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Global Deterrence of Wrongful Behaviour and Recent Trends in Class Action and Class Arbitration: Is the US Stepping Down as the World's Problems Solver?

Giacomo Pailli*
PhD at the University of Florence

Allocation of jurisdiction; Arbitration agreements; Class actions; Cross-border disputes; Extraterritoriality; Foreign companies; Foreign nationals; United States

1. Introduction

In a constantly more integrated and transnational society, corporations, and businesses in general, engage in all sorts of activities across all borders. It is not up to this paper to assess those activities, to praise the steady growth of a global economy or to target the fallacies exposed by the recent economic crisis. The focus of this paper is on the conduct of corporations that has, *amongst other things*, serial, widespread or mass effects. In the vast majority of hypothesis, those effects will be the lawful consequences of an ordinary or extraordinary commercial business: agreements will be made and unmade, goods sold and shipped, services performed and so on. Occasionally, though, something could go wrong and cause serial injuries to several subjects.[1]

In such scenarios, collective dispute resolution mechanisms are not only a means of bringing efficiency and certainty to the administration of justice.[2] A collective action can be the only way of vindicating claims otherwise too small to

*This contribution benefited greatly from participating to the Work-in-progress Conference on "Collective Redress in the Cross-Border Context: Arbitration, Litigation, Settlement and Beyond" organised by Prof. S.I. Strong with the Hague Institute for the Internationalisation of Law and the Netherlands Institute of Advanced Studies, in Wassenaar, The Netherlands, June 20–22, 2012, as well as to the VII Seminario Internacional de Derecho Internacional Privado, held in Madrid in April 11–12, 2013, at the Universidad Complutense. I warmly thank the organisers and participants to both events for their comments and suggestions, relieving them of any liability for my errors or omissions. Finally, thanks to Prof Nicolò Trocker for his mentoring.

[1] See, generally, M. Cappelletti, "Vindicating the Public Interest Through the Courts: A Comparativist's Contribution" (1975–76) 25 *Buffalo Law Review* 643, 645–48. See also P. Murray, "Class Actions in a Global Economy" in R. Stürner and M. Kawano (eds), *Current Topics of International Litigation* (Tübingen: Mohr Siebeck, 2009), pp.95–96.

[2] See the clear analysis by M. Taruffo, "Some Remarks on Group Litigation in Comparative Perspective" (2001) 11 *Duke Journal of Comparative & International Law* 405, 406, who divides traditional class actions' purposes into two broad groups: damaged-oriented and policy-oriented. See, also, R. Eckhardt, "Consumer Class Action" (1969–70) 45 *Notre Dame Law Review* 663, 668. An interesting comparative recount of class action can be read in R. Cappalli and C. Consolo, "Class Actions for Continental Europe? A Preliminary Inquiry", (1992) 6 *Temple International & Comparative Law Journal* 217. According to H. Micklitz-F. Cafaggi, "Collective enforcement of consumer law: a framework for comparative assessment" (2008) 16 *European Review of Private Law* 391, 394, from a practical point of view "[t]he need for aggregate litigation arises … when bundling claims would generate economies of scale and optimal ex ante investment". See also, 402–404.

be brought individually.[3] Above all, it is a way of deterring[4] wrong behaviour and fostering a greater public interest,[5] capable of reaching where public agencies and regulations fall short: to put it in a mythological fashion, it allows individuals to face, as a collective David, modern age Goliaths.[6]

Given the crucial regulatory and deterrent function that could be performed by global actions (section 2), it would seem rational that a single global forum existed where similarly damaged consumers could aggregate their cross-border collective claims. For decades such forum seemed to be somehow available in the United States. However, recent judicial developments in US class actions (section 3) and class arbitration (section 4) tell a different story.

2. Is a global forum desirable?

The idea of the desirability of a global forum in cross-border mass disputes is closely linked to the beneficial effects that global deterrence could exert on corporate behaviour. In quite elementary "law and economics" terms, to perform an effective dissuasive function the sanction threatened or imposed on the wrongdoer should be at least equal to the gain derived from the "wrong" conduct.[7] This element has been widely analysed, for instance, in the context of international cartels: if the profits drawn from a prohibited conduct are not entirely disgorged, why should companies refrain from smoothing competition through horizontal agreements?[8] The same can be said of other areas: why should a corporation enhance the safety of its products, if profits outweigh losses? Why integrate respect for fundamental values in the chain of supply?

Rendering economical unfeasible or inconvenient for a business to engage in a certain conduct, thus, means at least neutralising all its profits arising out of that practice. If those profits come from all over the world, deterrence would be undermined if enforcement actions (both private and public) were brought only in certain countries and only by or on behalf of certain damaged individuals.

There are various ways through which effective deterrence and punishment could be pursued. In the United States these are achieved through procedural devices such as class actions, discovery and, sometimes, treble damages. Taken

[3] This is "[t]he policy at the very core of the class action mechanism." *Amchem Prods Inc v Windsor* 521 U.S. 591, 617 (1997). See R. Nagareda, "Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism" (2009) 62 *Vanderbilt Law Review* 1, 28.

[4] Without necessarily sharing its utilitarian extremes, see the description of the "deterrence-insurance" theory in B. Fitzpatrick, "Do Class Action Lawyers Makes Too Little?" (2010) 158 *University of Pennsylvania Law Review* 2043, 2056. See also, D. Rosenberg, "Decoupling Deterrence and Compensation Functions in Mass Tort Class Action for Future Loss" (2002) 88 *Virginia Law Review* 1871, especially at 1880: "Optimal tort deterrence threatens firms with liability for the total costs of their tortious conduct. In so doing, it provides firms ex ante with the financial incentive to invest efficiently in precautions".

[5] See W. Rubinstein, "A Positive Externalities Theory of the Small Claims Class Action" (2005–06) 74 *University of Missouri-Kansas City Law Review* 709, showing the positive externalities generated by small claims class actions.

[6] Perhaps, bearing some of the excesses and abuses of US class actions in mind, the more appropriate similitude is a Goliath vs. Goliath picture. Indeed, class action is not the only possible imaginable way. See, e.g. the provocative and interesting perspective by B. Omri, "One-Way Contracts: Consumer Protection without Law" (2010) 6 *European Review of Contract Law* 221, suggesting to make B2C contracts only binding upon consumers and not upon firms.

[7] See, e.g. D. Rosenberg, "Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases" (2001–02) 115 *Harvard Law Review* 831, 831–833.

[8] See, e.g. J. Connor, "Latin America Cartel Control" in E. Fox and D. Sokol (eds), *Competition Law and Policy in Latin America* (Oxford: Hart Publishing, 2009), pp.291–324; J. Connor, "Effectiveness of Antitrust Sanctions on Modern International Cartels" (2006) 6 *Journal of Industry, Competition and Trade* 195.

together these mechanisms evoke the concept of the "private attorney general",[9] namely the idea that public interest can be advanced by means of private "egoistic" litigations. Their importance is so "substantial", that their limitation resembles more a cap on substantive rights rather than a mere procedural modification.

Not all that glitters is gold. Discovery may be abused,[10] class actions may be vexatious or distorted,[11] contingency fees and treble damages may be too much of an incentive for unprincipled law firms.[12] In a few words, rightful deterrence might turn into undesired over-deterrence: something that in antitrust terms will be said to have a "chilling effect" on competition,[13] and in more general terms is simply unjust or unfair (dangerous terms, indeed). Furthermore, it is common knowledge that the great majority of class actions in the US settle, mostly enriching the lawyers[14] and sometimes leaving the victims with nothing more than a coupon.[15] These are elements that must be kept constantly in the background while dealing with class actions (or class arbitrations) in order to inquire whether these are *really* superior ways of dealing with mass disputes.[16]

Two notes are due before leaving the topic. Hidden in the figure of the private attorney general is the theoretical consideration that private parties can, in certain conditions, vindicate a greater public interest while exercising a private right (or, better, asking for a private remedy). Without obscuring the need for public enforcement of public interests, private attorneys general helps solving the practical consideration that public regulatory bodies lack resources (and sometimes interest) to act in any and all situations, although their inactivity may be, sometimes, based on a reasoned choice not to act or not to sanction.[17] In other words, deterrence through private litigation is a substitute for public action in all those cases in which it would be too difficult or too burdensome for public bodies to detect, reach and target wrongful conducts.

[9] See, S. Burbank, S. Farhang and H. Kritzer, "Private enforcement of statutory and administrative law in the United States" (2011) Int'l Lis 153 ff.; H. Buxbaum, "The Private Attorney General in a Global Age: Public Interest in Private International Antitrust Litigation" (2001) 26 *Yale Law Journal* 219.

[10] See, e.g. F. Easterbrook, "Discovery as Abuse" (1989) *Boston University Law Review* 635; S. Issacharoff and G. Miller, "Will Aggregate Litigation Come to Europe?" (2009) 62 *Vanderbilt Law Review* 179, 188. *Contra*, L. Mullenix, "Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking" (1993–94) 46 *Stanford Law Review* 1393.

[11] See, e.g. A. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"" (1979) 92 *Harvard Law Review* 664, 666–667; S. Scheuerman, "The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element" (2006) 43 *Harvard Journal on Legislation* 1, 1–10, 38–39.

[12] B. Hay and D. Rosenberg, ""Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedies" (1999–2000) 75 *Notre Dame Law Review* 1377.

[13] W. Wills, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26 *World Competition* 473.

[14] See S. Issacharoff, "Class Action Conflicts" (1996–97) 30 *University of California Davis Law Review* 805.

[15] See, e.g. C. Leslie, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation" (2002) 49 *University of California Los Angeles Law Review* 991; J. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" (2000–01) 42 *William & Mary Law Review* 1, 34. See, also, G. Calabresi, "Class actions in the U.S. experience: the legal perspective" in J. Backhaus et al. (eds), *The Law and Economics of Class Actions in Europe: Lessons from America* (Cheltenham: Edward Elgar Publishing, 2012), p.10.

[16] See S.M.C. Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives—A Critical Analysis" (2008) 27 C.J.Q. 208.

[17] But see J. Beisner, M. Shors and J. Miller, "Class Action "Cops": Public Servants or Private Entrepreneurs?" (2004–05) 57 *Stanford Law Review* 1441, 1454.

The two models of enforcement, public and private, thus, should be viewed as complementary, and not mutually exclusive, parts of an efficient and modern way of fostering a healthy domestic market.[18]

The problem is that it is not straightforward to transpose such domestic model to the transnational level, where global deterrence, as noted, would require plaintiffs to be able to aggregate their claims in a single global forum.[19] At such a level obstacles and difficulties are encountered at each move. One, crucially, pertains to the relation between sovereignties: the perspective of one forum dispensing accountability for conducts that takes place throughout the world, raises the question of the authority upon which a particular court, or an arbitral tribunal,[20] purports to dictate the proper solution for the whole world. Formally, a worldwide judicial answer by a state entity has only the immediate effect of solving a (private) dispute. The outcome of a global action, however, is also a regulatory answer which has the side-effect of displacing the power of other *superiorem non recognoscentes* to provide their own solution.[21]

On a second note, it would be *naïve* to overlook all practical and procedural problems that the concentration of worldwide claims would have *de jure condito*. Only to mention a few, there are questions on the applicable law(s), which may and will probably be different for different sets of claimants. A great uncertainty surrounds also the circulation of the global decision. Without a specific international framework, enforcement could be resisted in many countries and produce a sort of "patchwork" or "leopard skin" map of recognition, which is definitely not in line with the idea of deterrence that we mentioned above.[22]

Other procedural and practical issues, already known in the context of US class action, simply become more intricate in the case of a global action. Some of them are worth mentioning even in this limited context. Assuming that a global forum existed, who selects the model plaintiff among the various injured parties around the world? Who assures, if an opt-out mechanism is in place, that everybody, worldwide, wants to sue or are guaranteed a real chance of dissociating from the action? Who gets to select the forum?[23] How to coordinate concurrent or parallel

[18] See, also, H. Micklitz and F. Cafaggi, "Collective enforcement of consumer law", pp.395–96; P. Puri, "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37 *Brooklyn Journal of International Law* 998.

[19] D. Rosenberg, "Mandatory Litigation", pp.833ff. goes even further, advocating that optimal deterrence (in mass torts) needs a mandatory class action, without exit or opt-out possibilities.

[20] The choice between litigation in court or arbitration before an arbitral tribunal is not entirely neutral, from the moment that only litigation, with its value as precedent (binding in certain countries) performs the function of effectively regulating and deterring.

[21] R. Nagareda, "Aggregate Litigation Across the Atlantic", p.13. See, also, P. Wautelet, "What has international private law achieved in meeting the challenges posed by globalisation?" in P.J. Slot & M. Bulterman (eds), *Globalisation and Jurisdiction* (The Hague: Kluwer Law International, 2004), p.77.

[22] R. Mulheron, "The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi" (2012) 75 *Modern Law Review* 180. See, also, R. Nagareda, "Aggregate Litigation Across the Atlantic", pp.33–37, confronting the Vivendi and the Alstom securities class certifications. A class arbitration award could perhaps avail itself of the stronger circulation mechanism provided by the widely ratified 1958 New York Convention. See S.I. Strong, "Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared" (2012) 37 *North Carolina Journal of International and Commercial Regulation* 921, 941–943; Id., "Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns" (2008) 30 *University of Pennsylvania Journal of International Law* 1, 53–75.

[23] See S. Issacharoff and G. Miller, "Will Aggregate Litigation Come to Europe?", pp.189–192; S. Burbank, "The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View" (2008) 156 *University of Pennsylvania Law Review* 1439.

actions?[24] Who selects the class counsel and who is the lead plaintiff?[25] Who decides to settle?[26] Would a lost class action have preclusive effect on unnamed and remote class members?[27] We are forced to leave these questions unanswered for the time being, and turn our eye to the land of all modern-age class actions, where all begun.

3. Developments in US class actions: Empagran and Morrison

As has already been noted, class actions are one of the most striking features of US civil procedure, paired only by devices such as pre-trial discovery, punitive and treble damages. These elements, taken together, are part of what has been aptly defined as "American exceptionalism".[28] Coupled with other features,[29] this exceptionalism grounds the often-quoted similitude of the litigants who, like moths drawn to the light, if manage to litigate a dispute in United States, stand to win a fortune.[30]

In the last decade, however, the US Supreme Court has shown a tendency toward limiting the scope of such similitude, including with reference to collective dispute resolution, either in court or in arbitration, either of domestic or foreign nature.[31] The Court seems to be following two roads: one considering foreign plaintiffs in general, the other more specifically addressing arbitration and consumers. The former is signalled by the *Empagran* and *Morrison* decisions, the latter by the *Concepcion* case.

Before dealing with the first two decisions, it might be helpful to briefly sketch the outlines of the relation between territory and prescriptive jurisdiction in the United States. It is a dimension that has been particularly litigated in the field of antitrust, but which functions as a paradigm for our discourse. Justice Holmes's famous statement in *American Banana* may serve as a starting point "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done".[32] Holmes pictures, thus, a strict territorial dimension of the scope of a sovereign's power.[33] Such a principle, however, was not apt to deal with the challenges of a world in which conducts and effects easily transcend national borders.

This contributes to explain why US courts have gradually downplayed the territorial aspect of the conduct, focusing instead on the place to which its effects

[24] See L. Carballo Piñero, "Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?" (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 81, 90–93.

[25] See L. Silberman and S. Choi, "Transnational Litigation and Global Securities Class-Action Lawsuits" (2009) *Wisconsin Law Review* 465, 479.

[26] See S. Issacharoff and G. Miller, "Will Aggregate Litigation Come to Europe?" pp. 183–85.

[27] See O. Fiss, "The Political Theory of the Class Action" (1996) 53 *Washington & Lee Law Review* 21, 24–25. Other issue relate, e.g. to notices and notification mechanisms (individual or collective), financing and third-party financing, costs sharing, and so on.

[28] O. Chase, "American "Exceptionalism" and Comparative Procedure" (2002) 50 *American Journal of Comparative Law* 277. For a comprehensive comparative analysis of civil procedure systems, see O. Chase, H. Hershkoff, L. Silberman, Y. Taniguchi, V. Varano and A. Zuckerman (eds), *Civil Litigation in Comparative Context* (St Paul, MN: Thomson West, 2007).

[29] Such as the widespread use of jury trial and contingency fee agreements.

[30] *Smith Kline & French Labs Ltd v Bloch* [1983] 2 All E.R. 74; [1983] 1 W.L.R. 730 CA, Denning MR.

[31] See R. Mulheron, "The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis" (2008–09) 15 *Columbia Journal of European Law* 409, 444–46. See also G. Johnson, "Note. Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions" (2012) 52 *Virginia Journal of International Law* 963.

[32] *American Banana Co v United Fruit Co* 213 U.S. 347, 356–357 (1909).

[33] Echoed, from a judicial jurisdiction point of view by the firm rule of *Pennoyer v Neff* 95 U.S. 714, 734 (1877) and its stress on the *physical presence* of the defendant within the court's jurisdiction.

were directed and felt.[34] The progenitor of this new conception is Judge Learned Hand's "effects doctrine" analysed in *Alcoa*[35] stating that US antitrust law does apply extraterritorially where a foreign conduct is intentionally directed toward US exports or imports. The doctrine has been subsequently refined by *Timberlane* into a so-called "jurisdictional rule of reasons",[36] encouraging judges to balance the "conflicting contacts and interests of those nations involved",[37] and eventually endorsed by the Supreme Court in *Hartford Fire* as encompassing "foreign conduct that was meant to produce and did in fact produce some *substantial* effect in the United States".[38] Although widely criticised,[39] the effects doctrine has stood still and sound for many decades, ensuring a broad scope of extraterritorial application of US antitrust law around the globe.[40] This, in turn, has lured many foreign plaintiffs into taking their chances in a US courtroom.

Such is the background of *Empagran*,[41] a spin-off of a larger private antitrust class action brought against Hoffman-La Roche and other "competitors", which had engaged in an international cartel to fix the price of vitamins for industrial usage in the global territory.[42] Several private lawsuits were commenced in the United States, where some foreign companies, domiciled in Ukraine, Panama, Australia and Ecuador, tried to join a class action, suing for treble damages under s.4 of the Clayton Act.[43] The particularity was that these foreign companies, certified in a parallel but separate class, were bringing claims similar to those of the American plaintiffs, arising out of the same international scheme but in which both conducts and damages occurred wholly outside the domestic market (*f-cubed* actions). When the case reached the top of the American judiciary pyramid, several academics filed *amici curiae* briefs in support of the possibility for these foreign companies to sue in the United States, while many foreign Governments strongly argued the opposite view.[44] The Supreme Court, reversing the decision of the DC Circuit Court of Appeals, denied the possibility that US courts could exercise jurisdiction over antitrust claims brought by foreign plaintiffs against an anticompetitive conduct that "significantly and adversely affects both customers

[34] See Dodge, "Understanding the Presumption against Extraterritoriality" (1998) 16 *Berkeley Journal of International Law* 85, 85–86.

[35] *United States v Aluminium Co of America (Alcoa)* 148 F. 2d 416 (1945). See Friedberg, "The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the ALCOA Effects Doctrine" (1990–91) 52 *University of Pittsburgh Law Review* 289.

[36] *Timberlane Lumber Co v Bank of America* 549 F.2d 597 (1976).

[37] *Timberlane Lumber Co* 549 F.2d 597, 615fn34 (1976).

[38] *Hartford Fire Insurance Co v California* 113 S. Ct. 2891, 2909 (1993). The complexities of US jurisdiction to adjudicate and jurisdiction to prescribe are well beyond the scope of this paper. Suffice to say that in *Hartford Fire* the question was understood as being about subject-matter jurisdiction, while Justice Scalia rightly contended that it was in fact a jurisdiction to prescribe case. At 2918ff. (Scalia J., dissenting).

[39] See, e.g. Scalia J. in his concurrences in *Hoffmann-La Roche v Empagran* 124 S. Ct. 2359, 2373 (2004); *Hartford Fire* , 113 S. Ct. at 2918 e ss. and, eventually, prevailing in *Morrison v. National Australia Bank* , 130 S.Ct. 2869, 2877–81 (2010)

[40] On the judicial jurisdiction side, the narrow territorial limitation of *Pennoyer* has been overcame by

[41] *Empagran* 124 S.Ct. 2359. See M. Bloom, "Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-Empagran Perspective From Europe" (2005–06) 61 *New York University Annual Survey of American Law* 433; E. Cavanagh, "The FTAIA and Empagran: What Next?" (2005) 58 SMU Law Review 1419; J. Connor and D. Bush, "Deterring International Cartels in the Face of Comity and Jurisdiction: A Legal, Economic, and Empirical Evaluation of the Extraterritorial Application of U.S. Antitrust Laws" (April 2, 2007), pp.14–21, available at: *http://ssrn.com/abstract=978846* [Accessed May 11, 2014].

[42] *Empagran* 124 S.Ct. at 2363–64.

[43] 15 U.S.C. § 15.

[44] See the briefs of Germany and Belgium, 2004 WL 226388; Canada, 2004 WL 226389; Japan, 2004 WL 226390; and United Kingdom, Ireland and the Netherlands, 2004 WL 226597.

outside the United States and customers within the United States,"[45] where "the adverse foreign effect is independent of any adverse domestic effect".[46]

The Supreme Court endorsed the view that the various foreign governments expressed in their *amici* briefs in support of a narrow reading of the Sherman Act. One of the stronger arguments was that, in principle, each state should determine how to best protect its own citizens. Another argument was that the principle of comity prescribes a narrow interpretation of ambiguous statues to "avoid unreasonable interferences with the sovereign authority of the other nations".[47] Lastly, the Court rejected the respondent's proposal to read comity on a case-by-case basis as too complex, and preferred to take a clearer view. In the end

> "[w]here foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."[48]

The only exception to this rule left open by the Court is when it can be proven that the foreign injury is dependent on the domestic harm.[49] If we read this decision outside the field of antitrust, we may observe that with *Empagran* the United States have closed their doors to foreign plaintiffs who sue for damages that occurred abroad, unless there is a (strong) causal nexus between the harm that they suffered abroad with the harm occurred in the domestic market.

After *Alcoa*, *Timberlane* and *Hartford Fire* the extraterritorial application of antitrust law is an established *topos*, and the analysis focuses, instead, on the limits of the effects doctrine. With reference to other laws, however, the Court has been able to develop more stringent limits based on the canon of legislative interpretation known as *presumption against extraterritoriality*.[50] A corollary principle of the neglected holding in *American Banana*, in fact, was that "in case of doubt, [...] any statute [should be construed] as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power".

Such statement, long from being forgotten, resurfaced from time to time to limit the application of US laws, although with no real systematic or widespread

[45] *Empagran* 124 S. Ct. at 2366.
[46] *Empagran* 124 S. Ct. at 2366. See E. Cavanagh, "The FTAIA and Empagran", pp.1428–29.
[47] *Empagran* , 124 S. Ct. at 2366.
[48] *Empagran* 124 S. Ct. at 2369. The majority also noted that the Foreign Trade Antitrust Improvement Act (1982) upon which was based the action, was passed to narrow rather than to broaden the scope of the Sherman Act, and therefore it alone could not be read as encompassing more conducts than the Sherman Act. At 2369. E. Cavanagh, "The FTAIA and Empagran", pp.1429 and 1434.
[49] *Empagran* 124 S. Ct. at 2372. For an assessment of the "linked effect" exception, see M. Bloom, "Should Foreign Purchasers", passim. The Court of Appeal on remand found that plaintiffs' harm could not be deemed to be so dependent on the domestic injury and dismissed the claims. *Empagran SA v F Hoffmann-LaRoche Ltd* 417 F.3d 1267 (DC Circuit 2005).
[50] W. Dodge, "The Presumption against Extraterritoriality after Morrison" (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 396.

relevance until *Morrison* came out.[51] The case[52] involved yet another *f-cubed* class action, this time a claim by foreign plaintiffs against securities frauds allegedly occurred on shares purchased from National Australia Bank on the Australian exchange.[53] The Supreme Court did not take the easy road of dismissing the action on a conduct-effect or interest-balancing approach,[54] or ruling on a forum non conveniens basis.[55] It rather chose to apply the "presumption against extraterritoriality", and held that s.10(b) of the 1934 Securities Act[56] does not apply to a conduct that took place wholly in the Australian market.[57] According to the majority opinion written by Scalia J., who bitterly criticises the "conduct and effects" test as "judicial-speculation-made-law",[58] "it is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"[59] and "[w]hen a statute gives no clear indication of an extraterritorial application, it has none".[60]

This writing is focused on the issue of a global forum and, therefore, it is not the place where to find criticisms or praises to the various solutions adopted.[61] What can be said here is that, while the answer provided by the Justices is praised by some on the level of clarity and predictability,[62] as well as on that of comity, the "presumption against extraterritoriality" is something capable of effectively limiting the possibility of bringing global class actions in the United States. This is partly because *Morrison* discourages those (foreign) plaintiffs that would like to take advantage of more generous US laws and standards, and partly rendering harder or even impossible to consolidate a single action in the US as the judge would have to handle different laws and could (and would) probably refuse to do so, for instance on forum non conveniens grounds.

Reading the two decisions, or better the two trends, together, the Court seems engaged in limiting foreigners' actions in the United States and the application of US law to foreign situations. One should not be too hasty to conclude that "*f*" class actions in the US are over. But, certainly, the overall trend is diminishing American

[51] Instances are *EEOC v Arabian American Oil Co* 499 US 244 (1991) and *Benz v Compania Naviera Hidalgo SA* , 353 US 138 (1957) in labour law and *Microsoft v AT&T* 550 US 437 (2007) in intellectual property. See, also, W. Dodge, "Understanding the Presumption against Extraterritoriality" (1998) 16 *Berkeley Journal of International Law* 85.

[52] *Morrison* , 130 S.Ct. 2869.

[53] See L. Silberman, "Morrison v. National Australia Bank: Implications for Global Securities Class Actions" (June 14, 2011), *Swiss Yearbook of Private International Law*2010, *NYU School of Law, Public Law Research Paper No.11–41*, available at: *http://ssrn.com/abstract=1864786* [Accessed May 11, 2014].; L. Silberman and S. Choi, "Transnational Litigation", pp.472–473.

[54] *Hartford Fire*. In this case the Court also specified that the presumption against extraterritoriality is overcame with regard to antitrust laws. L. Silberman, "Morrison v. National Australia Bank", pp.6–7.

[55] See *Gulf Oil Corp v Gilbert* 330 U.S. 501 (1947); *Piper Aircraft v Reyno* 454 U.S. 235 (1981).

[56] 15 U.S.C. §78j(b).

[57] More specifically: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States". *Morrison* 130 S.Ct. at 2888.

[58] *Morrison* 130 S.Ct. at 2881.

[59] *Morrison* 130 S.Ct. at 2877.

[60] *Morrison* 130 S.Ct. at 2878.

[61] See, e.g. I. Buschkin, "Note — The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts" (2005) 90 *Cornell Law Review* 1563.

[62] See L. Silberman, "Morrison v. National Australia Bank", pp.6–7. See, also, L. Silberman-S. Choi, "Transnational Litigation".

courts' utility and appeal to foreigners and of their status as a sort of court of general jurisdiction for the worlds' wrongs.

4. Developments in US class arbitration: Concepcion and Italian Color Restaurant

Another interesting trend is represented by several recent decisions of the Supreme Court in the context of class arbitration.[63] It might be helpful to trace the most important developments regarding (pre-dispute) arbitration clauses in consumer's contracts, before dealing with them.[64] Notably, the Federal Arbitration Act of 1925 does not afford any special protection to consumers.[65] The diffusion of arbitration clauses in standard form contracts, however, is more recent and follows three important steps. The first is the rise of class actions since the famous amendment of 1966,[66] which stimulated the minds and fantasy of in-house counsels to find ways of avoiding such threat.[67] The second is a change of attitude of American courts toward arbitration in general, marked by decisions such as *Scherk*,[68] *Mitsubishi*[69] and *Shearson*[70] that overturned the traditional prudence in enforcing arbitration agreement,[71] allowing for a great degree of arbitrability of disputes and reading in the FAA a federal policy favouring arbitration.[72] The third step[73] opens with the *Gilmer* decision, upholding an arbitration agreement in an employment contract,[74] and *Carnival Cruise*, validating a "reasonable" choice of court agreement contained in a standard form contract between a cruise line and

[63] For a recount of the development of class arbitration in the US, see S.I. Strong, "Resolving Mass Legal Disputes", pp.936–939, 945–946; and S.I. Strong, "Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles", (2012) 17 *Harvard Negotiation Law Review* 201. As well as her recent book *Class, Mass, and Collective Arbitration in National and International Law* (Oxford: Oxford University Press, 2013).

[64] See M. Glover, "Note. Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements" (2006) 59 *Vanderbilt Law Review* 1735. See also D. Schwartz, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration" (1997) *Wisconsin Law Review* 33, 61; L. Demaine and D. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience" (2004) 67 *Law & Contemporary Problems* 55, offer a thorough empirical research; see also M. Budnitz, "The High Cost of Mandatory Arbitration" (2004) 67 *Law & Contemporary Problems* 133; and T. Eisenberg, G. Miller and E. Sherwin, "Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts" (2007–08) 41 *University of Michigan Journal of Law Reform* 871. J. Sternlight, "Creeping Mandatory Arbitration: Is It Just?" (2005) 57 *Stanford Law Review* 1631, 1638–1639.

[65] See, C. Drahozal, "New Experiences of International Arbitration in the United States" (2006) 54 *American Journal of Comparative Law* 233, 254–255, for two exceptions: transportation workers and franchisees in motor vehicle franchise contract.

[66] A. Miller, "Of Frankenstein Monsters".

[67] Simple class-action waivers did not encounter the sympathy of US courts. See T. Eisenberg, G. Miller, E. Sherwin, "Arbitration's Summer Soldiers", p.890.

[68] *Scherk v Alberto-Culver Co* 417 U.S. 506 (1974).

[69] *Mitsubishi Motors Corp v Soler Chrysler-Plymoth Inc* 473 U.S. 614 (1985) (antitrust claims are arbitrable).

[70] *Shearson/American Express Inc v McMahon* 482 U.S. 220 (1987) (investors' claims under the Securities Exchange Act of 1934 are arbitrable).

[71] See, e.g. *Wilko v Swan* 346 U.S. 427, 435 (1953), later directly overruled by *Rodriguez de Quijas v Shearson/American Express Inc* 490 U.S. 477, 484 (1989).

[72] *Mitsubishi* 473 U.S. at 626–628 "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration". The arbitrability of consumer's claims is confirmed by a very recent decision, *Compucredit Corp v Greenwood* 132 S. Ct. 665 (U.S. 2012).

[73] See J. Senderowicz, "Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts" (1998–99) 32 *Columbia Journal of Law & Social Problems* 275; M. Glover, "Note".

[74] *Gilmer v Interstate/Johnson Lane Corp* 500 U.S. 20 (1991). Thus disregarding the probable unequal bargaining position and power of the employer and the employee. See J. Senderowicz, "Consumer Arbitration", pp.280–284.

two consumers.[75] After these two decisions came out, the ground was ready for decisions such as *Allied-Bruce*[76] and *Doctor's Associates*[77] to come up, giving their sanction to an already spreading phenomenon: the insertion of arbitration clauses in B2C standard form contracts. Both Court's decisions, in fact, invalidated state laws protecting weaker parties (consumers, franchisee) from arbitration agreements imposed by the stronger counterpart. The federal policy favouring arbitration provided by the FAA, assisted by the Supremacy clause,[78] made the deal: arbitration agreements must be on "equal footing"[79] with respect to all other terms of the contract and cannot be the target of discriminatory provisions, even when their *ratio* is a protective one. It followed that consumers could be compelled to arbitrate their claim, apparently shielding corporations from class proceedings before a court.[80] This represented a major victory for corporate counsels, but the story was not over yet.

The plaintiff bar has imagination, too, and discovered a new alternative when the standard form contained an arbitration agreement, waiving the possibility to pursue a class action. If the clause did not permit class action, they reasoned, maybe it could be possible to bring such "class" before an arbitral tribunal. The one obstacle, however, was that no arbitration clause contained an explicit permission to proceed as a class, and therefore two questions arose: whether class arbitration is permissible when a clause is silent and who gets to decide this issue. The answer came with the seminal *Bazzle*[81] decision rendered by a split Supreme Court in 2003. The *Justices* declared[82] that the question of whether a silent arbitration agreement allows for class arbitration is for the arbitrators to decide.[83] The holding was stretched, perhaps, a little bit farther than what it really intended and welcomed as a landmark ruling sanctioning that a silent arbitration agreement allows for a class arbitration.[84] The Court had also previously noted in *Randolph* that the costs of arbitration could effectively prevent the consumer from enforcing her substantive rights and that in such a case a clause could be found invalid.[85] To avoid this peril, arbitration clauses started to be drafted in a way so to minimise the financial burden

[75] *Carnival Cruise Lines v Shute* 499 U.S. 585 (1991). The sharp contrast with European rules could not be more evident: both consumers and employees cannot be removed from their "natural judge" at the place of their domicile by means of a pre-dispute choice of court agreement. Articles 17 and 21 of Regulation 2001/44/EC.

[76] *Allied-Bruce Terminix Cos v Dobson* 513 U.S. 265, 281 (1995): "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause".

[77] *Doctor's Assocs v Casarotto* 517 U.S. 681 (1996) (citing *Allied-Bruce*) "[c]ourts may not [...] invalidate arbitration agreements under state laws applicable only to arbitration provisions".

[78] Article VI cl.2, of the US Constitution. See *Southland Corp v Keating* 465 U.S. 1 (1984) (FAA preempts inconsistent state law).

[79] *Allied-Bruce* 513 U.S. at 281.

[80] See also. M. Budnitz, "The High Cost", pp.148–149, noting the impact of class action waivers on arbitration costs.

[81] *Green Tree Financial Corp v Bazzle* , 539 U.S. 444 (2003). But see the recent decision in *Stolt-Nielsen SA v AnimalFeeds International Corp* 130 S.Ct. 1758 (2010). See, also, S.I. Strong, "Does Class Arbitration".

[82] The opinion of the court was drafted by Breyer J., joined by Scalia, Souter and Ginsburg JJ. Justice Stevens, who wrote a partially dissenting opinion, concurred in the judgment in order for the Court to have a controlling judgment. *Bazzle* 539 U.S. at 455.

[83] *Bazzle* 539 U.S. at 451.

[84] In part this is because certain arbitrators begun allowing class arbitration simply relying on *Bazzle* and post-*Bazzle* decisions, without properly construing the agreement.

[85] *Green Tree Financial Corp-Ala v Randolph* 531 U.S. 79, 90, 92 (2000).

for the consumer.[86] In any case, another America's unique received full recognition from the highest court: class arbitration. At this point, and not before, leading US arbitral institutions started devising special rules for class arbitration.[87]

The story repeated once again, only this time before an arbitral tribunal: businesses faced the threat of class-wide proceedings and tried ways to escape. The counter-move engineered by corporate counsels was to insert within the bilateral arbitration clause in the standard form, class action *and* class arbitration waivers. The move did not pass unnoticed, and enforcement of such waivers was not uniform in the various federal and state courts. Among those more protective toward consumers were California's courts, which started to hold class action and arbitration waivers contained in non-negotiated arbitration clauses unconscionable and mandating class-wide proceedings.[88] Here is where we shall pause for a moment, and where the *Concepcion* saga begins.

Perhaps unaware of all these legal complexities, the Concepcions bought a mobile phone from AT&T Mobility, attracted by the advertisement of a "free phone".[89] Few months later, however, they found in their bills that they were being charged sales tax on the retail value of the "free" phone in the amount of around $30 for two phones. As well-educated American consumers, the Concepcions threw their dices and chose to sue AT&T, *i.a.* for false advertising and fraud. They were not alone in making such resolution and, thus, several individuals consolidated as a class action against AT&T. The phone company tried to resist by pointing to the arbitration agreements contained in each of the mobile phone contracts, and requesting the court to compel arbitration. Those clauses, oddly enough, prevented consumers to pursue their claim collectively as a class, expressly depriving the arbitral tribunal of such power.[90] The only option left for the consumer would have been individual bilateral arbitration. Applying California law,[91] both the District

[86] The same has been done by arbitral institution such as AAA-Consumer-Related Disputes Supplementary Procedures, effective September, 2005; see D. Bates, "A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?" (2004) 27 *Fordham International Law Journal* 823, 835–838. See also *Buckeye Check Cashing Inc v Cardegna* 546 U.S. 440 (2006), which is often cited with reference to the doctrine of *separability* of arbitration agreements, but was also a consumer's dispute. In the words of N. Reich, "More clarity after 'Claro'?" (2007) *European Review of Contract Law* 42, 51: "Consumer protection (…) depends on the willingness of arbitrators to apply and enforce consumer protection provisions in particular of state law; their awards are not subject to critical public and academic debate". See, also, at 49–52.

[87] See, e.g. AAA-Supplementary Rules for Class Arbitration, effective October, 2003; JAMS Class Action Procedures, effective May 1, 2009, both indirectly or directly modelled after r.23 FRCP. Class arbitration did not started in 2003 but *Bazzle* opened the floodgates.

[88] See *Discover Bank v Superior Court* 30 Cal. Rptr. 3d 76 (2005). J. Rizzardi, "Discover Bank v. Superior Court of Los Angeles" (2005–06) 21 *Ohio State Journal on Dispute Resolution* 1093; M. Nelson, "Discover Bank v. Superior Court: The Unconscionability of Classwide Arbitration Waivers in California" (2006–07) 30 *American Journal of Trial Advocacy* 649, 656–660. While the Supreme Court struck down state laws specifically targeting arbitration clauses, see supra fnn.76–77 and accompanying text above, the California courts relied on the general theory of unconscionability. This possibility is expressly permitted by the FAA § 2 "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". As we will see, however, this was not enough for the Supreme Court.

[89] *AT&T Mobility LLC v Concepcion* 131 S. Ct. 1740, 1742 (U.S. 2011).

[90] An articulated text that mandated arbitration and contained the following provision: "no Arbitrator has the authority to … (3) order consolidation or class arbitration". *Laster v T-Mobile USA Inc* 2008 U.S. Dist. LEXIS 103712, *7 (S.D. Cal. Aug. 11, 2008). It should be noted that, in order to comply with the *Bazzle* requirements, fn.92 below, the AT&T standard arbitration clause minimised the costs of arbitrating the dispute for the consumer: the real purpose of such clauses was and still is not to prevent the single individual from vindicating her rights, but to avoid class-wide actions. The arbitration clause in *Concepcion* was not silent regarding class arbitration, but it explicitly excluded it: therefore the *Stolt-Nielsen* issue could not and did not come up.

[91] *Discover Bank* 30 Cal. Rptr. 3d 76.

Court[92] and the Court of Appeals for the Ninth Circuit[93] found such clauses unconscionable and therefore dismissed AT&T's defence, keeping the dispute into court.

The Supreme Court did not agree and, granting AT&T petition for certiorari, reversed the lower court's decision on pre-emption grounds. Justice Scalia, writing for a majority of the Court, held that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration" and, thus, inconsistent state legislation is preempted by the FAA.[94] The Court, in fact, reasoned that arbitration as envisaged in the FAA is something of informal, low stakes and ontologically bilateral, while the complexities of class arbitration would denature such "purity".[95] The picture that the Court draws of arbitration surely strikes as disconnected from the reality of modern arbitration.[96]

However, and regardless of the merits of the decision, the impact of this holding is potentially epidemic. Even though the solution of the case turned on the issue of pre-emption of state law by federal law, the consequences are broader. It gives a green light to arbitration clauses in standard form contracts mandating bilateral procedures and excluding both class-arbitration and class-action.[97] A consumer would be, thus, left with the only option of pursuing her claim individually, hence with no option at all. If the trend is confirmed, it might signal the end of US consumer's class action as we know it. The *Concepcion* holding does not impact only consumers' disputes, because it targets all possible state provisions that carve out from arbitration clauses the possibility of collective redress mechanisms.[98]

This should be read also along the lines of the *Stolt-Nielsen* decision limiting *Bazzle* and holding that consent to class arbitration cannot be implied solely by the existence of a, otherwise silent, arbitration agreement.[99] In other words, arbitrators cannot simply rely only on *Bazzle* and post-*Bazzle* cases, but must "do their homework" and justify implied consent to class arbitration on some other

[92] *Laster* 2008 U.S. Dist. LEXIS 103712.

[93] *Laster v AT&T Mobility LLC* 584 F.3d 849, 855 (2009).

[94] Section 2 of the Federal Arbitration Act (1925), codified at 9 U.S.C. § 2, provides that an agreement to arbitrate in writing "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". The Court also held that "class arbitration greatly increases risk to defendants" and that it is "poorly suited to the higher stakes of class litigation". *AT&T Mobility LLC* 131 S. Ct. 1740.

[95] The following are some of the sentences characterizing the Court's view "[t]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution". *AT&T Mobility LLC* 131 S. Ct. 1740 at 1749. "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment". At 1751. "Arbitration is poorly suited to the higher stakes of class litigation". At 1752.

[96] Both commercial and investment arbitration. On the latter, see the claim brought by nearly 60.000 Italian bond holders against Argentina, *Abaclat v Argentine Republic* ICSID Case No.ARB/07/5 (formerly *Giovanna a Beccara v Argentine Republic*).

[97] This idea was already on practitioners' mind, as evidenced by the short article of E.W. Dunham, "The Arbitration Clause as Class Action Shield" (1996) 16 *Franchise Law Journal* 141. The fact that the main goal of arbitration clauses in consumers' contracts is to avoid class action is further evidenced by the A. "Recently, however, some state courts, including California's, have found class action waivers in consumer arbitration agreements to be unconscionable[.] Company lawyers responded to these adverse decisions by softening other terms pertaining to arbitration, while retaining the class action waiver, … suggest[ing] that [they] have turned to arbitration as a source of protective cover for class action waivers.". T. Eisenberg, G. Miller and E. Sherwin, "Arbitration's Summer Soldiers", pp.893–894.

[98] Nothing, in principle, prevents Congress from legislating so to amend the FAA (1925) and protect weaker parties, but this seems highly unlikely. See, e.g. C. Drahozal, "New Experiences", pp. 255–256, and fn.71 above.

[99] *Stolt-Nielsen SA* 130 S.Ct. 1758.

basis, for instance construing the arbitration clause in this sense.[100] This does not seem to go as far as requiring an explicit consent to class arbitration.[101]

Some caution is in order: as shown above, in the last decades defendants have tried many ways to escape class actions, while plaintiffs have constantly chased them. As courts have reacted with mixed feelings to this contest, it is likely that some courts will eventually attempt to grant consumers the chance to proceed as a class, albeit probably as a class action (striking down the entire arbitration clause) and not in class arbitration.[102]

To be sure, the Second Circuit recently tried to do exactly so in the context of a collective antitrust action brought by some restaurants against American Express for abusing its monopoly power and imposing certain negative tying arrangements. The plaintiffs tried to bring a class action, but each of their imposed contracts of adhesion contained a bilateral arbitration clause coupled with a class arbitration waiver. The arbitration clause went farther "cut[ting] off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs"[103] among the individual plaintiffs. When, after a dismissal of the action by the District court compelling arbitration, the case reached the Second Circuit, it was undisputed that, in order to bring their antitrust claims, the plaintiffs needed to provide an economic analysis costing something less than a million dollars. At the same time, it was equally clear that each of the plaintiffs could not recover, where successful, more than forty thousand dollars.

Given these elements, the Second Circuit reasoned that that

> "if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights".

From the moment that both the contract and *Stolt-Nielsen* (at least under the reading that the court offered) precluded it from mandating class arbitration, the only two alternatives open to plaintiffs were pursuing the claims as judicial class action or not pursuing them at all. Enforcing the bilateral arbitration clause would have, thus, "strip[ed] the plaintiffs of rights accorded them by statute". For this reason the Court found the entire arbitration clause unenforceable[104]: seemingly a straightforward application of the *Randolph* rule.[105]

Such a logical argumentation did not convince the Supreme Court that, in a decision dated July 22, 2013, reversed the Second Circuit, upholding bilateral arbitration clauses containing both a class action and class arbitration waiver, including where it is proven that bringing individual claims is unfeasible.[106] According to the majority, in fact, "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim", nor "congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of

[100] See S.I. Strong, "Resolving Mass Legal Disputes", pp.936–939, 946.
[101] *Oxford Health Plans LLC v Sutter* 133 S. Ct. 2064 (2013).
[102] S.I. Strong, "Resolving Mass Legal Disputes" (2012), pp.945–946.
[103] *Am Express Co v Italian Colors Rest* 133 S. Ct. 2304, 2313 (2013).
[104] *Italian Color Restaurant v Am Express Travel Related Servs Co (In re Am. Express Merchants' Litig)* 667 F.3d 204 (2d Cir. 2012), *reh'g en banc denied sub nom., Nat'l Supermarkets Ass'n v Am Express Travel Servs Co (In re Am. Express Merchants' Litig)* 681 F.3d 139, 2012 U.S. App. LEXIS 10815 (2d Cir., May 29, 2012).
[105] See fn.85 above and accompanying text.
[106] *Am Express Co* 133 S. Ct. 2304.

statutory rights".[107] The Court, providing a rather formalistic distinction between *proving* and *pursuing* a claim, noted that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy".[108]

Justice Kagan signed a sharp dissent, stating that "[w]hat the FAA prefers to litigation is arbitration, not de facto immunity"[109] and exposing the fallacies of the majority's reasoning. The dissent sided with the Second Circuit in considering that "[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands".[110] Kagan also criticised the majority decision for bringing to the illogical conclusion that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse",[111] as well as the majority's obsession with class actions "to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled".[112]

In the end, *Concepcion* and *Italian Color Restaurant* tell us two things: corporations can now freely insert bilateral arbitration agreements coupled with class action and class arbitration waivers in their contracts, thus effectively escaping not only from Rule 23 but from liability and accountability altogether. This, of course, does not shield corporations from all type of claims, especially not from tort liability, but still is an important shelter. Secondly, they confirm that the Supreme Court's 21st Century's agenda hardly supports the view of the US judiciary as a champion of David against Goliath.

5. Concluding remarks

In these pages we have tried to describe how, under the conscious guide of its Supreme Court, the American judiciary is moving away from the role as global judge that it acquired in the last decades. We have shown two of the paths that the Court is following. The first limits the applicability of US law to foreign situations, as well as, indirectly, the possibility for foreigners to join a class action in the United States. The second allows stronger parties to weaken class action as method of dispute resolutions, inserting simple bilateral arbitration clauses in their agreements, waiving class action and class arbitration. Both movements should be read against the background of deterrence that we have mentioned, because limiting the feasibility of class devices means not only depriving private damaged litigants of a powerful weapon to their arsenal. Often it also means shielding (corporate) wrongdoers from liability, abdicating the private enforcement component and diminishing the general welfare potentially arising out of deterrence.

The Court's new course is well signalled by another recent decision in the field of human rights litigation. In a much-debated Alien Tort Statute[113] action, *Kiobel v Royal Dutch Petroleum*, the Court faced the issue of whether corporations can

[107] *Am Express Co* 133 S. Ct. 2304 at 2309.
[108] *Am Express Co* 133 S. Ct. 2304 at 2311.
[109] *Am Express Co* 133 S. Ct. 2304 at 2315.
[110] *Am Express Co* 133 S. Ct. 2304 at 2316.
[111] *Am Express Co* 133 S. Ct. 2304 at 2313.
[112] *Am Express Co* 133 S. Ct. 2304 at 2320.
[113] 28 U.S.C. § 1350.

be held liable under international law.[114] The Justices dodged such complex and delicate question and focused instead, once again, on the familiar issue of the extraterritorial application of the ATS.[115] Finding that no element of the ATS suggests a clear intent by Congress to have such law applied outside the American territory, the Court closed the doors of US courts to any ATS action based on extraterritorial facts,[116] except where the claims "touch and concern" the territory of the United States.[117]

Kiobel is clearly in line with recent case law of the Robert's Supreme Court, but has the additional consequence of depriving victims of human rights violation of an important avenue for redressing the torts suffered. Significantly, though, one of the justifications that Roberts provided for its decision is that "[n]o nation has ever yet pretended to be the *custos morum* of the whole world". This self-restraint rationale, regardless of how seriously the Justices believe in it, seems to be surfacing in the other decisions as well. The question here might be, if the United States, which for long time provided some judicial answer to global problems, are stepping down from such role, what did other states, and Europe above all, do in the meantime? And what are they doing now? These are questions that could not find their way in this short contribution, and we will leave them unanswered for now. They deserve careful attention, however, and we pledge to return to them in a future research.

[114] Already answered 2 to 1 in the negative by the Second Circuit. *Kiobel v Royal Dutch Petroleum* 621 F.3d. 111 (2d Cir. 2010), *reh'g en banc denied* 642 F.3d 268 (2d Cir. 2011).

[115] *Kiobel v Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013). See Wuerth, "The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co." (2013) 117 *American Journal of International Law*, forthcoming; *Vanderbilt Public Law Research Paper No.13–26*, available at: *http://ssrn.com/abstract=2264323* [Accessed May 11, 2014]; see also the *insta-symposium* on Opiniojuris.org, at: *http://opiniojuris.org/2013/04/20/weekend-roundup-april-13-19-2013* [Accessed May 11, 2014].

[116] *Kiobel* 133 S.Ct. at 1669: "We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. [Therefore …] petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred" (internal citations omitted).

[117] *Ivi*. So far lower courts seem to have narrowly interpreted this exception, *Balintulo v Daimler AG* , 09-2778-cv(L) (2d Cir., 21 Aug. 2013). There are some more permissive decisions, see, in general: *http://opiniojuris.org/2013/09/23/lower-courts-narrowly-interpret-kiobel/* [Accessed May 11, 2014].