Enforcing Consumer Rights in Crypto Platform Failures: A US–EU Comparative Analysis of Collective Redress Mechanisms[1]

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Abstract

The collapse of major crypto assets platforms in 2022, notably Terraform Labs and FTX, resulted in substantial losses for retail consumers and exposed critical deficiencies in existing procedural remedies. The objective of this study is to compare the efficacy of two distinct collective redress models: the United States class action regime under Federal Rule of Civil Procedure 23 and the European Union's Representative Actions Directive (EU) 2020/1828. Using a comparative legal methodology applied to the case studies of Terraform Labs and FTX, this article analyses procedural gatekeepers (specifically arbitration clauses, cross-border jurisdiction, and the interplay with insolvency proceedings) to evaluate participation rates, recovery potential, and deterrence. The results demonstrate that while the U.S. opt-out model offers aggressive aggregation and third-party liability theories, it is frequently neutralized by mandatory arbitration waivers. Conversely, the EU model, exemplified by the Czech Republic's implementation, ensures broader access to courts by nullifying such waivers but faces practical hurdles regarding funding and the 'rational apathy' associated with opt-in mechanisms. The study's implications suggest the necessity for a hybrid policy approach involving the regulatory prohibition of class waivers in crypto contracts and enhanced international coordination between insolvency estates and collective actions.

Keywords: *collective redress, class action, representative actions, crypto assets, cross-border insolvency, arbitration.*

JEL Classification: K41, K22, K33

DOI: 10.62768/TBJ/2026/16/1/02

Please cite this article as:	**Article History**
Brandejský, Tomáš, 'Enforcing Consumer Rights in Crypto Platform Failures: A US–EU Comparative Analysis of Collective Redress Mechanisms', *Juridical Tribune – Review of Comparative and International Law* 16, no. 1 (March 2026): 29-44.	Received: 17 December 2025 Revised: 05 February 2026 Accepted: 03 March 2026

1. Introduction

The rapid expansion of crypto assets outpaced the development of procedural safeguards, creating a risky environment for retail investors. The catastrophic market

[1] Funding Details. This work was supported by the Prague University of Economics and Business (VŠE) through the Internal Grant System (IGS) project „Prevention of Crypto Asset Fraud and Failure of Related Service Providers in an International Context" [project number: 50/2024].

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corrections of 2022, which resulted in billions of dollars in losses and caused the collapse of major entities such as Terraform Labs and FTX, did not merely bankrupt corporations. They exposed a critical gap in cross-border consumer redress. Faced with global insolvency proceedings, millions of creditors were left navigating fragmented legal systems. Therefore, this article seeks to answer a fundamental question: Which procedural regime, specifically the U.S. entrepreneurial class action or the EU's newly established representative action, effectively protects consumer rights in the wake of cross-border crypto platform failures?

The current body of research concentrates mainly on token classification and custody rules which fall under the Markets in Crypto-Assets Regulation (MiCA) but procedural enforcement remains essential for substantive rights to be meaningful.[3] To address this, the article shifts the analytical focus from regulatory compliance to the mechanics of compensation. By prioritizing the unique vulnerabilities of retail consumers over institutional investors, the study evaluates the procedural efficacy of current collective redress mechanisms.

This study compares two distinct procedural philosophies: the mature, market-driven U.S. class action system and the new, regulatory-focused EU framework established by Directive 2020/1828.[4] The analysis demonstrates that neither regime offers a complete solution. The U.S. model acts as a powerful engine for asset recovery but is frequently stopped by mandatory arbitration waivers. In contrast, the EU model legislatively removes these barriers but lacks the "financial motivation" of the American plaintiff bar to drive complex litigation.

The article first describes the opposing legal frameworks, using the Czech Republic's implementation of the Directive as a primary case study. The analysis then examines three critical "procedural gatekeepers" that determine case outcomes: arbitration clauses, cross-border jurisdiction, and insolvency stays. Finally, the study applies these concepts to the empirical realities of the Terra and FTX litigations to propose a set of policy measures for better cross-border coordination.

2. Legal Frameworks for Collective Redress

2.1. The United States: The Entrepreneurial Opt-Out Model

The United States operates a robust collective litigation framework governed by Rule 23 of the Federal Rules of Civil Procedure.[5] This regime functions primarily as a mechanism of private enforcement, relying on financial incentives to trigger legal actions against corporate misconduct.[6]

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[3] Philipp Maume, "The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?," *European Company and Financial Law Review* 20 (2023): 243-275, https://dx.doi.org/10.2139/ssrn.4639010.

[4] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409 (December 4, 2020): 1–27.

[5] Fed. R. Civ. P. 23.

[6] John C. Coffee Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, MA: Harvard

Standing is not automatic. The representative plaintiff must navigate the certification process, which requires satisfying the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. For financial injury cases, including those involving crypto losses, plaintiffs typically seek certification under Rule 23(b)(3). This provision mandates that questions of law or fact common to class members "predominate" over any questions affecting only individual members, and that a class action is the "superior" available method for fairly and efficiently adjudicating the controversy. Failure to meet these standards results in the dismissal of the class claims, often ending the litigation entirely as individual pursuit of small claims is rarely viable.[7]

The U.S. framework is defined by its opt-out mechanism, a feature that maximizes claim aggregation by default. Upon certification, all individuals falling within the class definition are legally bound by the judgment unless they affirmatively request exclusion. This structure is underpinned by a counsel-driven model, where plaintiffs' attorneys advance litigation costs on a contingency fee basis, assuming the financial risk in exchange for a percentage of the final settlement.[8] The application of the „American Rule" generally shields representative plaintiffs from adverse cost orders, meaning they are rarely liable for the defendants' legal fees if the claim fails. This means law firms function as „private attorneys general," frequently initiating enforcement actions parallel to, or even preceding, official regulatory investigations.[9]

2.2. The European Union: The Qualified Entity Model

European collective redress systems have historically adopted a reserved stance, reflecting a conscious legislative effort to prevent the emergence of what EU policymakers perceive as the "toxic" features of U.S. court procedures.[10] Prior to the adoption of Directive (EU) 2020/1828, the European collective redress landscape was characterized by significant fragmentation and reliance on non-binding Commission recommendations. As Voet observes, this 'soft law' approach resulted in a patchwork of diverse national mechanisms (such as distinct regimes in France, Belgium, and the Netherlands) that lacked a cohesive procedural standard for cross-border enforcement.[11]

University Press, 2015), https://doi.org/10.4159/9780674287075.

[7] Michael J. Kaufman and John M. Wunderlich, "The Unjustified Judicial Creation of Class Certification Merits Trials in Securities," *University of Michigan Journal of Law Reform* 43, no. 2 (2010): 323–382, https://doi.org/10.36646/mjlr.43.2.unjustified.

[8] Brian T. Fitzpatrick, *The Conservative Case for Class Actions* (Chicago: The University of Chicago Press, 2019), https://doi.org/10.7208/chicago/9780226659473.001.0001.

[9] John C. Coffee Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions," *Columbia Law Review* 86, no. 4 (1986): 669–727, https://doi.org/10.2307/1122577.

[10] Christopher Hodges, "Collective Redress: A Breakthrough or a Damp Squib?," *Journal of Consumer Policy* 37, no. 1 (2014): 67–89, https://doi.org/10.1007/s10603-013-9242-0.

[11] Rafael Amaro et al., Collective Redress in the Member States of the European Union (Brussels: European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf.; Stefaan Voet, "European Collective Redress: A Status Quaestionis," *International Journal of Procedural Law* 9, no. 1

Fully applicable as of June 2023, the Directive provides a uniform mechanism for seeking both injunctive relief and redress measures (compensation) for infringements of EU law.

The EU framework operates through a fundamentally different paradigm than the U.S. model, primarily by restricting legal standing to Qualified Entities (QEs). These entities are typically pre-designated non-profit consumer organizations or public bodies. This policy was designed to mitigate the risk of abusive litigation driven by profit motives, widely regarded by EU legislators as a flaw inherent to the U.S. system. To obtain standing for cross-border redress actions, a QE must satisfy stringent criteria, including non-profit status, independence from market operators, and demonstrated previous public activity.[12]

While Member States maintain procedural autonomy regarding domestic actions, they are mandated to create an opt-in system for cross-border redress management. The regime requires consumers to take affirmative action to join the lawsuit to benefit from a favorable judgment. This creates substantial procedural friction, often deterring participation.[13] In contrast to the U.S. opt-out model, which achieves high aggregation by default, the EU approach prioritizes informed consent over participation rates. The Directive also explicitly prohibits punitive damage awards, limiting recovery strictly to actual loss suffered.

2.3. National Implementation: The Czech Republic

The transposition of the Directive into national law illustrates the tangible shift in the European legal landscape. The Czech Republic implemented the Directive via Act No. 179/2024 Coll., on Collective Civil Proceedings, which entered into force on July 1, 2024.[14]

Marking a departure from the historical absence of collective redress, the Czech Act establishes a specialized procedure under the exclusive jurisdiction of the Municipal Court in Prague. The system operates through a strict opt-in framework requiring Qualified Entities to aggregate a minimum of 10 consumers prior to commencing proceedings. For complex crypto disputes, the Act permits third-party litigation funding, albeit subject to stringent disclosure obligations to mitigate conflicts of interest. This reflects the EU's preference for a "controlled" enforcement environment designed to facilitate access to justice while structurally precluding the commodification of litigation characteristic of the U.S. model.[15]

(2019): 98–101.

[12] Alexandre Biard, "Collective Redress in the EU: A Rainbow behind the Clouds?," *ERA Forum* 19 (2018): 189-204, https://doi.org/10.1007/s12027-018-0509-4.

[13] Louis Visscher and Michael Faure, "A Law and Economics Perspective on the EU Directive on Representative Actions," *Journal of Consumer Policy* 44 (2021): 455–482, https://doi.org/10.1007/s10603-021-09491-3.

[14] Act No. 179/2024 Coll., on Collective Civil Proceedings [Zákon o hromadném občanském řízení soudním].

[15] Anežka Janoušková, "Class Members in Collective Proceedings: Searching for an Optimum Model of Class Members' Participation," *The Lawyer Quarterly* 13, no. 4 (2023): 375–376, https://tlq.ilaw.cas.cz/

3. Procedural Gatekeepers: Barriers to Effectiveness

Procedural frameworks employ specific mechanisms that act as 'gatekeepers,' strictly delimiting the accessibility of collective redress. In practice, the trajectory from initial complaint to final restitution is systematically impeded by three structural barriers: mandatory arbitration clauses, jurisdictional limitations, and the automatic stays triggered by insolvency proceedings.

3.1. Arbitration Clauses and Class Waivers

The U.S. and EU procedural systems demonstrate their greatest difference through their opposing positions regarding the legal power of pre-dispute mandatory arbitration clauses.

The Federal Arbitration Act (FAA) which operates in the United States creates a strong federal policy which supports arbitration practices. The Supreme Court established through AT&T Mobility v. Concepcion that the FAA prevents states from enforcing laws which seek to make class action waivers in arbitration agreements invalid.[16] The terms of service (ToS) which FTX and Binance.US platforms use to force users into individual arbitration remain legally binding.[17]

However, the 'arbitration wall' in the United States is not entirely impenetrable. In Coinbase Inc. v. Suski (2024), the Supreme Court delineated critical procedural safeguards regarding delegation clauses. The Court ruled that where a consumer is subject to conflicting contractual terms (specifically, a User Agreement containing an arbitration provision versus a Sweepstakes Official Rule mandating California judicial jurisdiction) the question of which contract governs must be decided by a court, not an arbitrator.[18] The court decision indicates that platforms which create contractual uncertainties can face successful challenges to their automatic arbitration waiver enforcement thus maintaining some access for class plaintiffs to file lawsuits in court.
The ToS from FTX contained two main conditions which forced users to undergo arbitration in Singapore while simultaneously blocking them from joining class action lawsuits. These clauses immunize defendants from group liability because courts can apply them to prevent retail consumers who lack sufficient funds from initiating individual arbitration for their small claims. The pervasive enforcement of these waivers effectively immunizes corporations from collective liability, precluding both class-wide arbitration and judicial recourse.[19] This trend reflects a broader erosion of the class action mechanism in the United States. Beyond contractual barriers, courts have increasingly tightened the procedural requirements for class certification, making it

index.php/tlq/article/view/567.

[16] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[17] S.I. Strong, "Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns," *University of Pennsylvania Journal of International Law* 30, no. 1 (2008): 1–100, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330611.

[18] *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1193–94 (2024).

[19] Myriam Gilles, "Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action," *Michigan Law Review* 104, no. 3 (2005): 373, https://repository.law.umich.edu/mlr/vol104/iss3/1.

significantly harder for plaintiffs to hold corporations accountable. These cumulative hurdles often drain the class action device of its power to compensate victims and deter future corporate misconduct, leaving retail consumers with few viable paths to justice.[20] The EU legal framework significantly restricts the enforceability of these clauses in B2C contracts. While the Unfair Contract Terms Directive (93/13/EEC) does not render such terms automatically void in all cases, it classifies them as terms that may be regarded as unfair if they exclude or hinder the consumer's right to take legal action. However, utilizing the minimum harmonization principle, many Member States (such as the Czech Republic[21], France[22] or Austria[23]) have adopted stricter national measures, categorizing pre-dispute arbitration clauses as automatically unfair and invalid.[24]

Furthermore, the French Cour de Cassation along with other Member State courts have made it clear that consumer contracts containing mandatory arbitration clauses will be declared invalid by court decisions.[25] Therefore, a representative action brought by a Qualified Entity in the EU cannot be blocked by the fine print of a user agreement. This protection is reinforced by the Court of Justice of the European Union, which ruled in *Karel de Grote* that national courts are required to assess the unfair nature of contractual terms of their own motion (*ex officio*), thereby ensuring that consumers are not deprived of judicial protection merely because they failed to raise the invalidity of such clauses themselves.[26] Unlike the U.S. system, where the burden rests on the consumer to overcome the waiver, the EU regime ensures that consumers are not deprived of judicial protection merely due to procedural passivity or lack of legal sophistication.

3.2. Jurisdiction and Cross-Border Reach

The U.S. court system faces various challenges when it tries to obtain jurisdiction over federal securities law cases which occur outside American territory. Under the doctrine established in Morrison v. National Australia Bank[27], U.S. law generally applies only to domestic transactions. The crypto environment produces two main effects which prevent foreign buyers from joining class actions and forces courts to reject cases about token purchases made through international exchanges even when the buyer resides in the United States. U.S. courts maintain personal jurisdiction over

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[20] R. H. Klonoff, *The Decline of Class Actions*, Washington University Law Review, Vol. 90, Issue 3, 2013, https://openscholarship.wustl.edu/law_lawreview/vol90/iss3/6.
[21] Section 2(1) of Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards, published in the Collection of Laws of the Czech Republic.
[22] Article 2061 of the French Civil Code (Code civil).
[23] Section 617 of the Austrian Code of Civil Procedure (Zivilprozessordnung).
[24] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, art. 3(3) and Annex para. 1(q), *OJ L 95*, 21.4.1993, 29–34.
[25] Cour de cassation [Cass.] [Supreme Court for judicial matters], 1e civ., Sept. 30, 2020, No. 18-19.241, Légifrance, https://www.legifrance.gouv.fr/juri/id/JURITEXT000043004549.
[26] Judgment of the Court (Third Chamber) of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v. Susan Romy Jozef Kuijpers*, C-147/16, ECLI:EU:C:2018:320.
[27] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

foreign entities which demonstrate sufficient contacts but the process of enforcing judgments against defendants based in foreign countries such as the Bahamas or Seychelles requires special treaties for success.

The Brussels I Recast Regulation establishes EU jurisdictional harmony through its automatic recognition system which enables judgments to obtain recognition in all Member States.[28] Non-EU defendants face jurisdiction based on national laws which focus on local subsidiaries of their companies (e.g. FTX EU Ltd. operates in Cyprus).

The Representative Actions Directive provides a mechanism for cross-border legal actions which enables a Qualified Entity from one Member State to initiate lawsuits in other Member States. However, the procedural friction of the opt-in requirement for cross-border cases creates a participation gap.[29] Unlike a U.S. global class settlement, which can theoretically bind worldwide users (subject to due process), an EU action requires the active mobilization of consumers across different jurisdictions. This fragmentation dilutes the aggregate claim value, frequently diminishing the economic viability of the action to the point where it may no longer justify the litigation risks.

3.3. Insolvency: The Definitive Procedural Gatekeeper

Insolvency proceedings constitute the final and most formidable obstacle that collective redress mechanisms must navigate. The financial collapse of a crypto platform engenders a fundamental conflict of legal principles: insolvency laws (predicated on equal distribution of assets) are structurally at odds with collective litigation strategies designed to maximize returns for specific subclasses of victims.

In the United States, a Chapter 11 bankruptcy filing triggers an automatic stay under 11 U.S.C. § 362, effectively halting all ongoing litigation against the debtor.[30] Consequently, direct class actions against the bankrupt platform are typically stayed, relegating class members to the status of unsecured creditors who must generally submit individual proofs of claim.

However, the U.S. procedural system illustrates its resilience through a strategic pivot to third-party liability. Since the automatic stay protects only the debtor, plaintiffs' attorneys frequently initiate parallel lawsuits against solvent third parties (including venture capital funds, promoters, auditors, and banks) for their alleged complicity in fraud or the sale of unregistered securities. This allows the class action vehicle to proceed against deep-pocketed defendants simultaneously with the bankruptcy administration.[31]

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[28] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, art. 36.

[29] Samuel Issacharoff, "Assembling Class Actions," *Washington University Law Review* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103860.

[30] 11 U.S.C. § 362 (2018).

[31] *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003) (holding that the automatic stay applies only to the debtor and not to non-debtor co-defendants); see also Consolidated Class Action Complaint at

This recovery is further complicated by the 'dollarization' of claims, because insolvency frameworks generally value digital assets as of the petition date rather than the date of distribution. This rule effectively strips consumers of any benefit from market appreciation during the lengthy bankruptcy process, meaning that even a successful legal claim may result in a payout that is worth only a fraction of the assets' current market value. In practice, the legal classification of assets (whether they are deemed property of the estate or held in trust) becomes the single most critical factor for retail investors, often outweighing the procedural successes of any prior class action litigation.[32]

Procedurally, the FTX litigation established an innovative precedent for cross-jurisdictional coordination. In September 2024, the FTX bankruptcy estate and the class action plaintiffs reached a stipulation agreement. The estate agreed to exchange evidence while permitting the class action lawsuit to continue against third-party defendants, ensuring that class action settlements would not diminish the amount customers could recover from the bankruptcy estate.[33] This mechanism aims to maximize total recovery by effectively harmonizing Rule 23 proceedings with Bankruptcy Code requirements. Nevertheless, it is important to note that generally, the United States still lacks established legal procedures which enable Representative Actions to join bankruptcy proceedings or to combine all creditor claims from different parties as a matter of right.[34]

In contrast, the EU lacks a unified cross-border insolvency framework for non-bank crypto entities. Insolvency is governed by national laws, coordinated loosely by the EU Insolvency Regulation. This fragmentation is explicitly codified, for instance, in Section 81 of the Czech Act on Collective Civil Proceedings.[35] Under this provision, once a defendant is declared bankrupt, the representative plaintiff must notify all class members to assert their rights individually through insolvency applications, effectively suspending the collective pursuit of the claim against the debtor.

The public enforcement system of European countries operates instead of private court disputes to offer redress to parties involved in insolvency cases. The Cyprus Securities and Exchange Commission (CySEC) took action to freeze FTX EU Ltd assets after FTX collapsed.[36] The regulator mandated the direct repatriation of client

12–15, *In re FTX Cryptocurrency Exchange Collapse Litigation*, No. 1:23-md-03076 (S.D. Fla. filed June 5, 2023).

[32] Nydia Remolina, Aurelio Gurrea-Martínez, and Daniel Liu, "The Treatment of Digital Assets in Insolvency," in *Oxford Handbook of Digital Assets and the Law*, eds. Jason G. Allen et al. (Oxford: Oxford University Press, forthcoming 2026), https://doi.org/10.2139/ssrn.4915592.

[33] *In re FTX Trading Ltd.*, No. 22-11068 (Bankr. D. Del. filed Nov. 11, 2022); see also *In re FTX Cryptocurrency Exchange Collapse Litigation*, No. 1:23-md-03076 (S.D. Fla. filed Feb. 6, 2023).

[34] Dominik Skauradszun and Jeremias Kuempel, "Crypto Custodians in Financial Distress," *International Insolvency Review* 32, no. 3 (2023): 538–561, https://doi.org/10.1002/iir.1521; *In re Musicland Holding Corp.*, 362 B.R. 644, 650–51 (Bankr. S.D.N.Y. 2007) (holding that class proofs of claim are not a matter of right and require strict application of Rule 23 standards within the bankruptcy context).

[35] Section 81 of Act No. 179/2024 Coll., on Collective Civil Proceedings, published in the Collection of Laws of the Czech Republic.

[36] Cyprus Securities and Exchange Commission, "Decision for the Suspension of CIF Licence of FTX (EU) Ltd," November 11, 2022, https://www.cysec.gov.cy/en-GB/public-info/decisions/93547/.

funds, thereby circumventing the need for complex international bankruptcy procedures for these specific clients. While effective for protected individuals, this administrative restitution restricts remedies to regulatory boundaries, reflecting the EU's preference for ex-ante regulatory oversight over ex-post judicial enforcement.

4. Empirical Case Studies in Procedural Effectiveness

The efficacy of procedural mechanisms is best tested by market failure. The following section evaluates two distinct insolvency scenarios which examine the proposed procedural theories: the Terraform Labs algorithmic failure (characterized by an absence of contractual privity) and the FTX bankruptcy (characterized by fraud and pervasive arbitration clauses).

4.1. Terraform Labs: The Failure of the „No Contract" Class Action

The collapse of the Terra/Luna stablecoin ecosystem in 2022 resulted in the loss of approximately $40 billion in market value. Unlike customers of centralized exchanges, retail investors typically purchased TerraUSD (UST) on secondary markets. This meant they lacked direct contractual privity with Terraform Labs. Thus, the mandatory arbitration clauses (which serve as the primary procedural barrier in most crypto-litigation) were absent in this instance.

United States plaintiffs utilised this procedural opening to initiate Patterson v. TerraForm Labs, a class action lawsuit alleging fraud and the sale of unregistered securities. The case successfully overcame initial certification hurdles precisely because there was no user agreement to compel arbitration, thereby allowing the dispute to proceed through the public court system.[37]

However, procedural access did not translate into economic redress. In a significant procedural reversal, lead plaintiffs voluntarily dismissed the action against key defendants, including Terraform Labs and founder Do Kwon, in 2024.[38] This strategic withdrawal was caused by Terraform Labs' filing for Chapter 11 bankruptcy protection just one day prior, coupled with the concurrent criminal prosecution of its founder. Facing the automatic stay of litigation and a defendant stripped of accessible assets, the plaintiffs recognized that the civil lawsuit had become a procedural shell with no recoverable funds.[39] Ultimately, the class members received no compensation.

This outcome exposes a critical defect in the U.S. „opt-out" model: its structural dependence on the defendant's solvency. While the class action vehicle provided a robust procedural engine, the insolvency and fugitive status of the primary defendants

[37] Class Action Complaint at 2–5, *Patterson v. TerraForm Labs Pte. Ltd.*, No. 3:22-cv-03600 (N.D. Cal. filed June 17, 2022)

[38] Notice of Voluntary Dismissal by Nick Patterson at 1, *Patterson v. TerraForm Labs Pte. Ltd.*, No. 3:22-cv-03600 (N.D. Cal. filed Jan. 22, 2024).

[39] Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re Terraform Labs Pte. Ltd.*, No. 24-10070 (Bankr. D. Del. filed Jan. 21, 2024); see also Indictment at 1–3, *United States v. Kwon*, No. 1:23-cr-00151 (S.D.N.Y. filed Mar. 23, 2023).

rendered the mechanism procedurally hollow.

4.2. FTX Exchange: The Triumph of the „Third-Party“ Model

The FTX collapse was driven by the unauthorized commingling and misappropriation of customer funds, culminating in a chaotic Chapter 11 bankruptcy process.[40] Aggrieved customers faced immediate procedural deadlock, as direct litigation against the exchange was foreclosed. The FTX Terms of Service contained an extensive class action waiver which mandated users to resolve all disputes through binding arbitration in Singapore.

The consolidated class action (*In re FTX Cryptocurrency Exchange Collapse Litigation*) leveraged a strategic „third-party liability“ method to circumvent this contractual restriction. The plaintiffs filed lawsuits against solvent non-signatories (specifically celebrity promoters, venture capital firms, and service providers) alleging that they helped execute the fraudulent scheme. The court upheld this legal distinction, denying defendants' motions to compel arbitration precisely because third parties lacked the contractual privity derived from signed user agreements.

This strategy yielded significant procedural victories. The class plaintiffs achieved their most significant victory when they obtained a coordination agreement with the FTX bankruptcy estate during October 2024.[41] This stipulation enabled the class litigation to continue alongside the insolvency process, effectively shielding customer claims against the bankruptcy estate from dilution by third-party litigation recoveries.

The FTX litigation illustrates the adaptivity of the U.S. legal system, demonstrating its ability to pivot towards financial institutions with deep pockets when contractual barriers insulate the primary tortfeasor. In sharp contrast, the European response remains fragmented. The Cyprus Securities and Exchange Commission (CySEC) protected FTX EU clients through administrative actions which facilitated partial refunds.[42] However, the absence of a unified pan-European representative action effectively insulates third-party enablers from collective liability, so the current Directive proves insufficient to address complex, cross-border financial fraud.

5. Comparative Synthesis: Effectiveness by Metric

This section benchmarks the U.S. and EU frameworks against actual case evidence from Terra and FTX, evaluating their procedural impact across five essential criteria.

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[40] Consolidated Class Action Complaint at 12–15, *In re FTX Cryptocurrency Exchange Collapse Litigation*, No. 1:23-md-03076 (S.D. Fla. filed June 27, 2023).

[41] *In re FTX Trading Ltd.*, No. 22-11068, Order Confirming Modified Second Amended Joint Chapter 11 Plan of Reorganization at 23–25 (Bankr. D. Del. Oct. 7, 2024).

[42] Christos Ioannides, "Cyprus and the FTX Collapse: Safeguarding of Clients' Funds," *Global Law Experts*, accessed December 19, 2025, https://globallawexperts.com/cyprus-and-the-ftx-collapse-safeguarding-of-clients-funds/.

First, participation rates reveal a fundamental structural divergence. The U.S. 'opt-out' mechanism is designed to maximize claimant participation. By default, it captures nearly the entire pool of affected victims unless they affirmatively exclude themselves. However, this strength is frequently negated because courts enforce mandatory arbitration clauses, which effectively exclude the vast majority of retail consumers from the class. Conversely, the EU model faces a major hurdle because member states require consumers to actively opt-in to cross-border cases. Historical data from European regimes demonstrate that due to administrative burdens, often less than 10% of eligible participants join these actions.[43]

Second, recovery potential differs significantly in scope. The U.S. system demonstrates high variance because it enables plaintiffs to seek punitive damages (often triple the actual loss) while using aggressive settlement methods against solvent third parties. However, the outcome depends heavily on the defendants' solvency. The EU approach follows a conservative framework strictly limited to compensation for actual loss, as punitive damages are explicitly prohibited under the Directive. The recovery amount depends only on the trader's available assets.[44] Recovery is also procedurally capped by insolvency valuation rules. In jurisdictions like the U.S., claims are often valued in fiat currency as of the petition date (e.g., FTX's filing during the 2022 dip). This prevents creditors from benefiting from subsequent asset appreciation during the lengthy restructuring process.

Third, the time-to-relief metric favors administrative solutions over judicial ones. U.S. complex litigation through Multi-District Litigation (MDL) typically requires three to five years to achieve final resolution. The EU presents a mixed timeline: while its private representative litigation process may take even longer than U.S. litigation due to untested procedural rules, public administrative enforcement (such as the regulatory refunds in the FTX EU case) can produce rapid results.

Fourth, enforceability depends heavily on jurisdictional reach. Defining jurisdiction for decentralized assets remains a complex challenge because traditional connecting factors like '*lex situs*' are difficult to apply to assets that reside on a distributed ledger rather than in a physical location.[45] The U.S. system is limited structurally because it lacks established methods to execute class action court decisions against foreign defendants without specific bilateral treaties. The EU maintains a built-in advantage because of its internal structure. The Brussels I Regulation enables automatic judgment recognition and enforcement throughout all 27 Member States, creating a single judicial area of effectiveness.

Finally, the U.S. system achieves high deterrence levels because third-party gatekeepers (like auditors and venture capitalists) fear the extensive discovery process,

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[43] Rafael Amaro et al., *Collective Redress in the Member States of the European Union* (Brussels: European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2018), 32–34, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf.

[44] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, 1, recital 10.

[45] Matthias Lehmann, "Who Owns Bitcoin? Private Law Facing the Blockchain," *Minnesota Journal of Law, Science & Technology* 21, no. 1 (2019): 93, https://doi.org/10.2139/ssrn.3402678.

unpredictable jury outcomes, and severe damage to their professional reputation.[46] While this 'private attorney general' model faces criticism for alleged abuses, Klonoff argues that empirical reality confirms class actions remain the sole effective mechanism for delivering meaningful compensation and checking corporate misconduct in mass-harm scenarios.[47] The EU model provides weaker deterrence, relying primarily on regulatory penalties. The absence of a profit-driven litigation market reduces the financial risks that non-compliant businesses face.

In summary, a functional metaphor illustrates the divergence. The U.S. model functions as a 'sword,' aggressively piercing corporate structures to seize third-party assets, but it is frequently blunted by arbitration waivers. The EU model operates as a 'shield,' offering strong statutory protection against unfair terms, yet its implementation is often hampered by procedural complexity and a lack of financial resources.

6. Policy Proposals for Procedural Optimization

Our analysis indicates that neither the U.S. nor the EU framework is fully optimized for the unique challenges of the digital asset economy. To bridge the gap between theoretical rights and actual remedies, we propose three targeted policy interventions designed to modernize these procedural systems.

The Federal Arbitration Act (FAA) currently stands as the primary impediment to U.S. consumer redress. The deterrence function of collective litigation needs restoration through legislative reform. Specifically, Congress should create a statutory exception under the FAA for consumer financial products and digital assets. This proposed measure would align U.S. policy with European regulations derived from the Unfair Contract Terms Directive, effectively precluding crypto platforms from using standard contract terms to immunize themselves from collective liability.[48]

The *ad hoc* coordination achieved between the FTX bankruptcy estate and class plaintiffs should serve as a blueprint for a standardized international protocol. The United Nations Commission on International Trade Law (UNCITRAL) is well-positioned to develop model laws that integrate insolvency proceedings with collective redress mechanisms.[49] A formalized framework would establish clear rules to manage information sharing between entities. This would prevent „double recovery" (where victims claim duplicate benefits) during debtor liquidation and third-party litigation, while minimizing procedural friction between liquidators and class representatives.

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[46] John C. Coffee Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions," *Columbia Law Review* 86, no. 4 (1986): 669–727, https://doi.org/10.2307/1122577.

[47] Klonoff, R. H., *The Decline of Class Actions*, Washington University Law Review, Vol. 90, Issue 3, 2013, https://openscholarship.wustl.edu/law_lawreview/vol90/iss3/6.

[48] See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding the preemption of state laws that prohibit class action waivers); compared with Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, Annex 1(q).

[49] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations, 2014), part one, art. 25–27 (providing a framework for cooperation with foreign courts, which could be extended to representative actions).

Relying solely on *post-hoc* litigation to recover stolen funds following a theft or collapse is often an ineffective solution. Therefore, the EU should modify its MiCA regulatory framework to make professional indemnity insurance coverage or participation in a "Crypto Consumer Protection Fund" mandatory for all licensed operators.[50] Establishing such a financial backstop would provide guaranteed baseline recovery, enabling expedited restitution before complex legal procedures even commence.[51]

7. Conclusion

This article set out to answer a fundamental research question: Which procedural regime (the U.S. entrepreneurial class action or the EU's representative action) effectively protects consumer rights in the wake of cross-border crypto platform failures?

The comparative analysis reveals that neither regime offers a complete solution. Rather, they present a trade-off between aggressive asset recovery and procedural accessibility.

The United States model proves superior in asset recovery in scenarios involving fraud. The FTX litigation illustrates how the U.S. incentive structure motivates lawyers to pursue claims against solvent third parties (such as promoters, venture capitalists, and gatekeepers) after bankruptcy stays direct claims against the debtor. In contrast, the European framework lacks the financial incentives that would enable consumer representatives to bypass the insolvent debtor and pursue risky litigation against wealthy third-party enablers. However, the U.S. effectiveness is entirely conditional on the absence of mandatory arbitration clauses. Where such clauses exist and are enforced, as remains common under the FAA, the U.S. model's aggressive potential is severely curtailed, leaving consumers with no collective procedural vehicle and effectively precluding relief for low-value claims.

The European Union model provides superior access to justice, as exemplified by the Czech implementation of Directive 2020/1828. The EU classifies mandatory arbitration waivers as abusive and unenforceable in consumer contracts, ensuring that the "courthouse door" remains open despite restrictive Terms of Service. Nevertheless, this legal access risks becoming a "paper right" devoid of practical utility. The reliance on non-profit Qualified Entities, combined with the friction of the opt-in process, creates significant barriers to participation. Without the profit-driven incentives that fuel U.S. litigation, the EU mechanism faces the real possibility of remaining dormant in complex, capital-intensive crypto disputes.

The solution to the research problem requires synthesizing the best elements

[50] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023.

[51] Dirk A. Zetzsche et al., "The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy," *Capital Markets Law Journal* 16, no. 2 (2021): 221–23 (arguing for strict custody rules and segregation of assets to ensure insolvency remoteness), https://doi.org/10.1093/cmlj/kmab005.

from each model instead of selecting between them. Our findings suggest a dual-track approach:

1. Statutory Access to Justice (The EU Contribution): The European model's invalidation of mandatory arbitration clauses in consumer contracts functions as the essential structural foundation. By ensuring that pre-dispute waivers cannot block judicial access, this approach guarantees that the "courthouse door" remains open which is a prerequisite without which no collective redress mechanism can function.

2. Private Litigation (The U.S. Contribution): The U.S. class action system functions as the primary vehicle for achieving full restitution. Its aggressive discovery powers and third-party liability theories provide the necessary force to extract compensation from solvent enablers. However, for this engine to work, policymakers must first apply the European standard of removing arbitration barriers.

The procedural architecture must evolve to handle borderless digital asset insolvencies. The FTX coordination agreement demonstrates that future redress relies on the convergence of group litigation and insolvency procedures. Ultimately, protecting retail investors depends on bridging the gap between the aggressive enforcement capacity of the U.S. and the robust consumer protection framework of the EU.

AI Disclosure: Large language models (AI) were utilized in the preparation of this manuscript, specifically for the translation of the original text from Czech to English and for subsequent linguistic polishing. The substantive content, analysis, and conclusions remain the original work of the author.

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