

## ARTICLE

## All for One and One for All: Class Action Litigation and Arbitration in New Zealand

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Class actions are a complex and contentious form of dispute resolution. They offer many benefits to parties—as well as society in general—and use of the procedure is expanding internationally. Class litigation, one mechanism for undertaking a class action, has been slow to develop in New Zealand. However, the alternative choice—class arbitration—has, to date, not publicly been chosen by any parties. This article examines the role of class actions in the New Zealand legal framework and conducts a comparative analysis of the relative merits of the two options (class arbitration or litigation). It contributes to the dearth of empirical and academic research in this field, where existing research focuses predominantly on the United States where class actions are well-established.

The article provides an overview of the existing legal framework for representative actions in the High Court Rules and specific statutory rights, and demonstrates the limited procedures available for class actions. It then provides a brief comparison with the Australian Federal class action regime and discusses the current and upcoming domestic class actions before our courts.

The article also argues that reforms proposed by the Rules Committee to introduce class action procedures to New Zealand should be a legislative priority for Government. While the courts appear willing to work around the existing framework, New Zealand must develop and introduce a formal procedural framework for class actions.

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The Arbitration Act 1996 does not address class arbitration. Parties wishing to bring class proceedings generally need to rely on consolidation, which is not adequate for such a purpose. The Act also has an inherent impediment to the growth of class arbitration with its special consumer protection requirements. Responding to these problems with the New Zealand approach, the article discusses United States-style class arbitration and considers whether any appropriate procedures could be implemented in New Zealand.

Finally, the article analyses the relevant advantages and disadvantages of both forums for parties choosing how to resolve their class action disputes. It concludes that the benefits are relative to the parties and particulars of the dispute, and a categorical answer is not possible. Ultimately, class actions are a new frontier that must be addressed in New Zealand before long.

## I Introduction

A *class action* can be defined as:<sup>1</sup>

... a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.

A comparable definition of the device was given in the New Zealand High Court by Asher J when he held that a true class action was where a third party brings a claim on behalf of persons who, when the case is heard, are unnamed and potentially indeterminate, identified only by category or class name.<sup>2</sup>

Class actions as a procedural device are recognised as part of the legal environment in many parts of the world, even in those places that do not provide for them as a form of formal dispute resolution.<sup>3</sup> Despite growing recognition, class actions remain complicated and—at times—controversial, inducing strong public debate.<sup>4</sup> Many academics, practitioners, business owners, public officials and consumers hold strong opinions for and against their introduction, and there are disparate views on their utility, efficacy, and

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1 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oregon, 2004) at 3.

2 *Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387 (HC) at [22], [27] and [43].

3 Paul G Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions around the Globe* (Oxford University Press, New York, 2012) at xxxv.

4 The topic is becoming the focus of seminars and conferences; see, for example, Queen Mary University of London School of International Arbitration and Calunius Capital "Inaugural Working Seminar on Group Claims in Arbitration" (Seminar, 2 November 2015) <[www.law.qmul.ac.uk](http://www.law.qmul.ac.uk)>.

desirability. While some commentators are firmly opposed, there is academic discussion emphasising the important public policy purposes the procedural device can serve.<sup>5</sup>

Class actions and related group litigation procedures are expanding throughout the world. Since 1990, numerous jurisdictions—including Australia, Canada, Chile, Germany, and the Netherlands—have adopted or substantially expanded dispute resolution procedures that allow for some form of class or collective redress.<sup>6</sup> They are now a well-established part of the United States and Australian legal environment—increasingly so in multiple Canadian jurisdictions.<sup>7</sup> In New Zealand, however, despite increasingly frequent discussions in the legal and business communities about the potential introduction and impact of class actions, development is slow.

There are a number of reasons why class actions have not been a feature of New Zealand's legal landscape.<sup>8</sup> One is the absence of clear procedural rules for such litigation: parties must rely on existing limited provisions in the High Court Rules and the Court's inherent jurisdiction.<sup>9</sup> Also, the Accident Compensation Scheme in New Zealand bars most forms of civil personal injury litigation, which provided much of the first wave of actions in other jurisdictions.<sup>10</sup> Other deterrents include the nominal damages generally awarded by the courts and the lack of litigation funding—at least until recently given the traditional restriction of the tort of maintenance and champerty.<sup>11</sup>

Despite these limitations, the number of actions in New Zealand is slowly increasing, some examples of which I discuss in this article. The topic is generating greater discussion, largely focused on how these claims are and should be dealt with by the courts. However, a controversial topic of equal importance and relevance—that of class arbitration (also known as “class action arbitration” or “class-wide arbitration”)—is also gaining traction. Class arbitration has been largely characterised as a “uniquely American device” and is the union of a traditional judicial class action and a contractual bilateral private arbitration, which evolved in response to the American corporate community's opposition to judicial class actions.<sup>12</sup>

While evidence suggests that class arbitration has been in existence since the early 1980s, the device rose to prominence with the United States Supreme Court decision in 2003 in *Green Tree Financial Corp v Bazzle* that implicitly approved the procedure.<sup>13</sup> The United States Supreme Court has subsequently further grappled with the procedural difficulties of this form of dispute resolution and these decisions received a great deal of

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5 Michael P Daly “Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration” (2007) 62 U Miami L Rev 95 at 106.

6 Karlsgodt, above n 3, at xxxv.

7 Liesle Theron “Class action litigation: a new frontier” (28 April 2014) New Zealand Law Society <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

8 See Nicole Smith and Sophie East “Class Actions – The New Frontier: What does ADR have to offer?” (paper presented to AMINZ Conference, Wellington, July 2015) at 2.

9 See Jenny Stevens and Sophie East “Class/collective actions in New Zealand: overview” (1 November 2016) Practical Law <<http://us.practicallaw.com>> at 1.

10 At 1.

11 At 1.

12 SI Strong “Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared” (2012) 37 NCJ Intl L & Com Reg 921 at 922 and 936.

13 *Green Tree Financial Corporation v Bazzle* 539 US 444 (2003).

attention.<sup>14</sup> While class arbitrations outside the United States are not widespread, there have been cases elsewhere, including Colombia, Germany and Spain.<sup>15</sup> There have also been court decisions in other countries, notably Canada, resolving issues relating to the assertion of class claims in the face of an arbitration agreement.<sup>16</sup> Given the rise in judicial class action procedure, class arbitration appears to be a new frontier faced by many jurisdictions and something that should be dealt with head-on.

To date, there have been no class arbitrations in New Zealand. However, as John Walton noted in his presentation to the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) Conference 2014, it is time New Zealand took a higher profile role in international dispute resolution.<sup>17</sup> New Zealand has a fine reputation in dispute resolution and the courts have adopted a strong pro-arbitration stance.<sup>18</sup> New Zealand was an early adopter of the UNCITRAL Model Law on International Commercial Arbitration 1985 and the Arbitration Act 1996 has maintained its relevance in arbitration practice. Thus, it is desirable that we stay at the forefront of arbitral practice and consider the implementation of procedures for major developments in the law, such as class arbitration.

Because this is a relatively novel area of arbitration internationally, and untested in New Zealand, there is a dearth of both empirical and academic research. Some research exists on the subject, but it is largely American-focused. As such, I limit the focus of this article and rely on a few commentaries and articles which have been selected for their comprehensive nature, including their incorporation of the limited research available. A leading commentator in the area of collective redress is Stacie Strong, a Professor of Law at the University of Missouri School of Law and an Adjunct Professor at Georgetown University (International Commercial Arbitration). She has written extensively on arbitration and I will draw expansively from her book *Class, Mass, and Collective Arbitration in National and International Law*, which is a leading work on this topic.<sup>19</sup> Her commentary supports the development of this form of arbitration and its inevitable rise in prominence outside the United States.<sup>20</sup>

Many questions remain concerning the development of class actions in New Zealand, relating to both procedural matters and the choice a claimant may make between pursuing litigation or arbitration. Whether there is any merit in developing a procedural framework for class actions is considered by examining the current legislative regime for dealing with domestic disputes in both forums. This leads to a brief review of the

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14 See *AT&T Mobility LLC v Concepcion* 563 US 333 (2011); and *Stolt-Neilsen SA v AnimalFeeds International Corp* 559 US 662 (2010). Commentators argued class arbitration was "dead" because of these cases, but this conclusion now appears premature. See Strong, above n 12, at 922, n 1.

15 See Jeffery S Leon, Eric R Hoaken and Rebecca Huang "Class Arbitration in Canada: The Legal and Business Case" (2010) 6 *Canadian Class Action Review* 383 at 386; and SI Strong "The Sounds of Silence: Are US Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitrations in Cases of Contractual Silence or Ambiguity?" (2009) 30 *Mich J Intl L* 1017 at 1035.

16 At 1035.

17 John Walton "International Arbitration: Are we a seat or are we just sitting" (paper presented to AMINZ Conference, Queenstown, August 2014) at 7.

18 At 1.

19 SI Strong *Class, Mass, and Collective Arbitration in National and International Law* (Oxford University Press, Oxford, 2013).

20 See, for example, SI Strong "Class Arbitration Outside the United States: Reading the Tea Leaves" in Bernard Hanotiau and Eric A Schwartz (eds) *Multiparty Arbitration* (ICC Institute of World Business Law, Paris, 2010) 183.

opposition to class arbitration and detailed comparison of the relative advantages and disadvantages of both options depending on the individual circumstances of the dispute.

Part II of this article provides an overview of the existing legal framework in the High Court Rules and specific statutory rights available for class actions, and includes a brief comparison with Australia where there is an established Federal class action regime, as well as the United States. Part III introduces and discusses two of the most high profile domestic class actions before our courts. Part IV examines the proposed reforms to the procedural framework, specifically the Bill drafted in 2009 to introduce a specific class action regime in New Zealand. I argue that it is prudent that these legislative reforms become a priority for Government. Although the courts demonstrate a willingness to work around the existing provisions, it is necessary for New Zealand to develop and introduce a formal procedural framework for class actions.

In Part V, I explore the technicalities of how an action of this type could be brought through arbitration in New Zealand. This involves a discussion of consolidation under the Arbitration Act 1996. I examine commentary on the appropriateness of this measure for these types of actions. Furthermore, I provide a brief discussion of class arbitration in the United States as a comparative tool for potential future developments of this procedure. Finally, in Part VI, I present the concerns of opponents to class arbitration and the policies affecting the willingness to create procedures to hear class claims. I then examine the potential choice parties must make between arbitration and litigation and the merits of each procedure that may influence the decision. There are very few analyses on the relative advantages and disadvantages of class litigation and arbitration, even though such qualitative analysis could significantly affect the future of the procedure. It will be argued that there are a variety of reasons why parties may prefer arbitration. However, these benefits are relative, and thus the decision must be made on a case-by-case basis.

Given the limited research available I focus on domestic disputes and minimise comparisons with other jurisdictions. It is not possible to canvass the entire range of associated substantive issues. Thus, I do not examine other relevant matters, such as the increasing availability of litigation funding in New Zealand or the use of mass arbitration in an investment treaty context.

Ultimately, class actions have a place in the future of dispute resolution in New Zealand and must be a priority for legislative reform. Class arbitration is a new frontier that should be met head-on by the New Zealand alternative dispute resolution community.

## **II Existing Class Action Legislation in New Zealand**

### *A Representative action under the New Zealand High Court Rules*

There are no specific class action statutes or procedural rules in New Zealand. The general mechanism that New Zealand claimants have relied on to bring a class action is the High Court Rules, contained in sch 2 of the Judicature Act 1908, permitting representative actions. There are two relevant Rules. The first, Rule 4.24, provides:

#### 4.24 Persons having same interest

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—

- (a) with the consent of the other persons who have the same interest; or
- (b) as directed by the court on an application made by a party or intending party to the proceeding.

While not originally intended to facilitate class actions, in *Saunders v Houghton* (part of the *Feltex* proceedings) the Court of Appeal described the Rules' orders as "a form of what elsewhere are called class action orders".<sup>21</sup> The Supreme Court in *Credit Suisse Private Equity LLC v Houghton* recently endorsed this where it said that r 4.24 must be exercised in a flexible manner and should be applied, provided its application would not cause injustice.<sup>22</sup> It also observed that "[a]s long as defendants are not compromised and the aims underlying representative actions are advanced, there is scope for continual development in this area."<sup>23</sup>

It seems then that the Supreme Court is open to and supportive of the courts making the necessary adaptations to grow representative actions in New Zealand.<sup>24</sup> One liberal development is the ability to bring a representative action for damages: the Court in *Saunders v Houghton* held that in appropriate cases, representative proceedings could be brought claiming a declaration of liability, thus establishing *res judicata* on the common issues and permitting individual claims to establish individual damage to follow.<sup>25</sup> A plaintiff, who has the consent of all members of the class and can establish the *same interest* requirement, can issue representative proceedings as of right. The threshold is set low for establishing the *same interest* requirement: the representative claimant only needs to establish that there are issues of fact or law common to all members, and that the representative group is capable of being clearly defined.<sup>26</sup> All members of the class validly represented are bound by the judgment.<sup>27</sup> Although the general time limits for civil proceedings apply to representative actions, the Supreme Court has held that once a representative action is initiated and an order made by the court, time ceases to run for potential members of the identified representative class.<sup>28</sup>

There has been debate whether r 4.24 allows proceedings to be brought on an opt-out basis.<sup>29</sup> An opt-out basis is where all persons falling within the bounds of the class are automatically included unless they take steps to exclude themselves. Rule 4.24(a) expressly requires some form of consent on the part of each claimant to participate in the proceedings; however, r 4.24(b) is expressed as an alternative and arguably allows an opt-out procedure. An opt-out approach was initially allowed in an *ex parte* application in the

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21 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [10]. See Part III(A) of this article for further discussion.

22 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [129]–[130] per McGrath, Glazebrook and Arnold JJ.

23 At [152]. See generally [147], [151], [152] and [159].

24 See also [130].

25 *Saunders v Houghton*, above n 21, at [14].

26 See, for example, *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 at [30]–[49] and [46]–[49]. The Court adopted a "generous approach", preferring to make a simple representative order to avoid complicating the case given so many members.

27 *Laws of New Zealand* Civil Procedure: High Court (online ed) at [72].

28 *Credit Suisse Private Equity LLC*, above n 22, at [127]–[129] and [170]–[171].

29 Smith and East, above n 8, at [18].

*Feltex* proceedings,<sup>30</sup> but subsequently reversed by French J to the standard New Zealand opt-in procedure.<sup>31</sup>

In that judgment her Honour made a number of comments disapproving of the possibility of opt-out proceedings under r 4.24(b). She stated:<sup>32</sup>

... in my view an opt-out procedure represents too radical a departure from the existing Rules. In the absence of legislative change, the Court must work within the existing Rules which only contemplate 'opt-in'.

In contrast, the Court of Appeal in obiter offered no comment, keeping open the possibility of an opt-out procedure under the existing rules.<sup>33</sup>

The second option for class action or representative proceedings under the existing legislation is provided in r 4.27. This allows for a "class of persons" or a community to be represented by "a local authority, public body or other representative body".<sup>34</sup> This Rule provides for representation of a far wider class of persons than those traditionally regarded within r 4.24 as persons having the same interest in the subject matter.<sup>35</sup>

### B *Specific statutory rights permitting class actions*

Some New Zealand statutes provide alternative mechanisms for collective recovery of alleged losses in certain limited situations. Most use the specific language of 'class actions'.<sup>36</sup> The proceedings are representative and must be brought by the nominated public body or person. Thus, the *class* option is not available under these statutes to multiple complainants who can establish similar interest. Instead, individual proceedings would be required.

For example, s 92B(2) of the Human Rights Act 1993 expressly allows the Human Rights Commission to bring civil proceedings on behalf of a class of persons where a complaint relates to persons who were allegedly subjected to a statutorily defined "discriminatory practice". Three conditions must be satisfied for the Commission to bring the class action proceedings, including consent from all complainants (in essence replicating the 'opt-in' function) and satisfaction that the proceedings will facilitate the Commission's specified function.<sup>37</sup> This provides a constraint on—and gives form to—the process.

Another example of a specific right is s 50(3) of the Health and Disability Commissioner Act 1994. That section allows the Director of Proceedings to bring representative actions on behalf of a class of persons before the Human Rights Review Tribunal in relation to allegations of a breach of the Code of Health and Disability Services Consumers' Rights. In comparison to the equivalent Human Rights Act section, there are surprisingly no detailed provisions relating to this type of class action.

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30 See *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 February 2008.

31 See *Houghton v Saunders* [2009] NZCCLR 13 (HC) at [168]–[170].

32 At [165].

33 *Saunders v Houghton*, above n 21, at [12].

34 Rule 4.27(g)–(h).

35 *Laws of New Zealand*, above n 27, at [72]. In *ENZA Ltd* it was held that *public interest* should not be given a narrow interpretation. See *ENZA Ltd v Apple and Pear Export Permits Committee* HC Wellington CP 266/00, 5 February 2001 at [13].

36 Stevens and East, above n 9.

37 Section 92B(6).

The High Court discussed both the above-mentioned provisions in *Commerce Commission v Carter Holt Harvey*.<sup>38</sup> The decision suggests that in proceedings brought under those provisions the individuals comprising the identified class do not need to be named. This is supported by the definition of a true class action held by Asher J.<sup>39</sup>

*Carter Holt Harvey* was a product liability case. At the trial court level, the High Court considered whether a class action could be brought under s 43 of the Fair Trading Act 1986. This provision requires that the names of those who would benefit from any orders had to be provided to the defendant before trial (but not when the proceedings were commenced). The Commerce Commission filed civil proceedings (brought under s 43) seeking refunds for end users and an order of payment of lost profits to Carter Holt Harvey's competitors for the misleading quality of timber.<sup>40</sup> The Commerce Commission did not disclose the names of the end users or competitors at the outset of the civil proceedings.<sup>41</sup> Carter Holt Harvey applied to strike out the statement of claim on two grounds: first, that the claim was brought too late in time; and, secondly, that the proceedings were an abuse of process—in part as they involved a class action in which the members of the class were not identified and had not consented to the claims being brought on their behalf.<sup>42</sup> Asher J contended that there was a legislative intention not to create in s 43 a right to bring true class actions (revealed in the parliamentary debates) and that this was evidenced by the specific emphasis on the persons being named (contrasted with the provisions discussed above).<sup>43</sup> However, the Court recognised that the section does authorise a type of variation of class action.<sup>44</sup> Following analysis of the section's procedural requirements, the Court held that it would be sufficient for the Commissioner to identify the class members at a later point and that the proceedings were not brought too late, thus refusing the strike out application.<sup>45</sup>

While not exhaustive, these examples demonstrate that Parliament is aware of the existence and potential of class actions. In the subsequent *Commerce Commission v Carter Holt Harvey* Court of Appeal judgment, in relation to class actions generally, one Judge noted that “[o]ne of the areas of serious underdevelopment in New Zealand civil law is that of ‘representative’ or ‘class action’ suits.”<sup>46</sup> Although current use is extremely limited, these specific statutory rights may be the bridge to further development and their (limited) application and discussion a guide to potential procedural requirements.

### C Comparison with other jurisdictions

In this Part, I compare the New Zealand approach with the approaches in Australia. I then briefly compare the approaches in Australia and the United States.

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38 *Commerce Commission v Carter Holt Harvey*, above n 2.

39 At [22], [28]–[30] and [43]. See s 1(B).

40 At [4]–[6].

41 At [17].

42 At [3].

43 At [43].

44 At [18] and [49].

45 At [46], [53], [55] and [98]–[99].

46 *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZCA 40, [2009] 3 NZLR 573 at [151]. Class actions were not discussed in the subsequent Supreme Court decision, *Carter Holt Harvey v Commerce Commission* [2009] NZSC 120, [2010] 1 NZLR 379, focus instead being on the time limitation point.



## (1) Australia

Class actions are now a firmly-established means of bringing a claim by a large group in Australia.<sup>47</sup> It is useful to understand the Australian class action model because, although it differs greatly from New Zealand's existing framework, it is likely to provide the basis for the development of New Zealand's approach. As discussed later in this article, the Rules Committee of the New Zealand courts proposed a class action Bill in 2009 and was greatly influenced by—and indeed copied some provisions directly from—the Australian legislation.<sup>48</sup>

Procedures had long existed in Australia allowing for forms of multiparty proceedings where plaintiffs had the “same interest” in the proceeding.<sup>49</sup> In the late 1980s the Australian Law Reform Commission presented a report in Federal Parliament recommending the introduction of class actions.<sup>50</sup> The identified policy objectives for the introduction were to enable individuals with causes of actions from multiple wrongs to bring proceedings for compensation in circumstances where it might not have otherwise been possible because of cost or lack of resources, to improve the efficiency of courts and the legal system in dealing with group claims and “to reduce the cost of proceedings by enabling common issues” to be heard in one proceeding.<sup>51</sup>

The Federal Court class action model is set out in pt IVA of the Federal Court Act 1976.<sup>52</sup> The amendment that introduced representative proceedings—styled as *class actions*—to the Federal Court of Australia came into effect on 5 March 1992.<sup>53</sup> Similar regimes came into effect in Victoria under pt 4A of the Supreme Court Act 1986<sup>54</sup> on 1 January 2000 and in New South Wales under pt 10 of the Civil Procedure Act 2005<sup>55</sup> on 4 March 2011, mirroring the Federal provisions.

In order to commence a class action in Australia, the claim must satisfy three threshold requirements. Together, these require seven or more persons with claims against one defendant in respect of “the same, similar or related circumstances”<sup>56</sup> giving rise to at least one “substantial common question of law or fact”.<sup>57</sup> The courts liberally interpret these threshold requirements and consequently they are generally not difficult to satisfy.<sup>58</sup> An action can be brought by an individual or a corporation who has sufficient interest to commence the proceeding on their own behalf against the defendant,<sup>59</sup> and it is not necessary to identify, name or specify the number of individuals within the class.<sup>60</sup>

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47 Ashurst Australia *Class Actions in Australia* (Quickguides, Ashurst Australia, September 2013) at 1.

48 Rules Committee *Class Actions for New Zealand: A Second Consultation Paper* (October 2008) at [3].

49 S Stuart Clark, Jocelyn Kellam and Larissa Cook “Australia” in Paul G Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions around the Globe* (Oxford University Press, New York, 2012) 392 at 405, n 70.

50 Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC 46, 1988).

51 At [354]. See also [69].

52 Federal Court Act 1976 (Cth), pt IVA.

53 Federal Court of Australia Amendment Act 1991 (Cth), s 3.

54 Supreme Court Act 1986 (Vic), pt 4A.

55 Civil Procedure Act 2005 (NSW), pt 10.

56 Federal Court Act 1976 (Cth), s 33C; and Supreme Court Act 1986 (Vic), s 33C.

57 Civil Procedure Act 2005 (NSW), s 157(1).

58 Ashurst Australia, above n 47, at 2.

59 Clark, Kellam and Cook, above n 49, at 408–409.

60 Federal Court Act 1976 (Cth), s 33H; and Supreme Court Act 1986 (Vic), s 33H.

Interestingly—and, at times, controversially—the Australian regime employs an opt-out model.<sup>61</sup> Under pt IVA of the Federal Court Act, once proceedings have commenced the court will fix a date by which members may opt out of proceedings. The court will also give directions as to the manner in which all class members are to be notified of the action and the procedure to be followed if they wish to opt out.<sup>62</sup> This approach notably differs from all current procedure—and the generally-accepted approach by the judiciary—in New Zealand to require an opt-in procedure.

## (2) Australia compared with the United States

Other jurisdictions, including the United States and Canada, provide for class actions. A comparison between these jurisdictions demonstrates that different approaches to the issue are possible. To illustrate, there are certain key differences between the Australian class action regime and the systems applicable in the United States.<sup>63</sup> First, Australia has no class certification requirement. This contrasts with the regime in the United States where the plaintiff must satisfy the requirements of numerosity, commonality, typicality and adequacy. Secondly, Australia needs only one substantial common issue of law or fact to commence an action, whereas the common issues must predominate the individual issues in the United States. Thirdly, class actions in Australia are heard by a judge alone, compared to a potential jury trial in the United States. Finally, unlike the regime in the United States, the Australian rules expressly allow for the determination of issues common to a subgroup or individual issues as part of the action.

Broadly, the Australian regime is more flexible and accommodating to claimants than the approach taken in the United States. This flexibility is desirable and a good model to consider given the existing similarities between that regime and New Zealand and the focus on making the court system accessible to all. As the Australian regime has now been in effect for over a decade, it may be possible to examine how the model is functioning and use that information to develop the procedural requirements for New Zealand.

## III Recent Class Actions in New Zealand

In New Zealand, at least seven high profile legal actions have or will proceed as class actions in all but strict legal name.<sup>64</sup> These cases have resulted in a body of case law, which

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61 Criticisms of the opt-out system in academia resoundingly focus on the provisions being inconsistent with the principle of freedom of choice. Proposed reforms, being promoted in the States of Victoria and New South Wales, include the adoption of an opt-in system. See Clark, Kellam and Cook, above n 49, at 393.

62 Sections 33J and 33Y.

63 See Ashurst Australia, above n 47, at 9–10; and Clark, Kellam and Cook, above n 49, at 411–412.

64 In addition to the two examples discussed in this Part, actions include the Kiwifruit Claim, the Plaster Cladding Claim against the James Hardie Group, the Steel Class Action, the Fair Play on Fees action, and claims related to the MV Rena grounding. See generally “Recent Decisions” The Kiwifruit Claim <[www.thekiwifruitclaim.org](http://www.thekiwifruitclaim.org)>; “Announcements” Plaster Cladding Class Action <[www.goodcladding.co.nz](http://www.goodcladding.co.nz)>; “Announcements” Steel Class Action <[www.steelclassaction.co.nz](http://www.steelclassaction.co.nz)>; and “About Us” <[www.fairplayonfees.co.nz](http://www.fairplayonfees.co.nz)>. For proceedings relating to the Kiwifruit Claim in particular, see *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596; and *Strathboss Kiwifruit Ltd v Attorney-General* [2016] NZHC 206. For proceedings relating to the Fair Play on Fees claim in particular, see *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827; and *Paciocco v Australia and New Zealand Banking Group Ltd*

taken together with the existing Rules, provide a framework for class actions. The following two actions I discuss demonstrate the particular growing need for more formal procedural guidance.

#### A *The Feltex shareholders claim*

Initiated in 2008, this legal action is the only large representative action in New Zealand to receive a substantive judgment.<sup>65</sup> It is a claim by former shareholders of Feltex Carpets Limited (Feltex) who bought shares in Feltex's initial public offering (IPO) in 2004. Feltex subsequently went into receivership and liquidation and the shareholders suffered losses relating to their investment.<sup>66</sup> A Mr Houghton, the representative plaintiff, commenced proceedings in February 2008 on his own behalf and on behalf of 3,689 other shareholders who suffered loss on that investment.<sup>67</sup> It became the first litigation-funded class action in New Zealand, with the claimants funded by a United Kingdom-based litigation funder, Harbour Litigation Funding Limited.<sup>68</sup>

The claim was against the directors of Feltex at the time of the IPO, the vendor in the IPO (Credit Suisse Private Equity) and the investment banks who acted as the Joint Lead Managers in the IPO (First New Zealand Capital and Forsyth Barr Ltd).<sup>69</sup> The causes of action alleged breaches of the Fair Trading Act 1986 and Securities Act 1978 by the inclusion of untrue statements and omissions in the IPO prospectus.<sup>70</sup> The substantive hearing was delayed by six years of interlocutory disputes (both pre-trial hearings and judgments) and a period where there was a stay of proceedings while the funding arrangement was sorted.<sup>71</sup> These interlocutory proceedings covered a range of procedural issues including security for costs, evidence admissibility, the funding arrangement, opt-in/opt-out orders, the application for representative orders and limitation periods.<sup>72</sup>

Although initially directed to be conducted as an opt-out proceeding,<sup>73</sup> the basis for joining the proceedings was subsequently transformed into a requirement to opt-in, with a final deadline for joining set as 30 May 2013 (with the exception of Forsyth Barr shareholders who had until 21 June 2013).<sup>74</sup> In August 2012, the High Court made a procedural order that issues raised by the proceedings should be dealt with in two stages.<sup>75</sup> The first stage determined Mr Houghton's own claim, together with common

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[2016] HCA 28, (2016) 333 ALR 569. For proceedings relating to the MV *Rena* grounding in particular, see *Daina Shipping Co v The MV Rena Claimants* [2013] NZHC 3450.

65 Stevens and East, above n 9.

66 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74 at [2]–[10].

67 At [14]–[15]. Proceedings were also commenced on behalf of shareholders who had bought shares on the market. Some of their causes of action were struck out in *Houghton v Saunders*, above n 31, at [93], and their representative plaintiff denied standing, so the claims for that second group have not proceeded. See *Houghton v Saunders*, above n 66, at [14], n 5.

68 Smith and East, above n 8, at [6].

69 At [17].

70 At [29]–[35].

71 At [6].

72 There have been over 21 interlocutory proceedings, most of which have been dealt with by the High Court, but a few have been appealed higher. See, for example, *Houghton v Saunders* [2015] NZCA 141; *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652; and *Credit Suisse Private Equity LLC*, above n 22.

73 *Houghton v Saunders*, above n 30.

74 *Houghton v Saunders*, above n 31, at [170] as cited in *Houghton v Saunders*, above n 66, at [15].

75 *Houghton v Saunders* [2012] NZHC 1828, [2012] NZCCLR 31 at [39]–[40].

issues to the claims of the shareholders whom he represented. The second stage would deal with any remaining issues arising from individual shareholders.<sup>76</sup>

The judgment for the substantive trial was issued on 15 September 2014 and found for the defendants in all respects.<sup>77</sup> An appeal against this decision was heard in April 2016 and the appellants lost on all grounds of appeal.<sup>78</sup> While the Court left the door open for the appellants to bring a cause of action, previously precluded, under the Fair Trading Act, the majority regarded this as untenable.<sup>79</sup>

### B *Southern Response class action*

The second claim involves Southern Response, the Government entity responsible for settling the remaining AMI Insurance Canterbury earthquake claims. Claimants insured by Southern Response who are frustrated by delays in the processing of their earthquake-related claims can sign up for the class action. The claim website states that damages sought will be for “anxiety, stress, relocation, rent storage and other costs caused because of payout delay”.<sup>80</sup>

Proceedings in the form of a representative action were filed in the Christchurch High Court on 26 August 2015 against Southern Response. Led by Cam Preston, 47 policyholders are bringing the action.<sup>81</sup> GCA Lawyers, the law firm handling the litigation, is doing so on a “no win, no fee” basis, and the action is funded by LLS (NZ) Ltd.<sup>82</sup> If successful, the firm and funders will deduct up to 20 per cent of the amount awarded.<sup>83</sup> The filing included an application for an opt-in order, to allow a further three months for policyholders to join the action.<sup>84</sup>

The first hurdle this action faces is establishing that the claimants have the same interest in the subject matter of the proceedings. Although the complaints have common allegations and issues, the insurance claims will likely be very different and individual in other respects. In particular, the loss and damage suffered to their homes is likely to differ, the required repairs may give rise to technical issues, and the handling of their claims by Southern Response is likely to have been a different experience for most.<sup>85</sup>

In *Southern Response Unresolved Claims Group Suing By Its Representative Cameron James Preston v Southern Response Earthquake Services Ltd* Mander J found that the claimants have not yet met the procedural threshold needed of commonality of fact or law between them to bring a representative (*class*) action.<sup>86</sup> However, his Honour did not

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76 *Houghton v Saunders*, above n 66, at [16].

77 *Houghton v Saunders*, above n 66.

78 *Houghton v Saunders* [2016] NZCA 493 at [313].

79 At [280]–[298].

80 Southern Response Class Action “Why join the Southern Response Class Action?” <[www.srca.co.nz](http://www.srca.co.nz)>.

81 Southern Response Class Action “Class Action Filed in Christchurch High Court” (26 August 2015) <[www.srca.co.nz](http://www.srca.co.nz)>.

82 Southern Response Class Action “About us” <[www.srca.co.nz](http://www.srca.co.nz)>.

83 Cecile Meier “Southern Response class action ‘no win, no fee’” (29 April 2015) *Stuff* <[www.stuff.co.nz](http://www.stuff.co.nz)>.

84 Southern Response Class Action, above n 81; and Meier, above n 83.

85 Andrew Horne and others “Earthquake claimants file High Court ‘class action’ against Southern Response” (28 August 2015) MinterEllisonRuddWatts <[www.minterellison.co.nz](http://www.minterellison.co.nz)>.

86 *Southern Response Unresolved Claims Group Suing By Its Representative Cameron James Preston v Southern Response Earthquake Services Ltd* [2016] NZHC 245 at [92].

preclude the possibility that a further application could be made addressing the issues raised in his judgment<sup>87</sup>—and an amended application was filed shortly after.<sup>88</sup>

The parties returned to court on 19 October 2016, with the claimants seeking an order for the class action to proceed following the filing of the amended application.<sup>89</sup> The decision of the Court as to whether—and how—the action will proceed is pending.

#### IV Proposed Changes to New Zealand Law on Class Actions

The Rules Committee is a statutory body which has responsibility for making procedural rules for the Supreme Court, the Court of Appeal and the High Court.<sup>90</sup> From 2006 to 2009, the Rules Committee developed detailed proposals for the introduction of a new legislative class action procedure.<sup>91</sup> The Committee released a second Consultation Paper in October 2008 together with a draft Class Actions *Bill* and Class Action *Rules* (for insertion into the High Court Rules) for consideration by the legal profession and public generally.<sup>92</sup> Following consideration of submissions, the proposals were amended and submitted to the Ministry of Justice in July 2009. However, citing legal privilege and the likelihood of modification by the Government, the documents were not made public.<sup>93</sup> Since then the documents have been posted online in their draft form.<sup>94</sup>

In developing the proposals, the Rules Committee examined class action legislation and procedure in overseas jurisdictions, including Australia, the United Kingdom, Canada and the United States. It concluded that the most appropriate class action model was that developed by the Federal Court of Australia. Thus, the Bill was largely modelled on the regime incorporated into pt IVA of the Federal Court of Australia Act 1976.<sup>95</sup>

The Rules Committee provided multiple reasons in favour of introducing a class action model in New Zealand. According to the Committee, introducing a class action procedure would not create a new legal right. Rather, it would provide a remedy and avenue for wrongs which affect many, but where access to the system may be unpractical or financially untenable on an individual basis.<sup>96</sup> Furthermore, the proposed model would promote efficiency of the court and judicial resources, by merging related claims and allowing swift issuing of proceedings without the need for identification and consent of all claimants.<sup>97</sup> There is also an important deterrence objective as the possibility of a proceeding being brought by an aggrieved group acts as a constraint on unlawful action

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87 At [93].

88 Southern Response Class Action “Southern Response Class Action – Back in Court 19 October” (12 October 2016) <[www.srca.co.nz](http://www.srca.co.nz)>.

89 Southern Response Class Action, above n 88.

90 Judicature Act 1908, s 51C.

91 Rules Committee, above n 48, at 1.

92 At 1.

93 Rules Committee *Note on Class Actions* (30 July 2009).

94 The Class Actions Bill 2008 and High Court Amendment (Class Actions) Rules 2008 can be located at <[www.globalclassactions.stanford.edu](http://www.globalclassactions.stanford.edu)>.

95 Briefing paper to the Ministry of Justice “Class Actions” (10 November 2009) at 1 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

96 Rules Committee, above n 48, at 2.

97 Briefing paper to the Ministry of Justice, above n 95, at 2. See also *Credit Suisse Private Equity LLC*, above n 22, at [147]. The Supreme Court makes similar observations.

by large corporate bodies who may otherwise consider the prospect of legal action non-existent or very small.<sup>98</sup>

The Rules Committee did not propose that the introduction of a class action regime would render High Court Rule 4.24 ineffective. However, it was not sufficient on its own as representative actions under that rule do not cater for the situations for which this proposal is designed.<sup>99</sup>

The draft Bill and proposed Rules give an insight into some of the issues faced by the High Court in managing class actions.<sup>100</sup> The issues dealt with in the draft Bill and rules include:<sup>101</sup>

- the minimum number of persons needed to form a class (seven, at the discretion of the court);
- the number of defendants and lead plaintiffs (there may be more than one);
- the necessary information to define the class;
- the discretion to order either an opt-in or opt-out action and associated registration and notification;
- the court approval required for settlement; and
- funding and fees arrangements.

Since 2009 it appears that progress has stalled. The Commerce Committee in October 2011 issued a report to the New Zealand House of Representatives as a result of an inquiry into the widespread failures of finance companies.<sup>102</sup> The report set forth various proposals for reforms and among the recommendations were “that priority be given to progressing legislation on class actions during the term of the 50th Parliament” and “that such legislation include guidelines for the operation of commercial third-party funders of litigation”.<sup>103</sup> The Government issued a response in March 2012 to the report as a whole, and, in relation to the specific recommendations on class actions, stated that further policy work was required before the Bill could be introduced to the House, but that this was expected to occur in 2012.<sup>104</sup>

At the time of writing the Bill has received no political consideration<sup>105</sup> and it is not anticipated that the legislation will be progressed in the near future. Currently the law surrounding class actions in New Zealand is being developed on a case-by-case basis. The High Court’s case management powers are able to deal with a number of the matters and some discussion is taking place on the issue of funding arrangements.<sup>106</sup> However, it is doubtful that the procedure will be able to develop in the courts (under the High Court Rules or its inherent jurisdiction) to the extent envisaged by the Rules Committee. To ensure that New Zealand remains relevant in civil jurisprudence it is necessary to revive, update, and implement the work done by the Rules Committee.

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98 Rules Committee, above n 48, at 5.

99 At 4.

100 See Class Actions Bill 2008, s 4. The Bill would restrict class action proceedings to the High Court.

101 Smith and East, above n 8, at [26]; and Briefing paper to the Ministry of Justice, above n 95, at 2–3

102 Commerce Committee *Inquiry into finance company failures: Report of the Commerce Committee* (October 2011).

103 At 33.

104 “Government Response to Report of the Commerce Committee on its *Inquiry into Finance Company Failures*” [2011–2014] 15 AJHR J1 at 11.

105 Smith and East, above n 8, at [24].

106 At [27]. See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 for discussion on funding arrangements.

## V Class Arbitration in New Zealand

### A *Introduction to the Arbitration Act 1996*

Arbitration can be defined as a consensual process where parties submit a dispute to a non-governmental decision-maker, selected by or for the parties, who renders a binding decision resolving the dispute in accordance with neutral, adjudicatory procedures.<sup>107</sup> Arbitration as an institution is founded on the consent of the parties (in contrast to litigation).<sup>108</sup> That consent can be found in an arbitration agreement to submit future disputes to arbitration or given once the dispute arises in a stand-alone agreement.<sup>109</sup> An arbitration award is a final and binding resolution of a dispute on the parties to the arbitration agreement and has the same preclusive effect as a court judgment.<sup>110</sup>

The Arbitration Act 1996 (the Act) came into force on 1 July 1997 and changed the practice of arbitration in New Zealand.<sup>111</sup> The Act consists of 20 sections and five schedules. Importantly, sch 1 sets out rules governing arbitrations generally; and sch 2 sets out additional optional rules. Pursuant to s 6, the provisions of sch 1 apply to all arbitrations, whether domestic or international, held in New Zealand;<sup>112</sup> and sch 2 applies automatically to domestic arbitration unless the parties expressly agree otherwise. However, sch 2 will not apply to international arbitrations held in New Zealand unless the parties expressly agree it shall. Significantly, the Act does not provide for class arbitrations.

### B *Arbitrability of class arbitration disputes*

Section 10 of the Act sets out the permissible scope of disputes capable of being determined through arbitration. It reflects a public policy limitation on party autonomy.<sup>113</sup> Regardless of an otherwise valid arbitration agreement, by virtue of this section it may not be given effect. In particular, where a dispute implicates public rights and/or private interests of a third party, public policy may demand that the dispute should instead be brought before a court.<sup>114</sup> This could be of particular importance to class arbitrations. In theory, it would be unlikely that a class arbitration could be conducted as an opt-out action as those claimants involved without active choice may be considered third parties for s 10 purposes.

Section 5 of the Act reflects legislative confidence in the arbitral process, suggesting that few types of arbitration agreements or subject matters will be deemed non-arbitrable.<sup>115</sup> Furthermore, the High Court has stated that a general public interest in the subject matter needs to be balanced with the public interest in upholding arbitration

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107 Gary B Born *International Commercial Arbitration* (Kluwer Law International, The Netherlands, 2009) at 217.

108 David AR Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 3.

109 Arbitration Act 1996, s 2 defines “arbitration agreement”; and Williams and Kawharu, above n 108, at 3.

110 Arbitration Act, sch 1, arts 35 and 36.

111 Anthony Willy *Arbitration* (Brookers, Wellington, 2010) at 1.

112 Schedule 1, art 1(3) defines “international arbitration”.

113 Williams and Kawharu, above n 108, at 195.

114 At 195.

115 At 195.

agreements.<sup>116</sup> There is, however, scope for arguments of the type advanced in the United States courts that arbitration clauses that fetter class actions could be unenforceable as contrary to public policy. Thus, it is not possible to say decisively if class arbitration agreements would or would not be considered arbitrable under the Act. I contend that most disputes would be arbitrable.

### *C Potential contracts that may raise or allow class arbitration disputes*

There are a number of situations where multiple claimants could jointly pursue their claims in a single arbitration proceeding despite the lack of specific class action provisions. This would effectively be operating on an opt-in basis. These situations include where there is a single contract—or linked contracts—involving multiple parties; and a standard form contract with an offer to arbitrate disputes.<sup>117</sup> A further situation is the consolidation of two or more individual arbitral proceedings, which is discussed in the next Part.

A lease agreement for a shopping centre is a common example of a single contract—or linked contracts—involving multiple parties (for instance, the leaseholders of store space) where each lease agreement contains an arbitration dispute resolution clause.<sup>118</sup> If a common dispute arose, the leaseholders could join to bring claims against the owner if there were cross-references in each lease agreement. However, if the agreements were not linked and each had an identical but separate arbitration clause then—unless the defendant owner consented to a joined claim—it would be necessary to commence individual proceedings and apply for consolidation.<sup>119</sup>

An example of a standard form contract containing an offer to arbitrate could be a service agreement, such as the terms and conditions of a utility or telecommunications company or the standard terms of an insurance provider or moneylender.<sup>120</sup>

Section 11 of the Act provides that an arbitration agreement in a contract entered into by a consumer in New Zealand is enforceable against that consumer only if a separate written agreement is also made.<sup>121</sup> In that separate agreement, entered into after the dispute has arisen, the consumer must certify “having read and understood the arbitration agreement [that they agree] to be bound by it”.<sup>122</sup> However, the provision does not prevent the consumer from choosing to rely on the arbitration agreement.<sup>123</sup>

The Law Commission recommended this consumer protection provision to ensure a reasonable degree of informed consent to arbitration and to protect genuine, uninformed consumers.<sup>124</sup> It took the view that consumer transactions gave rise to a greater probability of inequality of bargaining power, standard form contracts, and the absence of true consent.<sup>125</sup> This extra procedural requirement and special protection afforded to

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116 *Sure Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102 (HC). Anglo-American arbitration has always largely been a creature of—specifically—the law of contract, and thus ultimately beholden to the courts’ inherent jurisdiction and support through the enforcement of agreements to arbitrate. Williams and Kawharu, above n 108, at 28.

117 Smith and East, above n 8, at [35].

118 At [36].

119 Williams and Kawharu, above n 108, at 101.

120 Smith and East, above n 8, at [37].

121 Sections 11(1)(a)–(b) and 11(3). The section applies regardless of any agreement that the contract is governed by a law other than New Zealand law.

122 Section 11(1)(c).

123 Section 11(4).

124 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [157].

125 See generally [235]–[251].



consumers has potentially been and may continue to be the biggest restriction on the development of class arbitration in New Zealand. As class actions generally involve a group of aggrieved consumers (as demonstrated in the United States where there is no similar restriction), requiring this cumbersome process would deter most traders despite the potential benefits of aggregate arbitral proceedings. However, it is at least possible, considering the potential benefits, that consumers would elect arbitration in sufficient numbers to influence the viability of class arbitration in the form of consolidated consumer proceedings.

#### *D Consolidation of claims or proceedings under sch 2*

Effectively the only procedural tool in the Act that would allow something similar to class arbitration is the consolidation of two or more individual arbitral proceedings. There are two main consolidation options provided for in sch 2: first, where the same tribunal is established to hear the separate but related disputes; and, secondly, where more than one tribunal is established to hear the disputes. Thus, each claimant must have already gone through the process of establishing a tribunal before the claim can be consolidated with another set of proceedings. Additionally, consolidation will not apply to concurrent litigation and arbitration proceedings, as all parties involved must be exercising their contract's arbitration clause. Of course, consolidation of proceedings may occur by consent at any stage.<sup>126</sup>

Where the proceedings have the same tribunal, that tribunal may order consolidation on terms they think just, order the proceedings to be heard at the same time or sequentially, or stay any pending determination of any of the other proceedings.<sup>127</sup> Where not the same, the tribunal for any one of the proceedings may make provisionally the same orders as above, and all the tribunals may communicate to decide the terms of any provisional orders (such orders only becoming final and binding when consistent).<sup>128</sup>

A tribunal may only make an order on the application of at least one party,<sup>129</sup> but there is no requirement that any or all of the parties to each proceeding are common.<sup>130</sup> It is in this respect that consolidation diverges the most from class actions, which requires there to be at least one defendant similar to all the claimants. However, pursuant to cl 4, orders may not be made to consolidate proceedings unless it appears that:<sup>131</sup>

- a common question of law or fact arises in all of the proceedings; or
- the rights of relief claimed in all of the proceedings related to or arose out of the same transaction or series of transactions; or
- it is desirable for any other reason to make an order.

Notably, neither an application for consolidation nor the making of a provisional order will operate as a stay to the commencement or continuation of any of the arbitrations.<sup>132</sup> Presumably this is intended in part to ensure that the discretionary procedure is not used as a delaying tactic unfairly by one of the parties.<sup>133</sup>

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126 Clause 2(9).

127 Clause 2(1)(a).

128 Clause 2(2).

129 Clauses 2(1)(a) and 2(2)(a).

130 Clause 2(7).

131 Clause 2(4)(a)–(c).

132 Schedule 2, cl 2(6).

133 Willy, above n 111, at 117.

Consolidation can secure finality and certainty by avoiding a multiplicity of proceedings arising out of the same or a series of transactions.<sup>134</sup> It may reduce the overall cost and time of proceedings,<sup>135</sup> as well as being more convenient for witnesses. In *Amalgamated Finance Ltd v Wyness*,<sup>136</sup> McGechan J stated that the purpose of the comparable High Court Rule is to “secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application” and emphasised that the same purpose should be applied to arbitration.<sup>137</sup> However, this must be moderated by taking care that consolidation “will not in the end result in confusion through multiplicity of parties and issues, and will not in the end cause injustice by comparison with separate hearings”.<sup>138</sup>

Arguments opposing consolidation focus on a range of issues, including the potential lack of parties’ consent, allocation of fees and other costs, and a general lack of efficiency. The cost efficiency is decreased by the timing of the consolidation, duplication of already-submitted evidence for the benefit of parties not previously part of the proceeding and the compensation of dismissed arbitrators.<sup>139</sup> Moreover, consolidation may make the process more complex for individual parties and result in an unexpected loss of confidentiality.<sup>140</sup>

Although consolidation provides a type of aggregate proceeding similar to class arbitration, the intention behind the section makes it inadequate for that purpose. In particular, there is divergence from key aspects of a class action, notably lacking the requirement of at least one common defendant and consent of all claimants. This suggests that despite the growing recognition of class arbitration, consolidation should only be an interim procedural tool until new procedures are drafted.

#### E *Class arbitration in the United States*

Courts in the United States have wrestled with the interplay between class actions and arbitrations for nearly three decades.<sup>141</sup> Class arbitration explicitly imports elements of the United States-style class action into the arbitral context.<sup>142</sup> Thus, the paradigmatic form of class arbitration involves one or more “lead” or “named” claimants who bring legal claims on behalf of a group of “unnamed” claimants in a representative capacity.<sup>143</sup> The unnamed claimants may not all be identified or identifiable at the outset of the arbitration.<sup>144</sup>

Notably, any arbitration proceeds on an opt-out basis, just as the United States judicial class actions do under r 23 of the Federal Rules of Civil Procedure.<sup>145</sup> I contend that this is

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134 At 116.

135 *Bulk Oil (Zug) AG v Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd’s Rep 129 (QB) at 136.

136 *Amalgamated Finance Ltd v Wyness* [1987] HC Wellington CP 156/86, 19 February 1987.

137 High Court Rule 1.2.

138 *Amalgamated Finance Ltd v Wyness*, above n 136, at 12.

139 Lara Pair “Efficiency at all cost – arbitration and consolidation?” (14 March 2014) Kluwer Arbitration Blog <[www.kluwerarbitrationblog.com](http://www.kluwerarbitrationblog.com)>.

140 Williams and Kawharu, above n 108, at 165.

141 Lea Haber Kuck and Gregory A Litt “International Class Arbitration” in Paul G Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions around the Globe* (Oxford University Press, New York, 2012) 700 at 736.

142 Edward F Sherman “Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions” (2002) 52 DePaul L Rev 401 at 401.

143 Strong, above n 19, at 6.

144 SI Strong “Does Class Arbitration ‘Change the Nature’ of Arbitration? *Stolt-Nielsen*, *AT&T*, and a Return to First Principles” (2012) 17 Harv Negot L Rev 201 at 233.

145 Strong, above n 19, at 7.

one element that New Zealand should not adopt, to ensure reflection of the procedure that has so far developed in our courts favouring an opt-in approach.

The early 1980s case of *Keating v Superior Court* is commonly considered the beginning of the modern form of class arbitration in the United States.<sup>146</sup> At first the practice expanded slowly, due to judicial concerns that arbitration could unfairly deny plaintiffs the ability to bring their claims collectively.<sup>147</sup> However, the 2003 United States Supreme Court decision of *Bazze* marked a major turning point in the evolution of class arbitration.<sup>148</sup> The decision eliminated many of the concerns up to that point, essentially holding that arbitrators, not courts, should be the ones to decide whether class proceedings were proper, absent party agreement to the contrary.<sup>149</sup> Subsequently, the practice grew rapidly.

Two Supreme Court decisions—*Stolt-Neilsen SA v AnimalFeeds International Corp* (handed down in 2010) and *AT&T Mobility LLC v Concepcion* (2011)—radically changed the situation.<sup>150</sup> There appears to be confusion amongst commentators as to the meaning and effect of the two decisions.<sup>151</sup> First, the Court's decision in *Stolt-Neilsen* limited class arbitration to those situations where the parties are found to have agreed (either expressly or with a relatively clear affirmative showing of an implied agreement) upon class proceedings at the time they formed the arbitration agreement.<sup>152</sup> Secondly, the decision in *Concepcion* potentially curtails the scope and availability of class arbitration by expanding the opportunities for parties to prohibit class arbitration using a waiver of class proceedings.<sup>153</sup> Nonetheless, the status of class arbitration in the United States is very much in flux.<sup>154</sup>

In the wake of the decision in *Bazze*, three sets of specialised class arbitration rules were promulgated: the AAA Supplementary Rules, the JAMS Class Action Procedures and the NAF Arbitration Class Procedures.<sup>155</sup> The rules themselves do not authorise class proceedings, but provide a useful analytical framework.<sup>156</sup> Interestingly, both the AAA and JAMS made a conscious decision to mirror r 23, allowing both arbitrators and courts to rely on existing case law when construing the arbitral rules.<sup>157</sup>

In developing class arbitration procedures in New Zealand, it would be worthwhile to draw from the expansive developments in the United States, and adapt the judicial decisions and practical implementation of the institutional rules for our judicial environment.

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146 *Keating v Superior Court* 645 P 2d 1192 (Cal 1982) at 1209–1210.

147 Kuck and Litt, above n 141, at 736.

148 *Green Tree Financial Corporation*, above n 13.

149 At 453.

150 *Stolt-Neilsen SA*, above n 14; and *AT&T Mobility LLC*, above n 14.

151 Strong, above n 19, at 12, n 70.

152 *Stolt-Neilsen SA*, above n 14.

153 *AT&T Mobility LLC*, above n 14.

154 Strong, above n 19, at 14.

155 American Arbitration Association *Supplementary Rules for Class Arbitrations* (8 October 2003); National Arbitration Forum *Arbitration Class Procedures* (2007); and JAMS *JAMS Class Action Procedures* (1 May 2009). Note that the National Arbitration Forum has since stopped administering consumer arbitrations. Associated Press “Firm Agrees to End Role in Arbitrating Card Debt” (19 July 2009) *The New York Times* <[www.nytimes.com](http://www.nytimes.com)>.

156 Strong, above n 19, at 13.

157 At 43.

## VI The Desirability and Choice of Class Arbitration

### A *The desirability of class arbitration*

Some might ask whether class arbitrations are actually desirable. The answer—as with so many questions—is *it depends*. In particular, it depends on the details of the claim and which side you are on. Broader policy debate on the topic appears to have little to do with the consideration of the unique combination of class actions and arbitration. Rather, the debates focus on either the general desirability of class actions or the general desirability of arbitration.<sup>158</sup> Moreover, no long-term feasibility studies have been conducted on class arbitration.<sup>159</sup>

Strong addressed some of the issues relating to the desirability of class arbitration outside the United States in a paper presented to an ICC Institute Symposium on Multiparty Arbitration in 2009.<sup>160</sup> She notes that opponents to the United States style class arbitration typically challenge the procedure three ways: economic issues, jurisprudential issues, and arbitral issues.<sup>161</sup> Notably, the former two focus on matters commonly raised when discussing collective relief in a judicial context.

The international commercial community has thus far been the most vocal opponent, claiming that United States-style class actions—and thus class arbitration—are bad for business. But this argument may be based more on perception than reality.<sup>162</sup> Indeed, empirical studies demonstrate it is an incorrect criticism that class claimants routinely file frivolous suits to assert pressure for settlements of large sums of money.<sup>163</sup> However, class actions undeniably affect business practices. Empirical research shows that class actions “tend to increase the frequency and breadth of litigation” against corporate defendants.<sup>164</sup> In turn, the threat of litigation constrains corporations’ decision-making freedom by “rais[ing] the cost of doing business”, “mak[ing] the legal environment more uncertain” and having “the potential to bring questionable business practices into the media spotlight”.<sup>165</sup> This notwithstanding, a difference must be drawn between corporate costs and the cost to society as a whole, and it is doubtful that there is enough evidence to dismiss class arbitration entirely as economically unfeasible.<sup>166</sup>

The jurisprudential argument focuses on the longstanding debate over the legitimacy of collective redress. This has largely centred on the debate as to whether private enforcement of public rules is a more efficient choice than government regulation.<sup>167</sup>

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158 Dana H Freyer and Gregory A Litt “Desirability of International Class Arbitration” in Arthur W Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Martinus Nijhoff Publishers, The Netherlands, 2009) 171 at 175.

159 Strong, above n 20, at [I].

160 Strong, above n 20.

161 At [II].

162 At [II](1).

163 Elizabeth Chamblee Burch “Securities Class Actions as Pragmatic *Ex Post* Regulation” (2008) 43 *Ga L Rev* 63 at 85.

164 Deborah R Hensler “The Globalization of Class Actions: An Overview” (2009) 622 *Ann Am Acad Pol & Soc Sci* 7 at 25.

165 At 25.

166 Strong, above n 20, at [II](1).

167 Burch, above n 163, at 74.

Critically, a public regulatory structure affects a society's perspective on the nature of individual rights<sup>168</sup>—and vice versa.

However, class actions (litigation in particular) are a powerful tool for achieving social change. They can provide publicity and access to the judiciary for collective private interests concerning public issues (for example health issues)—and this can be a catalyst for legislative reform.<sup>169</sup> Therefore, developments in a state's perception are likely to affect the views on the desirability and availability of class arbitration.<sup>170</sup>

The argument over arbitral issues invokes basic notions of what arbitration is and what it should be. Opponents view class arbitration as expensive, legalistic, time-consuming and state the representative nature violates the consensual nature. Therefore, some people find class arbitration does not constitute *arbitration* at all.<sup>171</sup> The tension in this area has arisen out of some important historical shifts, mainly the perceived *Americanisation* of international commercial arbitration.<sup>172</sup>

Strong does not give an explicit view on whether class arbitration is desirable or necessary. However, she asks we recognise that the tools for creating class arbitration procedures already exist in many jurisdictions, and thus to avoid it would require avoiding arbitration entirely. As such, her paper can be read as providing counter-arguments advocating the desirability of class arbitration. Most importantly, Strong takes the view, with which I concur, that development of one or more forms of collective arbitration (such as class arbitration) outside the United States is inevitable. This is evident in the interest in the device by courts, legislators, public officials and practitioners, even in those countries that have traditionally shunned such mechanisms.<sup>173</sup>

### *B Relevant merits of arbitration and litigation for class actions*

As class arbitration develops in various legal systems, it is important to consider the types of disputes that are amenable to such a procedure. Strong notes that experience suggests large-scale arbitration is capable of use to resolve a wide variety of substantive disputes. She refers to American commentators who have stated “[c]lass proceedings in arbitration can include the same types of claims that are actionable in court.”<sup>174</sup> The question then is whether class arbitration may only arise in countries that also allow for similar litigation in their courts.<sup>175</sup> Commentators take the view that no such limitation exists: “[t]he fact that class actions are not recognized or available in many national litigation systems should not preclude the use of class action arbitrations.”<sup>176</sup> Therefore, the lack of a class action regime in New Zealand's courts is not an impediment to the creation of class arbitration procedure.

In considering the future of class arbitration in New Zealand, it is useful to determine whether and to what extent parties would be inclined to choose arbitration in preference

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168 For instance, a comprehensive regulatory structure leads to a narrow interpretation of individual rights regarding collective relief.

169 Theron, above n 7.

170 Strong, above n 20, at [II](2).

171 Michael J Mustill and Stewart C Boyd *Commercial Arbitration* (2nd ed, LexisNexis, London, 1989) at 283.

172 Strong, above n 20, at [II](2), n 22.

173 At [V].

174 Thomas H Oehmke *Commercial Arbitration* (3d online looseleaf ed, West Group) at [16:3] as cited in Strong, above n 19, at 21.

175 Strong, above n 19, at 22.

176 Born, above n 107, at 1232, n 442.

to litigation. There is considerable debate over the merits of each form of dispute resolution distinctly. Many academics in the United States tend to express reservations as to the efficiency of class arbitration compared to class litigation and to the ability of arbitrators to comply with constitutional requirements without court intervention.<sup>177</sup> However, it has not yet been proven that parties would, in fact, be better off going to court than choosing arbitration.<sup>178</sup>

Strong observed that very few analyses had been done comparing the relative merits of each choice, despite the examination potentially having a significant effect on how the procedure develops.<sup>179</sup> Thus, she conducted a brief comparison on the subject, which forms the basis for the following discussion. The discussion focuses on only some of the fundamental issues, with a specific focus on domestic disputes. The discussion demonstrates that the relevant advantages most likely depend on the type of dispute or parties.

### (1) Procedure

Procedural issues are where the differences between class litigation and class arbitration are most apparent. In class litigation the law of the court that has jurisdiction over the dispute dictates the procedure. The procedure may be reflected in rules of court (as in New Zealand's High Court Rules) or substantive legislation. As such, it is always clear which procedures are to be applied in the particular circumstances. Additionally, there is often little discretion concerning procedural matters given to the court.

Difficulties in the underlying procedure are most likely to arise in cross-border disputes, where, although it is clear which civil litigation procedure is to apply, difficulties may nevertheless arise from the differing nationalities of the parties.<sup>180</sup> These can range from relatively simple issues of language, linguistic and cultural differences, to largely different expectations of how a fair and reasonable resolution of a dispute should proceed. Notably, this can lead to the preclusion of an international or multijurisdictional class where the parties come from countries with differing approaches and views of class disputes as a regulatory, procedural or institutional matter.<sup>181</sup>

Party autonomy is a fundamental cornerstone of arbitration and gives parties a considerable amount of power in procedural matters. This has led some commentators to suggest that parties should strongly prefer arbitration to similar litigation given parties "control the whole process to a far greater extent in arbitration than in litigation".<sup>182</sup> Indeed, a long-appreciated feature of bilateral arbitration is the ability—advantageous in cross-border disputes—for disparate procedures to be harmonised, and this could be extended to class arbitration if needed.<sup>183</sup>

Because of party autonomy, arbitration offers parties a great deal of flexibility in the procedures and processes that may be adopted and adapted to suit the needs of the matter at hand.<sup>184</sup> This can be achieved in part through the selection of a set of arbitral

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177 Jean R Sternlight "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" (2000) 42 *Wm & Mary L Rev* 1 at 111.

178 Strong, above n 19, at 283.

179 At 283.

180 At 294–295.

181 At 295.

182 At 296, n 78.

183 At 296.

184 Williams and Kawharu, above n 108, at 8.

rules outlining the governing procedural principles or by granting a broad discretion to the appointed arbitral tribunal.<sup>185</sup> If the proceedings were conducted on an opt-out basis, it would be of particular importance for the tribunal to address due process concerns. Due process requires the legal rights of all persons to be respected, and an opt-out approach raises issues of bias and limitation of rights should the person be unaware of their position and unfavourably treated. So it is likely that special measures would be necessary to protect the interests of those non-identified class members. For this reason, in New Zealand—reflecting the current opt-in approach—class arbitration would likely be conducted on an opt-in basis, limiting the need for exceptional special measures for elements such as notice requirements and reasonable deadlines.

Arbitration can avoid a number of potentially problematic elements of basic civil procedure. Within the boundaries of the non-derogable provisions of the Arbitration Act—including certain fundamental doctrines of natural justice—the parties are free to agree on the best-suited process and are not bound by strict rules of evidence or court procedures.<sup>186</sup> Class arbitration would not likely be subject to the same wide-ranging discovery typical of judicial class actions.<sup>187</sup> Limiting this not only reduces the cost and time for—potentially—both parties, but also minimises the risk to defendants that new actions or grounds of liability will be identified through the discovery process.<sup>188</sup> Corporate defendants may find the restricted discovery appealing as it could effectively circumscribe some risk of exposure they may face in court.<sup>189</sup> However, some parties may find the restricted scope problematic in building their case. This concern could be alleviated by the ability of arbitral tribunals to make orders for further discovery or evidence.<sup>190</sup>

A significant benefit touted for class arbitration is that it is faster and less expensive than facing similar-sized judicial proceedings or a large number of individual bilateral arbitrations.<sup>191</sup> While this is particularly noticeable in international and multijurisdictional disputes, it would be of evident benefit when a defendant faced concurrent arbitral and litigation proceedings (a higher likelihood if the dispute is with multiple consumers). This feature would appear to be an advantage for both parties. Additionally, with a request for arbitration served, the claim could commence much faster, and as additional claimants join the group, it could be easier to attract a third party funder (if one is not already involved).<sup>192</sup> However, it may prove that the cost advantages in complex, three-member tribunals are not likely to be significantly different from equivalent litigation.<sup>193</sup>

One way that arbitration achieves savings of money and time is through the flexibility of certain procedural devices afforded to arbitrators. Provided due process is followed, a tribunal can be creative and flexible in how they manage proceedings and require interlocutory issues to be dealt with in short order.<sup>194</sup> Parties are able to agree on

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185 Arbitration Act, sch 1, art 19.

186 Williams and Kawharu, above n 108, at 8.

187 It would be assumed that parties choose arbitration to avoid the delays and expense of such procedures. See Willy, above n 111, at 139.

188 Strong, above n 19, at 296–297.

189 At 296.

190 Arbitration Act, sch 1, art 27, sch 2, cl 3. Some of the powers afforded to a tribunal include requiring the *sampling* of evidence and limiting the extent of cross-examination.

191 Strong, above n 19, at 298. In *CBI NZ Ltd v Badger Chiyoad* [1989] 2 NZLR 669 (CA). Cooke P noted at 675 that “the clogging of the Courts lists” was a key reason for the increasing popularity of arbitration.

192 Smith and East, above n 8, at [55]; and Arbitration Act, sch 1, art 21.

193 Williams and Kawharu, above n 108, at 10.

194 Smith and East, above n 8, at [52].

expedited procedures if a speedy result is desirable. It is therefore possible for interlocutory and procedural issues to be dealt with more rapidly in arbitration than waiting for them to be argued before the courts. Additionally, the tribunal can use a number of procedural tools, including phasing the proceedings to hear and decide on jurisdictional issues early, granting interim relief and scheduling hearings.<sup>195</sup>

In most group actions, the defendant raises the majority of the numerous interlocutory applications, appealing rulings as far as possible. This slows the process considerably and increases the costs for the claimants. A defendant might aim to reduce the class on procedural and jurisdictional grounds and ultimately have the claim dismissed before or at the liability stage. Alternatively, if the defendant believes they have strong grounds, they might wish to go to arbitration to swiftly obtain an award declaring no liability. The defendant might also wish to use the comparative speed to obtain decisions on limitation or jurisdictional issues, such as to limit the size of the potential class.<sup>196</sup> Alongside the mandatory stay provision in sch 1 art 8 of the Act, under art 8(2) arbitral proceedings may be commenced or continued, and an award made, while proceedings under art 8(1) are pending in court. This provision's obvious purpose is to minimise any delays resulting from having to wait for a determination of the stay proceedings. It also, however, serves an important function by reducing the opportunities for defendants to use court processes to delay arbitration where there is a valid arbitration agreement.<sup>197</sup>

Parties may prefer to adopt private and confidential procedures, particularly in a corporate context, to avoid the potential for any injury to their corporate reputation or goodwill.<sup>198</sup> These principles are encapsulated in ss 14–14I of the Act. Interestingly, the apparent dearth of international class arbitrations may be due to confidentiality requirements making it difficult to both discern their existence and the procedure they employ. While the practicalities of class arbitration may allow greater derogation from the principles of privacy and confidentiality, those disclosures would—in many ways—be less extensive and certainly no more extensive than what would occur in court.<sup>199</sup> It is possible for some class arbitrations to remain entirely confidential. A defendant may prefer arbitration to avoid the precedent effect of a court decision. Relying on the ruling remaining confidential could help reduce the risk of further action by those who did not opt-in initially, if the defendant considers they have a high risk of being held liable.<sup>200</sup>

There is significant debate about the changing relation between the State and private law, some of which falls into the realm of arbitration.<sup>201</sup> As Williams and Kawharu note, despite the law of arbitration deriving principally from contract law, it contains an overlay of public policy<sup>202</sup> and law.<sup>203</sup> This public and private dichotomy is demonstrated by how modern arbitration law makes a purely private law contractual approach to arbitration inappropriate.<sup>204</sup> If held true that arbitration serves only private, individual interests, then

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195 At [52]–[53]. See also Arbitration Act, sch 2, cl 3.

196 At [56]–[57].

197 Williams and Kawharu, above n 108, at 121.

198 At 9.

199 Kuck and Litt, above n 141, at 720, n 138.

200 Smith and East, above n 8, at [58].

201 See Ralf Michaels and Nils Jansen “Private Law Beyond the State? Europeanization, Globalization, Privatisation” (2006) 54 Am J Comp L 843.

202 The emphasis of this policy is to promote justice through a choice of procedure that respects natural justice and is also acceptable to the parties to the arbitration.

203 Williams and Kawharu, above n 108, at 26.

204 *Carr v Galloway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [91].



this form of dispute resolution leads to a “strict autonomy against all third-party interests and against the public sphere”.<sup>205</sup>

Arbitration in New Zealand is not held to be simply about party autonomy, as the public interest is reflected in, for example, the availability of review through the courts on statutory grounds.<sup>206</sup> However, art 5 of sch 1 of the Act affirms the principle of limited judicial intervention in arbitral matters, particularly as the first purpose of the Act in s 5 is to encourage “the use of arbitration as an agreed method of resolving commercial and other disputes”.<sup>207</sup>

It may be argued that with class arbitration there is an even stronger requirement for judicial oversight given the nature of the dispute and public interest. However, it is my opinion, reflecting that of Bernard Hanotiau, that experienced arbitrators are as well equipped as courts to guarantee the protection of due process rights, so consequently, the role of the courts in class arbitration should be kept to a minimum.<sup>208</sup> In any case, in creating new rules for class arbitration this dichotomy should be at the forefront of the drafters’ minds.

## (2) Appeal and enforcement

The desire to retain the right to substantive appeal focuses on the possibility that the arbitral tribunal may make a mistake on a question of fact or law. However, the right to appeal an arbitration award in New Zealand is limited. It is found in sch 2 cl 5 of the Act (thus generally limited to domestic disputes) and allows for an appeal to the High Court on any question of law in three strict circumstances.<sup>209</sup> Notably, it does not include questions of fact.<sup>210</sup> Clause 5(2) provides the threshold that must be reached for the High Court to grant leave. Essentially it is a substantiality requirement combined with judicial guidelines found in the leading decision of *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*.<sup>211</sup> Therefore, taking the claims to court may be more appealing to parties concerned about retaining a wide-ranging right to appeal. On the contrary, arbitration may be appealing for those wishing to avoid the time-consuming and costly appeals process.<sup>212</sup> It should be noted that if appeals on questions of law are pursued, sometimes arbitration proceedings can take much longer than the equivalent in court.<sup>213</sup>

It is well-proven that arbitrators are entirely competent to handle a wide variety of high-value, complex disputes.<sup>214</sup> Indeed, one of the major arbitral benefits is the right to choose the tribunal that will decide the dispute. This allows for the choice of experienced arbitrators who can draw on their particular expertise in the subject matter in dispute. As a result, arbitration may be preferable in that a properly selected tribunal may be less likely to make an error of law than an assigned judge with no specialist knowledge.<sup>215</sup>

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205 Michaels and Jansen, above n 201, at 882.

206 Carr, above n 204, at [91].

207 Section 5(1). See also Williams and Kawharu, above n 108, at 26.

208 Bernard Hanotiau *Complex Arbitration: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International, The Netherlands, 2005) at [602].

209 Clause 5(1).

210 Clause 5(10).

211 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

212 Born, above n 107, at 82.

213 Williams and Kawharu, above n 108, at 10.

214 Strong, above n 19, at 299.

215 Willy, above n 111, at 118.

Enforcement of judgments in domestic litigation is a relatively simple matter. However, international enforcement of civil judgments can cause many problems stemming from an absence of widespread multilateral treaties facilitating the easy enforcement of foreign judgments. For instance, judgments rendered in class litigation are likely to be subject to rigorous scrutiny given the perceived special procedural practices.<sup>216</sup> Accordingly, arbitration offers significant advantages over litigation both domestically and internationally for enforcement. All awards are subject to only a limited form of judicial review, rather than a complete appeal on the merits.<sup>217</sup> Thus, enforcement tends to be faster and less costly than in litigation. Additionally, many awards are complied with voluntarily, avoiding the need to undertake enforcement proceedings at all.<sup>218</sup>

As the number of class arbitrations continues to increase, the need for international enforcement is inevitable, and it is here where there is an evident benefit to arbitration. Rather than needing to rely on judicial comity, parties seeking international enforcement can typically rely on one of several international treaties designed to facilitate enforcement of foreign awards.<sup>219</sup> The most well-known of these is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention.<sup>220</sup> However, there is debate over whether class awards fall under the protection of the Convention. Some—but not all—commentators have answered affirmatively. Although there is some consensus that the Convention would permit substantial challenges to the enforcement, opinion is divided over whether the challenges would ultimately be successful.<sup>221</sup>

### (3) Conclusion

As the analysis shows, there is a range of reasons why parties might prefer class arbitration to class litigation. However, the benefits are relative: each party may prefer different routes at different times for different disputes. As a result, it is impossible to give a categorical answer to the question of which form of dispute resolution is superior. Therefore, this decision must be made on an individualised, case-by-case basis.

## VII Conclusion

Class actions are a growing part of the international legal environment. This is slowly bringing the subject to the forefront of academic and practitioner debates. In New Zealand, class actions have been slow to develop. However, the lack of a set of class action rules does not appear to have greatly impeded the progress of several significant class actions in our courts to date. The issue of class arbitration is, on the contrary, particularly novel and untested. The purpose of this article was to examine the merits of introducing class actions to New Zealand, by examining how the current legislative regime could deal with

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216 Strong, above n 19, at 300–301.

217 See Arbitration Act, sch 1, arts 34–36.

218 Strong, above n 19, at 301.

219 At 302.

220 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3739 (opened for signature 10 June 1958, entered into force 7 June 1959).

221 Strong, above n 15, at 1019–1020, anticipating that “vigorous opposition to international class arbitration will arise at the international enforcement stage”.

domestic class action disputes in litigation and arbitration, and then evaluating the choice parties may make between the two.

It is important to be aware that inquiries into class actions are not simply academic exercises: the issue has had and will continue to have a significant real-world effect. While class arbitrations have not yet significantly spread beyond the United States, it would be a mistake for the arbitration community to avoid discussion of the issue. It is desirable for New Zealand to begin the discussion, to retain our standing in the international arbitration community and be at the forefront of developments.

The current legislative framework for class actions in New Zealand is lacking. Claimants must rely on procedures for representative actions provided for in the High Court Rules (or the limited specific statutory rights). The courts have necessarily used their inherent jurisdiction to clarify the process, as demonstrated in the *class action* proceedings to date. However, the regime requires significant improvements to be of an appropriate and functional standard for true class actions. It is crucial that the extensive work done by the Rules Committee does not remain cast aside and that the proposed Bill becomes a legislative priority for the Government. Reviving the Bill would be a sensible way for New Zealand to develop and introduce a formal procedural framework for class actions.

While the Arbitration Act is a comprehensive piece of legislation, it does not provide an adequate procedure to deal with class arbitration. Currently a group of claimants would have to rely heavily on consolidation. Furthermore, the Act raises a potential impediment to a common form of class arbitration between consumers and a trader with its special protection requirements. Nevertheless, class arbitration would be more efficient than hundreds of separate proceedings for identical claims.<sup>222</sup>

It is possible to look to the United States to examine potential procedural requirements that could be implemented here. This comparison does highlight the importance of class arbitration procedures reflecting the relevant court procedures. If countries increasingly adopt procedures for class actions in their courts, it may lead to increased acceptance of the same class actions being resolved in arbitration.<sup>223</sup>

There are multiple reasons for—and factors determining—why parties may make the choice to pursue their claim in arbitration over litigation. As complicated as this cost-benefit analysis may seem when dealing with a large number of parties, it is in practice likely to be little different from what currently takes place before bilateral arbitration. While ideally any discussion and deliberation on the choice should be considered at the time of entering the contract, it is possible for parties to reach an agreement post-dispute.<sup>224</sup>

Although it is not possible to state conclusively that class arbitration is always superior to similar forms of litigation in all circumstances, the reverse is also true: it cannot be proven that class litigation is always superior to arbitration. Thus, it would be questionable for commentators or courts to adopt an interpretative stance that assumes no rational party would choose to agree to class arbitration.<sup>225</sup> In my view, comparative analysis suggests that class arbitration boasts multiple significant advantages over litigation and that these advantages would be appealing to parties looking to choose an optimal dispute resolution mechanism. It is crucial that New Zealand facilitates this, investigating and developing the necessary procedural adaptations to our current Act.

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222 Strong, above n 19, at 136.

223 Kuck and Litt, above n 141, at 736.

224 Strong, above n 19, at 303.

225 At 303.

It was beyond the scope of this article to propose procedures or to mention every potential challenge that class arbitration might encounter in the future. But it is worthwhile to raise some of the procedural and administrative challenges, the resolution of which may affect the desirability of class arbitration. As class arbitration becomes more common, there is likely to be debate concerning appropriate judicial involvement, as well as more particular issues such as the use of waivers and whether this would change the nature of arbitration (and the effect of this).<sup>226</sup> In New Zealand, in particular, it may be necessary to consider whether class arbitration procedures can even and should begin developing in the face of the continued debate over reviving the class action Bill.

Ultimately class actions are here to stay and will play a useful role in society. It is a new frontier that must be addressed in New Zealand, especially by the alternative dispute resolution community, and only time will tell if the growing number of class proceedings in litigation and arbitration will lead to increased acceptance and the exciting adaption of class arbitration practice internationally.

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226 Strong addresses many of these issues in *Class, Mass, and Collective Arbitration in National and International Law*. See generally Strong, above n 19.