* 1035 (5th ed. 2013); JACK H. FRIEDHENTAL ET AL., *CIVIL PROCEDURE* 709 (5th ed. 2015); LINDA J. SILBERMAN ET AL., *CIVIL PROCEDURE: THEORY AND PRACTICE* 968 (5th ed. 2017); JOANNA C. SCHWARTZ & STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 829 (10th ed. 2018). There are notable exceptions in which the driving concern is protecting class members in light of their individual expectations.

71. See, e.g., *Abbott Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 859 (7th Cir. 2002) (“The point of allowing opt outs is to separate the claims of class members from those of others. If parties that have opted out could be dragged back in under the supplemental jurisdiction, a core function of Rule 23(b) would be nullified.”); *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 470 (3d Cir. 1994) (“Members of a Rule 23(b)(3) class are automatically included and remain so unless they make a timely election to opt-out.”).

72. See FED. R. CIV. P. 23(c)(A) (emphasis added); see also FED. R. CIV. P. 23(b)(1)–(2).

73. See FED. R. CIV. P. 23(c)(B) (emphasis added); see also FED. R. CIV. P. 23(b)(3).

judgment “include[s] . . . those whom [the] court finds to be class members”<sup>74</sup> even when the court has chosen to avoid any notice to the class, while in the “*must*” situations, the judgment “include[s] . . . those to whom the . . . notice was [necessarily] directed.”<sup>75</sup> The focus on the use of notice has implications for the role played by the opt–out mechanism. Because FRCP 23(c)(2)(A) merely authorizes the court to order notice to the class that has been certified under FRCP 23(b)(1) or (2),<sup>76</sup> it provides little room for the opt–out mechanism to operate.<sup>77</sup> It allows class members to opt out of the class “on a selective basis,”<sup>78</sup> meaning only when the court has deemed it appropriate to ensure them the possibility of individual exclusion.

To the contrary, when the class is certified under FRCP 23(b)(3),<sup>79</sup> the court is required to order notice to all members so that they are individually entitled to opt out of the class whenever the class action has been certified. The underlying principle, which coheres with the representative nature of class actions, is that class litigation rigorously proceeds on an opt–out basis only when it is an aggregation of many individual claims that revolve *predominantly* around some common questions of law or fact. Conversely, when the class action becomes a mechanism for preventing impairments of non–class interests under FRCP 23(b)(1) or seeking final injunctive or declaratory relief under FRCP 23(b)(2), the right to opt out of the class depends on the cautious deliberation of the court.<sup>80</sup> In particular, the court is to allow class members to opt out when the binding effect of the class action on that member would be more detrimental than the costs of notice under FRCP 23(c)(2)(A).

This legal framework is informed by matters of individual behavior, economic analysis, and judicial efficiency. For jurists and commentators who view class litigation as promoting generalized solutions, the opt–out mechanism is the appropriate rule to govern collective cases without going further by issuing several similar decisions or imposing costs and risks on the class members.<sup>81</sup> On the one hand, the opt–out basis prevents procedural disturbances because issues such as the legitimacy of class members or their membership to the class cannot arise and pose obstacles to judicial decision.<sup>82</sup> On the other hand, the opt–out mechanism increases

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74. See FED. R. CIV. P. 23(c)(3)(A).

75. See FED. R. CIV. P. 23(c)(3)(B).

76. See FED. R. CIV. P. 23(b)(1)–(2). Rule 23(b)(1) allows the court to certify the class action when it alternatively recognizes that (i) the class opponent would otherwise be at risk of being subjected to incompatible duties or (ii) class members who would not be parties to the individual litigation could produce injustice as a practical matter. Rule 23(b)(2) allows the court to certify the class action when (i) the class shares a general claim against the party opposing the class and (ii) the class seeks either final injunctive or declaratory relief. *Id.*

77. *Cf. Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008) (“Members of a Rule 23(b)(2) class do not receive notice and can’t opt out.”).

78. *Cf. Eubank v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).

79. See FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) allows the court to certify the class action when it recognizes that (i) the questions of law or fact common to class members predominate over individual interests and (ii) the certification of class action reveals itself as the best way to process the case. *Id.*

80. See FED. R. CIV. P. 23(c)(A) (providing that “the court *may* direct appropriate notice to the class.” (emphasis added)).

81. See Dodson, *supra* note 22, at 173 (“In an ‘opt–out’ class, any person within the scope of the class definition is a class member by default unless she affirmatively excludes herself from the class and preserves her right to litigate individually.”).

82. See Miller, *supra* note 15, at 666 (“Even if the negative effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed

the efficiency of the legal system by reducing costs of litigation because the benefits of “aggregating the relatively paltry potential recoveries”<sup>83</sup> outweigh the costs of the representative nature of the proceedings.<sup>84</sup> In other words, the fact that class members do not directly participate in the proceedings (i.e., they are not entitled to the production of documents) can be accepted to avoid the costs of repeating “issues from trial to trial”<sup>85</sup> because requirements such as numerosity,<sup>86</sup> commonality,<sup>87</sup> and typicality<sup>88</sup> warrant a generalizable solution for all class members.<sup>89</sup>

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conduct and providing small claim rectification—considerations that thus far have escaped measurement and perhaps always will.”); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 785 (2005) (“When offered as a means of addressing potential sources of unfairness to class members in an ongoing proceeding, notice and opt out operate on the presumption that absentees will read the contents of a notification and possess the capacity to make a meaningful decision about how best to protect their own interests.”); FRIEDHENTAL ET AL., *supra* note 68, at 753 (arguing that “the [class] procedure aggregates claims and defenses that the named representative and class members share in common, but which any individual litigant alone might not be able to pursue because of the expense and inconvenience of litigation.”).

83. See *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

84. See FRIEDHENTAL ET AL., *supra* note 68, at 753.

85. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).

86. See FED. R. CIV. P. 23(a)(1). See also Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device*, 1983 SUP. CT. REV. 459, 475–76 (1983); *Cent. States Southeast & Southwest Areas Health & Welfare Fund v. Merck–Medco Managed Care, LLC*, 504 F.3d 229, 244–45 (2d Cir. 2007) (“The numerosity requirement . . . does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate.”); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (“Although the number of members in a proposed class is not determinative of whether joinder is impracticable . . . the size of the class in this case—100 to 150 members—is within the range that generally satisfies the numerosity requirement.”); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (“Impracticable does not mean impossible.”).

87. See FED. R. CIV. P. 23(a)(2). See also *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001) (commonality can be satisfied when at least one question of fact or law “is common to each member of [the] class.”); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (“[I]n a civil–rights suit . . . commonality is satisfied where the lawsuit challenges a system–wide practice or policy that affects all of the putative class members. . . . In such circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality.”); *Mullen*, 186 F.3d at 625 (“The test for commonality is not demanding and is met ‘where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.’” (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997))); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (noting that while “[t]he concepts of commonality and typicality are broadly defined and tend to merge, . . . neither of these requirements mandates that all putative class members share identical claims . . . [so that] factual differences among the claims of the putative class members do not defeat certification.”).

88. See FED. R. CIV. P. 23(a)(3). See also *Rector v. City and County of Denver*, 348 F.3d 935, 950 (10th Cir. 2003) (“By definition, class representatives who do not have Article III standing to pursue the class claims fail to meet the typicality requirements of Rule 23.”); *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (“Typicality focuses on the similarity between the named plaintiffs’ legal and remedial theories and the legal and remedial theories of those whom they purport to represent.”); *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 896 (6th Cir. 1996) (stating that the claimer “who can assert only federal . . . claims, would be unable to adequately represent a class which includes state law claimants, because his claims would not be typical of theirs, as Federal Rule of Civil Procedure 23(a)(3) requires.”); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (“The rule does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, ‘where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.’” (quoting *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D.Md. 1974))).

89. See *Wal–Mart*, 564 U.S. at 338; *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2245 (1997) (“Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a ‘class

The question thus arises of how civil law systems can balance the economic and procedural advantages of the opt-out mechanism against the legal restrictions on representative actions. The ideal of individual subjectivity pervades the relationship between substantial rights and judicial protection. Treating class actions as a means of judicial protection for absent parties is inconsistent with procedural systems that forbid representative actions, albeit with some notable exceptions.<sup>90</sup> Under the opt-out mechanism, the class judgment exerts binding force on all class members, including the proponents of class action; the judicial decision is binding even upon those who will never become party to the class litigation or exercise their procedural rights to protect their substantive interests.<sup>91</sup>

For these reasons, in the years following the first foray of the E.U. into representative litigation,<sup>92</sup> some European countries introduced a revolutionary legal change. The most basic regulations are those in which national legislators have authorized private damages lawsuits in the form of limited representative actions, such as in France<sup>93</sup> and Spain.<sup>94</sup> This legal restriction implies that certain consumer organizations are exclusively entitled to bring such lawsuits on behalf of

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[so large] that joinder of all members is impracticable’); (2) commonality (‘questions of law or fact common to the class’); (3) typicality (named parties’ claims or defenses ‘are typical . . . of the class’); and (4) adequacy of representation (representatives ‘will fairly and adequately protect the interests of the class’.”); see also Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353 (1999) (emphasizing “the requirement that there be adequacy of representation for absent class members before they may be bound to a proceeding in which they had no individual ability to participate.”).

90. For an illustration of the Italian legal system and its reluctance towards representative litigation, see *supra* Section II(A); see also Civil Code, *supra* note 62, arts. 2393–bis, 2409.

91. Cf. *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 176 (1974) (“[E]ach class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action.”). For classes certified pursuant to Rule 23(b)(3), a notification to the class is required before the binding effect of class judgment may be exerted. Because Rule 23(c)(2) makes explicit that the notification will specify that “the court will exclude from the class any member who request exclusion,” all class members are automatically bound by the class judgment, unless they decide to opt out of the class. See FED. R. CIV. P. 23(c)(2)(B)(v). Instead, the class members who do not opt out of the class “may enter an appearance through an attorney if [they] so desire.” See FED. R. CIV. P. 23(c)(2)(B)(iv).

92. See *supra* Section III(A).

93. See Loi n. 92–60, Jan. 18, 1992, arts. 524–1, 621–1, 621–2, 621–7 to 621–9 (French Consumer Code of 1992, Pub. L. No. 92/60, arts. 524–1, 621–1, 621–2, 621–7 to 621–9) (Fr.) [hereinafter French Law]; see also Sabine Bernheim–Desvaux & Patricia Foucher, *L’effectivité du droit français de la consommation*, in ENFORCEMENT AND EFFECTIVENESS OF CONSUMER LAW 287, 295 (Hans–W. Micklitz & Geneviève Saumier eds., 2018). For a comparative analysis, see Fisch, *supra* note 23, at 60.

94. See C.E., B.O.E. n. 51, Nov. 16, 2007 (Spanish Law of Consumers and Users Protection of 2007, Pub. L. No. 1, art. 37(c)) (Spain) [hereinafter Spanish Law]; L.E. CIV. N. 1, Jan. 8, 2000, art. 11 (Spanish Code of Civil Procedure of 2000, Pub. L. No. 1, art. 11) (Spain); L.O.P.J. n. 6 y 7(3), July 1, 1985 (Spanish Organic Law of the Judiciary of 1985, Pub. L. No. 6, art. 7(3)) (Spain). See also María Teresa Alonso Pérez et al., *An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law*, in ENFORCEMENT AND EFFECTIVENESS OF CONSUMER LAW 591, 601 (Hans–W. Micklitz & Geneviève Saumier eds., 2018) (“Nowadays, the most important proceedings before the courts in respect of consumer law (financial products, unfair terms on loans for house purchase) have been channeled through consumer associations.”).

individual consumers.<sup>95</sup> In other cases, the legal approach to collective actions has been more disruptive, leaving room for new considerations to move to the forefront. For example, the German legal system suggests a broad understanding of representative actions because it allows not only organizations, but also individual stakeholders (investors) to bring damages lawsuits against unfair financial information or breaches of duty to exactly perform securities contracts.<sup>96</sup> This legal backdrop is partly the product of financial scandals that involved a large number of shareholders and investors.<sup>97</sup> It also reflects the choice to empower the judicial protection of individual rights by allowing a representative subject to bring a lawsuit for money damages on behalf of a given group of stakeholders.<sup>98</sup>

While the new legal rules reflect a gradual development of legal principles in civil law countries, they reveal themselves as a sort of legal middle ground in which the active role of the *group representative* (the organization or the individual stakeholder) is overcome by the persistence of certain traditional characteristics. Recall the example of German law, which preserves the individual right of each member of the group to bring individual damages lawsuits on the same factual issues on which the claim of the group representative is already based.<sup>99</sup> These factual similarities authorize the aggregation and suspension of all individual cases until the common issues are addressed by a superior court.<sup>100</sup> The adjudication of a representative dispute exerts binding force on related private damages lawsuits. Thus, the German legal system is comprised largely of different elements that carry *neither* a pure civil law model nor a pure common law model.<sup>101</sup> The driving concern is not with protecting stakeholders through a representative claim but, rather, aggregating individual actions into a workable and integrated procedure.<sup>102</sup>

Similarly, English law has enacted a model of group litigation designed to comply with the requirements of representative lawsuits as articulated in other European countries. English law provides a special procedure used to guide the concrete disputes that come before the courts when factual or legal similarities are involved.<sup>103</sup> Each stakeholder is entitled to bring an individual lawsuit, paying

95. See French Law, *supra* note 93, arts. 621–1, 621–2; Spanish Law, *supra* note 94, art. 37(c).

96. See German Capital Markets Model Case Act, 2005, Pub. L. No. BGBL. I S. 2437 (amended in 2012) (Ger.) [hereinafter German Law]; see also P. Gottwald, *On the Extension of Collective Legal Protection in German*, 26 CIV. JUST. Q. 484 (2007); H. Micklitz & A. Stadler, *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, 17 EUR. BUS. L. REV. 1473 (2006); M. Bälz & F. Blobel, *Collective Litigation German Style: The Act on the Model Proceedings in Capital Market Disputes*, in CONFLICTS OF LAWS IN A GLOBALIZED WORLD 126 (E. Gottshalk et al. eds., 2007).

97. See M. Stürmer, *Model Case Proceedings in the Capital Markets: Tentative Steps Toward Group Litigation in Germany*, 26 CIV. JUST. Q. 250 (2007); see also THUIS BOSTERS, COLLECTIVE REDRESS AND PRIVATE INTERNATIONAL LAW IN THE E.U. 27–34 (2017) (noting that “[t]o come to some sort of resolution of (or at least a beginning of a solution to) the Deutsche Telekom case, the German legislator came up with the Kapitalanleger Musterverfahrensgesetz [(Capital Markets Model Case Act)] . . . which came into effect in 2005.”). For a comparative analysis, see Fisch, *supra* note 23, at 71.

98. See BOSTERS, *supra* note 97, at 31–32.

99. See German Law, *supra* note 96, art. 1(2); see also Stürmer, *supra* note 97, at 255.

100. See German Law, *supra* note 96, arts. 6(1), 7(1), 8(2); see also BOSTERS, *supra* note 97, at 31.

101. See Stürmer, *supra* note 97, at 258.

102. *Id.*; see also BOSTERS, *supra* note 97, at 31 (arguing that the German Law “can partly be seen as an opt-in system, as it will be accessible only when there is an adequate incentive for individual claimants to file a lawsuit in the first place.”).

103. See C.P.R. 19.10 (Group Litigation Orders) (Eng.). See generally I NEIL ANDREWS, ON CIVIL PROCESSES: COURT PROCEEDINGS 642, 645 (2013) (noting that GLO procedure “is founded on a simple requirement: that there will be a co-ordinated and central listing of all related cases on a group register



careful attention to the so-called “group litigation order” (“GLO”),<sup>104</sup> a judicial pronouncement that provides the basis for managing all claims that “give rise to common or related issues in fact or law.”<sup>105</sup> A GLO authorizes “the establishment of a register on which the claims . . . will be entered.”<sup>106</sup> The centralized resolution of common issues is binding on all individual claims entered on the group register, thereby precluding all similar claims.<sup>107</sup>

Despite important differences pertaining to the mechanisms for aggregating individual claims, both German and English law evidence substantial respect for the civil law tradition. Absent a stakeholder’s choice to opt in<sup>108</sup> and stand by the centralized solution of common issues, those collective procedures lack any effective means to give a generalizable and binding judicial decision on common issues. Bringing a civil lawsuit is a way of exercising a substantive right.<sup>109</sup> Therein lies the true significance of the principle of individual subjectivity that informs the civil law tradition: it leaves what is perhaps the most important principle for the protection of substantive rights on procedural grounds. Judicial protection depends on whether a plaintiff claims that the applicable law demands a certain substantive outcome.<sup>110</sup>

The lynchpin of American representative litigation, as articulated in the context of class action regulation,<sup>111</sup> is that when a class action is decided, all class members are bound by judgment.<sup>112</sup> European legal systems, on the other hand, treat the solution of common issues as the basis for deciding other similar cases.<sup>113</sup> Thus,

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. . . specify[ing] relevant issues.”); see also Rachael Mulheron, *Some Difficulties with Group Litigation Orders—And Why a Class Action is Superior*, 24 C.J.Q. 40 (2005).

104. See C.P.R. 19.11 (Group Litigation Orders) (Eng.). See also *Taylor v. Nugent Care Society* [2004] EWCA (Civ) 51 (Eng.) (explaining that the GLO system, which was introduced by an amendment to the English Civil Procedure Rules in 2000, depended on “the experience of the courts that if litigation involving a substantial number of claimants was to be managed in the appropriate way, it was essential that there should be some procedure which provided the courts with very wide powers to manage the proceedings.”); Mulheron, *supra* note 103, at 53 (noting that GLO procedures “have no requirement which would enable a court to make an order requiring a claimant to join a group action if the claimant chose not to do so. A claimant is perfectly entitled to decide to bring an action without taking that step. The fact that he has that right does not mean, however, that there are no good reasons why he should join a GLO which covers issues which will be involved in his litigation.”).

105. *Id.*; C.P.R. 19.10 (Group Litigation Orders) (Eng.). See also ANDREWS, *supra* note 103, at 646 (noting that “[s]uch a ‘common’ issue will normally concern questions of liability or the availability of a particular head of loss.”).

106. See C.P.R. 19.11(2)(a) (Group Litigation Orders) (Eng.).

107. C.P.R. 19.12(1)(a) (Group Litigation Orders) (Eng.). Under Rule 19.12(1)(a), the judicial determination on common issues is binding on the whole group “unless the court orders otherwise.” See ANDREW, *supra* note 103, at 646 (noting that “decisions on ‘common’ issues are binding on, and in favor of, the group.”).

108. See ANDREWS, *supra* note 103, at 643 (“The GLO procedure is an opt-in system.”); Mulheron, *supra* note 103, at 47 (“[T]he GLO schema is an opt-in regime.”).

109. See CAPPELLETTI & PERILLO, *supra* note 2, at 42; Rowe, *supra* note 2, at 159; Parker, *supra* note 2, at 280; Cappalli & Consolo, *supra* note 2, at 264.

110. See *supra* Section II(A).

111. See FED. R. CIV. P. 23.

112. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (“[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation. . . . Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply.”); Wolff, *supra* note 82, at 763 (“Rule 23 is hedged about with elaborate protections aimed at ensuring that the court will exercise th[e] authority [to multiply the binding effect of their proceedings] only to an extent consistent with the interests of the absentees.”).

113. See generally Rachael Mulheron, *The United Kingdom’s New Opt-Out Class Action*, 37 OXF. J. LEG. STUD. 814 (2017).

the central distinction between the American and European approach is that the former requires the consistent application of a given judicial decision within the context of class members, and the latter does not. The conceptual terrain of the American class action involves an interest all class members share in having their substantial rights protected in the absence of any procedural choice. In other words, class members are not called upon to show that they are entitled to relief. The adjudication of a class–representative claim is sufficient to protect the legitimate expectations of class members—those who live under “the same event or pattern or practice and . . . the same legal theory”<sup>114</sup>—on procedural grounds.<sup>115</sup> The irrelevance of class members’ lawsuits also provides a consistent explanation for the opt–out mechanism that infuses the non–mandatory American class action<sup>116</sup> with a general preference for control over the disruptive (and, as mentioned above, often unbearable) costs of individual claims.<sup>117</sup>

Instead, European legal systems are grounded in a more formalistic reasoning. Given the adjudication of a class–representative claim, bringing individual lawsuits is necessary to legitimate its application, or the application of its legal reasoning on common issues, to those who expressly consent to it. It is one thing to accept that the solution of common issues exerts binding force on the adjudication of class members’ claims, but it is quite another to conclude that when a representative case is decided, the judicial reasoning must be considered as effective to protect the expectations of all would–be class members. In cases where the representative procedure requires class members to bring individual lawsuits against the wrongdoer, judges are called upon to update their decisions in light of the solution to common issues arising in the representative case.<sup>118</sup> In doing so, judges will invariably take into account the relevant facts of each individual case and stand by the legal reasoning of previous decisions relevant to common issues notwithstanding doubts about the merits of said decisions. Further, judges are asked to combine prior legal reasoning with factual and legal contexts emerging from the cases before them. The existence of individual lawsuits implies that judges decide the disputes of class members on the assumption that the allegations align with the claim of the class representative. The factual and legal distance between the claim of the class representative and the claims of class members increases the probability that different judges will ground their decisions in different factual assumptions or

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114. See *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).

115. See Wolff, *supra* note 82, at 763. For a useful illustration of the English legal system, see ANDREWS, *supra* note 103, at 625 (arguing that representative proceedings under English rules imply that “[m]embers of . . . represented class are not parties to the action. Nevertheless, those class members will receive the benefit of a *res judicata* decision. . . . This form of proceedings, therefore, is an opt–out system.”).

116. See FED. R. CIV. P. 23(b)(3). If a class is certified under Rule 23(b)(1) and (b)(2), class members have no choice to be excluded from the class. *Id.*

117. See, e.g., Sherman, *supra* note 68, at 410 (“The percentage of ‘opt outs’ in most class actions is small, which could be explained by the fact that many class members, particularly in consumer and product liability cases, are content to have the case brought on their behalf, or simply by the natural inclination of people toward inaction in such situations.”); see also ANDREWS, *supra* note 103, at 625 (“[A] declaration in favour of a large class of represented persons can be a powerful and often decisive element in securing individual redress . . . [and] facilitat[ing] multi–party claims for monetary redress.”).

118. See C.P.R. 19.12(1) (Group Litigation Orders) (Eng.); see also Mulheron, *supra* note 103, at 44–45 (“Any judgment or order given on a GLO issue is binding upon other parties on the group register, and the court can also order the extent to which a judgment will bind parties to claims which are subsequently entered onto the register.” (footnote omitted)).

in different interpretations of legal principles. Put more simply, the European legal approach provides that when a judge finds a solution of common issues in a representative case, such a solution is binding for judges who will later be asked to decide the claims of individual class members.

In spite of the binding force of the representative judgement, there are sometimes plausible grounds for deciding the cases of class members differently; if warranted, judges *can* decide the individual cases of class members differently from each other or in contrast to the decision rendered in the representative case. If there is the possibility that the decisions of such cases can diverge in meaningful ways, that possibility suggests that the protection of class members' expectations depends, in large part, on individual consent. Where such expectations possess merit as individual lawsuits, the binding decision of a representative case will not necessarily deprive stakeholders of the power to exercise their substantial rights by suing the wrongdoer.<sup>119</sup> This dynamic lends even greater importance to the opt-in and opt-out mechanisms discussed further below.

### C. Opt-Out Versus Opt-in

The foregoing analysis offers two guiding principles for understanding representative litigation in diverse legal systems. First, common law legal systems establish the general principle that class actions, once certified, have a binding effect on whomever the court finds to be within the membership of the class, unless class members are entitled to opt out of the class and have chosen to exercise that option.<sup>120</sup> Second, European legal systems provide for a set of cases in which the representative power of a named plaintiff must be combined with the power of stakeholders to sue the same wrongdoer. Thus, representative litigation in European legal systems is not *fully* "representative." The representative claimant is entitled to bring a civil lawsuit on behalf of class members, but the adjudication of a representative dispute can exert its binding effects on class members if, and only if, they have consented to it by opting in.

Both mechanisms hold advantages and disadvantages, and the trade-offs are apparent. Those who view the opt-in mechanism as paramount to private and contractual freedom accept a substantive reduction in the representative nature of class action. The opt-out mechanism can create destabilizing consequences for stakeholders beyond those who directly bring class actions as named plaintiffs but shows an inclination in favor of the representative nature within the context of class actions.<sup>121</sup> For instance, the need to bring individual actions may impose individual costs and discourage class members from protecting their legitimate expectations. Nevertheless, the binding effect exerted by the solution of common issues reduces the destabilizing effects of different judicial decisions.<sup>122</sup> Likewise, the opt-out basis can reduce the costs and time of potential lawsuits, encouraging the named plaintiff to seek relief for small amounts of money, but concentrating all decisional powers—mainly the power to decide whether to settle or to continue litigation—on

119. See CAPPELLETTI & PERILLO, *supra* note 2, at 42; Rowe, *supra* note 2, at 159; Parker, *supra* note 2, at 280; Sherman, *supra* note 68, at 418–24.

120. See FED. R. CIV. PROC. 23(b)(3), (c)(2)(B)(v), (c)(3)(B).

121. For an illustration of the debate over the opt-out and opt-in mechanisms, see Dodson, *supra* note 22, at 184–87; John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3 (1983).

122. Kennedy, *supra* note 121, at 29.

a class representative.<sup>123</sup> Moreover, when the representative plaintiff enjoys a successful outcome, the opt-out mechanism tends to impede class members from bringing individual lawsuits because they remain subject to the binding force of the previous decision. Similarly, despite the opt-in mechanism, when a class representative is successful in his or her lawsuit, class members cannot bring individual lawsuits because their individual disputes are deemed to have been already litigated.<sup>124</sup>

#### IV. ITALIAN CLASS ACTION AND ARBITRATION

The scope of representative litigation takes yet another form within the context of the Italian legal system. The American legal system resolves collective disputes by relying on the opt-out mechanism and the guiding role of class certification. European legal systems generally warrant a more active role for the judiciary in addressing common issues of law or fact and imposing that legal reasoning on the judges who are asked to decide the claims of class members. The tendency of the Italian legal system, under analysis here, is to displace the centralized resolution of common issues with the acceptance of class litigation by class members. The Italian legal system gives import to the autonomy of individual class members to claim their rights and to avail themselves of the final adjudication. These legal principles reflect the long-held value of individual subjectivity by focusing attention on the role played by the class members within the contexts of multiparty litigation and arbitral proceedings.

##### A. *The Italian Class Action*

The dynamics of legal development at institutions like the Italian Parliament are seemingly in a state of perpetual hesitation. This is particularly true in cases involving new procedural rules. When the Italian legislature acknowledged the need to reinforce representative litigation through class actions, it began crafting a new regulatory regime. Two statutory proposals for authorizing stakeholders to bring a collective lawsuit for money damages borne of this regime were abandoned in 2004.<sup>125</sup> Even when the Italian legislature enacted a new statute that authorized collective actions for damages, it postponed its commencement both in 2008 and in

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123. Even if Rule 23(e) expressly authorizes class representatives to settle “claims, issues, or defenses of a certified class,” this authority is subject to the requirement of court supervision. When the proposal would bind class members, the judicial power to approve settlement can be exercised “only after a hearing and on finding that it is fair, reasonable, and adequate.” See FED. R. CIV. P. 23(e)(2); see also MULHERON, *supra* note 68, at 34; ANDREWS, *supra* note 103, at 626 (noting that under C.P.R. 19.6, “the representative claimant or defendant is *dominus litis* . . . and so it follows that the representative can compromise the claim or defense.”).

124. See Micklitz & Stadler, *supra* note 96, at 1499; Dodson, *supra* note 22, at 203. For an illustration of the English legal system, see Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249, 262 (2001) (noting that “multi-party litigations should proceed as group actions rather than as representative proceedings . . . [M]ost multi-party traffic already takes the group action route because the representative action does not generally allow damages to be awarded at large in favor of a class.”).

125. See Legislative Proposals no. 3838 and 3839 presented to the Italian Parliament on March 27, 2003 available, respectively, at [http://legxiv.camera.it/\\_dati/leg14/lavori/schedela/trovaschedacamera\\_wai.asp?PDL=3838](http://legxiv.camera.it/_dati/leg14/lavori/schedela/trovaschedacamera_wai.asp?PDL=3838) (last visited Jan. 11, 2019) and [http://legxiv.camera.it/\\_dati/leg14/lavori/schedela/trovaschedacamera\\_wai.asp?PDL=3839](http://legxiv.camera.it/_dati/leg14/lavori/schedela/trovaschedacamera_wai.asp?PDL=3839) (last visited Jan. 11, 2019).

2009. In 2010, the legislature finally established the first Italian class action through an amendment to the Consumer Code.<sup>126</sup>

Generally speaking, the Italian class action is effective at preserving a stable core within the broader legal system of consumer protection. The driving concern in the Italian legislature's decision to permit class actions was, no doubt, protecting consumers or users in light of their common expectations. For the Italian legislature, the solicitude for expectations of consumers or users represented specific concerns with judicial protection in matters of standard contractual clauses, products liability, and unfair commercial or competitive practices. When the amendment to the Consumer Code authorized class lawsuits for money damages, consumers and users lacked any representative means to protect themselves individually against contractual or non-contractual detrimental acts.<sup>127</sup>

### B. Comparative Analysis of Italian Class Litigation

According to Italian law, consumers and users can *individually* bring class lawsuits for money damages and restitution. Alternatively, they can bring such lawsuits by proxy, meaning through a given consumer organization. Even when they opt to delegate an organization, stakeholders may sue or be sued as representative parties on behalf of all members of a class. The permissibility of a class action depends on whether all requirements listed in the provisions of the Consumer Code are satisfied. Named plaintiffs have the burden of proving the requirements for class certification are satisfied; if so, the court will certify the class.

This set of requirements bears similarities to that of other European and Anglo-American legal systems. For example, FRCP 23 requires the existence of “questions of law or fact common to the class”<sup>128</sup> before the case will be certified as a class action in America. Likewise, under Rule 19.10 of the English Civil Procedure Rules, the group litigation order requires that the claims “give rise to common or related issues of fact or law.”<sup>129</sup> Pursuant to the Consumer Code, the court must evaluate whether the individual rights of the named plaintiff(s) can be

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126. See Consumer Code, *supra* note 37. For an illustration of Italian class actions, see generally Pailli & Poncibò, *supra* note 37, at 355. The class action has been considered at length in Italian academic literature. See, e.g., CLAUDIO CONSOLO & BEATRICE ZUFFI, L'AZIONE DI CLASSE EX ART. 140-BIS COD. CONS. (2012) [The Class Action Under Article 140-bis of the Italian Consumer Code]; ANDREA GIUSSANI, AZIONI COLLETTIVE RISARCITORIE NEL PROCESSO CIVILE (2008) [Civil Procedure and Collective Damages Lawsuits]; ROMOLO DONZELLI, L'AZIONE DI CLASSE A TUTELA DEI CONSUMATORI (2011) [The Consumer Class Action]; Giorgio Costantino, *La Tutela Collettiva Risarcitoria. Note a Prima Lettura dell'Art. 140-bis Cod. Cons.*, 5 FORO ITALIANO 17 (2008) [The Collective Damages Lawsuit. First Readings on Article 140-bis of the Italian Consumer Code]; Remo Caponi, *Azioni Collettive: Interessi Protetti e Modelli Processuali di Tutela*, 5 RIVISTA DI DIRITTO PROCESSUALE 1205 (2008) [Collective Actions: Protected Interests and Procedural Models of Protection].

127. According to the Italian legal system, the protection of consumer interests was, and is, afforded through representative actions in situations where consumer organizations are entitled to bring lawsuits aimed at preventing unfair commercial or contractual practices. The representative nature of litigation depends on the fact that Italian legal provisions expressly allow consumer organizations to bring lawsuits on behalf of consumers. While some consumers receive direct and immediate protection by impeding ongoing unfair practices that caused their individual harms, other consumers, such as those who are not already harmed by unfair practices, receive only preventive protection because the injunctive relief inhibits future unfair practices against consumers at large. See Consumer Code, *supra* note 37, art. 140; see *supra* Section III(B).

128. See FED. R. CIV. P. 23(a)(2); see *supra* Section III(B).

129. See C.P.R. 19.10 (Group Litigation Orders 19.10) (Eng.); see *supra* Section III(B).

described as *homogenous*.<sup>130</sup> This requirement is intended to ensure that class representatives will best represent the expectations of class members in cases involving:

- i. Contractual rights when an entrepreneur breaches contracts with consumers or users with regard to the same type of factual conditions or economic clauses;<sup>131</sup>
- ii. Contractual and non-contractual rights when a given type of flawed product or service harms consumers or users,<sup>132</sup> allowing for money damages against producers, suppliers, or retailers;<sup>133</sup>
- iii. Contractual and non-contractual rights when consumers or users are harmed by given commercial or unfair competitive practices, abuses of market dominance, or collusion, allowing for money damages or restitution against the same wrongdoer.<sup>134</sup>

While the scope of class actions in Anglo-American models is defined broadly to encompass all situations where the number of parties is high enough to make joinder of all members “impracticable,”<sup>135</sup> the Italian legislature has narrowly tailored its regulation of class actions to serve compelling interests of consumers and users. This limitation reflects the fact that, over the past several decades, E.U. institutions have devoted more of their attention to the protection of consumers and users than any other type of stakeholders.<sup>136</sup> These groups garner special

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130. See Consumer Code, *supra* note 37, art. 140-bis(1). Phrased in terms of the Consumer Code, Italian class actions can be brought for the protection of “individual homogenous rights.”

131. According to article 140-bis(2)(a) of the Consumer Code, the consumer class protection refers to “the contractual rights of a plurality of consumers or users who are involved in an [sic] homogenous situation against the same business.” It also refers to those situations in which consumers or users are parties to a contract of adhesion under the Italian Civil Code. See Consumer Code, *supra* note 37, art. 140-bis(2)(a); see also Civil Code, *supra* note 62, arts. 1341, 1342.

132. For example, when a product presents unreasonably dangerous defects or when a financial service impedes stakeholders from accessing essential information.

133. According to article 140-bis(2)(b) of the Consumer Code, the consumer class protection refers to “the individual homogenous rights of consumers with respect to products or services even when they are not parties to a contract.” See Consumer Code, *supra* note 37, art. 140-bis(1)(b).

134. According to article 140-bis(2)(c) of the Consumer Code, the consumer class protection refers to “the homogenous rights to the compensation of damages occurred to consumers or users for unfair commercial or competitive practices.” See Consumer Code, *supra* note 37, art. 140-bis(1)(c).

135. See FED. R. CIV. P. 23(a)(1).

136. Class action regulation provides a special means of joining parties who are consumers or users within the context of E.U. law. See, e.g., Astrid Stadler, *Group Actions as a Remedy to Enforce Consumer Interests*, in NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 305 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009) (“The European Commission takes class actions or group actions . . . into consideration as a means of enhancing private enforcement in antitrust and consumer law.”); Geoffrey P. Miller, *Compensation and Deterrence in Consumer Class Actions in the United States and Europe*, in NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT 263, 279 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009). The E.U. recently presented a Proposal of Directive on European representative actions for the protection of the collective interests of consumers. See *supra* note 52.

protections because they typically represent the weaker party in matters of contracting and commercial transactions and are inherently subjected to an inequality of bargaining power or contractual imbalance.<sup>137</sup> These protections are interpreted and applied in a restrictive manner, reinforcing the fact that representative lawsuits and class actions are, and will remain, a means of protecting only certain types of stakeholders.

Italian law requires the court to consider the question of homogeneity, meaning substantial commonality, among claims. This requirement can be equated to a typicality test because it ensures that strong similarities exist between the interests of class representatives and those of absent class members. If the claim of the class representative arises from the same event or course of conduct as the class claims, and if it involves the same legal rules or remedies, the case will be certified as a class action. Differences among the claims do not prevent class certification if they are compatible with the homogeneity of claims. Compatibility is dependent on the fact that the salient circumstances of individual cases are a typical and representative sample of the class claims. Disparities between claims are deemed intolerable only when they resulted from a significantly different course of action. For example, it may be that the lack of homogeneity depends on limited or irregular distributions of a given type of product or service among consumers or users.

The court is also called upon to decide questions regarding the ability of named plaintiffs to adequately represent the class. Italian law requires the court to be particularly attentive to evaluating whether a class representative improperly deviates from the interests of class members. Even if the court can exercise discretion in this determination, potential conflicts of interest and deficiencies in moral or economic integrity are sufficient to render class representatives inadequate.<sup>138</sup> These requirements provide ample room for judicial authority to operate. Crucial to class actions is a need to protect the interests of class members who play a less active role than parties engaged in a conventional litigation. The fate of a class action cannot be influenced by unfair behaviors of class representatives, so class representatives' adequacy and trustworthiness are indispensable, and deficiencies—whether moral deficiencies of the proposed individual or factual discrepancies between his or her case and the case of other class members—pose significant obstacles to bringing a class action.

Italian class certification carries similarities to the traditional grounds on which class certification is commonly justified in American law, but there are also crucial differences between the Italian legal regime and common law tradition. The most notable differences are twofold, and they are equally relevant in determining whether Italian class actions may be asserted in arbitral proceedings. First, Italian law requires that not only the defendant, but also the public prosecutor be served with original process via copies of the summons and complaint. Notifying a public

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137. See, e.g., Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 388 (2012) (arguing that “the class action is a primary mechanism of independent challenge to mass-scale wrongdoing . . . in the domain of consumer law, where the asymmetries of scale between mass marketers and individuals allow the former to control standard form contracting.”); Reich & Micklitz, *supra* note 4, at 46, 48.

138. See Consumer Code, *supra* note 37, art. 140–bis(6). To judge the adequacy of representation, courts may evaluate a panoply of factors including, but not limited to, moral and economic integrity. They call to mind considerations such as the honesty and trustworthiness of the named plaintiff or the ability of the class representative to represent the class as the most adequate plaintiff with respect to experience, expertise, intellect, and financial resources.

prosecutor that a class action has been filed against a wrongdoer facilitates the application of criminal law. For example, a class lawsuit may challenge a widespread practice or policy affecting class representatives and class members, such as unfair commercial practices or sales of defective goods. If Italian law criminalizes such individual behaviors, the fact that the existing Italian rules provide this notice to prosecutors serves as a useful device to promote criminal prosecution.

Second, the Italian class action not only represents a break from conventional, non-representative litigation, but also from existing representative litigation because the parties who bring a class action can be organizations or *individuals*. As a result, Italian law governs the new representative action without completely disavowing the model of individual subjectivity. Even if the class representative brings the class lawsuit on behalf of other stakeholders, class members are asked to individually decide whether they choose to adhere to the class action. By maintaining a focus on individual subjectivity, Italian law requires that the class action proceed on an opt-in basis for class members.

The problem with the opt-in mechanism is not with its efficiency,<sup>139</sup> but with the uncertainty of its legal boundaries. Class members are simply authorized to *adhere* to the case certified as a class action.<sup>140</sup> The choice to opt in must take the form of written consent filed with the court, but no special form is mandated. Consent is necessary in order for a judicial decision to bind class members, but additional issues that deviate from the common questions of law or fact cannot arise from their individual claims.<sup>141</sup> By submitting to a class action, class members are entitled to declare themselves bound by the final decision. Their declaration also implies a blanket waiver of individual lawsuits against the defendant.<sup>142</sup> In other words, notwithstanding their individual consent, class members are not authorized to individually sue the defendant. Consequently, proposals to settle a case must be submitted to the entire class for approval because the compromise binds each member of the class (though Italian law authorizes the parties to settle claims, issues, or defenses without the approval of the court).

While the opt-out model requires parties to resort to court supervision in order to prevent conflicts of interest between class representatives and *passive* class members, the opt-in model allows *active* class members to control the wisdom of

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139. See Dodson, *supra* note 22, at 188–89 (arguing that “a uniform opt-out regime will work well for some classes but poorly for others, just as a uniform opt-in regime will work well for some classes but poorly for others. The problem is that a rigidly uniform system will not fit all cases well. The solution is to allow flexibility through choice. . . . The better course is to give the class the choice.”); see also Miller, *supra* note 136, at 280 (“The opt-in approach offers two advantages: it ensures that people who participate in the litigation are actually interested in the outcome; and it addresses the jurisprudential perception that litigation is not legitimate if a party who has committed no actionable wrong is subjected to a preclusive judgment without voluntarily agreeing to participate.”).

140. See Consumer Code, *supra* note 37, art. 140-bis(3), (9)(b). According to these rules, consumers and users who want to avail themselves of the protection provided by this article are called upon to adhere to class action. *Id.* at art. 140-bis(3). They also dictate that adherence implies waiver of individual compensation and restitution lawsuits. *Id.* Finally, they require that class members declarations are to be filed with the clerk of court within, at most, 120 days after the publication of notice of class certification. *Id.* at art. 140-bis(9)(b).

141. See Consumer Code, *supra* note 37, art. 140-bis(14). This rule specifies that all parties—that is, both class representatives and class members—are bound by final judgment, while those class members who have chosen not to adhere to the class action can bring individual lawsuits against the wrongdoer.

142. *Id.*



the settlement. Thus, even if the opt-in model allows parties to settle their disputes without giving the power to approve or veto settlement to the court, those class members who do not settle their claims are entitled to bring individual lawsuits against the wrongdoer.<sup>143</sup> The same is true of many other cases that occur with some regularity in practice, such as voluntary dismissal or compromise.<sup>144</sup>

The Italian approach to class actions evinces a remarkable ambivalence. On the one hand, it combines the power to bring a lawsuit on behalf of a class of stakeholders with the need to accept the binding effect of final judgment, thereby warranting extensive consideration. On the other hand, the approach is inclined to give ample regard to class members' consent, avoiding judicial discretion in determining whether class members are bound by a judgment, and focusing instead on according respect to individual intentions. For example, the challenges inherent in the opt-in mechanism justify a more active role for the court in assuring that class members receive notice of the action.<sup>145</sup> This judicial activism depends on the premise that assessing the impacts of class actions serves as a basis for determining whether the opt-in mechanism is useful in protecting individual expectations. An informed choice to opt in and be bound by the final judgement requires that stakeholders receive adequate levels of information about the factual backdrop that affects putative class members.<sup>146</sup>

The importance of individual consent in class action litigation leads to the question of whether or not class action *arbitration* is consistent with the Italian legal system. This prospect is particularly intriguing in light of the consensual basis of arbitration in which the civil law tradition is deeply grounded. Viewed through the lens of arbitration, the class action becomes an element of legal protection that must be reconsidered to determine whether it is admissible in the context of arbitral proceedings, and whether it requires extensive adjustments to individual behaviors of stakeholders.

### C. *Interplay Between Italian Class Actions and Arbitration*

While class action arbitration represents an ordinary part of legal protection within the Anglo-American tradition, Italian scholars have not scrutinized the interplay between class actions and arbitration.<sup>147</sup> This is not because class litigation has not garnered appreciable reliance in the Italian legal system, but because many Italian stakeholders may overestimate the weaknesses or underestimate the strengths of class actions. The absence of written provisions can

143. See Consumer Code, *supra* note 37, art. 140-bis(15). Italian law implicitly requires that proposals to settle the case be submitted to all class members for approval. It does not, however, have the effect of giving the power to approve or veto settlement to the court. Moreover, article 140-bis(15) expressly authorizes class members to bring individual lawsuits against the wrongdoer when they have not consented to settlement of class action.

144. *Id.*

145. See Consumer Code, *supra* note 37, art. 140-bis(9).

146. Dodson, *supra* note 22, at 197 (declaring that “an affirmative expression to opt in to class membership is a much clearer manifestation of informed consent.”).

147. See Gabriele Crespi Reghizzi & Matteo Dragoni, *Class Action and Arbitration Procedures—Italy*, in CLASS ARBITRATION IN THE EUROPEAN UNION 115 (Philippe Billiet ed., 2013); see also Antonio Briguglio, *Class Arbitration in Italia: spunti di metodo per la (eventuale) prosecuzione delle indagini*, 2 RIVISTA DELL'ARBITRATO 219 (2015) [Class Arbitration in Italy: Hints of Method for the Possible Continuation of Analysis]; Marcello Gaboardi, *Arbitrato e azione di classe*, 4-5 RIVISTA DI DIRITTO PROCESSUALE 987 (2014) [Arbitration and Class Action].

impede stakeholders from precisely recognizing all their rights and expectations. In other words, even if class action arbitration is not expressly forbidden by Italian law, the lack of legal provisions authorizing class arbitration necessitates a more complex approach to large-scale arbitration. One might contend that normative silence on class action arbitration weighs against class arbitration practice, although it seems to reflect a disregard for arbitration agreement itself. Alternatively, one may be persuaded by the importance of individual consent that class disputes are entitled to go to arbitral tribunals even in the absence of any legal provision authorizing such.<sup>148</sup> The latter position is reasonably more consistent with the modern characterization of the Italian approach to arbitration and its contemporary practice. Nevertheless, class litigation has found general acceptance in the Italian legal culture.<sup>149</sup>

In the Italian legal system, the main problem with class arbitration lies in the difficulties inherent in reconciling it with the traditional model of individual subjectivity and the selective role played by individual consent in arbitration agreements. Italian law is generally inclined toward individual litigation. This restrictive view tends to reduce legal consideration of representative litigation because it allows representative lawsuits to be brought exclusively in cases in which a specific legal provision exists. Even if an individual's access to justice operates as an absolute,<sup>150</sup> bringing a lawsuit on behalf of other stakeholders represents an exceptional rule. For this reason, in approaching the issue of class arbitration, Italian scholars tend to use the exceptional regulatory regime of class action to entrench restrictive interpretations of class arbitration. For example, some Italian scholars believe that the output of the class arbitration analysis—that is, the answer to the question of whether the class action arbitration is compatible with the Italian legal system—must be weighed against the value of individual consent in the arbitration agreement.<sup>151</sup> According to this opinion, even if Italian law acknowledges the possibility of multiparty arbitration, it does not grant exceptions in which a multiparty arbitration does *not* reflect the fact that all the parties to a contract have signed the same arbitration agreement.<sup>152</sup> These legal limitations on arbitrability of different, but related disputes represent another objection to admitting class arbitration within the Italian legal debate.

Italian law suggests a restrictive view of multiparty arbitration, but it must be adapted to those frequent situations in which multiparty disputes arise from different contracts. Even when several parties enter into a variety of different, but related contracts containing different, but related arbitration provisions, all issues in the dispute should be resolved within the same set of legal proceedings rather than within many different, but related proceedings. The current preference is understandable given the difficulty of achieving consistency across different

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148. Cf. Gaboardi, *supra* note 147, at 1005–06.

149. In 2016, forty cases were still pending. Only ten cases were certified as class actions, and only three cases were also adjudicated. In eighteen cases, formal defects such as lack of legal requirements were the basis for denial of class certification. Osservatorio permanente sull'applicazione delle regole di concorrenza, available at <https://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tri-bunali-italiani-2018/>.

150. See CAPPELLETTI, *supra* note 7, at 268; Feldman, *supra* note 3, at 70.

151. See Briguglio, *supra* note 147, at 224; see also Crespi Reghizzi & Dragoni, *supra* note 147, at 133–34.

152. See *infra* Section IV(D).

cases.<sup>153</sup> Depending on parties' allegations, different arbitrators could give varying import to different, but related facts. Different arbitrators could also adopt different views of the applicable substantive rules. Therefore, class arbitration analyses should be conducted not only in light of Italian arbitration law, but also in light of what the parties to an arbitration agreement have specifically decided to submit to arbitration. Individual consent thus plays a crucial role in adapting the normative core of Italian arbitration law to class disputes arising from different contracts.

#### *D. The Differences Between Multiparty Disputes in Litigation and Arbitration*

In court proceedings, the rules governing both joinder of additional parties<sup>154</sup> and consolidation of separate proceedings<sup>155</sup> reduce the risk that the unique procedural choices of parties to different, but related contract disputes will produce different decisions. Likewise, joinder and consolidation foster judicial consistency and coherence across cases involving common issues of fact or law.<sup>156</sup> To the contrary, the consensual basis of arbitration makes it reasonable to require all the parties to a multiparty contract who are in dispute to sue or be sued in the same arbitration when they have expressly recorded their consent to joinder of parties in the contract—or in an arbitration clause—from the outset. For these reasons, Italian arbitration rules warrant the same level of deference toward individual choices accorded to multiparty arbitration in other legal systems.

By speaking in terms of a plurality of parties that extends to both permissive and compulsory joinder, article 816–quater of the Italian Code of Civil Procedure (“Code of Civil Procedure”)<sup>157</sup> authorizes each of the parties to a multiparty contract to bring suits for breaches of contract against other parties in an arbitral tribunal. Such a possibility depends on whether the plaintiff(s) and the defendant(s) are bound by the same arbitration agreement and the ways in which the arbitration agreement allows the parties to appoint the arbitrator(s).<sup>158</sup> Alternatively, article 816–quater of the Code of Civil Procedure authorizes multiparty arbitration by allowing the plaintiff(s) to appoint one or more arbitrators and the defendant(s) to agree upon the same number of arbitrators or the appointing authority. Though this rule portrays litigants as parties to the same arbitration agreement, it can be applied

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153. See generally Sherman, *supra* note 68, at 401 (“[The class action] serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members.”).

154. See FED. R. CIV. P. 19, 20. See C.P.R. 6.20(3)(b) (Service of Documents) (Eng.); see Zivilprozessordnung [ZPO] [Code of Civil Procedure], §§ 59–61 (German Civil Procedure Statute, §§ 59–61) (Ger.); see CODE DE PROCÉDURE CIVILE [CPC] [Civil Procedure Code] art. 325 (Fr.).

155. See FED. R. CIV. P. 42; see also Commonwealth Land Title Ins. Co. v. IDC Properties, Inc., 482 F. Supp. 2d 203, 206 (D.R.I. 2007); Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982).

156. See FED. R. CIV. P. 42(a); see also Malcom v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993); Doug Brady, Inc. v. New Jersey Bldg. Laborers Statewide Funds, 250 F.R.D. 171 (D.N.J. 2008).

157. See C.P.C. n. 1443, Apr. 21, 1942 (Italian Code of Civil Procedure of 1942, Pub. L. No. 1443) (It.) [hereinafter Code of Civil Procedure], translated and reprinted in SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE app. B (2010). The source contains several arbitration rules (arts. 806–840) designed to both promote arbitration agreements and shape arbitral proceedings.

158. See Code of Civil Procedure, *supra* note 157, art. 816–quater(1).

regardless of whether all litigants agree upon the same arbitrator(s) or the appointing authority.<sup>159</sup>

Multiparty arbitration is protected only insofar as *all parties* agree upon the arbitrator(s) or the appointing authority. This means that, according to Italian law, multiparty arbitration can find expression in those cases in which litigants are parties either to the same arbitration clause, the same arbitration agreement related to a given contract, or a dispute grounded in a given contract.<sup>160</sup>

Article 816–quater of the Code of Civil Procedure imposes certain restrictions on multiparty arbitrations when arbitrator(s) are not jointly selected by the parties or by the appointing authority.<sup>161</sup> Compared to other legal systems, Italian law ascribes great importance to the consequences of deviating from the rules governing the selection of arbitrator(s). By drawing a rigid line between permissive and compulsory joinder of parties, Italian law provides a mechanism for transforming collective arbitration into something more consistent with the different choices of arbitrators when a common question of law or fact makes joinder appropriate (although not mandatory).<sup>162</sup> In these situations, the collective arbitration must be divided into as many two–party arbitrations as there are disputes arising under a given contract.<sup>163</sup> By contrast, if parties to a contract must be joined as plaintiffs or defendants,<sup>164</sup> the dispute is completely exempt from any collective arbitration proceedings when the alternative mechanisms for jointly selecting the arbitrator(s) are unworkable (i.e., because the parties do not agree upon the same panel of arbitrators or the same appointing authority).<sup>165</sup>

### *E. Italian Class Action Arbitration*

The absence of legal provisions authorizing class arbitration might be problematic in several respects.<sup>166</sup> If the inquiry into class arbitration is a mere question of legislative enactment, it necessarily follows that class arbitration is not currently available to protect individual and collective interests in Italy. Nevertheless, simply because Italian law has not expressly authorized class arbitration does not mean that judges or arbitrators are bound to deny stakeholders this form of legal protection. Class arbitration appears as a necessary component of any system of legal protection that aims to be complete.

The experience of class litigation in Italy demonstrates that this type of representative litigation is not solely the product of a legal system’s ability to adapt and respond to normative changes.<sup>167</sup> It is also the result of reasoned deliberation

159. *Id.*

160. See, e.g., LAURA SALVANESCHI, *L’ARBITRATO CON PLURALITÀ DI PARTI* (1999) [Multiparty Arbitration]; Gian Franco Ricci, *Art. 816–quater*, in *ARBITRATO* 533 (Federico Carpi ed., 3d ed. 2016) [Comment on the Article 816–quater of the Italian Code of Civil Procedure, Arbitration]; Crespi Reghizzi & Dragoni, *supra* note 147, at 128 (“[T]hird party voluntary intervention and its attraction to the arbitral proceedings always require the agreement of the third party concerned, all the arbitrators and all the parties to the arbitration, unless we deal with situations of necessary joinder of party.”).

161. See Code of Civil Procedure, *supra* note 157, art. 816–quater.

162. *Id.* at art. 103; see also FED. R. CIV. P. 20.

163. See Code of Civil Procedure, *supra* note 157, art. 816–quater.

164. *Id.* at art. 102; see also FED. R. CIV. P. 19.

165. See Code of Civil Procedure, *supra* note 157, art. 816–quater.

166. See Crespi Reghizzi & Dragoni, *supra* note 147, at 133–34.

167. The modern approach to the judicial protection of collective and individual interests tends to emphasize the importance of representative litigation for its potential benefits in terms of decisional

based on the perceived virtues of class litigation. Such normative choice implies that because class disputes can be resolved through class litigation, there are compelling reasons to accept class arbitration when it is justified by an arbitral agreement. Rejecting class action arbitration in light of factors including the normative framework would mean reducing the incidence of individual and collective protection within the Italian legal system. Class disputes can actually arise in the context of consumer contracts and commercial transactions. Italian law promotes class litigation as a way of avoiding a number of costly and complex individual litigations. Thus, when parties agree to submit class disputes to arbitration, a normative framework silent on class arbitration should not pose any real obstacle to its practical application.<sup>168</sup>

Even if class arbitration seems to be compatible with the normative core of Italian class actions, there remains the question of whether the arbitration agreement itself can be silent on class arbitration. The United States Supreme Court faced this interpretative challenge in a series of seminal cases that collectively suggest a solution to the problem of silent arbitration agreements applicable even to Italian legal practice. In *Green Tree Financial Corp. v. Bazzle*,<sup>169</sup> the Supreme Court explained that arbitral tribunals, not judges, have the exclusive power to decide the question of whether class disputes can be submitted to arbitration considering the arbitration agreement.<sup>170</sup> Along with defending the conviction that the arbitral tribunal plays a crucial role in determining the concrete relevance of class arbitration, the Court concluded that an arbitration clause, though silent on class-wide arbitration, can be interpreted as implicitly consenting to class arbitration. Even if *Bazzle* has been viewed as an engine of normative activism in favor of class arbitration,<sup>171</sup> it produced a feeling of ambiguity and uncertainty by authorizing class proceedings on grounds of implicit consent.<sup>172</sup>

Post-*Bazzle* cases led to different interpretations of arbitration clauses silent on class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*<sup>173</sup> invoked the

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efficiency as well as reduction of costs. Several European legal systems used class litigation to entrench the legal protection of consumers' and users' interests. The Institutions of the European Union are being asked to craft a new regulatory regime authorizing a consumer class action that can be brought across the entire E.U. See *supra* Section III(B).

168. Cf. Gaboardi, *supra* note 147, at 1005.

169. 539 U.S. 444 (2003) (plurality opinion).

170. *Id.* at 450–51.

171. See *Supplementary Rules for Class Arbitrations*, AM. ARBITRATION ASS'N (Oct. 8, 2003), [https://www.adr.org/sites/default/files/documt\\_repository/Supplementary%20Rules%20for%20Class%20Arbitrations/pdf](https://www.adr.org/sites/default/files/documt_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf).

172. See, e.g., S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 10 (2013); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 312 (2004); Jean R. Sterling & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 LAW & CONTEMP. PROBS. 75, 102–03 (2004); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1100 (2011); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1139 (2011); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 440 (2011) (noting that “to pose the question in this way—does the agreement ‘forbid class arbitration,’ or is it merely ‘silent’?—is inevitably to sow the seeds of future confusion.”); Thomas J. Stipanovich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 331 (2011).

173. 559 U.S. 662 (2010).

Federal Arbitration Act (“FAA”)<sup>174</sup> to support the conclusion that when an arbitration agreement is silent on class disputes, the mere consent to arbitrate is not sufficient to include class action among the selected types of arbitrable disputes. The point simply is that there are crucial differences between bilateral arbitration and class-wide arbitration. The pivotal distinction is that while the former is a basic and confidential two-party arbitration, the latter is a complex and costly proceeding involving a number of parties through a representative mechanism. Thus, irrespective of whether the dispute arises outside “the realm of ‘adhesive’ contracts,”<sup>175</sup> meaning standardized consumer contracts, the *Stolt-Nielsen* Court portrayed class arbitration as completely inconsistent with mere consent to arbitrate.<sup>176</sup>

Finally, *AT&T Mobility LLC v. Concepcion*<sup>177</sup> reinforced a rigid approach to class arbitration. In a five-to-four decision, the Supreme Court treated the differences between one-to-one arbitration and class arbitration as deserving of careful attention because they would be reason enough to exclude the unconscionability of class action waivers in consumer contracts.<sup>178</sup> The Court held the *Discover Bank* test, which was created by the California Supreme Court<sup>179</sup> for the purpose of evaluating whether a class action waiver in consumer contracts is unconscionable, violated the substantive law of arbitrability under the FAA.<sup>180</sup> According to the majority, because the arbitration agreement is “valid, irrevocable, and enforceable, as a matter of federal law, save upon such grounds as exist at law or in equity for the revocation of any contract,”<sup>181</sup> the fact that an arbitration clause is silent on class arbitration and the parties agree upon a class action waiver does not imply that the arbitration clause is unconscionable.<sup>182</sup> For present purposes, the

174. See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1990) [hereinafter FAA]; *Stolt-Nielsen*, 559 U.S. at 682 (stating that “the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))); *Am. Express Co. v. Italians Colors Rest.*, 570 U.S. 228, 233 (2013) (stating that the FAA requires courts to “rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes.” (citations, internal quotation marks, and brackets omitted)).

175. See Stipanovich, *supra* note 172, at 330; see also S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards when Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT’L L. 1017, 1083–91 (2009).

176. See S.I. Strong, *Does Class Arbitration ‘Change the Nature’ of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201 (2012); see also Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration in Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265 (2011); Drahozal & Rutledge, *supra* note 172, at 1137; Nagareda, *supra* note 172, at 1101; Rau, *supra* note 172, at 447; Stipanovich, *supra* note 172, at 328.

177. 563 U.S. 333 (2011).

178. For an illustration of class action waivers doctrines, see generally STRONG, *supra* note 172, at 210–27; Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. OF CONFLICT RESOL. 335 (2009); Diana M. Link & Richard A. Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After Stolt-Nielsen v. AnimalFeeds International*, 11 PEPP. DISP. RESOL. L.J. 275 (2011).

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

180. *Concepcion*, 563 U.S. at 348 (“The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”); STRONG, *supra* note 172, at 207; Rau, *supra* note 172, at 524; Stipanovich, *supra* note 172, at 371.

181. See 9 U.S.C. § 2 (1990).

182. See Strong, *supra* note 176, at 241–68; Rau, *supra* note 172, at 507 (arguing that “[i]n *Concepcion* the power of courts to hold a class-action waiver to be ‘unconscionable’ was severely truncated, if not indeed eliminated entirely.” (footnote omitted)); Stipanovich, *supra* note 172, at 371 (“The subject

key takeaway is that, notwithstanding contractual provisions purporting to waive class action, the *Discover Bank* rule allowed parties to arbitrate a class-wide dispute. In particular, class arbitration becomes workable under the *Discover Bank* rule when the arbitration agreement, though silent on class arbitration, is not only part of a consumer contract of adhesion involving a small amount of damages, but also coupled with a “scheme” of the party with superior bargaining power to “deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>183</sup> However, the Court underscored that class action waivers should not be treated as unconscionable and unworthy of protection because they reflect parties’ willingness to waive class arbitration and select bilateral arbitration. This is the crucial point raised by the majority in *Concepcion*.

The trouble with the majority opinion is that even if the Court has emphasized class arbitration waivers as a matter of consent, it has expressed disfavor toward *implicit* class arbitration. According to the plurality, structural inefficiencies would make class-wide arbitration unsuitable for advancing “efficient, streamlined procedures” as envisioned by the FAA.<sup>184</sup> With such a theory in place, there would be no room for class-wide arbitration if the parties do not *expressly* agree to arbitrate a class dispute. Because *Concepcion*’s protection of class action waivers continues to be a matter of extensive debate in American literature,<sup>185</sup> it is worth noting that Justice Breyer, in his opinion on behalf of the four dissenting justices, asserted that class arbitration is not only “consistent”<sup>186</sup> with the purposes of arbitration, but also compatible with its “countervailing advantages.”<sup>187</sup> Justice Breyer was not persuaded by the majority’s treatment of class action waivers. As Justice Breyer saw it, class action waivers “cannot fairly be characterized as a targeted attack on arbitration”<sup>188</sup> because of their consensual nature. In defending his position, he reasoned that consolidated proceedings neutralize the threat of transaction costs associated with individual disputes.

The pronouncements in *Concepcion* demonstrate that the arguments for protecting class arbitration waivers face serious challenges. Nevertheless, the majority’s treatment of such waivers serves as an additional justification for the Supreme Court’s approach to class arbitration. Such an approach, especially as revealed in *Bazze* and *Stolt-Nielsen*, emphasizes the role of individual consent in class action arbitration. Therefore, if the Supreme Court assigns reduced importance to arbitration agreements silent on class arbitration, it requires that class-wide arbitration openly reflect the subjective intentions of the arbitration agreement’s framers.

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arbitration agreement, which had been modified with several seemingly consumer-friendly terms in response to earlier judicial decisions, offered [in *Concepcion*] an unusually strong potential counterweight to concerns about overreaching in adhesion contracts.”); Reskin, *supra* note 20, at 113; Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 LOY. L.A. L. REV. 435 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 ORE. L. REV. 703 (2012); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Ernst & Young, LLP v. Morris, 137 S. Ct. 809 (2017); Nat’l Labor Relations Board v. Murphy Oil USA, Inc., 138 S. Ct. 1612; (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

183. *Discover Bank*, 113 P.3d at 1101.

184. *Concepcion*, 563 U.S. at 344.

185. See Stipanovich, *supra* note 172, at 380.

186. *Concepcion*, 563 U.S. at 359 (Breyer, J., dissenting).

187. *Id.* at 365.

188. *Id.* at 362.

These implications appear perfectly consistent with the Italian legal system. Indeed, the absence of any regulatory regime authorizing class arbitration makes it necessary to require an explicit agreement to arbitrate class disputes. The new regulatory regime crafted by the Italian legislature<sup>189</sup> frames class actions as an essential means of reinforcing the protection of consumer interests within the Italian legal system. If that assumption is correct, it might follow that when stakeholders expressly agree that class disputes arising from their contractual or non-contractual relations with a given wrongdoer<sup>190</sup> are subject to arbitration, the specific characteristics of Italian class litigation should not pose insurmountable obstacles to class action arbitration.

Some academic scholars are reluctant to acknowledge the legitimacy of class arbitration within the Italian legal system. If class disputes are submitted to arbitration, they argue, then the process of appointing arbitrators in multiparty disputes under article 816–quater of the Code of Civil Procedure makes it impossible to assert that arbitrators have been appointed by *all the parties* in dispute.<sup>191</sup> That critique would be true if the process of appointing arbitrators in multiparty disputes was unable to adapt itself to the core features of class litigation. The opt-in mechanism, however, can be used to reshape class members into third parties and allow their participation in an ongoing class arbitration. There is an interpretative reframing that provides a rational basis for class action arbitration in Italy, but that reframing requires that arbitration agreements expressly authorize class arbitration and class member intervention. Thus, the normative silence on class arbitration can be overcome by arbitration agreements *explicit* on the subject of class actions.<sup>192</sup>

#### *F. The Intervention of Third Parties in the Proceedings*

For further analysis, it is necessary to distinguish between situations where litigants are parties to the same contract from those in which they are parties to different, but related contracts. The former refers to an arbitration agreement that is common to all the parties to a given contract, while the latter deals with several arbitration agreements or several contracts including arbitration clauses. Article 816–quater of the Code of Civil Procedure authorizes a multiparty arbitration agreement in situations where such an agreement represents a common approach to the dispute, meaning it represents parties' common volition. A rule based exclusively on parties' common consent implies that all the parties agree upon the same arbitral tribunal. Instead, when stakeholders are parties to different, but related contracts, their individual expectations to jointly submit a dispute involving two or more contracts to arbitration should receive a different level of consideration.

When there is a functional relationship between two or more contracts, the interested parties to a contract can join ongoing litigation between the parties to a related contract. This conclusion is directly grounded in Italian procedural rules.

189. See Consumer Code, *supra* note 37, art. 140–bis.

190. See Consumer Code, *supra* note 37, art. 140–bis(2)(a)(b)(c).

191. See Code of Civil Procedure, *supra* note 157, art. 816–quater.

192. See generally STRONG, *supra* note 172, at 258 (noting that “concerns about whether and to what extent class relief constitutes a remedy need not bar class arbitrations from being defined as a form of regulatory arbitration, since traditional types of remedies . . . can be combined with class relief in such a way that a number of class arbitrations fall within the definition of regulatory arbitration.”).



According to such rules, what is necessary to allow interested parties to intervene is first a question of law or facts that are *common* to the applicant's claim or defense and the pending litigation.<sup>193</sup> This feature reflects the functional relationship between the two concrete disputes because their factual or legal similarity depends on both disputes relying on the same unsettled issues. Moreover, this feature implies that it is appropriate to consistently decide both disputes in order to prevent two separate and potentially opposing decisions. As discussed previously, different judges can evince different approaches to the resolution of the same question of fact or law. Italian procedural rules also require something more for purposes of making a third party's intervention workable. This second requirement is meant to qualify the functional relationship between the related disputes posed by the existence of common questions of law or fact. Indeed, what authorizes third parties to intervene in an ongoing litigation is also the fact that third parties' claims or defenses are totally or partially *incompatible* with the claims or defenses of those already parties. The incompatibility between claims or defenses must be interpreted as matter of substantive law; it means that the judicial decision to admit the claim of the original party implies that the claim of the third party will be necessarily rejected, and vice versa. Sometimes the claim or defense of the third party can be qualified as incompatible with the original claim or defense because it concerns a property or contract right that exists only as an absolute, individual right irreconcilable with the claims or defenses of all the original parties.<sup>194</sup> Other times the claim of the third party can be defined as partially incompatible with the claims of the original parties because it is reconcilable with one of the claims of the original parties.<sup>195</sup>

To summarize: when the claim or defense of the third party involves a common question of fact or law and it is also compatible with the claims or defenses of the original parties, a party to a contract that can be described as related to the contract that has been submitted to the ongoing litigation is authorized to intervene in such litigation. The account that emerges is one in which the relevance of disputes concerning different, but related contracts is strictly linked to the normative regime of third-party intervention in private litigation. It also carries important implications for resolving the question of whether those types of contractual disputes can be submitted to arbitration.

When the related contracts include similar or, at least, compatible arbitration clauses, legal systems tend to allow an applicant to intervene in a pending arbitration, even though the permission to intervene depends, in part, on the discretion of the arbitral tribunal and on the consent of all the parties in dispute.<sup>196</sup>

193. See Code of Civil Procedure, *supra* note 157, arts. 103, 105(1); see also FED. R. CIV. P. 24(b)(2).

194. For example, when the disputes arise on a property issue, the existence of the property right can be affirmed exclusively in favor of one of the parties.

195. For example, in cases of joint liability, when a co-debtor wants to intervene in the ongoing litigation to seek a motion on the merits, he also tends to support the similar defense of the other co-debtor against the common creditor.

196. For the Italian legal system, see Code of Civil Procedure, *supra* note 157, art. 816-quarter; see generally S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 938 (1998) ("Courts have . . . been reluctant to consolidate arbitrations without the parties' consent. Although some U.S. courts have been known to permit consolidation, others have not. European courts have generally been disinclined to consolidate arbitrations without the consent of the parties unless they can identify a theoretically acceptable alternative to express consent. Lack of privity of contract is typically the obstacle to consolidation, as it is with joinder and intervention." (footnotes omitted)); see also STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* (2010);

This is particularly true of the Italian legal regime governing situations in which persons not already parties may intervene in existing arbitration. Article 816–quinquies of the Code of Civil Procedure authorizes third parties to intervene in a pending arbitration (i) when they are parties to a related contract or, more generally, they are involved in the same set of contractual or non–contractual facts depending on a common question of law or fact;<sup>197</sup> (ii) their claims or defenses are totally or partially incompatible with the claims or defenses of those already parties; and (iii) their intervention is based not only on the explicit consent of the arbitral tribunal, but also on a specific agreement between persons who are already parties and those who attempt to intervene.<sup>198</sup>

The foregoing analysis suggests that there are two principal ways to explain the intervention of third parties in arbitration under Italian procedural law. First, third parties seeking to intervene in arbitration can be singled out as parties to the *same* contract that original parties have submitted to arbitration. In this case, both original and third parties are signatories of the same arbitration provision. Thus, original parties' claims and defenses are inextricably linked to third parties' claims or defenses. Second, a party to a contract including an arbitration agreement can seek to intervene in a pending arbitration when it concerns a *related* contract between two or more completely (or partially) different parties. In this case, the intervenor is party to a contract that is different from, although related to the contract originally submitted to arbitration. The implication is that the link between third parties' claims or defenses and original parties' claims and defenses is weaker in this case than in the previous case involving the same contract. This weakness depends not only on the fact that the contract originally involved in arbitration and the contract submitted to arbitration by the third party are different, at least partially, in their content, parties, and arbitration agreements.

Even though those differences reduce the impact of a third party's intervention in an ongoing arbitration in cases of related contracts, it is worth considering one exception that might enable a party to a related contract to intervene in arbitration. In such situations, the third party who is signatory to a related contract can intervene in an ongoing arbitration when: (i) the ongoing arbitration concerns a different, but related contract; (ii) the related contracts contain arbitration clauses that authorize each party to intervene in the ongoing arbitration concerning the related contract; and (iii) both the original party and the arbitral tribunal consent to the intervention

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Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT'L L. 341 (1990).

197. According to Italian law, third parties are entitled to intervene in a pending arbitration not only when their intervention is treated as a matter of discretion, but also when it emerges as a matter of compulsion. The former situation is characterized by the existence of a common question of law or fact between the claim (or defense) of the person attempting to intervene and the pending arbitration. The latter situation arises when the absence of a person reduces the likelihood that the arbitrator can provide justice for those already parties or be detrimental to the third parties themselves. See Code of Civil Procedure, *supra* note 157, arts. 105(1), 816–quinquies(2). Third–party intervention is applicable to situations in which a non–contractual relation (i.e., a relation concerning tortious obligations or obligations that arise from unjust enrichment and analogous doctrines) exists between the original parties to the arbitration, or at least one of them, and the third party. According to article 808–bis of the Code of Civil Procedure, persons involved in a non–contractual situation can submit their claims to arbitration under a specific arbitration agreement. This legal provision also justifies intervention by third parties in an ongoing arbitration when the case deals with the same non–contractual situation or with a different, but related non–contractual situation. See Code of Civil Procedure, *supra* note 157, art. 808–bis(1).

198. See Code of Civil Procedure, *supra* note 157, art. 816–quinquies(1), (2).

of the third party under appropriate circumstances, which arise when the ongoing arbitration and the intervention of the third party concern related contracts and intervention is expressly authorized by existing legal rules. These situations are consistent with the Italian regulatory regime of third-party intervention in ongoing arbitration.

The first condition—the relationship between the contract that the original parties have submitted to arbitration and the contract that the third party attempts to use as a basis for intervention—reflects the ample room that Italian arbitration law accords to intervention. According to the Code of Civil Procedure, arbitrators who are faced with a request to intervene will look first to the existence of common questions of law or fact between the claims or defenses of the original parties and the claims or defenses of the third party. Even when those claims and defenses concern different contracts, a common question of law or fact remains adequate to justify the intervention in an ongoing arbitration if the claims or defenses of the original parties and the claims or defenses of the third party depend on the resolution of that common question.<sup>199</sup> These requirements are compatible with the legal framework of Italian class actions.

Italian class actions apply to breaches of contracts between consumers or users and the same professional trader, as well as to non-contractual situations in which consumers or users receive economic and non-economic relief as a consequence of unfair commercial practices or defective products. Usually, situations in which a contractual liability is involved evidence a functional relationship between two or more similar contracts. Such a similarity depends on the fact that the same professional trader is the common signatory to all those contracts. It further depends on the fact that contracts between consumers or users and the professional trader are contracts of adhesion. The superior contractual power of the professional party to a contract of adhesion implies a standardization of contractual provisions.<sup>200</sup> If the same professional trader is party to all contracts with a number of consumers or users, there arises a legal and economic correlation among all contracts, at least when they concern a similar type of product or service. This correlation reasonably implies that when all contracts with the same professional trader contain arbitration clauses authorizing the consumer or user to submit to arbitration all those class disputes that arise from the performance of the contract, all signatory consumers or users are entitled to intervene in, or opt-into, arbitration as class members. Their claims must be similar to the claim of the class representatives, be against the same

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199. See, e.g., Strong, *supra* note 196, at 937 (noting that “consolidated arbitrations, like consolidated trials, share similar subject matter, involve common questions of law and fact, and determine similar issues and defenses.” (footnote omitted)); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 505–06 (1987); Schwartz, *supra* note 196, at 341; Stavros L. Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 113 PENN ST. L. REV. 1165 (2009); Code of Civil Procedure, *supra* note 157, art. 105(1).

200. See, e.g., Fairfield, *supra* note 29, at 1408 (arguing that “informed consent is expensive, that standardization is the best way to keep information costs low, and that consumers rationally prefer standardized deals to idiosyncratic ones.”); Issacharoff, *supra* note 137, at 388; *but see* Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 HARV. L. REV. 1173, 1229 (1983) (“[T]he practice of using contracts of adhesion, and the consequences of that practice, are best seen neither as results of the exercise of monopoly power nor merely as concomitants of mass production and mass distribution, but rather as circumstances intimately linked to the specific organizational form in which mass production and distribution most typically occur in our society.”).

producer or seller, involve the same type of contract, and encompass the same type of contractual breach.

These implications are not different in kind from the implications of non-contractual situations involving a wrongdoer and several victims of his harm. According to Italian law, class disputes can arise even when the relationship between litigants is not grounded in contract. Notwithstanding the absence of any contractual relation, individual damages can also emerge as a direct result of the wrongdoer's negligence. When a professional trader commits the tort of negligence in relation to a number of consumers or users, he tortuously breaches a duty of care owed to them. These situations occur with some regularity, for instance, in cases of product liability or unfair commercial or competitive practices. The functional relationship between the wrongdoer on the one hand and consumers and users on the other depends, in part, on (a) the potentially diffuse harmfulness of the wrongdoer's conduct, and (b) the fact that the wrongdoer's conduct tends to produce, either intentionally or recklessly, similar detrimental effects.

In the abovementioned cases, what grants consumers and users the ability to participate in a pending class arbitration is more nuanced. The absence of any contractual framework makes it inevitable that all potential parties to a class arbitration will be contractually linked through more arbitration agreements. In theory, if all parties agree to submit their disputes to class arbitration, there is no legal obstacle to promoting a class arbitration. In practice, it is highly unlikely that consumers or users will sign arbitration agreements with the wrongdoer when they have already suffered damages or losses, partially because individual or collective settlements might well satisfy their expectations. It is also unlikely that the wrongdoer will treat the opportunity to submit all disputes to class arbitration as a relevant factor in the protection of his confidentiality because of the massive nature of class-wide arbitration.<sup>201</sup>

Further, both contractual and non-contractual situations display the same degree of incompatibility between the claims of class representatives and class members on the one hand and the position of the professional trader against which the class representative has brought the class lawsuit on the other hand. What this setting supplies is an element of continuity with the requirements of third-party intervention in multiparty arbitrations. Italian arbitration law authorizes third-party intervention when their claims or defenses are inconsistent with the original party's claims or defenses.<sup>202</sup> On this point, the claims or defenses of those parties who decide to opt in to a class can be portrayed as assertions of contractual or non-contractual rights against the same respondent. The assertions of class members are compatible with the assertions of class representative(s) because they allege the same type of breach of contract or legal duty.

Finally, once all arbitration agreements between the professional trader and each consumer or user expressly provide that class disputes will be submitted to arbitration, the participation of class members in the arbitration requires that third-party interventions be specifically accepted by the original parties and the arbitral

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201. *Stolt-Nielsen*, 559 U.S. at 22 ("Under the Class Rules, 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations' . . . thus potentially frustrating the parties' assumptions when they agreed to arbitrate."); *Concepcion*, 563 U.S. at 348 ("Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult.").

202. See Code of Civil Procedure, *supra* note 157, art. 105(1).

tribunal. In this way, the consensual nature of the proceeding receives the deference to which it is entitled. Like the original parties to the arbitration, the class members decide to participate in the arbitration on a voluntary basis. Similarly, the original parties and the arbitral tribunal are called upon to accept the decision of each class member to opt in to the class.

### G. Notable Procedural Issues

It is worth reiterating that the class action is one of the most potentially impactful components of the Italian system of judicial protection of individual and collective interests. Even though its representative nature carries the potential to increase judicial efficiency both in terms of consistency from case to case and in terms of expenditure of judicial resources, the Italian class action faces risks of least restrictive interpretation and understatement. Is it possible to conceptualize class action arbitration as a consistent development of class-wide litigation? The answer to that question, which depends on whether the primary characteristics of Italian class actions are compatible with the consensual basis of arbitral proceedings, presents serious challenges that may immobilize the Italian academic debate.

By undertaking the analysis of class arbitration within the Italian legal system, Section I provided legislative and procedural arguments for gauging class arbitration and its consistency with the Italian rules on arbitral proceedings. First, the issue of immediate concern is whether class arbitration is consistent with Italian law notwithstanding Italian rules on class actions, which are silent on class arbitration. To reiterate, an analysis of the pervasiveness of class disputes or soundness of class actions in the Italian legal system is possible even absent a legislative enactment expressly authorizing class arbitration. Second, when the question arises as to whether it would be possible to conceptualize a right for class members to opt in to class membership within an arbitral proceeding, the answer requires an appeal to the Italian rules on intervention of third parties in ongoing arbitrations. In particular, given the existence of structural similarities between the claims of class members and those of class representatives, it may be thought to authorize class member participation in a pending arbitration through the consent of all concerned.

Another set of questions that sometimes arises involves some procedural technicalities of the Italian class action.<sup>203</sup> This category includes: (i) the role class members' decisions to opt in to class membership are entitled to play; (ii) the tension between the regulatory regime of such declaration and the rules governing the third-party intervention in multiparty arbitrations; and (iii) the critical role that the public prosecutor has to play when the court is called upon to decide the suitability of a class action.

According to the Consumer Code, class members are entitled to opt in to the class. In other words, class members are asked to demonstrate that their claims against the respondent refer to the same type of breach of contract or legal duty. In this way, class actions certified under article 140-bis of the Consumer Code have a binding effect on those class members who opted in to the class and whom the court recognized as members. Though the written declarations can be deemed integral to protecting individual consent to a class action, they cannot be described as

203. See Briguglio, *supra* note 147, at 226; Gaboardi, *supra* note 147, at 1007.

“complaints”; only the named plaintiff can properly assert a claim in which a demand for relief against the respondent is included. By contrast, class members provide the court and their opponent with the grounds upon which their claims rest. By presenting their claims, class members reveal their consent to class action or, in the words of Italian law, their “*adesione*” (acceptance) of class action.<sup>204</sup>

There is little practical difference between the complaint of the class representative and the declaration of a class member. While the motion of class representatives must be served on the respondent no later than twenty days prior to the hearing on the motion, the declarations of class members must be filed with the court within a reasonable time after class certification.<sup>205</sup> Even so, the distinction between complaint and declaration implies that it is only the claim of class representatives that can be defined as the request seeking an order on the merits. Despite this implication, both class representatives and class members are equally bound by the judgment. The declarations of class members have no effect other than to accept the judgment on the merits. By accepting the class action, class members implicitly waive any individual lawsuit for money damages or restitution against the respondent.<sup>206</sup> In the end, the role of class members might be described as joint participation in class litigation, while acknowledging they cannot play any proper role as parties to the proceedings. Even though class members must provide a copy of all documents used to support their claims, they cannot act in the proceedings, they can only wait for the judgment.

This approach to the role of class members is a sort of deference to individual consent to litigate within the context of representative litigation, but it could pose a serious obstacle to class action arbitration. If class members are destined to play a limited role in class disputes, it could make it difficult to treat them as third parties who are entitled to intervene in the arbitration. According to Italian law, the intervention of third parties in conventional, non-representative litigation or arbitration is generally deemed a precursor to seeking an order on their complaint, which is precisely what class members cannot seek under the Italian rules on class litigation, as those class members are only entitled to accept the judgment on the merits.<sup>207</sup>

Ultimately, however, it is perfectly reasonable to consider class members as third parties who intervene in the arbitration even though they play a more limited role than third parties who intervene in a multiparty, but not-class, arbitration. Rules on intervention constitute a useful framework for fuller appreciation of the conditions, such as the functional relationship among claims or the consent to arbitration of all concerned, that justify the joinder of class members. Even if article 140-bis(10) of the Consumer Code expressly forbids third-party intervention in an ongoing class proceeding, it can be viewed as necessary to reconcile the opt-in basis

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204. See Consumer Code, *supra* note 37, art. 140-bis(3).

205. Whether the time between class certification and filing is reasonable is a question left to the discretion of the court. Nevertheless, Italian law requires that class members’ declarations be filed with the clerk of court within 120 days after the publication of notice of class certification in newspapers or periodicals that are of general circulation in a particular province or city. See Consumer Code, *supra* note 37, arts. 140-bis(3), (9)(b).

206. See Consumer Code, *supra* note 37, art. 140-bis(3).

207. Although Italian law authorizes third parties to intervene even when they simply want to support one of the original parties without any direct request for the court, this situation is not relevant to class action because class members aim to support exclusively their own claims. See Code of Civil Procedure, *supra* note 157, arts. 105(2), 816-quinquies(2).

of class actions with its representative nature. Indeed, Italian law bans using third parties' intervention in a class-wide proceeding because the possibility to opt in to class membership would otherwise be discouraged.<sup>208</sup>

Finally, according to article 140-bis(5) of the Consumer Code, the complaints of class representatives must be served not only on the respondent, but also on the attorney general.<sup>209</sup> Generally, when a legislative act authorizes public authority to intervene in civil proceedings, it is relevant for purposes of protection of public interests, such as prosecuting violations of criminal laws. In these cases, the relevance of public interests is viewed as a substantive reason for asserting that a dispute cannot be submitted to arbitration. The consensual nature of arbitration reflects the substantive interests that require protection through arbitration.<sup>210</sup> Given the characterization of arbitration agreements as a matter of discretion rather than compulsion, parties can involve only private rights in arbitration procedures. Public interests, on the other hand, remain a matter of civil or criminal litigation. Therefore, when the attorney general is called upon to participate in a civil proceeding under existing rules of procedure, the legal system responds by establishing a presumption in favor of the public nature of the interests involved in the proceedings. Such a presumption thus entails that, despite having signed an arbitration agreement, the parties cannot submit a dispute to arbitration when legal rules dictate the intervention of the attorney general.

Article 140-bis(5) of the Consumer Code requires that the complaints of class representatives be served to the attorney general. That again raises the question of whether the rule seriously impedes parties' ability to submit their disputes to class arbitration. Answering that question requires a distinction between those situations in which the attorney general has been served with a copy of the complaint and those in which the attorney general, once served, has decided to intervene in the ongoing arbitration. In the former situation, the class arbitration will continue because the intervention of attorney general is merely potential; even when he is served with a copy of the complaint, he is not obliged to intervene. In these cases, the service is required as a means of informing the attorney general that a party has chosen to seek class certification. By contrast, when the attorney general attempts to intervene in a class-wide arbitration, his intervention creates the risk of paralyzing the procedure because the nature of the dispute would suddenly change.

A strong argument exists that this rule should be amended because participation of the attorney general in a class litigation is irrelevant to prosecuting the respondent for violations of criminal law. It would be more reasonable to expect the attorney general to be served with a copy of the complaint rather than to grant him the ability to intervene in the civil proceedings. Even so, the role of the attorney general can be considered as consistent with class arbitration under existing rules. Placing article 140-bis(5) of the Consumer Code and article 818 of the Code of Civil Procedure<sup>211</sup> side by side suggests a solution to the question of the intervention of

208. For the Italian debate, see Gaboardi, *supra* note 147, at 1007–08.

209. See Consumer Code, *supra* note 37, art. 140-bis(5).

210. See, e.g., Cappelletti, *supra* note 26, at 799 (“In France, Belgium, and Italy, for instance, the *Ministre public* [i.e., the attorney general] has the power to participate in any suit in which he recognizes an element of public interest or *ordre public*; yet in areas where the public interest is in great need of a forceful representative—as in consumer and environmental protection matters—the *Ministre public* has done very little.” (footnotes omitted)).

211. See Code of Civil Procedure, *supra* note 157, art. 818; see also Consumer Code, *supra* note 126, art. 140-bis(5).

the attorney general. The latter rule is widely debated by Italian scholars because it provides that arbitral tribunals are not capable of making interim orders unless expressly authorized by law. According to Italian law, it is consistent with the arbitration agreement for a party to request interim orders from a court before or during the arbitral proceeding. The arbitration will be temporarily suspended until the time of judgment from the court. Likewise, when the attorney general who has been served with a copy of the complaint asks to intervene in class-wide arbitration, the procedure should be suspended until the court has certified the class. Article 140-bis(5) of the Consumer Code allows the attorney general to intervene in a class litigation until the court will make the certification decision.<sup>212</sup> Though uselessly complicated, these two suggestions constitute the simplest step toward the resolution of a thorny issue under existing rules.

## V. CONCLUSION

Although resistance to moving away from an “individual-subjectivity” model of litigation exists, the protection of collective interests in the Italian legal system is expanding significantly toward the model of representative litigation. Representative litigation under Italian law is a useful, but limited means of achieving objectives such as equal and consistent protection of collective interests. Italian law imposes rigorous restrictions on the scope of representative litigation. In this way, the new regulatory regimes breed cautionary interpretations by reducing the ability of judges and scholars to develop the potential of legal texts.

Class arbitration can be viewed as reinforcing the protection of collective interests. According to Italian law, the representative nature of class actions prevents stakeholders from entirely bearing the costs of bringing individual lawsuits, while the opt-in mechanism increases the efficacy of class actions by promoting not only individual goals (such as a relevant reduction in the individual costs of litigation or a consistent treatment of individual claims), but also wide-ranging collective objectives (such as legal certainty and social justice). Admitting that class disputes can be submitted to arbitration advances those individual and collective benefits. Even if class arbitration tends to limit the confidentiality of respondents,<sup>213</sup> it can engender relevant advantages in terms of its positive effects on the length of proceedings and the complexity of discovery. Given time, its effect can be pervasive because the consensual nature of arbitration allows arbitrators to manage the ongoing proceeding in a more discretionary way than judges. That said, class arbitration is also characterized by a reduced impact of discovery because class disputes generally deal with liability for breach of consumer contracts or contracts of adhesion with the same producer.<sup>214</sup> Finally, it represents a significant

212. See Consumer Code, *supra* note 126, art. 140-bis(5); Gaboardi, *supra* note 147, at 1008.

213. *Stolt-Nielsen*, 559 U.S. at 22 (“Under the Class Rules, ‘the presumption of privacy and confidentiality’ that applies in many bilateral arbitrations ‘shall not apply in class arbitrations’ . . . thus potentially frustrating the parties’ assumptions when they agreed to arbitrate.”); *Concepcion*, 563 U.S. at 348 (“Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult.”).

214. See Consumer Code, *supra* note 126, art. 140-bis(2). When class disputes deal with non-contractual liability including tort and product liability, the role of discovery is significantly increased. Nevertheless, arbitrators who are asked to decide both contractual and non-contractual cases will invariably take into account some common questions of law or fact. The representative nature of class actions implies some legal or factual similarities between two or more claims. The burden of proving



alternative to individual and representative litigation in promoting an effective protection of collective interests within legal systems, such as the Italian one, in which both judicial and arbitral systems revolve around the “individual subjectivity” characterization.

Contending that class arbitration is applicable within the Italian legal system presents the problem of interpretative adequacy. Italian law authorizes class actions against a respondent, regardless of whether those disputes can be submitted to arbitration. Nevertheless, the determinants of arbitration primarily include the individual consent of the parties to the arbitration agreement. Its prevailing role implies that an arbitration agreement can overcome the normative silence on class arbitration. Even though certain procedural features of arbitration require interpretative adjustments in order to discharge civil lawyers’ obligations to rigorously respect the written law, the inquiry into class action arbitration brings the foundational drivers of arbitration to the forefront. The consensual nature of arbitration is served by the existence of arbitration agreements that explicitly authorize class actions. The existing rules on third-party intervention warrant reconciling the opt-in basis of class actions with the basic legal principles of arbitration. Therefore, class action arbitration is a viable alternative within the Italian legal system.<sup>215</sup>

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the material facts in which the named plaintiff and class members place their claims tends to be eased by those similarities. *See supra* Section IV(F).

215. The Italian Parliament recently enacted a new regulatory regime of class action by amending the Code of Civil Procedure. *See* Italian law on class action, Apr. 12, 2019, Pub. L. No. 31 (It.). It will enter into force in April 2020 and will abrogate the class litigation ruled by the Consumer Code. While the new Italian class action continues to proceed on an opt-in basis, its scope significantly changes. The new class litigation will be not only a way of protecting the interests of consumers or users, but it will become a general way of implementing individual protection by applying to the court. Indeed, the new regulatory regime will allow individuals or organizations to bring lawsuits for money damages or restitution on behalf of the class against a wrongdoer. Therefore, the scope of the new Italian class action is now limited to those situations that are expressly determined by consumer law, but it can be defined as broad and general. Any situations in which the stakeholder can assert a violation of an individual right is entitled to bring such collective redress on behalf of the class. The homogeneity among the situation in which the representative plaintiff was involved and situations in which class members are individually involved is the new requirement for the certification of class action. On the procedural ground, class members are entitled to adhere to class litigation not only in a preliminary moment during the litigation, but also when the collective case has already been decided on the merits. Moreover, according to the new law, the complaint of the class representative must be served only on the respondent, while there is no longer any need to serve it on the attorney general. *See supra* Section IV(G). Finally, the new features of class action do not foreclose the same conclusions reached above about the workability of class arbitration within the Italian legal system.