Dispute resolution

Jamie E. Hanley and Jonathan Waisnor, Labaton Keller Sucharow

The case for mass arbitration

There are a growing number of large collective or group consumer actions in the UK, as consumer or employee claimants seek redress for widespread business practices. Commentators often compare these developments to class and collective litigation in the US. In the US, a spate of consumer or employee 'mass arbitrations' has led to the creation of specialised protocols to address mass arbitration. This article summarises the development of these protocols and whether they could be introduced in the UK.

The 'mass arbitration' phenomenon arose when US companies succeeded in convincing courts to enforce pre-dispute arbitration clauses for consumer or employment disputes that provided for individual, bilateral arbitration and prohibited class or collective procedures. Individual consumers or employees then filed many individual arbitrations. The number of claims in any mass arbitration may be quite large, with some involving over 70,000 individual claimants. Mass arbitrations include disputes over consumer finance, data privacy and breaches, deceptive and false advertising, gaming addiction, employee misclassification, underpayment of wages and benefits, and antitrust/competition claims.

While there is no single definition of a mass arbitration, the American Arbitration Association (AAA) defines it as: '(i) 25 or more individual consumer or employment arbitrations involving similar or common issues of law or fact and (ii) where representation of all parties is consistent or coordinated across the cases'. These demands do not need to be filed at the same time; claims are often filed in waves and assigned to a mass arbitration based on the consumer or employee's choice of counsel.

AAA statistics showed that in 2024 alone, 82 mass arbitrations were filed in its consumer division, involving 247,327 individual claims, and 10 in the employment division, involving 33,022 individual claims. However, the true scope of mass arbitration in the US is unknown. Many mass arbitration claims are resolved through pre-suit negotiations between the parties before a claim is even filed. Other arbitration providers, such as the Judicial Arbitration and Mediation Services and National Arbitration and Mediation, administer mass arbitrations but do not publish global data.

These providers have developed mass arbitration rules for consumer and employment disputes. These usually provide for lower administrative fees for both parties, the appointment of a single arbitrator to determine administrative, non-merits issues, and default rules for the assignment of merits arbitrators if the parties cannot agree.

Several collective action mechanisms in the UK are used by claimants seeking redress for corporate injuries. The Competition Appeal Tribunal can hear claims for damages or loss brought by individuals or on a collective opt-in or opt-out basis. The number of claims in the CAT is growing; there are more than 55 class or collective claims currently before the CAT. Mass claims that are not eligible for treatment in the CAT are often brought under Part 19 of the Civil Procedure Rules, commonly called 'group litigations'. There have been over 120 group litigations filed, including most recently around a dozen vehicle emissions litigations filed against major car manufacturers.

Finally, UK regulators are empowered to create collective redress schemes such as those used to compensate consumers. For example, the Financial Conduct Authority established a redress scheme to compensate consumers who complained of allegations of misconduct in relation to payment protection insurance sales. The FCA supervised the resolution of 18.4 million claims relating to mis-sold PPI. Thus, mass arbitration would need to supplement, or provide a viable alternative to, the existing collective action schemes.

In the UK, companies typically cannot enforce binding pre-dispute arbitration clauses against consumers or employees. However, the US experience has shown that large numbers of consumers and employees believe that arbitration is an option to resolve their disputes against companies. Several options have been proposed for how such clauses could be drafted so that they are enforceable.

Under a pre-dispute non-binding clause, consumers could agree to one-way 'non-binding' arbitration if a claim arises. Such a contract would require a consumer to first submit the claim to optional arbitration before or in lieu of going to court. Consumers or employees may voluntarily choose to submit their claims to arbitration because it is cheaper, faster and more informal than court procedures.

Under a post-dispute binding arbitration clause, companies and consumers or employees could negotiate to submit to binding mass arbitration after a dispute has arisen. The company could make the offer in a post-dispute notice – for example, with a notification of a data security incident. The arbitration clause could also be included in a pre-dispute contract as an open 'offer to arbitrate', which the consumer or employee would affirmatively accept post-dispute by giving the company notice of the intention to arbitrate. This process could also provide an opportunity for settlement negotiations to take place before the filing of arbitration.

The notices would likely need to inform consumers that they have the right to proceed in court, to retain counsel to represent them and that arbitration is not the only means for seeking redress for their injuries.

Providers thinking about introducing mass arbitration procedures into the UK may wish to review the process of becoming certified by an applicable regulatory or self-governing body, depending on the types of disputes the provider wishes to administer.

As the number of class, collective or group actions in the UK increases, more businesses may explore whether mass arbitration could serve as a viable alternative to court for large disputes. Companies will need to consider the specific types of dispute and under what terms and circumstances they could offer mass arbitration as a solution.

Jamie E. Hanley and Jonathan Waisnor are partners at Labaton Keller Sucharow, London