

THE CLASS ACTIONS  
LAW REVIEW

THIRD EDITION

Editor  
Camilla Sanger

THE LAWREVIEWS

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**Editor**  
Camilla Sanger

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# PREFACE

Class actions and major group litigation can be seismic events not only for the parties involved, but for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this third edition.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, are giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

**Camilla Sanger**  
Slaughter and May  
London  
April 2019

# BELGIUM

*Hakim Boularbah and Maria-Clara Van den Bossche<sup>1</sup>*

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

### i Definition of class or collective actions

In Belgium, there are various forms of multiparty litigation (that is, litigation involving multiple claimants or defendants). These include the following.

#### *Action for collective redress (class action)*

This is an action exercised by a claimant appointed by law (the group representative) who, on behalf of an unknown group of individuals who have not previously given a proxy to this applicant, brings an action that leads to a decision that prevents subsequent litigation, not only towards the group representative and the defendants, but also towards all group members that have opted in or have not opted out of the procedure. Only the group representative and the defendants are parties to the proceedings, not the group members. There is no affiliation of membership between the acting representative and the individuals represented. At the beginning of the procedure, the number of represented group members is undetermined. This is the main type of class action addressed in this contribution.

#### *Collective actions (related actions)*

Several individual legal actions arising from the same or a similar event or contract joined and consolidated in the same proceedings by different claimants are often represented by the same lawyer. The related actions are examined by the court jointly, even though they remain individual actions.

#### *Action of collective interest*

This is an action brought by an organisation or by a group of people, regardless of whether they intend to achieve an objective of general interest, but with the aim of realising an objective that goes beyond the personal interests of the individual members of the organisation or group.

### ii Use of class or collective actions

In principle, class actions are not permitted under Belgian law. For actions to be admissible, the claimant must fulfil the ‘personal interest’ requirement (Articles 17 to 18, Belgian Judicial Code). An important exception to this principle was introduced in Title 2 of Book XVII of

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<sup>1</sup> Hakim Boularbah is a partner and Maria-Clara Van den Bossche is an associate at Loyens & Loeff.



the Belgian Code of Economic Law by the Act of 28 March 2014, providing for the ‘action for collective redress’. Until 2018, the scope of this action was strictly limited: only groups of consumers represented by non-profit organisations or public bodies were allowed to bring an action for collective redress, which must be brought against an enterprise and must concern an alleged violation of specifically enumerated Belgian and European laws, which all include consumer protection provisions (see Section III). Since June 2018, actions for collective redress can also be instituted by small and medium-sized enterprises (SMEs) represented by non-profit organisations or public bodies as described in the law (see Section III). Since the Act entered into force in September 2014, eight class actions have been instigated (see Section II).

Collective action is a very common method to collectively bring related actions before Belgian courts.

There are several exceptions to the ‘personal interest’ requirement. For example, labour unions and qualified human rights organisations are entitled to seek injunctive relief against practices that infringe upon specified labour rights or non-discrimination laws. Professional organisations and consumer protection organisations can also bring cease and desist actions in case of unfair commercial practices.

### **iii Principal institutions**

Since 2018, the Brussels Commercial Court and the Brussels Court of Appeal (in appeal) have exclusive jurisdiction to rule on actions for collective redress (Article XVII.35, Belgian Code of Economic Law; Article 633 *ter*, Belgian Judicial Code).

There are specific rules for actions of collective interest.

## **II THE YEAR IN REVIEW**

Since the entry into force of the class action regime in the Belgian legal order in September 2014, eight class actions have been instigated. Seven out of eight actions were brought by Test Achats, the main Belgian consumer protection organisation.

The first action was brought against the commercial airline company Thomas Cook following a major delay of a flight from Tenerife South to Belgium. The second action was launched to obtain compensation from the national railway company SNCB/NBMS for the interruption and the suspension of the train service during eight days of strikes in 2014 and 2015. The third class action was brought against the Volkswagen Group within the context of the ‘Dieselgate’ scandal. The fourth action was initiated against the largest Belgian telecommunications company (Proximus) after it introduced a renting formula for its new decoders. The fifth class action was initiated against eight websites involved in the resale of concert tickets at exorbitant prices. The sixth class action was initiated against the marketing company Groupon following a sales offer for diapers by a company named Luerbox. The seventh class action was brought against three Facebook entities within the context of the Cambridge Analytica data scandal. The most recent class action was initiated at the initiative of the Ombudsman for Energy by the consumer ombudsman service against six energy suppliers concerning fixed fees that energy suppliers continue to charge when the energy contract is terminated early.

### III PROCEDURE

#### i Types of action available

##### *Different mechanisms*

Under Belgian Law, until 2018, only groups of consumers represented by non-profit organisations or public bodies were allowed to bring an action for collective redress, which must be brought against an enterprise and must concern an alleged violation of specifically enumerated Belgian and European laws.

Following an evaluation of the collective redress system at the national level, the Fipronil crisis in the EU and the recommendations in this sense of the EU institutions, the Belgian government decided to extend the scope of the collective action under Belgian law. Notably, since June 2018, actions for collective redress can also be instituted by SMEs represented by non-profit organisations or public bodies as described in the law. In this context, SMEs are defined (in accordance with EU Recommendation 2003/361/EC on SMEs) as enterprises that employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million, or both. This extension is applicable to all cases introduced after 1 June 2018, provided that the alleged breach occurred after 1 September 2014.

An action for collective redress can only be admissible if it appears more effective than an individual action of ordinary law (Article XVII.36(3), Code of Economic Law). The elements that can be taken into consideration by the judge when examining this admissibility requirement are:

- a* the potential size of the group;
- b* the existence of individual damage that can be sufficiently related to the collective damage;
- c* the complexity and legal efficiency of the action for collective redress;
- d* the legal certainty of the group of consumers or SMEs;
- e* efficient consumer protection;
- f* the smooth functioning of the judiciary; and
- g* the amount of damage suffered by each individual consumer/SME cannot be a decisive element in the consideration.

In a decision of 17 March 2016 (Case 41/2016), the Belgian Constitutional Court emphasised that it cannot be simply assumed for every instance of damage with a collective character that the action for collective redress will necessarily be more effective than an individual action of ordinary law. It needs to be assessed by the judge on a case-by-case basis whether this is so, based on different criteria (such as those listed above).

Collective actions are based on Article 701 of the Belgian Judicial Code, which stipulates that different actions between two or more parties can be brought by one single writ, if the actions are related. Actions can be dealt with as ‘related’ cases, if they are so closely connected that it is desirable to consider and rule on them together, in order to avoid conflicting solutions if the claims were adjudicated on separately (Article 30, Belgian Judicial Code). Even after the initiation of the proceedings, related cases that are pending before the same judge, can be compiled, on request or *ex officio* (Article 856, Belgian Judicial Code).

Action for collective redress can only be commenced for alleged violations by an enterprise of its contractual obligations or of specifically enumerated Belgian and European Rules (Article XVII.36(1) and Article XVII.37, Code of Economic Law). These rules have in

common that they all contribute to the protection of consumers. This list includes provisions from the sections of the Code relating to competition law, price developments, market practices, consumer protection, payment and credit services, safety of products and services, intellectual property and electronic economy. There are also special pieces of legislation regarding privacy protection, electronic signatures, insurance, health, professional liability, banking and finance, tour operators, passenger transport, energy and product liability, among others.

In short, the action for collective redress can only be used for alleged violations of consumer protection provisions within these pieces of legislation.

On 6 June 2017, following the recommendations of the EU institutions, the scope of the class action regime was extended to include infringements of EU competition law (Articles 101 and 102 Treaty on the Functioning of the European Union, including the ban on cartels and abuses of dominant positions).

In the decision of 17 March 2016, the Belgian Constitutional Court held that it is legitimate to limit the scope of these laws. The court referred to the legislator's purpose to reserve the proceedings to consumer law, an area of law in which many cases of limited individual damage ('small claims') occur. In the view of the court, the legislator struck the right balance between all interests at stake. These are, on one hand, the interests of the victims of collective damage and of the enterprises, and on the other, the concern to increase the access to justice for such damage while guaranteeing the smooth implementation of these new proceedings in the judicial system (which are, therefore, better introduced gradually).

Collective actions arise in all areas. However, they are most commonly used in competition claims, and in environmental and financial services disputes.

Actions of collective interest can only be commenced for alleged violations of rights specified in the relevant special legislation.

## ii Limitation periods

The Belgian Civil Code sets limitation periods (Article 2262 *bis*). The limitation periods vary depending on the nature of the action. The main terms of limitation are the following.

- a* Claims in tort are time-barred five years after the day on which the claimant in tort is aware of the damage and of the identity of the person liable for this damage, and in any event 20 years and one day after the date on which the fact, action or negligence that caused the damage occurred.
- b* Most other claims are time-barred after 10 years (for example, contractual liability).

Specific rules, given below, are provided in the Code of Economic Law regarding action for collective redress.

- a* The term of limitation of SMEs' or consumers' individual actions that have exercised their 'opt-out' option is suspended from the date of publication of the decision on the admissibility of the action for collective redress in the Belgian Official Gazette until the date SMEs or consumers inform the court registry of their option (Article XVII.63, Section 1, Code of Economic Law).
- b* If the action for collective redress ends because there is no representative for the SMEs or consumers, the term of limitation for the SMEs' or consumers' individual actions that are members of the group is suspended from the date of publication in the Belgian Official Gazette of the decision on the admissibility of the action for collective redress

until the date the end of the action is ascertained (Article XVII.63, Section 2, the Code of Economic Law).

- c The term of limitation of SMEs or consumers' individual actions that have been excluded from the action is suspended from the date of publication of the decision on the admissibility of the action for collective redress in the Belgian Official Gazette until the date the SMEs or consumers are informed by the court registry that they are not members of the group (Article XVII.63, Section 3, Code of Economic Law).

### iii Commencing proceedings

#### *Definition of class*

The 'class' represented by the group representative in an action for collective redress is a group of consumers or SMEs that personally suffered damage as a consequence of a common cause (notably, a violation of one of the rules mentioned above).

The group of consumers or SMEs that can benefit from the compensation that would be awarded by the court can be composed by means of an 'opt-in' or 'opt-out' system.

Under an opt-in system, only the consumers or SMEs that have suffered the collective harm and have expressly notified the registry of their intention to belong to the group will potentially be considered as members.

Under an opt-out system, all consumers or SMEs that have suffered the collective harm and have not expressly notified the registry of their intention not to belong to the group (after having had knowledge of the existence of the action) will potentially belong to the group.

Once the action has been initiated, the judge chooses between an opt-in or opt-out system in the decision on admissibility, which then applies to the consumers or SMEs of the group having their habitual residence or main establishment in Belgium (Article XVII.38, Section 1(1) and Article XVII.43, Section 2(3), Code of Economic Law).

However, the opt-in system is mandatory in two cases (Articles XVII.38, Sections 1(2) and 1/1(2) and XVII.43, Section 2(3), Code of Economic Law):

- a for consumers who do not have their habitual residence, or for SMEs that do not have their main establishment, in Belgium; and
- b if the action aims for restoration of physical or moral collective damage.

The judge chooses between both systems based on the following elements:

- a the facts and arguments submitted by the parties;
- b the interest of both the consumers or SMEs and the market;
- c the type and the size of the damage suffered; and
- d the number of potential victims.

The decision on the admissibility of the class action initiated by Test Achats against the airline Thomas Cook was the first decision on the admissibility of a class action in Belgium. The court held that, in deciding which system applies in a particular case, it must first be assessed how the consumers' interests can be best protected in the specific case.

According to the court, when consumers are aware that they have become a victim of damage and when they can easily get an idea of their rights, the interest of the individual victims in being part of the group is sufficiently protected by the opt-in system, which requires an active effort of the victims.

The court further held that, by contrast, the consumers' interests are best protected by the opt-out system in cases where compensation of the damage is not so obvious and where

consumers are not necessarily aware of the damage they have suffered, or when their rights are less clear.

These findings were confirmed in the decision on admissibility in the action initiated against Proximus. In that decision, the court specified that the fact that consumers are informed about their rights through the press or their group representative (*Test Achats*) does not imply that the interests of individual victims should be less protected and is not decisive in the assessment of whether consumers can be aware of their rights. This view was confirmed in the decision on admissibility in the Dieselgate case. In this case, the court decided that the application of the opt-out system was justified for the reason that the alleged material wrongdoing did not have any visible damage consequences for the consumer, so that the court was dealing with 'unconscious' consumers, in which case a higher level of protection is required.

In the view of the legislator, the opt-out system is most appropriate in cases where the amount of the damages is limited. However, this reasoning has not always been applied in practice by the courts.

As regards the type of damage suffered, the Court of Appeal, deciding on appeal on the admissibility of the action against Proximus, has chosen for the opt-in system for the reason that the alleged damage required an individual assessment of the personal situation of each consumer (the existence of damage and causal link to the alleged infringement had to be proven (and decided upon) for each consumer individually).

The number of potential victims and the size of the group are not irrelevant, but in themselves are not decisive to determine the applicable system. In the action against Thomas Cook, the low number of potential victims was one of the reasons that the opt-in system was chosen. In the action against Proximus, the high number of potential victims resulted in the choice for the opt-out system in the decision on admissibility in first instance (on appeal, however, the opt-in system was chosen). Also in the Dieselgate case, the high number of potential victims was the second decisive element for the court to apply the opt-out system.

### ***Potential claimant***

Standing in actions for collective redress is governed by Article XVII.36 and Articles XVII.38 to 40 of the Code of Economic Law.

Actions for collective redress can only be brought on behalf of a group of consumers or SMEs that have been personally harmed by the alleged violation of an enterprise.

The action can only be brought by a representative of this group of consumers or SMEs. Where both consumers and SMEs decide to act in the same cause, the two groups will have to be represented separately.

Article XVII.39 of the Code of Economic Law identifies, exhaustively, the potential bodies that can act as group representative.

The following bodies can act as group representative of a group of consumers:

- a* A consumer protection organisation with legal personality, represented in the Council for Consumption or recognised by the Minister of Economy.
- b* A non-profit organisation with legal personality recognised by the Minister of Economy, of which the objective is directly related to the collective damage suffered by the group.
- c* The Ombudsman's office for consumers, but only for representing the group in the stage of negotiation of an agreement of collective redress.
- d* A representative body recognised by a Member State of the European Union or the European Economic Area to act as a representative and meeting the conditions of

point 4 of Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

Under the Recommendation, these bodies must be designated by the Member States on the basis of clearly defined conditions of eligibility, which must include at least the following requirements:

- a* the entity must have a non-profit making character;
- b* there must be a direct relationship between the main objectives of the entity and the rights granted under EU law that are claimed to have been violated; and
- c* the entity must have sufficient capacity in terms of financial resources, human resources and legal expertise to represent multiple claimants acting in their best interest.

The following bodies can act as group representative of a group of SMEs:

- a* An interprofessional organisation with legal personality that defends the interests of SMEs, represented in the High Council for the Self-Employed and the SME or recognised by the Minister of Economy.
- b* A non-profit organisation with legal personality recognised by the Minister of Economy, whose corporate purpose is directly related to the collective damage suffered by the group.
- c* A representative body recognised by a Member State of the European Union or the European Economic Area to act as a representative and meeting the conditions of point 4 of Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (see above about the minimum requirements).

Natural persons cannot act as a group representative, nor can commercial companies, trade unions or law firms. By limiting the pool of potential group representatives to certain categories of claimants selected on the basis of the interest they defend or the corporate goal they pursue, the legislator aims to avoid abusive or frivolous actions for collective redress.

In addition to the formal requirements set out above, the group representative must also be deemed 'suitable' for this purpose by the judge. This criterion has been introduced for three main reasons:

- a* ensuring that the group members are soundly represented considering that, without having granted any mandate or proxy to the group representative, they will, however, be bound by the decision obtained by the latter;
- b* protecting defendants by avoiding frivolous actions; and
- c* if several candidates apply, enabling selection by the judge of the most suitable representative, excluding the principle of 'first come, first served'.

Lastly, the group representative must meet the above requirements during the entire procedure. If these are no longer met in the course of the proceedings, a new group representative is appointed by the judge. If no new group representative meeting the requirements can be found, the procedure is closed by the judge (Article XVII.40, Code of Economic Law).

### ***Professional claimants***

Only consumers and SMEs can be represented in an action for collective redress.

Professional commercial claimants cannot buy consumers' claims in exchange for a share of the proceeds of the action.

### **Funding**

Third-party funding of action for collective redress is not prohibited. However, this type of funding is of limited interest owing to the legal provisions concerning the distribution of compensation among the consumers or SMEs.

The Code of Economic Law provides that a court-appointed administrator must pay compensation to members of the group under the court's supervision. Therefore, a third-party funder cannot take a share of any proceeds of the action unless it concludes an agreement with the group members before the distribution of the compensation, which is unlikely. If a consumer uses third-party funding, it will not give the third-party funder standing to participate in the proceedings. However, given the potential influence of the third-party funding on the action for collective redress, its existence must be disclosed in the application initiating proceedings for the judge to rule on its adequacy (as for the group representative).

No public funding is available for actions for collective redress.

The Code of Economic Law does not provide for the compensation or remuneration of the group representative. As a matter of principle, the action for collective redress cannot be a way for the group representative to make profits. The group representative is only entitled to the reimbursement of the costs and fees incurred in relation to the proceedings, as well as of the legal 'procedural indemnity' (that is, the lump sum that must be paid by the losing party to the winning party; see subsection iv).

Consequently, the group representative's financial capacity is one of the central criteria for the certification of the action for collective redress, specifically the assessment of its adequacy.

There are no other funding options available.

It is very likely that the lack of a funding regime will affect the attractiveness and frequency of actions for collective redress in Belgium since group representatives must have adequate financial capacity to undertake such actions on behalf of consumers or SMEs, without any remuneration and with limited recovery of their lawyer fees.

However, financial benefits that indirectly result from class actions have increased the attractiveness of initiating such actions for one group representative (*Test Achats*) already.

As indicated, seven out of the eight class actions initiated so far have been initiated by *Test Achats*, the main Belgian consumer protection organisation. Although class actions cannot be initiated for profit and the class actions initiated by *Test Achats* can be joined by consumers without payment, it appears that class actions have become an important source of income for the organisation. By launching actions for collective redress, on the one hand, and activities relating to collective purchase of products and services, on the other hand, the organisation has reached 2.4 million consumers in recent years, which has resulted in 60,000 new paid member subscriptions and in an increased use of its service platform.

Therefore, despite the lack of a funding regime, indirect financial benefits resulting from class actions can raise the attractiveness of class actions and can financially enable group representatives to initiate subsequent class actions.

### **iv Procedural rules**

#### ***Timetabling***

Under the Code of Economic Law, the action for collective redress comprises four phases:

- a* Admissibility phase (two months after the filing). However, it appears that this legal deadline is not applied in practice. In the class actions initiated so far, taking into account the importance of the admissibility phase and the rights of defence (of the defendant in particular), a procedural timetable was set with deadlines for the parties to exchange briefs regarding the admissibility of the class action, followed by oral pleadings concerning this aspect only. Since this timetable has always been (and is usually likely to be) spread over several months, the decision on the admissibility is generally not rendered within two months of the filing of the class action.
- b* Compulsory negotiation phase (three to six months after the judgment on the admissibility).
- c* Litigation phase. This involves:
  - proceedings on the merits;
  - exchange of briefs;
  - oral pleadings held before the court; and
  - judgment rendered by the court.
- d* Distribution of compensation phase.

At the very beginning of the proceedings on the merits, the court or the parties must set a procedural timetable to determine the deadlines for filing the parties' briefs with the court and the date of the oral pleadings. Parties are entitled to request jointly the postponing of the case for an indefinite period.

### ***Certification and qualification***

As mentioned, the first stage of action for collective redress is the admissibility phase (Articles XVII.42 to 44, Code of Economic Law). The purpose of the admissibility phase is threefold and aims at checking:

- a* whether the alleged breach suffered by consumers or SMEs falls within the scope of the action for collective redress (see subsection i);
- b* the status and adequacy of the representative (see subsection ii); and
- c* the efficiency of the action for collective redress compared to individual actions (see subsection i).

Under the first condition of admissibility, the court must examine whether the cause invoked may constitute a potential infringement of the legal provisions or contractual obligations invoked. As confirmed in the first admissibility decisions rendered, the claim may already be rejected at this stage if at first sight it appears to be manifestly unfounded, for example because no damage is likely to be sustained or because the possibility of the infringement is not proven to be likely.

In addition, if the defendant claims that the action for collective redress is without basis (that is, devoid of purpose) because all (potential) victims have already been compensated, the court is allowed (for procedural efficiency) to assess the accuracy of this statement in the admissibility phase, even though this touches upon the merits of the case.

The court confirmed this in the decision on the admissibility of the class action initiated by *Test Achats* against the airline Thomas Cook.



The court specified that it can establish that the proceedings are partially or entirely without basis (that is, devoid of purpose) if it is either:

- a* not disputed that all or some of the victims have been compensated; or
- b* manifestly clear at first sight (and therefore, it cannot be disputed) that full payment of the claim had been made.

The court indicated that in the admissibility phase the claimant cannot be obliged to demonstrate who has been compensated in full and to take a position concerning this issue, as this pertains to the merits of the case.

In theory, the court must rule on the admissibility of the action for collective redress within two months of its filing with the court (however, see ‘Timetabling’, above). If the court considers the action for collective redress admissible, the judgment will authorise the group representative to act. The judgment must identify the group and any subcategories. It must also determine whether the group will be composed on an opt-in or opt-out basis, as well as determining how the option will be exercised.

The parties are entitled to lodge an appeal against the judgment on the admissibility of the action for collective redress.

### ***Minimum and maximum number of claimants***

No minimum or maximum number of claimants is required for an action for collective redress to be brought and declared admissible. The only condition is the efficiency of the action for collective redress, which can only be admissible if it appears more effective than an individual action of ordinary law. As indicated, the (potential) number of the claimants is an important factor to be taken into consideration by the judge when examining the admissibility requirement (see subsection i).

An action for collective redress is more likely to be deemed more efficient than individual actions when a significant number of consumers is potentially affected by a common issue.

In the decision on the admissibility of the class action initiated by *Test Achats* against the airline Thomas Cook, the court indicated that, when the majority of the (potential) victims has already been compensated before the action was initiated and only a limited number of (potential) victims has not been compensated yet, the court can consider that collective redress is not more efficient and that the action is therefore inadmissible.

In this regard, the court specified that if some compensation was paid after the proceedings had been initiated, the action is inadmissible only in relation to the remaining (potential) victims who have not received compensation. However, it is still admissible in relation to the victims who have been compensated pending the proceedings. In relation to these victims, the proceedings will be without basis (that is, devoid of purpose) because once they are compensated, they will automatically lose their substantive right. Therefore, a decision on the admissibility becomes unnecessary.

If all (potential) victims are compensated pending the proceedings, the entire action for collective redress can be declared without basis (that is, devoid of purpose).

## **v Damages and costs**

### ***Damages***

Under Belgian law, the basic principle is the full compensation of the actual damage suffered. The injured person must be reinstated into the position he or she would have been in if the injury had not been committed. To that extent, punitive damages are prohibited.

Quantification of the actual loss suffered is calculated by the judge on the grounds of parties' submissions and, possibly, experts' reports.

There is no cap on the quantum that can be recovered either from a single defendant, or overall. As a matter of principle, each defendant is jointly and severally liable for the damage suffered unless the judge rules otherwise.

It is possible for a defendant to bring a separate action against other persons responsible for the conduct complained of to recover part of the damages he or she paid (that is, a contribution claim).

There are no special rules applicable to the payment of interest in the field of actions for collective redress. However, specific interest rates are potentially applicable depending on the area of law concerned by the action for collective redress. Post-judgment interest must be awarded from the date of the application initiating proceedings at a rate that is currently set (for 2019) at 2 per cent per annum.

### ***Costs***

There is a 'loser pays' principle under Belgian law. The losing party will bear all the costs of the proceedings (filing fee, expert costs, translation costs, among others). The recoverable lawyer fees of the winning party are limited to the procedural indemnity. The amount of the procedural indemnity is set by law. Since 1 March 2011, the amount of the procedural indemnity is calculated as follows.

If the claim cannot be appraised in monetary terms, the basic amount of this indemnity is €1,440.

If the claim can be appraised in monetary terms, the basic indemnity will range between €180 and €18,000.

Under certain circumstances, the amounts set by law can be increased or decreased by the court.

If the case is settled, costs and fees are set out in the agreement concluded by the parties.

## **vi Settlement**

### ***Settlement rules***

Under the Code of Economic Law, a compulsory negotiation phase that lasts between three and six months must take place immediately after the decision of the court on the admissibility of the action for collective redress (see subsection iii) (Articles XVII.45 to 51, Code of Economic Law). This compulsory stay of the proceedings is provided to allow parties to negotiate a potential collective settlement agreement within a specific time frame decided by the court.

At the end of this 'cooling-off' period, either the court endorses the settlement by making the agreement binding on the parties or the proceedings on the merits start.

Otherwise, if the parties reach an amicable settlement of the case 'out of court' before the decision on the merits, they can file an application with the court to enact the collective settlement agreement already entered into to make it binding on all group members.

### ***Separate settlements***

The negotiation can cover all or part of the dispute. Therefore, where there is more than one defendant, they can settle separately. The settlement agreement will be endorsed by the court

only with respect to them. The judge will remain seized of the action for collective redress with regard to the remaining defendants to rule on the merits.

#### IV CROSS-BORDER ISSUES

Consumers of the group who are domiciled or SMEs that have their main establishment outside Belgium can participate in an action for collective redress, provided that they explicitly opt in to the procedure within the term laid down in the decision on admissibility, by notifying the registry of their intention to join the action for collective redress (Article XVII.38, Sections 1(2) and 1/1(2), Code of Economic Law).

#### V OUTLOOK AND CONCLUSIONS

##### *Proposals for reform*

At the European level, for many years, the European Commission has been considering the introduction of a collective redress mechanism. Following the Commission's earlier Recommendation 2013/396/EU on collective redress dated 11 June 2013, many Member States have adopted a collective redress mechanism, but as each Member State adopted a slightly different model, the desired goal of harmonisation had not been achieved. On 11 April 2018, the European Commission published proposals on the New Deal for Consumers, which aims to strengthen EU consumer rights and the enforcement thereof in a more harmonised way. As part of the New Deal for Consumers, the Commission submitted a Proposal for a Directive on representative actions for the protection of the collective interests of consumers (Collective Redress Directive),<sup>2</sup> repealing the Injunctions Directive 2009/22/EC, which was considered to not sufficiently address the challenges for the enforcement of consumer law. Although the Injunctions Directive already allows a court or an administrative authority to stop a practice violating consumer rules, such injunctions do not give harmed consumers the option of obtaining redress or compensation at the same time. Where compensatory collective redress is already available in 19 Member States, in over half of them it is limited to specific sectors, mainly to consumer claims. At the same time, nine Member States do not provide the option to collectively claim compensation in mass harm situations, and only six Member States are considered to have a proper alternative dispute mechanism focused on mass harm situations: Belgium, France, Italy, the Netherlands, Spain and the United Kingdom.<sup>3</sup>

The proposed Collective Redress Directive aims to strengthen the right to access to justice by allowing consumers to join forces across borders and jointly request unlawful practices to be stopped or prevented, or to obtain compensation for the harm; harmonise collective redress mechanisms and end disparities across Member States; expand the scope of representative actions to include infringements of many other EU laws; reduce the financial burden and make remedies more accessible through collective representation; and strike a balance between citizens' access to justice and protecting businesses from abusive lawsuits by way of safeguards (such as the 'loser pays' principle) and requirements applicable to 'qualified

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2 [www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2018/0184/COM\\_COM\(2018\)0184\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0184/COM_COM(2018)0184_EN.pdf).

3 [www.europarl.europa.eu/news/nl/press-room/20181205IPR21088/first-eu-collective-redress-mechanism-to-protect-consumers](http://www.europarl.europa.eu/news/nl/press-room/20181205IPR21088/first-eu-collective-redress-mechanism-to-protect-consumers).

entities'. The proposed Collective Redress Directive shall be without prejudice to other forms of redress mechanisms provided for in national law. It shall respect the fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, and particularly the right to a fair and impartial trial and the right to an effective remedy.

On 7 December 2018, the Committee on Legal Affairs of the European Parliament adopted a report on the Proposal for the Collective Redress Directive. The European Parliament confirmed its negotiation position on March 26 with a large majority. The Council needs to adopt its position before trilogues can start and the legislation can enter into force.

# BRAZIL

*Sérgio Pinheiro Marçal and Lucas Pinto Simão*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Back in the 1970s, legal writings in Brazil started supporting class actions as a form of dispute resolution as social conflicts could no longer be handled and settled via individual lawsuits.

Drawing on US experience, Brazilian lawmakers issued specific statutes aimed at creating efficient mechanisms to protect ‘trans-individual rights’ through class actions. Albeit inspired by the US model, the Brazilian class actions system differs greatly from that in place in the United States.

In 1985, Law 7,347 created a true subsystem for class actions in civil procedure to protect diffuse and collective rights. Later, the 1988 Federal Constitution introduced significant innovations, expressly assuring the protection of diffuse and collective rights and interests as a constitutional warranty. Then, the Brazilian Consumer Protection Code of 1990 brought important contributions to the class actions system, such as the definition of trans-individual rights. The Consumer Protection Code also provided for the use of class actions to protect homogeneous individual rights, another landmark initiative geared toward representing consumers collectively and expediting resolution for recurrent lawsuits involving common interests of a class.

Although Law 7,347 of 1985 and the Consumer Protection Code are the most salient statutes in the class actions system in Brazil, other specific statutes also deal with class action-related issues, in parallel with substantive law. Among them are Law 7,913 of 1989 (the Securities Market Investors Protection Act); Law 7,853 of 1989 (the Persons with Disabilities Act); Law 8,069 of 1990 (the Children and Juveniles Act); Law 8,429 of 1992 (the Administrative Misconduct Act); and Law 10,741 of 2003 (the Elderly Act). In this context, legal scholars say that the Brazilian regulatory framework truly contemplates a class actions system, mostly backed by Law 7,347 of 1985 and the Consumer Protection Code.<sup>2</sup>

After over 30 years of experience with the use of class actions in Brazil, the general belief is that class actions have since contributed significantly to the resolution of collective disputes in Brazil, and Brazilian law undoubtedly sets a pattern for all civil law countries wishing to legislate on and regulate the use of class actions.

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1 Sérgio Pinheiro Marçal is a partner and Lucas Pinto Simão is a senior associate at Pinheiro Neto Advogados.

2 Nery Junior, Nelson. *Código Brasileiro de Defesa do Consumidor comentado pelos autores do anteprojeto. Processo Coletivo*. Volume II. 10th Edition. Rio de Janeiro. Editora Forense. 2011, p. 221.

## II THE YEAR IN REVIEW

In Brazil, 2018 was marked by: (1) an important judgment from the Superior Court of Justice related to staying individual lawsuits while pending a class action; (2) enactment of the Brazilian General Data Protection Act with specific sections related to class actions; and (3) the rollout of incidental proceedings for the resolution of same subject matter lawsuits as the New Civil Procedure Code (Law 13,105 of 2015) entered its second year after coming into force.

With regard to the first point, in December 2018 the Superior Court of Justice rendered a decision in order to stay all individual lawsuits seeking indemnification due to damages caused by environmental contamination related to the exploitation of a lead mine in the city of Adrianópolis, state of Paraná.<sup>3</sup> This decision was rendered within the system of repetitive appeals, which means that it will be applied to all lawsuits related to the already mentioned environmental contamination. The established thesis determines that the individual lawsuits must remain suspended until the final judgment of the class action related to the same fact.

In spite of being a decision related to a specific case involving environmental law, the case precedent has procedural outlines and may have consequences for the entire class action system. The Consumer Defence Code expressly points out that there is no *lis pendens* between class actions and individual lawsuits (article 104) and, as a rule, individual lawsuits were not stayed while pending judgment of a same related class action. What we identify is a tendency of the Superior Court of Justice to avoid the possibility of divergent decisions on the same question by law and perhaps in fact. In practice, such decision from the Superior Court of Justice may lead to even greater attention and importance for a class action, whose evidentiary instruction and result will probably influence – in an even more sensitive way – the result of individual lawsuits on the same fact.

With regard to the second point, it is worth noting that on 10 July 2018, the Brazilian National Congress approved Bill No. 53/2018, which was subject to presidential sanction on 14 August 2018, and Law No. 13,709/2018, the Brazilian General Data Protection Act, which is now in place (with an 18-month *vacatio legis* period). It is important to highlight: (1) Section 22 specifically stating that the interests and rights of consumers and data holders may be exercised through class actions; and (2) Article 43, Section 3º, stating that class actions can be filed seeking to redress collective damages and pursue indemnification when someone, while processing personal data, causes property, moral, individual or collective damages, in violation of the Brazilian General Data Protection Act.

On the third point, the incidental proceeding for resolution of same subject matter lawsuits introduced by the New Civil Procedure Code (Law 13,105 of 2015) aims to (1) expedite the administration of justice and access to court relief; (2) reduce caseloads; and (3) generate uniformity in court decisions. In general terms, the New Civil Procedure Code establishes that an incidental proceeding for resolution of same subject matter lawsuits can be brought when there is an actual repetition of cases involving the same matters in controversy (matters of law only) and a risk of offence to equitable treatment and legal certainty. As a rule, all lawsuits (including class actions) are put in abeyance until this proceeding is adjudicated upon, and all subsequent judgments must follow the decision on the incidental proceeding for resolution of same subject matter lawsuits.

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<sup>3</sup> Special Appeal No. 1.252.327/PR, Reporting Justice Luis Felipe Salomão, judgment on 12 December 2018, Second Section of the Superior Court of Justice.

To date, the Brazilian Justice Council<sup>4</sup> has reported approximately 141 incidental proceedings for resolution of same subject matter lawsuits involving consumer law, tort, civil procedure and other subjects. This new proceeding has been praised as a part of the Brazilian court precedents system based upon binding precedents, and intends to unclog Brazilian courts.

Nevertheless, the Brazilian court precedents system is not meant to grant court relief directly to claimants, but rather to define legal principles to be followed in all individual and class actions. Consequently, it is possible to say that the class actions system and the Brazilian court precedents system are complementary. Class actions remain as an important tool to address threats or injuries to rights and interests that would not qualify for protection via traditional individual actions.

### III PROCEDURE

#### i Types of action available

In Brazil, as a rule, class actions can be brought to deal with matters relating to the environment, consumer relations, assets and rights carrying artistic, aesthetic, historical, tourism and landscape value, and should centre on the protection of diffuse, collective or homogeneous individual rights.

Article 81, I of the Consumer Protection Code defines diffuse rights as ‘indivisible trans-individual rights held by unidentifiable persons linked by factual circumstances’.

Article 81, II of the Consumer Protection Code defines collective rights as ‘indivisible trans-individual rights held by a group, category or class of persons linked to each other or to the opposing party through a basic legal relationship’.

Article 81, III, sole paragraph of the Consumer Protection Code defines homogeneous individual rights as ‘those with a common origin’. Legal scholars have it that homogeneous individual rights are collective only incidentally because, in principle, their protection could be pursued individually by each holder, as it happens with the traditional system for protection of subjective rights. The approach to collective protection of individual rights, however, was incorporated into Brazilian law to resolve identical conflicts in one single proceeding, thus avoiding multiple individual actions.

According to Article 83 of the Consumer Protection Code, all kinds of actions can be brought for adequate and effective protection of diffuse, collective or homogeneous individual rights, that is, prohibitory actions, actions seeking affirmative and negative covenants, indemnification actions, declaratory actions, actions seeking urgent relief, among others. Hence, class actions may result in condemnatory, declaratory, constitutive, self-enforceable and commanding judgments.

For illustrative purposes, class actions may be brought to seek compensation for damage caused to consumers on account of a defective product, or to compel a certain polluter to bear expenses for the clean-up of illegally polluted soil. There are no objective and specific limits on the scope of class actions and of the particular claims, and the class that potentially benefits is defined based on the claims asserted by the plaintiff in the class action.

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<sup>4</sup> [www.cnj.jus.br/bnpr-web/](http://www.cnj.jus.br/bnpr-web/).

## ii Commencing proceedings

With regard to the standing to file class actions, unlike what is found in US law, Brazilian lawmakers opted for expressly indicating which parties have standing to file a class action. Under Law 7,347 of 1985 (Article 5) and the Consumer Protection Code (Article 82), the parties with standing to bring a class action to defend the rights of citizens in court are: (1) the Public Prosecutor's Office; (2) the Public Defender's Office; (3) the federal government, states, municipalities and federal district; (4) the entities and bodies of the direct or indirect public administration, even if with no separate legal identity, when specifically intended to defend diffuse and collective interests and rights; and (5) associations legally organised for at least one year, and whose institutional purposes include the defence of diffuse, collective or homogeneous individual rights. Further, the Public Prosecutor's Office must also intervene in class actions as an overseer of the law (when it is not a plaintiff in the class action).

In Brazil, there is generally no requirement for class-representative adequacy as to the parties with standing to file class actions, and Antonio Gidi notes that the standing to file a class action is concurrent, disjunctive and exclusive. It is concurrent because all parties with legal standing may seek collective relief for citizens in an independent manner. On the other hand, the legal standing is disjunctive, which is different from a complex standing, 'as any of the parties with joint standing to sue may file, alone, a class action with no need to form a joinder or else obtain authorisation from the other parties which also have standing to sue'. Such standing is also exclusive in that the parties with legal standing are expressly identified in prevailing law.<sup>5</sup>

The Brazilian legislation has not established mandatory binding effects in a class action (the opt-out system). The rule is that if the class action is judged groundless, it does not prevent citizens from filing indemnification claims, but if the class action is judged to have grounds, the sentence benefits the victims and their successors, who may proceed with individual enforcement of the sentence.

As for the standing to file class actions, the most relevant matter up for debate in court in 2017 pertained to the standing of associations to file class actions. Past rulings of the Superior Court of Justice signalled that associations and trade unions had standing to act as substitute parties in class actions, regardless of express authorisation from those being substituted and of submission of a nominal list of their members.

It so happens that the matter was taken to the Full Bench of the Federal Supreme Court which, acknowledging the leading case status of this issue, held in Extraordinary Appeal 573.232/SC that the activity of associations in defending the interests of their members can take shape by representation only, not as substitute parties in the proceedings. It was thus declared that express authorisation should be obtained, whether individually or by a meeting resolution, for an association to file class actions. After this finding by the Federal Supreme Court, other Brazilian courts<sup>6</sup> sided with this opinion that an association could only bring a class action defending its members by way of representation in the proceedings (Article 5, XXI of the Federal Constitution) under prior express authorisation (either through an individual act or through a resolution made at a meeting, which is a measure not satisfied merely via a generic statutory authorisation).

5 Gidi, Antonio. *Coisa julgada e litispendência em ações coletivas*. São Paulo: Saraiva, 1995. pp. 37/38.

6 Special Appeal No. 1481089/SP; Bill of Review in Special Appeal No. 494160/DF; Bill of Review in Special Appeal No. 1331592/RJ; Special Appeal No. 1185823/GO, among other judgments from the Superior Court of Justice.



As mentioned above, in 2017, a new decision rendered by the Full Bench of the Federal Supreme Court held that ‘the subjective efficacy of *res judicata* from an ordinary class action brought by a civil association in defence of the interests of its members only reaches those members residing within the jurisdiction of the adjudicating body on or before the filing date and listed on the complaint’.<sup>7</sup> This judgment has triggered discussions on whether the interpretation of Article 5, V of Law 7,347 of 1985 and Article 82, IV of the Consumer Protection Code would lead to the conclusion that the general statutory provision is not enough to legitimise the standing of associations in defence of the rights of their members, it being thus indispensable to obtain the prior express authorisation of such members.

### iii Procedural rules

A class action starts with a complaint that must be addressed to a court with jurisdiction, and must accurately identify the parties, the facts and their legal grounds, as well as the pleadings with all specifications, the amount in controversy, and the evidence by which the plaintiff intends to prove the truthfulness of alleged facts.

Before analysing the merits of the case, the judge must scrutinise whether all conditions for valid existence of the class action have been satisfied, such as the standing to sue and to be sued, the procedural interest, and the legal possibility of the pleading. These conditions may be recognised by the judge on his or her own initiative, or challenged by the defendant as preliminary arguments in the defence.

After process is served upon the defendant, he or she will present an answer containing all possible arguments of defence, which will occasionally be followed by a reply and then a defendant’s rejoinder. The judge then renders a decision on the preliminary arguments so as to establish the matters in controversy and to specify the evidence to be produced in the case.

The evidentiary phase (discovery) starts after the conciliation hearing. The parties may prove their allegations through all means admissible into evidence by operation of law. Basically, evidence can be composed of supporting documents, oral testimony or expert investigation.

The parties may put forth any type of document to prove the alleged facts. Ordinarily, the parties must introduce documentary evidence in the complaint and in the statement of defence, but further documents may also be put forward at a later stage in support of unforeseen facts or to refute evidence presented by the opposing party.

Examples of oral evidence are the plaintiff’s deposition and the hearing of witnesses. Brazil adopts the inquisitorial system of proceeding. Oral evidence is collected at specific hearings in which the judge and the counsels for the parties may ask questions to the plaintiff or to the witnesses enrolled.

Expert evidence is made when specific forensic knowledge (e.g., in the accounting, medical or engineering area) is required. To obtain expert evidence, the judge appoints an expert of his or her trust, and the parties may also designate experts to assist in expert works. The parties submit questions that will be answered by the court-appointed expert, who eventually issues an expert opinion.

There is no jury and the judge will make a decision granting or denying the class action. Under Law 7,347 of 1985, this decision has immediate effects, and appeals usually cannot

<sup>7</sup> Extraordinary Appeal 612043/PR, Reporting Justice Marco Aurélio, judgment of 10 May 2017, Federal Supreme Court.

stay the applicability of such decision until a future favourable judgment by the Court of Appeals.

Appeals, if any, are heard by a three-judge panel of the Court of Appeals. The appellate ruling can generally be challenged via an extraordinary appeal to the Federal Supreme Court and a special appeal to the Superior Court of Justice; such appeals, however, cannot revisit issues of fact and evidence.

As a class action can be filed to safeguard diffuse, collective or trans-individual rights, the Consumer Protection Code sets how *res judicata* applies to each of these scenarios.

For diffuse rights, the court ruling on a class action will ensure *res judicata erga omnes*, unless the claim is dismissed for lack of evidence, in which case any legitimate party may file another lawsuit with identical grounds and based on new evidence' (Article 103, I).

For collective rights, the court ruling on a class action will ensure *res judicata 'ultra partes*, but limited to the group, category or class, except the claim is dismissed for lack of evidence' (Article 103, II).

For trans-individual interests, the court ruling on a class action will ensure *res judicata erga omnes*, only if the claim is granted to benefit all victims and their successors' (Article 103, III). Also, 'if the claim is dismissed, the interested parties that did not intervene in the case as co-plaintiffs may file an individual suit for damages' (Article 103, paragraph 2). However, further class actions would be barred given the *res judicata*.

#### **iv Damages and costs**

As to court costs, Article 87 of the Consumer Protection Code states that, in class actions, 'there shall be no advance payment of costs, court fees, expert fees or any other expenses, nor shall there be any sentencing of the plaintiff association, save in case of proven bad faith, to attorneys' fees and court costs and expenses.'

As for damages awarded on behalf of citizens in a class action, a class action in Brazil generally seeks to have the courts recognise a legitimate right and establish the *an debeatur* (what is due), so that the *quantum debeatur* (how much is due) may then be ascertained for each citizen.

As a rule, each aggrieved citizen must sue for calculation and enforcement of the award. This new individual proceeding would be subject to presentation of evidence and answer by the defendant, but the answer would be limited to discussing the *quantum debeatur*.

Nonetheless, one of the legitimate entities may file a class action suit for calculation and enforcement of an award as well. This possible enforcement by extraordinary legitimate entities was introduced in the Brazilian legal system to prevent the supplier or vendor from escaping the payment of damages out of the injury caused by it, if citizens do not show interest in seeking recovery on an individual level. If citizens are not interested in seeking individual redress of the damage caused, the recovery sum is to accrue to a diffuse rights defence fund. Under the Consumer Protection Code, the legitimate entities can only plead fluid recovery after 'one year has elapsed without identification of interested parties in a number compatible with the seriousness of the damage' (Article 100).

#### **v Settlement**

In Brazil, unlike in US law, there is no systematic regulation of settlements in class actions involving diffuse, collective or homogeneous individual rights. There are only sparse provisions in Article 5, Paragraph 6 of Law 7,347 of 1985 and in Article 107 of the Consumer

Protection Code, but these provisions are clearly not enough, which ends up hindering the effective settlements involving class actions.

Article 5, Paragraph 6 of Law 7,347 of 1985 establishes the ‘terms of agreement’ by which ‘the public bodies with standing to sue may demand from the legitimate parties to execute terms of agreement by which these will abide by legal requirements or else face penalties; such document is valid and enforceable as an extrajudicial enforcement instrument.’ Terms of agreement are defined as an alternative dispute resolution method that is meant to avoid or put an end to the lawsuit by means of execution of an agreement between a private party and one of the public bodies with standing to file a class action.

Article 107 of the Consumer Protection Code, in turn, institutes the ‘consumer collective agreement’ by which ‘the civil consumer entities and the associations of suppliers or unions of an economic category may regulate, by means of a written agreement, consumer relations intended to lay down specific conditions on price, quality, quantity, warranty and characteristics of products and services, as well as complaints and settlement of consumer-related disputes.’

However, a significant portion of legal writings states that the terms of agreement and the consumer collective agreement do not operate as true forms of settlement since there is purportedly no actual disposal of rights under those instruments. Generally, in the terms of agreement and in the consumer collective agreement, the representatives of a given class are not the holders of the substantive right being protected, and are thus unable to ‘perform any act that directly or indirectly entails the disposal of those substantive rights involved, as the latter do not belong to them’.<sup>8</sup> Hence, according to the majority view emerging from legal writings and court rulings, such settlements could only be reached with regard to the form, time, place and conditions for fulfilment of an obligation or redress – without ever entailing a disposal or waiver of substantive rights, though.

In Brazil, the terms of agreement and consumer collective agreements may be executed out of court, but these may also be taken to court recognition – especially when a class action has already been brought. The judge’s roles in recognising a settlement in class actions differ greatly from those of a US judge. As a rule, the Brazilian judge does not analyse the merits of a settlement or whether the interests of the class have been properly satisfied on the agreement. The judge only checks the formal aspects of a settlement, such as the parties’ standing, no undue disposal of a right and the parties’ status in the proceedings.

Settlements in class actions follow the opt-in system and are not automatically binding upon all interested parties, which may file individual lawsuits regardless of the agreement (unless they have expressly opted in). Also, most legal writings and court rulings hold that the execution of a settlement is not binding on the other legitimate parties that could file class actions to discuss the same collective dispute covered by the agreement.

#### IV CROSS-BORDER ISSUES

Class actions are usually filed in Brazil to obtain redress on behalf of Brazilian citizens – but, in theory, they could also include foreign claimants. Nevertheless, in contrast to other jurisdictions, Brazilian law does not offer particularly favourable options for foreign claimants, and cross-border class actions are possible – but extremely rare in practice. Much to the

<sup>8</sup> Zavascki, Teori Albino. *Processo coletivo – tutela de direitos coletivos e tutela coletiva de direitos*, 4th ed. São Paulo, Ed. *Revista dos Tribunais*, 2009, p. 139.

contrary, in some cases, foreign claimants are even required to post bond when bringing suit in Brazil.

Further, Brazilian courts only have jurisdiction in Brazil and, as a rule, a foreign class action brought before a foreign court does not result in *lis pendens* nor does it prevent a Brazilian judicial authority from entertaining and adjudicating upon the same case (and connected cases).

On the other hand, to become enforceable in Brazil, a foreign judgment on a class action must be: (1) final and binding, with *res judicata* effects according to Article 15 of Decree-Law 4,657 of 1942 and to Article 5, III of Resolution 9 of 2009 of the Superior Court of Justice; and (2) recognised by the Superior Court of Justice as per Article 961 of the Brazilian Civil Procedure Code. These rules apply on general terms, and Brazil can sign international treaties with other countries establishing different procedures for enforcement of decisions. For instance, Brazil has an international treaty on judicial cooperation with Mercosur countries (Argentina, Venezuela, Uruguay and Paraguay), by which a decision is valid in Brazil if it has become *res judicata* or is otherwise enforceable in the country of origin.

## V OUTLOOK AND CONCLUSIONS

Class actions in Brazil are an important instrument for resolution of collective trans-individual conflicts, which are typical in current society. Brazil has over 30 years' experience in class actions and a well-defined system that serves as a veritable reference for civil law countries that are willing to put in place a legal framework for class actions. Class actions are largely used in Brazil to handle matters related to consumer relations, product liability and environmental law.

However, as noted above, class actions in Brazil are undergoing a crisis as regards effectiveness, which is mostly due to misinterpretation of this proceeding based on the ordinary rules of the Brazilian civil procedure (which is strongly marked by an individualistic culture). The New Civil Procedure Code seeks to challenge this matter by instituting the Brazilian court precedents system, and it is hoped that collective trans-individual conflicts will be better treated in Brazil by concurrently applying this system to class actions.

# COLOMBIA

*Javier Tamayo Jaramillo*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The Political Constitution of Colombia of 1991, in Article 88, conceived actions aimed at protecting collective interests and rights as well as damages that are common to a group of people. These actions were developed by Law 472 of 1998, which divided them into ‘popular actions’ and class actions. In Colombia, popular actions seek to protect collective rights, and class actions seek to protect the individual interests of 20 or more people harmed by the same act.

Since the enactment of this law, 20 years have elapsed in which the issues arising from these actions have been evidenced. This is so because even if the legislator had previously enshrined similar actions in the Civil Code of 1887 – articles 1005 and 2359 – class actions *per se* were only legally established with the enactment of Law 472. Thus, the initial years were characterised by high expectations generated by the law’s enactment, followed by a boom period and then the abuse of these actions, particularly the highly publicised popular actions. There were too many people pursuing the economic incentives that the law incorporated in favour of those who were triumphant. This experience means some laws have led to a more settled case law, albeit one still in evolution.

In Law 472 of 1998, the Colombian legal system provides the protection of collective rights and interests and the compensation rights to a group of people whose individual rights have been violated, through two mechanisms that pursue apparently similar objectives, but that are diametrically opposed in their characterisation.

Accordingly, popular actions are the mechanism by means of which the threat to collective interests is suppressed or prevented, or the damage already caused and compensated; while class actions seek compensation for the damage suffered by a plural number of people. In this sense, it is worth noting that, when talking about individual damage, reference is made to an effect on the patrimonial and extra-patrimonial assets of each of the individuals; this is so to the extent that class actions, inspired by the Anglo-Saxon model, pursue compensation of individual damage that affects a ‘large’ group of people.

When reference is made to collective damage, what is put forward is the present or future impact on an entire community. Collective damage, then, intangibly affects the quality of life of a whole conglomerate, and the action that seeks to prevent or repair must be exercised on behalf of the community through a popular action.

It is not necessary, therefore to affirm that class actions pursue the protection of collective rights and interests, as it is apparent that they tend to protect individual rights. A

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<sup>1</sup> Javier Tamayo Jaramillo is the founding partner and director of Tamayo Jaramillo & Asociados.

different thing is that class actions are only aimed at seeking the compensation of individual damage of a group of victims, so that from the harmful event there is no damage to a right or a collective interest.

## II THE YEAR IN REVIEW

As has been already noted, during the first few years after the issuance of the Law on popular actions this mechanism was used abusively; therefore, this situation led the legislator to suppress the economic incentive that had been conceived for actors that were triumphant in their claims. Through the issuance of Law 1425 of 2010, the lucrative business that represented for some the filing of series of popular actions was eliminated leading to the achievement of apparently more laudable ends and thus controlling the exercise of the action.<sup>2</sup> However, this situation was not easily accepted, and there were those who filed actions against the issuance of the Law since they considered that it presented an involution in the law, so a constitutionality claim was filed before the Constitutional Court. In this claim, the Court confirmed the Law's adjustment of the Colombian legal system.<sup>3</sup>

Even more important have been the legislative changes in matters of jurisdiction, particularly in the case of those that, being directed against a state entity, are processed by the contentious-administrative courts. In consequence, when Law 472 of 1998 came into effect, these actions were processed in the first instance before the administrative courts of each judicial district and in the second instance, before the Council of State, the supreme court of administrative litigation. This ensured that, during the first years of the Law's validity, jurisprudential lines were created around the interpretation, application and scope of collective rights, a subject that until then had little development in Colombia. However, in 2006,<sup>4</sup> the administrative courts began operating, so that claims concerning popular actions in the first instance – and, in some cases, also class actions – were filed before them, and second-instance knowledge was transferred to the administrative courts of each district, making jurisprudence more diffuse.

Considering the above, Law 1285 of 2009<sup>5</sup> established the mechanism for a review of judgments and some injunctions, handed down by the courts pertaining to the contentious-administrative jurisdiction to the Council of State, both in popular and class actions. This review seeks the unification of court rulings, as well as ensuring the effective protection of fundamental rights and the review of legality regarding the judgments of the administrative jurisdiction. However, this mechanism is not always effective because many of these procedures take years to decide, given the amount of matters to be resolved by the Council of State. In addition, the review is possible, not automatic, much less mandatory, and, finally, it only proceeds when it is proven that the judgment is contrary to what is normally

2 In this regard, the Superior Council of the Judiciary, the body in charge of compiling the statistics of the exercise of popular action, among others, reported that, since the elimination of the economic incentive, popular actions decreased by approximately 60 per cent: *¿Se han transformado las acciones populares con ocasión de los cambios normativos y jurisprudenciales ocurridos en el periodo 2006–2012?*, Manjarrés Bravo, Patricia Victoria. Universidad del Rosario, Bogotá, 2013.

3 Judgment C-630 of 2011. PJ. Luis Ernesto Vargas Silva, Constitutional Court.

4 Agreements No. PSAA06-3345 of 13 March 2006 and of 9 May 2006, of the Administrative Chamber of the Superior Council of the Judiciary.

5 Law 1285 of 2009, by means of which the law 270 of 1996 Statutory of the Administration of Justice is reformed.

decided by the courts in similar cases or when it is contrary to the established jurisprudence of the Council of State, which has led to few judgments being subject to review.<sup>6</sup>

Moreover, not all rulings in popular and class actions are subject to review. Rulings that are appealable before the Council of State once the process is filed in the administrative courts, or those given by the administrative judges are not subject for review. Similarly, the judges of the Council of State do not review matters that generate new debates based on evidence or legality.

Nor are rulings susceptible to review delivered in popular or class actions that are processed by the civil jurisdiction. This is the reason why in this domain jurisprudence is diffuse.

We clarify that although the extraordinary appeal before the Supreme Court of Justice, which aims to unify court rulings in civil matters, is clearly applicable for class actions, according to the judgment by the State Council of 20 September 2018, this is still in debate for popular actions.

Indeed, Article 338 of the General Procedural Code, apparently by mistake, established that in popular actions the amount awarded with a conviction should not be considered in order to allow the appeal. Subsequently, Article 6 of Decree 1736 of 2012 corrected the aforementioned article, indicating that it referred exclusively to group actions, with which extraordinary appeal before the Supreme Court of Justice in popular actions had been ruled out. However, the ruling of 20 September 2018, issued by the State Council, declared Article 6 of Decree 1736 of 2012 void, so that Article 338 reverted to its initial regulation. Thus, there is currently no certainty about whether extraordinary appeal is possible in terms of popular actions, but, based on future decisions of the Supreme Court of Justice, this should be decided.

It is significant that over the past 20 years, the most relevant and frequently discussed issues in collective actions have been, among others, those related to the protection of the environment, the ruling on the pollution of the Bogotá River, judgment 01-479 of 25 August 2004, access for the disabled and the services provided for them in public places, the access to and provision of home public services and, finally, administrative morality in state contracting.

### III PROCEDURE

Having already presented the general panorama of collective actions in Colombia, this section deals with the procedures provided by the law for their processing, and exposes some of the practical problems that have been evidenced during the 20 years of the application of Law 472 of 1998.

It must be clarified that collective actions are those aimed at guaranteeing either the defence and protection of collective rights and interests, in which case there would be a popular action, or in the face of a claim seeking compensation for massive or group damages, in which there would be a class action.

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6 Hernández Nárvaez, Adriana and Ducuara Granados, Janefriend Carolina. Eventual review of popular and class actions. Retrieved on 02/27/2018, at <http://repository.unimilitar.edu.co/bitstream/10654/9226/2/HernandezNarvaezAdriana2012.pdf>.

## i Types of action available

The Colombian legal system provides two types of collective actions, according to the object of protection pursued by each of them. Thus, if what is intended is the safeguarding and protection of collective interests and rights,<sup>7</sup> recourse should be made to a popular action; whereas if the aim is the defence of the rights and interests of a number of people (i.e., a group), the procedural method will be the class action. In this way, the determining factor will be the damage caused.

The damage that intangibly affects the quality of life of an entire community is a collective damage, and the preventive or restorative action must be exercised on behalf of the entire affected community through a popular action. In contrast, group damage affects a number of victims who suffer individual personal damage that, when it touches a significant number of individuals, sets up the group or massive damage, whose compensation can be claimed in the same judicial process, through a class action. In the case of mass or group damage, each of the affected victims can seek compensation for their damage through an individual claim; however, owing to the scale of the damage the law provides for class action as a theoretically more flexible procedural mechanism for the protection of the affected group's interests. The word 'theoretically' is used as, in practice, claimants do not always obtain the aforementioned benefit provided for class actions.

7 Article 4 of Law 472 of 1998 makes a non-exhaustive statement of collective rights and interests. Despite the generosity of the list, there is nothing to prevent a popular action from seeking to safeguard a collective right not included in the norm. The article quotes the following:

*Article 4º. Rights and collective interests. Are collective rights and interests, among others, those related to:*

- a The enjoyment of a healthy environment, in accordance with the provisions of the Constitution, the law and regulatory provisions;*
- b Administrative morality;*
- c The existence of ecological balance and the rational management and use of natural resources to ensure their sustainable development, conservation, restoration or replacement. The conservation of animal and plant species, the protection of areas of special ecological importance, the ecosystems located in the border areas, as well as the other interests of the community related to the preservation and restoration of the environment;*
- d The enjoyment of public space and the use and defence of public property;*
- e The defence of public patrimony;*
- f The defence of the nation's cultural heritage;*
- g Public safety and health;*
- h Access to a service infrastructure that guarantees public health;*
- i Free economic competition;*
- j Access to public services and that their provision is efficient and timely;*
- k The prohibition of the manufacture, importation, possession, use of chemical, biological and nuclear, as well as the introduction into the national territory of nuclear or toxic waste;*
- l The right to safety and prevention of technically foreseeable disasters;*
- m The construction of buildings, buildings and urban developments respecting legal provisions, in an orderly manner, and giving prevalence to the benefit of the quality of life of the inhabitants;*
- n The rights of consumers and users.'*

Equally, collective rights and interests are defined as such in the Constitution, ordinary laws and international law treaties signed by Colombia. The rights and interests set forth in this Article shall be defined and regulated by the regulations currently in force or those issued after the effective date of this law.



Although the object of protection of the actions in question is different, nothing prevents the same event leading to both types of action being initiated, for example, when some fishermen fall ill or are deprived of their daily activity because of the contamination of a river. It was already mentioned that a common theme in popular actions is environmental damage, in which through this action, protection of the healthy environment would be requested, while individual damage caused to the health and patrimony of the fishermen would be the object of a class action.

On the other hand, in previous publications<sup>8</sup> we have argued that, despite the fact that Law 472 of 1998, in Article 46, establishes as the exclusive purpose of class actions the recognition of damages, it would be absurd that in the process of a class action for massive damage already caused, the judge could find a latent threat of new individual damage or the aggravation of the same damage in the future and could not order the suppression of such threat under the argument that the law created the class action exclusively for indemnification purposes. A correct interpretation of this Article would consider that class actions are meant not only to collect compensation for individual damage already caused to the class, but also to suppress the threat of contingent damage to the property of individuals. Our interpretation has been accepted by national jurisprudence on several occasions.<sup>9</sup>

In addition to the damage, other elements of procedural processing allow the differentiation of popular actions from class actions, such as: the time frame to initiate the action, the individuals legitimated to exercise the action, the passive subject of the action, the precautionary measures, the possible agreements of the parties and their execution, the sentence and its execution.

This section outlines the elements of these actions, as well as briefly studies the expiration periods to exercise the actions. In later sections, those legitimated to initiate and resist the actions, the possible agreements between the parties and the judgment and its execution are discussed.

### *Elements of the actions*

In addition to the damage to the collective interest, for a popular action to be admissible the defendant must be potentially liable for the damage. This means that the principles of civil liability are applicable to popular actions, because they imply the verification of a contingent

8 Tamayo Jaramillo, Javier. *Las Acciones Populares y de Grupo en la Responsabilidad Civil*, first edition, pages 185–187, Baker McKenzie, Dík, 2001.

9 Judgment of 24 August 2000. Administrative Tribunal of Cundinamarca. File AG-99-001. Class action, plaintiff Marcos Yesid García, against the Mayor's Office of Bogotá. In the judgment of 24 August 2000, decided by the Administrative Court of Cundinamarca, the claims of some owners of some properties were accepted, in which, if no corrective measures were taken, their houses were in danger of collapsing. The court ordered '[t]ake the necessary measures and perform the corrective works of drainage and containment sufficient to stop the thrusts of the land that come from the active landslide of the neighbourhoods of Granada Sur and Montebello, taking into account the recommendations of Ingeominas'. The Superior Court of Popayán ruled on the same line in the judgment of 8 October 2002, where it established 'that the contingent damage in the case analysed was evident and, therefore, there was no doubt of the right that assisted the consumers to obtain a product in which the possibility of error or failure of production and harm to the consumer is reduced to the maximum'. The arguments presented by the Superior Court of Popayán, Civil Chamber, referred to a reasonable interpretation of the provisions that regulate popular actions in defence of consumers and concluded that there was contingent damage that could be cautioned through such action. Judgment 8 October 2002. *Mario Sagid Mosquera López v. Panamco Colombia SA*.

or already caused collective harm, a fact attributable to the defendant and a causal link between one and the other.

As in popular actions, class actions require the defendant to be responsible. This implies the verification of civil liability, because if this is not so, the compensation is not deemed appropriate. In this way, a popular action process will be one of non-contractual civil liability or contractual civil liability, according to the elements of one or other liability regime.

### ***The expiration periods of both actions***

In terms of popular actions, the current procedural rule establishes that a 'Popular Action may be promoted during the time that the threat or danger to the collective right and interest persists'.<sup>10</sup> This implies that the action is not extinguished by the passage of time, when what is involved is a request that a latent or continuous threat of damage to collective or individual interests be eliminated. If damage is already caused whose repair or compensation fails to prevent the production of new damage, the action will be subject to the terms of prescription of ordinary actions in the legal system.

In relation to class actions, Law 472 of 1998, in Article 47, states that 'without prejudice of the individual action corresponding to the compensation of damages, the class action shall be promoted within two years of the date in which the damage was caused or the injurious action that caused it ceased'. This Article states that if two years have passed since the damage was caused or since the harmful action ceased and no class action has been commenced, the individual action of each member of the group can still be filed and will be valid in accordance with the terms of expiration and prescription conceived in the jurisdiction.

In addition, in accordance with subparagraph h) of numeral 2, Article 164, Law 1437 of 2011, in administrative matters the previous expiration rule has an important exception: 'If the damage caused to the group comes from an administrative act and is intended to void it, such a request must be submitted within four months, counted from the day following the communication, notification, or publication of the administrative act.'

### **ii Commencing proceedings**

In relation to legal standing in popular actions, Law 472, Article 12 provides that every citizen, whether a natural or legal person, can file actions. These actions can be exercised by a single person, who must be the holder of an individual right under threat and who wishes to protect it by means of a popular action. It can also be any member of the community whose collective interests are threatened, when it comes to the affecting or threatening of collective rights.

It should also be noted that there can only be one popular action in progress against the same plaintiff and for which the same claim is requested, under penalty of pending litigation.

In relation to class actions, Law 472, Article 48 establishes that any aggrieved party may initiate the action, but it also requires the plaintiff to identify a group of at least 20 affected people who meet the same conditions in the case. In this regard, it is important to specify that it is enough for a single member of the group to give power of attorney to initiate the action on behalf of the group, indicating in the lawsuit the criteria that allow the identification and

<sup>10</sup> Article 11, Expiry action, Law 472 of 1998.

delimitation of the affected class. This person must file the claims in the name of the whole group, not just for those victims who granted power of attorney.<sup>11</sup>

Once the action is filed by at least one member of the group, the effects of the process extend to all the members covered by the class, except, exclusively, to those affected who have decided to exclude themselves from the group expressly, to whom are left open the possibility to sue separately and individually.<sup>12</sup> The above places the class action in Colombia as a type of opt-out action.

### ***Defining the class***

Limiting the class is where the greatest disadvantages of class actions lie because once the identification is presented by the plaintiff in the lawsuit, there is no specific law that establishes the specific procedure to follow regarding the moment when the class must be completely identified. It is also important to consider that in judicial practice, judges often ignore the criteria to identify the class and end up ruling on the case without there being a clear delimitation. Such situation leads in many cases to the emergence of doubts about the effects of the process and the ruling against the possible new members of the class that did not grant power of attorney.

In our opinion, the identification of the class should be established by the judge before admitting the claim, based on the requisite contained in Article 53 of Law 472 of 1998.

The importance of the delimitation of the class is also that, if not done this way, the distribution of compensation before the judgment would be unmanageable and would make the compensation open to discussion by people who did not become part of the process and whose membership in the class action could be debatable. The non-determination of the class in case of an acquittal could also generate avoidance of the effects of *res judicata*. Finally, an inadequate delimitation of the class could impede the settlements, as there would be no clarity as to who would have to be called to the settlement and there would not be sufficient guarantees for the defendant to ensure the closing of the event in a definitive manner.

### **iii Procedural rules**

#### ***Effects of class exclusion***

The exclusion of one of the members of the class the group occurs after he or she states a desire to be excluded, and this must take place within a time limit of five days.

#### ***Effects of the judgment***

The judgment that ends the process of class actions has effects of *res judicata* against all those involved, and it benefits those who claim within 20 days of the publication of the judgment, except those who were expressly excluded from the class at the beginning of the action and so are not affected by the decision.

Likewise, the acquittal has the effects of double jeopardy for all the members of the class, except for those who were expressly excluded in a timely manner. We consider this situation absurd and unjust for the victims, because those who did not expressly exclude themselves from the class and did not become part of the class action process see the violation

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11 Colombian Constitutional Court. Judgment C-116-08 of 13 February 2008, PJ. Dr Rodrigo Escobar Gil.

12 Article 56, Law 472 of 1998.

of their right of defence, as they are linked by an unfavourable ruling in a lawsuit in which they did not even participate.

However, we emphasise that Article 56 of Law 472 of 1998 provides an important instrument for the benefit of the victims belonging to the class that may be unfairly affected by the ruling. Paragraph b) of this Article establishes that the members of the group will not be bound to the sentence when, having not participated in the process, they 'prove in the same term (five days after the judgment) that their interests were not represented in appropriate form by the group representative or that there were serious errors in the notification of the action'.

### *The presiding judge*

Both popular and class actions apply the jurisdiction rules to determine which judge is competent. The Colombian legal system contemplates a civil jurisdiction and a contentious-administrative jurisdiction. If we simplify the analysis, it could be said that the jurisdiction will depend on whether the litigation is about a matter that involves a public function or a state entity. Therefore, the collective actions will be processed before civil judges or before administrative judges, depending on the jurisdiction called to review the matter in dispute and the parties involved.

### *Applicable regulations*

The rules that govern the processing of collective actions are those enshrined in Law 472 of 1998. In cases of normative gap, the same rule (Article 68) provides for referral to the Code of Civil Procedure, which was called to govern conflicts in the sphere of private law and that has now been replaced.

This normative compilation was replaced by the General Procedural Code, which today corresponds to the applicable legislation but, given its novelty, there are still claims being processed under the previous legislation. To this we should add that part of the jurisprudence and the doctrine have understood that popular and class actions known by the contentious-administrative jurisdiction must apply as residual rules of the Contentious-Administrative Code (Law 1437 of 2011). The plurality of the mentioned laws can create confusion regarding the procedural norm applicable to a popular or class action; this may end up affecting the right of defence of the parties in the proceedings or it may create uncertainties in the procedure and bring about legal uncertainty.

## **iv Damages and costs**

### *Cost recovery*

For both popular and class actions, the legal system admits that the parties agree with their lawyers the fees they will charge for the representation of their interests in the process. It must be specified that in Colombia, the pact of contingency fees is admitted, as well as other mechanisms of remuneration for services whose agreement and content are lawful. There is, therefore, no special regulation or prohibition for the remuneration of the trial lawyer.

Anyone can file a popular action without the need for the presence of a qualified lawyer; so the interested party can directly access the courts intending the protection of the interests of the community.

### ***The jury***

The Colombian legal system does not contemplate the existence of a jury, so the presiding judge decides the processes of any nature.

### ***Tort compensation***

The recognition of monetary compensation in favour of the plaintiff is, as a rule, predicated about class actions. In these actions, the damage that can be compensated corresponds to the damage that the plaintiff tries to prove in the process, both in relation to the damage of the group and in respect of the individual damage of each member of the class that becomes part of the process. Traditionally, the recognition of the damage has been governed by the limits to compensation for non-pecuniary damage recognised in case law and applicable to liability proceedings. As far as damage to property is concerned, within the process compensation for the damage that can be proven will be recognised, if every element of tort law has been proven.

### ***The compensation imposed in the ruling of a class action***

The judgment that ends the class action must provide for the amount of collective compensation and the weighted sum of the individual compensation of the members of the class. The sum corresponding to the compensation must be delivered to the Fund for the Defence of Rights and Collective Interests, which will handle the distribution of the resources to the claimants who present themselves and prove their class member status. This fund is administered by the Ombudsman to guarantee the interests of the members of the class and to give a suitable adequate management of the resources.

## **v Settlement**

Law 472 foresees the scenarios in which the parties in collective actions can reach an agreement to put an end to the process, before it begins.

In the case of popular action, Article 27 of the Law orders the holding of a compliance hearing, which is decreed *ex officio* by the judge, and to which the parties are obliged to attend to subscribe a compliance agreement. In the compliance agreement, the parties discuss measures to protect the collective right or interest that has been threatened by the defendant, and if possible, accept the agreement. In case it has been approved, it is then signed and the judge reviews it and approves it through a judgment. If the trial judge considers that the agreement signed by the parties does not comply with the purposes of protection of the collective right, or that it does not comply with current regulations or that for any other reason it is not appropriate, he can also reject it through a judgment.

Finally, if the compliance agreement is approved, it becomes *res judicata*. This we find especially problematic, especially in cases of environmental damage owing to contamination, because it can close the doors to a future action if the defendant continues polluting. However, the Constitutional Court has foreseen and managed this risk, and it has said that there is no *res judicata* if as a result of new behaviour of the defendant, the collective assets are again put at risk.

In relation to class actions, according to the applicable regulations, the early termination of the process could be done through a settlement hearing or a transaction between the parties, and by reference to the regulations of the General Procedural Code it could be said

that it would also end the withdrawal of the class action lawsuit. Regarding each of the early termination mechanisms of the process, the following are of note.

The settlement can be agreed between the parties during the settlement hearing provided by law for class actions. The settlement agreement signed by the parties is treated as a judgment and has the effects of *res judicata*. Once the agreement is signed, the judge will order its publication in national journals, so that the members of the class that did not become part of the process may present themselves to prove their quality and claim the corresponding weighted compensation.

Regarding the transaction and withdrawal, despite the fact that Law 472 does not rule on its admissibility or inadmissibility for class actions, nothing would prevent the early termination mechanisms of the process from being applicable, by remission to the General Procedural Code. In relation to the transaction, we believe that it would have to be governed by the rules provided by the law regarding settlements, except that there is no mandatory settlement hearing. There is also the doubt of whether, once the transaction contract is concluded, it must be approved by the presiding judge, because the law is silent in this regard.

Concerning the withdrawal, also applied by referral to the General Procedural Code, many doubts arise about its origin and convenience to prematurely end the class action, especially for the effects on the members of the class that are not present in the process and that would be affected by what is decided in the process. Finally, we would like to expand on what was mentioned previously, regarding the inadequate identification of the class. This generates conflicts in practice, as it makes it impossible to settle because there is no clarity in the potential claimants or in the members of the class.

#### IV CROSS-BORDER ISSUES

In principle, Colombian law does not prohibit foreign claimants from exercising a popular action or adhering to a class action. However, such exercise is rare in practice.

In cases in which issues of international law are discussed, Colombian law does not establish restrictions for those who can exercise class actions in other jurisdictions. Cases that are brought before the knowledge of judges of foreign legal systems will then have to be governed by the applicable law of the sovereign state in question.

Although in practice the application of foreign judgments in the matter is unlikely, for the foreign judgment of a class action to have effects in Colombia, Colombian law requires the application of the figure of the *exequatur*, with the respective completion of its requisites.

The foreign decision must:

- a* not refer to property rights constituted in assets that were in Colombian territory at the time of indicating the process in which the sentence was issued;
- b* not oppose Colombian laws or provisions of public order, except procedural ones;
- c* be enforceable in accordance with the law of the country of origin and presented in a duly completed copy;
- d* not exclusively fall on a matter exclusive to Colombian judges;
- e* not concern an existing process or enforceable judgment by Colombian judges on the same matter; and
- f* meet the *exequatur* requirement.

## V OUTLOOK AND CONCLUSIONS

The legal system does not clearly establish the criteria for establishing the class, nor does it contain clear procedural rules for its delimitation, which in practice creates difficulties regarding compensation, the conclusion of settlements and in the effects produced by the *res judicata*.

The judgment is imprecise and insufficient if, after the conviction, a significant number of people are affected, in which case individual compensation decreases significantly.

The absence of clear rules to determine the class means that the action largely loses its efficiency, since as claims evolve, lawsuits are filed by small groups of injured parties, which leads to enormous uncertainty in terms of the effects of *res judicata* in the first lawsuit.

Finally, while there are no clear mechanisms to identify the class in space and time, class actions will not guarantee the victims massive damages.

# DENMARK

*Christian Alsøe, Søren Henriksen and Morten Melchior Gudmandsen*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The class action scheme under Danish law is a form of legal civil procedure that entered into force on 1 January 2008. It was part of the largest reform of the Danish judicial system since 1919. The regulation on class actions has not been significantly amended since it was introduced.

The Danish class action regime is a genuine mass claim process with an opt-in mechanism as the general rule. Any private individual or legal entity that is a holder of a civil claim or credit can commence class actions with the ordinary courts with a request for approval of a class action and appointment of a class action representative to be the formal party to the court case.

Under Danish law there are, however, several ways in which multiple claimants may commence legal proceedings. Generally, three forms predominate:

- a* multiple parties and the defendant agree on a test case concerning one or a few individual claimants;
- b* multiple claimants sue individually and have all claims joined in one court proceeding; and
- c* multiple claimants file a class action.

In practice, all of the above forms have been used.

There may be several advantages for a party to advance its claim by way of a class action rather than having to pursue the claim by way of individual litigation. However, the following circumstances may be reasons why class actions are avoided in some instances:

- a* As opposed to, for example, US law, Danish law does not provide for a standardised way of computing losses. Given the fact that alleged losses must be documented individually, class actions are often not the preferred approach.
- b* Under Danish law, attorneys are not entitled to charge fees as a specific share of the profits made from the outcome of a given case. Accordingly, the attorney cannot fully share the procedural risk of the case with the client. Since the client must bear all risks with regard to the case, there may not be much advantage to initiating a class action as opposed to awaiting the outcome of a potential test case or initiating individual litigation by those who have had the greatest losses.

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<sup>1</sup> Christian Alsøe is a partner, Søren Henriksen is an attorney-at-law and Morten Melchior Gudmandsen is an assistant attorney at Gorrissen Federspiel.



In practice, matters have been filed as individual cases as an alternative to class action and in other cases both individual cases and class actions have been filed simultaneously or consecutively – often with the individual cases being a precursor for the class action.

Where many identical cases are filed, a test case could be chosen by the parties or a test case simply emerges from the fact that where several cases have been initiated by several independent claimants, one case is processed while others are stayed.

Mass litigation has in practice also been organised by one lawyer representing several plaintiffs initiating one joint action on behalf of these specific plaintiffs.

None of these mechanisms procedurally prevents others from initiating separate lawsuits.

## II THE YEAR IN REVIEW

Although the class action regime has been available in Denmark since 2008, only few cases have been initiated and finalised in Denmark.

To our knowledge, no empirical study is available on the mechanisms that result in parties opting for the route of class action, following other procedures or abstaining from making a claim. It is therefore an open question, what is the cause of the relatively scarce amount of cases, hereunder whether individual cases are filed instead of class actions. However, it is the general impression that an increase in investor-related cases has been seen over the past 10 years. This may be due to the fact that a number of foreign companies and organisations have been increasingly active with financing and managing such cases. The market has also seen funding of commercial litigation filed and run as one joint action by multiple plaintiff parties, but managed through the financing company, which also instruct the representing lawyer. In such cases, the financing company is, however, not formally a party to the proceeding.

In 2018, a decision in substance was reached in the *Amagerbanken* class action (under appeal), and the Eastern High Court rendered two important decisions (the *AP Pension* case and the *OW Bunker* case) on limits for the frame for prospectus liability class actions. These decisions are dealt with in more depth in Section III.ii). The decisions generally set out clear distinctions between cases, where individual factual or legal assessments are required, which are not eligible for class actions, and cases where the facts and legal assessments are of an identical nature, where class actions can be held to be the best option depending on other available options and the amount of claimants.

## III PROCEDURE

There is a substantial difference between litigating in Denmark and common law countries such as the UK and the US. The differences mainly relate to the process including the forms and types of evidence and how they are provided, the timing, the risks, the costs and the way a claim or loss is calculated and documented. A Danish case can be initiated as one case, several individual cases or as a class action. In any event, the plaintiffs will have the burden of proving that (1) as a consequence of a negligent act (2) a loss has been suffered. It should be expected that there will be (or can be) an exchange of information between plaintiffs in different jurisdictions and despite the cases being independent of each other, it is recommended that there is some coordination between the lawyers on the different defence teams.

Under Danish law, a class action is characterised as a legal action where a number of uniform claims are heard as one case by the court without the members of the class action having to meet all of the ordinary procedural requirements for a plaintiff.

The legal basis of the Danish class action regime is Chapter 23a, Sections 254a to 254k, of the Danish Administration of Justice Act (AJA), which provides the possibility of initiating class actions in Denmark, provided certain criteria are met.

Pursuant to the provisions of the AJA, class actions may only be instituted where (1) the venue or jurisdiction for all claims is in Denmark, (2) the court is the geographically competent court for one of the claims and (3) the court holds subject matter competence in respect of one of the claims.

The Danish courts decide whether a case may be heard as a class action, based on the following criteria:

- a* the claims are uniform (i.e., not necessarily identical, but arising from the same legal and factual basis);
- b* class action is believed to be the best way to hear the claims;
- c* the class members can be identified and notified in an appropriate way; and
- d* a class representative can be appointed.

In the preparatory remarks to the bill on the introduction of group litigation, a non-exhaustive list of typical actions where a class action could be expected to be relevant is included.<sup>2</sup>

Regarding the requirement that a class action must be the best way to hear the claims, the court makes an assessment of the advantages and disadvantages of a group action compared to other legal procedures available.<sup>3</sup> In the court's assessment, a number of considerations are taken into account including the advantages of a 'package solution' and concentration of many claims in one case, the concentration of the procedural rights with the class action representative, and low costs per individual. The disadvantages traditionally include the slow start of a class action case and the risk that the opposing party may sue the individual group members for counterclaims. In addition, the assessment may somewhat overlap with the assessment of 'uniformity', given that non-uniform claims will *per se* not be considered to be fit for a class action under this requirement.

Case law shows that class actions have been found to be the best way to hear claims when the claims are nearly identical and the claimants comprise a large number of persons. For instance, questions related to the lawfulness of share redemptions or the overcharge of land registration acts have been tried as class actions.

The class action members are not parties to the case in the traditional way. As set out in the above, they are represented by the class action representative who is the legally competent party to the court action, having capacity to act as such in the class action proceeding and being responsible for conducting the action on the plaintiff's side. The AJA provides the persons who can be appointed as class action representatives.<sup>4</sup> The class action representative has the authority to instruct an attorney, decide what arguments to be made, etc.

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2 See pages 214–218 of the White Paper prepared by the Commission for the Administration of Justice (Retsplejerådet) in connection with the preparation of the bill on the introduction of group litigation into Danish law.

3 Reference is made to Section I for other types of group litigation available under Danish law.

4 See Section 254 c(1) of the AJA. Other requirements, such as the financial ability to represent the class action members, apply. The Danish Consumer Ombudsman is currently the only public authority

Importantly, the class action members are not, as such, competent to instruct the representative. However, in recent years, the prevailing method of mounting a class action representative has been to form an association established and funded by class members with the purpose of acting as class action representative.

Once appointed, only the court can release the class action representative from the assignment. In opt-in class actions, the court must decide whether it is necessary to appoint another class action representative if a minimum of 50 per cent of the members of the class action having opted into requests. The request must be accompanied by a proposal for another class action representative who is willing to accept appointment.

It is difficult to indicate the time span between the filing of a lawsuit and a final decision. Unless settled, it is most likely that cases of this type will be appealed and thereby dealt with by two instances. Owing to formal issues in respect of accepting a case as a class action, such cases will normally require more time than individually filed cases.

The prospectus liability action *BankTrelleborg* was commenced on 14 February 2008 and decided by the Supreme Court in 27 January 2012. The case on land registration fees was initiated on 12 August 2011 and is still pending. The *Amagerbanken* class action was initiated in 2013 and was decided in first instance in 2018. In comparison, an older landmark prospectus liability action concerning Hafnia (which was not a class action but two individual claims) was filed in 1997 and a final judgment was rendered in by the Supreme Court in 2002.

### **i Types of action available**

In principle, all types of civil claims may be heard together under the class action provisions, if the claims are uniform and made on behalf of several persons. The rules do, however, not apply in:

- a* marriage and parental rights cases;
- b* paternity cases;
- c* guardianship cases;
- d* review of administrative detention;
- e* review of decisions on adoption without consent;
- f* acquiring judgment for declaration of null and void of documents;
- g* acquiring judgment for confirmation of ownership; and
- h* private criminal cases.

There are no particular limitation periods of procedural or substance law nature applicable to class actions. In matters against public authorities for cancellation of administrative decisions, particular limitation periods for filing court actions will apply depending on the relevant statutory provisions of the area of law relevant for the decision to be challenged.

### **ii Commencing proceedings**

The class action is initiated by submitting a writ of summons or claim form to the court with a request to examine the writ as a class action. The writ may be filed by any person who

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with statutory authorisation to be elected class action representative. As a consequence, only the Danish Consumer Ombudsman can be elected class representative in opt-out class actions as set out in Section 254 e(8) of the AJA.

is eligible to be appointed as class representative. In addition to (or as part of) the writ, the following information must be included:

- a* a description of the class (group) to be encompassed by the action;
- b* information on how the members of the class can be identified and be informed about the action; and
- c* a proposal for the class representative to be appointed and a statement confirming that this potential representative is willing to accept the appointment or assignment.

Professional companies or organisations often assist in the process of gathering relevant plaintiffs to act as class members, and some companies have specialised in managing or funding the court action.

There is no formal requirement to hear the defendant's view as to whether the criteria for accepting an action as a class action are met. However, in practice the court always invites the defendant to present its comments hereto. Often several pleadings are exchanged and even hearings take place on whether to approve of the class action, the appointing of the representative and the frame or scope of the action.

As an element in deciding whether to approve of the class action, the court may limit the scope of the action (for the claims to be encompassed to be sufficiently identical) and the court may order the class representative to provide security for the potential legal costs, which the class representative may be ordered by the court to pay to the opposing party and even order individual class members to provide security for costs relating to the class members' own claim. Thus, the court will determine the framework of the court action (i.e., the types of claims that may be part of the action, the relevant time period pertaining to the claims, specific criteria to be fulfilled by those who wish to participate in the class action, etc.). Court hearings in respect thereof on whether or not to approve a class action are often required. A defendant will normally be allowed to comment on whether or not to approve of the class action, the suggested class representative and the framework for the action.

The parties may also ask for permission to have the case handled by either three judges in the city courts, by the High Courts or the Danish Commercial and Maritime High Court. Permission will depend on a discretionary decision by the court that will only be granted if the matter is considered of a principal nature.

If a class action is approved by the court, the action encompasses the claims by eligible participants within the approved frame (e.g., investors having purchased shares of a company on a specific date or within a specific period).

Claimants who want to participate in the class action must register (opt in) with the court or the class action representative within a certain time frame. In this respect, the Danish rules are different from class actions known from the US, as a class in the US will normally consist of all potential class members unless they actively opt out of the class.

Conversely, approval of a Danish class action does not exclude parties that do not want to participate in the class action from initiating separate legal actions.

In addition to the opt-in class actions, the courts may, upon request from the group representative, decide that the group action shall cover all members, who have not opted out (the opt-out model).<sup>5</sup> The opt-out model is subject to two conditions. First, the action must relate to claims for which it is evident that they normally are not expected to be processed in individual proceedings due to their small size. The preparatory remarks to the bill state that

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<sup>5</sup> See Section 254 e(8) of the AJA.

this condition will usually only be met if the individual claim does not exceed 2,000 Danish kroner. Second, it must be assumed that the opt-in model will not be a beneficial way to handle the claims. In these extraordinary opt-out cases, only public authorities specifically authorised hereto by law can be appointed as the group representative. Currently, only the Consumer Ombudsman has been authorised to act as a representative in opt-out class actions. An opt-out class action has not yet been filed or approved in Denmark.

Cases against financial institutions involving claims for recovery of investment losses have often given rise to discussion as to whether said claims fulfil the criterion of being sufficiently uniform in order for the case to be tried as a class action. Although the decision whether or not to approve the case as a class action depends on the specific circumstances of the case, in general it may probably be said that the court is more likely to approve a case of this nature as a class action if:

- a* the claims may be said to have the same factual and legal basis; and
- b* for the purpose of ruling on the merits, the court is not required to examine the individual circumstances relating to each plaintiff's claim (e.g., the plaintiff's previous experiences with investments, the plaintiff's educational and professional background, size of individual loss).

In the *OW Bunker* prospectus liability class action, in February 2018, the Eastern High Court, in line with the court's previous decisions, confirmed that the court may freely determine the framework of the class action and will only include those claims that – in the court's opinion – are uniform.<sup>6</sup> See also the previous decisions in *Bank Trelleborg* and *Roskilde Bank*.<sup>7</sup> The *Bank Trelleborg* cases are referred in more detail in subsection iv. In the Eastern High Court's decision in the *AP Insurance* case, the Court denied approval of the case as a class action. The claimants argued that a class action should be approved for a case concerning change of terms and conditions for a pension insurance due to misrepresentation but where the class should encompass both claimants still working, others about to retire and also already retired individuals. The High Court ruled that the claims were not sufficiently identical.<sup>8</sup>

Accordingly, a class action is dismissed if the criteria cannot be met at all or claimants who do not fulfil the criteria set by the court will be excluded from the class action.

Under Danish law, the plaintiffs in, for example, securities cases must provide evidence supporting their loss, and the plaintiffs must further prove that the ordinary conditions for imposing civil liability upon the defendant (e.g., negligence, causality, foreseeability) have been fulfilled. This often renders it very difficult for plaintiffs to document an actual loss, as Danish law does not recognise standardised mathematical methods of computing losses. In securities cases, an important element with regard to the computation of losses is whether a plaintiff has kept or sold (some of) its securities shortly after the event that gave rise to the alleged claim. Strong evidence of a correlation between negligent behaviour and the development (decrease) of the stock price is normally required.

<sup>6</sup> See the decision in the weekly periodical *Ugeskrift for Retsvæsen* 2019, page 962.

<sup>7</sup> See the unpublished Eastern High Court decisions of 21 June 2012 in cases 1198/11 and 1255/11 and published *Roskilde Bank* case in the weekly periodical *Ugeskrift for Retsvæsen* 2016, page 1,014.

<sup>8</sup> See published Eastern High Court decision in *Ugeskrift for Retsvæsen* 2018, page 3,361.

### iii Procedural rules

The civil procedure rules applicable to class actions are generally the same that apply to individual civil actions.

Court involvement in class action procedures can, however, be held to be deviating from involvement in other ordinary civil litigation proceedings since the mere approval of the action requires the court to rule that class action is the best way to handle the case.

Normally, courts do not interfere with parties' decisions whether to commence proceedings or joint claims. In addition to the introduction of the rules on class actions, the courts were given authority to order joint hearing of actions and refer actions to other courts where feasible. However, the courts have not shown increased activity in that area.

The courts are also more involved with the substance in class actions than in other cases at a non-ruling level as the courts are to approve any settlement that the parties may wish to adopt. In individual cases, settlements out of court do not require court approval.

The length of procedures involved in class actions are, in theory, no different from other types of actions; however, given the requirements for class actions to encompass several claims it is very likely that the class actions generally will have a longer duration than other cases.

Issues whether to bifurcate proceedings and, for example, split liability and quantum are likely to occur in class actions but of a specific nature depending on each case. Such split of proceedings are also seen in other cases.

### iv Damages and costs

There is no jury involved with Danish civil litigation and this applies to class actions as well. Damages are not computed differently in class actions than ordinary civil cases. In the white paper prepared in connection with the proposal of the bill on introduction of class actions, the following was stated: '[...] Retsplejerådet does not propose an amendment of any substantial regulation, and it is thus not proposed to introduce the option of awarding standardised (average) damages or the like'.<sup>9</sup>

Not many class action cases have decided on damages. In the only class action case to this day decided by the Supreme Court, *BankTrelleborg I*, the Court did not approve any damages.

BankTrelleborg was a savings bank (organised as a self-owned institution). The savings bank had been converted into a bank being a limited liability company where a prospectus had been issued. Subsequently, the shares were all redeemed by the majority owner, Sydbank as a measure to save BankTrelleborg, which had otherwise gone bankrupt. The court cases involved four different lawsuits (one individual action and three class actions). *BankTrelleborg I* concerned alleged liability due to illegal compulsory redemption of the majority owner (Sydbank). The three other cases concerned prospectus liability. Two class actions were filed concerning the same claim as the individual case. One encompassed claimants who only became shareholders by conversion of their position as guarantors in a savings bank by a global offer. The other class action encompassed claimants with various backgrounds who had subscribed for shares over a period of time and where both private individuals as well as companies could join. The High Court only approved the first of the two cases as a class action. These cases were never dealt with by the Supreme Court but apparently settled based

<sup>9</sup> Our translation of page 24 of the white paper prepared by Retsplejerådet in connection with the preparation of the bill on the introduction of group litigation into Danish law.

on the individual case. In the case involving individual claimants, the Supreme Court also rendered a decision and ruled in favour of the claimants confirming prospectus liability and adopted a general approach to the damages of shareholders.<sup>10</sup> The approved damages consisted of a difference of value between a later compulsory redemption of shares and the offered conversion price.

Costs are awarded in the same way for class actions as in other cases and are based on a tariff system by the courts depending primarily on the amount of the claim.

The special act on processing of damages actions concerning violation of competition law applies in follow-on damages cartel cases and sets out special provisions of both procedural and substance nature.<sup>11</sup> According to the act, the Consumer Ombudsman is also authorised to act as class representative.

Danish lawyer fees are governed by the Section 126 of the AJA. While 'no cure no pay' is allowed, genuine success fees such as a mere percentage of a claim are not allowed as such.

## v Settlement

For filed and approved class actions, a settlement requires court approval (see Section 254h). The court shall assess whether the settlement is fair. There are no public decisions on approved settlements.

With reservation for the limited possibility for filing and having approved opt-out class actions, a settlement will bind all class members that have joined the class action (opted-in) unless they specifically decide to opt out of the settlement. That class members that do not accept the settlement will, within certain time limits, be entitled to continue their claims as individual civil cases (see Section 254g).

## IV CROSS-BORDER ISSUES

The Danish class action rules may give rise to several issues of cross-border nature. However, to date, no ruling involving a cross-border issue as such has been made.

With respect to the exceptional opt-out actions, a limitation of the cross-border effect has been specifically provided for in Section 254f, subsection 2. In that provision it is stated that the binding effect in an opt-out action only applies to parties that could have been sued individually in Denmark concerning the substance of the matter at the time the class action was initiated.

The provisions allowing for ordering securities for costs apply to both domestic and foreign members of the class. This provision differs from the general provision on securities for costs since in individual cases normally only claimants domiciled in a country outside the EU and EEA area can be ordered to provide security for costs (see the AJA, Section 321). In an exceptional Supreme Court decision from 2018, the Court, however, ruled that even a Danish domiciled claimant could be ordered to provide security for costs (i.e., avoiding risk of circumventing cost awards), and more particularly where the claimant party had acquired the claim in question and been particularly established as special vehicle for the purpose of the court action.

One of the criteria for approving a class action is whether it is possible and feasible to notify the potential class members of the case. It may be argued that in many instances it may

<sup>10</sup> See published decision in *Ugeskrift for Retsvæsenet* 2013, page 1,107.

<sup>11</sup> See Act of Parliament No. 1541 of 13 December 2016.

be more difficult to notify foreign parties of a class action in Denmark. The question does not appear to have been tested in any of the approved class actions and most of them have primarily related to potential class members residing in Denmark.

## V OUTLOOK AND CONCLUSIONS

In the coming years, it remains to be seen whether there will be an increase in lodging of class actions and whether a current trend of funding litigation will have an impact on class action cases.

The decisions in the filed class actions against the Ministry of Justice and the state-owned broadcaster Danmarks Radio are expected as the next decisions in substance in class action cases. They will also be the first class actions against state entities.

### **Funding of class actions**

Mass litigation may be funded in a number of ways. Specifically, for class actions the predominant method seen in Denmark so far has been to set up a separate association to act as the group representative, which is funded by its members – the potential class members.

In several of these cases, the group or class representative has requested that membership of the association should be a prerequisite to join the class action. In the *Trelleborg* cases, the Eastern High Court briefly questioned whether such a criterion could be permissible but accepted it in the specific case, making reference to the fact that the defendant had not objected to it.

As another possibility to funding class actions, the emerging trend of litigation funding should be mentioned.

Class actions – primarily in consumer cases – may also benefit from free legal aid (*fri proces*) to the effect that the members of the class action are not obliged to pay legal costs in relation to the handling of the case. This applies, for instance, to the *Danmarks Radio* class action mentioned above.



# ENGLAND AND WALES

*Camilla Sanger and Peter Wickham*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Group litigation has been available in the English<sup>2</sup> courts for over a century and is an established part of modern English civil procedure, with several significant cases passing through the courts each year.<sup>3</sup> However, it is only in the past three years that true ‘opt-out’ class actions,<sup>4</sup> as lawyers from the United States (US) would recognise them, have become available; and only then in the context of certain competition law claims. Nonetheless, while the English system is not as developed as certain jurisdictions, the variety of procedural mechanisms available is significant, particularly as against many European jurisdictions. Future advances both in terms of civil procedure and the class action market more generally (e.g., third-party funding, development of the claimant bar) are also likely to result in further development.

## II OVERVIEW OF PROCEDURAL OPTIONS

The regimes available for English class or group actions broadly fall into two categories: the older ‘opt-in’ procedures, and the more recent opt-out procedure.<sup>5</sup> As prescribed by these older procedures, the English courts have traditionally only heard opt-in actions, either by representative actions or group litigation. These regimes have become, and continue to be, an established and integral part of modern English civil procedure. However, there have been major recent innovations in the form of amendments to the Competition Act 1998 (CA) provided by the Consumer Rights Act 2015 (CRA). This introduced a new opt-out procedure, which established a ‘US-style’ class action regime in English law for the first time,

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1 Camilla Sanger is a partner and Peter Wickham is an associate at Slaughter and May. The authors would like to thank Isabelle Whitaker for her assistance in producing this chapter.

2 For convenience, ‘England’ and ‘England and Wales’ will be used interchangeably.

3 Representative actions can be traced back to the practice of the Court of Chancery. It was a requirement that all interested parties were to be present to end a dispute, though for the sake of convenience certain individuals of those who held similar interests would be selected to represent the group. See *London Commissioners of Sewers v. Gellatly* (1876) 3 Ch. D. 610, at 615 per Jessel M R.

4 An opt-out claim being a claim that can be brought on behalf of a defined group, irrespective of whether the exact members are known, excluding parties that opt-out. In contrast, an opt-in action requires claimants to explicitly join the group to participate. As explained in greater detail below, it is also important to consider that opt-out proceedings are only available to a UK-domiciled claimant, in contrast to opt-in proceedings, which are available to all.

5 This chapter shall only address the formal mechanisms that are available. Claimants sometimes consolidate individual claims on an *ad hoc* basis: these shall not be considered further.

currently though only for private competition litigation.<sup>6</sup> Under such an action, a collective proceedings order (CPO) is obtained from the court, which then determines the scope of the class that will be bound by any subsequent judgment.

With regards to the older regimes, the Civil Procedure Rules<sup>7</sup> (CPR) set out both representative actions<sup>8</sup> and proceedings where group litigation orders (GLOs) are sought.<sup>9</sup> Representative actions and proceedings where GLOs are sought share a number of similarities. For instance, they are both opt-in regimes, require a representative or lead claimant, and unlike collective proceedings, can be utilised for any type of action. Proceedings for GLOs, introduced more recently in 2000, have, however, become the more favourable of the two, due to the simpler procedure and lower standard of commonality required between the class members.

In contrast, the opt-out regime currently applies solely to the competition sphere. Prior to this, there had been a specific opt-in procedure for private competition law claims, though this was deemed to have been too restrictive in scope.<sup>10</sup> Given the nature of competition law claims, namely where the loss to the individual is small but over a very wide class, the regime seeks to provide the collective redress that is considered imperative for effective remediation. Efforts have been made to introduce similar collective redress mechanisms to other sectors. For example, an amendment to the Data Protection Bill sought to apply the opt-out class action regime to data breaches but was rejected during the passage of the bill and is not contained in the enacted statute, the Data Protection Act 2018, although group litigation in this sphere does, as explained below, appear to be taking off. Despite its limited current application, and the lack of headway made in extending the scope of the regime, the new CRA regime remains of particular interest as it may possibly be a harbinger of future broader, or sector-specific, class actions in England.

In all class or group actions, regardless of the procedural form they take, the court must seek to ensure that each case is dealt with justly and at proportionate cost. This is known as the overriding objective.<sup>11</sup>

### III THE YEAR IN REVIEW

The past 12 months have seen several further significant developments in relation to class and group actions.

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6 Consumer Rights Act 2015, Schedule 8, Part 1.

7 English Civil Procedure is governed by the Civil Procedure Rules and supplementary Practice Directions (PD). These can be found, with commentaries and interim updates, in *The White Book* published by Sweet & Maxwell.

8 CPR 19.6.

9 CPR 19.10.

10 Department for Business, Innovation and Skills (BIS), Private Actions in Competition Law: A consultation on options for reform: Government Response, (January 2013), paragraph 5.12. Note also that under the previous regime there had only been one collective action: *Consumers' Association v. JJB Sports* (1078/7/9/07).

11 It is set out in the Civil Procedure Rules (which provide for and apply to representative actions and group litigation orders) at CPR 1.1, and in the Competition Appeal Tribunal Rules 2015 (which apply to collective proceedings) at Rule 4.

## i Opt-out class action proceedings

The English courts have continued to deal with issues arising from two cases where the opt-out class action procedure for competition cases has sought to be used.

### *Walter Hugh Merricks CBE v. MasterCard Inc and others (MasterCard)*<sup>12</sup>

Filed on 8 September 2016 with the Competition Appeal Tribunal (CAT), MasterCard was the second follow-on claim brought under the new opt-out collective proceedings regime (the first being in relation to *Dorothy Gibson v Pride Mobility Products Limited (Pride Mobility)*).<sup>13</sup> The claim followed on from the European Commission's finding that MasterCard had infringed EU competition law as a result of interchange fees on transactions between 1992 and 2007. The case was brought by the former Chief Ombudsman of the Financial Ombudsman Service and was valued by the claimants' lawyers at £14 billion, making it the largest claim heard in England to date. In 2017, the CAT refused to grant a CPO on the basis that expert evidence adduced at the certification stage failed to demonstrate a commonality of interest owing to the fact it could not be determined how much of the loss had been passed through to each proposed claimant. *MasterCard* was, therefore, the second of the collective proceedings cases tabled in England that failed to proceed beyond the certification stage. Following the CAT's ruling, the claimant representative sought permission from the CAT to appeal to the Court of Appeal. However, the application was dismissed in September 2017 on the basis that there was no jurisdiction to appeal a decision to approve or refuse a CPO. According to the CAT's reasoning, refusal to grant a CPO was not a decision 'as to the award of damages or other sum', for which an appeal right existed.<sup>14</sup> Rather, it was a decision that the proposed manner of pursuing the claims was not permitted, and if the legislature had intended for a decision by the CAT making or refusing a CPO to be subject to appeal, it would have included an express provision for doing so. The application was therefore dismissed. However, the claimant representative subsequently sought – and obtained – permission to appeal from the Court of Appeal and at the same time filed an application to the Administrative Court of the High Court for a judicial review of the CAT's decision. In a hearing held in October 2018, the issue of whether the Court of Appeal had jurisdiction to hear an appeal against a refusal by

12 *Walter Hugh Merricks CBE v. MasterCard Inc. and others* (Case No. 1266/7/16).

13 *Dorothy Gibson v. Pride Mobility Products Limited* (Case No. 1257/7/16). Pride Mobility is a distributor of mobility scooters that was found by the Office of Fair Trading (OFT) to have infringed the CA, following an agreement between several retailers that they would not advertise particular scooters online at a price below Pride Mobility's recommended retail price. The OFT's decision did not impose a penalty on Pride Mobility. A follow-on claim was brought by the National Pensioners' Convention on behalf of a class of approximately 30,000 people and was England's first opt-out collective action. At the end of 2017, the CAT determined that proceedings should be adjourned on the grounds that the proposed class could only comprise those directly affected by the scope of the OFT's original decision. The claimants declined to attempt to reformulate the proposed class, which would have been insufficiently large for the costs incurred to be met by the potential damages to be awarded, let alone compensate the class members, and the claim was withdrawn.

14 Section 49 CA provides that: '(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings – (a) as to the award of damages or other sum (other than a decision on costs or expenses), or (b) as to the grant of an injunction. (1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).'

the CAT to make a CPO was addressed. This was the first time the point had been considered since the introduction of the collective proceedings regime. In a judgment handed down the following month, the Court of Appeal found it did have such jurisdiction, and that a right of appeal therefore existed – provided the appeal raised a point of law. The joint hearing of the Court of Appeal and the Administrative Court (with the same judges sitting in both courts) to consider the substantive appeal was held on 5 and 6 February 2019, though no judgment had yet been handed down at the time of writing.

Although the challenges experienced in *MasterCard* (and, before it, *Pride Mobility*) are in part because of the complexity of issues raised in the claim, the respective judgments do not suggest (at least at a theoretical level) an overly strict stance being adopted by the CAT. In particular, the CAT has indicated that it does not require all significant issues to be deemed common issues for a claim to be suitable for a CPO, something that could be important in future litigation. Nonetheless, how this plays out in practice in future cases is still to be determined. Arguably, the experiences of claims under the collective proceedings regime to date are illustrative of the safeguarding role CPO applications were intended to have in protecting defendants against frivolous and unmeritorious claims, as opposed to setting any more general precedent.

The discussion by the CAT as to funding arrangements also merits consideration. Objections were raised by the defendants as to the third-party litigation funding arrangement in place on the following three grounds:

- a* it could be terminated by the funder (and so would not force the applicant to pay the defendants' costs, if ordered to do so);
- b* its liability was limited to £10 million; and
- c* its terms gave rise to a conflict of interest on the part of the applicant.

The CAT rejected grounds (b) and (c) but accepted ground (a). Therefore, while *MasterCard* demonstrates the opportunities provided by third-party litigation funding (with over £40 million of funding having been made available to the claimants in an action that would otherwise seem unfeasible without such support), it also highlights the potential challenges such funding arrangements might face.

*MasterCard* therefore helped elucidate the CAT's approach to opt-out collective proceedings actions in what is a very new area of the law and has also acted as a precedent for the latest collective proceedings cases that have been in the CAT, dealt with below.

*Road Haulage Association Limited v. MAN SE and others (Road Haulage)*,<sup>15</sup> and *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others (UK Trucks)*<sup>16</sup> (together, *the Trucks Applications*)

The *Trucks Applications* were the third and fourth follow-on claims that have been brought pursuant to the new collective proceedings regime to date.

The *Road Haulage* CPO application has been brought under the opt-in collective proceedings regime, while the *UK Trucks* CPO application has been brought as opt-out collective proceedings in the first instance, but opt-in in the alternative.

Both applications, brought in July 2018 and May 2018 respectively, followed the European Commission's finding in July 2016 that certain European truck manufacturers had

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15 *Road Haulage Association Limited v Man SE and others* (Case No. 1289/7/7/18), (*Road Haulage*).

16 *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and others* (Case No. 1282/7/7/18) (*UK Trucks*).

engaged in collusive arrangements on pricing and other financial determinations. In light of the similar issues involved, the *Trucks Applications* are being heard together.

Broadly, the proposed class across the *Trucks Applications* encompasses those who purchased or leased new or pre-owned medium or heavy trucks during the relevant period, but the claim forms and expert reports of the two applicants take different approaches to defining the classes. As at December 2018, over 5,000 members had signed up to the *Road Haulage* proceedings, though this number is expected to increase if the CAT grants the CPO. At a case management conference held in December 2018, the CAT directed that both claims should be heard together in a hearing listed for 3 to 7 June 2019, which could result in the first certification under the new regime. The CAT also suggested at the case management conference that there was nothing under the collective proceedings regime that prevented two opt-in proceedings being certified for the same cartel. This raises the possibility that both the *UK Trucks* and *Road Haulage* applications could be certified as opt-in proceedings, allowing claimants to choose between the two proceedings. However, the strength of the applications remains in dispute and the funding arrangements of both applicants have so far come under scrutiny, so it is still unclear whether either application, let alone both, will pass the certification stage.

***Justin Gutmann v. First MTR South Western Trains Limited and another (South Western)***<sup>17</sup> **and *Justin Gutmann v. London & South Eastern Railway Limited (Southeastern)***<sup>18</sup> (together, the *Trains Applications*)

The first stand-alone claims have also now been brought under the opt-out collective proceedings regime, in the *Trains Applications*.

These applications, brought in February 2019, involve claims against UK rail operators concerning the availability of certain rail fares and involve proposed classes in the millions. Unlike the other claims mentioned above, the *Trains Applications* will not only need to overcome the hurdles detailed above in order to obtain a CPO, but also demonstrate a breach of the underlying competition law. Other cases to date, being follow-on actions, have been brought where such a breach has already been established. The success or otherwise of this case may well, therefore, have a significant impact on whether further stand-alone claims are brought in the future.

**ii Significant group litigation order actions**

The past year has been relatively subdued in respect of the GLO regime in England.

There have been developments in the claim brought against Volkswagen in relation to the diesel engine emissions scandal. Pursuant to an application, a GLO was granted in May 2018. The period for marketing to potential claimants closed in October 2018, and while the final claimant group is yet to be determined, the class is known to currently consist of at least 60,000 of a potential 1.2 million motorists.<sup>19</sup> On 4 September 2018, the High Court handed down an order for indemnity costs against one of the claimant law firms in the proceedings, on the basis that the firm had prematurely issued a GLO application in order to gain a commercial advantage in the litigation.

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17 *Justin Gutmann v. London & South Eastern Railway Limited* (Case No. 1305/7/7/19).

18 *Justin Gutmann v. First MTR South Western Trains Limited and Another* (Case No. 1304/7/7/18).

19 According to an article published by Leigh Day (one of the law firms co-leading the claim) on 25 May 2018.

Separately, seven claims under a GLO were also made against Lloyds Banking Group and five of its former directors on behalf of nearly 6,000 claimants.<sup>20</sup> The claimant groups argue that a number of omissions and misstatements were made to shareholders regarding Lloyds' acquisition of Halifax Bank of Scotland Plc and its participation in the government's recapitalisation scheme during the course of 2008 and 2009. The trial concluded in March 2018; however, no judgment had yet been handed down at the time of this book going to press.

### iii Significant environmental actions

There have also been a number of large environmental actions filed this year. BHP Billiton Plc and five other BHP group entities currently face actions in England over the Samarco dam failure, alongside actions against other BHP group entities in a number of jurisdictions including Brazil and Australia. This comes after BHP group entities settled related proceedings in the United States in August 2018.<sup>21</sup> The English proceedings are for a claimed amount of around £5 billion, brought on behalf of over 200,000 claimants, making it one of the largest claims in British legal history, although notably no specific procedural mechanism has been used by the claimants at this stage, instead the claims simply involve a very large number of individual claimants and appear to rely on the English court's ability to manage large and complex claims. The first procedural hearing in the UK is expected to take place in mid-2019. Separately, the group action filed in 2015 by Zambian villagers against Vedanta Resources Plc, relating to the Nchanga copper mine, continues to develop. Vedanta's jurisdiction challenge was dismissed by the Court of Appeal in late 2017, though Vedanta was later granted permission to appeal this decision and a hearing in the Supreme Court to determine jurisdiction was heard on 15 and 16 January 2019. No judgment had yet been handed down at the time of this book going to press. Similarly, the Court of Appeal declined the English court's jurisdiction to hear collective proceedings made against two companies in the Shell group relating to alleged pollution in the Niger Delta in Nigeria in February 2018.<sup>22</sup> The questions of jurisdiction raised in these recent environmental class actions have shed interesting light over the piercing of the corporate veil, namely whether UK parent companies in these situations can be held to have a tortious duty of care to those affected by the actions of their foreign subsidiaries.

### iv Significant data breach actions

This year has also seen an increase in activity in the data sector, regarding potential breaches of the new Data Protection Act 2018 and the associated EU General Data Protection Regulation 2018. Cathay Pacific Airways Ltd, for example, is potentially facing a group litigation action after announcing a data breach that resulted in the personal data of approximately 9.4 million customers being compromised, in what appears to have been one of the global travel industry's most serious data breaches ever.<sup>23</sup> It also appears that British Airways has been threatened with

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20 According to a judgment issued by the Chancery Division of the High Court on 21 December 2017 [2017] EWHC 3390 (Ch).

21 See <https://www.bhp.com/media-and-insights/news-releases/2018/08/samarco-update>.

22 Finally, although not strictly relating to an environmental issue, jurisdiction of the English courts was also dismissed upon appeal in the case of *AAA and others v. Unilever Plc*, which related to ethnic violence carried out in Kenya.

23 See <https://cathaydatabreach.com>.

class action after a data leak of over 380,000 customers' data in September 2018, while Google has recently successfully defended an action relating to its alleged misuse of personal data.<sup>24</sup>

#### v **New EU proposal for collective redress**

In April 2018, the European Commission (the Commission) adopted a package of proposals entitled 'The New Deal for Consumers' which addresses, among other issues, the need for injunctive and compensatory collective redress mechanisms. Against the backdrop of the proliferation of 'mass damage' situations occurring across the EU, the package aims to bolster consumer rights and harmonise the means of collective redress across Member States, while also maintaining and respecting the legal traditions of each state. The relevant proposal outlined a potential form of collective redress for qualified entities, pursuant to which victims of unfair commercial practice not in compliance with EU law will 'be able to obtain remedies collectively through a representative action' under a proposed new Directive.<sup>25</sup> Such actions could be cross-border and would not be available to law firms to pursue, instead being only available to non-profit entities monitored by a public authority (for example, consumer organisations) that fulfil a strict eligibility criteria. The package has been expressed as a priority for the Commission and finalisation of the proposed Directive has been provisionally set for May 2019. It awaits to be seen how the proposals will pass through the European Parliament and the Council; however, successful implementation of such a collective redress mechanism could have wide-ranging impacts on the effectiveness of compensatory relief available in Member States, particularly in areas such as data-protection and human rights. However, considering the timeline for implementation, it is uncertain what impact these proposals will have in England in light of the UK's current scheduled exit from the EU.

### IV PROCEDURE

#### i **Types of action available**

As noted at Section II, the regimes available for English class or group actions broadly fall into two categories: the older opt-in procedures, and the more recent opt-out procedure.

#### ii **Commencing proceedings**

##### ***Representative actions***

As noted above, not only can representative actions be utilised for any type of claim, there are also no requirements pertaining to the number of representees, be they claimants or defendants. The principal requirements for a representative action are:

- a the representative is a party to the proceedings; and
- b the representative and the represented parties all have 'the same interest' in a claim.

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24 In relation to the *British Airways* action see: <https://www.badatabreach.com>. In relation to the *Google* action see the judgment issued by the Queen's Bench Division of the High Court on 8 October 2018 [2018] EWHC 2599 (QB).

25 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM/2018/0184 final – 2018/089 (COD)).

If a court orders that a representative action may be continued, the court's judgment will bind everyone the representative party purports to represent.<sup>26</sup> However, it may only be enforced by or against a non-party with the court's permission. Importantly though, the representee need not authorise being represented<sup>27</sup> so long as the same interest requirement is met.<sup>28</sup>

Whether the parties are deemed to have 'the same interest' in a claim might appear to be a narrow and restrictive concept. However, over time the boundaries of the interpretation of the requirement have been tested. *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ 1284 provided a detailed analysis of the requirements for a representative action.<sup>29</sup> It was noted that the class must have a common interest or grievance and seek relief that is beneficial to all. It did not matter whether the class fluctuated, so long as at all points it was possible to determine class membership qualification. However, the attempt in this case to use the representative action as a proxy for an opt-out class action failed because of the inevitable conflicts within the claimant 'class' sought to be represented, which was drawn so widely that it was described by the court as fatally flawed. In particular, the court found that the same interest could not be said to be present as the sheer breadth of the class meant it was impossible to identify which members had the same interest. Furthermore, the overriding objective is important too in shaping its application. Concepts similar to proportionality can be distilled from the case law. Although the CPR appears to require an identical interest,<sup>30</sup> Megarry J stated that 'the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice'.<sup>31</sup> In light of the requirements for the court to consider the overriding objective, particularly that the dispute is dealt with 'expeditiously and fairly',<sup>32</sup> the representative action regime continues to provide significant potential for effectively bringing a group action.

### **GLOs**

GLOs are an opt-in mechanism that require an individual to have brought his or her own claim first to be entered upon the group register.<sup>33</sup> They are similarly premised on the notion that where there are similar facts and issues to be resolved, it is more efficient that these are dealt with collectively. Given the costs inherent in litigation, such efficiencies have enabled claimants to recover losses previously unobtainable. It is important to distinguish, however, between instances where the determination of a single issue is common to all the claims, and instances where a defendant is liable to numerous claimants but each is separate as to liability and quantum. Where there are no generic issues, 'nor generic issues of such materiality as

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26 CPR 19.6(4)(a). See too *Howells v. Dominion Insurance Co Ltd* [2005] EWHC 552 (Admin).

27 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch.): the defendant's application for a direction under CPR 19.6(2) to prevent the claimant acting as a representative was dismissed in part on the grounds that a representative may act without the representee's authority as long as CPR 19.6(1) was fulfilled.

28 CPR 19.6(1).

29 The claimants were unsuccessful in obtaining a representative action as the class was so wide that it was impossible to identify members before and possibly after the judgment, too.

30 CPR 19.6.

31 *John v. Rees and others* [1970] Ch. 345 at 370, per Megarry J.

32 CPR 1.1(2)(d).

33 CPR 19.11, PD 19B, Paragraph 6.1A.



to save costs in their determination',<sup>34</sup> a GLO will not be granted and the individual must litigate separately.

Court consent is required for a GLO, which may be obtained if the claimant can show that there are 'common or related issues of fact or law'.<sup>35</sup> Nonetheless, the court has discretion in granting the order.<sup>36</sup> There is no guidance as to how this discretion is to be exercised,<sup>37</sup> though the overriding objective would still be applicable. Similarly, consideration must also be given to whether a representative action would be more appropriate,<sup>38</sup> namely when the interests and issues of the parties are the same. It must be noted, however, that broadly the requirements of a GLO have not proven difficult to meet.<sup>39</sup> This is in part because the standard of commonality is lower.

There are no special requirements for a GLO application,<sup>40</sup> though the applicant should both consider the preliminary steps<sup>41</sup> and ensure that his or her application contains the prescribed general information.<sup>42</sup> As part of this information, the applicant must provide details relating to the 'GLO issues' in the litigation. It is important that these GLO issues are defined carefully, given that the judgments made in relation to the GLO issues will bind the parties on the claim's group register.<sup>43</sup> Nevertheless, the court may give directions<sup>44</sup> as to the extent to which that judgment is binding on the parties that were subsequently added to the group register. Once a GLO is granted, a deadline is set by which time the other claimants must have been added to the group register. However, GLOs have not proved especially popular to date. Since the introduction of the GLO procedure in 2000, there have so far been fewer than 100 GLOs ordered. Whether the increased availability of funding for these types of claims will lead to an increase remains to be seen.

## CPOs

The most significant recent change to the English class action regime resulted from the CRA which came into effect in October 2015. Schedule 8 introduced changes to the competition law class actions regime under Section 47A of the CA. Collective proceedings are proceedings that are brought by multiple claimants or by a specified body on behalf of claimants, sharing certain characteristics (i.e., a class action as ordinarily understood). While collective proceedings are limited solely to competition actions before the CAT, it is notable for two reasons. First, it is currently the only opt-out class action regime in England, and second, it is a possible indicator of changes to come more broadly to English class actions. While claimants already have the right to bring collective actions,<sup>45</sup> as detailed above, these were perceived as insufficient to address the harm caused to both direct and indirect purchasers.

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34 *R v. The Number 8 Area Committee of the Legal Aid Board* [1994] P.I.Q.R. 476 at p. 480, per Popplewell J.

35 CPR 19.10.

36 CPR 19.11(1).

37 There is no guidance contained within CPR 19, nor the accompanying PDs.

38 PD 19B Paragraph 2.3(2).

39 This can be seen particularly in the recent actions brought under Section 90, FSMA.

40 The normal application procedure under CPR 23 should be used according to PD 19B Paragraph 3.1.

41 The preliminary steps are detailed at PD 19B Paragraph 2.

42 This information is contained at PD 19B Paragraph 3.2.

43 CPR 19.12(1)(a).

44 Pursuant to CPR 19.12(1)(b).

45 Under CPRs 19.6 and 19.11.

There are three sources that set out the procedure for obtaining CPOs: these are the CRA Schedule 8, the Competition Appeal Tribunal Rules 2015 (the CAT Rules) and the CAT Guide to Proceedings 2015. Notwithstanding the fact that CPOs were introduced under the CRA, both individuals and businesses can apply for a CPO. The reforms also widened the types of claims that the CAT could hear. The CAT had previously been restricted to hearing follow-on claims, while collective proceedings can be either follow-on or stand-alone. A follow-on claim is one where a breach of competition law has already been determined by a court or authority such as the OFT or the Commission. With breach already having been established, the claimants are only required to show that the breach caused them loss. In contrast, a stand-alone claim is one where there is no prior decision by either body upon which the claimant can rely and the claimant must therefore prove breach before the CAT as well.

Similar to proceedings for a GLO, collective proceedings require certification to proceed, in this instance from the CAT. This mechanism works to remove frivolous or unmeritorious claims and enables the CAT to determine the class representative, class definitions and whether the proceedings should be opt-in or opt-out. Section 47B CA and Rule 79 of the CAT Rules detail the requirements that must be met for the CAT to make a CPO. Principally, the CAT must determine that ‘the claims raise the same, similar or related issues of fact or law’,<sup>46</sup> and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.<sup>47</sup> How the CAT determines the representatives, the classes (and sub-classes), and whether it is to be an opt-out action, will be fundamental to the collective proceedings’ operation, reach and success.<sup>48</sup> The limited case law under the new regime fails to give definitive guidance on how the CAT will exercise its discretion. Nonetheless (as noted above) the judgments in the *Pride Mobility* and *MasterCard* hearings indicate, at least in principle, that the CAT may be willing to adopt a relatively flexible approach to the eligibility and representative criterion, particularly regarding the delineation of classes (and sub-classes). However, this must be set against the fact that both of these cases failed to satisfy the hurdles identified by the CAT.

Upon certifying the class in an opt-out action, all members falling within the definition will automatically become part of the action unless they opt out before the end of the designated time period. However, this will only apply automatically to members domiciled within the UK. Non-UK domiciled claimants can still be a member of the class, though they will have to actively opt in before the end of the specified time period.

### **iii Procedural rules**

#### ***Management***

Given the differing group and class action procedures that can be used under English law, the process of determining the class differs between them too. With representative actions, the court can order that an individual is, or is not, a representative of a particular person. While the representee need not authorise the representative to bring an action (or even be aware that it is being brought), a representative claimant cannot assume an unfettered right to control the litigation because any party to the proceeding can apply for such an order. For a GLO,

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46 Section 47B(6), CA.

47 Rule 79(2), CAT Rules 2015.

48 Lawne, ‘Private enforcement and collective redress: A claimant perspective on the proposed BIS reforms’ [2013] *Comp. Law* 171.

the court may give directions stipulating the date by which further claims cannot be added to the group register without the court's permission.<sup>49</sup> However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.<sup>50</sup>

In contrast, with the collective proceedings regime the CAT has a broad discretion in the certification process to outline how a CPO is to be conducted given that it may take into account 'all matters it thinks fit'.<sup>51</sup> Furthermore, in considering the suitability of bringing the claim in collective proceedings, the CAT may limit the CPO to just some of the issues to which the claim relates.<sup>52</sup> In certifying a claim as eligible for inclusion in collective proceedings, the CPO must describe the class and any sub-classes along with the provisions for opting in and out of the proceedings.<sup>53</sup> The CAT also has the full remit to vary the order, including altering the description or identification of class members, at any time on its own initiative or following an application by the class representative, defendant or any represented person.<sup>54</sup>

### **Process**

Given the breadth of the class or group action mechanisms in England, generalities regarding the process of such actions are difficult to discern. For example, liability and quantum may be split depending on the type of claim that is brought, though in other instances, such as in follow-on claims, breach need not even be assessed. The same can be said for assessing the speed at which class actions progress. As regards collective proceedings, it is impossible at present to determine the rate at which these are to progress given how recently they have become available and the preliminary stages that cases under the new CRA regime have reached.<sup>55</sup> Proceedings for GLOs and representative actions will also by their nature be context specific. Since GLOs have recently been used for notable, complex securities claims, some of which have already seen significant settlements,<sup>56</sup> they may not provide a good benchmark from which to assess the speed and potential efficiencies of such a group action mechanism.

### **Disclosure**

The disclosure provisions do, however, vary between the different class or group action regimes. Taking for instance representative claims, because the representees are not parties to the claim, they are not subject to the ordinary disclosure standards. Instead, they must only meet the requirements that a non-party is held to. In contrast with collective proceedings, the CAT holds comprehensive disclosure powers based on those more generally applicable in litigation in the English courts. The CAT can, therefore, order the disclosure of documents that are likely to support the case of the applicant, or adversely affect one of the other parties'

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49 CPR 19.13(e) and PD 19B.13.

50 *Taylor v. Nugent Care Society* [2004] EWCA Civ 51.

51 Rule 79(2), CAT Rules. Rules 79(2)(a)–(g) give some guidance on the types of consideration that the CAT should have.

52 Rule 74(6), CAT Rules and paragraph 6.37, CAT Guide to Proceedings 2015.

53 Rules 80(1)(c) and 82, CAT Rules.

54 Rule 85(4), CAT Rules.

55 In relation to the timing of CPOs, the CRA implemented changes to the limitation period, extending it from two to six years so as to be on a par with the High Court.

56 *In Re RBS* (Rights Issue Litigation) in claims entered in the Group Register (HC 2013 000484) (RBS), the trial was delayed for four months until April 2017 owing to the complexity of the disclosure process. Significant settlements were also reached in December 2016, January 2017 and June 2017.

case, from any person irrespective of whether they are a party to the proceeding, as long as it is necessary to save costs or dispose of the claim fairly.<sup>57</sup>

#### iv Damages and costs

##### *Costs*

The general rules on costs are detailed at CPR 44. This provides discretion as to the award, amount and timing of payment for costs. Given that the unsuccessful party will ordinarily be ordered to pay the other side's costs, unmeritorious class actions have traditionally been restrained. This is particularly in light of the significant costs inherent in class actions, given their size and complexity.

However, as demonstrated by *BritNed Developments Ltd v. ABB AB*,<sup>58</sup> parties and their advisers should be mindful of the fact that the judiciary has recently shown its willingness to depart from the typical 'loser pays' costs order. In this case (in October 2018), the High Court ordered both parties to pay their own multimillion-pound costs, in light of the fact that the claimant was awarded damages significantly lower than that claimed.<sup>59</sup> Although the case was not brought as a group claim or class action, it is notable as it demonstrates the willingness of the English Court to exercise its discretion to limit the extent of recoverable costs. In the context of group claims – which are often subject to third-party funding – the likelihood of recoverability of costs can be a key factor in deciding to pursue a claim. The potential for a winning party to be barred from recovering their costs could act as a deterrent to litigation funders and law firms normally interested in pursuing large-scale class actions.

There is also the added complication of how costs are to be split between the constituent members of the class. For representative actions, as the represented individuals are not parties to the action, they are not individually liable for costs. The court may nevertheless accept an application for costs to be paid by the representees.<sup>60</sup> There are also specific costs rules in the CPR for proceedings governed by GLOs. The default position is that group litigants are severally, and not jointly, liable for an equal proportion of the common costs.<sup>61</sup> In *RBS*, however, the court decided at a case management conference in December 2013 that adverse costs should be shared on a several basis in proportion to the size of the individual's subscription cost in the rights issue relative to the total subscription cost for all the claimants on the group register.

With the growth in after-the-event (ATE) insurance and third-party litigation funding, the costs risk may, however, become less pronounced. Nevertheless, as addressed above, the risk is still a considerable factor in determining whether and how a class action is brought. Indeed, the arrangement of ATE insurance is often considered alongside, and of equal importance to, the litigation funding arrangements.<sup>62</sup> Unlike proceedings governed by GLOs or representative actions, damages-based agreements are prohibited in respect of opt-out

57 Rule 63, CAT Rules.

58 *Britned Development Ltd v. ABB AB* [2018] EWHC 2616 (Ch).

59 BritNed was awarded only €11.7 million (plus interest) of the €180 million claimed.

60 *Howells v. Dominion Insurance Company Ltd* [2005] EWHC 552 (Admin).

61 CPR 46.6(3). Common costs are the costs incurred in relation to GLO issues, or individual costs in relation to a test claim. The individual will be liable for all of their other individual costs in the claim.

62 Examples, such as *RBS*, have demonstrated either the difficulties in obtaining ATE insurance, or the influence that it has on the handling of the case. Securities class actions by way of an example are ordinarily relatively cheap for the claimant to bring in the early stages of the claim. However, during later stages of the

collective proceedings.<sup>63</sup> Therefore, for opt-out collective proceedings to be successful, it is increasingly likely that they will be dependent upon third-party funding being obtained.

### **Damages**

One of the notable differences between civil actions in England and certain other jurisdictions, particularly the US, is that there are no jury trials in English civil actions. This difference becomes apparent with quantum as English class action damages are typically much lower than in the US.

With regard to damages for representative actions, the historic position was that the ‘same interest’ requirement excluded damages from being recoverable for the class.<sup>64</sup> However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.<sup>65</sup> The damages awarded, however, in proceedings governed by a GLO or representative action will be dependent on the type of claim that is brought, though under English law, damages are generally compensatory (e.g., breach of contract, tort).<sup>66</sup>

The provisions for damages in collective proceedings claims are, however, more detailed. Damages are ordinarily compensatory; exemplary (i.e., punitive) damages for collective proceedings have been statutorily excluded.<sup>67</sup> Punitive damages may still be sought in relation to a competition law breach; however, to seek them, the individual would need to opt out from the collective proceedings action and bring an individual claim. The CAT will calculate damages aggregately for the class or sub-class and will not undertake an assessment as to the amount of damages recoverable by each represented person. Rules 92–93 of the CAT Rules stipulate that the CAT may give directions for the assessment of damages, for instance a formula to quantify damages. Damages are ordinarily to be paid to the class representative for distribution.<sup>68</sup> If all of the damages are not claimed within the CAT’s specified period, the CAT may order that undistributed damages are paid to the representative ‘in respect

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litigation, particularly if other claimant groups have already settled, the adverse liability risks can be hugely important in determining the ongoing strategy.

63 While there was a concern to limit the number of claims on the introduction of the opt-out scheme, there have been suggestions that the prohibition of damages-based agreements would stifle the incentive to litigate given the significant costs involved in class actions (Bolster, *The structure and funding of competition claims post-Jackson – ‘All change’ or ‘Status Quo’* [2014] *Comp. Law* 202). Moreover, there appears to be an unexplained inconsistency given that the DBA restriction does not apply to opt-in actions (Simor, Gibson et al. (2015) *UK Competition Law – The New Framework*, Oxford University Press p. 205).

64 *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021.

65 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch.).

66 With regards to the measure of damages for claims brought under Section 90 FSMA, a claimant is entitled to compensation for damages to cover loss suffered as a result of the misstatement or omission. FSMA, however, does not detail the measure of damages, nor is this subject to any direct authority.

67 Section 47C(1), CA.

68 Rule 93(1)(a), CAT Rules 2015.

of all or part of the costs or expenses incurred by the representative in connection with the proceedings'.<sup>69</sup> Any other remaining unpaid damages are to be paid to charity.<sup>70</sup>

The CPO applications that have so far been brought, in particular *MasterCard* (the claim value of which is £14 billion), indicate that significant damages may be sought through the collective proceedings regime. The sums that are potentially at stake will also be likely to provide a useful bargaining tool for claimants seeking to settle their claims instead of pursuing protracted litigation.

## v Settlement

In common with other jurisdictions, there is often a significant and mutual impetus for claimants and defendants to settle class actions out of court. In some instances, such as in securities litigation under Section 90 FSMA, where the cause of action has not been frequently litigated, the absence of clear precedent may encourage the parties to settle to avoid uncertainty. With regard specifically to follow-on actions, since breach will have already been determined, the dispute will likely focus on the issues of causation and quantum. Given that the determination of causation and quantum can still be a complex and expensive process and defendants may therefore consider it more economical to settle out of court.

As noted, it is increasingly likely that third-party litigation funding will take a larger role in English class and group action litigation. The consequences could be significant, opening up new claimants, types and scales of litigation to class and group actions not previously seen before. Third-party litigation funding also introduces a new dynamic when considering and negotiating settlement: although professional funders are legally prohibited from exercising control over the litigation they fund, the manner in which many funding packages are structured (with the cost of funds effectively increasing the longer a case progresses) may incentivise claimants to give fuller consideration to settling actions pretrial. Unlike in some other jurisdictions (notably the US), settlements in GLO and representative actions do not require court approval, though admissible settlement attempts may still have an impact upon the court's allocation of costs as between the parties if a settlement is not reached. The CPR do not, however, contain any explicit guidance on how any settlement negotiations or agreements are to be managed.

In contrast, the CA contains provisions, implemented by the CRA, for a collective settlement scheme.<sup>71</sup> Once a CPO has been made and proceedings are authorised to continue on an opt-out basis, claims may only be settled by way of a collective settlement approved by the CAT. The proposed settlement must be presented to the CAT by the representative

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69 Section 47C(6), CA. Criticisms have been levied at such a system that does not require all victims to exercise their rights to ensure the funder's effective repayment: A. Higgins and A. Zuckerman, 'Class actions come to England – more access to justice and more of a compensation culture, but they are superior to the alternatives' [2016] CJQ 1. In turn, questions have been raised regarding the potential for conflict between funders and representatives on the one hand, and claimants on the other. The government was concerned about this and initially considered not allowing law firms or third parties to act as representatives. While this provision was removed from the final draft, the CAT Guide to Proceedings 2015 Paragraph 6.30 states that 'conflict between the interests of a law firm or third-party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative'. Given the potential conflict of interest in a conceivably large proportion of claims, it awaits to be seen what influence this guidance has on the CAT's determinations in certification hearings.

70 Section 47C(5), CA.

71 Section 49A, CA.

and the defendant of the collective proceedings. The settlement need not apply to all of the defendants in the proceedings, merely those that intend to be bound by it. The CAT, however, may only make an order approving the settlement where it deems the terms to be 'just and reasonable'.<sup>72</sup> If the time frame specified in the collective settlement approval order given by the CAT has expired, the collective settlement will be binding upon all those domiciled in the UK who fell within the CPO's defined class and did not opt-out, and those domiciled outside the UK who otherwise fell within the defined class and opted-in.<sup>73</sup> Opt-in collective proceedings are not subject to such requirements, although they cannot be settled without the CAT's permission before the expiry of the time given in the collective proceedings for a class member to opt in to the proceedings.

The potential success of the collective settlement scheme will, however, be closely tied to a claimant's ability to use the collective action scheme. If the opt-out certification process proves to be unduly restrictive, the defendant will no longer be induced to settle. The residency provisions in the CRA may also present issues to the success of the collective settlement scheme.<sup>74</sup> Defendants could be reluctant to pursue a collective settlement scheme since it does not automatically provide the 'global' settlement that they might be seeking, given non-UK domiciled individuals will need to opt in to any settlement.<sup>75</sup> Nonetheless, certain other provisions may further promote settlement, for instance that any remaining unpaid damages are to be paid to charity.<sup>76</sup> It, therefore, awaits to be seen how the collective settlement scheme is adopted.

#### IV CROSS-BORDER ISSUES

England is a popular forum for the resolution of disputes both domestic and international. The reasons for this include the sophistication and probity of English judges, the availability of lawyers and specialists in a range of fields, and perhaps above all, the pre-eminent place of English law in international commercial relations. While many claimants have traditionally (although unnecessarily) looked to the US to pursue relief through class actions, the Supreme Court's decision in *Morrison v. National Australia Bank*,<sup>77</sup> which effectively barred securities actions without a US nexus,<sup>78</sup> has caused potential claimants, including institutional investors, to reappraise the situation. The advent of opt-in actions under the CA, which are open to claimants domiciled outside the UK, and the increasing availability of third-party litigation funding, in combination with the pre-existing attractions of England as a forum, is likely to continue to drive an increase in this kind of work in the English courts.

The impact of the June 2016 Brexit referendum result remains at the forefront of practitioners' minds. EU law has a significant role with regards to class actions: the Recast Brussels Regulation contains a framework for the allocation of intra-EU jurisdiction as well as provisions for the reciprocal enforcement of Member State court judgments; and a multitude

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72 Section 49A(5), CA.

73 However, the likelihood that this covers all potential claimants is still limited.

74 Lawne, 'Private enforcement and collective redress: a claimant perspective on the proposed BIS reforms' [2013] *Comp Law* 171.

75 Section 49A(10)(b), CA.

76 Section 47C(5), CA.

77 561 U.S. 247 (2010).

78 'Foreign-cubed' claims, at issue in *Morrison*, were those made by non-US investors against non-US issuers to recover losses from purchases on non-US securities exchanges.

of statutory claims, particularly in the area of securities law and financial regulation, are based on EU law.<sup>79</sup> The European Union (Withdrawal) Act 2018, passed on 20 June 2018 and given royal assent six days later, repealed the European Communities Act 1972 and provided for the transposition of existing directly applicable EU law into UK law, subject to a restricted parliamentary power to adapt and remove laws it considers necessary. However, at the time of publication, it remains to be seen whether the withdrawal agreement – which has been negotiated and agreed with the other EU Member States but rejected by the UK Parliament on 15 January 2019, on 12 March 2019 and again on 29 March 2019 – will be approved and will govern the UK's departure from the EU in April 2019. Nevertheless, the avowed aim is for continuity and stability, and it may be a number of years before any change in this area materialises. By way of practical example, even after the UK's exit from the EU, key tenets of the EU competition regime will remain in effect because they are contained within the CA, a freestanding UK statute. Breaches of EU competition law in remaining EU Member States will remain actionable in England where an English court is willing to accept jurisdiction over a defendant. The law applicable to such disputes would be determined either according to rules analogous to the current regime<sup>80</sup> or by reference to the formerly applicable, and substantively similar, UK rules.<sup>81</sup> Thus, the outlook for the class action market in England remains positive, though it will still be an area to monitor as exit negotiations continue.

## V OUTLOOK AND CONCLUSIONS

As discussed above, any Brexit deal is something that will be of particular interest to English class action litigators. However, there are also a number of other forecasted developments to track in 2019 and onwards.

Beginning with collective proceedings, the outcome of the first CPO applications, which have failed to proceed beyond the certification stage, have done little to shed light on the willingness of the CAT to adopt a flexible approach to approve opt-out proceedings and how the CAT will shape the future of the collective proceedings regime. Going forward, attention will be focussed on whether the *UK Trucks* applications and the *Trains Applications* will be the first opt-out proceedings to proceed past the certification stage and, if so, whether this will shed any further light on the effectiveness of the CRA regime in obtaining collective redress.

It also seems likely that the considerable fervour regarding the growth of third-party litigation funding will continue to develop. Although the home of such funding has been traditionally regarded as the US, the growth of the UK litigation funding market has been notable. The past years have shown continued expansion of law-focused finance firms in London. Whether this continues, and how UK finance firms' acquisitions fare, will be particularly important for an uptake in class actions.

Time will tell whether the CRA reforms will continue to foster a liberalisation of the class action market, although commentators are generally of the view that the outlook for England to be an increasingly favourable jurisdiction is positive.

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79 For instance, Section 90A FSMA implemented EU Directive 2004/109/EC.

80 For instance, a domestication of the Rome II Regulation (Regulation (EC) No. 864/2007).

81 For instance, Section 15A, Private International Law (Miscellaneous Provisions) Act 1995.



# FRANCE

*Alexis Valençon and Nicolas Bouckaert*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Class actions analogous to those in the United States did not exist in the French legal system before 2014, when a ‘group action’ mechanism was created by the French legislature.<sup>2</sup>

Prior to the creation of group actions, various other procedural means, which are still in existence, could be relied upon to bring joint claims, namely:

- a* joint actions brought by way of a single writ of summons by multiple claimants having a common interest against the same defendants;<sup>3</sup>
- b* a third party’s voluntary interventions in existing proceedings;<sup>4</sup>
- c* consolidations of different, coexisting proceedings;<sup>5</sup>
- d* legal actions undertaken by associations in the name of their members (but solely in relation to the members’ collective, rather than individual, interests);<sup>6</sup>
- e* specific proceedings brought by accredited consumer associations in the collective interests of consumers<sup>7</sup> (such as, for example, proceedings relating to consumer contracts containing clauses that are deemed to constitute unfair terms);<sup>8</sup>
- f* joint representative actions brought by accredited associations when instructed by individual claimants to seek damages in matters regarding consumer law, financial law and environmental law;<sup>9</sup> or
- g* specific proceedings brought by labour unions on behalf of employees who have been dismissed on economic grounds.<sup>10</sup>

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1 Alexis Valençon and Nicolas Bouckaert are partners at Kennedys. The authors are grateful to Sébastien Tadiello for his invaluable assistance in the preparation of this chapter.

2 Law No. 2014-344 of 17 March 2014. It should be borne in mind, however, that while French group actions share some common traits with US class actions, they differ in certain key respects and it is therefore best to approach them as a distinct and autonomous mechanism, *sui generis*, rather than try to understand them by comparison to or via the prism of the US regime.

3 Cour de cassation (Supreme Court), Com., 5 February 1969.

4 Article 328 et seq., Code of Civil Procedure.

5 Article 367 et seq., Code of Civil Procedure.

6 Cour de cassation, Civ. 3, 4 November 2004, No. 03-11377 and 4 May 2011, No. 10-11863.

7 Article L621-1 et seq., Consumer Code.

8 Article L621-8, Consumer Code.

9 Article L622-1, Consumer Code; Article L452-2, Monetary and Financial Code; Article L142-3, Environmental Code.

10 Article L1235-8, Labour Code.

The above-listed recourses, however, lacked efficiency, especially when dealing with mass disputes (among other things, due to the strict conditions limiting the ways in which associations can communicate publicly in relation to the proceedings they bring).<sup>11</sup>

Before the creation of group actions in 2014, the creation of a French class action type mechanism had been discussed on and off for about 30 years by the legislature. Indeed, as early as the mid-1980s, two draft bills seeking to create a French version of class actions were debated but ultimately failed to be enacted (although they did lead to the creation of the above-mentioned joint representative actions).<sup>12</sup> Discussions were renewed, once again, in 2003 and the project had the support of the government in place at the time.<sup>13</sup> The following government, however, did not view it as a priority and legislation establishing a class action mechanism was not passed, despite the fact that several draft bills were debated and public opinion was overwhelmingly favourable.

Finally, thanks in part to the resolve of the sitting minister for consumers, Mr Benoît Hamon, group actions became part of the French legal landscape on 17 March 2014, when Law No. 2014-344 was enacted. The group action mechanism created by this law was quite different from its north American inspiration, as, under the new, French mechanism, such actions could only be initiated by a limited number of consumer associations (accredited at national level), rather than individual claimants. Furthermore, claims brought by way of group actions could only relate to financial losses and were initially limited to disputes falling under consumer law and competition law. However, the 17 March 2014 law was but the first of a series of steps, as additional laws extending the scope of group actions or creating new types of group actions were enacted at a steady pace since then. French law now also provides for group actions in relation to health issues,<sup>14</sup> data protection, discrimination, environmental matters and administrative law.<sup>15</sup>

Although the various group actions created since 2014 differ slightly from one another, they do share certain, essential characteristics, namely that they are:

- a* brought by accredited legal entities<sup>16</sup> acting in the name and interests of individual victims (rather than by the individuals themselves); and
- b* all organised according to a two-step process, with a judgment on liability being handed down, followed by a post-judgment opt-in mechanism for the indemnification of the individuals represented in the group action at issue.

In December 2016, the French legislature passed a law<sup>17</sup> creating a dedicated fund, intended to support claimants initiating group actions. The fund was intended to be financed thanks to the fines handed down against defendants to group actions brought before French criminal

11 Cour de cassation, Civ.1, 26 May 2011, No. 10-15676.

12 Parliamentary Opinion No. 1123, 11 June 2013, MP S. DENAJA, p. 8.

13 *ibid.*, p. 9.

14 Law No 2016-41 of 26 January 2016.

15 Article 60 et seq, Law No. 2016-1547 of 18 November 2016. Group actions that relate to administrative matters are brought before administrative courts, whereas the other types of group actions, which all relate to civil law matters, are heard before civil courts (i.e., the High Court having territorial jurisdiction over the matter at issue).

16 The vast majority of these accredited legal entities is made up of associations, but several labour unions have also been accredited, for certain types of group actions.

17 Article 217, Draft Bill No. 878 regarding equality and citizenship, adopted by Parliament on 22 December 2016.

courts (but no similar fines would be handed down before French civil jurisdictions). The creation of the fund was postponed, however, following a request from certain French MPs that it first be the subject of constitutional scrutiny. The said constitutional scrutiny was carried out and the envisaged fund was never created as the Constitutional Council held that it was unconstitutional<sup>18</sup> in that it violated the constitutional principle of equality, because defendants before civil jurisdictions would not be treated in the same fashion as defendants before criminal jurisdictions.

Although a limited number of group actions have been initiated since 2014, group action case law has already started to take shape, which has, in turn, influenced the French legislature: decisions handed down in November 2017<sup>19</sup> and May 2018<sup>20</sup> held that claims relating to residential leases fell outside the scope of consumer law group actions (contrary to the initial objective of the legislature when it created this type of group action), as a result of which Law No. 2018-1021 was enacted on 23 November 2018, modifying the relevant provisions to include residential leases in the scope of consumer law group actions.<sup>21</sup>

As at December 2018, 13 group actions have been brought before civil jurisdictions (some are still ongoing, while others have settled or been rejected) regarding, among others, housing, financial services and mobile telecommunications, and two group actions for discrimination are currently pending before administrative courts.

## II THE YEAR IN REVIEW

### i Recent statutory developments

Law No. 2016-1547 of 18 November 2016 extended the initial group action mechanism created in 2014 to actions relating to personal data.<sup>22</sup> However, this law was criticised, as it only allowed claimants to request an injunction putting an end to the harmful data processing – thereby excluding claims for damages. This shortcoming was addressed by Law No. 2018-493 of 20 June 2018, which extended personal data group actions to include claims for damages for moral and financial prejudice.<sup>23</sup>

Another noteworthy development, mentioned above, was Law No. 2018-1021 of 23 November 2018, which modified the relevant provisions of the Consumer Code so as to explicitly include residential leases in the scope of possible consumer law group actions.

### ii Recent court decisions and current proceedings

Over the course of the previous calendar year, three decisions were handed down by French courts in group action proceedings and, towards the end of the year, an association formally declared that it would likely be initiating a data protection group action in the first semester of 2019.

On 27 June 2018, the French Supreme Court, Court de cassation, rendered its first decision regarding a group action.<sup>24</sup> The decision was on a procedural point, but it

18 Constitutional Council, 26 January 2017, Decision No. 2016-745.

19 Court of Appeal of Paris, 9 November 2017, Appeal No. 16/05321.

20 Nanterre High Court, 14 May 2018, Case No. 14/11846.

21 Article 138, Law No. 2018-1021 of 23 November 2018.

22 Article 91, Law No. 2016-1547 of 18 November 2016.

23 Article 25, Law No. 2018-493 of 20 June 2018.

24 Cour de cassation, Civ. 1, 27 June 2018, No. 17-10891.

is noteworthy as it is a procedural point that is common to all group actions, namely the necessity that the writ initiating a group action contain a (non-exhaustive) list of individual claimants who are deemed to be representative of the types of claimants who would join the group action at the opt-in phase. In this case, the appellant argued that, upon initial analysis of the writ, the pretrial judge had the legal obligation to scrutinise the list of representative claimants contained in the writ to verify that its members were indeed capable of constituting a list of people who had suffered identical or analogous prejudices that had allegedly all been caused by the defendant. The appellant further argued that, as the inclusion of such a list was an imperative requirement for any group action writ, any defect with the said list would render the writ null and void. The appellant therefore argued that, in the case at hand, the pretrial judge should have inspected the list, as per its legal obligation, and declared the writ null and void, as the individuals included in the list at issue were not capable of representing a homogenous set of claimants, having suffered identical or analogous prejudices due to a common cause.

In its decision, which should be followed in the future by French courts, the Cour de cassation ruled that the pretrial judge only had the legal obligation to verify that such a list was indeed included in the group action writ. Contrary to what the appellant had argued, however, the pretrial judge did not have the legal obligation to review the list in detail to ascertain that it could indeed be deemed to be representative of individuals constituting a homogenous class of claimants; this obligation, the Cour de cassation ruled, befell the judge on the merits, and not the pretrial judge.

As indicated above, in a group action devoted to residential leasing contracts, in May 2018, the Nanterre High Court<sup>25</sup> ruled in line with the 2017 Paris Court of Appeal decision, finding that leasing contracts fell outside the scope of consumer law group actions. This principle should not, however, be followed in future decisions, given the legislative changes enacted in November 2018 that explicitly include residential leasing contracts in the scope of consumer law group actions.<sup>26</sup>

Finally, the last group action judgment rendered in 2018 was the 3 October Paris High Court decision regarding the case brought by a consumer association against a mobile phone network provider.<sup>27</sup> The court rejected the association's claims that the network provider was in breach of its legal and contractual obligations to provide a particular service to its customers. As the case was rejected at the first phase, during which its merits were considered by the High Court, it did not progress to the second, opt-in phase.

To our knowledge, there are six group action proceedings currently pending, two undertaken against banks regarding financial services, two against pharmaceutical companies regarding a drug and a contraceptive, and two against the French state regarding discrimination in the police force and the higher education system. Finally, in late November 2018, Internet Society France, an association devoted to internet-related standards, formally announced that it would be bringing a group action against Facebook regarding various data protection violations (some of which are announced as being violations of the General Data Protection Regulation (GDPR)). Needless to say, if Internet Society France effectively initiates this group action in 2019, it will be followed and scrutinised by the legal community with great

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25 Civil High Court of Nanterre, 14 May 2018, Case No. 14/11846.

26 See Section I.

27 Paris High Court, 3 October 2018, Case No. 15/07353.

interest, owing not only to the relative youth of the French group action regime, but also to the allegations of GDPR violations and, obviously, the target: Facebook.

### **iii Upcoming legislation and announced future changes to the class actions sector**

On 17 October 2018, a group of MPs filed a draft bill<sup>28</sup> that would enable groups of 100 individuals or more, rather than solely accredited legal entities, to initiate group actions. These groups would need to designate one of their members as a representative, who would be charged with representing the group before the courts. If this draft bill is enacted in its proposed state and accredited legal entities are no longer the exclusive initiators of group actions in France, the group action mechanism would take a significant step towards the US model and one could potentially expect to see significant changes in the number of group actions brought before French courts.

At an EU level, a draft directive<sup>29</sup> was filed on 11 April 2018 that could lead to considerable changes to the class action landscape in Europe and, it follows, in France. The draft directive would create a new type of national class action, for damage suffered by consumers in various sectors, such as banking, energy, telecommunications, healthcare and the environment. The envisaged class actions would enable claimants to seek damages, as well as various types of injunctions. It would share some similarities with group actions provided under French law, as the class actions envisaged in the draft directive would also be initiated by accredited entities and include an opt-in mechanism. In 'low-value cases' an opt-out mechanism is provided. This new type of class action would coexist with those already existing at a national level. It is difficult, however, to envisage how the EU level regime and the domestic, French regime would dovetail, given that the former is still in draft form and the latter is still in its infancy and evolving at a steady pace.

## **III PROCEDURE**

As indicated above, group actions were introduced progressively in the French legal system, one industry sector or type of prejudice at a time. It follows that the provisions that govern the various available group actions are spread out over various corresponding legal corpuses (the Consumer Code, the Code of the Environment and the Labour Code). As a consequence of the approach chosen by the French legislature, the procedures applicable to the different types of group actions may vary slightly, although they all share common fundamental characteristics, listed below.

### **i Types of action available**

For a group action to be filed, various individuals need to have suffered identical or analogous prejudices as a result of a defendant's breach of its statutory or contractual obligations.<sup>30</sup> Although most group actions can only be brought against a single defendant, group actions based in consumer law and competition law allow more than one defendant.<sup>31</sup>

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28 Draft bill of 17 October 2018 to extend group actions to citizens (Draft No. 1327).

29 Proposal for a directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, 11 April 2018, 2018/0089 (COD).

30 Article 62, Law No. 2016-1547 of 18 November 2016.

31 Article L623-1, Consumer Code.

Not all types of prejudice can be indemnified under every available group action. In certain cases, damages may only be awarded for financial losses, such as in consumer and competition group actions.<sup>32</sup> In healthcare group actions, on the other hand, claims can only be brought as a result of personal injuries.<sup>33</sup> Other types of group actions, however, such as environmental group actions, can allow damages to be awarded for both physical injuries and financial losses.<sup>34</sup> Finally, in group actions relating to discrimination and data protection, damages may be awarded for moral harm or financial losses.<sup>35</sup>

Given the fact that certain types of group actions only allow claims for specific types of prejudice, but not all types of prejudice, one could conceivably expect situations to arise whereby two distinct group actions are initiated so as to enable claimants to seek compensation for the various types of damage suffered as a consequence of a single, common breach (i.e., victims could, for instance, participate in both a healthcare group action and a consumer law group action if a given drug has caused them to suffer personal injuries and financial losses, as healthcare group actions only allow claims for personal injuries, whereas consumer law group actions only allow claims for financial losses). Such a scenario, which has not occurred yet, would have clear disadvantages for both the claimants and the defendants due to the duplication involved. It could be avoided altogether if the scope of the various group actions were extended, but no such plan is currently being considered by the legislature that we are aware of.

The limitation period that applies to group actions is the standard five-year time period that applies in French civil law,<sup>36</sup> which starts to run from the date the victim became aware or should have become aware of the facts that gave rise to its right of action. If a group action is initiated and the defendant is found liable at the end of the first phase of the proceedings, the time limitation applicable to individual actions that could be brought in the context of the group action (during the second, opt-in phase) is suspended.<sup>37</sup> The applicable time limitation resumes its course when the court's decision on the group action has become final or after a settlement agreement has been approved by the court.<sup>38</sup>

## ii Commencing proceedings

As mentioned above, only specific entities can introduce class actions:

- a* for consumer and competition law group actions: only consumer associations accredited at a national level can initiate proceedings,<sup>39</sup> of which there are only 15 at the present time;
- b* for healthcare group actions: only associations devoted to consumers of the healthcare system that are accredited at a regional or national level (and whose activities do not encompass commercialising health products) can initiate proceedings;<sup>40</sup>

32 *ibid.*

33 Article L1143-2, Healthcare Code.

34 Article L142-3-1, Code of the Environment.

35 Article 10, Law No. 2008-496 of 27 May 2008; Article 62, Law No. 2016-1547 of 18 November 2016; Article L1134-8, Labour Code; Article L77-11-3, Code of Administrative Justice; Article 43 ter (Article 37 as of 1 June 2019), Law No. 78-17 of 6 January 1978.

36 Article 2224, Civil Code.

37 See, for instance, Article L623-27, Consumer Code; Article 77, Law No. 2016-1547 of 18 November 2016.

38 *ibid.*

39 Article L623-1 Consumer Code.

40 Article L1143-2 Healthcare Code.

- c for discrimination and handicap group actions: only associations dedicated to fighting discrimination or disabilities that have been in existence for a minimum of five years or more can initiate proceedings (provided their stated aims encompass the defence of rights or interests that may be the object of discrimination);<sup>41</sup>
- d for group actions relating to discrimination in the workplace: only labour unions and associations with the stated purpose of fighting discrimination or disabilities (that have been in existence for five years or more) can initiate proceedings;<sup>42</sup>
- e for group actions relating to environmental law: only accredited associations devoted to the protection of the environment or accredited associations with the stated purpose of defending their members in relation to physical or financial prejudice can initiate proceedings;<sup>43</sup> and
- f for group actions relating to data protection: proceedings can only be initiated by associations with the stated purpose of protecting privacy and personal data (that have been in existence for five years or more), or accredited consumer associations when the data processing at issue affects consumers and labour unions when the data processing at issue affects the workers whom the union protects.<sup>44</sup>

Prior to introducing a group action, by serving a writ, the accredited association or labour union that wishes to do so must first serve a formal notice on the defendant to request that it end the breach or indemnify the losses for which the group action is envisaged.<sup>45</sup> The action may be initiated only four months after this notice. In matters regarding discrimination at the workplace this period is increased to six months to allow for a discussion process to take place between the claimant, unions and employee organisations.<sup>46</sup>

French law does not impose a requirement that the class or group of claimants be defined from the inception of the proceedings, in the writ itself; it is for the court to do so in the decision it will hand down at the end of the first phase, wherein it will rule on both the admissibility of the claim and the defendant's liability<sup>47</sup> (there is, however, an exception to this rule is the derogatory regime of the simplified group actions relating to consumer law).<sup>48</sup>

### iii Procedural rules

As mentioned above, group actions in France were created progressively, in an incremental fashion, and according to a sectorial approach. Due to this approach, the procedural framework for the different possible group actions is not entirely homogenous, although it shares certain fundamental characteristics.

Depending on the type relied upon, group actions can be intended to obtain indemnification for the loss arising out of a wrongful act or to bring an end to the said act.

When a group action is initiated, proceedings are organised in a two-phase fashion.

41 Article 10, Law No. 2008-496 of 27 May 2008.

42 Article L1134-7 Labour Code; Article L77-11-2 Code of Administrative Justice.

43 Article L142-3-1 Code of the Environment.

44 Article 43 ter (Article 37 as of 1 June 2019), Law No. 78-17 of 6 January 1978.

45 Article 64, Law No 2016-1547 of 18 November 2016; Article L77-10-5 Code of Administrative Justice. This requirement for a letter before action does not apply to group actions in healthcare, competition law or consumer law, however.

46 Article L1134-9 Labour Code.

47 See Section III.iii.

48 Article L623-14 Consumer Code.

During the first phase, the judge on the merits will consider the admissibility and the merits of the case. If he or she holds that the defendant is liable, the judge on the merits will then determine the criteria defining the group of victims entitled to compensation, the types of losses that can be indemnified, the amount of corresponding damages that can be claimed, and the deadline before which the victims will have to opt in following the decision. To enable victims to come forward, the court will also indicate how its decision is to be published (at the costs of the defendant).<sup>49</sup> If the initial claimant so requests, the judge on the merits may also order that negotiations be undertaken with the defendant regarding the level of compensation.<sup>50</sup>

The second phase of the proceedings is devoted to the indemnification of individual claimants who have opted in after the initial judgment on liability handed down by the court. During this phase, individual claimants who wish to opt in send their claims for damages (either to the defendant or the claimant) and the defendant proceeds to the compensation on an individual basis, according to the criteria set out by the judgement on liability.<sup>51</sup> If the court ordered a negotiation, any possible settlement agreement requires the court's approval before it can give rise to compensation of individual claimants.<sup>52</sup> If issues arise regarding the compensation of individual claimants, the matter is referred to the court that handed down the decision regarding the defendant's liability.<sup>53</sup>

It should be noted, however, that the above two-tiered process does not apply to group actions relating to consumer law, which have their own, simplified procedure. Pursuant to this streamlined process, in such group actions, when the identity and the number of consumers affected is known and when they have suffered similar or identical losses, the court can, after having held the defendant liable, order compensation to be paid directly to the individual consumers as per the conditions set out in the judgment.<sup>54</sup> In such a case, the defendant must then contact the affected consumers so that they may accept the compensation they are owed.<sup>55</sup>

Decisions handed down in group actions have *res judicata* authority, but only towards the parties that participated in the proceedings.<sup>56</sup> The decisions do not, however, have *res judicata* in relation to claims that fall outside the scope of the court's decision.<sup>57</sup>

If the group action has been brought to obtain an injunction, so as to end a wrongful act by the defendant,<sup>58</sup> be it in breach of a statutory or a contractual obligation, the court will consider the merits of the case. If it is satisfied that such an act is taking place and that the defendant must be compelled to cease, the court will render a judgment wherein it orders the defendant to cease the harmful act by a specific deadline, beyond which date it may be ordered to pay fines that will be awarded to the claimants.<sup>59</sup>

49 Article 66 and 67, Law No. 2016-1547 of 18 November 2016; Article L623-4 et seq. of the Consumer Code.

50 Articles 68, 72 and 73, Law No. 2016-1547 of 18 November 2016. Note, however, that this option is not available in group actions relating to consumer law, labour law and healthcare matters.

51 Articles 69 and 70, Law No. 2016-1547 of 18 November 2016; Article L623-18 Consumer Code.

52 Article 73, Law No 2016-1547 of 18 November 2016.

53 Articles 71 and 73, Law No. 2016-1547 of 18 November 2016.

54 Article L623-14 Consumer Code.

55 Article L623-15 Consumer Code.

56 Article L623-28 Consumer Code; Article 78, Law No. 2016-1547 of 18 November 2016.

57 Article L623-29 Consumer Code; Article 79, Law No. 2016-1547 of 18 November 2016.

58 Possible only in class actions on matters of discrimination, environmental law and personal data.

59 Article 65, Law No. 2016-1547 of 18 November 2016.



#### iv Damages and costs

As alluded to above, various types of group actions can allow claimants to seek different kinds of remedies:

- a* in consumer law and competition law group actions, damages can only be sought in relation to financial losses<sup>60</sup> (where appropriate, the judge may order reparation in kind);<sup>61</sup>
- b* in healthcare group actions, damages can only be sought in relation to personal injuries;<sup>62</sup>
- c* in discrimination-related group actions (including those that relate to discrimination in the workplace), damages can be sought in relation to financial losses and moral prejudice;<sup>63</sup>
- d* in environment law group actions, damages can only be sought for personal injuries and financial losses; and<sup>64</sup>
- e* in personal data-related group actions, damages can only be sought in relation to financial losses and moral prejudice.<sup>65</sup>

Obviously, the nature and quantum of the damages that could effectively be awarded, in a given group action, will depend upon several factors, including the remedies sought in the initial writ and the decision as to the defendant's liability handed down by the judge on the merits at the end of the first phase.

Punitive damages may not be awarded under French law.

At the time of writing, and to the best of our knowledge, none of the group actions initiated to date have resulted in damages being awarded by the courts (although in two instances, the parties settled the dispute).

#### v Settlement

Group actions can give rise to settlements either before proceedings are initiated or during the proceedings themselves.

If a settlement agreement is reached in principle, before a group action is effectively initiated (such as, for instance, after the defendant receiving the pre-action letter specific to group actions), it will nonetheless require the court's approval before it can be enforced. This necessity is to ensure that the terms of the agreement are in line with the interests of the victims represented by the certified entity. The court's decision ratifying the settlement agreement will indicate how the defendant is to inform potential victims that an agreement has been reached, as well as the steps that must be followed for individual victims to opt in and receive the compensation they have been awarded under the said settlement agreement.<sup>66</sup>

Courts can, at the claimant's request, order the parties to participate to settlement talks after the initial judgment on liability has been handed down. This is only possible

<sup>60</sup> Article L623-2 Consumer Code.

<sup>61</sup> Article L623-6 Consumer Code.

<sup>62</sup> Article L1143-2 Healthcare Code.

<sup>63</sup> Article 62, Law No. 2016-1547 of 18 November 2016; Article L1134-8 Labour Code and Article L77-11-3 Code of Administrative Justice.

<sup>64</sup> Article L142-3-1 Code of the Environment.

<sup>65</sup> Article 43 ter (Article 37 as of 1 June 2019), Law No. 78-17 of 6 January 1978.

<sup>66</sup> Article L623-22 and -23 Consumer Code; Article 75 and 76, Law No. 2016-1547 of 18 November 2016.

in group actions for environmental, data protection and discrimination matters (excluding discrimination at the workplace).<sup>67</sup> In such instances, settlement negotiations have a narrow scope that is set by the court and only relates to the quantum of compensation to be paid out and not to the principle of the defendant's liability, which has been established.<sup>68</sup> For the settlement agreement to be enforceable, it must be ratified by the court, which must be satisfied that its terms are in line with the interests of the victims represented by the claimant. If, however, the court finds that the envisaged agreement is not compatible with the interests of the victims, it may refuse to ratify it and order a new negotiation period. If no settlement agreement is reached, the court will decide on the level of compensation, as it would normally have done, had no settlement discussions been ordered. If, however, the court finds that one of the parties objected to the conclusion of a settlement agreement in a vexatious or dilatory manner, it can fine the offending party for up to €50,000.<sup>69</sup>

At the time of writing and to the best of our knowledge, there have only been two group action settlements to date:

- a* The first settlement, which was agreed upon before the group action was introduced and related to claims that the public housing office of the city of Paris had unlawfully charged tenants to pay for their estates' video surveillance costs, provided for the payment, by the defendant, of a total sum of €2 million, to be shared among 100,000 tenants.
- b* The second settlement, which was reached after the judgment on liability and related to service disruptions suffered by customers of a mobile phone network when it upgraded to 3G service, provided that the defendant pay each of the 141,000 users €12 of compensation (amounting to a total sum of circa €1.7 million).

#### IV CROSS-BORDER ISSUES

The recognition and enforcement of foreign class action decisions in France will differ depending on whether the decision was rendered by an EU Member State court or a non-Member State court.

A class action judgment handed down by a Member State court shall be recognised in the other Member States without any special procedure being required,<sup>70</sup> although in France it is nevertheless necessary to seek the enforcement of the decision.<sup>71</sup> Recognition and enforcement of the foreign decision can, moreover, be refused, following the application of any interested party, if it successfully demonstrates that enforcement would clearly be contrary to the public policy of the Member State where it is being sought.<sup>72</sup>

A class action judgment handed down by a non-Member State court shall be recognised provided three mandatory conditions are met, namely: (1) the foreign court must have had jurisdiction as a result of obvious ties between the matter, on the one hand, and the state in which it was ruled upon, on the other hand; (2) the judgment at issue must not be contrary to French public policy (with regards to both substantive and procedural law); and (3) the

<sup>67</sup> Article 1134-10 Labour Code.

<sup>68</sup> Article 72, Law No. 2016-1547 of 18 November 2016.

<sup>69</sup> Article 73, Law No. 2016-1547 of 18 November 2016.

<sup>70</sup> Article 36, 'Brussels Recast', EU Regulation No. 1215-2012 of 12 December 2012.

<sup>71</sup> Article 509 et seq., Code of Civil Procedure.

<sup>72</sup> Article 45 1.(a), 'Brussels Recast', EU Regulation No. 1215-2012 of 12 December 2012.

parties must not have fraudulently sought a decision from the foreign court that would have been unattainable under French law.<sup>73</sup>

In both instances, the main difficulty could arise from possible conflicts between French public policy and foreign class action decisions. One illustration of this possible risk, which has been identified by legal commentators, may be provided by the conflict that would arise if parties tried to obtain the recognition and enforcement, in France, of foreign class action decisions that were rendered as a result of opt-out procedures, as opt-out procedures should be excluded under French law as a matter of public policy (as they limit victims' right of action).<sup>74</sup> In practice, however, the question remains open, as French courts have, to the best of our knowledge, never had to rule on the matter.

Discussions regarding the possible creation of a standardised class action regime shared by all Member States were reactivated, within the EU, as a result of the *Dieseltgate* scandals and the *Schrems v. Facebook* case. For such a regime to be effective, however, it would be necessary to create an EU-wide database containing all final decisions relating to class action disputes. In 2013, the EU Commission recommended that such a database be implemented by the Member States, but only Germany and the UK have done so to date.

Finally, and as discussed above, the class action landscape could evolve significantly in the EU if the draft directive filed on 11 April 2018 is enacted in its current draft, thereby creating a new class action in all Member States.

## V OUTLOOK AND CONCLUSIONS

Since the creation of group actions in France in 2014, a little under 20 such actions have been undertaken.

To this day, only two group actions have resulted in damages being awarded and, in both instances, it was as a result of settlements being reached before the second phase of the group action (i.e., the allocation of damages to individual claimants once they had opted in).

While certain legal commentators have been rather quick to criticise the various French group actions available, it should, however, be borne in mind that group actions are still very much in their infancy, within the French legal landscape. Indeed, they were only created in 2014 and, since then, various types of remedies (such as injunctions), additional rights of action (i.e., claims as a result of personal injuries or moral prejudice) and new types of group actions (such as group actions relating to healthcare or personal data) have been created at a steady pace. It is, therefore, still too early to look back and take stock, not least as some of the more recent legal mechanisms have yet to be tested by case law.

Moreover, one of the main objectives the French legislature had in mind when creating group actions was to create proceedings – and the threat of potentially significant damages – that would constitute a sizeable deterrent for corporate entities and induce them to carry out audits, promote best practices and stray from practices or contractual terms that could be deemed to be unfair. While it is too early to tell how big and effective a deterrent French group action will be, in the medium term, the fact that they have already led to settlement figures in the millions (albeit the low millions) does suggest that corporate entities that choose

<sup>73</sup> *Cornelissen v. Avianca*, Cour de cassation, 1st civil division, 20 February 2007, appeal No. 05-14082.

<sup>74</sup> M-L NIBOYET, *Action de groupe et droit international privé*, *Revue Lamy Droit Civil*, No. 32, 1 Nov. 2006. Note, however, that this issue has not been decided by case law, at this stage, as it has not been ruled upon by French courts.

to ignore the possible financial and reputational liabilities that group actions could represent will be doing so at their own risk.

This is a fast-evolving area of French law, and its evolution will no doubt be closely watched by consumers, corporate bodies and the legal community alike. As mentioned above, there are currently a certain number of potentially significant developments on the horizon, such as a possible EU Directive on class actions or a new kind of French group action, that could be initiated by groups of consumers, rather than accredited legal entities. If either or both these envisaged mechanisms became a reality in the near to medium term, one could reasonably expect them to constitute significant developments, susceptible of generating and accelerating further changes.

# GERMANY

*Henning Bälz*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Class actions in a formal sense do not exist under German law. The concept of a lawsuit on behalf of others who are potentially eligible to the same relief and who need not be present or even named in the lawsuit is largely foreign to German civil law procedure. The typical litigation envisioned by the German Code of Civil Procedure is a lawsuit between few, often only two, parties. To obtain the relief sought, a litigant must appear to the court as an individual and must show that he or she seeks a certain remedy on his or her own behalf.

This status quo has been meaningfully changed in the past year with the introduction of a Model Case Proceedings. While not a class action, this instrument for the first time allows a form of collective redress not limited to specific areas of law. Certain consumer organisations can now bring a claim to determine certain elements of law and of fact for future proceedings between myriad claimants. However, this action does not itself provide for damages for the injured parties, differentiating it substantially from a true class action. The benefits and drawbacks of this system have been proposed in the literature, yet remain to be seen in practise.

In addition to this, German law provides for certain means of obtaining collective redress: several parties can jointly commence a lawsuit. Alternatively, potential claimants can assign their claims to one single plaintiff who asserts multiple claims on their behalf. In the area of capital market liability, if several lawsuits on the same subject matter are pending, the court may select a model case to decide on factual or legal issues that the lawsuits have in common. Finally, certain institutions, such as consumer protection organisations, are able to legally pursue the enforcement of laws that serve the protection of others.

Each of these measures partly resembles class actions in terms of their procedural objective, but none of them qualifies as a class action in the formal sense. In addition, all of them have specific drawbacks, which decrease their efficiency compared to class actions.

## II THE YEAR IN REVIEW

In the past year, Germany opened a new chapter with regard to collective redress. On 14 June 2018, the German legislator passed a law creating a collective redress action for consumers. The new law came into force on 1 November 2018. It allows for Model Case Proceedings. These Proceedings provide a model action for a declaratory judgment. Under the new law, certain consumer associations may file suit to have legal issues or disputed questions of fact bindingly determined by a court. Consumers can register their claims to the

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<sup>1</sup> Henning Bälz is a partner at Hengeler Mueller.

action in order to receive the binding effects for their individual proceedings. Registration also suspends their limitation period.

The aim of this legislation is to allow for redress for minute damages, for which a single party would not rationally bring action owing to the insufficient potential benefits.<sup>2</sup> With a view to political realities, however, the introduction of the first global collective redress mechanism in Germany was heavily influenced by the events of ‘Dieselgate’ (i.e., the revelations on the alleged manipulation of diesel emissions tests by Volkswagen). This matter demonstrated to a larger audience the striking differences between the United States and Germany when it comes to collective redress. The fact that roughly 500,000 American plaintiffs were able to recover damages from VW in one single, comparably short court proceeding, whereas German plaintiffs had to enforce their alleged claims individually, has been perceived as unjust by parts of the German public.<sup>3</sup> In fact, about 23,000 actions are currently pending, with the competent local courts scattered all over Germany.<sup>4</sup> The courts have already handed down around 6,000 judgments on the matter. Contradicting court opinions are thus the norm, with courts of appeal still not showing a uniform approach to the matters before them. It is quite probable that claims of potential claimants will have become time-barred before legal certainty is obtained. A major deadline for this type of action was supposed to lapse at the end of 2018, which led to doubling or even tripling of filings in some courts.<sup>5</sup> The Model Case Proceeding must therefore be seen in reaction to the limits of German car owners having to file suit individually in lieu of a class action.

Rather predictably, an action for a Model Case Proceeding was immediately brought on 1 November 2018 against Volkswagen in the matter of diesel manipulation allegations in front of the Higher Regional Court of Braunschweig. As at February 2019, 401,000 individual claims have been registered to the action equalling more than 10 times the previously brought claims.<sup>6</sup> Because of this massive number, a schedule for the proceedings is not yet foreseeable. Meanwhile, the first proceedings on the basis of the new Model Case Proceedings have already been concluded on 20 March 2019 in front of the Higher Regional Court of Stuttgart. They concern the Mercedes-Benz Bank, which is alleged to have provided insufficient consumer credit information.<sup>7</sup> More than 600 consumers are reported to have registered their claims to this action.<sup>8</sup> Finally, on 21 February 2019, another action was brought in the Higher Regional Court of Frankfurt, pertaining to the liability of the company Bisnode for ratings of stock creditworthiness the company had provided.

As at April 2019, these are the three only proceedings under the new law.<sup>9</sup> A similar action against VW Bank has not been accepted by the Higher Regional Court of Braunschweig, meaning the Federal Court of Justice will rule on issues of admissibility in

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2 BT-Drucks. 19/2439.

3 *Legal Tribune Online*, Braucht Deutschland die Sammelklage?, 27 May 2016.

4 *Handelsblatt Online*, ‘Die wichtigsten Fragen und Antworten zur Diesel-Klage gegen VW’, 22 October 2018.

5 *Legal Tribune Online*, ‘Klageflut zum Jahresende’ 2018, 28 January 2019.

6 *Tagesschau Online*, ‘401.000 Dieselfahrer gegen VW’, 1 February 2019.

7 Higher Regional Court of Frankfurt, judgment of 20 March 2019, reference No. 6 HK 1/18.

8 *Handelsblatt Online*, ‘Mercedes-Benz-Bank muss erste Musterfeststellungsklage in Deutschland abwehren’, 23 January 2019.

9 C.f. official registry of the Federal Ministry of Justice and Consumer Protection, [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Bekanntmachungen/Klagen\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Bekanntmachungen/Klagen_node.html).

the near future.<sup>10</sup> Yet even these fledgling developments show how disparately proceedings under the new law may unfold. Whereas the *VW* action has not seen any real development at all, the *Mercedes-Benz Bank* case has already been concluded. After an oral hearing on 25 January 2019, the court rejected the action as inadmissible on 20 March 2019.<sup>11</sup> It ruled that the claimant consumer organisation did not fulfil the requirements for such an organisation provided by law. Thus, it did not rule on the merits. For the *VW* case on the other hand, neither timeline nor tendencies of the proceedings can be predicted at the current stage.

Also in the realm of Dieselgate, a US law firm led initiative continues to bring mass actions for payment against automobile manufacturers, which are sometimes named class actions in layman's terms.<sup>12</sup> Having made headlines by commencing a lawsuit before the District Court of Braunschweig on behalf of more than 15,000 car owners in November 2017, the initiative is reported to have filed another action regarding 18,700 car owners in December 2018.<sup>13</sup> For this purpose, the law firm is cooperating with a limited liability company called 'financialright GmbH', known under the brand name 'myRight'. The company is using the opportunity to bundle claims through fiduciary assignment. Car owners assign their potential claims to myRight, which then asserts these claims in court. In the event of success, myRight receives a payment, more precisely a fee of 35 per cent of the realised amount. Technically, every single claim transferred to myRight must be ruled on by the court individually. The combined sum in question for both actions now exceeds €1 billion.<sup>14</sup> In total, myRight has stated to have accumulated the claims of 45,000 car owners.

Finally, the previously existing methods of collective redress are also being utilised in the case of Dieselgate. A separate group of plaintiffs commenced lawsuits against VW and Porsche, emulating the effects of a class action. Shareholders of the two corporations brought actions alleging that VW and Porsche did not inform them in due course about the ramifications of the emissions matter. They are making use of an instrument exclusively available to plaintiffs who sustained damages on account of false or misleading capital market information. The Capital Markets Model Case Act (KapMuG) allows courts to select a model case, decide common issues of fact and law, and thereby facilitate individual lawsuits brought by shareholders. Further actions to the same effect have been brought in front of the Higher Regional Court of Stuttgart.<sup>15</sup>

### III PROCEDURE

Class actions are not available under German law. Yet there are certain means of collective redress available that, while they are limited, partly resemble the objective of class actions.

10 *Handelsblatt Online*, 'Erste Musterfeststellungsklage - Chancen für Dieselbesitzer vor Gericht schwinden', 25 January 2019.

11 Higher Regional Court of Frankfurt, judgment of 20 March 2019, reference No. 6 HK 1/18. 2019.

12 *Welt Online*, 'Erstes Musterfeststellungsverfahren am Oberlandesgericht Stuttgart begonnen', 25 January 2019.

13 *Legal Tribune Online*, 'Klageflut zum Jahresende 2018', 28 January 2019.

14 *Spiegel Online*, '19.000 weitere Dieselmotorkunden klagen gegen Volkswagen', 12 December 2018.

15 *Juве Online*, 'Auftritt zur Abrechnung: Anleger fordern mit Tilp Milliarden wegen Diesellaffäre', 10 September 2018.

## i Model Case Proceedings

The Model Case Proceedings allow for registered consumer organisations to bring an action that bindingly determines legal issues or contested facts. As opposed to regular actions, which only have effect *inter partes*, these determinations have binding effect for other court proceedings. The Model Case Proceedings bind the decisions of all individual claims under the requirement that the claimant made a valid registration to the Model Case Proceedings. Thus, the Model Case Proceedings do not operate as a true class action, because they do not themselves provide any relief for the injured class. There is no payment that follows from the Model Case Proceedings themselves. Rather, each individual party has to bring an individual claim before a court, which is then bound by the determinations of the Model Case Proceedings. A payment only arises from the Model Case Proceedings themselves, if the parties agree upon a class settlement. This is a major difference to class actions. Commentators have therefore continued to call for further expansion of collective redress mechanisms.

The actions under the new law may be brought by consumer organisations. For these, special limits apply in order to prevent claimants from creating consumer associations as litigation vehicles (e.g., the consumer organisations may not receive more than 5 per cent of their funding from private sector companies). As mentioned above, the specific make-up of consumer organisations has already become a decisive issue in the *Mercedes-Benz Bank* case. The court specifically pointed out that the organisation may not pursue consumer protection mainly through litigation, but needs to focus on helping consumers by way of advice and education, with litigation playing only a minor role.<sup>16</sup> A downside is there are no safeguards to facilitate that the Model Case Proceedings are in fact pursued by organisations that are actually well adapted to the task. Quite simply, the first Model Case Proceedings regarding a matter are admitted, with later proceedings of the same substance being inadmissible. A first-come-first-serve system is applied rather than a selection of the best claimant and best model case.

The established facts and legal views of the Model Case Proceedings do not affect all individual claims on the adjudicated matter, but only bind courts for claims registered to the action. To achieve this, Model Case Proceedings are mandated to be entered into the Registry. Claimants can then add their claims to the proceedings by entering them into the Registry. This can be done until the date prior to first hearing of the trial. This rule is intended to prevent free-riding on proceedings for which the hearings give promising prospects to claimants. Claims that are not registered prior to this date cannot benefit from the determinations of the Model Case Proceedings. The registration of claims may be revoked until the close of the day of the first oral hearing.

Model Case Proceedings follow the general rules of civil procedure, with some notable exceptions. At first instance, the proceedings are judged by a Higher Regional Court, which usually only acts as a court of appeal. Furthermore, the inadmissibility of the Model Case Proceedings is determined by a rather unique mechanism. An action is only admissible if at least 50 parties sign their claims onto the action. This means that at the point of filing, all actions are by default inadmissible and in turn grow into admissibility with future registration of claims. Additionally, pending Model Case Proceedings bar not only other Model Case Proceedings on the same matter, but also individual actions for individual claim if they have been registered to the Model Case Proceedings Registry.

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16 Higher Regional Court of Frankfurt, judgment of 20 March 2019, reference No. 6 HK 1/18.



Model Case Proceedings end either with a judgment or a settlement. A judgment has the binding effect outlined above irrespective of whether the ruling is in favour of plaintiff or respondent. A different effect is attached with regard to settlement. A settlement needs to contain stipulations on the compensation payable to the registered consumers, when these payments are due and also how the individual claimants need to verify their claims. The settlement is also subject to approval by the court. The court must evaluate whether the proposed settlement is an adequate amicable settlement for the claims at hand. Despite these in-built protections against the misuse of settlements, consumers may still choose to opt-out of the settlement within one month. The settlement only becomes effective if no more than 30 per cent of claimants choose to opt out of the settlement. This is, in turn, determined by a court decision, which is the final requirement for the effectiveness of a settlement.

## ii Capital Markets Model Case Act

The Capital Markets Model Case Act (KapMuG) facilitates the establishment of factual or legal aspects of claims on behalf of a group of plaintiffs in capital market mass disputes. It became known to the public owing to several proceedings against Deutsche Telekom AG concerning stock market flotations of Telekom shares in 1999 and 2000. After each flotation, the share price decreased significantly in a short period of time, causing plaintiffs to file lawsuits against Telekom alleging prospectus errors. Between 2001 and 2002, approximately 17,000 investors filed 2,650 actions with the Regional Court of Frankfurt, which led to an overload at the court with the consequence that no oral hearing could be arranged until the spring of 2004. This incident accelerated the efforts of the German parliament to enact the KapMuG. It is because of this that the KapMuG is seen by some as a *lex Telekom*. The KapMuG came into force in 2005 and was maintained and slightly modified in 2012.

As opposed to the new Model Case Proceedings, the scope of the KapMuG is limited to (1) claims for damages on account of false, misleading or omitted public capital market information, (2) claims for damages owing to the use of such capital market information or the omission of necessary clarification and (3) contractual rights to performance resulting from an offer of shares according to the German Securities Acquisition and Takeover Act. Public capital market information is defined as information on business data directed at a large number of investors that concern an issuer of securities or any other distributor of financial instruments. It refers, for instance, to offering prospectuses, information sheets, annual accounts and status reports.

The first stage of the proceedings takes place before the trial court and starts with the request of one litigant to execute a Model Case Proceeding under the KapMuG. The request must aim to establish a certain fact or legal aspect that is decisive for the alleged claim. If admissible, the trial court will suspend the proceeding and publish the request in the litigation register of the Federal Gazette. Provided that at least nine further similar requests are published within six months, the trial court refers the matter to the Higher Regional Court (a decision that cannot be contested). The decision has the effect that further pending proceedings with trial courts concerning the same subject matter are also suspended, and that the parties to those proceedings will be involved in the model proceeding, unless a plaintiff withdraws from the action within a month.

In the second stage, the Higher Regional Court appoints a model case plaintiff. The selection is generally left to the discretion of the court. However, the court must take into account (1) the suitability of the plaintiff litigating the case compared to the other plaintiffs, (2) an agreement of the plaintiffs regarding the appointment, and (3) the amounts claimed by

each plaintiff. In contrast to the Model Case Proceedings, which follows a first-come-first-serve approach with regard to case selection, the KapMuG action features the selection of a suitable model case by the court. The remaining plaintiffs may take part in the proceeding as third parties with limited rights. As such, they are entitled to avail themselves of means of contestation or defence independently. In contrast, there is no model case defendant. Instead all defendants of the initial proceedings are considered defendants in the model proceeding.

Subsequently, the case is published in the litigation register of the Federal Gazette once again. Within six months of the publication, third parties have the opportunity to register their claims before the competent Higher Regional Court. While the parties registering must be represented by a lawyer, they do not become involved in the model case. The registration rather serves the purpose of suspending the limitation period of the claim so that the registered party may wait and contemplate whether a future action is suitable.

The model case is then concluded either by a decision of the Higher Regional Court or by settlement. The decision by the court is binding for all suspended cases, but may be appealed on points of law to the Federal Court of Justice. The validity of a settlement depends on the approval of the court and the participants. The latter have the right to withdraw from the court-approved settlement within a month of service of the written settlement. If less than 30 per cent of the registered claimants declare their withdrawal, the settlement becomes effective for all parties who have not opted out of the settlement.

During the third and final stage, the suspended proceedings before the trial court are continued and concluded by judgment or settlement, including a decision on the costs of both the initial and the model proceedings. The judgment obtained in the continued proceeding can again be appealed for reasons that were not the focus of the model case.

As for the aforementioned *Telekom* trials, two model case proceedings were concluded by the Higher Regional Court of Frankfurt in 2012<sup>17</sup> and 2013,<sup>18</sup> which found that the Telekom prospectus had not been misleading. The plaintiffs appealed both decisions. At the end of 2016, the Federal Court of Justice approved the decision concerning the flotation of 1999.<sup>19</sup> In 2014, the Federal Court held that there was a prospectus error regarding the flotation of 2000 and remanded the case to the Higher Regional Court of Frankfurt for the determination of causality and fault.<sup>20</sup> The Higher Regional Court of Frankfurt then confirmed the responsibility of Telekom for the misleading prospectus and ruled that the causality between the prospectus and the decisions made by the investors had to be determined individually by the competent trial court.<sup>21</sup> Telekom appealed the decision and the case is now pending in front of the Federal Court of Justice again.<sup>22</sup> The mere fact that the KapMuG has not provided any relief to plaintiffs 18 years after the incurrence of the alleged damage shows that it has not lived up to the expectations many had for it. This is, among other things, because of the fact that the relevant cases are not conducted by one or more

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17 Higher Regional Court of Frankfurt, judgment of 16 May 2012, reference No. 23 Kap 1/06, ZIP 2012, 1236.

18 Higher Regional Court of Frankfurt, judgment of 3 July 2013, reference No. 23 Kap 2/06, ZIP 2013, 1521.

19 Federal Court of Justice, judgment of 22 November 2016, reference No. XI ZB 9/13, ZIP 2017, 318.

20 Federal Court of Justice, judgment of 21 October 2014, reference No. XI ZB 12/12, BGHZ 203, 1.

21 Higher Regional Court of Frankfurt, judgment of 30 November 2016, reference No. 23 Kap 1/06, BeckRS 2016, 114441.

22 Federal Court of Justice, court ruling of 20 June 2017, reference No. XI ZB 24/16.

plaintiffs on behalf of others in one single trial, but that there are essentially two trials, the individual and the model case proceedings – each with the possibility of appeal.

As mentioned above, two model case trials have recently been commenced against Volkswagen AG and Porsche SE. More than 2,000 shareholders filed suits against VW for damages totalling an amount in dispute of approximately €9 billion.<sup>23</sup> The model proceeding is pending in front of the Higher Regional Court of Braunschweig. After delay, the oral hearing was recommenced on 26 November 2018. Owing to the large number of participants, the hearings are taking place in a local convention centre.<sup>24</sup> Separate proceedings against Porsche SE were rejected as inadmissible by the Higher Regional Court of Stuttgart on 27 March 2019. In doing so, the Court has upheld the view that the proceedings before the Higher Regional Court of Braunschweig concern the same subject matter and thus bar all other proceedings on this matter.<sup>25</sup>

### **iii Joinder of parties**

Beyond specific forms of collective redress, German law provides some instruments that may be used to try to mimic some effects of class actions. Several litigants may, or in certain cases must, sue or be sued as joined parties. The option to do so is, however, not provided for all scenarios. For purposes of procedural economy, the courts tend to interpret the requirements liberally insofar that the mere suitability of a joint proceeding and decision-making is considered sufficient to justify a joinder of parties.

In essence, plaintiffs asserting a similar cause of action are able to jointly bring a lawsuit in the same court. In this respect, the possibility of joinder resembles class actions. There are, however, significant differences and striking disadvantages that make it generally unattractive for larger groups of plaintiffs to bring a joint lawsuit in most matters. Most importantly, even though only one proceeding takes place, the court must still rule on each case individually and determine the merits of each plaintiff's claim separately. Each litigant must obtain his or her own judgment. Therefore, the higher the number of plaintiffs is, the greater the difficulties in handling the case become. Moreover, a (voluntary) joinder of parties may result in inconsistent decisions in terms of procedural law, for instance, if a default judgment is rendered against one party but not another, and does not prevent the court from coming to different conclusions on the merits of the individual cases under substantive law. From the plaintiffs' perspective, a joinder of parties may also not be desirable because the litigants are no longer available as witnesses in each other's proceedings as they become party to the consolidated lawsuit. Finally, it is in the court's discretion to separate the joint lawsuits as it sees fit. In short, there is little incentive for plaintiffs to resort to a joinder of parties in order to bring similar claims against one defendant.

### **iv Bundling of claims**

Another way of allowing plaintiffs to partly emulate the effect of class actions is the bundling of claims. Potential plaintiffs may assign their claims to an institution or entity, or may give them the authorisation to assert such claims on their behalf. In this way, multiple claims can

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23 Handelsblatt Online, 'So wollen Tausende Anleger Milliarden von VW erstreiten', 10 September 2018.

24 Süddeutsche Zeitung Online, 'Musterverfahren von Investoren gegen VW fortgesetzt', 26 November 2018.

25 Higher Regional Court of Stuttgart ruling of 27 March 2019, reference number 20 Kap 2/17; 20 Kap 3/17; 20 Kap 4/17.

be concentrated in one proceeding. The ‘myRight’ action chose this approach to assist car owners in asserting their potential claims.

In some ways this may resemble the effects desired by class actions, given that one plaintiff asserts claims on behalf of multiple others. Those others do not carry the burden of engaging in the litigation, yet benefit if the plaintiff prevails. Potential plaintiffs may be less hesitant to allege their claims because the hassle associated with litigation and the risk of bearing the costs in case of defeat are reduced to a minimum. This method does, however, differ from class actions in one important aspect. While the economic effects on potential claimants may be similar to class actions, the legal structure is not. From a legal point of view, every single claim transferred to the plaintiff must be evaluated by the court individually. Even though only one plaintiff appears in court, it must argue and prove every individual case separately. Unlike in class actions, there is no class certification process that ensures at an early stage of the proceeding that one uniform judgment is appropriate for all class members. The mere fact that only one judgment is required provides little relief to the court or to trial economics.

A further drawback is that in order to be valid, the assignment of claims must comply with the requirements of the Legal Services Act (RDG). This law regulates the provision of legal out-of-court services by non-lawyers. Institutions such as consumer organisations and other associations as well as individuals are entitled to provide such services only if they are registered in the legal services register. The registration process sets out high standards on proof of personal suitability and reliability. In addition, theoretical and practical knowledge and a professional liability insurance covering at least €250,000 are required. The European Court of Justice recently added another disincentive to the bundling of claims. The court ruled that a consumer who asserts claims assigned to him or her by other consumers may not rely on Article 18 of the Brussels Ia Regulation. This means the consumer is barred from commencing a lawsuit on behalf of other consumers in the courts of his or her place of domicile.<sup>26</sup>

#### **v Association or interest group complaints**

Collective redress can be obtained to a certain extent by lawsuits brought by associations or interest groups. The Act on Actions for Injunctions (UKlaG) aims at ensuring a comprehensive level of consumer protection and enables private parties to enforce consumer protection laws.

The UKlaG allows qualified representative organisations, such as consumer protection associations and chambers of commerce, to seek injunctive relief against parties that use or recommend the application of certain general terms and conditions. It mainly applies when general terms and conditions are considered to be invalid or a law aimed at the protection of consumers (interpreted in a broad sense) is infringed. While the UKlaG facilitates the enforcement of consumer protection laws, it deviates in important ways from class actions. On the one hand, it allows claims to be brought against illicit practices and standard terms that affect a large number of consumers. By forcing businesses to refrain from using such clauses, relief is provided to a potentially large number of affected claimants. The method is also beneficial from an economic point of view because the trial only involves two parties. On the other hand, unlike class actions, consumers affected by the violation of consumer protection laws are not entitled to receive any further remedy in the course of the lawsuit.

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26 ECJ judgment of 25 January 2018, reference No. C-498/16.

If, for example, a consumer feels entitled to compensation of damages, he or she must commence a separate lawsuit.

#### IV CROSS-BORDER ISSUES

Owing to the fact that there is no general collective redress mechanism in the German legal system, there are no genuine cross-border issues concerning class actions. The aforementioned rules and proceedings are generally applicable to foreigners. With regard to the new Model Case Proceedings, a qualified entity from any Member State can register with the European Commission, thus allowing for standing in Germany.<sup>27</sup>

Class action judgments by foreign courts are largely recognised in Germany. Issues may only arise if the recognition would violate public policy. The fact that the foreign proceeding was a class action does not as such conflict with German public policy. It is widely assumed, however, that enforcement of a class action may violate public policy if a party domiciled in Germany did not have the possibility to opt out of the action.<sup>28</sup> Enforcement of foreign judgments is also likely to violate public policy if a class action judgment awards punitive or treble damages.<sup>29</sup>

#### V OUTLOOK AND CONCLUSIONS

Despite recent developments, means of collective redress are comparably insignificant in Germany, in particular when compared to the class actions in other countries such as the United States. The Model Case Proceedings are to be understood as the German lawmaker walking a thin red line. On the one hand, recent events fuelled the discussion that German law should facilitate collective redress in particular, as it is considered to be a burden for individuals and small or medium-sized businesses to pursue potential claims individually against large or multinational corporations. On the other hand, there is also significant concern that an expansion of collective redress might lead to a ‘claims industry’ or ‘conditions like in the United States’, where – in the perception of many – highly professionalised plaintiffs’ firms have the power to coerce or even blackmail companies with the mere threat of a class action.<sup>30</sup> The German government has, therefore, taken a rather cautious approach to the matter. Yet, as it is widely held that the model case proceedings for capital markets liability have not lived up to expectations, it remains to be seen, whether the new Model Case Proceedings significantly change the landscape of collective redress in Germany.

As at April 2019, no inferences can be drawn from the six-month practical application of the action. A major stumbling block might lie in determining whether Model Case Proceedings and individual claim actions actually pertain to similar facts. The Model Case Proceedings may only bind the court if the case at hand is, in fact, comparable. This, however, opens the door to factual disputes about the nature of the case at hand and its relation to the Model Case Proceedings. Therefore, the proceedings may not in fact substantially alleviate the burden of factual investigation on the courts of the individual claim. Additionally, registering a claim with the action does not require the assistance of an attorney and can thus be achieved

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27 A list of these entities can be found in the Official Journal 2016/C 361/01.

28 Stein/Jonas/Roth, Commentary on the German Code of Civil Procedure, Section 328 Paragraph 113.

29 Federal Court of Justice, judgment of 4 June 1992, reference No. IX ZR 149/91, BGHZ 118, 312.

30 Tilp/Schiefer, NZV 2017, 14, 18.

by savvy consumers. Yet as there are certain requirements of substantiation, consumers might be in for a shock if, years after registering their claim, the registration turns out to be invalid on the basis of a formal requirements.

As a further outlook, the current developments may only be the beginning for collective redress in Germany. In April 2018, the European Union proposed the creation of a representative action for the protection of collective interests of consumers. Under the proposal, qualified entities are enabled to bring representative actions for different types of recourse, including interim or definitive measures to stop and prohibit further action. Additionally, measures for redress orders and declaratory decisions establishing towards harmed consumers are to be provided.<sup>31</sup> Further developments remain to be seen.

Attempts to circumvent the absence of class actions in Germany by resorting to a joinder of parties or a bundling of claims tend to be uneconomic because in these cases every single claim needs to be assessed and decided on separately. The fact that even in these cases individual and model proceedings have to be performed in parallel or subsequently, each with the possibility of appeal, has led to exceptionally long trials. Providing consumer protection organisations with the possibility of taking action against improper general terms and conditions and other violations against consumer protection laws may have an effect on ensuring consumer protection, but does not provide relief to the individual consumer.

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31 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, 2018/0089 (COD).

# HONG KONG

*Mark Hughes and Kevin Warburton*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

While Hong Kong's common law legal system is well established, highly regarded and operates independently from mainland China and Chinese law, its class actions framework remains rather rudimentary in comparison. Unlike a number of other jurisdictions with similarly advanced legal systems, Hong Kong currently does not have specific laws governing class actions or a set of procedures providing for separate forms of class action litigation. The Hong Kong procedures are modelled on the former English representative proceedings applicable in England prior to the enactment of the Civil Procedure (Amendment) Rules 2000.<sup>2</sup>

Multiparty proceedings in Hong Kong are governed by Order 15, Rule 12 of the Rules of the High Court (RHC), which provides:

*Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*<sup>3</sup>

Order 15, Rule 12 of the RHC also provides that the court may appoint a defendant as the representative defendant.<sup>4</sup> The court's judgment would then be binding on all those persons represented by the representative plaintiff or representative defendant, as the case may be. There are equivalent provisions for representative actions in the District Court, which has jurisdiction for matters exceeding HK\$50,000 but below HK\$1 million.<sup>5</sup> There is also a provision for appointing a representative plaintiff in the Small Claims Tribunal, which has jurisdiction for matters not exceeding HK\$50,000.<sup>6</sup>

Institutional support for amending the current class actions regime started to gain traction with the release of the Final Report by the Chief Justice's Working Party on Civil Justice Reform (the CJR Report) in March 2004. The CJR Report called for Hong Kong to adopt a dedicated scheme for multiparty litigation. This resulted in the Law Reform Commission of Hong Kong (LRC) taking up the topic for consideration. In May 2012,

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1 Mark Hughes is a partner and Kevin Warburton is a counsel at Slaughter and May.

2 The multiparty proceedings approach has since been superseded in England by Section III of Part 19 of the Civil Procedure Rules.

3 Order 15, Rule 12(1), Rules of the High Court (Cap. 4A).

4 Order 15, Rule 12(2), Rules of the High Court (Cap. 4A).

5 Order 15, Rule 12, The Rules of the District Court (Cap. 336H).

6 Section 21, Small Claims Tribunal Ordinance (Cap. 338). The Small Claims Tribunal does not permit legal representation in hearings before it.

the LRC released its Report on Class Actions (the LRC Report) in which it considered the multiparty litigation models adopted by various jurisdictions, including Australia, Canada, England and Wales, and the United States. The LRC recommended that Hong Kong introduce a multiparty litigation model that used an ‘opt-out’ approach. In other words, once the court certifies a case is suitable for a class action suit, the members of the class would be automatically bound by the outcome, save and except for those actions involving a foreign plaintiff, in which case an ‘opt-in’ approach should be used instead. A judgment or order given by the court shall not be enforced against any person who is not a party to the proceedings except with the court’s permission.<sup>7</sup>

Further, the LRC also proposed phasing the implementation of class action mechanism by starting first with consumer cases – with funding made available through a Consumer Legal Action Fund (the Fund) managed by the Hong Kong Consumer Council for class action proceedings arising from consumer claims. In this regard, the Fund is intended to give greater consumer access to legal remedies by providing financial support and legal assistance.

However, the Hong Kong Department of Justice (DOJ) is still in the process of exploring the LRC’s recommendations on class action suits. At the time of publication, no legislative bill has been drafted for submission to the Hong Kong Legislative Council for debate and consideration.

## II THE YEAR IN REVIEW

As mentioned above, the implementation of a class action regime in Hong Kong has stalled of late. In May 2012, the DOJ set up a cross-sector working group chaired by the Solicitor General (and an associated subcommittee) to study the LRC’s class action proposals and to make recommendations to the Hong Kong government. As at the end of September 2018, the working group has held 23 meetings and its subcommittee has held 28 meetings but neither have yet given their recommendations.

Despite the proposal to make funding available to consumer-claims class action litigants, there is no concrete plan or legislation to implement the proposal. The reply by the Acting Secretary for Commerce and Economic Development, Dr Bernard Chan, to the Honourable Mr Holden Chow, a member of the Hong Kong Legislative Council, stated that so far there have been eight applications with similar causes of action and the Fund arranged for the cases to be heard at the same time. However, in the absence of a class action regime, none of the cases assisted by the Fund is a class action case.<sup>8</sup>

Recent events in Hong Kong have highlighted the need for Hong Kong to have a more developed legal mechanism for class actions. For example, following the discovery in 2015 that drinking water in certain public housing estates was contaminated by heavy metals, a member of Hong Kong’s Legislative Council wrote to the local media to suggest that a class action model would have been the most effective procedure for resolving claims from numerous affected occupants against the Housing Authority and responsible contractors.<sup>9</sup>

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7 Order 15, Rule 12(3), Rules of High Court (Cap. 4A).

8 <https://www.info.gov.hk/gia/general/201712/13/P2017121300451.htm>.

9 Dennis Kwok, ‘Lead-in-water crisis highlights the need for class-action suits’, *Hong Kong Economic Journal* (25 July 2015), available at: [www.ejinsight.com/20150725-lead-water-crisis-highlights-need-class-action-suits/](http://www.ejinsight.com/20150725-lead-water-crisis-highlights-need-class-action-suits/).



In 2016, the gym chain California Fitness closed down all its outlets overnight and, as at time of writing, still owes approximately HK\$20.8 million to nearly 27,000 former members, in the form of unused gym access fees and unredeemed training sessions. In the absence of a class actions regime, the prospect for these individuals to pursue their claims and be compensated remains bleak.

The introduction of a class action regime has also been linked to Hong Kong's recent push to safeguard against anticompetitive practices. Similar to victims in consumer claims, victims of anticompetitive practices may come in masses, all of whom claiming for a relatively small amount. Thus, the introduction of a class actions regime would likely be seen as positive developments aimed at promoting a fairer economy.<sup>10</sup> While the Competition Ordinance has been in effect since late December 2015, the class action reform proposal continues to stall at the consultation stage. It remains a missed opportunity that the two complementary mechanisms are still not able to operate in tandem so as to allow victims of anticompetitive practices collective redress through a class action procedure.

There were no significant developments in 2018 for reforming Hong Kong's class action regime.

### III PROCEDURE

#### i Types of action available

##### *Representative plaintiff*

For proceedings involving a representative plaintiff, RHC Order 15, Rule 12 provides that where numerous persons have the 'same interest', they may commence proceedings by nominating a representative plaintiff to represent all of them. The only exceptions are proceedings involving: (1) the estate of a deceased person; (2) property subject to a trust; and (3) construction of a written instrument including legislation, each of which is excluded from the representative proceedings regime.

The crucial element in considering whether RHC Order 15, Rule 12 has been satisfied is whether the representative plaintiff has the 'same interest' as the other plaintiffs. The Hong Kong courts have identified a 'three-fold test' to assess whether the 'same interest' threshold is met: (1) common interest; (2) common grievance; and (3) seeking a remedy that is beneficial to all.<sup>11</sup>

The 'common interest' element was traditionally extremely difficult to satisfy. The representative plaintiff originally had to establish that: (1) the same contract applied between all members of the represented class and the defendant; (2) the defendant would rely on the same defences against all members of the class; and (3) the same relief was being claimed by all the class members.<sup>12</sup> If, for example, the defendant could show that he or she had a separate defence against even one of the members, then the 'common interest' part of the test would not be satisfied.<sup>13</sup> Further, the requirement that the same relief shall be claimed by each plaintiff meant that in practice, equitable relief (and not damages, which would more

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10 David Webb, 'Why HK should back competition law and class actions', *International Financial Law Review* (28 February 2012) available at: [www.iflr.com/Article/2986290/David-Webb-Why-HK-should-back-competition-law-and-class.html](http://www.iflr.com/Article/2986290/David-Webb-Why-HK-should-back-competition-law-and-class.html).

11 *CBS / Sony Hong Kong Ltd v. Television Broadcasts Ltd* [1987] HKLR 306.

12 *Markt & Co. Ltd. v. Knight Steamship Co. Ltd* [1910] 2 KB 1021 (CA) at 1040–1045.

13 *ibid*, at 1039–1040.

than likely be different for each plaintiff) was the only relief that could effectively be granted in representative proceedings.<sup>14</sup>

The courts have since moved to relax the strict interpretation with the aim of making representative actions ‘not a rigid matter of principle but a flexible tool of convenience to facilitate the administration of justice’.<sup>15</sup>

Instead of requiring a ‘common interest’, it is now sufficient that there is a ‘common ingredient’ or some ‘common element’ in the causes of action of the represented class members.<sup>16</sup> If the representative plaintiff succeeds in his or her claim, then the defendant would be barred from challenging those common ingredients or elements on the principle of *res judicata*. The other class members would only need to establish the other elements in their own separate proceedings.<sup>17</sup> The ‘same contract’ requirement is also no longer a prerequisite to commencing representative proceedings<sup>18</sup> and it is accepted that members within the represented group may have different degree of interest.<sup>19</sup> The impediment of a defendant raising separate defences against different class members is also no longer a bar to bringing representative proceedings.<sup>20</sup>

If a representative plaintiff discontinues his or her individual claim for any reason, the court may add or substitute him or her with any person in the represented class. To avoid the claim being time-barred if the addition or substitution occurs after the limitation period for the relevant claim has expired, the new plaintiff is treated as being the representative plaintiff at the date of the original writ.<sup>21</sup>

### ***Representative defendant***

The ‘same interest’ requirement also applies to the appointment of a representative defendant. Therefore, the legal principles discussed above for representative plaintiffs are equally applicable to representative defendants. However, where separate defences exist for some but not all members, the same interest requirement will not be met.<sup>22</sup>

The appointment of the representative defendant may only be made by the court on the application of the plaintiffs (discussed in greater detail below).

## **ii Commencing proceedings**

### ***Representative plaintiff***

The individual (or individuals) claiming to represent others with the same interest should commence proceedings as the representative plaintiff or plaintiffs. The representative plaintiff is not required to seek leave of the court or an order of the court to act as the representative plaintiff. He or she may also act as the representative plaintiff on his or her own volition without first seeking the consent of those he or she purports to represent.<sup>23</sup> The representative

14 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 244, 255.

15 *John v. Rees and Others* [1970] Ch 345.

16 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 252, 255.

17 *ibid*, at 255.

18 *Irish Shipping Ltd v. Commercial Union Assurance Co plc (The Irish Rowan)* [1991] 2 QB 206 (CA).

19 *Ng Hing Yau v City Noble Developments Ltd* [2017] HKEC 2470, at 12

20 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch).

21 *Moon v. Atherton* [1972] 2 Q.B. 435, CA.

22 *London Association for Protection of Trade v. Greenlands Ltd* [1916] 2 A.C. 15.

23 *Sung Sheung-hong v. Leung Wong Soo-ching* [1965] HKLR 602.

plaintiff's writ must clearly and precisely define the 'class' being represented.<sup>24</sup> The court must also be satisfied that the 'same interest' test has been met. The court will continually review whether the same interest test is met as the case develops and may order the representative proceedings be dismissed if it is not.<sup>25</sup>

A representative plaintiff action is suitable if there is a large number of plaintiffs with the same interest. If there are only a few members in the defined class, then, in the absence of any other acceptable justification, the court may order that all members be added as plaintiffs to the action instead.<sup>26</sup> There is no set number required, but a class that consists of five or fewer members is unlikely to suffice.<sup>27</sup>

If a person who falls within the member class is to be excluded, that fact has to be included in the description of the class and the excluded persons must be made parties in their personal capacity. It is not possible to state in the writ that the representative plaintiff acts for some of the members of the class without specifying who those members are.<sup>28</sup>

### ***Representative defendant***

An application for the appointment of a representative defendant can be made by the plaintiffs at any stage of the court proceedings. The application must be made by a writ of summons and the representative capacity of the defendant should be endorsed on the writ.<sup>29</sup> The representative application would usually be heard before a master, as opposed to a judge.

Similar to the criteria for representative plaintiffs, the court will consider whether there are sufficiently numerous defendants with the same interest such that it is appropriate to make the representative order.

The court retains the ultimate discretion in selecting the representative and will make a representation order to those it considers most proper, even if it is inconsistent with the choice made by the plaintiffs and defendants.<sup>30</sup> The court has the power to compel a defendant to be the representative defendant if it determines that defendant is the most suitable candidate, irrespective of whether that defendant wishes to be the representative defendant.<sup>31</sup>

### **iii Defining the 'class'**

The potential plaintiffs must satisfy the court that their choice of candidate for representative plaintiff or representative defendant has sufficient interests in common with the class of individuals the potential plaintiffs contend the representative plaintiff or representative defendant represents. It is possible, in principle, for overseas plaintiffs to be included provided that they share the same interest as the representative plaintiff.

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24 *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171.

25 *Hong Kong Kam Lan Koon Ltd v. Realray Investments Ltd (No. 2)* [2005] 1 HKC 565.

26 *Malayan Banking Berhad v. China Insurance Co Ltd.* [2003] HKEC 708.

27 *Re Braybrook* [1916] WN 74.

28 *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171.

29 Order 6, Rule 3(b), Rules of the High Court (Cap. 4A).

30 *Walker v. Sur* [1914] 2 KB 930.

31 *Baynard Ltd v. Secretary for Justice* [2011] 1 HKLRD C3 English Judgment.

#### **iv Binding effect on the class**

A judgment or order given in a representative proceeding will be binding on all members represented by the representative plaintiff or representative defendant.<sup>32</sup> This also applies to judgments in default as well as judgments delivered after trial. However, an individual bound by the judgment in default could apply to be added to the action and then apply for the judgment in default to be set aside. In contrast, a judgment properly rendered at trial can only be challenged by the represented member on appeal.

The binding nature of the representative proceedings together with the lack of consent required from class members before a representative plaintiff commences proceedings mean that it will fall upon the individual members to opt out by ensuring they are specifically excluded from the representative action when the writ is served.

#### **v Procedural rules**

##### ***Enforcement***

Leave of the court is required to enforce a judgment against an individual who is not a party to the proceedings but who is a member being represented. The application for leave will be made by way of summons before a master and must be served personally on the individual against whom the judgment is to be enforced.<sup>33</sup>

The individual member cannot challenge the validity or binding nature of the judgment. Nor can he or she put forward any defence that could have been (but was not) raised in the proceedings. He or she can only challenge enforceability on the ground that the facts and matters in his or her particular case meant he or she, in fact, fell outside the definition of the class being represented and therefore the judgment should not be binding on him or her.

##### ***Size of the class***

The size of the class should be determined at the outset by the plaintiffs' use of a clear definition of the 'class' being represented. The definition will be put forward when serving the writ through the representative plaintiff, or when making the representative application for appointment of a representative defendant. The court's concern generally is whether the represented class is large enough such that it is appropriate to make use of the representative proceedings mechanism. As discussed in subsection ii, a class consisting of five or fewer members is likely too small. If the class is too small, the definition is not clearly defined or the court otherwise concludes that the representative method is wholly inappropriate in the circumstances, then the court may order that the proceedings be dismissed.

##### ***Judge or jury***

Apart from cases involving defamation, all civil actions in Hong Kong are heard by a single judge.

##### ***Speed of the litigation***

The speed of the litigation for the representative proceedings will vary depending on the usual factors, such as the cause of action, the issues, the facts and the court diary. One of

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32 Order 15, Rule 12(3), Rules of the High Court (Cap. 4A).

33 Order 15, Rule 12(4), Rules of the High Court (Cap. 4A).

the principal aims of representative proceedings is to save time and resources by having the representative action be binding on all represented members such that, once that judgment is obtained, represented members are estopped from re-litigating common elements in their own proceedings.

### ***Liability and quantum***

As discussed above, in the past it was not possible to bring a representative action for damages. Those actions were instead confined to seeking equitable relief. The recent trend has been for the courts to relax this rigid approach, with the effect that the losing party to a representative proceeding is estopped from challenging the common elements for establishing liability (or lack thereof) in subsequent proceedings. The winning side need only establish the remaining elements (if any) in subsequent proceedings. The quantum for each class member, except the representative party, will also be determined in the subsequent separate proceedings. While that may save time in the overall process, the substantive hearing itself is likely to take as long as other litigation and, perhaps, even longer in the event there are disputes about the definition of the class or identity of the representative parties.

### ***Damages and costs***

In civil claims, the damages to be awarded will be determined by the presiding judge (save in defamation cases that are tried by jury, where the jury also determines the level of damages). Ordinary principles for assessment of damages will apply with the aim of compensating the plaintiff for loss suffered or putting him or her back in the same position as he or she would have been had the defendant not committed the wrong. In special cases, for example where the defendant's profits exceed the loss suffered or where there is a strong need for deterrence, the court may disgorge the defendant's profits or impose punitive damages.

Hong Kong still maintains the common law offences of champerty and maintenance. This position has been reaffirmed by the highest court in Hong Kong, the Court of Final Appeal.<sup>34</sup> Therefore, success fee arrangements for recovery of costs, such as conditional or contingency fees, are not permitted except under three limited exceptions, namely where: (1) a person may have a legitimate common interest in the outcome of the litigation to sufficiently justify him supporting the litigation; (2) it is in the interests of promoting access to justice to fund a plaintiff who would otherwise be unable to pursue litigation owing to a lack of funds; and (3) funding is provided to a liquidator to pursue litigation that may improve the return to creditors.<sup>35</sup> Hence, litigants funded by the Ordinary Legal Aid Scheme or the Supplementary Legal Aid Scheme, aimed at ensuring those without the means still have access to justice, are required to make a contribution out of their recovered proceeds back into the scheme fund.

The LRC Report has recommended that a general class actions fund, similar to the Supplementary Legal Aid Scheme fund, be set up to provide financial support to means-tested eligible class action plaintiffs, who must in turn contribute part of their recovered proceeds back into the fund.

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<sup>34</sup> *Unruh v. Seeberger* [2007] 2 HKLRD 414.

<sup>35</sup> *ibid.* See also *Re Cyberworks Audio Video Technology Limited* [2010] 2 HKLRD 1137.

### ***Settlement***

The representative plaintiff is the individual who has a real interest in the outcome of a case and, prior to the rendering of the court's judgment, may choose to settle and discontinue his or her action. In such an event, the rights of the represented members are not extinguished and they may commence proceedings in their own name. The court can also add or substitute an unnamed member of the class as the plaintiff of the action, who will be treated as being brought in at the date of the original writ.

## **IV CROSS-BORDER ISSUES**

Despite attempts to make representative proceedings more flexible, there are very few instances of the mechanism being used in practice. In principle, an overseas plaintiff should not be treated differently to a local plaintiff falling within the same member class in a representative proceeding. However, the usual practice in respect of overseas plaintiffs is for them to pursue their case separately in their own name as opposed to relying on a representative plaintiff. It is also the usual practice for overseas plaintiffs to separately name and join each defendant to an action unless it is in their strategic interest, due to the large number of defendants, to apply to court for a representative defendant to be appointed.

## **V OUTLOOK AND CONCLUSIONS**

Hong Kong's representative proceedings system remains an underutilised mechanism for plaintiffs pursuing class-action-type claims. As the Chief Justice's Working Party on Civil Justice Reform Interim Report and Consultative Paper note, there are still many 'self-evident' limitations under the existing system. First, the current system is still comparatively restrictive when it comes to defining 'same interest'. Second, even if a judgment is rendered in a representative proceeding, there is still a lack of finality given that class members who are, in principle, bound by the decision can still plead that the facts and matters of their own case mean they should fall outside the represented class. Finally, the existing provisions may not be able to cope with the special problems that arise in the context of a multiparty litigation.<sup>36</sup>

Likewise, the LRC Report observes that very few Hong Kong cases have made use of representative proceedings. The LRC attributes this to the fact that despite initiatives to reform the system, judicial actions have been piecemeal at best and many hurdles still exist in order to bring about a representative proceeding, which dissuades plaintiffs from choosing this route.

The LRC's recommendations represent a positive step forward in the effort to reform the current class action regime in Hong Kong. However, the pace of reform is far from quick and Hong Kong is still some way off benefiting from a class actions regime that adequately addresses the needs of large-scale, cross-border multiparty litigation. The Hong Kong government appears hesitant to charter into the waters of class actions regime as it currently takes the view that the existing system provides adequate channels for claimants to seek judicial remedies, and encourages potential litigants to use channels other than litigation, such as mediation, to resolve disputes.<sup>37</sup> Nevertheless, the Panel on the Administration

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36 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001) at pp. 148–149.

37 <https://www.info.gov.hk/gia/general/201712/13/P2017121300451.htm>.

of Justice and Legal Services of the Legislative Council will review the work progress of introducing the class action regime within the 2018–2019 legislative session. It is, therefore, hoped that the working group and subcommittee will be able to make recommendations in light of the LRC’s class action proposals in the near future and the DOJ will map out the process of drafting legislation to reform and update Hong Kong’s class action regime.

# IRELAND

*April McClements and Aoife McCluskey*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

There is no legislative framework in Ireland to facilitate class actions. However, multiparty or multi-plaintiff litigation does occur and is often brought by way of ‘representative actions’ and ‘test cases’.

The legal basis for representative actions is set out in the Rules of the Superior Courts,<sup>2</sup> which provide that where numerous persons have the same interest in a cause or matter, one or more persons may sue or be sued or may be authorised by the court to defend a matter on behalf of or for the benefit of all interested persons. In addition to this legal basis, various statutory provisions allow for a person or persons to sue in a representative capacity. By way of example, Section 28 of the Civil Liability Act 1961 allows an action for damages to be brought where death is caused by a wrongful act, neglect or default. The action may be instituted by the personal representative of the deceased or by all or any of the dependants ‘for the benefit of all the dependants’.<sup>3</sup>

The basis for test cases is the inherent jurisdiction of the court to make directions in respect of the trial of proceedings and the duty of the court to ensure that its resources and the resources of parties to litigation are not inappropriately wasted by unnecessary duplication. Consequently, where a number of cases have similar issues it is possible for one case to be selected as a test case and the subsequent cases to be stayed pending resolution of the test case.

Multiparty litigation commonly arises in financial services litigation, particularly in cases involving the mis-selling of a financial product to a large number of consumers. Cases involving latent defects in buildings caused by the use of pyrite in the construction process that involve multiple litigants have also been brought by way of representative actions or test cases. Other examples of multiparty litigation in Ireland include claims relating to army deafness, contaminated blood products and tobacco-related illnesses.<sup>4</sup>

The Law Reform Commission has previously recommended (as part of its Report on Multi-Party Litigation in 2005), that a formal opt-in procedure be introduced. However, such a structure is yet to be implemented.

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1 April McClements is a partner and Aoife McCluskey is a senior associate at Matheson. The authors would like to thank Valerie Sexton for her contribution to this chapter.

2 Rules of the Superior Courts Order 15 Rule 9.

3 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

4 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.



In November 2017, the Multi-Party Actions Bill 2017 was published as a private member's bill,<sup>5</sup> containing many of the Law Reform Commission's recommendations. The government considered the Bill and while its intent was not dismissed, the Bill was opposed by the government.<sup>6</sup> The proposals in the Bill have been referred for consideration as part of an ongoing Review of Civil Justice Administration, chaired by Mr Justice Peter Kelly, upon the request of the government. The Review is discussed in more detail in Section V.

## II THE YEAR IN REVIEW

Litigation funding is often considered in the context of multiparty litigation. As the law currently stands in Ireland, professional third-party funding is prohibited on the basis that it offends the rules of maintenance and champerty that exist under the Maintenance and Embracery Act (Ireland) 1634. While professional third-party funding arrangements are unlawful in this jurisdiction, the Irish courts have found that third parties that have a legitimate interest in proceedings, such as shareholders or creditors of a company involved in proceedings, can lawfully fund them, even when such funding may indirectly benefit them. Therefore, funding of representative actions by the class members does not offend the laws of maintenance and champerty, as the class has a pre-existing legitimate interest in the litigation.

The impact of the 1634 Act was considered by the High Court in Ireland in a number of cases between 2013 and 2015 and was considered again in 2016 in the context of the legality of professional third-party litigation funding in the case of *Persona Digital Telephony Ltd & Another v. Minister for Public Enterprise & Other*. In that case, an application was made to assess the legality of a third-party funding agreement. The plaintiff, Persona Digital Telephony Limited, was unable to fund the proceedings. A professional third-party funder from the UK was prepared to enter into a litigation funding arrangement. The plaintiff sought a declaration from the High Court that the litigation funding arrangement did not constitute an abuse of process or contravene the rules on maintenance and champerty.

While the High Court had some sympathy for the plaintiff, it affirmed that both maintenance and champerty are part of Irish law and are torts and criminal offences. The High Court found that to permit a litigation funding arrangement by a third party with no legitimate interest in the proceedings would necessitate a change in legislation and this could not be done by the High Court. This decision was unexpected, given some *obiter dicta* comments from the High Court in a judgment approving ATE insurance to the effect that the laws have to be interpreted in the context of modern social realities (*Greenclean Waste Management Ltd v. Leahy* [2014] IEHC 314). Further, the High Court in *SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, Optimal Investment Services, SA and Banco Santander, SA* indicated that litigation funding could be deemed by the court to be legitimate in future as reflecting 'modern social

5 A private member's bill (PMB) is a draft law that is proposed by a single member or members (Teachtaí Dála or Senators), rather than by the government.

6 The Bill was opposed on a number of grounds including the fact that many years had elapsed since the publication of the Law Reform Commission's recommendations, many of which had been incorporated into the Bill, and there had been a number of key developments in the intervening period. In addition, the government considered the Bill to be 'technically flawed' as it sought to enact as primary legislation a scheme that was intended by the Law Reform Commission to be in the form of rules of the Superior Courts.

realities'. The plaintiff, Persona Digital Telephony Limited, appealed the decision of the High Court.

Given the issues of public importance raised in the case, the Supreme Court allowed the plaintiff to bypass, or 'leapfrog', the Court of Appeal to have the appeal heard directly by the Supreme Court itself. The decision of the Supreme Court was handed down in May 2017. In dismissing the appeal and finding that the third-party litigation funding was unlawful (where none of the exceptions apply), Denham CJ stated that it would not be appropriate for the Supreme Court to develop the common law on champerty, pointing out that it is a 'complex multifaceted issue, more suited to a full legislative analysis'. The Chief Justice emphasised that the third-party funder in this case had 'no connection with the plaintiffs, apart from an agreement to fund their proceedings', distinguishing it from the recent decision of *Thema International Fund v. HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 I.R. 654, in which the court recognised that it is lawful for a party with a legitimate interest in the litigation to fund the litigation of another party and a creditor or shareholder may have such a legitimate interest.

Therefore, the Supreme Court has confirmed that third-party funding is unlawful in Ireland by reason of the Maintenance & Embracery Act (Ireland) 1634, which remains the law in Ireland, so 'a person who assists another's proceedings without a *bona fide* independent interest acts unlawfully'. The courts have clearly indicated that it is a matter for the legislature rather than the courts to develop the law in this area. However, in his Supreme Court judgment in the *Persona Digital* case, Clarke J left open the possibility of the courts, in their role as guardians of the Constitution, reconsidering the position in circumstances where there is a breach of the constitutional right of access to the courts and 'no action' has 'been taken by either the legislature or the government to alleviate the situation'. In the meantime, however, it is clear that third-party funding from a third party with no legitimate interest in the litigation to progress a claim in Ireland remains off limits unless and until the legislature addresses this issue.

The decision in *SPV Osus Ltd*, referred to above, which addressed the issue of maintenance and champerty – but not in the context of litigation funding, came before the Supreme Court in 2018 for consideration of the related issue of litigation trafficking. In this case a fund, Optimal Strategic US Equity Ltd (SUS), was entitled to make a claim in the US bankruptcy proceedings of Bernard Madoff. In order to allow investors in the fund to trade their share in the bankruptcy claim (which is allowed in the US), SUS set up a special-purpose vehicle SPV OSUS Ltd (SPV) and assigned the bankruptcy claim to it. The majority of the original investors in SUS swapped their shares for shares in SPV and then traded the shares in SPV to distressed debt hedge funds. SPV then issued proceedings in Ireland against the custodian to the fund claiming an entitlement to the net asset value of the investments of SUS as at 30 November 2008.

The custodian challenged the standing of SPV to bring proceedings on the basis that the assignment was contrary to public policy, and should not be enforced for reasons of maintenance and champerty. The High Court upheld the custodian's application and dismissed the action, holding that the transaction was void, contrary to public policy, and constituted trafficking in litigation.

In March 2017, the Court of Appeal upheld the ruling of the High Court. The Court of Appeal confirmed that, under the rules of champerty, an assignment is unenforceable unless one or more of the exceptional circumstances apply that would grant it legality (for example, an assignment of a bare cause of action that is incidental to the property transferred,

or the assignment of a debt), none of which applied in this case. The Court of Appeal further ruled that there was no requirement to prove an improper motive under the principles of maintenance and champerty. SPV was granted leave to appeal to the Supreme Court.

In July 2018, the Supreme Court upheld the decision of the Court of Appeal, confirming that the assignment in question did not fall within any of the exemptions to the rule against the assignment of a right to litigate nor did it fall within some plausible and permissible extension to the exemptions to the rule against the assignment of a right to litigate. However, the Supreme Court reiterated the sentiment expressed in the *Persona Digital* case, namely that it is a matter for the legislature to develop the law in the area of right of access to the courts. Notwithstanding this, the Supreme Court was of the view that ‘where the legislature persistently fails to take corrective measures to vindicate a constitutional right, such as the right of access, responsibility in this regard will fall to be discharged by the judiciary’.

### III PROCEDURE

As mentioned above, multiparty litigation in Ireland may proceed by way of ‘representative action’ or ‘test case’. There is no formal class action procedure in Ireland. A representative action arises where one claimant or defendant, with the same interest as a group of claimants or defendants in an action, institutes or defends proceedings on behalf of that group of claimants or defendants.

Representative actions will typically arise where the class either has a pre-existing relationship with the main party, or where the class is relatively small. Because of this, the more common approach to multiparty litigation in Ireland is usually the test case.

A test case can arise where numerous separate claims arise out of the same circumstances. By way of example, in 2008 the Commercial Court was faced with more than 50 individual shareholder claims related to the fraudulent investment operations run by Bernard Madoff. The Commercial Court exercised its inherent jurisdiction in deciding to take forward a small number of cases initially, as test cases. In this instance, it was decided that two cases by shareholders and two cases by funds would be heard sequentially as a first step and the Court stayed the other claims pending the resolution of the four test cases.

A similar approach was adopted by the Irish Commercial Court in relation to claims for the mis-selling of financial products that were initiated by over 200 claimants against ACC Bank in 2010. Five claimants’ cases were heard as test cases and the remaining claimants agreed that ‘the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings.’

#### i Types of action available

In order to bring a representative action there must be ‘a common interest, a common grievance and relief in its nature beneficial to all’.<sup>7</sup> There is sufficient ‘common interest’ where the dispute involves joint beneficial entitlement to property, such as customary rights or corporate shareholdings. In contrast, the courts have refused to extend the representative procedure to actions founded in tort, a point emphasised by the Supreme Court in *Moore v. Attorney General (No. 2)*. Notwithstanding this pronouncement, courts have occasionally

<sup>7</sup> *Duke of Bedford v. Ellis*.

entertained representative actions founded in tort where the relief sought is injunctive. There is an analogous prohibition on representative actions against individuals for breach of constitutional rights.<sup>8</sup>

Test cases are not limited to any particular types of action. However, in practice these procedures are typically utilised in tort actions where a negligent act or misrepresentation has affected a number of people who wish to have their rights vindicated. For example, claims for the mis-selling of financial products will often involve an allegation that the financial service provider committed the torts of misrepresentation or negligent misstatement.

The following limitation periods apply to the various causes of action:

- a* tort claims: six years from the date of accrual of the cause of action;
- b* contract law: six years from the date of breach;
- c* claims for liquidated sums: six years from the date the sum became due;
- d* personal injuries under negligence, nuisance or breach of duty: two years from the date of the cause of action accruing or the date the claimant first had knowledge, if later;
- e* land recovery: 12 years from accrual of the right of action;
- f* maritime and airline cases: two years from the date of accrual of the cause of action;
- g* defamation: one year from the date of accrual of the cause of action; and
- h* judicial review: the claim must be brought promptly and in any event within three months of the date of the cause of action (the court can extend this period if there is a good reason).

The period during which mediation takes place in a cross-border dispute to which the Mediation Directive applies is excluded from the calculation of the limitation periods.

The Law Reform Commission's Report on Limitation of Actions 2011 discusses the limitation of all actions (although property claims are excluded). The Law Reform Commission recommended the introduction of a limitation period of two years, to run from the date of knowledge of the claimant for 'common law actions' (breach of duty, negligence, contract and nuisance). The 'date of knowledge' is the date from which the claimant knew or ought to have known of the cause of action and 'knowledge' includes both actual and constructive knowledge. Interestingly, an 'ultimate' limitation period of 15 years was also recommended. It was proposed that this would run from the date of the act or omission giving rise to the cause of action and there would be statutory discretion to extend this limitation period. It should be noted, however, that the proposals put forward by the Law Reform Commission are not binding and, to date, none have been implemented.

The Financial Services and Pensions Ombudsman Act 2017, enacted in July 2017, revised the limitation period for bringing complaints to the Financial Services and Pensions Ombudsman (FSPO) in respect of 'long-term financial services'. The definition of a long-term financial service captures products or services where the maturity or term extends beyond six years, and is not subject to annual renewal.

The revised limitation period for complaints in relation to long-term financial services is either: six years from the date of the act or conduct giving rise to the complaint; or, three years from the earlier of the following two dates:

- a* the date on which the consumer making the complaint first became aware of the said act or conduct; or
- b* the date on which that consumer ought to have become aware of that act or conduct.

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8 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

Prior to the commencement of the Act, the Financial Services Ombudsman (the predecessor of the FSPO) had no jurisdiction to investigate complaints where the conduct complained of occurred more than six years before the complaint is made and had no discretion to extend this limitation period. This extension only applies to complaints to the FSPO and not to claims brought before the courts.

For other short-term financial services, the limitation period is six years.

It must be anticipated that multiparty litigation, by way of complaints made to the FSPO, could arise as a result of the change to the limitation period.

## **ii Commencing proceedings**

To litigate the various actions set out above, a person must have sufficient interest in the subject matter of the action. Provided a person has sufficient interest or standing, that person may institute proceedings. Alternatively, in respect of representative actions, where a claimant or defendant has the same interest as a group of claimants or defendants in an action he or she may institute or defend proceedings on behalf of that group of claimants or defendants.

To commence proceedings by way of representative action, an application must be made to the court for an order permitting the claimant or defendant to bring or defend the proceedings on a representative basis. The application for such an order will be grounded by an affidavit that lists each of the interested parties who have agreed to be represented in the proceedings. Each member of a class has to 'opt-in'; that is to say that the court must be satisfied that each individual has authorised the main party to represent them. Where the claimant or defendant sues in a representative capacity, the endorsement of claim is required to show the capacity in which the party is suing or being sued.<sup>9</sup> There is a strict requirement that the parties must have the same interests in the same proceedings as opposed to merely similar or 'common' interests. Any judgment or order in the action will usually then bind all claimants or defendants represented.

To commence proceedings by way of a test case, each party must institute its own case and then one party becomes the benchmark by which the remaining cases are resolved. Importantly, however, each case is judged on its own merits (by a judge alone) and the fact that causation is proved in the context of one case does not necessarily guarantee the same outcome in all subsequent cases unless the facts, liability issues and causation are identical. The Irish courts take great pains to ensure that each case is judged on its own merits, and this is seen to benefit defendants, as plaintiffs are put to the expense of having to fully prove their case despite the fact that numerous similar (but not necessarily identical) cases may have already been determined. In reality, however, if there has been a negative finding against a defendant in a test case and liability has been established, where there are numerous similar cases yet to be heard, a defendant (or its insurers) will attempt to settle the outstanding claims unless they can be distinguished in terms of liability, causation or fact from the test case.

## **iii Procedural rules**

The average length of proceedings in the High Court (from issue to disposal) is approximately two years. This can vary, however, depending on the complexity and urgency of the case.

The High Court has a separate commercial division (the Commercial Court). This specialist court has extremely stringent case management procedures in place and judgment

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<sup>9</sup> Rules of the Superior Courts Order 4 r 9.

is generally delivered quite promptly. According to the Commercial Court's own statistics, 90 per cent of cases that come before it are concluded within one year.

#### **iv Damages and costs**

In representative actions, the plaintiff is entitled only to declaratory and injunctive relief.<sup>10</sup>

The test case plaintiff will have their award of damages judged on the merits of their individual case.

Damages can be compensatory or punitive, for example:

- a* general damages: compensation for loss with no quantifiable value, such as pain and suffering;
- b* special damages: compensation for precise financial loss, such as damage to property;
- c* punitive (exemplary) damages: awarded to punish the behaviour of a defendant (rarely awarded); and
- d* nominal damages: awarded where the claimant has been wronged but has not suffered financial loss.

The level of damages that may be awarded is determined by the court before which the action is brought; claims up to a value of €15,000 are dealt with by the District Court, while the Circuit Court deals with claims with a value between €15,000 and €75,000 (the upper limit is €60,000 for personal injuries cases). Any claim with a value in excess of €75,000 is heard by the High Court, which has an unlimited monetary jurisdiction. Choosing the correct court is a particularly important step for a claimant as one can be penalised as to costs by a court, where they receive an award of damages that does not meet that court's jurisdictional threshold. Provided that court is also of the opinion that the action could have been taken in a lower court, it is permitted to award the typical costs of the lower court action.

As noted previously, subsequent litigation following a test case is often settled on the basis of the test case outcome and, in such circumstances, an award of damages does not fall to be considered by the court.

While there are no specific costs rules applicable to multiparty litigation, costs 'follow the event'<sup>11</sup> in Ireland (i.e., the successful party is entitled to recover its costs from the unsuccessful party). Costs are ultimately a matter of discretion for the court, however, and although this 'loser pays' rule is the norm, it is becoming more common for issues-based cost awards to be made. It should also be noted that costs in this jurisdiction are usually awarded on a 'party-party basis'. This means that the successful party is only entitled to recover the costs reasonably incurred by them in prosecuting or defending the litigation. Recoverable costs are usually anywhere between 50 and 75 per cent of the total costs incurred.

Irish lawyers are expressly prohibited from charging fees by reference to a percentage of damages awarded. Litigation lawyers are permitted, however, to enter into arrangements known as 'no foal, no fee' or 'no win, no fee' arrangements. These are conditional arrangements with clients, where any payment made at all by the client to the solicitor is conditional on the success of the case. No foal, no fee arrangements are more common in individual personal injuries claims than in commercial cases.

As mentioned above, multi-plaintiff litigation can also arise in the form of complaints made to the Financial Services and Pensions Ombudsman (FSPO). The FSPO is a quasi-judicial

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10 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

11 Rules of the Superior Courts Order 99 Rule 1(4).

body tasked with resolving disputes outside of litigation. While parties to complaints to the FSPO are permitted to be legally represented at each stage of the complaints process, the costs of such representation are a matter for the party who incurs the costs to bear himself or herself and the FSPO is not empowered to award costs.

#### **v Settlement**

There are no rules of court to be followed in multiparty litigation in Ireland. Where multiparty litigation is brought by way of a test case, the test case effectively becomes the benchmark by which the remaining cases are resolved. However, because the subsequent claimants and defendants are not parties to the original litigation, they are not bound by the result of the test case and are not party to any settlement agreement entered into in the test case. Although not bound by the result, the test case has an effect by virtue of the doctrine of precedent. Therefore, the benefits of the original ruling may be extended to cases involving factual situations identical to those of the test case. As a result of this, subsequent litigation is often settled on the basis of the test case outcome.

Where multiparty litigation is brought by way of a representative action, since representation extends to all aspects of the legal proceedings, including settlement, the representative has autonomy over the way in which the litigation is conducted, subject to the expectation that he or she will act in the interests of the class. Generally, any judgment or order in the action will bind all persons represented at the direction of the court. Representative actions, therefore, presuppose a level of confidence between the representative and the members of the class.<sup>12</sup>

A settlement agreement between parties to litigation is a binding contract and, subject to the ordinary rules of contract law, the parties are free to choose to enter into and agree the terms of a settlement agreement. Court sanction is not required for a settlement save where the case is one in which money or damages are claimed by or on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties.<sup>13</sup>

## **IV CROSS-BORDER ISSUES**

In June 2013, the European Commission recommended that all Member States adopt collective redress schemes, for both injunctive and compensatory relief. This Recommendation deals with ‘mass harm situations’, which are defined as those where two or more natural or legal persons claim to have suffered harm from the same illegal activity carried out by another person (whether natural or legal), in breach of their EU rights.

Other issues discussed in the Recommendation include: funding, legal fees and legal costs, standing to bring a representative action; cross-border disputes; alternative dispute resolution and damages. Although the Recommendation was not binding, its intention was to shape future legislation in the area. The European Commission carried out a review in 2017 on how the Recommendation was implemented and found an absence of a harmonised approach to collective redress.

As a result of this, in April 2018 the European Commission published a draft Directive that proposes a new type of European-wide collective redress mechanism for consumers. This would allow a ‘qualified entity’ take a representative action before a Member State court on

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12 Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.

13 Rules of the Superior Courts Order 22 Rule 10.

behalf of a group of consumers who have been affected by a breach of European law, to seek redress for the affected group. This would increase litigation risk for industry sectors that are subject to EU regulation, in areas such as product liability, data protection, financial services, travel and tourism, energy, telecommunications and environment. The draft Directive will require further consultation in the European Parliament and the European Council and is likely to be amended prior to publication in the Official Journal. It is anticipated that it may be adopted in 2020.

When it comes to forum shopping, Ireland may be seen as a less attractive option for class actions due to the lack of a legal framework facilitating class actions; however, in numerous *forum non conveniens* challenges to jurisdiction in New York and Florida, the US courts have dismissed US class actions in favour of Ireland.

## V OUTLOOK AND CONCLUSIONS

Almost 14 years have now passed since the Law Reform Commission recommended that a formal procedural structure be put in place to deal with multiparty litigation, however, this recommendation has yet to be implemented and does not form part of the government's current legislative programme. As mentioned in Section I, the Bill, which incorporates the Law Reform Commission's recommendations, progressed to the third stage in the legislative process in early 2018, however, there has been little progress since then and it was made clear earlier in the process that the Bill lacks the government's support. Accordingly, legislative intervention does not appear to be imminent.

Multiparty litigation and litigation funding are issues that go hand in hand as plaintiff lawyers claim that the absence of rules permitting litigation funding restrict their clients' ability to obtain access to justice. The law on litigation funding in Ireland has been subject to considerable clarification in recent years; however, following the Supreme Court's recent decision in the *Persona Digital* case, confirming that third-party litigation funding remains unlawful, it is clear that any further development of the law in this area will require legislative reform. The Contempt of Court Bill was published in late 2017 and included provisions to abolish the offences of maintenance and champerty. However, the Bill does not appear on the government's legislative programme, so it remains to be seen whether it will be progressed.

Both the Bill and the issue of litigation funding are two of the issues being considered by Mr Justice Peter Kelly in the Review of Civil Justice Administration. The objective of the review is to identify recommendations that would improve access to civil justice in Ireland. As such, there may be change on the horizon. The issue of litigation funding is also being examined by the Law Reform Commission, which proposes to make recommendations next year.

The absence of a formal structure does not seem to have impeded multiparty litigation in this jurisdiction and, in the absence of legislative reform, it can be anticipated that multiparty litigation will continue to proceed on the basis of test cases for the foreseeable future. However, the introduction of a formal structure would certainly be consistent with the recommendations of both the Law Reform Commission and the European Commission. At the time of writing, we understand that the Review of Civil Justice Administration will be concluded in 2020 and a report published.



# ISRAEL

*Hagai Doron and Uriel Prinz*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Israel's class action law allows any individual, as well as qualified non-profit organisations and government commissions, to file a claim on behalf of a group of people who may not have requested any such claim, and who may not even be aware of the fact that a claim is being managed on their behalf. Should the class action be approved, its result (if settled or dismissed) is likely to impair the rights of those claimants in whose name it is brought. Class actions may also constitute an injury to the procedural rights of defendants, who are forced to deal with claims that, whether justified or not, may be of unusual scope and risk.

Despite these and other considerable difficulties, the class action is an important tool that forms an integral part of the Israeli legal system, serving as a bulwark to balance the interests of the individual against corporations that interact with the public on a large-scale basis. The Class Actions Law, 2006 (the Law) is a detailed statute governing all class action claims in Israel, which seeks to strike the necessary balance between the competing interests, rights, and policy considerations at stake in the class action proceeding.<sup>2</sup> The Law reflects the basic premise that a class action is not just a procedural method for handling claims, but first and foremost a tool for promoting the public interest, with the understanding that worthy class actions should be encouraged without being unduly hampered by procedural stumbling blocks.<sup>3</sup>

The Law's innovations include an expansive set of qualified causes of action, a unified framework for class actions including detailed guidelines and regulations, legal standing for certain government entities and third-sector organisations as parties and as *amici curiae*, guidelines for 'opt-in' versus 'opt-out' actions, comprehensive guidelines for the appointment of representative counsel as well as for court approval of settlements and fees, a substantial degree of flexibility with regards to damages, causality and remedies, a public record of motions for approval of class actions, and the establishment of a fund to assist class actions that promote the public interest.

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1 Hagai Doron and Uriel Prinz are partners at S Horowitz & Co. The authors express their gratitude to David Silber, Liat Mayoni, Saar Sedbon and Bernard David for their assistance in preparing this chapter.

2 The Class Actions Law, 2006, 2054 S.H. 264 (12 March 2006).

3 Introduction, commentary to the Class Actions Bill, 2006, 234 H.Ch. 256, 257 (26 January 2006). Regarding the Law as substantial public policy, rather than a purely procedural statute, see (Supreme Court Justice) Esther Chayut, 'Class Actions as a Tool for Public Civil Enforcement' (in Hebrew), 19 *Mishpat Va'asakim* 935, 942–943 (August 2016).

Since the Law's enactment, the number of motions filed per year for approval of a class action has multiplied more than fiftyfold in one decade, and has been estimated at 1,250 motions for 2018.<sup>4</sup> By number, nearly 55 per cent of the motions filed are related to consumer products, with insurance-related and banking-related claims together corresponding to an additional 3 per cent and 2 per cent related to breaches of securities and competition law.<sup>5</sup> By amount consumer products and banking claims accounted for five of the top approved settlements for 2018, accounting for 247 million Israeli new shekels of the aggregate 425 million Israeli new shekels awarded to the public from class actions.<sup>6</sup>

## II THE YEAR IN REVIEW

Recent developments in Israel's case law on class actions include an increased tendency of courts to rule in favour of motions for approval of a class action, alongside increased judicial review of the class 'agents' (i.e., representative plaintiff and counsel seeking fees and costs alongside the collective claims that they promote).

Despite this, most of the certification motions in 2018 ended with arrangements for withdrawal.

In addition, 2018 saw a decrease of approximately 13 per cent in the number of certification motions that were submitted in comparison with 2017. The reason for this probably stems from a 2018 amendment to the Court Regulations (Fees) 2007, which introduced a fee related to the bringing and disposal of a certification motion for a class action. The regulations now provide that in order to bring an application for the certification of a class action, the representative plaintiff is required to pay part one of the fee in the amount of 6,000 Israeli new shekels when filing a class action motion in the district court, 3,000 Israeli new shekels when filing a class action motion in the magistrates' court and there are no fees payable when filing a class action motion against governmental and local authorities. Where the certification motion is dismissed or withdrawn, the representative plaintiff is required to pay part two of the fee in the amount of 10,000 Israeli new shekels in the district court, 5,000 Israeli new shekels in the magistrates' court or 1,800 Israeli new shekels for certification motions against governmental or local authorities (irrespective of whether the representative plaintiff filed the motion in a district or magistrates' court – if the respondent is a governmental or local authority the court fee is always 1,800 Israeli new shekels). On the other hand, should the certification motion be successful, the respondent will be required to pay part two of the fee and reimburse the representative plaintiff for part one of the fee. The court still retains a discretion in this regard. In a worst-case scenario, the representative plaintiff is at risk for the full fee (i.e., part one and part two of the fee) as well as the respondent's legal costs.

Certain types of plaintiffs are exempt from paying these court fees namely: (1) an organisation registered with the Registrar of Non-Profit Organisations or the Registrar of Charitable Trusts, which operates to promote public goals and the filing of class actions

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4 Keren Vinshal-Margal and Alon Kalamant, 'The Class Actions Law in Practice in Israel – an Empirical Perspective' (in Hebrew), 45 *Mishpatim* 709,725 (2016) and Asaf Fink, 'The Seventh Annual Conference for Class Actions 3 February 2019, Research Summary for 2018' (in Hebrew), available at <http://knowit.org.il/Uploads/Documents/sikum2018.pdf>.

5 *ibid*, p. 727 and *ibid*. These proportions have remained relatively stable over the past several years.

6 Based on statistics reported by Fink, footnote 4.

motions is not its main activity, (2) the Israel Consumer Council, and (3) a person who hires a public apartment and conducts a suit against a company for public housing.

The two main objectives of the amendment are:

- a* a reduction in groundless class actions and their proportion in relation to all the class actions that are submitted. While it is anticipated that the proposed fee may deter claims with a low chance of success, the ‘chilling effect’ on reasonably worthy claims may be moderate, since the class actions public assistance fund is likely to provide increased assistance to reasonably worthy claims in light of the new fees (money that is likely to be returned to the fund should the action result in a favourable settlement); and<sup>7</sup>
- b* to cover a portion of the court expenses and judicial resources that are required by a class action due to it being a complicated and long, legal proceeding.

In our estimation, during 2019 an additional decline may be expected in the number of class actions to be filed, in light of the fact that the amendments to the regulations regarding the payment of a fee for the filing of an application for approval of a class action entered into force during May of 2018, which could affect the data for 2019.

With regards to withdrawals of class action proceedings, a representative plaintiff and their lawyers were previously permitted by the court to receive a reward and legal fees, respectively, despite the withdrawal of proceedings. However, during August 2018 in *Markit v Sonol*<sup>8</sup> the Supreme Court held that in a case of a withdrawal of proceedings, a representative plaintiff and its lawyers were not permitted to receive a reward or legal fees unless the case was exceptional. Although the Supreme Court refrained from providing a closed list of factors that a court had to consider when deciding whether a case was exceptional, it did mention the following considerations:

- a* the benefit to any injured persons represented by the plaintiff and their lawyers;
- b* the efforts that the representative plaintiff and their lawyers invested during the class action;
- c* the risk taken and expenses incurred by the representative plaintiff and their lawyers in bringing the class action;
- d* the degree of public importance of the class action;
- e* the manner in which the representative plaintiff conducted the class action proceedings; and
- f* the gap between the remedies that were requested in the application (for approval of the class action) and the remedies that are to be received by the representative plaintiff as part of the withdrawal. A withdrawal, including the terms of the withdrawal, requires the approval of the court.<sup>9</sup>

Subsequent to this case, it appears that the courts are willing to intervene and reduce the rewards and the legal fees, and even deny it completely in some cases of withdrawal.<sup>10</sup>

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7 The currently proposed amounts are significantly lower than the Minister’s original proposal of 62,000 Israeli new shekels for the district courts and 50,000 Israeli new shekels for the magistrate courts; the new proposed fees fall reasonably within the range of current levels of public funding assistance.

8 Fin.App 8114/14 *Markit Muzrei Yeul Ltd v. Sonol Israel Ltd* (published Nevo, 5 August 2018).

9 Section 1 of the Class Actions Law, footnote 2.

10 Based on statistics reported by Fink, footnote 4.

### III PROCEDURE

#### i Types of action available

The Law is the exclusive procedural framework for any group action in Israel. No action may be brought on behalf of a group of individuals without their express power of attorney, unless the claim falls within the ambit of the Law. A class action will only be recognised if it falls within a statutory list of enumerated causes; it should be noted, however, that as a rule, these causes are broadly worded. Some of the causes that may be of interest to international corporations include: claims against manufacturers, distributors and service providers, including product liability claims and various claims against internet platform providers; claims against insurance providers and agents; antitrust claims, including ‘follow-ons’; claims related to corporate securities or trading platforms; claims related to environmental damages or nuisances; and claims related to the ‘anti-spam’ amendment to the Communications Law (Telecommunications and Broadcasts) 1982.

A class action suit requires prior approval of the court, in a preliminary proceeding known as a ‘motion for approval of a class action’. A court may, at its discretion, approve a class action if it falls within the ambit of the enumerated causes, and all of the following elements are present:

- a* the claim presents questions of law or fact common to the class members;
- b* there is a ‘reasonable chance’ that those questions will be decided in the group’s favour;
- c* a class action would be the just and efficient method for resolving the dispute;
- d* there are reasonable grounds to believe that the class members’ cause will be adequately represented and managed; and
- e* there are reasonable grounds to believe that the class members’ cause will be represented and managed in good faith.

Class actions do not have a special statute of limitations. In nearly all circumstances relevant to this note, the period provided by Israel’s general statute of limitations applies, which is seven years from the time when the grounds for the claim arose, or would have become known to a reasonably diligent injured party. The Law includes a saving clause such that claims whose statute of limitations would otherwise have run in the course of a class action proceeding will survive for an additional year from the date that a motion for approval was denied or dismissed, or from the date that the claimant was removed from the class.

#### ii Commencing proceedings

A motion for approval of a class action may be commenced by either a person possessing a cause of action that raises the question in law or fact common to the group, one of the government commissions listed in the Law’s appendix, or a qualified non-profit organisation whose purposes include the public cause advanced by the class action. In practice, approximately 99 per cent of motions for approval of class action are commenced by a private member of the group.<sup>11</sup> At least one Supreme Court Justice has expressed the sentiment that standing in a class action should be granted liberally and with heightened

<sup>11</sup> Vinshal-Margal and Kalamant, footnote 4, p. 730.

flexibility, in order to better promote the public cause.<sup>12</sup> In practice, ‘entrepreneurial’ lawyers may take an active role in the formation of the claim, and the Supreme Court has said, in obiter, that in light of the public interest of promoting ‘civil enforcement’, the mere fact that a lawyer may take a leading role and even recruit a representative plaintiff to advance the claim does not, in and of itself, disqualify the lawyer or the representative plaintiff.<sup>13</sup> Furthermore, the Law mandates that a court that would otherwise have allowed a motion for approval of a class action must ‘cure’ any defect in locus standi by ordering that the class action be maintained and continued by an additional plaintiff.<sup>14</sup>

The default mechanism for a class action is ‘opt out’, meaning that upon approval of a motion for a class action, all individuals meeting the definition of the group as approved will be judged as members of the group and bound by the outcome of the proceedings, unless they file an objection within the required time period (the default period is 45 days from publication of the decision to approve the motion). In special circumstances, the court may, at its discretion, rule that the action be conducted on an ‘opt-in’ basis, which means that the proceeding will relate only to those class members who request to be included. In either case, the procedural and substantive provisions of the Law will apply.

The class must be defined, initially, by the party bringing the motion for approval. In the course of hearing the motion, however, the court has substantial discretion to alter or redefine the class, or create sub-classes and appoint representative plaintiffs and attorneys for each sub-class. Ultimately, the final definition of the class will be set forth in the court’s ruling to approve the class action. There is nothing in the Law to exclude foreign claimants from being included in a class; however, several cross-border jurisdiction questions may arise in cases with foreign elements, as explained in Section IV.

The Class Actions Law established a seven-year pilot period for a dedicated government fund to provide financial assistance for representative plaintiffs whose causes of action are of public or social importance, and the lifetime of that fund has been continually renewed each year since 2013 by subsequent orders of the Minister of Justice.

Indeed, during 2018 the Ministry of Justice submitted a memorandum for a proposed amendment to the Law (proposed amendment number 11), according to which the fund’s activity will become permanent. This is a reflection of the success of the fund in facilitating class actions with merit and of public and social importance.<sup>15</sup>

The fund’s nine-member management committee includes representatives from the Attorney General’s office and several government commissions concerned with matters

12 Chayut, footnote 3, p. 945,

13 Civ.App. 8037/06 *Barzilai v. Prinir* (Hadas 1987) Ltd (published Nevo, 4 September 2014) (*Prinir (I)*, the majority opinion). In her refusal to grant Prinir an ‘additional hearing’ [Add.Civ.Hrg. 5406/15 *Prinir (Hadas 1987) Ltd v. Barzilai* (published Nevo, 25 August 2015), *Prinir (II)*], Chief Justice Na’or noted that while the concurring opinion in *Prinir (I)* had expressed the reservation that allowing such claims would be tantamount to promoting an ‘industry’ of lawyering cases of questionable value, since the allegation that counsel had ‘recruited’ plaintiffs in bad faith had not been proved in the lower court, an additional hearing to resolve issues argued in obiter was not justified. Nonetheless, the *Prinir (I)* majority obiter has recently been cited favourably in the District Court of the Central District in Cls. Act. (Central) 5286-08-07 *Freibrun v. Boulus Gad Tourism and Hotels Ltd* (published Nevo, 31 March 2017).

14 This provision of the Law is frequently cited by courts when taking a liberal position on the question of standing; for a recent district court decision ordering the actual appointment of an alternative plaintiff, see *Freibrun*, op cit.

15 Ministry of Justice – Memorandum of the Class Action Law (amendment number 11), 2018

related to class actions (such as the Commission for Consumer Protection, the Antitrust Commission, the Environment Ministry, and so forth). The management committee holds quarterly meetings in which it examines, approves and follows up on funding requests, based on each claim's degree of public importance and its potential to promote the public interest, and the committee may also take into account any particularly onerous financial obstacles that a claim may face. Assistance may be offered at any stage of the motion for approval, in the course of the claim itself or any process of appeal and, in specially warranted circumstances, even before the initial motion is filed. To the degree that the sponsored motion or action is successful (whether upon judgment or settlement), proceeds from the award corresponding to the monies received are recycled into the fund. In its annual report for 2018, the fund reported that 1,582,126 Israeli new shekels had been approved for 64 funding requests, for an average of approximately US\$6,800 per request.<sup>16</sup>

### iii Procedural rules

One defining aspect of the Law is the requirement that a motion for the approval of a class action may be granted only once the court is satisfied that there is a 'reasonable chance' of the common question of fact or law being decided in favour of the class. The 'reasonable chance' criterion for approving a class action in Israel essentially forces the court to have some initial regard for the merits, even as it considers what is otherwise (and ostensibly remains) a procedural motion.<sup>17</sup> The representative plaintiff must provide a preliminary evidentiary basis that sufficiently demonstrates a reasonable chance of success on the merits.<sup>18</sup> Although phrased in terms of a procedural question, this essentially substantive requirement has created, *de facto*, a bifurcated process, in which a preliminary approval often serves as an indication of the court's leaning as it progresses to the merits. Experience has shown that the parties to litigation invest considerable resources in the 'preliminary motion' stage, which may include discovery, testimony and cross-examination, and may last several years in complex cases.

The Supreme Court directly responded to the bifurcation dilemma in *The Phoenix v. Amosi*,<sup>19</sup> in which three insurance companies (as defendants joined into a single class action) contended that their alleged underpayment of personal accident insurance benefits was justified by the rules of contractual construction applicable to similarly phrased policy wordings. The court held that the very fact that the defendants had placed reliance upon an inferred reference not mentioned in the plain language of the policy wordings was sufficient, in and of itself, to determine that the plaintiffs' interpretation of the policy had a 'reasonable chance' of success in the claim. The court established that the guiding rationale of the 'reasonable chance' requirement was to strike a balance between protection of class action defendants from the collateral damage caused by spurious claims on the one hand, and the public interest of encouraging worthy class actions on the other hand.

The court in *The Phoenix* did not expressly retreat from the previous case law that had clearly established the need for a plaintiff to provide preliminary evidence to support the

16 'Fund for financing class actions' activity report for 2018 –Ministry of Justice (retrieved on 11.2.2019 [https://www.gov.il/BlobFolder/generalpage/representative\\_actions\\_fund/he/2018.pdf](https://www.gov.il/BlobFolder/generalpage/representative_actions_fund/he/2018.pdf)).

17 Lv.Civ.App. 729/04 *State of Israel v. Kav Machshavah* (published Nevo, 26 April 2010).

18 Lv.Admin.App. 3284/10 *Municipality of Tel Aviv v. Ressler* (published Nevo, 3 December 2012).

19 Lv.Civ.App. 2128/09 *The Phoenix Insurance Company v. Amosi* (published Nevo, 5 July 2012).

claim's 'reasonable chance' of success, and acknowledged that certain complex cases might even require preliminary legal or factual findings on the merits. On the other hand, the court warned against a bifurcation that would require 'duplicate proceedings' that place undue obstacles before plaintiffs, and potentially increase the collateral cost for defendants. In light of the above, the lead opinion held, *inter alia* (and in obiter), that where plaintiffs sought an identical remedy on several alternative grounds, it was sufficient to find that just one of the grounds had a 'reasonable chance' for success to allow the entire claim to proceed as a class action.<sup>20</sup>

Upon the court approving a certification motion, the representative plaintiff's proposed statement of claim takes effect as the claim of the plaintiff class, and the main proceeding continues in accordance with the normal rules of civil procedure. All claims available in a normal proceeding remain available to both sides at this stage, unless and to the extent that the court, in its discretion, orders amendments to the statement of claims.

Experience has shown that nearly all class actions in Israel are resolved either by a withdrawal of the motion for approval or by settlement, most often during the motion's preliminary approval stage. While recent years have seen a measured increase in the number of class actions that gain approval (approximately 8 per cent on average in the past three years versus 5 per cent or less in previous years), the lion's share consistently result in a negotiated withdrawal or settlement, and typically only about 1 per cent, are finally resolved through a judgment.<sup>21</sup> Of the tens of cases that have reached judgment since the Law's enactment, the vast majority have been decided for the claimants, an indication that the court's finding of a 'reasonable chance' of success in the approval stage may in fact include some preliminary review of the merits.<sup>22</sup>

The Law does not entirely entrust the public interest to the self-appointed 'class agents'. It gives special procedural standing to the Attorney General's office, government commissions, non-profit organisations, and others. In every motion for approval of a class action, the representative plaintiff must send a notice, including the full motion and proposed statement of claims, to the government commission associated with that particular type of class action.<sup>23</sup> The Attorney General, as well as the relevant government commission, must also receive every public notice related to the class action, including interim court decisions as well as any joint motion for the approval of a settlement. Qualified non-profit organisations and government commissions (as well as any individual class member) may, with the court's permission, participate in hearings to the extent the court deems such participation required for the sake of fairness, efficiency, or the defence of any of the class members' interests, and the court may, in its discretion, award a fee to a non-profit organisation in light of its contribution to the hearings. In addition to the Attorney General and all of the aforementioned persons, 'any person acting for the benefit of the class members' interests' may submit a reasoned objection to the proposed settlement of a class action proceeding, including an objection to the costs and fees proposed for the 'class agents' thereby, which objection may not be withdrawn

20 *ibid*, at [12] to [17] (for the entire paragraph).

21 According to figures provided by Vinshal-Margal and Kalamant (p. 738) and Fink, footnote 4.

22 Vinshal-Margal and Kalamant, footnote 4, p. 741.

23 As noted above, a class action must fall within one of the enumerated categories of causes; the Class Action Regulations, 2010 specify the commission that must receive notice of each class action, according to type. For example, the Commissioner for Consumer Protection must receive a copy of each class action related to consumer claims; the Antitrust Commissioner must receive a copy of each class action related to the Restricted Trade Practices Law, etc.

without court approval, and in light of which the court may award a fee, commensurate to the extent to which the objection served to promote the public interest.

The Israel Consumer Council has special standing under the law, in that it may commence a class action proceeding without needing to demonstrate any particular difficulty or burden in the action being commenced by a private individual.<sup>24</sup> The Israel Consumer Council has played a role both in commencing class actions and filing objections to proposed settlements that resulted in arrangements more favourable for consumers.<sup>25</sup>

Motions for class actions are most commonly submitted to the district courts, since they generally involve aggregate claims in excess of 2.5 million Israeli new shekels.<sup>26</sup> They generally require more judicial hours than an average case judged by the standard rules of civil procedure, but are still resolved, on average, with fewer judicial hours than cases involving standard form contracts, antitrust law or serious crimes.<sup>27</sup> Of those certification motions in respect of which a decision was rendered, the average time lapse between the date of filing and the date of the decision (of the certification motion) has been approximately 1.5 years, although of those motions for which approval was granted, the average time lapse is slightly higher, and it is not uncommon for particularly complex certification motions to require several years to be adjudicated.<sup>28</sup>

#### **iv Damages and costs**

There are no jury trials in the Israeli legal system. Class actions are typically heard before a single judge, who will determine all questions of fact and law regarding the certification motion, the action, and the extent and nature of damages and other remedies.

Israeli law takes a particularly flexible approach to damages and causality in class actions, an approach anchored in statute by the express purposes of the Law, which include '[civil] enforcement of the law and deterrence of its breach' and 'the grant of fitting remedy to those injured by a breach of the law'.<sup>29</sup> Even prior to the Law's enactment, the Israeli courts had viewed flexibility in damages as essential to certain class actions. A prevalent jurisprudential sentiment is that while the damages awarded in classic tort actions are meant to provide 'corrective justice', a strict adherence to the traditional rules of damages would undermine the basic rationale and primary purpose of the law of class actions: to achieve efficient and effective deterrence against breaches of the law.<sup>30</sup>

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24 Section 4(a)(3) of the Law, footnote 2, as amended in 2008.

25 See Chayut, footnote 3; see also the Israel Consumer Council website (English language) at [www.consumers.org.il/category/en-consumers](http://www.consumers.org.il/category/en-consumers).

26 Generally, a district court's approval or refusal to approve a class action may be appealed by leave granted either by the Supreme Court, or by the district court itself if leave was granted concurrently with the decision. If the district court goes on to hear the action and renders a judgment, there is a right of appeal to the Supreme Court. Cases of smaller aggregate sums are heard by a magistrate court, with parallel rules of appeal applying to the district court of that district.

27 Vinshal-Margal and Kalamant, footnote 4, p. 756.

28 Keren Vinshal-Margal, 'Class Actions in Israel: An Empirical Perspective' (in Hebrew), unpublished manuscript, presented at the Hebrew University of Jerusalem on 9 March 2015, p. 35.

29 Section 1 of the Class Actions Law, footnote 2.

30 Chayut, footnote 3, p. 948.



In the landmark *Tenuva (I)* case,<sup>31</sup> Tenuva, a major Israeli dairy manufacturer, had misled consumers regarding the use of a clear, non-toxic, silicone-based polymer as an additive to prevent frothing in low-fat milk. The plaintiff class consisted of those who had consumed the milk on the false understanding that the silicone had not been added, yet plaintiffs had failed to demonstrate any physical damage. The Supreme Court upheld the district court's approval of the certification motion for a class action, based on breach of consumers' autonomy, with non-monetary damages awardable based on plaintiffs' negative feelings of disgust upon learning of the additive. Flexibility would also be required in awarding the damages to benefit a public cause, since it would be impossible for those who had actually consumed the milk to prove their identity, or the extent of the injury they suffered.<sup>32</sup>

Subsequently, the Law anchored and built upon the case law that had preceded it. Punitive damages are rarely granted by Israeli courts, and, with the exception of certain class actions regarding the rights of people with disabilities, the Law specifically disallows punitive or exemplary damages in a class action, rather requiring the class members to prove that they suffered actual 'injury'. As in the previous case law, however, flexibility lies in the causation, scope and proof of injury, as well as the variety of remedies available.

The Law itself provides statutory mechanisms for overcoming the problem of class members whose individual identity may be difficult or impossible to ascertain or prove. A court rendering judgment in favour of the class members may grant damages or any other remedy (including any injunction or declaratory relief), which may include the quantum of damages for each member as well as the standard of proof required of a class member to demonstrate his or her right to damages (or other remedy). The court may also determine a global quantum of damages that the defendant must remit in any event, and in the event that the proved claims of individuals do not reach that amount, may provide instructions for the distribution of any remainder to class members with a proved right, up to the full satisfaction of their loss. If there is still a remainder from the global quantum, it will be paid to a statutory fund charged with distributing the proceeds to the public benefit in a manner most closely resembling the matter of the class action.<sup>33</sup>

The Law further recognises, as did the Supreme Court in *Tenuva (I)*, that the award of traditional 'damages' to atomised class members is not always a feasible remedy (especially, as in the *Tenuva* case, where the injured members were consumers of household items, who are not readily identifiable and who do not generally maintain proofs of their purchase or consumption). If a court is of the opinion that class members cannot be individually identified and compensated without unreasonable cost or difficulty, the Law authorises the court to grant damages, or any other remedy, for the benefit of either the group as a whole or the general public.

The Law reflects the jurisprudential sentiment that the damage in a class action is more than just the sum of the parts; the claimant is not just an individual representing other individuals, but rather a 'super-plaintiff' who gives expression to the collective and

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31 Civ.App. 1338/97 *Tenuva Central Coop for the Mktg of Agr Prod In Israel Ltd v. Rabi*, PD 57(4) 673, 2003 (*Tenuva (I)*).

32 *ibid*, at 688F.

33 These provisions reflect the state of Israeli jurisprudence prior to the Law's enactment, which reflected the doctrine of 'fluid class recovery'; see the Supreme Court of Israel decision Civ. App. 10085/08 *Tenuva Central Coop for the Mktg of Agr Prod In Israel Ltd v. estate of Rabi (deceased)* (published Nevo, 4 December 2011): (*Tenuva (II)*), at [46] to [53], citing especially *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472-473 (Cal., 1986).

aggregate interest of the class.<sup>34</sup> This sentiment found authoritative expression in *Tenuva (II)*, the sequel to the first *Tenuva* case, in which *Tenuva* was ordered to donate approximately US\$11 million to public causes.<sup>35</sup> The court in *Tenuva (II)* further allowed for group causality to satisfy the causality requirement of a class action in tort, under which generalised and statistical evidence of consumer preferences and behaviour as a whole would be sufficient to demonstrate the causal link between non-monetary damages and the violation of consumer autonomy.<sup>36</sup>

The remedy of enforced donations as damages payable to the public raised an ancillary issue in the Israeli courts: the concern that either or both of the parties to a class action would leverage the outcome to promote their own public image or sponsor their own preferred channels, exploiting court-mandated donations to serve their own goodwill and advertising interests.<sup>37</sup> The Law's amendment of 2016 has provided a statutory solution: from now on, damages awarded to a public cause will be transferred to a statutory fund charged with distributing the proceeds to causes that match or approximate the public interest that each particular class action is meant to promote.<sup>38</sup>

## v Settlement

Any settlement of a class action proceeding requires court approval. A report of the claim and the proposed settlement, including certain key parameters, must be publicised and sent to the Attorney General as well as to the public commission charged with the claim's designated subject area,<sup>39</sup> and any other person whom the court deems appropriate. A proposed settlement must include, inter alia, a definition of the class, a summary of the claim and the proposed settlement, the gap between the amount of the claim and the amount of the settlement, the stage of the proceedings and an evaluation of the benefits and risks of their continuation, and the issues and remedies regarding which the proposed settlement would comprise an estoppel. Class members who wish to exit from the proposed settlement may request leave from the court to do so.

The Law mandates that a court may approve a proposed settlement only after it is satisfied that the settlement is fair, adequate and reasonable, and that concluding the proceedings by way of settlement is the most equitable and efficient manner for resolving

34 Civ. App. 10262/05 *Aviv Legal Services Ltd v. Bank Hapoalim Ltd* (published Nevo, 11 December 2008) at [10].

35 The Supreme Court in *Tenuva (II)* (footnote 30) reduced the quantum from approximately US\$16 million awarded in the District Court judgment, ruling that non-monetary damages for a breach of autonomy be awarded based on a statistically modelled quantum of consumers who had experienced, subjectively, actual feelings of disgust, as opposed to the abrogation of their right to autonomously make an informed decision in the abstract. This distinction was subsequently affirmed in Civ. App. 4333/11 *Solomon v. Guri Importers and Distributors* (12 March 2014) and *Prinir (I)* (footnote 12, 4 September 2014). The Supreme Court also rejected the District Court's allocation of 22 per cent of the global damages to price rollbacks, ruling that the proceeds be distributed between food and nutrition research (44.33 per cent) and the free distribution of dairy products to the needy (55.66 per cent).

36 *Tenuva (II)*, footnote 30, at [36] and [37].

37 Cls. Act. (T.A.) 22236-07-11 *Schreier v. Automated Banking Services* (published Nevo, 16 September 2014); Chayut, footnote 3, p. 951.

38 Amendment 10, footnote 9; Sections 20(d) and 27A of the amended Law. The same applies, *mutatis mutandis*, to any similar condition in a court-approved settlement (Section 19(a2) of the amended Law).

39 See footnote 20, above.

the issue under the circumstances. In the case of a settlement in the ‘motion for approval’ phase, the court must also be satisfied that the claim would have met all of the procedural requirements for a class action, including the quasi-substantive requirement of a ‘reasonable chance of success’. Furthermore, the court may not ordinarily approve a settlement until it has first received the expert opinion of an ‘examiner’ appointed as an officer of the court, who is authorised to summon the parties for a hearing or suggest variations to the proposed settlement. The court may provide specific instructions for supervision of the settlement’s execution, and may also predicate the payment of fees and costs to the representative plaintiff and counsel on the settlement’s actual execution (in full or in part).

The Attorney General and any government authority relevant to the claim, as well as any class member, qualified non-profit organisation, or person who acts in general for the benefit of the class members, have legal standing to file an objection to a proposed settlement within 45 days of its publication notice; any such objection may not be subsequently withdrawn without court approval. Under a recent amendment to the Law, if the court accepts the objection in full or in part, it may order that a ‘reward’ commensurate with the public interest achieved to be paid to the objector.<sup>40</sup>

It is common for the Attorney General to express a position (‘objection’ or ‘no objection’) regarding the proposed settlement, and there seems to be a recent trend of the Attorney General responding with comments to the proposed settlement even when filing a ‘no objection’ response.<sup>41</sup> The Attorney General has typically filed objections to around 15 per cent of proposed settlements, and among such cases, the court’s tendency to reject the settlement or approve the settlement with substantial changes is correspondingly greater.<sup>42</sup> If approval of a settlement is withheld or cancelled, nothing said or determined in the course of the settlement approval proceeding may serve as evidence in any civil proceeding.

#### IV CROSS-BORDER ISSUES

The Law does not provide any territorial limitations; as a rule, cross-border issues will be a matter of Israel’s general private international law. Thus, a foreign corporation may be the respondent in a certification motion of a class action (and a defendant in the action itself), subject to procedural rules regulating the lawful service to foreign defendants. A class may also include foreign members, thereby binding such members to the result of the proceedings, although a preponderance of foreign connecting factors may guide the court in deciding whether to allow the service of proceedings abroad, or whether it will relinquish its jurisdiction under the *forum non conveniens* doctrine.

An Israeli court gains jurisdiction over a foreign defendant in one of three ways: either by direct service of claims to the defendant (or an officer of the defendant) within the territory of Israel, by service to the defendant abroad upon leave from an Israeli court (or a registrar who is a judge) under Regulation 500,<sup>43</sup> or by service to the defendant’s ‘authorised agent’ in Israel

40 Amendment 10, footnote 9; the position adopted by the Amendment is consonant with previous academic critique of Israeli and US law: Eran B. Taussig, ‘Opposition Motions to Class Action Settlements – Alya V’Kotz Ba’ (in Hebrew), 53 *Hapraklit* 393, 441-451 (December 2014).

41 Vinshal-Margal and Kalamant (pp. 754–755) and Fink, footnote 4.

42 Vinshal-Margal and Kalamant, *op cit*.

43 Permission to serve a statement of claims outside of the territory of Israel is governed by Regulations 500-503A of the Civil Procedure Regulations, 1984, and is a matter of judicial discretion that is also

under Regulation 482.<sup>44</sup> From a plaintiff's perspective, the advantages of Regulation 482 are obvious: it is a more efficient procedure that does not necessitate a preliminary hearing, and is not subject to judicial discretion. The barrier lies in the question of who is deemed to be an authorised agent of the defendant. The case law has established a fact-dependent 'intensiveness of commercial relationship' test, which looks at a variety of objective factors to determine whether the agent in fact reports to and does business on behalf of the principal.<sup>45</sup> It is settled law that an 'intensive relationship' with one foreign company does not necessarily constitute a relationship with another group affiliate of that company,<sup>46</sup> and that the mere fact of an exclusive distributorship, unless supported by evidence of additional factors, does not in and of itself constitute an authorised agency.<sup>47</sup> Similarly, the mere fact of being an affiliate or member of the foreign company's group does not necessarily constitute an authorised agency, to the extent that the affiliate operates as a *bona fide* supplier of services to the parent group, and especially if its lack of authorisation is adequately documented in representations made to the public.<sup>48</sup> In practice, the question is highly dependent on the facts of the case.

Even if a foreign corporation does not have an 'authorised agent' in Israel, it may be directly served with a certification motion of a class action by leave of the court if the criteria of Regulation 500 are met.<sup>49</sup> In a string of cases regarding foreign companies operating global internet platforms, the courts have interpreted Regulation 500 broadly to allow Israeli plaintiffs and classes to bring their claims before an Israeli court, and have consistently struck down foreign jurisdiction and choice of law clauses in the platform operator's standard terms and conditions by means of the 'presumption of unfairness' clause of Israel's Standard Contracts Law 1982.<sup>50</sup> Furthermore, although *forum non conveniens* is a doctrine applied in a court's discretion on a case-by-case, fact-dependent basis, a common thread in these cases indicates that where a platform operator appeals to the Israeli public through the internet in the Hebrew language, and especially where Israel has a public policy interest in protecting the

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conditioned upon the claim falling within a closed list of links to Israel based on the cause of action.

Permission is granted in an *ex parte* proceeding, which may subsequently be challenged by the defendant without prejudice to any defence pertaining to lack of jurisdiction.

- 44 Service to an 'authorised agent' in Israel is governed by Regulation 482 of the Civil Procedure Regulations, 1984, and the case law's expansive interpretation of that term. Either of the purported 'principal' or 'agent' may challenge the validity of such service without prejudice to any defence pertaining to lack of jurisdiction.
- 45 Lv.Civ.App. 39/89 *General Electric Corp v. Migdal Insurance Company Ltd*, PD 42(4) 762, 768 (1989) (GE); Lv.Civ.App. 2652/94 *Tendler v. Le Club Méditerranée (Israel) Ltd* PDE 94(3) 409 (1994); Lv.Civ. App. 11822/05 *Philip Morris USA Inc v. Al-Roey* (published Nevo, 8 May 2006).
- 46 Cls. Act. (T.A.) 1634-05-11 *Pinchevsky v. Sony Corporation* (published Nevo, 4 April 2013).
- 47 GE, footnote 42, at [9]; *Misc.Civ.Motion (T.A.) 8620/05 Shirit v Sharp Corporation* (published Nevo, 26 December 2006); *Misc.Civ.Motion (J-m) 6158/09 Rubin v. Elchiani* (published Nevo, 27 April 2009) at [7].
- 48 Cls. Act. (T.A.) 19529-06-14 *Hota v. Booking.com BV* (published Nevo, 19 July 2015) (*Booking (I)*).
- 49 *Booking (I)*, *ibid*, and Cls. Act. (T.A.) 19529-06-14 *Hota v. Booking.com BV* (published Nevo, 3 February 2017) (*Booking (II)*).
- 50 Civ. Case (T.A.) 30847-12-13 *Ciappa v. Dadon* (published Nevo, 8 June 2014); Cls. Act. (Central) 39292-04-13 *Klinghoffer v. Paypal Pte Ltd* (published Nevo, 21 September 2015); Cls. Act. (Central) 46065-09-14 *Ben Hamu v. Facebook Inc* (published Nevo, 10 June 2016); Civ. Case (T.A.) 39265-04-16 *Forex Capital Markets Limited v. Dural* (published Nevo, 23 November 2016); *Booking (II)*, *op cit*.

rights of Israeli residents, it will be challenging for a foreign defendant to persuade an Israeli court to relinquish jurisdiction.<sup>51</sup>

Cross-border jurisdiction issues may be highly relevant for multinational corporations facing follow-on class actions in Israel for breaches of competition law. These issues were the focus of the *Optronics/Sharp* case, a follow-on action in Israel against foreign defendants regarding an alleged large-scale international cartel of screen manufacturers that claimed a domestic 277 million Israeli new shekels in damages.<sup>52</sup> The plaintiffs sought to introduce the 'effects doctrine' to Israel to justify extraterritorial application of Israel's Restricted Trade Practices Law 1988.<sup>53</sup> The registrar refused the defendants' motion to annul the service of proceedings, holding that the sale of the cartel-related products in Israel, as well as the deleterious effect on competition in Israel under the 'effects doctrine', were sufficient grounds to allow service of proceedings to foreign defendants alleged to have participated in a cartel.

The district court reversed the registrar's decision on appeal, setting aside the service of proceedings and annulling the court's jurisdiction. The district court held that the sale of goods in Israel could not be interpreted as an 'act' by the alleged cartel members, and that the 'effects doctrine' could only apply to the scope of Israel's substantial antitrust law, and could not transform an alleged international cartel, which took place globally, into an 'act or omission' done in Israel to satisfy the requirements of Regulation 500 for service abroad. Since the basis for Israeli jurisdiction was removed, the court did not reach the issue of whether the 'effects doctrine' would apply to Israel's substantial antitrust law, but expressed doubt in obiter as to whether the 'effects doctrine' (even if adopted by the court) would apply to the facts of the case, where defendants had not sold products or operated directly in the Israeli market (such that the effect on the Israeli market was at best indirect). This was an important cross-border precedent for follow-on class actions in competition law, which places a significant procedural barrier before 'class agents' seeking to bring multinational corporations into an Israeli court.<sup>54</sup>

However, a recent, significant amendment to the Civil Procedure Regulations<sup>55</sup> has increased the risk to a foreign company of being sued for damages in an Israeli court. The new section provides that an Israeli court may hear a claim for damages where the damage occurred in Israel even though the act or omission that caused the damage occurred outside Israel's borders. The claim must be based on damage caused to the plaintiff in Israel from a product, service or behaviour of the defendant and that two further conditions must be

51 *ibid*; see also *Lv.Civ.App. Alison Transport Inc v. Cosco Container Lines Co Ltd* (published Nevo, 15 July 2015) at [12] and *Civ.App. 7841/09 Palestinian Fund for Compensating Victims of Traffic Accidents v. Doe* (Published Nevo, 28 November 2015) at [20].

52 *Cls. Act. (Central) 53990-11-13 Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronics Corp et al* (published Nevo, 6 March 2016); on appeal: *App.Reg. 57451-03-16 Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronics Corp et al* (published Nevo, 29 December 2016). Full disclosure: our firm successfully represented one of the foreign defendants in the proceedings.

53 This was a threshold issue in the motion for approval of the class action, owing to the Law's exclusive reference to Israeli antitrust law in the enumerated causes allowable as class actions; as a matter of Israel's procedural law, it is impossible to bring a follow-on antitrust claim (on behalf of a class) unless the claim arises from a violation of Israel's Restricted Trade Practices Law.

54 It should be noted that the district court's decision is currently subject to leave for appeal proceedings pending before the Supreme Court.

55 Section 500 (7a) of the civil regulation law procedure 1984.

fulfilled, namely: first, the damage caused to the plaintiff in Israel must be from a product, service or behaviour of the defendant and the defendant could have expected that the damage would be caused in Israel. The assumption is that the foreign company can expect the damage to occur in Israel and therefore be able to take precautions against it occurring. The amendment was introduced by the Department of Justice to bypass the decision in the *Optronic/Sharp* judgment and enhance Israeli consumer protection.

It should be noted that Section 500(7a) is a new regulation that came into force recently, and accordingly it has not yet been examined by the Israeli courts. Therefore, the manner in which the courts will interpret and apply the new section is uncertain.

The second, that the defendant or a related person<sup>56</sup> must be engaged in international trade or the provision of significant international services.

The mirror image of service of proceedings to foreign defendants is the degree to which Israeli courts will recognise a decision rendered in a foreign class action suit as binding on Israeli plaintiffs. If a judgment has been rendered on a similar class action in a foreign court, an Israeli court may allow 'incidental' recognition of the foreign judgment for purposes of *res judicata* or collateral estoppel. For a foreign judgment to provide estoppel in an Israeli certification motion of a class action, the foreign court must possess, in addition to jurisdiction under its own laws, a 'real and substantial connection' to the matter, which may include, *inter alia*, the location of a substantial portion of the class members, and the reasonable expectation of class plaintiffs that their class matter would be resolved in that forum.<sup>57</sup> It must also be shown that the procedural rights of the class members were not compromised; specifically, that they had fair notice of the proceedings, the opportunity to participate in or withdraw from the proceedings, and adequate legal representation throughout the proceeding.<sup>58</sup> Under exceptional circumstances, the court may re-examine the judgment or court-approved settlement reached in a foreign class action if its result was 'patently inadequate' or contrary to public policy.<sup>59</sup> Otherwise, the foreign class action judgment will generally merit incidental recognition by the Israeli court and, if and to the extent that the foreign law so mandates, may create claim or issue estoppel.<sup>60</sup>

In a recent *Facebook*<sup>61</sup> ruling, the Supreme Court held in a class action that a clause in a contract, which was determined to be a standard contract under the Standard Contracts

56 If the defendant is a corporation, then a 'related person' in respect of that corporation is '(1) a person who controls the corporation; (2) a corporation controlled by a person as stated in paragraph (1); (3) a corporation controlled by any of the provisions of paragraphs (1) and (2);' (Paragraph (1) to (3) of Section 500(7a)).

57 Lv.Civ.App. 3973/10 *Stern v. Verifone Holdings Inc* (published Nevo, 2 April 2015) (*Verifone*), at [24]. This Supreme Court decision cited in support of its conclusions, among other authorities, 'Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress', International Bar Association 6 (2008); John P. Brown, 'Seeking Recognition of Canadian Class Action Judgments in Foreign Jurisdictions: Perils and Profits', 4(2) *Canadian Class Action Rev.* 220 (2008); and *Currie v. Macdonald's Restaurants of Canada Ltd*, 74 O.R. (3d) 321 (Ont. C.A. 2005, Canada).

58 *Verifone*, op cit, at [25], citing the elements that have been described by American academics as 'voice', 'exit', and 'loyalty', based on *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 811-812 (U.S., 1985).

59 *Verifone*, op cit, at [27].

60 See Misc.Civ.Motion 4986/09 *Merck Sharp & Dohme (Israel 1996) Ltd v. Nafiali* (published Nevo, 22 July 2009), in which a motion to recognise a foreign class action decision as issue estoppel was denied, on the basis of an expert legal opinion regarding the extent of that decision's effect under the law of the forum in which it was given.

61 Lv.Civ.App.5860/16 *Facebook Inc v. Ohad Ben Hemo* (published Nevo, 31 May 2018).

Law, 1982 (the Standard Contracts Law), that stipulated that any dispute arising between the parties shall be heard in a jurisdiction outside Israel may deprive consumers, pursuant to the Standard Contracts Law, of their right to bring their dispute before an Israeli court and it was therefore null and void. Under the Standard Contracts Law, a court may annul or change any condition of a standard contract that, having regard to the totality of the contract's conditions and to other circumstances, involves an undue disadvantage to customers or an unfair advantage for the supplier, which is likely to lead to the customers' deprivation (Section 3). A condition in a standard contract that stipulates the law regarding, among other things, the place of jurisdiction for the settlement of a dispute unilaterally is presumed to be an unduly advantageous condition and thus unenforceable (Section 4(9)). However, a stipulation as to a choice of a foreign governing law (as opposed to a choice of the place of jurisdiction) was held to be valid, provided that such choice of law clause was not used to 'bypass' those provisions of Israeli law that cannot be conditioned.

## **V OUTLOOK AND CONCLUSIONS**

In general, Israel continues to be a class-action-friendly jurisdiction even though there was a 13 per cent decrease in the number of certification motions brought in 2018. This marked a departure from what had been, until then, a consistently increasing volume of motions for approval of class actions. As mentioned above, this reduction might be due to the introduction of significant court fees required to bring an application for the approval of a class action.

Israel's case law in class action claims continues to be proactive and dynamic. A series of successful class actions involving internet platform providers further emphasises the fact that vigilant observance of local laws, regulations and standards should be of concern for all multinational corporations operating in the Israeli market. Foreign companies should also be attentive to the details of the degree and nature of their relationship with local entities (whether group affiliates or not) in managing the risk of litigation. The exact extent of foreign companies' exposure is subject to the manner in which the courts will interpret and apply the new legislation.

# ITALY

*Gianfranco Di Garbo and Gaetano Iorio Fiorelli*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The first form of class action was introduced into the Italian legal system in 2007 by Law No. 244/2007 (the Finance Law 2008). In particular, this law added Article 140 *bis* to the Consumer Code, which expressly provides for and regulates the ‘compensatory collective lawsuit’. In principle, such provision should have entered into force 180 days after the coming into force of Law No. 244/2007. However, owing to several fundamental and procedural issues, its coming into force has been continuously postponed. By Law No. 99 of 23 July 2009, the Italian legislator substantially modified the original Article 140 *bis* of the Consumer Code (Legislative Decree No. 206 of 6 September 2005), adopting a new text that entered into force on 1 January 2010 (the Class Action Law), regarding events and infringements occurring after 15 August 2009 (the date of coming into force of Law No. 299/2009).

Lastly, in 2012 the Class Action Law was amended so as to expand its scope and to protect the contractual rights of a number of consumers and users that find themselves in ‘homogeneous’ situations, while the previous language of the law required the situations to be ‘identical’, still according to an opt-in scheme.<sup>2</sup>

More in detail, the current version of Article 140 *bis* provides that consumers with homogeneous interests are entitled to file a class action against a private corporation in three different cases: breach of contract, unfair or anticompetitive commercial practices and product or service liability (see below).

For the sake of completeness, it has to be noted, that, by the Legislative Decree No. 198 of 2009 on the efficiency of public administration, the Italian legislator enacted a different type of class action, granting consumers the right to protect their interests in case of misconduct performed by public bodies or private companies providing public services. The commentators usually refer to this as ‘public class actions’, as opposed to the above-mentioned ‘private class action’.

Further significant change could result from the reform of the Class Action Law now pending before the Senate of the Republic, after having been approved by the House of Representatives. The most significant changes could be:

- a* the inclusion of the rules of the class action in the Italian Code of Civil Procedure, consolidating the private class action and the public class action;

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1 Gianfranco Di Garbo is a partner and Gaetano Iorio Fiorelli is a counsel at Baker McKenzie.

2 See Law No. 27 of 2012, which also introduced other amendments to the Class Action Law, for example, regarding the deadline for the consumers to join the class, which is now set forth by the court not later than 120 days after the decision to admit the action. Under the previous version of the law, consumers were allowed to join the class at any time after the admission of the class, even during the appeal proceedings.



- b* the expansion of the subjective and objective scope of the class action with the opportunity for the consumers to join the latter even after the court's decision; and
- c* the provision of financial incentives to the attorneys who represent the class.

In this chapter, we will deal with the private class action only, in light of the different scope supporting the public class action.

## II THE YEAR IN REVIEW

In recent years, the railway company Trenord has been involved in different class action proceedings.

In particular, the most important was incepted on 25 August 2017 before the Court of Appeal of Milan, which issued a historical decision ordering Trenord to pay compensation of €300,000 as a result of the class action brought by Altroconsumo.

The claim arose from the inefficiencies suffered by the consumers for more than 15 days in December 2012, when Trenord was responsible for cancellation of trains, delays and lack of information, which caused damage to approximately 700,000 commuters.

In 2014, after four days of mobilisation, Altroconsumo had filed before the Court of Milan a class action that had been admitted on 3 March 2014.

In the first instance proceeding, the Court of Milan dismissed the class action. In particular, the Court recognised commuters' right to be compensated as a result of the delays occurred, however it considered that the automatic compensation offered by Trenord - equal to the 25 per cent of the monthly subscription's cost - was sufficient.

Altroconsumo appealed this decision. At the first stage, the Court of Appeal of Milan stated that the failures in Trenord's software management had to be assessed and compensated in a single proceeding. Consequently, the class actions promoted by the consumers' associations Codici and Codacons were to be consolidated with that one of Altroconsumo. Second, on 25 August 2017 the Court of Appeal of Milan overturned the decision of the Court of Milan ruling for a compensation of €100 for each member of the class action in addition to the automatic compensation already paid.

For sake of completeness, it is worth noting that in 2018 Trenord was again subject to a class action in relation to the difficulties faced by the consumers after a railway accident occurred in Pioltello in January 2018.

On that occasion, the Court of Milan upheld consumers' claims and the damages suffered; however, it considered the class action inadmissible as each of the commuters should have proved that he or she was actually on the train that was late and suffered damages. In addition, the Court of Milan ordered the commuters to pay €7,000 for legal costs. As a result of this surprising decision, the parties accepted Trenord's proposal, according to which they will waive the appeal upon a waiver by Trenord of the legal costs.

## III PROCEDURE

### i Types of action available

Pursuant to Article 140 *bis* of the Italian Consumer Code, (private) class actions can be brought to seek legal relief in case of breach of the following rights, which are now required to be simply 'homogeneous' and no longer 'identical':

- a* contractual rights of a class of consumers towards the same professional defendant, these rights deriving also from standard terms and conditions, and mass contracts;
- b* rights arising from product liability, even in the absence of a direct contractual relationship with the manufacturer. In particular, reference must be made to the damage arising from defective or dangerous products as regulated by Articles 114 and following of the Consumer Code. It is worth mentioning that, in the case of defective goods, the manufacturer's liability is widely considered by Italian case law as a 'strict and objective liability' and, therefore, the consumer merely has to prove the existence of the damage, the causal nexus between the damage, and the use of the product and the fact that the product resulted as defective during its use, while the producer has the burden to prove that the defect of its product did not exist when the product was put into circulation or that there was no fault or negligence from its side; and
- c* rights to compensation for the damage suffered owing to unfair commercial practices and anticompetitive behaviour.

Although, so far, most of the cases relate to unfair trade practices and financial contracts, most commentators consider that environmental law should be covered by the Class Action Law, despite the subject not being expressly indicated in Article 140 *bis* of the Consumer Code.

Limitation periods are the same as ordinary civil actions (i.e., five years for torts and 10 years for contractual liability).

## **ii Commencing proceedings**

Pursuant to new Article 140 *bis* of the Consumer Code, consumers and users that have suffered damage are entitled to bring a class action lawsuit. Such a lawsuit may be brought individually by the consumer, as a party of the relevant damaged class, or through associations to which the consumers have granted proper delegation of power or through a committee in which the consumers participate. Any association may be delegated, provided that it is registered in a special register held by the Ministry of Industry or, lacking such registration, is deemed by the court to be sufficiently representative of a class of consumers in a given market.

Consumer associations are not entitled to bring class actions on their own.

Other consumers or users that intend to join a class action that have already been initiated can do so without the need of a counsel for the defence. Such joining involves the waiver to start any individual lawsuit grounded on the same claim as that of the joined class action.

Both the defendant and the public prosecutor have to be notified of the complaint. The public prosecutor will then be able to take part in the first stage of the proceedings and recommend that the court admit or dismiss the class action for reasons of public interest.

According to Article 140 *bis*, if a consumer is willing to benefit from the court's decision, he or she is required to join the class and file the relevant documentation supporting his or her position (e.g., the invoices or tickets proving he or she bought a certain item), listing the factual elements and legal grounds on which his or her claim is based. Nonetheless, joining the class does not imply that the party will directly participate in the proceedings, and, for this reason, he or she is not required to be assisted by a lawyer.

A consumer may also decide not to opt in. In this case, he or she will be allowed to file a separate individual action. Furthermore, if he or she joins the class and then the lead plaintiff

decides to bargain a settlement with the defendant, he or she can refuse to be bound by it and regain his or her individual power to sue.

As to overseas claimants, nothing in Italian law prevents them from joining the action, pursuant to the same provisions applicable to Italian and EU consumers.

### iii Procedural rules

Class action lawsuits fall under the jurisdiction of the court located in the main city of the region where the company is based (with some exceptions) and are handled by a panel of three judges of the tribunal, no matter what the value of any single (or aggregated) claim.

At the end of the first hearing, the court rules on the admissibility of the lawsuit. In particular, the lawsuit shall be declared inadmissible if:

- a* it is *prima facie* clearly groundless;
- b* there is a conflict of interest;
- c* the judge believes that the individual rights indicated in the class action are not homogeneous; or
- d* the proponent does not appear to be capable of properly protecting the interests of the relevant class.

In the past, this has proved to be a crucial stage of the class action and most actions were rejected at that moment, particularly on the point of homogeneity, as opposed to the identity of positions of the consumer plaintiffs. The purpose of the first reform of 2012 was just to make it easier for the class actions to be admitted, but this is still a serious hurdle to overcome.

In that respect, two main positions have been taken by the Italian courts. The first, stricter one, maintained by the Court of Milan by the decision issued on 8 November 2013, stated that only the breaches caused by a single event may be considered ‘homogeneous’ for the purposes of the Class Action Law. In contrast, the Court of Venice (decision issued on 12 January 2016) interpreted the concept of homogeneity as a mere similarity; this means that the class can be considered as homogeneous on condition that the damages are caused by the same behaviour, even if this is not (necessarily) the same event that actually caused all the breaches.<sup>3</sup> Clearly, the interpretation of the Court of Milan implies a substantial limitation of the applicability of the class action. That said, even in the lack of precedents of the Court of Cassation (see below), it seems that the interpretation of the Court of Venice may prevail, as the recent decision of the Court of Milan in the *Samsung* case declared the admissibility of the class on the assumption of the homogeneity of the behaviours.

At the end of this first stage of the proceedings, if the action is considered inadmissible, the court will rule on the legal costs of the lawsuit that the losing party will have to bear. It is worth noting that, while the decision stating the inadmissibility can be challenged before the court of appeal, the decision issued by the latter cannot in turn be challenged before the Court of Cassation.

According to the recent decision issued by the Joint Chambers of the Court of Cassation Court on 1 February 2017, the class action is just one of the possible ways for the

3 For example, while one cannot deny that, for an action concerning unfair commercial practices committed by a bank, based on the (same) standard contractual forms, the misconduct is homogeneous (see the cases against the banks); in other cases – such as the unfair information provided to consumers in relation to several models of tablets and smartphones – the situations may be actually different both for the scope of the information and the persons who actually received it under different circumstances.

consumers to enforce their rights, so the decision of the court of appeal does not prevent the consumers from seeking compensation for the damage suffered following the ordinary procedural rules. According to the Supreme Court, while the inadmissibility declared by the court of appeal prevents the consumer plaintiffs from restating another class action under the same structure, other consumers are still entitled to put forward a class action based on the same grounds.<sup>4</sup> The Supreme Court also highlighted that the consumers who initially promoted the (inadmissible) class action would be able to join the said new class action, once it is finally admitted. This decision has been criticised by many commentators, in light of the crucial role played by the preliminary stage for scrutiny of admissibility, where most of the class actions started as of 2010 have been stopped over past years. Owing to the features of the Italian legal system, in the absence of judgments issued by the Court of Cassation, there will be no chance to have a clear and final interpretation of the Class Action Law and namely of the criteria set forth to identify the homogeneity of the consumers' positions, a concept still subject to divergent interpretations of the courts of merits. In fact, even though in the Italian legal system the precedents of the Court of Cassation are not automatically binding (*stare decisis*) on the lower courts, it is without doubt that they have great influence on all territorial courts.

Coming back to the class action proceedings, if the action is admitted, the court will specify the requirements that every consumer should fulfil to join the class.<sup>5</sup> Most importantly, it will order the publication of the decision at the expenses of the plaintiff, and will establish a term within which any consumer may opt-in.

Parties will be able to challenge the court's decision within 30 days of notification. The appellate body (the competent court of appeal) will then re-evaluate the claim and issue a judgment within the following 40 days. If the court of appeal does not overturn the decision of the first instance court, the merits phase will begin.

#### **iv Damages and costs**

During the merits stage, the court goes through and analyses the merits of the case. Hence, if the judges find the defendant to be liable, they will rule on the amount of damages that each consumer deserves or indicate general uniform criteria. According to Law No. 27 of 2012, the parties are granted 90 days to reach an agreement on the above; failing this, the court will quantify the amounts due. Consistently with the opt-in mechanism, consumers who did not join the class are not bound by any agreement.

Punitive damages are not allowed under Italian law.

At the end of this stage, the court will also rule on the legal costs that the losing party should bear. The decision can be challenged before the court of appeal and, subsequently, in the Court of Cassation.

#### **v Settlement**

Any possible settlement reached during the proceedings is binding only on the consumers who have joined the action and expressly accepted the settlement.

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4 See below a brief description of the *Samsung* case footnote 6.

5 For example, in the recent *Samsung* case, the Court of Milan made reference to some smartphone and tablet models, bought within a certain period of time, also relying on the decision of the Italian Competition Authority that had dealt with the case from a public enforcement point of view.

## **IV CROSS-BORDER ISSUES**

The Class Action Law does not expressly address the possibility for overseas consumers to join the class or that a class action can be brought before foreign companies. Ordinary jurisdiction and applicable law provisions apply.

As to follow-up actions relating to competition law infringements, where an infringement has been identified by a decision of the European Commission, Italian courts will consider themselves bound by the findings made in that decision, according to Article 16 of EU Regulation No. 1/2003. An Italian court may, therefore, opt to stay proceedings brought in reliance on a European Commission decision where that decision is subject to appeal before the European courts, so as not to reach a judgment that is irreconcilable with the outcome of that appeal or appeals.

It is worth noting that under a recent judgment, the joint divisions of the Italian Supreme Court ruled on 5 July 2017 (judgment No. 16601) that in Italy it will be possible to enforce judgments issued by foreign courts, granting the payment of punitive damages. This will apply also to judgments following class actions, whereas for domestic class actions it will still be impossible to get punitive damages, as the general principle emerging from the Italian framework on civil liability is based on compensatory damages, which are granted only as a compensation for the actual losses, injuries or harm suffered as a result of the behaviour of the wrongdoer.

## **V OUTLOOK AND CONCLUSIONS**

Even after the amendment of 2012, the class action has not proved over the years to be an effective instrument to secure and enforce consumers' rights. Even if official data are not available, it is well known that since 2010 fewer than 10 cases reached a positive outcome for the consumers. Throughout 2016 and 2017, consumers associations scored some important points, but most commentators state that the law needs sweeping amendments, otherwise the entire system is doomed to fail.

As mentioned above, the most common problem with class actions still lies with the requisite that consumers have to be in a homogeneous situation. Based on that, most class actions have been dismissed at the preliminary stage as they were found to be inadmissible under the Class Action Law. This was the case, for example, with some class actions with a potentially huge impact, as those started versus the state-owned broadcasting company (RAI TV), the navigation companies Moby and Snav, and the railway company active in Lombardia, Trenord.

A further problem with the Class Action Law over the past years has been the availability of the action to consumers only, and the rather restricted definition of 'consumer' adopted by the courts.

As highlighted above, two different trends were maintained by courts, and so far no consistent trend has been established, also owing to the fact that the Supreme Court is not allowed to reconsider the decisions issued by the courts of appeal.

As regards the subject of the cases, the majority of the class actions concerned unfair commercial practice allegedly committed by Italian banks against consumers.

Below is a short outline of some of the most significant class action cases brought before Italian courts over the past years.

## i Some significant cases

### *Samsung Electronics Italia*

In March 2017, the Court of Milan admitted a class action brought against Samsung Electronics Italia by Altroconsumo. The claim arose from a breach of the rule concerning the unfair trade practices and it was based on the fact that for some devices Samsung declared a memory substantially higher than that actually available. Samsung objected that the positions of the consumers were not homogeneous as required by law. The Court of Milan, firstly, ruled that the above mentioned positions were sufficiently identified, the action proceeded on the merits but, ultimately, the Court of Milan decided not to proceed any further with the class action because of the unsuitability of the methods Altroconsumo had adopted for its communication.

### *IntesaSanPaolo*

This case was started in 2011 before the Turin Court by the consumer association Altroconsumo. The Court finally ascertained that some overdraft charges applied by the bank were unlawful and sentenced the latter to give them back to the account holders. However, owing to some formal issues as regards the joining deeds, only six consumers were finally compensated.<sup>6</sup>

### *Wecantur*

The action started by some consumers seeking compensation for damage suffered a result of the cancellation of a holiday package. The Naples Court sentenced the tour operator Wecantur to pay €3,600 for each consumer, but in the end nobody got their money, as Wecantur went bankrupt.<sup>7</sup>

### *Volkswagen and FCA – class actions versus the automotive industry*

Late in 2015, the Turin Court of Appeal admitted a class action started by the Italian consumer associations Altroconsumo against Fiat, regarding the falsification of the pollution tests of the vehicle Panda third series 1.2.<sup>8</sup> More recently, Altroconsumo scored a good point for a class action brought against Volkswagen about the well-known case concerning the falsification of pollution tests of diesel vehicles. On 16 June 2016,<sup>9</sup> the Venice Appeal Court, by reversing a previous decision of the Venice First Degree Court, admitted the class action concerning the Volkswagen vehicle model Golf 1.6 HDI and opened the possibility for further consumers to join the action. In November 2017, the Court rejected an appeal, and the case is now pending on the merits. The next hearing will be in May 2019; by that time the Court will have to analyse all the 76,000 filed claims.

6 See the decision of the Court of Turin of 28 March 2014 (Turin Court Case No. 32770 of 2011).

7 See the judgment of the Court of Naples of 18 February 2013 (Naples Court Case No. 2195 of 2013).

8 See the decision of the Court of Appeal of Turin of 17 June 2015 (Turin Court of Appeal case No. 1775 of 2015).

9 See the decision of the Court of Appeal of Venice of the 17 June 2016 (Venice Court of Appeal Case No. 298 of 2016).

### ***British American Tobacco Italia***

This is the first and only case of a tobacco class action in Italy. The lawsuit was filed by Codacons, on behalf of several consumers who claimed that the high level of nicotine contained in the cigarettes sold by British American Tobacco Italia caused addiction. Consequently, the plaintiffs sought compensation both for the costs of the cigarettes purchased under this dependence and the health damages caused by the same.

From a procedural point of view, the defendant objected that the alleged facts occurred before Article 140 *bis* came into force, thus no class action could be filed, and that in any case the rights at issue were not homogeneous.

The Court of Rome partially upheld the arguments of British American Tobacco and ruled that the class action proceedings was applicable only for the misconduct that occurred after Article 140 *bis* became enforceable (i.e., after 15 August 2009). Then, as regards the merits of the case, the Court considered the action to be groundless on the statement that every smoker was in fact fully aware of the risks arising from the consumption of cigarettes, and the damage was, therefore, a consequence of a free and aware choice of theirs.

The Court also declared that a collective protection could be granted only upon condition that the judge's assessment can focus on the same legal and factual issues (i.e., on homogeneous rights). On the contrary, in the specific case, as every consumer had his or her own smoking 'history' and has been differently affected by the nicotine, the Court of Rome ruled that the class was not homogeneous for the purposes of the Class Action Law. Accordingly, the action was dismissed as being inadmissible.<sup>10</sup>

## **ii Conclusions**

The Italian class action system clearly needs further legislative interventions to gain popularity.

As reported above, only a few class actions have been declared admissible. Indeed, there are several issues among the provisions of Article 140 *bis* that need to be addressed.

The courts tend to allocate the litigation expenses between the parties or to apply the general principle whereby the losing party bears the costs and attorney fees of the winning party. However, one of the most significant financial burdens of a class action litigation is the publication expense of the ordinance admitting it. Even Article 140 *bis* does not contain provisions as to how to allocate such expenses; so far the courts have uniformly imposed on the plaintiff to anticipate those expenses (which, only at the end of the proceedings, may possibly be charged to the defendant, if the action is upheld). Accordingly, in order to comply with the adequacy requirement, a consumer is required to prove that he or she has enough economic and organisational resources to provide the publication of the court orders as well as the legal costs of a possible merits stage.

The economic factor has often been proved to be decisive for the courts to dismiss many lawsuits, and has inevitably affected the practice of class actions in Italy, where most cases are in fact promoted by associations granted with an *ad hoc* mandate. These associations, in fact, have organisational and financial resources greater than single individuals or small groups of consumers.

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<sup>10</sup> See the decision of Rome Court of 1 April 2011, confirmed by the decision of the Rome Court of Appeal of 27 January 2012.

On the other hand, the costs for proceedings and the high standard of representativeness required by the courts might discourage the consumer associations when the number of class members is presumed not to be significant.

Through Article 140 *bis* a consumer may only seek compensation for damages and restitutions, but not 'punitive damages', which are not allowed by Italian law (whereas, as indicated in Section IV, foreign decisions granting punitive damages may be enforced in Italy).

However, contingency fee arrangements are not allowed by law, and this has made big legal firms reluctant to take cases where the amount of damages awarded may be eventually modest and the attorney fees liquidated by the court not sufficiently rewarding.

For the above reasons, in light of the relevant financial resources needed to have court orders published with national newspapers, the consumers' associations could likely find it too onerous to promote a class action. Moreover, even assuming that the class is dimensionally significant, there is no certainty that after that the action has been admitted, it will end with a positive judgment in the merits. Consumers and associations are forced to run the risk that the high publication expenses are paid for no benefit. Nonetheless, the publicity is necessary to inform people and put them in a position to opt in. Also, the above mechanism has an important impact on the outcome of class actions proceedings. In fact, consumers other than the plaintiffs can join the class only after the action has been admitted. Hence, in theory, a class potentially involving thousands of consumers could stop at the preliminary admissibility stage, if filed by a promoter without the appropriate financial resources.

One may, therefore, wonder whether it makes sense to switch to an opt-out system, which would presumably entail lower publicity costs. Apart from the issues that such a choice may raise, such a mechanism would hardly be successful in the Italian system unless appropriate procedural powers are granted to the consumers that would be involved, by operation of law, into the class action.

Another possible change could involve a better definition of the element of homogeneity to ensure its uniform interpretation.

Also for these reasons, the Italian parliament considered enacting the above-mentioned reform of the class action law, which is now pending before the Senate of the Republic



# JAPAN

*Yuriko Kotani and Haig Oghigian<sup>1</sup>*

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In addition to conventional civil actions seeking damages or injunctive relief, the Consumer Contract Act introduced injunctive relief action by a qualified consumer organisation (QCO) certified by the Prime Minister to protect the interests of a large number of unidentified consumers in 2007.

In addition, the Act on Special Measures for Civil Procedure in Collective Restoration of the Consumer Property Damage (the Special Procedure Law), which is a Japanese class action law, came into effect on 1 October 2016.

The Special Procedure Law has an opt-in system. The plaintiff must be a specified qualified consumer organisation (SQCO) certified by the Prime Minister. Certain district courts have jurisdiction depending on the nature of claims and the estimated number of individual consumers. Claims must be based on contracts between consumers and business operators in which consumers owe monetary obligations.

## II THE YEAR IN REVIEW

Prior to the Special Procedure Law, consumers had been required to sue business operators individually to recover damages arising from a seller's misrepresentations and misstatement of warranties and other claims about products or services. Owing to significant financial and informational disparities between the parties, the system had been invariably advantageous to the business operators.

Therefore, the Japanese government had been considering the introduction of some kind of consumer collective action. It extensively reviewed and evaluated class action laws and bills worldwide. In particular, it critically assessed US class actions and adopted what it believed to be best practices suitable to Japanese culture and submitted these to the national Diet. It integrated the new system into Japan's judicial system for civil claims, which has the following characteristics:

- a* it is a civil law system. (Courts can interpret the statutes but only the legislature can make laws);
- b* there is no jury system in civil cases;
- c* there is no 'US-style' discovery outside court; and
- d* there are no punitive damages.

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<sup>1</sup> Yuriko Kotani is a senior attorney and Haig Oghigian is a senior counsel at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (Squire Patton Boggs).

The first case was filed by Consumers Organisation of Japan on 17 December 2018 with Tokyo District Court in relation to unfair entrance examination conducted by Tokyo Medical University (the *TMU* case).

### III PROCEDURE

#### i Types of action available

##### *Conventional civil actions*

Claims do not need to be based on contracts. A broad range of tort claims, including personal injury, is available. However, all of the plaintiffs and defendants must be named and no John/Jane Doe filing is allowed. Claims for monetary damages, or temporary or permanent injunctions, or both, are possible.

##### *Injunction action under special laws*

Injunction actions are available against unfair solicitation or unfair provisions under the Consumer Contract Act (since 7 June 2007), unfair presentation under the Act against Unjustifiable Premiums and Misleading Presentations (since 1 April 2009), unfair solicitation, unfair provisions or unfair advertisement under the Act on Specified Commercial Transactions (since 1 December 2009) and false labelling under the Food Labelling Act (since 1 April 2015).

##### *Damage recovery action under the Special Procedure Law*

Damage must have occurred after 1 October 2016. Claims must be based on a contract between a consumer and a business operator in which the business operator owes monetary obligations to the consumer in the following five ways.

##### *Claim for performance of contractual obligation*

For example, a security deposit of a private membership club is not refunded upon termination of membership even if the membership charter requires the refund.

##### *Claim related to unjust enrichment*

For example, although students paid tuition to a language school, they cancelled the lesson agreement before taking all of the classes paid for, but the proportionate refund has not been made.

##### *Damage claim based on non-performance of contractual obligations*

For example, persons paid a fee to receive a referral to guarantors for property lease agreements but no guarantor has been referred.

##### *Damage claim based on warranty obligation*

For example, purchasers of a condominium in the same building, which does not meet fire resistance standards.

*Damage claim based on tort provisions in the Civil Code<sup>2</sup> provided that actions cannot be brought for personal injury<sup>3</sup>*

For example, a broker that purchased on a customer's account unlisted stock issued by a company whose business situation was not confirmed and which caused loss to customers.

Only monetary claims are covered by the action under the Special Procedure Law. Neither demand for product recall nor repair of defective products may be asserted.

## **ii Commencing proceedings**

### ***Conventional civil actions***

Any legal entities; both corporations and individuals may initiate the actions.

### ***Injunction action under special laws***

Only a QCO may bring the actions. An individual consumer has no standing to sue on behalf of a 'class'. As at August 2018, 19 QCOs had been certified by the Prime Minister.

### ***Damage recovery action under the Special Procedure Law***

This is a two-step proceeding.

The first step is to seek declaratory judgment of common liabilities. If the court determines that the business operator does not have liability to make monetary payments to consumers, then the procedure ends. If the court determines that it has such liability, then the procedure moves on to the second step, called a summary procedure to determine claims. A losing party may appeal the judgment to a High Court that has jurisdiction over the competent district court.

The second step is to determine the claims of individual consumers where the opt-in takes place.

The plaintiff must be an SQCO. As at April 2018, only three organisations, Consumers Organisation of Japan, Kansai Consumers Support Organisation, and Saitama Organisation To Get Rid of Consumer Damage have been certified by the Prime Minister among 19 QCOs. An SQCO is supervised by the government and subject to corrective action orders and revocation of certification. Compensation and fees to be charged by an SQCO to consumers are regulated. Therefore, there is no room for seeking significant contingency fees.

The defendant must be the business operator who has a contractual relationship with consumers, typically a retailer. An SQCO may not sue a manufacturer, unless the manufacturer has entered into the contract with the consumer. If the business operator ultimately loses in the action and paid damages to consumers, it may be able to recover the amount from the manufacturer. Therefore, the manufacturer may file an application to intervene in the action.

In addition to courts that have jurisdiction over the defendant's head office and other business offices, the location where the tort was allegedly conducted, and the location for the performance of the alleged legal obligation, (1) if the number of subject consumers is expected to be 500 or more, any district courts under the common jurisdiction of those courts; and (2) if the number of subject consumers is expected to be 1,000 or more, the Tokyo District Court and Osaka District Court also have jurisdictions.

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2 Act No. 89 of 27 April 1896, as amended.

3 The main cause of action in the *TMU* case is based on this claim and seeking for return of expenses (including travel and accommodation costs) incurred to take the subject entrance examinations.

If multiple cases in which the content of claims and defendants are identical have been filed, their procedures shall be consolidated.

After the first step action is filed, if there is pending conventional civil action filed by a subject consumer and the defendant for the related claim, the court where the conventional case is pending may stay the procedure.

An SQCO may apply for provisional attachment to the business operator's assets in order to secure the performance of claims.

### **iii Procedural rules**

#### ***Conventional civil actions***

In contrast with the US legal system, Japanese civil procedure has the following characteristics (which are also applicable to injunction actions and the damage recovery procedure):

- a* no jury or lay judge participates in decision-making. Only bench trial by professional judge is available; and
- b* no discovery is available between the parties. The party seeking information needs to obtain court ruling upon filing a request for specific documents.

#### ***Injunction action under special laws***

A typical start is when a consumer provides information to a QCO regarding his or her damage. If the QCO sees the merit on the case upon its internal review, it would contact the business operator in question and request suspension of its unfair activities. If the business operator does not accept the request, the QCO would file the injunction action against it. The judgment may be appealed to higher court by a losing party.

#### ***Damage recovery action under the Special Procedure Law***

As explained in subsectionii, it is a two-step proceeding.

The first step is to seek declaratory judgment of common liabilities. The outcome of the first step is binding upon the plaintiff (SQCO), the defendant (business operator), other SQCOs and consumers who filed proof of claims at the second step.

The second step is to determine the claims of individual consumers where the opt-in takes place. In principle, the SQCO is required to apply for determination of the claims within one month of the day when the declaratory judgment becomes final.

Opt-in invitations are made in the following methods:

- a* the court shall post the official notice;
- b* the SQCO shall notify subject consumers individually in writing or by email and post official notice (internet notice is permitted) at its cost;
- c* the business operator shall announce the content of the court's official notice (internet announcement is permitted) and upon request by an SQCO, disclose documents containing information regarding subject consumers; and
- d* the Consumer Affairs Agency shall announce the summary of declaratory judgment.

In response to the invitation, the subject consumer shall authorise the SQCO to file proof of claim on his or her behalf and pay fees to the SQCO. The SQCO shall file the proof of claim per such authorisation. The filing of proof of claim shall toll the statute of limitation.

The business operator shall accept or deny the claim. If the SQCO does not dispute the answer from the business operator, its answer becomes the final determination of the

claim. If the SQCO disputes the answer, the court will decide on the claim's existence and amount, which will be paid to consumers. A losing party may appeal the determination to the High Court in the jurisdiction.

Those consumers who do not opt in are not barred from bringing or resuming individual lawsuits.

#### **iv Damages and costs**

Court costs should be borne by the losing party while each party pays its own attorney's fee.

##### ***Conventional civil actions***

For contract claims, ordinary damages are recoverable while special damages are recoverable if they are foreseen or foreseeable by the breaching party. For tort claims, the statute requires 'causation', which is interpreted by courts as 'foreseeability'.

##### ***Injunction action under special laws***

Damages are not included in the remedies.

##### ***Damage recovery action under the Special Procedure Law***

Only direct damages are recoverable. Lost earnings or pain and suffering are unrecoverable.

#### **v Settlement**

##### ***Conventional civil actions***

Court sanction is not needed for a settlement. Only named parties to the settlement and their legal successors are bound by the settlement.

##### ***Injunction action under special laws***

Court sanction is not needed for a settlement. Only named parties to the settlement and their legal successors are bound by the settlement.

##### ***Damage recovery action under the Special Procedure Law***

The law authorises the SQCO to settle the case with the defendant during the first step to confirm the common liabilities. Court sanction is not required by law. The settlement triggers the commencement of the second step. The subject consumers who opt in during the second step are bound by the settlement.

## **IV CROSS-BORDER ISSUES**

No punitive damages are allowed. No Japanese statutes provide punitive damages. The Act on General Rules for Application of Laws provides that even when a tort is governed by a foreign law, the victim may make a claim only for damages or any other remedies that may be permitted under Japanese law. The Japanese Supreme Court has found the punitive damage portion of foreign judgments unenforceable in Japan because it is against the public policy of Japan and therefore does not meet one of the statutory requirements for enforcement.

There has been no foreign class action case in which a final foreign judgment was enforced or attempts were made to enforce it in Japan.

## **V OUTLOOK AND CONCLUSIONS**

Injunction action under special laws appear to be effective methods to make business operators voluntarily correct their unfair practices. Many litigated cases have been resolved in a settlement in or outside of court, while some have been decided in favour of the QCO.

Since the first damage claim case filed by an SQCO proceeded with the first hearing before the judge on 22 February 2019, it remains to see if the system functions well.

# LUXEMBOURG

*François Kremer and Ariel Devillers*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

While class actions are on their way to being introduced in Luxembourg, there is currently no defined legal framework applicable to class actions and group litigation. As a matter of principal under Luxembourg procedural rules, a claimant can only sue for his or her own personal benefit to recover a loss personally suffered. There are, however, some sparse judgments that recognise that certain legal entities may be entitled to bring claims on behalf of their members. The District Court of Luxembourg, for example, held in 2005 that a legal entity would have standing to claim damages on behalf of its members on the condition that its constitutional documents authorise the entity to defend, through court proceedings, the interest of part or all of its members.<sup>2</sup> In another judgment from the Court of Appeal dating back to 2007, it was held that unions are entitled to defend the interests of their members through court actions.<sup>3</sup> The law also authorises some limited organisations (especially in the areas of consumer protection, animal rights and the preservation of the environment) to lodge claims for damages in criminal proceedings where the collective interests defended by these organisations are at stake. Other organisations are granted standing to bring legal claims in the general interest, but their ability effectively act of behalf of multiple victims is still very limited.<sup>4</sup> It thus seems difficult to argue that there is currently a general possibility to bring class actions under Luxembourg law, especially in the absence of any constant stream of case law or approval from the Court of Cassation. There are, however, mechanisms available to manage group litigation that will be further discussed in this chapter. These tools aim to group mass claims and to test a defined single claim before all other claims are resolved.

## II THE YEAR IN REVIEW

The initial stages of the preparation of a collective redress mechanism in Luxembourg have been ongoing for some time since the publication of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under

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1 François Kremer is a partner and Ariel Devillers is a senior associate at Arendt & Medernach.

2 DC Lux., 19 May 2005, docket No. 88227, BIJ 8/2005, p. 155.

3 Court of Appeal, 20 June 2007, docket Mo. 30686, 30687 and 30688.

4 G. Ravarani, *La responsabilité civile des personnes privées et publiques*, 3rd ed., Pasirisie Luxembourggeoise 2014, No. 1127 et seq., p. 1,108 et seq.

Union Law.<sup>5</sup> These past couple of years have seen a steady increase in efforts to lay the groundwork.

According to the 2018–2023 Coalition Agreement<sup>6</sup> that was signed at the formation of the new government following the latest parliamentary elections in late 2018, a bill of law on consumer class actions should be adopted shortly. It is intended that the bill of law will draw inspiration from the proposal for a Directive of the European Parliament and of the council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.<sup>7</sup>

The 2018–2023 Coalition Agreement also mentions that it will be further analysed if there is any incentive for introducing mediation either prior to or during a class action, and whether class actions should be extended to other matters such as environmental claims, discrimination, abuse of dominant position and unfair competition.

In an interview published in early January 2019, Luxembourg's Minister for the Environment reiterated that consumer class actions would shortly be introduced in Luxembourg, confirming that this subject is likely one of the government's current priorities.

### III PROCEDURE

#### i Tools for managing group litigation

##### *Assignment of claims*

To effectively manage mass litigation, it might be appropriate to group all claims under the same claimant to simulate to some extent the effects of a representative action.

As in most jurisdictions, claims can be transferred in Luxembourg by means of an assignment according to Articles 1689 et seq. of the Luxembourg Civil Code. To be effective, it is necessary to either notify the assignment to the debtor or to have the debtor specifically agree to the assignment.

Assuming Luxembourg law applies to a given assignment, it would seem paramount to pay attention Article 1699 of the Civil Code, which provides that in case of an assignment of a litigious right against consideration, a debtor is allowed to exercise his or her right of withdrawal. Put simply, once a litigious right is transferred, a debtor is, in essence, entitled to extinguish the transferred claim by repaying the transfer price to the assignee with interests as of the date of the assignment. Such a right of withdrawal is contingent upon the right being litigious, meaning, according to Article 1700 of the Civil Code, that court proceedings have been commenced and that the right has been challenged on the merits.

Thus, to enable the assignee to mitigate the effects of the right of withdrawal, it would seem necessary to assign the claim before any legal proceedings are initiated against the debtor.

Article 1701 nevertheless provides that the right of withdrawal does not apply where (1) the assignee is a co-heir or co-owner, (2) the assignment is in payment of a claim owed to the assignee, or (3) if the litigious right is transferred to the possessor of an inheritance that is subject to the litigious right so transferred.

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5 OJ L 201, 26.7.2013, pp. 60–65.

6 <https://gouvernement.lu/dam-assets/fr/publications/accord-coalition/2018-2023/Accord-de-coalition-2018-2023.pdf>.

7 COM/2018/0184 final – 2018/089 (COD).



It would, in principle, be possible to constitute a special purpose vehicle to collect the various claims through different assignments and subsequently commence proceedings against the defendants.

The obvious advantage of assigning all claims to one single assignee is that the assignee is able to bring all claims in one single lawsuit against the defendants.

### ***Joinder of related proceedings***

If group claims are nevertheless brought individually, it would still be possible to have them consolidated into one single judgment and a single set of proceedings by applying for a joinder based on Article 206 of the New Code of Civil Proceedings.

According to case law, in the interest of the good administration of justice, two or more isolated proceedings can be joined by a court of law if they are related (*connexes*), have a strong affinity, are closely correlated or are so interdependent that there may be a risk of disparity should the claims be tried and judged separately.

However, cases pending before different kinds of courts, under different procedures or in different instances cannot in principle be joined. This applies, for example, to multiple claims brought separately before the commercial section of the civil courts either under the standard civil written procedure or the commercial oral procedure. Parties can, however, agree to adjourn the pleadings under the commercial oral procedure until the proceedings conducted under the standard written procedure reach the pleadings phase.

When faced with claims that are normally attributed to either the Justice of the Peace or the District Court because of the amounts in dispute, it is theoretically possible to try and join all claims together, provided the various claims are filed before the same Court. Article 18 of the New Code of Civil Procedure allows the parties to agree (either tacitly, or expressly through a signed joint declaration in Court) bring proceedings before the Justice of the Peace where the amount under dispute would normally attribute the case to the District Court. The District Court's jurisdiction in terms of value is considered to be of public order, but a lower value claim can exceptionally be brought before it in case it is related to a claim that falls under its own jurisdiction.<sup>8</sup>

It should also be highlighted that class actions can to some extent be hypothetically simulated through the use of joinder proceedings in conjunction with a principal claim brought by a representative organisation (as discussed in Section I).

### ***Test cases***

Test cases are not provided for by law. In the event of mass claims, in order to save on time and expenses, test cases are used in practice with the consent of both the litigating parties and the courts to try one specific case and adjourn or suspend all other related claims pending the outcome of the elected test case.

Test cases have proven their effectiveness and have specifically been implemented during the Madoff scandal when custodian banks were sued massively in Luxembourg for restitution by the victims. However, formally speaking, *res judicata* rules do not apply from one case to another.

<sup>8</sup> T. Hoscheit, *Le droit judiciaire privé au Grand-Duché de Luxembourg*, ed. Paul Bauler, No. 211, p. 147.

## II DAMAGES AND COSTS

Under Luxembourg law, a claimant is only entitled to lawful, certain, direct and personal damages. Punitive and symbolic damages are generally excluded. If the suit is based on a breach of contract, the alleged damages should also have been foreseeable at the time of conclusion of the contract.

There is currently no exception foreseen in case of mass claims or group litigation, meaning that each and every claimant should, in principle, demonstrate a personal damage meeting these requirements.

## III SETTLEMENT

Settlements are governed by Article 2044 et seq. of the Luxembourg Civil Code.

A settlement agreement will only be binding and have the effect of *res judicata* on the contracting parties. In case of group litigation, it is possible to have all claimants settle their demands with the defendant in one single document. It should nevertheless be noted that a valid settlement requires mutual concessions that, in case of a group settlement, need to be identifiable between each of the claimants and the defendant. In other words, a general concession by the group of claimants would likely not suffice. It is, therefore, also advisable to include a severability clause in case any anyone tries to invalidate the settlement with one of the claimants at a later stage.

Court approval of a settlement does not generally apply, but there are some limited exceptions such as when a bankruptcy receiver is settling.

## IV CROSS-BORDER ISSUES

### i Conflict of law and choice of law in group litigation

If a claim has an international aspect and is brought before the courts in Luxembourg, these will usually resort to the Rome I<sup>9</sup> and II<sup>10</sup> Regulations, which are both universally applicable, to determine the governing law (unless the claim is not caught or is specifically excluded from the scope of these Regulations).

In applying the rules under the Rome I and II Regulations, it is mostly unlikely, but nevertheless possible, that claims might be governed by different applicable laws, even in similar factual circumstances. Such disparities may exist, for example, in instances where the claimants are of different jurisdictions or where the various contracts vary in terms of chosen governing laws. In practice, disparities in terms of governing laws will form an obstacle to grouping the claims together under the same proceedings, especially if this also implies differences in the laws applicable to evidence.

If a foreign law applies to a claim brought in Luxembourg, case law considers that the applicant bears the burden to prove the substance of the foreign law. Parties will usually rely on legal opinions issued by foreign practitioners. Luxembourg courts would also be able to

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9 Regulation (EC) No. 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

10 Regulation (EC) No. 864/2007 of the Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

rely on information on foreign law obtained in accordance with the European Convention on Information on Foreign Law of 7 June 1968.

## **ii Enforcement of foreign class action judgments**

Whether or not caught by the Brussels Recast Regulation<sup>11</sup> or other international agreements,<sup>12</sup> recognition and enforcement of a class action judgment in Luxembourg may prove to be challenging.

Depending on the architecture of the class action lawsuit at stake, concerns of Luxembourg International Public Order (in its mitigated application) may become a hurdle to effective recognition and enforcement of a class action judgment in Luxembourg. Issues may arise, for example, in relation the applicable opt-in or opt-out mechanism, which may affect, to some extent, the rights of defence as conceived in Luxembourg. Other problems may exist when non-strictly compensatory damages have been awarded, such as punitive damages.

## **VI OUTLOOK AND CONCLUSIONS**

As a bill of law is shortly expected on a new framework for collective redress in Luxembourg, we may be in a position to present the envisaged rules in next year's edition of this chapter.

It is also anticipated that the introduction of class actions in Luxembourg will probably have an effect on the analysis whether foreign class action judgments are likely to be recognised and enforced in Luxembourg.

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11 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.

12 Such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Enforcement Convention).

# NETHERLANDS

*Jan de Bie Leuveling Tjeenk and Bart van Heeswijk*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Dutch law has a different approach to class actions compared with common law jurisdictions, such as the United States. In particular, the claimant in a ‘Dutch-style’ class action, a collective action, is a representative organisation. Rather than having its own interest in the litigation, it files the claim solely for the benefit of third parties whose interest it purports to represent.<sup>2</sup> The representative organisation, which must be a foundation or association, does not, however, represent the interested parties in a formal sense.

A key limitation to a collective action under Dutch law is that it does not allow representative organisations to claim damages. As a result, in practice, the primary use of a collective action is to pursue a declaratory judgment establishing the basis for liability (e.g., a declaration that the defendant committed a tort or breached a contract). On the basis of that declaratory judgment, the interested parties may claim damages in individual proceedings.

On 19 March 2019, new legislation was approved by the Dutch parliament to amend the existing collective action, which permit representative organisations to claim damages (the New Legislation). The New Legislation is expected to enter into force in July or September 2019.

Although Dutch law does not currently provide for an US-style class action, it does offer a mechanism that is somewhat similar to the US class action settlement. The Dutch Act on the Collective Settlement of Mass Claims (WCAM) provides for an opt-out mechanism that facilitates the implementation of collective settlements through a binding declaration by the Amsterdam Court of Appeal. The WCAM was developed exclusively as a mechanism to offer the opportunity to give a wide effect to settlements reached. Nine settlements have already been declared binding based on the WCAM court proceedings to obtain a binding declaration in another settlement – *Ageas* – are currently pending. Since the US Supreme Court’s decision in *Morrison v. National Australian Bank*,<sup>3</sup> the international relevance of the Dutch mechanism for collective settlements has increased. Indeed, now that ‘foreign cubed class actions’ have become a problem in the United States, the Netherlands may become a serious alternative for the certification of collective settlements involving non-US investors in non-US securities listed on a non-US stock exchange.<sup>4</sup>

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1 Jan de Bie Leuveling Tjeenk is a partner and Bart van Heeswijk is a senior associate at De Brauw Blackstone Westbroek.

2 Article 3:305a Dutch Civil Code.

3 No. 08/1191 (US 24 June 2010).

4 R Hermans and D Horeman – ‘International Class Action Settlement in the Netherlands since *Converium*’, in: I Dodds-Smith, A Williams (eds.) – *ICLG to: Class & Group Actions 2017*, Global Legal Group Ltd., London, UK, 2018.

Besides a collective action and a mechanism for collective settlements, Dutch law provides the possibility to bundle claims by allowing a multitude of damaged parties to assign their claims to a single third party, for instance, a claims vehicle, which can then commence proceedings in its own name.<sup>5</sup>

## II THE YEAR IN REVIEW

The New Legislation facilitates collective redress in the form of an opt-out mechanism for Dutch claimants, and an opt-in mechanism for foreign claimants. It provides mechanisms for reaching a class settlement similar to the procedure for a WCAM settlement. In Section III.ii, we discuss the existing collective action legislation, and highlight the amendments made by the New Legislation.

In 2016, Ageas and a number of representative organisations submitted a request to a Dutch court to declare binding a global settlement agreement covering all securities litigation regarding the former Fortis group for events that occurred in 2007 and 2008. These events relate, among other things, to the acquisition of parts of ABN AMRO. In July 2018, the court declared the revised global settlement in the *Ageas* case<sup>6</sup> binding after having handed down two interim decisions. On 1 January 2019, the Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA) opened its doors. The NCC and NCCA offer the possibility to litigate in international business disputes (including mass claims) in English before the Amsterdam District Court and the Amsterdam Court of Appeal, making litigation about international mass claims more efficient, effective and attractive.

## III PROCEDURE

### i Types of action available

#### *Claim bundling*

Under general rules of Dutch law, claims can be assigned to a third party, which can then commence proceedings and sue for damages in its own name. This practice of bundling claims is common in the Netherlands, for example, in the context of cartel damage claims. The claims are usually brought by a claims vehicle in its own name, having obtained a large number of claims through an assignment from parties that have allegedly suffered loss as a result of, for example, a cartel.

#### *Collective actions*

Article 3:305a of the Dutch Civil Code enables representative organisations to bring a collective action. Under the current law representative organisations may not file claims for damages. The New Legislation removes this restriction. Subsection ii further discusses the collective action currently provided by Dutch law and the proposed changes.

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<sup>5</sup> Article 3:94 Dutch Civil Code.

<sup>6</sup> Amsterdam Court of Appeal, 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Ageas*).

## ***Collective settlements***

In the WCAM Dutch law provides for a mechanism that facilitates the implementation of collective settlements. This mechanism is outlined in subsection iii.

### **ii Collective actions**

#### ***Initiating proceedings***

An association or foundation may bring a collective action to protect the interests of a defined group of interested parties or public interests.<sup>7</sup> The representative organisation can file a collective action on its own initiative. To have standing in court, a number of requirements must be met. The representative organisation must have the objective of protecting the relevant interests according to the objective clause in its articles of association. In addition, the association or foundation must show its ability to sufficiently protect the interest of the parties on whose behalf the action is instituted. This is commonly known as the criterion of representativeness test. Before initiating the collective action, the representative organisation must have tried to achieve the required result through negotiations.

In a collective action, the representative organisation represents all persons in whose interest the claim is filed, including but not limited to any persons who are associated with, or members of, the representative organisation.

#### ***Procedural rules***

Except for a claim for damages, any form of relief may be sought, including declaratory relief on liability, rescission or the specific performance of a contract, injunctive relief or the annulment of a legal act. A declaratory judgment establishing liability can be followed by individual damages claims.

The collective action is covered by the normal rules of Dutch civil procedural law.

#### ***New Legislation***

As stated earlier, the New Legislation broadens the scope of the current collective actions so as to enable collective actions for damages on an opt-out basis for domestic claimants, and on an opt-in basis for foreign claimants. The New Legislation also introduces stricter criteria for representative organisations with regard to governance, funding and representativeness. These criteria apply for collective actions for damages claims as well as for other collective actions. According to the New Legislation, the court will decide early in the proceedings whether the representative organisation meets the relevant criteria and whether the action is fit to be dealt with through collective proceedings.

Within two days of filing the claim, the representative organisation must enter the matter into a central register for collective actions. The entry in the register triggers a three-month period during which other representative organisations can file alternative competing collective actions that are based on the same event. If more than one representative organisation files a claim for the same event, the court will appoint a lead claimant, called an 'exclusive representative', to represent the interests of the whole class. After the court appoints a lead claimant, the claimants can opt out of the collective action.

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<sup>7</sup> An association is defined by Article 2:26 Dutch Civil Code. A foundation is defined in Article 2:285 Dutch Civil Code. A foundation may be set up especially for the purpose of participating in a collective action or settlement.

The court's decision regarding the appointment of an exclusive representative, the definition of the class and the scope of the claim must be notified to all members of the class. This notification will also indicate that Dutch claimants have the opportunity to opt out of the collective action and that foreign claimants can opt in. However, at the request of a party to the class action, the court can rule that the opt-in mechanism also applies to Dutch claimants. The minimum period for opting in or opting out is one month.

The New Legislation includes a 'scope rule', which provides that the collective action must have a sufficiently close connection to Dutch jurisdiction. As this provision is especially important in the context of collective actions with an international character, this issue is discussed further in Section IV.

In addition, the New Legislation contains a transitory provision and only applies to claims for damage-causing events that have occurred on or after 15 November 2016.

### ***Damages and costs***

The representative organisation may not have a financial interest in the claim. It may, however, derive its funding from third parties to achieve the objectives set out in its articles of association. This means that a third-party litigation funding entity or law firm can provide funds to that organisation to finance a collective action.

In principle, attorney fees can be negotiated between the representative organisation and the attorney without any particular restrictions. However, that freedom is somewhat restricted by the Dutch Bar Association's Code of Conduct (DBACC), which provides that 'an attorney may not agree to charge a proportionate part of the value of the result obtained'. Hence, contingency fees are not permitted. Furthermore, the DBACC provides that 'an attorney may not agree that he will only charge for his services upon obtaining a specific result'. Therefore, attorneys are not allowed to agree to not receiving a fee unless a specific result is obtained. However, charging fees at a higher rate if the case is successful is allowed.

### **iii Settlement**

#### ***The WCAM***

A collective action could end up in a class settlement certified by the WCAM procedure. However, to be entitled to a WCAM procedure, it is not required that a collective action be filed first. The WCAM enables parties to a settlement agreement to jointly request the Amsterdam Court of Appeal (the Court) to declare the settlement agreement binding. The agreement must be concluded between one or more potentially liable parties, and one or more foundations or associations representing one or more groups of persons for whose benefit the settlement agreement was concluded (together, the 'interested persons'). If the Court declares the settlement agreement binding, the agreement binds all persons covered by its terms, unless such person decides to opt out in writing within a certain time period after the binding declaration. The opt-out period is determined by the Court, but is at least three months.

So far, the Court has issued nine final decisions within the framework of the WCAM, namely in:

- a* *DES* and *DES II* (regarding personal injury allegedly caused by a harmful drug);
- b* *Dexia* (regarding financial loss allegedly caused by certain retail investment products);
- c* *Vie d'Or* (regarding financial loss allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company);

- d *Vedior* (regarding financial loss allegedly suffered by shareholders as a consequence of late disclosure of takeover discussions);
- e *Shell, Converium* (both regarding financial loss allegedly suffered by shareholders as a consequence of misleading statements by the company in a certain period);
- f *DSB Bank* (regarding possible damages claims on the bankrupt estate of a bank owing to the bank allegedly violating its duty of care towards the customers); and
- g *Ageas* (regarding financial loss allegedly suffered by shareholders as a consequence of misleading statements and a failure to provide sufficient information on strategic decisions).<sup>8</sup>

In each of these cases, the Court declared the settlement agreements binding. It further found the settlements reasonable and affirmed the representativeness of the representative organisations.

The procedure of reaching a binding settlement under the WCAM is as follows:

- a settlement: a settlement is concluded with one or more organisations representing the interests of claimants;
- b binding declaration: the Court may declare the settlement binding upon all relevant claimants, ‘known’ and ‘unknown’, on an opt-out basis; and
- c binding settlement: upon the binding declaration, all beneficiaries are automatically bound to the settlement unless they opt out.

### ***Initiating proceedings***

#### *Parties*

The beneficiaries are not initially a party to the settlement. However, after the Court issues the binding declaration, each beneficiary is, by virtue of the binding declaration, automatically deemed to be a party to the settlement, unless he or she submits an opt-out statement before the deadline. If a group of persons is excluded from the settlement, the binding declaration does not diminish their rights in any way. The binding declaration cannot be invoked against them, and they are free to pursue their claim in court without the need to timely issue an opt-out statement. Excluding a certain group of persons from the scope of beneficiaries under a settlement is different from the situation where a certain group of persons is included in the scope of beneficiaries under the settlement but is not awarded any compensation.<sup>9</sup> In that case, the binding declaration can be invoked against these persons: they will need to opt out in time to be able to pursue their claim in court.

One or more associations or foundations that, pursuant to their articles of association, promote the interests of, and are representative of the beneficiaries (representative

8 Amsterdam Court of Appeal, 1 June 2006, LJN AX6440, NJ 2006/461 (*DES*); Amsterdam Court of Appeal, 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*); Amsterdam Court of Appeal, 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d’Or*); Amsterdam Court of Appeal, 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*); Amsterdam Court of Appeal, 15 July 2009, LJN BJ2691, JOR 2009/325 (*Vedior*); Amsterdam Court of Appeal 17 January 2012, LJN BV1026 (*Converium*); Amsterdam Court of Appeal, 4 November 2014, JOR 2015/10 (*DSB*) Amsterdam Court of Appeal 24 June 2014, ECLI:NL:GHAMS:2014:2371 (*DES II*) and Amsterdam Court of Appeal, 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Ageas*).

9 See, for example: Amsterdam Court of Appeal, 27 January 2007, LJN AZ7033 (*Dexia*), Paragraph 3.12; Amsterdam Court of Appeal, 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d’Or*), Paragraph 3.3.



organisations) can conclude a settlement.<sup>10</sup> The WCAM stipulates that the Court must deny the binding declaration of a settlement if the representative organisations are not sufficiently representative with regard to the interests of the beneficiaries.<sup>11</sup> The Court actively ascertains whether this requirement is met. The test as to whether a representative organisation is sufficiently representative is, hence, a discretionary test applied by the Court on the basis of all circumstances of the matter. This representativeness can be derived from several factual circumstances and that not one circumstance is decisive. In the *Dexia* and *Ageas* case, the Court looked at the statutory objects of the foundations and associations involved, the number of participants or members, the activities of these foundations and associations apart from filing the WCAM request, such as their websites, mailings to interested persons, activities in the media, and earlier activities in the field of litigation in connection with the issues that were covered by the settlement.<sup>12</sup> Furthermore, the Court assessed whether the representative organisations sufficiently guaranteed the legal interests of their members, in line with the Dutch Claim Code (this is a soft law that applies to foundations and partially to associations acting in a collective action or in WCAM proceedings).

In the *Probo Koala* case,<sup>13</sup> the Court declared the claims of the foundation inadmissible because the interests of the potential claimants were insufficiently safeguarded. The claims that were filed by the foundation had already been prepared by the Ivory Coast organisations. The foundation was too dependent on these organisations and could not convince the Court that compensation awarded to potential claimants would not be granted to the Ivory Coast organisations.

#### *Terms and conditions of the settlement*

The settlement is a private agreement between private parties and as such, in principle, the parties are free to agree on the terms and conditions. That said, the settlement is not intended to only govern the legal relationship between the compensating parties and representative organisations, but ultimately to govern the legal relationship between them and a large group of future parties: the beneficiaries. In deviation from the main rule of interpretation of contracts covered by Dutch law that hinges on the parties' intentions, a settlement – which binds parties that were not involved in the conclusion of that settlement – will need to be interpreted more objectively.<sup>14</sup>

10 Article 7:907(1) Dutch Civil Code.

11 Article 7:907(3)(f) Dutch Civil Code.

12 Amsterdam Court of Appeal, 27 January 2007, LJN AZ7033 (*Dexia*), Paragraph 5.23 ff.

13 District Court of Amsterdam, 18 April 2018, JOR 2018/201.

14 Supreme Court of the Netherlands, 9 December 2017, NJ 2017/11.

### *Procedural rules*

Once a settlement is reached, the parties may jointly request the Court to issue a binding declaration.<sup>15</sup> Until now, a binding declaration has been requested – and issued – in nine cases.<sup>16</sup>

The WCAM limits the options of the Court to either issue or altogether refuse a binding declaration.<sup>17</sup> In practice, the Court issues interim judgments to indicate whether or not the settlement, in its view, passes the test and allow the parties to submit one or more amended settlements accordingly, before issuing a final judgment.

The Court's decisions cannot be appealed unless a binding declaration is refused<sup>18</sup> (which has never happened, although the Court has indicated in some cases that it would only declare the settlement binding after being amended) and then only by all petitioners jointly to the Supreme Court of the Netherlands on limited grounds of material procedural errors or breach of law.<sup>19</sup>

### *Petition*

The compensating parties and the representative organisations submit a joint petition to the Court, together with the settlement, in which they request the Court to issue a binding declaration.

### *Notification*

Notification of the persons for whose benefit the settlement agreement is concluded is crucial, both at the stage of the litigation aimed at obtaining a binding declaration, as well as after the binding declaration has been issued.<sup>20</sup> The WCAM provides for direct notification of interested persons known to the petitioners, as well as for public notification, through announcements in newspapers, of interested persons whose identity is unknown to the petitioners. Insofar as foreign unknown interested persons are concerned, the Court may order announcements in

15 Article 7:907(1) Dutch Civil Code: 'may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused'. The Amsterdam Court of Appeal has exclusive jurisdiction to decide on Pre-Agreed Settlements under the WCAM. Article 1013(3) Dutch Civil Code. Kamerstukken II 2003/04, 29 414, No. 3, p. 25.

16 Amsterdam Court of Appeal 1 June 2006, LJN AX6440, NJ 2006/461 (*DES*); Amsterdam Court of Appeal 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*); Amsterdam Court of Appeal 29 April 2009, LJN BI2717, JOR 2009/196 (*Vie d'Or*); Amsterdam Court of Appeal 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*); Amsterdam Court of Appeal 15 July 2009, LJN BJ2691, JOR 2009/325 (*Vedior*); Amsterdam Court of Appeal 17 January 2012, LJN BV1026 (*Converium*); Amsterdam Court of Appeal 4 November 2014, JOR 2015/10 (*DSB*) and Amsterdam Court of Appeal 24 June 2014, ECLI:NL:GHAMS:2014:2371 (*DES II*) and Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Ageas*).

17 Pursuant to Article 7:907(4) Dutch Civil Code, the Court may not amend or supplement the settlement except with the petitioning parties' consent.

18 Article 1018 Dutch Code of Civil Procedure.

19 Article 79 Dutch Law on the Organisation of the Judiciary.

20 Direct international notification, insofar as EU-domiciled persons are concerned, is governed by Council Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. If interested persons reside outside of the EU, notification must be effected pursuant to applicable treaties, most notably the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

relevant foreign newspapers, as is demonstrated in *Shell* and *Converium*.<sup>21</sup> In *Ageas*, the Court took the same approach but also allowed foreign and domestic shareholders to be notified of proceedings via email if they had registered with the claimant organisations that were a party to the settlement. The Court only required more formal notification for those shareholders for whom a confirmation of receipt had not been obtained.

### *Judicial review*

A settlement needs to meet certain mandatory statutory requirements in order to qualify for a binding declaration.<sup>22</sup> These requirements may be divided into two categories: on the one hand, more ‘technical’ requirements (such as a description of a damage-causing event and the group of beneficiaries), essentially pertaining to information that is necessary for a standardised settlement, and ‘substantive’ requirements, which enable the Court to determine whether the terms and conditions of the settlement provide sufficient safeguards for the interests of the beneficiaries to justify a binding declaration (such as ‘reasonable compensation’, see the following paragraphs, and the representative organisation being sufficiently representative).

### *Reasonableness test*

The WCAM provides that the Court will refuse the binding declaration if the compensation awarded in the settlement is not reasonable, having regard to, among other things, the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage. In determining whether the amount and terms of the compensation awarded in the settlement are ‘reasonable’, the Court may take into account all circumstances of the case – whether they arose before or after determination of the amount of compensation and before or after the settlement was reached.<sup>23</sup> In *DSB Bank*, the Court also took into consideration that it is both in accordance with the law and in the interest of the parties involved that the number of opt-outs is as limited as possible.

‘Reasonableness’ of the settlement has many aspects. The first aspect discussed here is the reasonableness of the criterion by which it is determined whether a person is included in the group of interested parties. The Court will not easily decide that a certain group was wrongly excluded from the settlement.<sup>24</sup> Obviously, if a group is excluded from the settlement, the binding declaration will not diminish their rights in any shape or form, that is: the binding declaration cannot be invoked against them; and they still have standing in court, without the need to issue an opt-out statement in time.

The type of exclusion described in the preceding paragraph is different from the situation where a certain group is included in the settlement, in the sense that it is covered by the description of interested persons potentially eligible for compensation, but is not awarded anything. In that case, the binding declaration can be invoked against this group and these

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21 See the record of the court session in *Shell* of 12 July 2007, the record of the court session in *Converium* of 24 August 2010 and the record of the court session in *Ageas* of 27 March all published on the website of the Court.

22 Article 7:907(2)(3) Dutch Civil Code.

23 Amsterdam Court of Appeal 17 January 2012, LJN BV1026 (*Converium*), Paragraph 6.2.

24 In *DES* (ground 5.19), the Court held that it will only test whether it is ‘incomprehensible’ that a certain group of potentially eligible persons was excluded from the settlement agreement (in that case, the group of haemophilia patients).

persons need to opt out to still have standing in court. In such a case, the Court will fully test whether such limitation is reasonable.

The concept of ‘reasonableness’ also refers to the amount of compensation awarded in the settlement. It is an implied starting point of the WCAM that the settlements may differentiate between different groups of eligible parties on the basis of the expected strength of their claim in court. In addition, the Court in *Dexia* held that a settlement is the outcome of negotiations in which all parties have made concessions based on the perceived strength of its legal position and perceived interest in having the matter resolved outside of court. As a consequence, a settlement will normally not result in full compensation of the losses as originally presented by the claiming parties. The Court held that this in itself does not make a settlement unreasonable.<sup>25</sup>

In the *Shell* case, the Court held on multiple grounds that the compensation granted was not unreasonable. It referred to the broad support the settlement had met – both from institutional investors and from shareholders’ associations. The Court also referred to two favourable opinions of US scholars that were filed by the petitioners, which indicated that the settlement was somewhat better for the beneficiaries than the average of settlements in comparable cases. The Court furthermore took into account that the alleged misleading statements had not given rise to any litigation outside of the US, which suggests that it was uncertain if an award in a non-US court could be obtained that would be better than the compensation awarded in the settlement.<sup>26</sup>

In *Shell*, no question arose about unequal treatment of shareholders in different jurisdictions, as the shareholders were actually treated equally in all jurisdictions. However, there may be international cases in which the settlement differentiates between parties residing in different countries, on the basis that their claims have a different value under the laws that apply in each of their cases.

In *Converium*, just as in *Shell*, the settlement only regarded non-US shareholders. The Court found that the proposed non-US settlement amount was considerably lower than the US settlement amount. However, it held that despite this difference the amount of compensation was not unreasonable. The Court ruled that the difference between the US and non-US settlement amount was justified given the fact that the legal position of the US shareholders differed from the legal position of the non-US shareholders. According to the Court, the non-US shareholders were excluded from the US settlement, and it would be very difficult for them to get compensation outside the US, whereas it was improbable that they would get compensation in the US. Also, the non-US shareholders could opt out and start individual proceedings.<sup>27</sup>

In the *Converium* case, the Court ruled that despite a considerable lawyers’ fee of 20 per cent, the amount of compensation as included in the settlement was not unreasonable. As most preparatory work had been done by US lawyers, the Court took into account US standards of what is common and reasonable in judging what a reasonable fee is. The Court found that it was sufficiently established that according to such standards, the fee was not unreasonable.<sup>28</sup>

25 Amsterdam Court of Appeal, 25 January 2007, LJN AZ7033, NJ 2007/427 (*Dexia*), Paragraph 6.6.

26 Amsterdam Court of Appeal, 29 May 2009, LJN BI5744, JOR 2009/197 (*Shell*), Paragraph 6.15–6.17.

27 Amsterdam Court of Appeal, 17 January 2012, LJN BV1026 (*Converium*), Paragraph 6.4.1–6.4.5.

28 Amsterdam Court of Appeal, 17 January 2012, LJN BV1026 (*Converium*), Paragraph 6.5.1–6.5.7.

In its first interim decision in *Ageas*, the Court did not declare the settlement binding but allowed the parties to present an amended settlement. The Court considered the distinction made between ‘active’ and ‘non-active’ claimants for purposes of awarding compensation unreasonable, but it did eventually allow a uniform compensation of for active claimants. In its interim decision, the Court also considered that in the case of capped total compensation, the reasonableness towards certain shareholders whose loss is more plausible (buyers), should be considered in light of the greater part of that amount potentially going to others whose claim is unlikely to succeed (holders). Although the court emphasised the difficulty holders would have to successfully bring a claim, it did eventually approve the amended settlement agreement that still compensated holders. The Court also emphasised the importance of clarity in the release obtained by the potentially liable party under the settlement agreement.

### *Binding effect*

A binding declaration by the Court transforms the settlement into a binding settlement, meaning that all beneficiaries – known and unknown – are bound by it unless they expressly opt out within a certain time period.<sup>29</sup> The opt-out format of a binding settlement hence makes the playing field more transparent: if a binding declaration is obtained, the compensating parties will, after the opt-out period, know who may still sue for damages.

An opt-out notice can only be submitted after the binding declaration has been issued by the Court. The duration of the opt-out period is set by the Court, normally three to six months after publication of the binding declaration.<sup>30</sup>

The parties can stipulate in the settlement that the compensating parties are jointly entitled to terminate the settlement in case of a certain percentage of opt-outs.<sup>31</sup> The percentage can be agreed upon in the settlement – the WCAM does not specify which percentage must be met.

## IV CROSS-BORDER ISSUES

### i Collective actions

#### *Scope rule*

Apart from the question of international jurisdiction, the New Legislation provides for a ‘scope rule’ for admissibility of the collective action. The scope rule provides that a class action is inadmissible if the claims have insufficient nexus with the Netherlands. The New Legislation specifies that sufficient nexus with the Netherlands exists if one of the following conditions are fulfilled:

- a the majority of the individuals on behalf of whom the representative organisation files the collective action reside in the Netherlands;
- b the defendant is domiciled in the Netherlands and additional circumstances indicate that sufficient nexus with the Netherlands exists; or
- c the event on which the collective action is based, took place in the Netherlands.

29 Article 7:908(2) Dutch Civil Code.

30 Article 7:908(2) Dutch Civil Code.

31 Article 7:908(4) Dutch Civil Code.

## ii Collective settlements

### *Jurisdiction in international settlements*

With regard to proceedings for the binding declaration under the WCAM of international settlements, the Court assumes jurisdiction rather easily, even if the case has no substantive connection to the Netherlands.

In terms of the jurisdiction, recognition and enforcement of a binding declaration, the Brussels I bis Regulation applies if the person 'to be sued' (i.e., the shareholder or, in a product liability case, the alleged victim of a defective product) is domiciled in a Member State of the EU.<sup>32,33</sup> If the person 'to be sued' is domiciled in Norway, Switzerland or Iceland, the Lugano Convention applies. In both *Shell* and *Converium*, the Court assumed jurisdiction over the shareholders domiciled outside the Netherlands, but within the EU, Switzerland, Iceland or Norway, because their potential claims were 'so closely connected' to the claims of the shareholders domiciled in the Netherlands that it was 'expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.<sup>34</sup> Furthermore, the Court also assumed jurisdiction with regard to the shareholders who were not domiciled in the Netherlands, or in any other EU Member State, Switzerland, Iceland or Norway. This decision was based on the fact that five out of six petitioners in *Shell* and two out of four petitioners in *Converium* were domiciled in the Netherlands. Jurisdiction was based on Article 3 of the Dutch Code of Civil Procedure, which provides that, in these types of proceedings, Dutch courts have jurisdiction if at least one of the parties requesting the binding declaration, or one of the defendants, is domiciled in the Netherlands.

The Court's decision on international jurisdiction in *Converium* implies that even if the case is not substantively connected to the Netherlands, but a minority of the parties 'to be sued' are domiciled in the Netherlands and one of the parties to the settlement is a Dutch entity (for example, a Dutch foundation representing the interests of the alleged victims), the Court will assume jurisdiction. It should be noted that the Court in *Converium* also held as a separate and autonomous ground for jurisdiction that the settlement to be declared binding has to be executed in the Netherlands.<sup>35</sup> In *Ageas*, the Court confirmed the approach taken in *Shell* and *Converium*.

### *International recognition and enforceability of a WCAM decision*

Whether the WCAM procedure will prove to be helpful in declaring international settlements binding will, in the long run, also depend on whether foreign courts recognise and enforce binding declarations by the Court. The criteria dictating whether foreign courts will decide on recognition and enforcement of a foreign court decision will differ from country to country. However, insofar as the foreign court is a court of an EU Member State, a solid argument can be made that the decision to declare a settlement binding is a 'judgment' as referred to in Article 2(a) Brussels I bis Regulation. This type of judgment must be recognised

32 Council Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 12 December 2012 (the Brussels I bis Regulation).

33 In both *Shell* and *Converium*, the Court rules that for the purpose of these international instruments, the WCAM procedure is a 'civil and commercial matter' and that the shareholders are to be regarded as the persons 'to be sued' as referred to in the Brussels I bis Regulation and the Lugano Convention.

34 See Article 8 Section 1 of the Brussels I bis Regulation, see Article 6 Section 1 of the Lugano Convention.

35 As a consequence, the Court also assumed jurisdiction on the basis of the predecessor of Article 7, sub 1 of the Brussels I bis Regulation and Article 5 sub 1 of the Lugano Convention.

by the courts of other Member States unless one of the grounds to refuse recognition in Article 45 apply. However, these grounds are rather narrow. In these cases, a ground for refusal include that the defendant was not properly served (Article 45 Section 1(b)). The court deciding on recognition may not review the Court's binding declaration for its substance (Article 52) unless it is manifestly contrary to public policy in the Member State where recognition is sought (Article 45 Section 1(a), Brussels I bis Regulation). However, there is currently no specific mechanism for the international recognition and enforcement of collective settlement proceedings. Additionally, with the exception of some scholarly writing, there are no legal authorities or precedents, such as judgments, on the recognition of WCAM judgments. The atypical nature of the proceedings (a contractual settlement with a subsequent binding declaration from the Court, which has the effect of making other persons bound as contractual parties to the same settlement unless they opt out) combined with the lack of a specific mechanism for recognition and enforcement leads to uncertainty with regard to recognition and enforcement abroad.

### ***Representativeness in international settlements***

In WCAM settlements with an international character, the representative organisations must also be sufficiently representative of foreign beneficiaries. In the *Shell* case, a Dutch foundation was created for the sole purpose of representing the interests of all non-US shareholders affected by the alleged misrepresentations by Shell. This foundation sought and obtained the support of participants and supporters, such as shareholder organisations in relevant foreign countries and institutional investors. In the WCAM petition, all interested persons were represented by this foundation (backed up, so to speak, by its participants and supporters) and the Dutch Shareholders' Association (VEB). The court accepted these two parties as being sufficiently representative. The Court appeared to have looked at the articles of association of the foundation and the VEB, and abstained from scrutinising the actual activities of these entities.

In the *Converium* case, the shareholders were represented in a similar manner as in the *Shell* case, and the court also accepted the Dutch foundation and the VEB as being sufficiently representative. In both the *Shell* case and the *Converium* case, the court repeated part of the *Dexia* ruling, reiterating that it is not required for each petitioner organisation to be representative for all persons involved.<sup>36</sup> In adding to this ruling, the court in *Converium* stated that there was insufficient reason to also require each petitioner to be sufficiently representative for a group of a sufficient size of interested persons.<sup>37</sup>

The court followed the same approach in its interim decision in *Ageas* and confirmed that the formal requirement of representativeness was also met in that case. However, the court criticised the distinction made in the compensation between 'active' and 'non-active' claimants, and fees payable to some of the claimant organisations, as set out above (reasonableness test). The Court allowed the parties to present an amended agreement.<sup>38</sup> The amended agreement, which the Court ultimately approved, struck the distinction for purposes of awarding compensation. While there was still a distinction, it related to uniform

36 Amsterdam Court of Appeal 29 May 2009, LJN BI5744 (*Shell*), Paragraph 6.3; A similar formula was employed in Amsterdam Court of Appeal 15 July 2009, LJN BJ2691 (*Vedior*), Paragraph 4.20 and 4.21; and Amsterdam Court of Appeal 4 November 2014, JOR 2015/10 (*DSB*), Paragraph 6.2.3 and 6.2.4.

37 Amsterdam Court of Appeal 17 January 2012, LJN BV1026 (*Converium*), Paragraph 10.2.

38 Amsterdam Court of Appeal 16 June 2017, JOR 2018/10 (*Ageas*).

compensation costs for active claimants. While the Court found the compensation structure reasonable for the claimants, it found that the additional remuneration for active claimants was not reasonable insofar as it concerned the members of one of the claimant organisations. These claimants paid only a membership fee to the non-profit organisation, and the organisation itself would also receive a €25 million remuneration under the settlement agreement. On the same basis, the Court found that this particular organisation was inadmissible because it was insufficiently representative for non-active claimants. However, it did consider the other organisations sufficiently representative and, on balance, found that the settlement as a whole should be approved.

## **V OUTLOOK AND CONCLUSIONS**

The WCAM, in force since 2005, may become an efficient mechanism for settling international mass claims. As from the entry into force of the New Legislation, Dutch law will also provide a collective action mechanism to obtain damages in mass litigation situations. One of the objectives and expected consequences of the New Legislation is that defendants will have more of an incentive to reach a settlement. Therefore, it will be interesting to see how the introduction of a collective action for damages will influence the class action climate in the Netherlands.



# NORWAY

*Andreas Nordby*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The Norwegian system of civil justice was overhauled at the beginning of this century, and a new Civil Procedure Act was adopted in 17 June 2005 and entered into force 1 January 2008.<sup>2</sup> The overall aim of the reform was to ensure fair justice with greater efficiency (faster and cheaper).

As part of the reform, class actions were introduced in the Civil Procedure Act. The introduction was made with a particular view on promoting access to justice in cases involving small claims and to obtain more efficient and effective justice in such cases. The American and in particular the Swedish rules served as inspiration for the specific chapter in the Civil Procedure Act devoted to class actions (Chapter 35). In addition to specific rules applicable to class actions the Civil Procedure Act also allows, to a rather large extent, joinder of parties in ordinary proceedings, provided that certain conditions are fulfilled.

The enactment of the class action rules was preceded by considerable debate in Norway. Simply put, advocates for consumer interest saw class action as a vital and important instrument to ensure justice, while advocates for business interest warned against adopting class action rules and feared ‘ill-founded blackmailing’ lawsuits. However, the rules were adopted unanimously by the Norwegian parliament.

The Civil Procedure Act includes the possibility for both opt-in and opt-out class actions. According to the preparatory works, the main rule for class action shall be deemed to be opt-in. Which of the two procedures that is most suitable for a specific class action is ultimately left to the court to decide.

Class actions may be brought either by a claimant meeting the conditions for becoming a group member provided that the action is approved or representative or public bodies, provided that the action falls within their purpose and natural sphere of activity (e.g., the Consumer Council).

Class actions are heard before the ordinary courts (i.e., there are no specialised courts for class actions). Norway has a court system with three tiers. In civil cases the court is composed by one legal judge in the court of first instance, three legal judges in the court of appeal and five legal judges in the Supreme Court. In the court of first instance and in the court of appeal the court may, in an individual case, be strengthened by two technical expert judges. There is no jury in civil cases in Norway.

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1 Andreas Nordby is a partner at Arntzen de Besche.

2 An unofficial (and not necessarily updated) translation of the Civil Procedure Act into English may be found at the following page: <https://lovdata.no/dokument/NLE/lov/2005-06-17-90/>.

Class actions have been brought on different areas involving different areas of law (pension law, tax law, consumer law etc.). However, class actions typically involve some kind of monetary claim (i.e., the class is seeking to obtain damages, repayment or similar from the defendant).

## II THE YEAR IN REVIEW

In the early years following the entry into force of the class action rules, there was some uncertainty whether class action would play any significant role in Norway. Furthermore, for some cases that were brought as class actions in this early phase, there seemed to have been no point in applying the class actions rules (e.g., the number of claimants was very small and all the (potential) claimants were known at the time the class action was instigated).

The development during the past years seems, however, to imply that the legal environment has matured. In some more recent cases, the courts have also taken a somewhat more sceptical approach to the class action institute and emphasised that class action should be reserved for typical class action situation and not cases where there may be a simple joinder of cases. At the same time, a number of class actions have been brought, or discussed, in cases where there may be a real benefit from applying the class action rules (see below).

In 2013, three unions brought a class action against several oil and offshore companies alleging that a certain night-time tariff that was paid to employees should also be included in the basis for the employee's pensions arrangements. The class action was approved as an opt-out action and had approximately 7,000 members. The class did not succeed in its action.

In 2016, the Home Owners Association instigated a class against the municipality of Oslo alleging that property tax, which was introduced following the municipal election in 2015, is invalid, and that illegally recovered property taxes should be repaid. Approximately 2,000 citizens in Oslo have so far joined the class actions, which is handled as an opt-in class action. The case was heard before the district court in April 2017, and the decision was handed down 21 November 2017. The group was unsuccessful, and the District Court found that the property tax was lawful. The case was heard before the Court of Appeal in 2018, and the Court of Appeal handed down its decision 31 October 2018. The Court of Appeal ruled in favour of the group and found that the property tax was unlawful. The Supreme Court has granted leave to appeal and the case will be heard in May 2019.

In 2016, the Norwegian Consumer Council instigated a class action against DNB, the largest Norwegian bank alleging that some 180,000 customers<sup>3</sup> have lost a total of approximately 700 million kroner by paying excessive fees for management of their savings. The average claim per customer is somewhat below 4,000 kroner. The class action was brought as an opt-out action. The action was approved as a class action by the District Court in January 2017, but DNB appealed the case to the Court of Appeal and argued that the action should not be approved as a class action. The Court of Appeal dismissed the appeal from DNB and found that the requirements for an opt-out action were met. DNB further appealed the case to the Supreme Court, which dismissed the appeal. The main hearing in the case was held in late November and early December 2017. In January 2018, the District Court handed down its decision where DNB was acquitted. The Consumer Council has appealed the case to the Court of Appeal.

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3 It seems that a very limited number (around 50 persons) decided to opt out of the action.

In 2016, a class action was brought against a private school on the basis that its tuition fees were too high. The action was approved as a class action in January 2017, with close to 500 members (former students with the school). In September 2017, the District Court handed down its decision and ordered the school to repay an amount to the members of the class action. The case has not been appealed.

In 2016–2017, there was a debate about whether to instigate another class action against the municipality of Oslo claiming repayment of refuse collection charges. Almost all households in Oslo have experienced garbage not being collected after the company running the refuse collection on behalf of the municipality of Oslo had severe problems. A claim for repayment of refuse collection charges would probably not constitute any large amount for the individual household (around 100 kroner each), but multiplied by the number of households (over 300,000) the total claim may be significant. So far, however, no class action has been brought.

### III PROCEDURE

Section 35-1(2) of the Civil Procedure Act defines class action as an ‘action that is brought by or directed against a class on an identical or substantially similar factual and legal basis, and which is approved by the court as a class action’. The characteristic feature of a class action, as opposed to an ordinary action with several plaintiffs, is that it is the class (group) as such that is party to the litigation.

#### i Types of action available

The Civil Procedure Act recognises two different forms of class actions:

- a opt-in: anyone who falls within the scope of the class as defined by the court in its approval of the class action is entitled to be registered as a member within the time limit set by the court; and
- b opt-out: anyone who falls within the scope of the class as defined by the court in its approval of the class action is automatically a member of the group (and will be bound by a subsequent ruling) unless he or she withdraws from the class.

For a class action to be approved under the opt-out alternative, the claims or obligations must be of such a minor value individually that they would not justify a separate legal action and it must be assumed that the claims or obligations will not raise issues that need to be heard individually.

The class action rules have been prepared based on a class comprising claimants. However, pursuant to Section 35-15 the class action rules in Chapter 35 apply *mutatis mutandis* to class actions whether the class is defendant, except that class membership without registration (i.e., opt-out, for natural reasons) is excluded. Applying the class action rules in a case where the class is defendant will give basis for a series of questions, and it is ‘questionable whether such actions will be of any practical use since defendant members are entirely free not to register as members and will then not be bound by a judgment’.<sup>4</sup> So far, there have been no class actions where the class is the defendant.

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<sup>4</sup> Inge Lorange Backer, ‘The Norwegian Reform of Civil Procedure’, *Scandinavian Studies in Law*, Volume 51, 2007, page 41–75.

In addition to class actions the Civil Procedure Act also allow for joinder of parties in ordinary proceedings. An action may be brought by several plaintiffs (or against several defendants), for instance, when the factual and legal basis for the claims is the same or substantially similar, provided that all claims fall under Norwegian jurisdiction and the court is the correct venue for one of the claims, and the claims can be heard by a court with the same composition and pursuant to the same procedural rules. There are no formal limits as to how many parties may participate in such a lawsuit, and there are many examples in case law with several hundred parties. Several parties on the same side in a legal action shall be regarded as independent parties in relation to the opposite party.

Another option under the Civil Procedure Act is consolidation of actions (cases), which means that two or more actions raising similar issues are joined to be heard in one hearing or be adjudicated jointly.

## ii Commencing proceedings

A class action may be instituted by anyone who fulfils the conditions for class membership if approval to bring the action is granted. For example, in a case against a bank concerning the legitimacy of an increase in borrowing rates, action may be brought by any bank customer being affected by the increase. Furthermore, a class action may also be brought by an association, trust or public body if the action falls within the scope of their purpose and field of activity. As this alternative indicates, there is no requirement that the organisation has its own claim similar to that of potential class members in order to initiate a class action lawsuit. This alternative will, *inter alia*, allow the Consumers' Council to bring class actions on behalf of consumers.

The class action shall be brought by submission of a writ of summons to the court. The writ of summons shall contain information necessary for the court to assess whether the conditions for a class action are fulfilled. In the writ of summons it shall also be stated whether the class action is sought to be brought as an opt-in or opt-out action.

Pursuant to Section 35-4 of the Civil Procedure Act the court must approve that the action is brought as a class action. In order for a class action to be approved the following conditions, set out in Section 35-2, must be met:

- a* several persons have claims or obligations whose factual or legal basis is identical or substantially similar;
- b* the claims can be heard by a court with the same composition and in the main pursuant to the same procedural rules;
- c* class procedure is the most appropriate way of dealing with the claims; and
- d* it is possible to nominate a class representative.

There is no formal lower limit with respect to the number of members; the statutory requirement merely refers to 'several persons', see point above (a). In practice there have been some cases where the number of group members has been on the very low side. If the number of group members is low, this will have to impact the court's assessment of whether class procedure is the most appropriate way of handling the case, see point (c). A low number of (potential) group members will weigh against handling the case as a class action. However, at the same time it must be kept in mind that a feature of the class action institute is to ensure that the action is made public – so that potential group members are informed of the lawsuit. In some cases it may be significant uncertainty as to how many group members that exist. In such cases, it may be an argument in favour of class action that class action is the only way

to get in touch with potential members or claimants. This appears to have been the situation in a case from 2009, which concerned state liability for wrongful implementation of EU Directives; the case was approved as a class action because it was suspected that there were many potential claimants (members). However, the case ended with the class only consisting of seven members.

In order for an action to be approved as a class action, the members of the group must have 'claims or obligations whose factual or legal basis is identical or substantially similar', see also point (a), above. This is often a matter of debate in actions that are being pursued as class actions and it is quite common that the defendant is arguing that the requirement is not met. When assessing whether this requirement is met, the court cannot only apply the claimants' perspective but must also take into account possible 'objections' from the defendant. The claimants may rightfully argue that the basis for their claim is very similar (e.g., they were all customers in the same bank, acquired share in the same share fund, got the same standard information, etc.). However, when looking at the objections from the defendant it may be that the requirement is not met after all, because it may be necessary to decide whether some of the customers have lost their rights owing to statutory limitation, some of the customers were given specific information prior to entering into the agreement or whether there are other individual circumstances on the customers' side.

In general, however, the class action rules have been designed in a manner to cater for certain possible individual differences and to ensure that such differences will not be an obstacle for a class action. Pursuant to Section 35-10, the court may decide that the provisions on class actions shall not apply to the hearing of issues in the dispute that only relate to a limited number of class members, but that the class members themselves shall have control over the issues. The court may also decide to establish two or more subgroups if the class consists of a large number of class members and the same or substantially similar legal or factual issues apply to several of them but differ from the issues that apply to the class as a whole.

Pursuant to Section 35-2, there is also a requirement that 'the claims can be heard by a court with the same composition and in the main pursuant to the same procedural rules', see point (b), above. This requirement will typically be fulfilled as long as the case concerns ordinary civil claims.

A class action may only be approved if the procedure is the most appropriate (i.e., 'best' way of dealing with the claims, point (c)). This is a vague criterion and leaves the court faced with a petition for a class action with a margin of appreciation. Based on the preparatory works, the following elements should, however, be taken into account:

Finally, class action may only be approved if it is 'possible to nominate a class representative', as in point (d): any person who fulfils the requirements to initiate a class action and who is willing may serve as class representative. However, it is left to the court to appoint the class representative. Pursuant to Section 35-9(3), the representative must be able to safeguard the interests of the class in a satisfactory manner and also be able to cover the class's potential liability for costs towards the other party.

Provided that the court approves the class action, the court shall also define the scope of claims to be covered by the class actions and thereby also the range of class membership. There is no limitation as to who that may be member of the group, in other words, both private individuals and corporations, nationals and foreigners may be members – depending on how the court has described the scope. However, only persons who could have brought or joined an ordinary legal action before the Norwegian courts may be class members. This

may to a certain extent limit the possibility for foreigners to join a Norwegian class action. An example, taken from the preparatory works, will illustrate this: a Norwegian resident consumer having purchased tangible goods from a professional party. Germany will be able to instigate ordinary legal proceedings in Norway against the German trader.<sup>5</sup> The Norwegian consumer will thus also be able to join a class action against the German trader. However, a consumer who is resident in Denmark and enters into an agreement with the same German trader will have to instigate litigation against the trader either in Denmark or in Germany; the Danish consumer will not be able to take legal action in Norway. Consequently, the Danish consumer will not be able to join a class action against the German trader in Norway.

If the class action is disallowed by the court as a class action, interested parties may bring individual actions that may be brought as a joint action if the conditions for joinder are fulfilled.

### **iii Procedural rules**

Once a class action has been approved, the court shall ensure that those who may qualify for class membership are informed of the action by notification, public announcement or otherwise. The notice or announcement shall state what the class action and the class procedure implies, including the consequences of registering or withdrawing as a class member, the potential liability for costs that may be incurred and the authority of the class representative to settle the action. The notice shall further state the time limit for registering. The court shall decide the content of the notice and how notice shall be given, including whether the class representative shall take charge of issuing the notice or announcement and paying the expenses thereof.

The court's approval of the class action may later be amended or withdrawn if it becomes evident that it clearly is not suitable to continue the case as a class action or that the scope of claims covered by the class action ought to be adjusted. Parties who are then no longer included in the class action may, within one month of the ruling for reversal or amendment becomes final and enforceable, require the court to continue to hear their claims as individual actions.

Apart from the specific rules in Chapter 35 of the Civil Procedure Act, class actions are handled by the courts in the same manner as ordinary individual cases. Courts are, among other things, obliged to keep an active dialogue with the parties during the preparatory stage of the proceedings.

As a general rule, the main hearing in a civil case shall, unless there are special circumstances, take place within six months of the date of submission of the writ of summons to the court. This also applies for class actions. However, in class action cases it is common that the defendant contests that the criteria for bringing the action as a class action are met. This may lead to exchange of pleadings and in some cases also a separate hearing with respect to the approval issue. In case the class action is approved, the approval may also be appealed

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5 Also, Norwegian law recognises that consumers to a certain extent may take legal action against a professional party in the before the courts for the place where the consumer is domiciled, cf. also Article 16 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

to the Court of Appeal. Thus, in many class actions it will not be possible to schedule the main hearing until later.<sup>6</sup>

The class shall be represented in court by a class representative nominated by the court when giving approval to hear the action. The representative shall keep the class members informed of the handling of the action. The representative is liable for costs awarded to the opposite party but can claim reimbursement from the class members individually if this was made a condition for registration as a class member. As a main rule, the class is required to be legally represented by counsel, who shall be an advocate, in addition to the class representative.

#### **iv Damages and costs**

When the class actions rules were adopted it was emphasised that it was not the intention to make any changes to the substantive law (tort, contractual liability, etc.). This means that the same rules with respect to burden of proof, documentation for economic loss, etc., will apply in a class action, and damages will be awarded based on each member's individual loss. However, in a class action involving a significant number of members, a certain standardisation may take place in practice. Norwegian law does, to a very limited extent, recognise the concept of punitive damages.

With respect to costs for legal fees, etc., Norwegian law is based on the loser pays principle (i.e., the successful party in a class action will be entitled to recover its cost from the losing party, provided that the court finds that the costs have been necessary to incur in view of the importance of the case). These rules also apply to class actions. For class actions, Section 35-13(1) also provides that the court shall determine the class representative's and the legal counsel's fees and coverage of expenses.

Class members in opt-in actions will be liable towards the class representative for costs imposed on the representative for remuneration and refund of disbursements insofar and to the extent that such liability is a condition for registration. On application from the person who has brought the class action or the class representative, the court may namely decide that registration shall be subject to the class members accepting liability for a specified maximum amount of costs. In cases where the class action is brought by a private individual or the class representative is a private individual this is typically done. In cases where the class representative is an organisation or similar, the organisation sometimes decides that it will cover all the costs itself.

Class members in opt-out actions will not have any liability towards the class representative (or towards the other party in the action for that matter) for costs.

Pursuant to the ethical guidelines from the Norwegian Bar Association, it is prohibited for a lawyer to agree a fee arrangement whereby the client's claim in whole or in part is acquired by the lawyer so that the lawyer's fee is dependent on the outcome of the case.

In the case of a class action, there is neither any direct public funding, nor any generally available private funding. In principle, each member of the group must cover his or her share of the costs, unless he or she is eligible for legal aid. So far there have been no examples of third-party financing or similar arrangements in class actions. However, there is an increasing interest for such arrangements in Norway.

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<sup>6</sup> The case against DNB is perhaps illustrative, where the writ of summons was submitted 21 June 2016 and where it took until 1 September 2017 (when the Supreme Court dismissed the appeal from DNB) to resolve the procedural issue of whether the case should be heard as a class action.

## v Settlement

Pursuant to Section 35-11(3), settlement in a class action pursuant to Section 35-7 (opt-out) requires the approval of the court. This requirement is a consequence of the claims or obligations having a low individual value and where it, therefore, cannot be expected that the group members will have any active role in the proceedings or as part of a settlement discussion. The requirement is also a consequence of the fact that the members of the class action may be completely unaware of the action. The court's approval has thus been seen as important in order to safeguard the members' interest.

The court's approval has two aspects. First, the court must ensure that the process leading up to the settlement has been satisfactory (i.e., that the group members, to the extent possible and taking into account that it as an opt-out action, have been informed of the settlement). Secondly, the court must also ensure that the content of the settlement is satisfactory. With respect to the latter, very little guidance is provided in the preparatory works as to how the court shall exercise its control with the settlement. With reference to how similar provisions have been understood in Denmark and Sweden, it is probably correct to assume that the court should approve the settlement unless it is clearly unreasonable or discriminatory towards some group members. In general, the parties should have a wide margin of appreciation when it comes to agreeing on an amicable solution.

Court approval is not necessary for an opt-in action, but it is emphasised in the preparatory works that it is important that the group representative consults with the group members prior to any settlement.

In case of a settlement, both in case of opt-in and opt-out, the settlement will be binding for all that are members at the time the settlement is made.

## IV CROSS-BORDER ISSUES

In general, it is difficult to identify any specific cross-border issues arising from class actions in Norway. As noted above there may, however, be some limitations for foreign residents to join a Norwegian class action. To the extent that a foreign resident will be able to join the class action the foreign member will be treated in the same manner as any national member.

Norway is not a member of the EU. However, Norway's cooperation with the EU through the EEA Agreement provides for the inclusion of EU legislation covering the four freedoms, as well as non-discrimination and rules of competition, into Norwegian law. Provisions equal to the EU antitrust rules (Articles 101 and 102 Treaty on the Functioning of the European Union), prohibiting cartels or abuse of a dominant position in the market, are also found in the EEA Agreement Articles 53 and 54 and are also implemented in secondary legislation. With respect to the competition area, where private enforcement and class actions have been subject to great interest, it should be mentioned that Directive 2014/104/EU has not yet been made part of the EEA Agreement. However, the Norwegian Ministry Trade, Industry and Fisheries in December 2015 launched a consultation setting out a proposal for possible amendments to Norwegian law if the directive is made part of the EEA Agreement. The inclusion of this Directive has been somewhat controversial in the sense that the EEA EFTA states are of the opinion that provisions on civil procedure are, in general, not EEA relevant and fall outside the scope of the EEA Agreement.<sup>7</sup> In general, it remains to be seen to

<sup>7</sup> This is, for example, also the background for why Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, which also contains



what extent any EU initiative on this area (e.g., if the current Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU Law is followed by a directive or a regulation) will impact Norwegian law.

## V OUTLOOK AND CONCLUSIONS

The Norwegian rules concerning class actions have ‘celebrated’ their 10-year anniversary. As previously noted, the application of the rules seems to have matured during these years and class actions are now a natural part of the Norwegian legal landscape and are being brought in cases where there is a real benefit to applying the rules.

At the same time, it may seem as though the consumer side, strongly advocating class action rules, may have had expectations that were somewhat too high. On the other hand, the sceptics from the business organisations appear to have been too pessimistic. The scepticism from the business organisations seems to have continued into the court room, in the sense that private corporations facing class action, as a first line of defence, take the position that the requirements for class actions are not fulfilled. In some cases it is difficult to see why it is argued against the class action. A class action may to a certain extent be advantageous also for a defendant; it will be sufficient for the defendant to engage with the class representative (and not multiple counterparties) and the court has, through the appointment of the class representative, made sure that the representative has sufficient financial strength to cover the defendant’s legal fees. Public bodies have taken a perhaps more pragmatic approach and not opposed the case being litigated as a class action.

The Norwegian Ministry of Justice has carried out a ‘re-examination’ of the Civil Procedure Act and launched a public consultation proposing some changes to the Civil Procedure Act. However, the proposal does not include changes to the class action rules.

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some procedural rules, has not been made part of the EEA Agreement.

# POLAND

*Agnieszka Trzaska*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In Poland, the mechanism of pursuing claims in group proceedings, which can be perceived as the ‘Polish version’ of the US class action, has been present since 2010. It was introduced into the Polish legal system by virtue of the Act of 17 December 2009 on Pursuing Claims in Group Proceedings, *Journal of Laws* 2010.7.44 of 18 January 2010 (the Act). This Act is separate from the regulation provided for by the Polish Code of Civil Procedure (CCP).<sup>2</sup> After several years, the Act was amended in 2017 by virtue of the Act of 7 April 2017 Amending Certain Acts to Facilitate the Seeking of Receivables (Amendment 1);<sup>3</sup> the amendments have been in force since 1 June 2017.

The Polish group proceedings are a type of court proceedings facilitating the joint pursuit of many claims that are based on the opt-in model and the principle of representation.

In Article 1, the Act defines group proceedings as civil court proceedings in cases where claims of a single type from at least 10 persons are pursued, based on the same or identical actual grounds.

The Act is an example of the sectoral approach, which means that group proceedings are not permitted in every civil case (which qualifies for examination by a civil court), but in certain categories of cases (the catalogue of which was expanded by Amendment 1).

Thus, group proceedings are permitted in the following cases,<sup>4</sup> which involve claims:

- a* for liability for a loss caused by a hazardous product;
- b* for torts;
- c* for liability for the non-performance or improper performance of a contractual obligation;
- d* for unjust enrichment; and
- e* in other matters with regard to claims for consumer protection.

As a rule, group proceedings may not be used to pursue claims arising out of the violation of personal rights. This exclusion does not apply to options to pursue claims in group proceedings that result from bodily harm or disturbance of health, including claims of the

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1 Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Galkowski.

2 Consolidated text of 19 January 2018 published in *Journal of Laws* 2018.155.

3 *Journal of Laws* 2017.933 of 12 May 2017.

4 Prior to Amendment 1, group proceedings were permitted in cases involving claims for the protection of consumers, liability for loss caused by a hazardous product and liability in tort, with the exception of claims for the protection of personal rights.

closest family members of the claimant, deceased as a result of a bodily harm or disturbance of health. However, this category of claims is limited to the request for the establishment of the defendant's liability. The damages in such category of claims have to be pursued in separate civil proceedings.

The entity that holds the sole mandate to institute group proceedings is known as the representative. This function can be performed by a member of the group or a *poviat* consumer ombudsman. All members of the group must approve the person who will act as the representative.

The Act is an example of solutions based on the opt-in model; only persons who directly expressed their willingness to participate in the proceedings by submitting a declaration on joining the group (before the proceedings are instituted or during the second stage, while the group is being formed, see also Section III) may become participants in a group proceeding. The very institution of group proceedings does not preclude the option for the individual pursuit of claims by persons who did not join the group or who have left the group (the admissibility of leaving the group is limited by certain time frames – see Section III.iii). A binding judgment is effective upon all members of the group, although they are not formally a party to the proceedings in which the judgment is issued. Only the group representative is formally the party to the proceedings.

Group cases belong to the functional competence of the regional courts. There is not a single court or several specialised courts competent for these types of cases. Thus, the cases may be examined by one of the 45 regional courts in the Republic of Poland. Group cases are examined by a panel of three professional judges.

Amendment 1 was primarily aimed at increasing the efficiency of group proceedings; it was the legislator's response to certain dysfunctions of the existing solutions revealed in the first years of using the collective redress mechanism.

In accordance with intertemporal regulations, group proceedings instituted before 1 June 2017 are subject to the provisions of the existing (original) Act, while for proceedings instituted after that date, the new wording of the Act shall apply.

The institution of group proceedings is moderately popular in Poland. As evidenced by the statistical data published by the Ministry of Justice, a total of 242 class actions (in the Polish form) were filed in courts from 2010 to 2017.

## II THE YEAR IN REVIEW

Summarising the eighth year of the functioning of the Act in the Polish legal system, it should be noted that it was a relatively effective year with regard to resolving group cases previously initiated, at various stages of proceedings. On the other hand, 2018 was also a year in which a decrease in the number of group proceedings initiated before a Polish court was seen. In 2017, there were 17 cases in total (i.e., almost half that in each previous year between 2010 and 2016).

As far as the most interesting decisions are concerned, it is worth pointing out the following. For the sake of clarity they are categorised into phases of group proceedings (for an explanation about phases of group proceedings, see comments in Section III).

## i Decisions on cases heard in phase I in 2018

### *Group proceedings related to Volkswagengate*

At the end of 2018, it was finally determined that the class action related to Volkswagengate would not be examined according to the Act. The Polish courts<sup>5</sup> held that they had no jurisdiction to hear a case concerning liability for a dangerous product in the form of Volkswagen diesel-powered vehicles manufactured in Germany and equipped with software that manipulates the readings of the exhaust emissions, even if they were purchased in Poland. The court of first instance (and this position was fully accepted by the court of the second instance) stated that jurisdiction should be established according to Article 7(2) Brussels *Bis* (i.e., it should be determined by the place in which the event resulting in damages occurred). The claimant pursued its claim on the basis of the liability for a dangerous product or tort liability (i.e., the manufacture of defective cars and the issue of certificates of conformity for them). Both of these events took place in Germany. Thus, the place in which the event resulting in damages occurred, as the courts established, is the territory of Germany. Polish courts have referred to the achievements of the Court of Justice of the European Union (CJEU), in particular to the judgment of the CJEU of 16 January 2014, C-45/13, *Andreas Kainz v. Pantherwerke AG*, where it was assumed that in the case of an action to determine the producer's liability for a dangerous product, the place of the event giving rise to damages is the place in which the product was manufactured. Therefore, the statement of claims was finally rejected on formal grounds.

The proceedings in this case were initiated by the statement of claim of 29 September 2016. The claimant – a representative of the group – requested the total amount of 1,485,000 zlotys. This amount encompasses damages for two subgroups. In the first subgroup, consisting of 45 members, each member should have received 30,000 zlotys and in the second subgroup, consisting of nine members, each member should have received 15,000 zlotys.

### *The further group proceedings of the polisokolaty – savings insurance policies*

In 2018, further group proceedings instituted against insurance companies in connection with insurance agreements, the *polisokolaty*, were also accepted for examination.

The class action against TU Europa No. 2 in case file No. XXIV C 709/15, by decision of the Regional Court in Warsaw, 24 Civil Division dated 1 February 2018, was accepted. This decision became final following the dismissal of the defendant's complaint by decision of the Court of Appeals in Warsaw, 1 Civil Division, of 4 October 2018, case file No. I ACz 861/18.

By the statement of claims (lawsuit) issued on 15 July 2015, the representative seeks a declaration that there is no insurance relationship between the defendant and the members of the group and that all insurance premiums paid by the members of the group are to be reimbursed or, alternatively (in the event that the above claims are not taken into account), that the provisions relating to the liquidation and administrative fee (management fee) are prohibited contractual clauses and, as such, are not binding on the members of the group and, therefore, that all amounts collected as administrative fees (management fees) by the defendant are to be paid to the group members (as benefits not due to the defendant).

<sup>5</sup> See decision of the Regional Court of Warsaw, 3 Civil Division dated 27 November 2017, case file No. III C 1310/16 and decision of the Court of Appeals in Warsaw, 6 Civil Division of 2 October 2018, case file No. VI ACz 537/18.

### ***Case of Border Guard officers against the State Treasury***

In spring 2018, the Supreme Court once again expressed its opinion on the prerequisites for the admissibility of group proceedings on the occasion of the case of a group of Border Guard officers against the State Treasury.

The Supreme Court once again presented a more liberal approach than the courts of a lower instance.

In the judgment of 17 April 2018, case file No. II PK 44/17, the Supreme Court decided to examine the case in group proceedings. The class action proceedings initiated by a group of Border Guard officers for payment of compensation for damages arising in connection with the non-adjustment of remuneration of group members in the years 2009–2014 were previously rejected by the court of the lower instance. The statement of claims (lawsuit) filed in April 2015 had previously been rejected in a final manner on the basis of the lack of homogeneity of claims. However, the Supreme Court explained that the premise of the homogeneity of pecuniary claims of group members referred to in Article 1. 1 of the Act should refer to the same type as regards the subject matter of the claim. This premise should not be construed according to the method of claim calculation (claims for compensation are homogeneous regardless of how compensation has been calculated).

#### **ii Phase II**

It is also worth noting that in several group proceedings in 2018, decisions on the composition of the group were issued.

#### **iii Decisions on cases pending in Phase III of 2018**

In 2018, at least four group proceedings, one of the first initiated on the ground of Act, were resolved as to the merits.

### ***Group proceedings against the administrator of the Pobieraczek.pl website***

Thus, in March 2016 the Regional Court in Gdańsk issued a judgment<sup>6</sup> that takes full consideration of the action brought by a group of consumers – users of the Pobieraczek.pl website against entrepreneurs – administrators or owners of the Pobieraczek.pl website. The Court established the invalidity of Usenet service contracts concluded by 48 members of I subgroup with the defendants and ordered the defendants to pay jointly and severally the amount of 94.80 zlotys to each of the 48 members of I subgroup. This amount should be paid as reimbursement of the undue benefit. For the other subgroups, the court invalidated the service contracts.

The lawsuit initiating the proceedings in this case was filed in March 2012. After the positive certification in 2013, a total of 589 members of the group joined the case in the second phase. The case was suspended for some time, and finally ended in 2018. The defendant has not filed appeal against the decision at the first instance.

### ***Group proceedings related to the disaster of the exhibition hall***

Also in April 2018, the proceeding related to the construction disaster of the exhibition hall located in Chorzów, ended in the first instance. The proceedings were initiated by a group of

<sup>6</sup> Case file No. XVC 1216/12.

persons close to the victims of this catastrophe. Apart from this, the event (which took place in 2006) was an impulse for the Polish legislator in the scope of work on the Act.

The case underwent a long certification phase. Thanks to the landmark judgment of the Supreme Court of 28 January 2015, case file No. I CSK 533/14, the case was recognised as to its merits, by the judgment of 23 April 2018 taken by the Regional Court in Warsaw, case file No. II C 127/15.

The court determined that the State Treasury represented by the President of Chorzów and the District Building Control Inspector in Chorzów is liable in connection with the collapse of the exhibition hall in Chorzów on 28 January 2006 for claims for compensation for significant deterioration in the life situation, owing to the death of the closest family members.

The case was related to a construction disaster that took place on 28 January 2006. During the exhibition of racing pigeons, the roof of the hall of Katowice International Fair in Chorzów collapsed. During the catastrophe there were about 700 people in the hall. As a result, 65 people were killed, including relatives of the group. The group proceedings covered the claims provided in Article 446, Section 3 in conjunction with Article 434 of the Civil Code (CC) and the claims provided in Article 446, Section 3 in conjunction with Article 417 of the CC. The source of claims is the same factual event (a specified construction disaster), being the cause of death of a member of the immediate family of group members.

The evidence in the case showed that the building's faulty structure (the roof and, more precisely, the insufficient strength and stability of the hall structure), overloaded with snow and ice lying on the roof, was the cause of the building's collapse. The State Treasury at the time of the catastrophe was an independent possessor of an exhibition hall that collapsed, hence it was liable under Article 434 of the CC on a risk basis for damage resulting from the collapse of buildings. According to the court opinion there were no exemption circumstances (excluding its liability). As for the second State Treasury organisational unit – the District Building Control Inspector in Chorzów – the court found it liable for the consequences of the disaster. The District Building Control Inspector in Chorzów was held liable owing to failure to fulfil statutory obligations arising under the Polish construction law.

The discussed judgment has already become legally binding – the appeal filed by the defendant was dismissed by the judgment of the Court of Appeals in Warsaw of 23 January 2019, case file. No. V ACa 630/18.

A final determination judgment shall constitute a prejudice for the members of the group to pursue individual claims for damages against the defendant, unless an amicable settlement is reached between the victims and the State Treasury.

### ***Case against GENERALI TU insurance company in connection with polisolokaty***

In 2018, the group proceeding brought by a group of clients – represented by the District Consumer Ombudsman in Pruszkowski District – against Generali Życie Towarzystwo Ubezpieczeń SA related to the *polisolokaty* – savings insurance policies ended legally.

The Court of Appeals in Warsaw dismissed the defendant's appeal against the judgment of the Regional Court in Warsaw, 24 Civil Division of 10 May 2017, case file No. XXIV C 554/14.

The judgment of the court of first instance adjudged, in favour of individual group members (divided into subgroups). The court granted reimbursement of the amounts unduly collected from group members by the defendant on the basis of prohibited contractual clauses

in life insurance contracts, 'buyout fees' (collected in the event of termination of investment life insurance contracts).

The statement of claims in this case was filed in 2014. The court found that all 165 members of the group had concluded life insurance contracts with insurance capital funds with the defendant.

The court assumed that the provisions regulating the redemption fee/fee for the total redemption of the policy value do not specify the main benefits of the parties in insurance agreements concluded by the parties with insurance capital funds. The provisions governing the redemption fee/fee for the total redemption of the policy value do not affect the essence of the legal transaction itself. The elimination of this fee from the content of the contract will not render it unenforceable. At the same time, the court assumed that these provisions were contrary to good practices. Having found that the clause relating to the redemption fee is abusive, the general terms and conditions of the agreement and the general provisions on obligations are inapplicable.

The court found that members of the group should be reimbursed on the basis of the provisions on undue performance – Article 410 of the CC.

### ***Customers of Duo Express (consumers) against Getin Noble Bank SA***

In autumn 2018, the case against Getin Noble Bank related to the actions of its agent was also finally concluded.

In its judgment of 29 April 2015, the court of first instance, case file No. I C 709/12, awarded the amount of 5,665,040 zlotys with statutory interest from 4 March 2013 until the date of payment, determining the amounts due to individual group members allocated to 44 subgroups. Court of Appeals in Gdańsk, 5 Civil Division, by judgment of 26 September 2018, case file No. V ACa 722/15 dismissed the defendant's appeal.

The case concerned claims for damages of group members who suffered damage as a result of fraud committed by the agent Duo Express, a franchisee of the defendant bank, while performing activities entrusted to it by the bank in franchise outlets of the bank that resulted in the fact that the members of the group, entrusting Duo Express with their savings, remained convinced that they concluded agreements on savings products with the defendant bank, and not with Duo Express as its franchisee. The court found that the bank is liable for damages suffered by the claimant and members of the group on the basis of the provisions of Articles 429 and 415 of the CC (i.e., the bank is liable in tort).

The defendant bank entrusted the performance of certain banking activities to an agent by concluding an agency agreement with him of 15 October 2008. The agreement included the performance of certain banking activities in the name and on behalf of the defendant. The agent, on the other hand, also concluded agreements in the outlets operated by the agent, to which the defendant bank was not a party, designated as an investment loan. Following the conclusion of those agreements, the claimant and the members of the group suffered damages and the damages were functionally linked to the activities entrusted to the defendant bank agent by the defendant bank on the basis of an agency agreement. The court assumed that the agent of the defendant bank caused damage to the claimant and members of the group while performing the activities entrusted to it under the agency agreement. Such activities were functionally related to the banking activities performed.

The agent intertwined prohibited activities with banking activities performed under the agreement. As a result, the injured parties believed that the agreement concluded by

them concerned a banking product. The court found that the defendant failed to prove the circumstances excluding his liability (i.e., that he took due care when selecting an agent).

In 2018, the provision concerning the limitation period was amended (see Section III.i: Limitation).

### III PROCEDURE

Polish group proceedings are court proceedings described by specific stages; the legal regime of the proceedings is prescribed by the provisions of the Act and the provisions of the CCP.

Apart from group proceedings, which is a mechanism for the collective pursuit of claims, the provisions of the CCP provide for certain institutions related to the number of entities in court proceedings.

Under the CCP, collective actions by representative bodies, for example, consumer organisations or interest groups, are not possible.

The CCP allows for actions to be brought by non-governmental organisations regarding their chartered objects in specific categories of cases (e.g., environmental protection and consumer protection), but these proceedings involve an individual action for a specific natural person that may be, in addition, submitted only with the written consent of such a person.

The institution of ‘co-participation’, where multiple entities are present on one side of the litigation (the claimant’s or defendant’s side), features among typical institutions that tackle the issue of multiple entities, as part of the classic bilateral process. The CCP distinguishes between formal and material co-participation. The first occurs when the subject of the litigation involves claims or liabilities of a single type, based on the same factual and legal basis if, in addition, the jurisdiction of the court is justified for each separate claim or liability as well as for all of them jointly. Material co-participation takes place if the subject of the litigation involves joint rights or obligations of several entities or rights or obligations based on the same factual and legal basis.

In addition, several individual cases can be merged procedurally for joint examination and resolution or for examination only. Such merging is merely technical in nature, the cases still have a stand-alone nature and maintain their separateness.

#### **i Types of action available**

In accordance with the wording of provisions of the Act (Articles 1 and 2) the following premises (preconditions for the admissibility of group proceedings) should be met:

- a* homogeneity of claims of the group members;
- b* identical (the same) or, similar (equal) factual grounds (basis) of claims (common factual grounds for claims sought);
- c* size of the group (number of members);
- d* whether the claims can be examined in group proceedings given their object (whether the claims belong to one of the categories of cases – see above); and
- e* in addition, for pecuniary claims, Article 2.1 of the Act provides for standardisation of the amount of the pecuniary claims of individual group members.

The requirement of homogeneity means that a representative should apply to the court on behalf of each member of the group for legal protection in the same form, for example, for establishment or for payment (sometimes there is a requirement that the claims result



from the same type of legal relations). As the Supreme Court explained in its decision of 28 January 2015, Case File No. I CSK 533/14:

*[i]n this provision, the legislator used the 'claim' term in the procedural meaning, namely as seeking of adjudication of a performance or establishing the existence of a legal relation or law or the formation of a legal relation or law. The need to pursue a 'single type of claim' in group proceedings, within the meaning of this provision, means that all claimants should seek the adjudication of the performance or the establishment or formation of a legal relation or law.*

In the last decision issued on 17 April 2018, case file No. II PK 44/17, the Supreme Court additionally indicated that the premise of homogeneity should be understood functionally. It means that the type of claim and the method of its calculation are two separate things, therefore the duality of the mechanism used to calculate it (common to all participants) does not oppose the homogeneity of the claim.

Next, claims by members of a group sought in group proceedings, should be based on the same (identical) or similar (equal) factual grounds. Fulfilment of this premise usually raises most doubts in practice. It is assumed that the factual ground of a claim is the main set of facts constituting the basis for the disputed legal relationship and a specific claim; however, the scope of the factual grounds of a claim does not include factual circumstances that affect the amount, objective scope or maturity of the claims.

The requirement for the size of the group means that the proceedings should encompass at least 10 claims.

From the viewpoint of interpretation of the provisions that lay down the premises for the admissibility of group proceedings, the first statements of the Supreme Court based on the Act were of particular importance. The following decisions are of note: the judgment issued in the case of a group of closest persons injured as a result of a disaster construction (i.e., decision of the Supreme Court, Civil Chamber, of 28 January 2015, Case File No. I CSK 533/14); judgment of the Supreme Court, Civil Chamber, of 14 May 2015 Case File No. II CSK 768/14 issued in the case involving a group of consumers pursuing the establishment of liability for damages of a bank for the improper performance of the contract (more precisely, provisions on the method in which interest was accrued on the bank loan); and the resolution of the Supreme Court of September 2015 regarding the case of a group of local government units against the State Treasury related to the incorrect implementation of the EU law (fees charged in connection with vehicle records).

In the first of the judgments mentioned above, the Supreme Court stressed the need to take the essence, purpose and functions of group proceedings in the course of interpretation of provisions of the Act into account.

When the Supreme Court issued these rulings, the courts examining Polish class actions began to be more open in their judicature towards group solutions for pursuing claims, while the interpretation of the provisions of the Act became more in favour of certification. Since mid-2015, and in particular in 2016, a number of cases have been positively certified, for example, a series of cases against insurance companies related to unfair contractual clauses (pertaining to insurance of a low down payment for a mortgage loan, the liquidation fee).

The group proceedings have no limitations as to the method of shaping the demand for the statement of claim; a class action may be an action for performance (adjudication). In the case of adjudication, the amount of claims sought by various group members must be standardised. A class action may take the form of an action for establishing the legal relation

or the right (Article 189 of the CCP) or an action for establishing liability (Article 2.3 of the Act). It is also possible that the demand for a class action involves the demand for shaping the right or legal relation (only in such cases where filing such an action is permitted).

Currently, after Amendment 1, standardisation of the amount of claims means that group members have to, altogether or in at least groups of two, seek payment from the defendant in the equal amount (previously the Act required that the standardisation took place after the consideration of the ‘common circumstances of the case’, which gave rise to doubts and resulted in a different approach of the courts to the interpretation of common circumstances). Now, a sufficient criterion for standardisation is the criterion of the amount.

### ***Action for establishing liability***

An institution unique to group proceedings is the action for establishing liability; the essence of this action was explained by the Supreme Court in the said ruling of 25 January 2015, arguing that:

*In these proceedings, the declaratory judgment regarding a large group of persons is aimed solely at establishing defendant's liability for a specific event and does not concern establishing whether damage was incurred by each of the individual group members. This may, but does not have to be, the subject of assessment only in individual trials, as long as, after the statement of claim for establishing liability is accepted, no individual out-of-court settlements are concluded, which is one of the purposes of issuing such a judgment. If individual trials take place, where a judgment issued on the basis of Article 2.3 is a precedent, then, in such proceedings, individual circumstances will be examined, such as the origin of the damage and its amount, causal link, contribution or limitation if any, as long as it applies to individual claims only and not to all group members. The subject of group proceedings for the demand for establishment are only circumstances that are common to all group members and not individual circumstances of individual members to be examined during individual trials at a later date.*

As regards the action for establishing liability, the issue of the defendant's liability is separated from the size of such liability.

The legislator essentially ‘implemented’ the solutions proposed by the Supreme Court to the Act in the form of Amendment 1 to Articles 2.3 and 2.4 of the Act, where it was specified that the purpose was to establish the defendant's liability for a specific event or events. The statement of claim should indicate the pecuniary claim for which such a claim is pursued. When accepting the action, the court establishes circumstances that are common to group members.

### ***Limitation***

The institution of limitation in the Polish law is an institution of substantive law and not of procedural law. The provisions of substantive law determine the deadline after which, in the event of inaction of the entitled party, specific claims expire (strict time limits) or lose their ability to be enforced (limitation periods). In 2018, the provisions of the Civil Code defining the length of general limitation periods were amended. And so, currently, unless specific provisions provide for different periods, the general period of limitation for all property claims is six years (not 10 years), and for claims for periodic performance and claims related to business activity – three years. The limitation period for claims for compensation under tort liability is specifically regulated. A claim of this sort lapses, in principle, after three

years since the date on which the injured party established the damage and the identity of the perpetrator. However, this period may not be longer than 10 years since the date of the event giving rise to the damage.

The period of limitation for compensation for damage resulting from infringement of competition law is longer, amounting to five years, and its course does not begin to run as long as the infringement is still ongoing and is suspended (the limitation period) for the time of duration of proceedings before state or EU authorities concerning the infringement of competition law.

In addition, also in 2018 a change was introduced in the scope of counting the end of the limitation period – according to the newly introduced rule – the limitation period takes place on the last day of the calendar year. This rule does not apply to limitation periods of less than two years.

The Act itself contains no specific regulation on the limitation period for the claims of particular group members. The Act provides that, for a claim of such person, the effects of filing a claim in group proceedings (i.e., primarily an effect of suspension of the limitation period for such claim) shall remain only in the following situations: (1) when a group member files an individual group statement of claims covered by the rejected statement of claims, within 12 months of the decision on the rejection of a group action becoming final; and (2) when a person who joins the group but is not covered by the final court decision on the composition of the group files an individual statement of claims within six months of such decision.

Before 2018 the court was never required to consider the consequences of the lapses of limitation periods *ex officio*, but only when such defence (objection) is raised by the opposite party. As of 9 July 2018, special rules on the consequences of limitation periods apply to consumers. Thus, in accordance with the new Article 117.2, Section 1 of the CC, after the expiration of the limitation period, no claim against the consumer can be claimed. The statute of limitations on a claim against a consumer therefore deprives the claim of its actionable nature. This means that the court is obliged to take into account the limitation period of the claim against a consumer *ex officio*. In addition, in certain special circumstances, the court may disregard the statute of limitations for consumer claims

## ii Commencing proceedings

The entity exclusively mandated to institute group proceedings is the representative, which acts on its own behalf but in the name of all the group members. This function can be performed by a member of the group or a *poviat* consumer ombudsman. Group members agree that a certain person should act as a representative. From a procedural viewpoint, that person is solely a claimant in the group proceedings. The Act introduces the requirement for the representative to act via a professional legal counsel. Apart from that, the Act does not regulate the internal relations between the representative and group members; in practice, an agreement is usually concluded to regulate such issues.

Current solutions are based on the opt-in model. Group proceedings are open only to persons who express their willingness to join the group clearly. The Act does not require the group or class to be defined or specified. The announcement on the commencement of proceedings (see below) should basically provide what claims can be referred to the proceedings by submitting a declaration on joining the group. Such a declaration can be submitted by every person (as long as such a person is capable of acting in court proceedings) and, of course, provided such a person has a claim that can be covered by group proceedings.

The provisions of the Act do not provide for limitations as to nationality or place of domicile of persons joining the group (for example, as regards claims for damages, where the loss was incurred on the territory of Poland, the place of domicile of the group member is irrelevant). The Act does not provide for specific provisions as to jurisdiction; general rules prescribed by EU legislation or relevant provisions of the CCP apply.

### **Costs**

The Act does not include any specific regulations pertaining to the financing of group proceedings; in general, the Polish provisions lack regulations on the financing of proceedings by third persons.

The loser pays the costs rule is in force. The group representative is the sole claimant, and he or she is formally required to bear the costs of the proceedings.

The Act does not regulate the rules for the redistribution of the costs related to the group proceedings (including the costs of legal services) or any allocation to common costs and the costs attributable to each individual claim inside the group. These issues are left to be arranged between the group members. In practice, usually all group members participate in the costs related to the commencement and conducting of the group proceedings, but the Act does not provide for such a requirement. Group members may freely agree on internal relations among them. It is usually agreed that each member pays a fixed or lump-sum amount or it is agreed that such costs are incurred by an entity in proportion to the value of the claims pursued by them.

The CCP's provisions define the costs of the proceedings not as the costs actually incurred by a party, but the costs necessary for the reasonable pursuance of rights or reasonable defence. These costs also include fees paid to legal counsel, but may not be more than six times a specific minimum rate. The court decides on the cost of proceedings in the decision concluding the case in the given instance.

### **iii Procedural rules**

Group proceedings are divided into stages. Compared to an ordinary individual trial, there are four stages, including two specific stages that precede the substantive examination of the merits of the case that can be distinguished for group proceedings: stage one is the certification stage and stage two involves shaping the composition of the group.

The first stage, namely the certification stage, is when the court examines whether a specific case can be examined as a class action. A statement of claim in group proceedings should contain a motion to examine the case in this procedure with substantiation. Based on these arguments, the court examines whether the premises for admissibility of the group proceedings are met (as discussed above). If the result of the examination is positive, the court issues a decision on examination of the case in group proceedings, and if the result is negative, the court rejects the statement of claim. Previously, the Act required the decision on this subject to be passed after the court hearing (which prolonged this stage). Currently, for statements of claim brought after 1 June 2017, such a decision may be made at a closed session. Before a decision on this subject is made, the court orders that the defendants submit a response to the statement of claim, where the defendants may object to the case being examined in this procedure.

The 'certification' decision may be challenged in the court of appeals. In accordance with Amendment 1, when the decision on the examination of the case in group proceedings

becomes final, the admissibility of group proceedings is not subject to re-examination in the further course of the proceedings.

The decision on the dismissal of the complaint on the decision to reject the statement of claim may be appealed against with a cassation complaint in the Supreme Court. In admitting the cassation complaint, the Supreme Court may repeal the appealed decision and issue a ruling on examination of the case in the group proceedings.

The second stage is shaping the group. This stage begins with an announcement on the commencement of the proceedings and ends when the decision of the court on final group members becomes valid. As regards the method of announcement publication, at present, the provisions of the Act let the court choose the method most appropriate for the given case.

The contents of the announcement are proposed by the claimant, and the court orders the announcement to be published. The publication of the announcement on the commencement of group proceedings<sup>7</sup> is to facilitate notification of all those potentially interested in joining the group. In particular, the announcement may be published on the pages of the public information bulletin of the competent court, on websites of the parties or their legal counsel or in the nationwide or local press. The announcement on the commencement of group proceedings can be skipped if the circumstances of the case show that all group members submitted declarations on joining the group.

Declarations on joining the group from new members are referred to the representative. Based on such declarations, the representative prepares a letter with a list of group members and the declarations. The court delivers a list of group members to the defendant and sets the date for filing objections as to the membership of individual persons in the group. The defendant may challenge the membership of a person in the group by arguing that the claim of that person is different from the claims of other members, for example, that it is based on different factual grounds or does not meet other criteria that the court considered during the certification. Then, the court issues (at a closed session or during the court hearing) a decision on the composition of the group, where it lists, by full name or business name, the persons who are members of the group and specifies membership in subgroups if the group members are divided into subgroups. This procedural decision can also be challenged with a complaint.

As regards proving that a person belongs to the group, for cases involving pecuniary claims, the Act requires the claimant (representative) to prove such a membership, in other cases making the fact plausible is sufficient.

Filing a complaint against the decision on the composition of the group does not suspend the substantive examination of the case.

When the decision on the composition of the group becomes final, attempts by members to leave the group becomes ineffective.

The third stage of the proceedings is the examination proceedings as to the merits of the case. In this scope and with regard to the manner of conducting the proceedings to take evidence, the Act introduces no provisions that would be different from those in force for

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<sup>7</sup> The announcement on commencement of group proceedings should include (Article 11.2 of the Act): (1) identification of the court before which the group proceedings are conducted; (2) designation of the parties to the proceedings and designation of the subject of the case; (3) information about the possible joining the group by persons whose claims may be included in the class action by presenting the group representative, by the prescribed time limit not shorter than one month and not longer than three months from the announcement date, with a written declaration on joining the group; (4) rules of remuneration of the legal counsel; and (5) a mention of the binding effect of the judgment on group members.

ordinary proceedings. The progress of the proceedings depends on the subject of the case – Polish procedure does not provide for a disclosure institution.

Certain differences are evident at the stage of issuing the judgment. First, the court is obliged to list all the members of the group or subgroup in the judgment (operative part). If the judgment involves pecuniary performance, the court should determine the amount attributable to each member of the group or subgroup separately.

Second, in each case involving a pecuniary claim examined in group proceedings, where the amount of the claim of any of the group members cannot be precisely proven or proving it is particularly difficult, the court may adjudicate, in the judgment, at its own discretion, the amount in favour of that group member that is not greater than the standardised amount of the claim (given the prohibition to make a judgment in excess of the demand). The court may adjudicate based on consideration of all the circumstances of the case and based on the accumulated evidence. To use such an option, the court should hear the parties on the amounts adjudicated in favour of members of the group or subgroup. If the parties present agreeing motions on the amounts attributable to members of the group or subgroup, in accepting the statement of claim, the court shall be bound by such motions, in accordance with Article 20a.2 of the Act, with regard to the amount attributable to members of the group or subgroup.

The fourth stage is the stage of performance of a final and binding judgment. As regards the enforcement of a pecuniary performance, the enforcement can be instituted by any member of the group or subgroup to the extent of the amount adjudicated in their favour, based on the excerpt from the judgment (Article 22 of the Act). As regards cases involving non-pecuniary performance, enforcement of the adjudicated performance is instituted upon the motion of the representative of the group. Six months after the day on which the judgment becomes binding, if the representative of the group does not put forward a motion for instituting the enforcement, the enforcement is instituted upon the motion of any of the group members.

The speed of proceedings was unsatisfactory in the first years; it is evident that, at present, the cases are processed much faster.

An institution unique to group proceedings is the option for the defendant to demand that the claimant pay the deposit to secure the costs of proceedings. The intention of the legislator was to introduce the deposit as an instrument to deter claimants from rashly bringing class actions.

From the moment the Act came into force, the institution of the deposit is optional, which means that if the defendant files a motion, the court may, but does not have to, commit the claimant to deposit a relevant cash amount as the deposit to secure the costs of proceedings. Initially, the Act did not specify the criteria to be followed by the court in reviewing the motion; such criteria were introduced by Amendment 1. Based on the current wording of the Act (Article 8), the court may issue a decision to oblige the claimant to submit a deposit to secure the costs of proceedings if the defendant makes plausible that the action is groundless and that the lack of the deposit would prevent or considerably hinder the execution of the ruling on the costs of proceedings if the action is dismissed. Circumstances that justify imposition of the obligation to submit the deposit can be, among others, the poor financial situation of the representative (a party) and the lack of regulations applicable to the rules of payment of the costs of proceedings within the group. The court decides on the amount of the deposit in its decision, having regard to the likely sum of costs to be incurred by the defendant. The deposit cannot exceed 20 per cent of the value of the object

of the dispute. Although the motion for obliging the claimant to submit the deposit should be placed by the defendant at the first procedural action, the court adjudicates on the deposit when the decision on the composition of the group becomes final. Amendment 1 introduced this rule so that the deposit can be incurred equally by the group although formally only the claimant (i.e., the representative is obliged to pay it). If, during the case, it transpires that the deposit is insufficient to secure the costs of proceedings, the defendant may demand an additional security. If the deposit has not been submitted during the time frame set by the court, the court suspends the proceedings, and if the deposit is not paid within the next three months, the court rejects the statement of claim or the appeal.

#### **iv Damages and costs**

The issues related to damages and their legally permitted amount are governed by substantive law. Polish law incorporates a principle that the damages must not exceed the loss actually suffered by the claimant. Therefore, the damages should correspond to the amount of the loss, and the amount of the damages is determined on a 'differential method' basis. This is based on comparing the assets that would have existed had there been no event causing the loss to the current state of affairs. The principle of *compensatio lucri cum damno* also applies. It is essential that the court may adjudicate, in favour of each group member, an appropriate amount (not greater than the standardised amount) pursuant to Article 322 of the CCP in conjunction with Article 20a of the Act.

In Polish civil law, the general assumption behind the liability for damages is to reinstate the condition that would have existed had the loss event not occurred (Article 361, Section 2 of the Civil Code). The damages remedy the loss and, as a rule, the amount must not exceed the amount of the loss. This also applies to remedying a non-pecuniary loss; the cash compensation for the claimant for the loss incurred should correspond to the size of the loss.

Polish law does not include the concept of punitive damages.

One of the elements of the costs of proceedings are the costs of court representation – the losing party does not refund the winning party for the costs actually incurred but the costs recognised on a lump-sum basis, being the amount of the specific minimum rate (in the range from one to six times the amount). The Act provides for the option to pay the success fee.

#### **v Settlement**

The progress of mediation proceedings is governed by provisions of the CCP. The Act stipulates that in group proceedings, the court may refer the parties to mediation at any stage (Article 7). There are no specific rules for conducting mediation proceedings in group proceedings. It should be assumed that the representative will participate in the mediation. In entering the mediation, the representative should consider that it should obtain the consent of at least half of the group members to reach a settlement and for other dispositive actions.

In accordance with Article 19 of the Act, withdrawal of an action, withdrawal or limiting the claim and conclusion of a settlement require the consent of more than half of the group members.

A settlement is subject to control by the court, which may find reaching the settlement inadmissible if circumstances of the case show that this stands in conflict with the law or good manners, aims at circumventing the law or is a gross violation of interests of group members.

To date, only a fraction of class actions have ended with a settlement. At least one of the cases brought against an insurance company and one against a developer ended with a settlement: the former at the preliminary stage of the certification and the latter at the stage of merits.

#### **IV CROSS-BORDER ISSUES**

The Act may be quite attractive considering the fact that nine Member States of the EU still have no mechanisms of pursuing claims in group proceedings, for example, with regard to pursuing claims for infringement of the competition laws.

The Polish class action is available to overseas claimants, as long as they have claims included in the proceedings and as long as they are willing to participate in the case by submitting a declaration on joining the group.

To date, case law has not considered the issue of whether a judgment issued in a foreign class action procedure would be recognised or subject to an execution clause in Poland. It should be noted that Polish provisions are quite liberal. As regards the legal order clause, it should be noted that the Polish law follows the principle that the damages must not exceed the loss and the judgment adjudicating punitive damages would certainly be met with the refusal to be recognised or declaration of enforcement as being in contradiction of the proportionality principle of civil law measures against the perpetrator of the damage.<sup>8</sup>

#### **V OUTLOOK AND CONCLUSIONS**

Currently, more than 50 class actions (approximately) are pending in Polish courts (at various stages of the proceedings). Considering the number of all cases brought, it could be said that the institution of group proceedings is relatively popular.

Undoubtedly, the changes introduced in Amendment 1 eliminated the shortcomings that were identified as reasons for excessively lengthy group proceedings. In the future, considerable improvement in this regard should be expected.

In addition, the introduction to the Polish legal system of group proceedings based on the opt-out model for the same types of cases is still being considered at the ministerial level.

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8 See the judgment of the Supreme Court of 11 October 2013, Case File No. I CSK 697/12.



# PORTUGAL

*Nuno Salazar Casanova and Madalena Afra Rosa*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The only collective action procedure available in Portugal that is similar to common law's class action is the 'popular action'.

In accordance with Article 52 of the Portuguese Constitution, every citizen has the right to individually, or jointly with others, submit petitions, representations, claims or complaints to defend: their rights; the Constitution; the laws or the general interest of sovereign entities; self-government bodies of the autonomous regions; or any authority. They also have the right to be informed of the outcome of any petition, representation, claim or complaint within a reasonable time frame.

All citizens with political and civil rights have the right to popular action, independently or through associations or foundations incorporated to defend relevant diffuse interests.

The general procedure and framework for bringing popular actions is set out in Law 83/95 of 31 August 1995. Law 83/95 establishes a right to 'opt out' of popular action to all interested parties. This is explained in more detail below.

While the rules concerning popular actions apply to all areas and sectors of the law, there are several provisions, in addition to Law 83/95, that expressly prescribe the right to popular action. These provisions relate to specific areas of the law, such as the Environmental Policy Law (Law 19/2014 of 14 April), the Consumer Protection Law (Law 24/96 of 31 July), the Cultural Heritage Law (Law 107/2001 of 8 September), the Securities Code (Decree-law 486/99 of 13 November) and the rules governing actions for damages for infringements of competition law (Law 23/2018 of 5 June).

Comparable to class actions are the collective actions heard together when multiple claimants join in one action separate claims on a similar or related subject (joinder of parties). This type of group claim is provided for in Portugal in both the Civil Procedure Code and the Administrative Procedure Code. Moreover, when two or more proceedings are already pending before the court, it is possible to request that both cases be joined where there is a connection between the claims (joinder of actions).

The main difference between a joinder of parties or actions and popular actions is the opt-out rule. Also, whereas claimants generally only represent themselves and their interests, even where they join an action, popular actions' claimants represent all parties with an interest or a right in the proceedings. Contrary to the mere joinder of parties, in popular actions the claimant may not have a direct interest in the claim submitted. Furthermore, it

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<sup>1</sup> Nuno Salazar Casanova is a partner and Madalena Afra Rosa is a junior associate at Uría Menéndez – Proença de Carvalho.

is not mandatory that the claimants involved in a popular action have suffered any ongoing or impending injuries or damage. Claimants represent their class at their own discretion, without needing a proxy or express authorisation from the other class members.

Since these types of claims are not common, no specific court or judge has jurisdiction to hear popular actions. The administrative and the civil courts have general jurisdiction.

## II THE YEAR IN REVIEW

As mentioned before, class actions are not very common in Portugal. According to statistical reports regarding the exercise of civil class actions before the first instance courts, from 2007 to 2017, only 200 cases were finalised.<sup>2</sup> The average number of cases heard before the first instance courts in Portugal is 18 per year.

Nonetheless, the number of class actions filed by retail investors, or associations on behalf of retail investors, for the protection of the investors' homogeneous individual or collective interests in financial instruments, and class actions filed by the Association for the Defence of Consumers (DECO) with the purpose of ensuring consumer safety and protection, has increased significantly.

In March 2016, 100 investors, from the Association of Aggrieved Investors of Banif (Alboa), filed a class action before the administrative courts to annul the resolution measure taken against Banif.

In September 2016, more than a thousand investors filed a class action before the Lisbon Administrative Court against the Bank of Portugal, its governor and the Portuguese state. They claimed compensation for damages caused by serious shortcomings in the prudential and market conduct supervision with regard to the defendants' involvement in the *Banco Espírito Santo* case.

Also, in April 2017, Alboa filed a new claim before the Lisbon Administrative Court against the Bank of Portugal to annul a new resolution that clarified and amended the resolution measure taken against Banif. This claim was also filed against the public prosecutor, in representation of the Portuguese state, the Resolution Fund, the Directorate General for Competition of the European Commission, the European Commission (EC), Banif and Banco Santander Totta, among others.

In September 2017, the Alfama Heritage and Residents Association filed for a protective measure to prevent the construction of the Jewish Museum in Largo de São Miguel, arguing that the area designated for the building should be used for housing purposes.

In November 2017, it was reported that Association of Investors and Technical Analysts and the association that represents the aggrieved investors of PT/Oi (Alope) intended to file a class action against Haitong (formerly known as Banco Espírito Santo de Investimento). The claim should take into account the sale of structured finance products of the former Portugal Telecom.

Additionally, in November 2017 the Legionnaire's disease victim support association stated its intent to file a class action for damages against the Portuguese state, on the grounds of the lack of legislation in this regard and a breach of the constitutional right to life.

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<sup>2</sup> This statistical analysis was carried out by the Portuguese Directorate-General for Justice Policy and is available at [www.siej.dgpj.mj.pt](http://www.siej.dgpj.mj.pt).

In January 2018, the president of the Municipality of Sintra announced that a popular action was being drafted against the Portuguese Postal Service owing to the unilateral decision to close one of the post offices in the area.

In March 2018, a popular action was filed by DECO for the reimbursement of €60 million, allegedly unlawfully charged by the telecommunications operators Altice/MEO, NOS and NOWO to its clients in late 2016 and August 2017, through unilateral amendments to prices without prior written notice.

In April 2018, the Algarve Surf and Marine Activities Association filed a popular action before the Loulé Administrative and Tax Court to stop oil prospection and exploitation in Aljezur, Algarve. The proceedings were brought against the Portuguese state, the Ministries of Economy, of the Sea and of the Environment, the Directorate-General for Marine Natural Resources, Security and Services, the Fuel Market National Institution, the Portuguese Energy Regulatory Body, the Directorate-General for Energy and Geology, the Portuguese Environment Agency, GALP and ENI.

In November 2018, DECO filed a class action against Facebook, regarding the misuse of users' personal data without their prior consent and the breach of their privacy, through apps operating in the social network. DECO is claiming a minimum amount of compensation of €200 for each Facebook user, for each year of registration on Facebook.

### III PROCEDURE

#### i Types of action available

Popular action comprises the right for an aggrieved party or parties to request the applicable compensation, in the cases and under the terms provided for by law. In particular, popular action may be taken to promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life, or environmental and cultural heritage preservation. In addition, the right to popular action may also be exercised to safeguard property owned by the Portuguese state, autonomous regions or local authorities.

Popular action applications can be filed before the administrative or the civil courts. The relevant court depends on the interest in question and on whether the interest or right, and the damage caused, is related to a public or a private entity.

Popular action may take any of the forms set out in the Civil Procedure Code and the Administrative Procedure Code.

To initiate a popular action, the claimant must file the claim before the competent court.

Except for Article 22, Paragraph 4, Law 83/95 of 31 August does not provide for specific rules regarding limitation periods applicable to popular actions. In addition, the statute of limitations regime in the Portuguese Civil Code<sup>3</sup> applies.

However, one particular rule concerning the statute of limitations applicable to popular actions relates to the right to compensation for tort. This right expires three years from the date the judgment is final and is no longer subject to appeal.

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3 Decree-law 47 344/66 of 25 November.

## ii Commencing proceedings

There are three requirements that must be fulfilled for an association or a foundation to be able to file a claim on behalf of a group of citizens: (1) the association or foundation must have legal personality; (2) the defence of the relevant interest in the popular action to be filed must be an activity covered by the foundation or the association's corporate purpose as set out in its articles of association; and (3) the association or foundation cannot carry out an activity that could, in any way, be deemed as competing with an activity carried out by a corporate entity or a liberal professional.

In addition to citizens, associations or foundations created to defend any relevant interest, Law 83/95 also allows local authorities or the public prosecutor to file a claim on behalf of a group of people with a relevant interest. Under Portuguese law, there is no specific definition of a class. In contrast with US law, the class is not determined by preliminary certification and there are no prerequisites that must be fulfilled to qualify the proceedings as a class action.<sup>4</sup>

Moreover, the new rules governing actions for damages for infringements of competition law establish that popular actions for such damages may also be filed by an association or foundation acting within the scope of consumer protection, or by an association of undertakings whose members are injured parties for the competition law infringements in question, even if the corporate purpose of the association does not include the defence of competition.<sup>5</sup>

As prescribed in Article 15 of Law 83/95 of 31 August, once a class action claim is filed with the court, if a member of the class in question disagrees with the proceedings submitted, that person must opt out of the action.

After being summoned to accept or refuse the claim, the members of the class that have had no involvement in the proceedings will have three options: (1) they can declare that they ratify the proceedings at their current stage and they accept the claimant's representation; (2) they can say nothing, in which case their silence will be deemed as acceptance; or (3) they can declare their refusal of the claimant's representation to not be bound by the decisions that follow.

The right to opt out of a class action may be exercised, until the end of the evidence production stage of the proceedings by submitting a statement to the court.

Law 83/95 of 31 August does not foresee a minimum number of claims to be filed.

Portuguese law only requires the claim to be filed by an individual and does not exclude overseas claimants. Hence, class action claims may be brought by Portuguese citizens or foreigners in, or residing in, Portugal. Due to the Portuguese constitutional principle of equal treatment, any person has the right to lodge a claim before a court irrespective of their national origin or citizenship.

## iii Procedural rules

Once a claim is filed, the interested parties are summoned to join the proceedings, if they wish to, or to declare that they do not agree to be represented by the claimant that initiated

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4 Rule 23(c), (1), (a) of the US Federal Rules of Civil Procedures states that '[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.'

5 Article 19, Paragraph 2, of Law 23/2018 of 5 June.

the class action. The judge will determine the deadline for interested parties to inform the court of their acceptance or refusal.

The summons to accept or refuse the claim issued to any potential members of the class covered by the claim will be publicly announced by the media or through a public notice, if the interests in question concern general interests or can be geographically recognised. The personal identification of the class of persons covered by the claim does not need to be provided in the summons. The potential members of the class covered by the claim may be referred to as holders of the relevant interests. The summons should also identify: the case file and the first claimant that submitted the claim, when there are several; the defendant or defendants; the subject matter of the class action; and the grounds for the claim.

When the interested parties cannot be specifically identified, the summons should refer to the relevant scope of people. This scope should be determined based on the specific circumstances and features that the people have in common, the geographic area where they live or the group or community that they are part of. However, the court is not bound by the way in which the application identifies the class of persons covered by the claim.

Recently, the Portuguese Supreme Court of Justice issued a decision that determined that a popular action should be declared inadmissible if the defendants have grounds to raise specific arguments of defence against individual claimants.

Since popular actions are aimed at the defence of diffuse interests, particular circumstances with respect to each claimant must be disregarded. In addition, the Supreme Court held that the claimant who files the claim on behalf of the class cannot represent the class if there is a conflict of interest between the claimant and any member of the class.<sup>6</sup> While the parties must provide the necessary evidence to the court, judges have a more active role in Portugal than they do in adversarial systems in the US. Judges conduct the trial and have the power to question witnesses and also require the production of evidence.

The Portuguese civil litigation system, as opposed to the US legal system, is characterised by written procedure. The parties lodge their claim, defence and replies (if applicable). As a general rule, the judge only intervenes after all written pleadings have been filed and, when necessary, calls for a pretrial hearing. At the pretrial hearing, the judge will verify if the procedural prerequisites have been fulfilled. If so, the judge will determine the subject matter of the case and the key issues that are to be subject to evidence. At the final hearing the judge will hear the witnesses' testimony, as well as the parties and the experts' clarifications, if requested. The hearing will end with the parties' closing arguments and be followed by the final judgment.

As provided by Law 83/95 of 31 August, in class actions the judge is more independent than in civil procedure actions. The judge is not dependant on the evidence submitted by the parties and may require the parties to provide additional evidence.

In addition, if the judge believes that it is highly unlikely that the application will succeed, the judge can preliminarily refuse the claim. However, before reaching such a decision, the public prosecutor must be heard and the judge should carry out the preliminary assessments deemed necessary or requested by the parties or the public prosecutor.

The public prosecutor may replace the claimant when the claim is withdrawn and settled or the claimant acts harmfully against the relevant interests to be defended.

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<sup>6</sup> See Decision of the Supreme Court of Justice dated 8 September 2016, in Case No. 7617/15.7T8PRT.S1, available at [www.dgsi.pt](http://www.dgsi.pt).

When an appeal does not suspend the effect of the initial decision, the judge may rule in favour of suspension to prevent irreparable damage.

When the final judgment in a class action is final and no longer subject to appeal (when it has the force of *res judicata*), the decision will be binding against all interested parties. Apart from the members of the class who expressly opted out of the proceedings, all remaining members who declared their acceptance or who did not opt out will be bound by the court's judgment.

The final judgment will be published in two newspapers, chosen by the judge, which are presumed to be read by the parties with a relevant interest in the subject. This publication must be made at the expense of the losing party. Failure to comply with this obligation will result in liability for disobedience. Instead of publishing the full text of the judgment, the judge may determine that only extracts of its key points are to be published. According to a recent decision of the Lisbon Court of Appeal dated 15 February 2018, if a preliminary injunction is filed before the court as part of a popular action, the publication of the judgment regarding the preliminary injunction in two newspapers is not compulsory.<sup>7</sup>

There is no difference between the time taken for class actions and other actions in Portugal, where the average length of civil proceedings is three years though some actions last for several years.

The trial is heard and decided by a single judge, without a jury.

Pursuant to Portuguese law, as a general rule, no punitive damages are awarded for class actions. All types of damages may be recoverable, including general and special damages and compensation for loss of profit. The law does not impose a maximum limit on the damages that the court may award: the quantum is fixed taking into account the losses suffered by the claimants.

The remedies available in class actions include compensation for damage, specific performance, penalties for non-performance and injunctions.<sup>8</sup>

When it is not possible to identify the holders of the interests in question, the court fixes a global quantum to be awarded for civil liability.

When the class of persons covered by the claim has been identified, those people will be entitled to compensation under the general rules of Portuguese civil liability law.

Where the limitation period for compensation has expired, any damages awarded will be provided to the Ministry of Justice. These damages will be held in a special account and allocated to pay attorney expenses and support legal aid for popular action rightholders that may lawfully request it.

The Securities Code provides that when compensation is not paid due to a statute of limitation or the inability of the court to identify the injured parties, payment should revert to the guarantee fund for the transaction giving rise to the claim or, if such fund does not exist, to the investors' compensation system.<sup>9</sup>

The claimant is exempt from paying preliminary costs and judicial costs are only due after the final judgment. Under Portuguese law, the losing party must reimburse the court fees borne by the winning party. If the claimant's claim is totally or partially upheld, the claimant will be exempt from paying court fees. However, if the court refuses the claim, the

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7 See Case No. 3375/16.6FNC.L1-6, available at [www.dgsi.pt](http://www.dgsi.pt).

8 Injunction claims are foreseen in Article 10 of the Consumer Protection Law and Article 25 of the Regime concerning general contractual terms (Decree-law 446/85 of 25 October).

9 Article 31, Paragraph 3 of the Portuguese Securities Code.

judge will determine the court fees to be paid. This varies between 10 per cent and 50 per cent of the regular fees. The judge should take into consideration the claimant's financial situation and the substantial or formal grounds for the refusal of the claim.

Law 83/95 of 31 August provides for the joint liability of claimants involved in the proceedings.

In Portugal – as in most of the Member States of the European Union<sup>10</sup> – the use of contingency fees (also known as *pactum de quota litis*) is prohibited by Article 106 of the Portuguese Bar Association Statute (Law 145/2015 of 9 September) and Article 3.3 of the Code of Conduct for Lawyers in the European Union. Contingency fees are defined as the agreement between a lawyer and client, entered into prior to the final conclusion of the case, whereby the client undertakes to pay a share of the damages awarded with the lawyer, regardless of whether the amount awarded represents payment in cash or in kind.

Nonetheless, lawyers and their clients can previously agree that the fees to be awarded are based on the value of the case's subject matter or that, apart from the fees awarded based on other criteria, the lawyer will be entitled to additional fees related to the outcome of the case.

#### iv Settlement

In Portugal, there are no specific rules regarding the settlement of class actions, so the general requirements set out in the Civil Procedure Code apply.

In accordance with Paragraph 3 of Article 290 of the Civil Procedure Code, when the parties to a class action enter into a settlement agreement, the agreement must be submitted to the court for approval.

To approve the settlement of the class action, the court must assess if the class of people covered by the claim was adequately and lawfully represented.<sup>11</sup>

The settlement agreement will only be binding on, and enforceable in relation to, those who subscribe to it. The members of a class that refuse to subscribe to the agreement or that have expressly opted out of the class action will not be bound by the settlement.

## IV CROSS-BORDER ISSUES

In Portuguese law, there is no specific provision restricting 'forum shopping'.

Additionally, the EC recently issued a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States, concerning violations of rights granted under Union Law (EC Recommendation 2013/396/EU of 11 June 2013). Though non-binding, EU Member States were supposed to have implemented the principles set forth in the Recommendation in their national collective redress systems by 26 July 2015. By 26 July 2017 at the latest, the EC will assess the implementation of the Recommendation.

In our view, there are numerous principles set out in the Recommendation that could lead to an amendment of the Portuguese legislation regarding class actions.

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<sup>10</sup> The *quota litis* is permitted in Spain, for example.

<sup>11</sup> See, for example, Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, cit., page 242.

First, the Member States should ensure that the losing party in a collective redress action reimburses the necessary legal costs borne by the winning party (the ‘loser pays principle’).<sup>12</sup>

Also, at the outset of the proceedings the claimant should be required to declare the origin of the funds that it is going to use to support the legal action to the court.<sup>13</sup>

As regards cross-border cases, the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national law regarding admissibility, or the standing of foreign groups of claimants or representative entities originating from other national legal systems.<sup>14</sup>

The Recommendation favours an opt-in model, as opposed to the opt-out system applicable in Portuguese class actions. The class of claimants is constituted by the interested parties, claiming to have been harmed, providing their express acceptance of the claim. Any legal or judicial exception to this principle must be duly justified based on the sound administration of justice.<sup>15</sup>

As for collective follow-on actions, Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of EU law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings initiated by the public authority are launched after the collective redress action commences, the court should avoid handing down a decision that would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings initiated by the public authority have been concluded.<sup>16</sup>

Finally, Member States should establish a national registry of collective redress actions.<sup>17</sup>

## V OUTLOOK AND CONCLUSIONS

There are many reasons for the fact that the Portuguese popular action mechanism was rarely used for years. The main problems with the implementation and enforcement of popular action have been summarised by Paula Meira Lourenço.<sup>18</sup> Instead of popular action claims, consumers generally opt for filing injunction claims in accordance with the Portuguese Consumer Protection Law, as these tend to be more effective. Moreover, alternative dispute resolution schemes, such as mediation or arbitration, have become entrenched and have significantly increased in recent years. Today they are seen as an expedient and efficient option. In most cases, the court cannot immediately set compensation for damages that it awards. This is because the court requires settlement procedures to be filed, which further delays the enforcement process. Though exempt from payment of preliminary costs, the prohibition of contingency fees can also be discouraging to potential claimants.

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12 Point 13 of the Recommendation.

13 Point 14 of the Recommendation.

14 Point 17 of the Recommendation.

15 Point 21 of the Recommendation.

16 Point 33 of the Recommendation.

17 Point 35 of the Recommendation.

18 See Paula Meira Lourenço, Public Hearing on a Horizontal Instrument for Collective Redress in Europe? (Brussels — 12.07.2011 - 09:30-11:00 - Room JAN - 4Q1) – Portuguese Experience, page 8.



One of the primary challenges of the popular action procedure is the backlog in court proceedings. Also, the commencement of proceedings always suffers delays due to uncertainty with respect to the legal standing of the association or foundation that files the claim on behalf of the group of citizens with a relevant interest. For example, take the case of the popular action filed by the Portuguese Competition Observatory against the television sports channel Sport TV, regarding damages caused by competition law infringements. Not only did it take about a year for the preliminary hearing to be scheduled, but also the concerns regarding the Portuguese Competition Observatory's legal standing to bring proceedings caused a one-year delay.

Nevertheless, it is already clear that we are witnessing a growing increase in the use of popular action claims, in particular with regard to the protection of retail investors' collective interests and consumer safety and protection.

First, following the collapse of Banco Espírito Santo, the downfall of Banif and the related resolution measures taken, associations incorporated to defend and protect the individual or collective interests of investors who suffered injury or losses due to the lack of the repayment for their financial investments have not only strived to represent the interests of their members but also of any other interested parties. These cases are still pending and the decisions have yet to be handed down.

Second, the Facebook class action lawsuit may be a groundbreaking and revolutionary proceeding, since the final judgment may be enforceable by thousands of Facebook users and could involve international repercussions. Furthermore, the aftermath of the Facebook class action in Portugal may also be important for the similar lawsuits that have been filed by other consumer rights groups in Spain, Belgium and Italy against Facebook, on the same grounds.

The increase of popular action claims will put the implementation and effectiveness of the Portuguese popular action mechanism to the test. The outcome will affect a considerable number of national and foreign citizens and will most definitely be publicly broadcast throughout Portugal and Europe. This is definitely a turning point that could define the future of the class action system in the country. It is likely to address whether the system is an adequate form of group litigation for the defence of diffuse interests in Portugal. Additionally, the fact that popular actions are in the spotlight has been drawing out the relevant features of the procedure that require improvement. Finally, it may also serve as evidence that certain rules are blocking the success of this scheme, such as the courts' uncertainty regarding the legal requirements for associations to bring proceedings, the opt-out system, the lack of preliminary certification by the courts or the prohibition of contingency fees.

# SCOTLAND

*Colin Hutton and Graeme MacLeod<sup>1</sup>*

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

While many Commonwealth jurisdictions provide a legal mechanism for the facilitation of group litigation, such a framework has remained notably absent in Scotland. The debate concerning whether or not such a procedure should be introduced in Scotland has persisted for decades. In 1979, the Scottish Consumer Council (SCC) established a working group to review the existing methods under which consumers could enforce their rights. The SCC's final report was published in 1982, concluding that the means of the Scottish courts to entertain matters of 'group interest' were restrained, and advocating for the availability of class action procedure in Scotland.<sup>2</sup> A report drawing similar conclusions was published in 1996 by the Scottish Law Commission (SLC).<sup>3</sup> The SLC concluded that a single litigation could deal with a number of possible claimants or pursuers with a core of common issues, and that the advantages of the single litigation outweigh the disadvantages.

Despite this continued discussion, and seeming approval for class actions in both academia and practice, it has taken until 2018 for the Scottish Parliament to tackle the issue head-on. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the 2018 Act) received Royal Assent on 5 June 2018. The 2018 Act, for the first time in Scotland, makes provision for class action litigation. However, with the more detailed rules needed to implement the 2018 Act still a work in progress, there remains a great deal of uncertainty surrounding how the 2018 Act will operate in practice.

## II THE YEAR IN REVIEW

Traditionally, the Scottish courts have required to utilise existing tools of procedure to grapple with multiple claims which, in essence, are premised on the same or similar rights and obligations. A pragmatic approach is taken and courts will often sist (a stay in Scottish procedure) all but one claim, and allow that one matter to run to a debate (a legal argument

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1 Colin Hutton and Graeme MacLeod are both partners at CMS Cameron McKenna Nabarro Olswang LLP. Colin and Graeme would like to acknowledge the assistance of Jordan Rhodes (trainee solicitor) and Emma Boffey (associate) in the preparation of this chapter.

2 Scottish Consumer Council (SCC), *Class Actions in the Scottish Courts: A new way for consumers to obtain redress?* (May 1982).

3 Scottish Law Commission (SLC), *Multi-Party Actions: Report on a reference under Section 3(1)(e) of the Law Commissions Act 1965* (July 1996).

without evidence) or proof (a civil trial on the evidence in Scotland) as a 'test case'.<sup>4</sup> The remaining cases will then be continued, pending the final outcome of the test case. For example, there are over 500 cases presently before the Court of Session seeking damages for personal injuries caused by allegedly defective vaginal mesh products. On 1 June 2018, and following a five-day debate, Lord Boyd handed down his decision in *AH v. Greater Glasgow Health Board*,<sup>5</sup> which constitutes a combined judgment of four of the 18 'lead actions' in these vaginal mesh claims. In the introduction to his decision, his Lordship explains that all but 18 of the 500 cases have been sisted, pending the outcome of these proceedings.<sup>6</sup> Lord Boyd accepted the position of the pursuers and granted a proof before answer (a mixed trial of law and evidence) in all of the cases, subject to time bar.<sup>7</sup>

The primary downfall of such an approach is that, strictly speaking, these cases are still entirely distinct: there is no means by which numerous actions can be consolidated into a single court action and managed as a group. The outcome of the test case therefore has no automatic bearing on the remaining cases, subject to the doctrine of precedent. As different claimants may rely on different documentation and different witnesses, this approach poses a risk to decisional harmony. Moreover, by having to advance each case separately, there still remain issues as to cost and duplication of papers; problems that underpin the rationale for class action procedure.

In light of these shortcomings, the 2018 Act was passed, its provisions regulating what are 'group proceedings', and came into force on 30 January 2019.<sup>8</sup> The 2018 Act's genesis dates back to 1 June 2017, when the then Cabinet Secretary for Justice, Michael Matheson MSP, introduced a Bill before the Scottish Parliament. The Bill was intended to deal with various matters of civil procedure in Scotland, including success fee arrangements, expenses in civil litigation, and the regulation of claims management companies. A novel concept for Scotland, at least through a strictly legal lens, was the proposal to introduce multiparty procedure.

Termed 'group proceedings', the Scottish Parliament's Stage 1 Report to the Bill<sup>9</sup> explored the possible forms that the new procedure might take. For example, the Report identified three broad categories of group proceedings, described respectively as class actions, organisation actions, and public interest actions. Class actions are brought by a named pursuer who acts as a representative of the class of individuals with the same legal issue, with the representative seeking redress for themselves and on behalf of the class as a whole. Organisation actions are brought by organisations, such as consumer or environmental groups, on behalf of their members or the general public. Public interest actions are advanced by public officials on behalf of the public at large, or a specific group of the public. The new procedure, which could encompass all of these forms, is termed 'group proceedings' under the 2018 Act.

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4 The Scottish Parliament Justice Committee, Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Policy Memorandum (2 June 2017).

5 [2018] CSOH 57.

6 *AH v. Greater Glasgow Health Board* [2018] CSOH 57 at [1].

7 *AH v. Greater Glasgow Health Board* [2018] CSOH 57 at [1].

8 Regulation 2, The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2018.

9 The Scottish Parliament Justice Committee, Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (21 December 2017).

The Report further highlighted that group proceedings can take the form of either an opt-in or opt-out procedure. The former refers to a procedure where a group of pursuers expressly consent to be a part of, and therefore opt in to, the proceedings. An opt-out procedure, on the other hand, operates by defining a class of individuals who are deemed to be entitled to benefit from any ultimate remedy. Anyone falling within the definition of the group is deemed to have consented to the proceedings being pursued on their behalf, unless they opt out expressly. Only those who actively opted out of the proceedings would be entitled to raise their own separate claim.

### III PROCEDURE

#### i The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

The 2018 Act establishes the overarching framework for group proceedings in Scotland. Section 21 of the 2018 Act then confers power on the Court of Session to make more detailed provision about group proceedings by way of what is called an Act of Sederunt.<sup>10</sup> These more detailed procedural rules, intended to supplement the 2018 Act, are currently being drafted by the Scottish Civil Justice Council (SCJC), the rule-drafting body to the Court of Session. While the SCJC has a degree of discretion over the final form that the rules will take, they must fall within the parameters set down by the 2018 Act. Nevertheless, it is only possible to provide an outline of the procedure at this early stage.

The 2018 Act provides that group proceedings will only be available in the Court of Session.<sup>11</sup> The Court of Session is Scotland's supreme civil court, and it will not be competent to initiate group proceedings in any lower court, such as local sheriff courts. The sheriff court has exclusive jurisdiction over claims in Scotland worth £100,000 or less.<sup>12</sup> The 2018 Act provides powers for the Court of Session to make rules regarding the disapplication of this rule in relation to group proceedings. Until a draft of the rules governing group proceedings is available, it remains unclear whether any monetary limit will apply to group proceedings, or whether their aggregate value might have to be £100,000 or more to qualify as competent group proceedings. Given the Court of Session has exclusive jurisdiction to hear group proceedings, the current thinking is that no monetary limit will apply, making them an even more unique species of Scottish civil court procedure, post the 2014 Act reforms.

Group proceedings in Scotland will be initiated by a person known as a 'representative party', who will bring the proceedings on behalf of the wider class, described in the legislation as a 'group'.<sup>13</sup> There may only be one representative party to the proceedings.<sup>14</sup> A group, for these purposes, comprises two or more legal individuals who each have a separate claim in the subject matter of the group proceedings. The representative party will often be a member of the defined class on whose behalf the proceedings have been brought, although not necessarily so. If the representative party is not a member of the class, they can only advance the claim

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10 An 'Act of Sederunt' in Scotland is a form of secondary legislation enacted by the Court of Session, regulating civil procedure in the Scottish Courts. Such Acts are accordingly 'laid only' and are not subject to the typical legislative process of the Scottish Parliament.

11 Section 20(1) 2018 Act.

12 Section 39(1) and (2) Courts Reform (Scotland) Act 2014.

13 Section 20(2) 2018 Act.

14 Section 20(4) 2018 Act.

with the Court's authorisation.<sup>15</sup> The 2018 Act does not contain any indication as to whether the Court has an unfettered discretion in granting this consent, or whether there are guiding principles to be followed in the making of such a decision.

Permission must be granted by the Court before group proceedings can be progressed.<sup>16</sup> The 2018 Act provides that permission is only to be granted if the Court considers that all of the claims raise issues, whether of fact or law, which are the same, similar or related to each other; and if the Court is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings.<sup>17</sup> These are cumulative requirements. Further, the Court will only be permitted to give permission in accordance with the procedural rules to be developed by the SCJC.<sup>18</sup>

The 2018 Act leaves the question of whether an opt-in, opt-out or hybrid regime will be established open to the Court of Session, and therefore to the SCJC.<sup>19</sup> At present, the SCJC has given no indication which route is likely to be taken. For the purposes of the legislation, 'opt-in proceedings' are defined as group proceedings that are brought with the express consent of each member of the group on whose behalf they are brought.<sup>20</sup> Conversely, 'opt-out proceedings' are defined as group proceedings that are brought on behalf of a group, each member of which has a claim that is of a description specified by the Court as being eligible to be brought in the proceedings, and either (1) is domiciled in Scotland and has not given notice that they do not consent to the claim being brought in the proceedings; or (2) is not domiciled in Scotland and has given express consent to the claim being brought in the proceedings.<sup>21</sup> In short, non-Scots domiciliaries will not be able to participate in the opt-out process; they must opt in to the class irrespective of whether those particular proceedings are running on an opt-out basis for Scots domiciliaries.

At first blush, the definitions of opt-in and opt-out group proceedings, and the class requirements, in the 2018 Act are markedly similar to those in the Competition Act 1998 (CA), as amended by Schedule 8 to the Consumer Rights Act 2015. Section 47B CA provides that opt-in proceedings for the purposes of competition law are collective proceedings brought on behalf of each class member who 'opts in by notifying the representative . . . that the claim should be included in the collective proceedings'. Opt-out proceedings, under the CA, are defined as those brought on behalf of each class member except: (i) any member who opts out by notifying the representative; or (2) any class member who is not domiciled in the UK and does not opt in to the proceedings. In other words, the 2018 Act follows the CA's approach in defining opt-out class actions. Both instruments proceed on the basis that, unless they explicitly opt out, the class for the purposes of the proceedings will encompass every possible member of the class, unless that member is domiciled outside Scotland or the UK or specifically opts out. Those with a foreign domicile can only take part in the proceedings by opting in, reflecting the UK's far more conservative approach to class action procedure in contrast to jurisdictions such as the US. So far as class definition is concerned,

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15 Section 20(3) 2018 Act.

16 Section 20(5) 2018 Act.

17 Section 20(6)(a) and (b) 2018 Act.

18 Section 20(6)(c) 2018 Act.

19 Section 20(7) 2018 Act.

20 Section 20(8)(a) 2018 Act.

21 Section 20(8)(b) 2018 Act.

the Competition Appeal Tribunal (CAT) must determine whether the claims raise ‘the same, similar, or related issues of fact or law’.<sup>22</sup>

Until a fully fledged body of case law emerges in Scotland, it remains to be seen how the judiciary will interpret the provisions of the 2018 Act on class definition. The 2018 Act is not a UK statute, and so there is not the same need as arises in interpreting such a statute to take a consistent approach across the UK. This said, it is possible, given the similar definitions of class in both sets of legislation, that the Scottish courts, in deciding whether permission should be granted for group proceedings, will have one eye on decisions of the CAT, which sits primarily in London. Further, given that the CA’s territorial scope extends to Scotland in competition law matters, there may nevertheless be a desire to take a consistent approach to applications under the 2018 Act as would be taken to applications to the CAT deriving from Scotland.

## ii The funding of litigation

The reforms introduced by the 2018 Act do not stop at the introduction of group proceedings. The 2018 Act brings about significant procedural changes that complement class actions, including radical change to the funding of litigation in Scotland.

On 3 June 2014, Sheriff Principal Taylor published the Taylor Review of Expenses and Funding of Civil Litigation in Scotland (the Taylor Review).<sup>23</sup> The Taylor Review recommended the introduction of various changes to the expenses and funding regime in Scotland, including more detailed provisions about success fee arrangements, the introduction of qualified one-way costs shifting (QOCS), and the notification of third-party funding.

Until 30 January 2019, solicitors in Scotland were not competent to enter into damages-based agreements (DBAs). DBAs are a subset of success fee arrangements, whereby the solicitor’s legal fees are calculated as a percentage of the sum awarded upon successful litigation. Traditionally, such arrangements were deemed an agreement for a share of the litigation proceeds (*pactum de quota litis*) in Scotland, and consequently unenforceable. The reasoning was that lawyers take on a professional role for their clients in relation to a claim, and that they were therefore debarred from combining that function with a pecuniary interest of their own in the amount received.<sup>24</sup>

Section 2 of the 2018 Act reverses this position, providing that a success fee arrangement is not unenforceable by reason only that it is an agreement for a share of the litigation. One of the primary drivers for the introduction of group proceedings is a desire to reduce legal expenses incurred per capita and improve access to justice for consumers. DBAs are arguably being introduced into Scottish litigation for similar reasons. DBAs often proceed on a ‘no win, no fee’ basis, and similarly provide claimants with the opportunity to litigate without being restricted by the financial barriers associated with pursuing court proceedings. It is possible that the two will operate together to bring about a more favourable environment for, and therefore an increase in, class actions in the Scottish courts. Claimants may be more willing to pursue group proceedings if they do not have to fund their own fees unless they are successful; and solicitors may well see the attraction of acting on a damages-based arrangement for multiple clients in group proceedings.

22 Section 47B(6), CA.

23 Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014).

24 *Quantum Claims Compensation Specialists Ltd v. Powell* 1998 S.C. 316.

The 2018 Act's implementation of QOCS may bring about a similar effect, at least in the context of mass personal injuries claims. The general rule on legal expenses in Scotland is that 'expenses follow success'. In other words, a successful litigant, whether pursuing or defending, will be entitled to recover expenses from the unsuccessful litigant, who bears both his or her own expenses and the opponent's. The risk of a party potentially incurring liability for their opponent's expenses, should the litigation prove unsuccessful, may be seen as constraining that party's access to justice.<sup>25</sup>

QOCS 'shifts' this burden from the unsuccessful litigant. Section 8 of the 2018 Act prohibits the Court from making an award of expenses against an unsuccessful pursuer, essentially removing this hurdle. The new QOCS regime is restricted to personal injuries actions and contains its own procedural safeguards to ensure that vexatious litigants are not afforded such protection. Section 8(1)(b) of the 2018 Act provides that QOCS only applies where the pursuer conducts the proceedings in an appropriate manner, which they are considered to have done unless their lawyer makes fraudulent representations, acts fraudulently, behaves in a manner that is manifestly unreasonable or otherwise conducts the proceedings in a manner that the Court considers amounts to an abuse of process.<sup>26</sup> Evidently, the 2018 Act imposes a high threshold before the protection under the QOCS regime can be taken away from a pursuer. In all other circumstances, pursuers will be taken as having conducted the proceedings appropriately and will therefore be entitled to the exemption under Section 8(1)(b). Again, that is likely to make the environment more favourable for class actions in personal injuries matters, including clinical negligence claims, subject to the pursuers being able to establish a class at the permission stage.

Finally, the 2018 Act requires parties receiving financial assistance in respect of proceedings from another third party to notify that fact to the Court.<sup>27</sup> The litigant must disclose both the identity of the third party and the nature of the assistance provided. Typical examples of third-party funding of litigation include insurance cover and legal aid. However, litigation funding increasingly takes the form of an investment, whereby commercial funders assist litigants by covering their legal expenses, and take a return in the event the litigants succeed.

Unlike in England and Wales, Scotland has never imposed a restriction on third-party funding. However, the English restriction on third-party funding arrangements has gradually been eroded, resulting in England becoming one of the premier jurisdictions for third-party funding, along with Australia and the US.<sup>28</sup> By contrast, the Scottish market for third-party funding has never quite found fertile ground.<sup>29</sup> However, as has already been mentioned, certain aspects of the 2018 Act may make Scotland a more attractive jurisdiction for third-party funders, most notably its introduction of the possibility of opt-out class actions.

It will ultimately be up to the SCJC to decide which types of claim may be the subject of opt-out proceedings, and for the Court of Session then to exercise its discretion in any given case. However, should opt-out proceedings become a reality, Scotland will become the only jurisdiction in the UK where, aside from in competition matters, they are available to

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25 See, for example, Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014), page 161.

26 Section 8(4) of the 2018 Act.

27 Section 10(2) of the 2018 Act.

28 [www.cms-lawnow.com/ealerts/2016/12/third-party-funding-for-litigation-and-arbitration](http://www.cms-lawnow.com/ealerts/2016/12/third-party-funding-for-litigation-and-arbitration).

29 Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014), page 244.

litigants. The financial rewards that might be available from a successful opt-out litigation are bound to attract the interest of litigation funders, not least when Scotland is generally a less expensive jurisdiction in which to litigate than its neighbouring jurisdictions.

#### IV CROSS-BORDER ISSUES

The UK was due to leave the European Union on 29 March 2019. At the time of writing, it remains unclear what transitional measures (if any) will apply once (and if) the UK does leave the European Union at any future date.

Currently, holders of decrees (judgments) from Scottish court actions enjoy the almost automatic right to enforce these throughout the EU. Post-Brexit, the national law of each EU Member State will determine the enforceability of a judgment (unless the decree emanates from proceedings where parties contracted for exclusive Scottish jurisdiction, which will remain recognisable under the Hague Convention on Choice of Court Agreements).

Domestic rules vary considerably as to the extent to which the merits of the underlying action can be reopened and as to the procedure to be followed. One factor that many states take into account is reciprocity (i.e., whether or not the sending state would enforce a judgment of the destination state in similar circumstances). Post-Brexit, the position on cross-border enforcement may be less straightforward than the current procedure under Brussels I Recast and the Lugano Convention.

More generally, Brexit's impact may be felt in subtler ways: the advent of group proceedings in Scotland owes much of its heritage to developments in the fields of competition, data protection and consumer law, all of which have strong roots in EU law. It remains to be seen how much of that shared heritage will continue to shape the future development of Scots law, post-Brexit.

#### V OUTLOOK AND CONCLUSIONS

As already mentioned, the Court of Session is entitled to design the procedural rules of group proceedings in secondary legislation known as an Act of Sederunt. This responsibility is presently vested in the SCJC, whose first draft of the rules is expected later in 2019. The scope of the rules is only restricted by the substantive provisions of the 2018 Act outlined above, which override any existing Rule of the Court of Session. So long as the SCJC stays within the bounds of the 2018 Act's substantive rules, it will be entitled to regulate the procedure however it sees fit.<sup>30</sup> The 2018 Act does, however, provide a non-exhaustive list of the matters the relevant Act of Sederunt may cover, including, among others, the persons who may be authorised to be a representative party, the action to be taken by a representative party, and the means by which members of the class give their consent or notice of non-consent, depending on whether the matter is an opt-in or opt-out class action.<sup>31</sup>

The SCJC will need to decide which claims can, subject to the Court's discretion, be made the subject of group proceedings. One obvious possibility is claims for losses suffered as a consequence of breaches of the Data Protection Act 2018 (DPA). The precursor to the DPA, the EU General Data Protection Regulation, gave Member States the option of allowing opt-out class actions for claims for damages for data breaches. This option was

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30 See the opening of Section 21(2).

31 For the full list, see Section 21(2) 2018 Act.



not included in the DPA (a subject of much debate during the DPA's passage through the UK Parliament). Instead, the DPA provided the UK government with the power to make regulations enabling, effectively, opt-in class actions alone. That restriction is, however, only applicable to England and Wales. The position in Scotland will instead be governed by the 2018 Act and the Court of Session's Rules.

The framework is in place, through the 2018 Act, for Scotland, in the next few years, to move closer to an US-style opt-out class action model. The litigation funding environment has also been made far more receptive. Depending on how the SCJC's draft rules approach matters, the stars may be aligning for class actions in Scotland for 2020 and beyond.

# SWEDEN

*Magnus Rydberg and Ola Hansson*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

The main and virtually exclusive legislation in Sweden that governs class actions (hereinafter referred to as group actions, in accordance with the official Swedish-to-English translation) specifically is the Swedish Group Proceedings Act, which came into force in January 2003. The Act is only applicable to civil cases and procedural matters thereof; it does not affect substantive law. In addition, where the Group Proceedings Act does not specifically regulate otherwise, the general framework that governs litigation in Sweden (found mainly in the Swedish Code of Judicial Procedure) is applicable to group actions. Owing to the narrow scope of the Group Proceedings Act, the Code of Judicial Procedure to a large extent *de facto* covers group actions. For a number of environmental and competition matters, a few provisions relating to group actions can be found in the Swedish Environmental Code and the Swedish Competition Damages Act. All group action proceedings are adjudicated by judges; there are no juries.

Three categories of groups are entitled to commence group actions:

- a* private groups (i.e., individuals or companies, and other entities, that have a claim that is subject to the action);
- b* organisation groups (i.e., non-profit associations that, in accordance with the association's charter, protects consumer or wage-earner interests in disputes between consumers and business operators regarding any goods, services or other utility that a business operator offers to consumers or a dispute of any other kind provided there are significant advantages with the disputes being jointly adjudicated with reference to the investigation and other circumstances); and
- c* public groups (i.e., authorities, provided that the authority is suitable to represent the members of the group with reference to the subject of dispute).

Group actions are administered by the general courts, which are organised in a three-tier system: district courts (and in the case of group actions, specifically by the district courts appointed by government, with each county having one), courts of appeal and the Supreme Court. However, competent district courts for group actions relating to environment matters and competition matters are the land and environmental courts or the Patent and Market Court respectively.

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<sup>1</sup> Magnus Rydberg and Ola Hansson are partners at Hamilton Advokatbyrå.

Group actions are based on an opt-in system; each member of the group must, within a time frame, decided by the court give notice to the court if he or she wishes to take part in the group action.

Group actions pursued under the Group Proceedings Act are rare in Sweden; only 16 litigation proceedings have been commenced since the Act came into force in 2003. One explanation of why this is the case could be that the general procedural rules regarding intervention and consolidation of proceedings are fairly liberal under Swedish procedural law. Anyone who can make it probable to the court that the disputed matter has an impact on his or her legal rights or obligations may intervene in a pending court proceeding. The rules on consolidation are more complex, and there are several ways in which two or more court proceedings can be consolidated, some of which are mandatory. Mandatory consolidation is normally applied if the same claimant initiates more than one court proceeding against the same defendant or if one or more claimants initiate proceedings against one or more defendants, if, under all these circumstances, the claims are based on essentially the same legal ground (e.g., the same contract or the same negligent act). The most prevalent reason for consolidation in other situations is that a consolidation would benefit the handling of the court proceedings, but this type of consolidation is not mandatory. It is not unusual that, for example, claims regarding professional liability for financial advisers that have provided advice to a vast number of consumers are consolidated with support of the procedural rules of consolidation instead of being filed as a group action. Courts may not *ex officio* decide whether consolidated proceedings should instead be pursued as a group action, although such a change is possible under certain conditions upon request by the claimant.

A further reason specific to competition matters as to why group actions are rare in Sweden may be that the statutes of limitation have been unfavourable to claimants prior to the new Competition Damages Act, which was enacted in 2016.

## II THE YEAR IN REVIEW

One group action claim was filed in 2018, regarding a claim for damages of roughly 135 million kronor. The claimant and the group members are seeking damages for loss incurred in relation to an acquisition of a company. The preliminary group consists of the shareholders of the target company. Notwithstanding that the claim was filed in February, no summons applications has of yet been issued the defendant.

In light of the Dieselgate scandal, the European Commission proposed a new directive in April 2018, with the purpose of improving consumers' opportunities of seeking collective redress (COM(2018)184/F1). The Swedish government generally is in favour of the proposal.

## III PROCEDURE

### i Types of action available

Any civil claim that can be brought to general courts may be subject to group action, for example, virtually all commercial disputes. Any other type of claim may not be brought as a group action unless such opportunity is available by statutory backing. There is statutory backing for group actions in several environmental and competition matters. Notable matters that may not be litigated as group actions are maritime, patent, trademark and a number of employment matters.

The Group Proceedings Act is, with a few exceptions, applicable to environmental matters where it is permissible to bring a group action, for example, claims concerning damages. One of the exceptions is that public groups (i.e., authorities) are restricted from pursuing certain remedies; public groups may only bring claims concerning damages. Private and organisation groups may, in addition, bring claims concerning the prohibition of environmentally hazardous activity and claims to order the defendant to take protective measures or other precautions regarding such activities. Moreover, non-profit associations that, in accordance with the association's charter, protect environmental interests – as well as associations of professionals within the fishing, agricultural, reindeer and forestry industries – are entitled to bring an organisation group claim to court, in addition to what follows from the Group Proceedings Act.

Limitation is part of Swedish substantive law. As was mentioned above, the Group Proceedings Act does not affect substantive law. Consequently, general statutes of limitation apply. The general limitation period is 10 years from the occurrence of a claim unless otherwise agreed upon by the parties or specifically regulated elsewhere, according to the Swedish Limitations Act. Some areas of law are subject to specific limitation periods (e.g., under certain circumstances, matters of product liability). The limitation period can be interrupted if the debtor offers payment, pays interest or instalments, or otherwise acknowledges the claim. The creditor may also interrupt the limitation period by presenting a written demand to the debtor or commencing legal proceedings. If the limitation period is interrupted, a new limitation period begins from that day. Concerning interruptions because of legal proceedings, specifically, the new limitation period begins when the legal proceedings are concluded. Generally, to avoid limitation, it is sufficient to notify the opposite party of the claim, although in some instances initiation of court proceedings is required.

## **ii Commencing proceedings**

Group actions can only be commenced by a person who has a claim that the group action concerns. In addition, group actions may only be commenced by the claimant; a claim initiated by a single claimant (which is not in itself a group action) against several defendants cannot be litigated as a group action. This issue is instead resolved by the rules of consolidation mentioned above. The basic prerequisites to pursue a group action are: (1) the action must be based on circumstances (i.e., legal grounds, that are common or of similar nature for the claims by the members of the group); (2) the group proceedings must not appear to be mismatched owing to some claims of the members of the group differing substantially from claims by other members of the group on legal grounds; (3) the majority of the claims to which the action relates cannot equally well be pursued by the members of the group individually; (4) the group, as regards its size, demarcation and other circumstances is appropriately defined; and (5) the claimant, taking into consideration the claimant's interest in the substantive matter, financial capacity to bring the group action and other circumstances, is suitable to represent the members of the group.

The group members themselves are not parties in a group action, with the exception of the representative of the group in private groups (i.e., the actual claimant: the representative of a private group must have a claim that is subject to the group action). However, a group member is in several aspects treated as a party (e.g., in matters relating to conflict of interest and evidence). Notably, a group member has an independent right to appeal in his or her own interests or in the interests of the group. How such appeals are administered is a complex issue, but they entail that the group member becomes party to the proceedings.

Theoretically it should be possible to involve more than one defendant in group proceedings. The Group Proceedings Act does not specifically regulate this situation although it may be deemed inappropriate as regards the prerequisites outlined in (1)–(5) above (however, these prerequisites primarily concern the claimant and the group members).

The group is preliminarily defined by the statement of claim. Consequently, a group can be defined fairly loosely at an initial stage, for example, ‘everyone who purchased cars from X in the year of 2016’. Ultimately, however, the group is defined by those members of the preliminary group that decide to opt in.

There are no specific provisions in the Group Proceedings Act concerning claimants outside Swedish jurisdiction, hence ordinary rules applicable to individual claims apply to group actions as well. Issues concerning jurisdiction are primarily resolved with reference to international legislation or treaties or, in absence thereof, national sources of law; see further below.

Group actions may be funded in primarily three ways: ordinary contingency fees, contingency fees arrangements under the Group Proceedings Act and third-party funding.

Lawyers who are members of the Swedish Bar Association are generally prohibited from requesting contingency fees, according to the Swedish Bar Association’s Code of Conduct. Exemptions may be granted only for very specific reasons, making contingency fees very rare.

However, contingency fees (as agreed upon in a risk agreement) are, under certain conditions, specifically permitted by the Group Proceedings Act. The statutory backing for contingency fees relating to group actions thus makes contingency fees available for members of the Swedish Bar Association acting for a group. Contingency fee arrangements must be in writing and indicate how the fee will differ from an ordinary fee arrangement, that is, how a group member may incur additional legal costs depending on the extent of the claim being sustained or dismissed. The contingency fee arrangement must also be approved by the court. Court approval may be obtained only if: (1) the arrangement is reasonable in light of the nature of the matter at issue; and (2) the fee is not based solely on the value of the relief sought. Contingency fee arrangements according to the Group Proceedings Act are not binding to the defendant. Accordingly, any costs incurred by the claimant specifically as a result of a contingency fee arrangement cannot be recovered from the defendant in accordance with the general loser-pays-principle according to general Swedish procedural law.

There are no general restrictions to third-party funding under Swedish law. Members of the Swedish Bar Association are, however, *de facto* restricted from funding a party’s costs themselves owing to restrictions imposed by the Swedish Bar Association’s Code of Conduct. There are no restrictions for a member of the Bar to act for a claimant funded by a third party. It is worth noting that because of a Supreme Court precedent in 2014, owners and representatives of special purpose vehicles (SPVs) may, under certain circumstances, be held liable for the defendant’s litigation costs where the SPV arrangement is made for the purposes of circumventing the loser-pays principle established in the Code of Judicial Procedure.

### iii Procedural rules

There are no specific court proceedings of certification prior to a group action being initiated. In practice, however, the court will *ex officio* decide on various issues (including the general prerequisites for initiating court proceedings set out in Code of Judicial Procedure) where a group’s statement of claim is filed. A party is not required, but permitted, to raise objections regarding issues that the court will assess *ex officio*. Specifically for group proceedings the court will, among other things, make the following enquiries.

Most importantly, the court will assess whether the claim is appropriate as regards the issues outlined in subsection ii. Generally, the court will only render a formal decision concerning these issues either if the claim is rejected by the court without prejudice or the court dismisses an objection raised by the defendant. Either outcome is possible to appeal. In addition, group actions brought by a private group or an organisation must be represented by an attorney who is a member of the Swedish Bar Association. There is no such requirement for a public group, and it is not unusual that such group actions are brought by in-house lawyers of the authority bringing the claim. The court may grant exemptions to the member of the Bar-requirement where special reasons apply. Accordingly, the court will enquire whether the claimant's attorney is a member of the Bar. The court will also assess any contingency fee arrangement made under the Group Proceedings Act and how each of the group members will be notified the group proceedings.

As mentioned above, the Group Proceedings Act has no application on substantive law. Consequently, issues regarding quantum of damages and liability, etc., are resolved in the same way as in any individual action where several parties are involved. Under Swedish law, it is permitted to split issues of liability and quantum of damages, that is, to first bring a declaratory claim regarding the issue of liability to the court and in subsequent proceedings, assuming liability applies, bring the issue of quantum of damages. However, any declaratory action brought before the court concerning whether a certain legal relationship exists, for example, whether a defendant is liable to pay damages, must, *inter alia*, be fitting as regards various criteria. A court shall *ex officio* decide whether such a claim is permitted. Typically in claims concerning damages, this permission is granted. Issues of liability and quantum of damages may also be split in ongoing proceedings by means of an intermediate judgment.

The time frame of litigation in matters that may be litigated as group actions is usually between one to two years in the district court where the proceedings are not a group action. Considering the low number of group actions in Sweden, there is not enough data to draw any conclusions regarding the time frame of group action proceedings. From our experience, group actions may, however, stretch out for several years.

#### **iv Damages and costs**

As a starting point and in the absence of an agreement on how to calculate damages, the aggrieved party is entitled to its actual loss incurred. As a general rule, Swedish law does not recognise punitive damages. The 'doctrine of difference' is the primary tool in calculating the amount of damages that the aggrieved party is entitled to. According to this principle, the liable party is obliged to pay damages to the amount that puts the aggrieved party in the hypothetical position where it would have been had the damaging act not been performed (i.e., the aggrieved party is entitled to full financial compensation (including loss of profit)).

Liability to pay damages is, as a general rule, limited to the immediately aggrieved party; third parties, that is, anyone who incurs financial loss as a result of the aggrieved party's loss, are generally not entitled to damages. In addition, the compensation to the aggrieved party may be reduced with reference to, for example, contributory negligence or failure to mitigate loss.

Many of the group actions in Sweden were settled. However, one case in which the claimant was successful was initiated in 2008 in the Uppsala District Court. The claimant and each of the 43 group members were awarded damages. The case concerned whether the state had discriminated against the claimant and the group members in application processes

to a university run by the state. The judgment was rendered in the spring of 2009 and was affirmed by the Svea Court of Appeal in December the same year.

In general, the winning party is entitled to full compensation from the losing party for reasonable litigation costs (e.g., counsel costs, compensation for the party's own costs, costs for experts and witnesses) and interest, but there are exceptions to this loser-pays principle. A group member is, as a general rule, not liable for costs since it is only the claimant (i.e., the entity that represents the group; not the actual group members) that is considered a party. There are a few exceptions to this rule, however: most notably, if the defendant has been ordered by the court to compensate the claimant for its costs but is not able to do so the group members are instead liable to pay these costs. The same applies for additional costs resulting from contingency fee arrangements made under the Group Proceedings Act, as mentioned above. Each member of the group is liable for his or her share of the costs and not liable to pay more than what he or she has gained through the proceedings.

#### v Settlement

Generally under Swedish law, a settlement does not require court approval. However, a settlement concluded by the claimant on behalf of the group members is valid only if the court confirms it in a judgment. The settlement shall be confirmed at the request of the parties, provided it is not discriminatory against particular members of the group or in another way manifestly unfair. A group member has the opportunity to settle its claim individually without involving the claimant. It is also possible for the claimant to settle claims on behalf of the group – that is, the claimant is, according to the statutory text, not able to settle claims on behalf of individual group members, although it is disputed among scholars whether this limitation actually applies. As mentioned above, it is in theory possible to involve more than one defendant in group proceedings. Theoretically, it should be possible to settle separately between the defendants.

## IV CROSS-BORDER ISSUES

As was mentioned above, the Group Proceedings Act does not contain provisions on jurisdiction. Generally, there are no specific issues arising in relation to group members or defendants not being domiciled in Sweden. Jurisdiction must, however, apply to all group members' claims.

It follows from the above that group actions may be brought on behalf of group members from several jurisdictions. A Swedish court will *ex officio* determine whether it has jurisdiction. Generally, the court will examine the statement of claim to establish if anything therein indicates that the court does not have jurisdiction. If in doubt, the court will normally issue a remedial injunction to the claimant to provide opportunity to argue on the jurisdiction issue. Eventually, the court will rule on its jurisdiction based on international legislation or treaties applicable or, in the absence thereof, national sources of law.

No particular issues of forum shopping in group actions have as of yet, to the authors' knowledge, arisen in Sweden, which is most likely because of the low number of cases. Forum shopping is rarely an issue in general, however, especially in matters where group actions are feasible, mainly due to the widespread application of the Brussels Regulation and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007.

## **V OUTLOOK AND CONCLUSIONS**

Interest in pursuing group actions in Sweden has remained at a low level since the Group Proceedings Act's inception. However, there may be an increase of group actions in Sweden in competition matters, as the rules on limitation have been made more favourable to claimants in the new Competition Damages Act that was enacted in 2016. In addition, the Swedish government deems that the directive proposed by the European Commission (see Section II) may lead to a slight increase in group actions in Sweden (if enacted).



# SWITZERLAND

*Martin Burkhardt*<sup>1</sup>

The Swiss system of civil procedure does not provide for a class action *per se*.

In its Report on Collective Redress in Switzerland of 3 July 2013<sup>2</sup> the Swiss Federal Council notes that Switzerland's mechanisms for collective redress are for practical purposes insufficient and partly unfit for the efficient and actual enforcement of mass and dispersed damages. There is, in particular, no class action available under Swiss law.<sup>3</sup>

The Swiss Federal Council notes that in this area of collective redress there is a gap in the system of legal protection that the legislator has so far not been willing to fill. On 2 March 2018, the Swiss Federal Council published a project for a revision of the Swiss Civil Procedure Code (CPC) that also contains some steps towards collective redress.<sup>4</sup> The proposals include (1) the extension of standing to claim monetary damages to representative associations on the basis of an opt-in;<sup>5</sup> and (2) the introduction of a group settlement mechanism, the resulting settlement to become binding on the entire class, subject, however, to individual opt-out.<sup>6</sup>

Both proposals were subject to a formal consultation process, which was open for comments by interested parties until 11 June 2018. The proposal of the 'reparatory associations' action', as provided for in Article 89a ZE-ZPO of the project for revision received disparate opinions.<sup>7</sup> The views expressed ranged from endorsement, suggestions for improvement to questioning the very necessity to introduce such means of collective redress. Currently the opinions are being evaluated, before the Federal Council (government) submits the bill to the Federal Assembly (parliament) along with the Federal Council's Dispatch (Botschaft des Bundesrates) explaining the bill.

Under the current law, the most recent attempt of a class action-like suit was initiated by the Swiss consumer protection organisation Stiftung für Konsumentenschutz (SKS)

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1 Martin Burkhardt is a partner at Lenz & Staehelin.  
2 Report of the Swiss Federal Council 'Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und Handlungsmöglichkeiten', Berne 3 July 2013.  
3 *ibid.*, p. 14.  
4 [https://www.admin.ch/ch/d/gg/pc/documents/2940/Bericht\\_ZPO\\_de.pdf](https://www.admin.ch/ch/d/gg/pc/documents/2940/Bericht_ZPO_de.pdf), Erläuternder Bericht zur Änderung der Zivilprozessordnung (Verbesserung der Praxistauglichkeit und der Rechtsdurchsetzung), pp.17–18.  
5 Preliminary draft, new Article 89a ZE-ZPO p. 3 et seq.; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf>.  
6 Preliminary draft, new Article 352a et seq. ZE-ZPO pp. 10 et seq.; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf>.  
7 [https://www.admin.ch/ch/d/gg/pc/documents/2940/STN\\_Revision\\_ZPO.pdf](https://www.admin.ch/ch/d/gg/pc/documents/2940/STN_Revision_ZPO.pdf), last accessed 4 February 2019.

before the Zurich Commercial Court against Volkswagen AG and Swiss car dealer AMAG on behalf of approximately 6,000 Volkswagen diesel car owners.<sup>8</sup> They alleged that the sales of the vehicles were made under misleading statements, particularly as regards their emissions. In a first proceeding, SKS – in its own name but for the benefit of its members – brought an action for declaratory judgment under Article 10, Paragraph 2 in connection with Article 9, Paragraph 1c of the Federal Act Against Unfair Competition (UCA). SKS further lodged a second proceeding claiming individual damages suffered by certain individual car owners (Article 9, Paragraph 3 and Article, 10 Paragraph 2 UCA in connection with Article 41ff Code of Obligations), on the basis of individual assignments of their claims by the respective Volkswagen diesel car owners. On 12 July 2018, the Zurich Commercial Court decided not to consider the first suit on the grounds that the procedural requirement for the plaintiff to have a legitimate interest was not satisfied,<sup>9</sup> as ‘it is undisputed that the alleged infringing act ended on 18 September 2015’ when the diesel motor ceased to be built into the 2015 vehicle model and no new cars equipped with this engine were put into circulation in Switzerland.<sup>10</sup> Further, the Court added that in light of the significant media attention, the recall actions of the cars and the ban on the registration of such vehicles, the argument put forward by SKS of the allegedly continued misrepresentation through misleading statements and advertising is not convincing.<sup>11</sup> The challenge is currently pending before the Federal Tribunal.<sup>12</sup> The second proceeding is still pending before the first instance.

As a general rule, foreign judgments in class action proceedings are eligible for recognition and enforcement in Switzerland. Likewise, Swiss courts will normally entertain requests for judicial assistance by foreign courts dealing with class action proceedings.<sup>13</sup>

We continue to follow developments.

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8 Plädoyer 01/2018, Sammelklage über Umwege möglich, available under: <https://www.plaedoyer.ch/artikel/d/sammelklage-ueber-umwege-moeglich/> last accessed 8 February 2018.

9 [www.gerichte-zh.ch/fileadmin/user\\_upload/entscheide/oeffentlich/HG170181.pdf](http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf), p. 13, E. 3.4 / last accessed 4 February 2019.

10 [www.gerichte-zh.ch/fileadmin/user\\_upload/entscheide/oeffentlich/HG170181.pdf](http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf), p. 11, E. 3.2.3 / last accessed 4 February 2019.

11 [www.gerichte-zh.ch/fileadmin/user\\_upload/entscheide/oeffentlich/HG170181.pdf](http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf), p. 12, E. 3.3 / last accessed 4 February 2019.

12 The challenge is pending with the Federal Tribunal under Case No. 4A\_483/2018.

13 *ibid.*, p. 52 et seq.

# UNITED STATES

*Timothy G Cameron, Alex B Weiss and Sofia A Gentel*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS IN THE UNITED STATES

This chapter addresses class actions in US federal courts, and provides a practical overview as to how such cases typically proceed. In federal courts, the class action mechanism permitted by the Federal Rules of Civil Procedure allows '[o]ne or more members of a class' to prosecute a lawsuit 'as representative parties on behalf of all members' of the class.<sup>2</sup> In the US, the class action is viewed as promoting judicial efficiency – permitting courts efficiently to resolve, together, a multiplicity of actual and potential individual lawsuits premised upon the same factual events and legal claims.<sup>3</sup> It is a fundamental principle of US class action law that class members – including absent class members who do not opt out of the class – are bound by the result of the class action litigation, and are precluded from later seeking to re-litigate the same claims against that defendant (including in an individual capacity).<sup>4</sup>

Class actions are a long-standing part of the American legal landscape, at both the state and federal level. Class actions are routinely used to prosecute a wide variety of substantive claims, including consumer fraud, labour and employment, products liability, antitrust and securities claims.

Class actions are explicitly permitted in both the US federal and state systems.<sup>5</sup> This chapter focuses solely on federal class actions, which are provided for by Rule 23 of the Federal Rules of Civil Procedure.

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1 Timothy G Cameron is a partner, and Alex B Weiss and Sofia A Gentel are associates, at Cravath, Swaine & Moore LLP in New York City.

2 Fed. R. Civ. P. 23(a).

3 See, e.g., *Haynes v. Planet Automall, Inc.*, 276 F.R.D. 65, 73 (E.D.N.Y. 2011) ('The underlying purpose of the class action mechanism is to foster judicial economy and efficiency by adjudicating, to the extent possible, issues that affect many similarly situated persons.') (internal citation omitted).

4 Fed. R. Civ. P. 23(c)(3); see also *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Under US law, the doctrine of *res judicata* prevents parties from re-litigating claims where (1) a previous action resulted in an adjudication on the merits, (2) that action involved the same adverse parties, and (3) the claims asserted in the subsequent action were already raised in that first action. See, e.g., *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, 779 F.3d 102, 107–8 (2d Cir. 2015). This principle applies to judgments in class actions. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

5 Under New York state law, for example, class actions are permitted pursuant to Rule 901 of the New York Civil Practice Law and Rules. State class action requirements often are similar to federal requirements. See Thomson Reuters, 50 State Statutory Surveys: Class Action Requirements (April 2018). The Class Action Fairness Act of 2015 provides for federal court jurisdiction over any class action where the matter in controversy exceeds US\$5 million, and any member of the class can establish diversity of citizenship from any defendant, provided that certain exceptions do not apply. See 28 U.S.C. Section 1332(d).

A typical class action under Rule 23 follows a series of distinct procedural steps. First, a class action is initiated by the filing of a complaint by a named plaintiff (or plaintiffs) on behalf of a putative (or proposed) class. If defendants choose to file a motion to dismiss and the case survives, then the court will next determine whether or not a plaintiff class should be ‘certified’ (i.e., confirming whether the case is appropriate for class action treatment, and defining the specific class on behalf of which the case will then be litigated). The court will also appoint class representatives and class counsel, to represent the class. Following certification, notice is typically provided to members of the class – actual notice, where possible, and/or publication notice through newspapers and the internet – and class members are given an opportunity to ‘opt out’ (or express their desire to be excluded from the class). The case is then litigated on the merits by the class representative(s) and class counsel on behalf of the class (excluding the opt outs), until such time as there is either a settlement or a result on the merits (e.g., after a trial). A final judgment from either a trial or settlement will bind all class members who have not affirmatively opted out of the class action. In addition, any settlement must expressly be approved by the court as fair to the class.

## II THE YEAR IN REVIEW

Notable decisions in 2018 concerning class actions include the following cases.

In *China Agritech, Inc v. Resh*,<sup>6</sup> the Supreme Court held that the filing of a timely putative class action does not extend (i.e., ‘toll’) the statutory time period within which an absent class member may file the same claim as a subsequent class action. Prior Supreme Court precedent – *American Pipe & Construction Co. v. Utah* – provides that, under certain circumstances, the commencement of a class action will suspend ‘the applicable statute of limitations as to all asserted members of the class’.<sup>7</sup> The Supreme Court found that the *American Pipe* rule only allowed the tolling of subsequent individual claims and did not permit the filing of successive class actions beyond the time prescribed by the applicable statute of limitations.<sup>8</sup> Though considerations of ‘efficiency and economy of litigation’ supported tolling individual claims pending class certification, the Court found that those policies favoured the ‘early assertion of competing class representative claims’, allowing courts to decide the question of class certification ‘once for all the would-be class representatives’ and to ‘select the best plaintiff with knowledge of the full array of potential class representatives and class counsel’.<sup>9</sup>

In *Cyan, Inc v. Beaver County Employees Retirement Fund*,<sup>10</sup> the Supreme Court held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) does not prohibit state courts from adjudicating class actions alleging violations of the Securities Act of 1933 (the Securities Act). SLUSA amended the Securities Act to prohibit certain state law securities class actions and to authorise the removal of other state law securities class actions to federal court. However, the Court found that nothing in SLUSA limited the Securities Act’s grant of state court jurisdiction over class actions based on federal law.<sup>11</sup> Consequently, the Securities

6 138 S. Ct. 1800 (2018).

7 414 U.S. 538, 554 (1974).

8 *China Agritech, Inc.*, 138 S. Ct. at 1804

9 *id.* at 1806-07.

10 138 S. Ct. 1061 (2018).

11 *id.* at 1069.

Act class action was properly brought in state court where it was not subject to the additional procedural requirements applicable in securities class actions brought in federal courts.<sup>12</sup>

Additionally, the Supreme Court approved amendments to Rule 23 in 2018. The amendments mainly address the procedure that applies to a proposed class-wide settlement, clarifying, among other things, the criteria courts need to consider in determining whether a class-wide settlement is fair, reasonable and adequate.<sup>13</sup>

### III PROCEDURE

#### i Commencing proceedings

Like any other lawsuit, a class action is initiated when a ‘named plaintiff’ (or certain ‘named plaintiffs’) files a complaint.<sup>14</sup> However, a complaint filed on behalf of a putative class must also contain (1) a definition of the proposed class, (2) pleading as to why class action treatment is appropriate and consistent with the requirements of the Federal Rules of Civil Procedure, and (3) any other pleadings required by statute or case law for the prosecution of a class action in specific contexts (e.g., to comply with the requirements of the Private Securities Litigation Reform Act of 1995 in securities class actions). Otherwise, the complaint in a federal class action is subject to the same requirements as other complaints filed in federal cases – including the requirement that plaintiffs sufficiently allege a claim upon which relief can be granted.

Failure to meet these requirements may be grounds for a defendant’s motion to dismiss the class action complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>15</sup> Such motions are typically decided before the court certifies the class.<sup>16</sup>

#### ii Appointment of lead plaintiff and lead counsel

If the complaint survives a motion to dismiss, then in certain cases it may be appropriate for the court to appoint a ‘lead plaintiff’ and ‘lead counsel’, to represent the putative class even before class certification. That typically occurs in securities class action cases, where multiple proposed class actions can be filed by different named plaintiffs. Appointment of a lead plaintiff and lead counsel helps clarify who will then have primary responsibility on behalf of the class for filing an amended complaint (which often occurs following consolidation of multiple cases) and/or seeking certification of the class.

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides specific guidance to courts concerning the appointment of a lead plaintiff and lead counsel in securities class actions. The PSLRA requires the named plaintiff to publish notice of the class action ‘in a widely circulated national business-oriented publication’ no later than 20 days after filing the class action complaint.<sup>17</sup> Then, no later than 90 days after that publication, the

<sup>12</sup> See *id.* at 1066-67.

<sup>13</sup> See Fed. R. Civ. P. 23(e)(2).

<sup>14</sup> Fed. R. Civ. P. 3.

<sup>15</sup> Rule 12(b)(6) provides that a party may move to dismiss a complaint because the complaint ‘fail[s] to state a claim upon which relief can be granted’. Fed. R. Civ. P. 12(b)(6).

<sup>16</sup> *Managing Class Action Litigation*, Federal Judicial Center, at 9 (2010).

<sup>17</sup> 15 U.S.C. Section 77z-1(a)(3)(A)(i). 15 U.S.C. Section 77z-1 is part of the Securities Act of 1933.

The PSLRA enacted parallel provisions related to appointment of lead plaintiff and lead counsel in the Securities Exchange Act of 1934. See 15 U.S.C. Section 78u-4.

court must consider ‘any motion made by a purported class member’ even if the individual was not named in the original complaint, and the court must appoint as lead plaintiff the member of the class that the court determines to be ‘most capable of adequately representing the interests of class members’.<sup>18</sup>

In appointing lead plaintiff, the court is instructed to ‘adopt a presumption’ in favour of plaintiffs with ‘the largest financial interest’ in the class action.<sup>19</sup> This presumption can be rebutted by evidence showing that the presumptive lead plaintiff ‘will not fairly and adequately protect the interests of the class’, or ‘is subject to unique defences that render such plaintiff incapable of adequately representing the class’.<sup>20</sup>

The court-appointed lead plaintiff is then empowered, ‘subject to the approval of the court’, to ‘retain counsel to represent the class’.<sup>21</sup>

### iii Class certification

Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure requires that ‘[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action’. This occurs following a motion for class certification filed by the named or lead plaintiff, which typically is opposed by the defendant.

In recent years, the Supreme Court of the United States has issued a series of decisions regarding class certification in different contexts. The Court has indicated that plaintiffs bear the burden of ‘affirmatively demonstrat[ing] . . . compliance’ with all of the class certification requirements of Rule 23,<sup>22</sup> and that motions for class certification should only be granted if the district court is ‘satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied’.<sup>23</sup> As a result of those decisions, and a greater focus by litigants on class certification, these motions are typically hotly contested by defendants.

To meet the requirements of Rule 23 – and thus demonstrate to a court that class certification is warranted – a plaintiff must satisfy all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Those rules are discussed below.

#### *Fed. R. Civ. P. 23(a)*

All class actions must satisfy the four requirements of Rule 23(a). Rule 23(a) requires plaintiffs affirmatively to demonstrate that the class action meets four prerequisites, referred to in shorthand form as: (1) ‘numerosity’ (Rule 23(a)(1)), (2) ‘commonality’ (Rule 23(a)(2)), (3) ‘typicality’ (Rule 23(a)(3)), and (4) adequacy of representation (Rule 23(a)(4)).

‘Numerosity’ requires a showing that ‘the class is so numerous that joinder of all members is impracticable’.<sup>24</sup> Generally, there is no numerical threshold for determining

18 15 U.S.C. Section 77z-1(a)(3)(B)(i).

19 15 U.S.C. Section 77z-1(a)(3)(B)(iii)(I)(bb). This plaintiff must also have ‘either filed the complaint or made a motion’ responding to the notice required by 15 U.S.C. Section 77z-1(a)(3)(A)(i).

20 15 U.S.C. Section 77z-1(a)(3)(B)(iii)(II).

21 15 U.S.C. Section 77z-1(a)(3)(B)(v).

22 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

23 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414–15 (2014) (permitting defendants to offer lack of ‘price impact’ evidence to rebut the ‘fraud on the market’ presumption at the class certification stage).

24 Fed. R. Civ. P. 23(a)(1).

whether a class is sufficiently numerous. Rather, courts must examine ‘the specific facts of each case’.<sup>25</sup>

‘Commonality’ requires a demonstration that ‘there are questions of law or fact common to the class’.<sup>26</sup> This requirement was addressed in *Wal-Mart Stores, Inc v. Dukes*.<sup>27</sup> There, the Supreme Court found that class certification of a Title VII discrimination case was inappropriate because Wal-Mart had ceded control over employment decisions to regional managers in different geographic locations, so there was insufficient overlap in questions of law and fact among the proposed class.

To satisfy the requirement of ‘typicality’, the plaintiffs must demonstrate that ‘the claims or defences of the representative parties are typical of the claims or defences of the class’.<sup>28</sup> The commonality and typicality requirements are similar in nature to, but less onerous than, the Rule 23(b)(3) ‘predominance’ inquiry, which is discussed below.

Finally, plaintiffs must show that ‘the representative parties will fairly and adequately protect the interests of the class’.<sup>29</sup> Here, the primary inquiry for courts is to ‘uncover conflicts of interest between named parties and the class they seek to represent’.<sup>30</sup> Courts also will assess the adequacy of proposed class counsel at this stage.<sup>31</sup> In assessing the adequacy of class counsel, courts must conclude that the representative’s counsel is ‘qualified, experienced and capable of handling the litigation’,<sup>32</sup> and that class counsel will represent the interests of the class as a whole.<sup>33</sup>

### **Fed. R. Civ. P. 23(b)**

In addition to fulfilling the requirements under Rule 23(a), ‘parties seeking class certification must show that the action is maintainable’ under Rule 23(b).<sup>34</sup> The subsection of Rule 23(b) most commonly invoked as a basis for class certification is Rule 23(b)(3), which provides that a class action may be maintained where the prerequisites of Rule 23(a) are satisfied and the court finds that (1) ‘questions of law or fact common to class members predominate over

25 *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm’n*, 446 U.S. 318, 330 (1980).

26 Fed. R. Civ. P. 23(a)(2).

27 564 U.S. 338 (2011).

28 Fed. R. Civ. P. 23(a)(3).

29 Fed. R. Civ. P. 23(a)(4).

30 *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). In *Amchem*, for example, the Supreme Court found that plaintiffs with present asbestos-related illnesses had interests that were potentially adverse to class members who were exposed to asbestos but had not yet manifested injury. *id.* at 625–28.

31 Rule 23(c) instructs courts to ‘appoint class counsel under Rule 23(g)’. Rule 23(g) explicitly requires courts to ensure that class counsel will ‘fairly and adequately represent the interests of the class’. Fed. R. Civ. P. 23(g)(1)(B). In making this assessment, courts must consider: ‘(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class’. Fed. R. Civ. P. 23(g)(1)(A).

32 *In re Avon Sec. Litig.*, 1998 WL 834366, at \*9 (S.D.N.Y. Nov. 30, 1998). As noted in *Avon*, in complicated class actions such as a securities class action, plaintiffs rely heavily on class counsel, and as such, in those cases ‘the qualifications of class counsel are generally more important in determining adequacy than those of the class representatives’. *id.*

33 See, e.g., *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (stating that the responsibility of ensuring ‘that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court’).

34 *Amchem Prod., Inc v. Windsor*, 521 U.S. 591, 614 (1997).

any questions affecting only individual members' (known as the 'predominance' requirement under Rule 23(b)), and (2) 'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy' (known as the 'superiority' requirement).<sup>35</sup>

The purpose of the predominance inquiry is to test 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation'.<sup>36</sup> 'An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a *prima facie* showing [or] the issue is susceptible to generalised, class-wide proof.'<sup>37</sup>

In determining whether a class action satisfies the superiority requirement of Rule 23(b)(3), courts assess the following non-exhaustive statutory factors listed in Rule 23:

- (A) *the class members' interests in individually controlling the prosecution or defense of separate actions;*
- (B) *the extent and nature of any litigation concerning the controversy already begun by or against class members;*
- (C) *the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and*
- (D) *the likely difficulties in managing a class action.*<sup>38 39</sup>

### ***The class certification order***

If the court finds certification is proper under the requirements of Rules 23(a) and (b), the court will then enter a 'certification order' pursuant to Rule 23(c). The certification order is important because it defines the class of individuals that – subject to opt-outs – will be bound by the action as it proceeds. The certification order is also the procedural mechanism for appointing the class representative and class counsel. Such orders may be altered or amended before final judgment.<sup>40</sup> For example, in appropriate circumstances, the court may elect to divide a class into subclasses, which 'are each treated as a class' under Rule 23.<sup>41</sup>

### ***Notice of class certification and opting out of the class***

Once the class is certified, absent class members – namely, class members other than the named or lead plaintiffs who nonetheless fall within the definition of the certified class – must, in the case of a Rule 23(b)(3) class action, be given notice and provided with the opportunity to 'request[] exclusion' from the class (commonly referred to as 'opting out').<sup>42</sup> Those individuals that opt out, normally by providing written notice in the manner prescribed by the court, will not be bound by final resolution of the class action, and may bring a separate case

35 Fed. R. Civ. P. 23(b)(3).

36 *Amchem Prod, Inc*, 521 U.S. at 623.

37 *Tyson Foods, Inc v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted).

38 *Zinser v. Accufix Research Inst, Inc*, 253 F.3d 1180, 1190 (9th Cir. 2001) ('In determining superiority, courts must consider the four factors of Rule 23(b)(3).').

39 Fed. R. Civ. P. 23(b)(3).

40 Fed. R. Civ. P. 23(c)(1)(C).

41 Fed. R. Civ. P. 23(c)(5).

42 Fed. R. Civ. P. 23(c)(2)(B)(v).



against the defendant based on the same underlying claim at some later date (subject to any applicable statute of limitations).<sup>43</sup>

Affording absent class members the opportunity to exclude themselves from a class action comports with the due process requirements set forth in the Fifth and Fourteenth Amendments to the US Constitution.<sup>44</sup> Under US law, an individual typically is not ‘bound by a judgment . . . in a litigation in which he is not designated as a party’, and judicial enforcement of such a decision would violate due process requirements.<sup>45</sup> As discussed above, final resolution of a class action will bind absent class members, and preclude future litigation of their claims against that defendant. To comport with due process, this opt-out mechanism ensures that absent class members in a Rule 23(b)(3) class action will not be bound by a final resolution if that class member affirmatively elects to not participate in the case.

The type of notice required to be provided to class members following certification of a Rule 23(b)(3) class action is ‘the best notice that is practicable under the circumstances’, and where individuals can be identified ‘through reasonable effort’, individual (or actual) notice is required.<sup>46</sup> Notice may be provided by regular mail, electronic means or any ‘other appropriate means’.<sup>47</sup>

Notice must be ‘clearly and concisely state[d] in plain, easily understood language’.<sup>48</sup> Notice must, at a minimum, state: (1) ‘the nature of the action’, (2) ‘the definition of the class’, (3) ‘the class claims, issues, or defenses’, (4) ‘that a class member may enter an appearance through an attorney if the member so desires’, (5) ‘that the court will exclude from the class any member who requests exclusion’, (6) ‘the time and manner for requesting exclusion’, and (7) ‘the binding effect of a class judgment on members under Rule 23(c)(3)’.<sup>49</sup>

Rule 23 does not set forth a categorical rule for the amount of time absent class members must be given to respond to this notice. That is usually set at the discretion of the court. Generally, federal courts are advised to provide a minimum of 30 days from when notice is first sent; opt-out periods of 60 to 90 days are preferred.<sup>50</sup> Where the class is sizeable, or actual notice is not practicable, those time periods can be significantly longer. As explained above, if a party does not affirmatively request exclusion from the class during this opt out period, he or she will be included in the class and – subject to a potential further round of opt outs in the case of a settlement – bound by the final resolution of the claim.

#### **iv Litigation on behalf of the class**

After entry of the certification order, provision of notice and the completion of opt-outs, the class action is then litigated on the merits by class counsel acting on behalf of the class. As the case proceeds, the class representative and class counsel control the action on behalf of

43 Fed. R. Civ. P. 23(c)(3); see also *Amchem Prod, Inc v Windsor*, 521 U.S. 591, 617 (1997). Notice to absent class members, and in some cases, the opportunity to opt out, is required at other stages of a class action litigation as well; most notably, notice must be given to class members who would be bound by any proposed settlement, voluntary dismissal, or compromise. Fed. R. Civ. P. 23(e).

44 See *Phillips Petroleum Co v Shutts*, 472 U.S. 797, 812 (1985).

45 See *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

46 Fed. R. Civ. P. 23(c)(2)(B).

47 Fed. R. Civ. P. 23(c)(2)(B).

48 Fed. R. Civ. P. 23(c)(2)(B).

49 Fed. R. Civ. P. 23(c)(2)(B).

50 Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center, at 4 (2010).

the class. Other class members do not participate in most phases of litigation, even though such class members will be bound by any final judgment in the action unless the individual elected to opt out of the class.

Rule 23 provides the court flexibility in conducting the proceeding. For example, the court may issue orders to ‘determine the course of proceedings’, to ‘impose conditions on the representative parties’ or to ‘require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly’.<sup>51</sup>

Litigation of class actions is similar to other civil proceedings in federal courts, in that federal procedural and evidentiary rules still apply. This was highlighted in *Tyson Foods, Inc v. Bouaphakeo*.<sup>52</sup> There, the court considered whether to establish a categorical rule regarding the use of representative evidence to establish class-wide liability (instead of requiring individual proof of liability, which likely would preclude class certification, because individual issues would predominate over common class issues). The court declined to create such a rule, explaining that the permissibility of representative evidence ‘turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action’ pursuant to Federal Rules of Evidence 401, 403 and 702.<sup>53</sup>

## v Settlement

This section focuses on procedural aspects of a class action settlement, as set forth in Rule 23(e), and the jurisprudence that has evolved around those requirements.

### *The settlement class*

Rule 23(c) requires class certification before any entry of final judgment, including when the court enters a judgment approving a settlement.<sup>54</sup> If the parties want to settle a case before the court has entered a Rule 23(c) class certification order, then courts may resort to use of a ‘settlement class’ mechanism. This is ‘a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification’.<sup>55</sup>

### *Preliminary approval of a settlement*

The first step in the class settlement process involves preliminary approval of the proposed settlement by the court under Rule 23(e)(1). For the court to direct notice of a settlement proposal to all class members it must find that it will likely be able to, first, approve the settlement under Rule 23(e)(2) and, second, certify a settlement class (if it has not already done so).<sup>56</sup> The parties must provide the court with information sufficient to enable it to determine whether to give notice under that standard.<sup>57</sup> The type of information that parties may provide at the preliminary approval stage includes details of the settlement, the nature

51 Fed. R. Civ. P. 23(d)(1).

52 136 S. Ct. 1036 (2016).

53 id. at 1046.

54 Fed. R. Civ. P. 23(c)(3).

55 *In re Gen Motors Corp Pick-Up Truck Fuel Tank Prod. Liab Litig*, 55 F.3d 768, 786 (3d Cir. 1995).

56 Fed. R. Civ. P. 23(e)(1)(B).

57 Fed. R. Civ. P. 23(e)(1)(A).

of any compensation to be provided to class members, and any agreements regarding the payment of attorneys' fees and costs to class counsel. Some relevant factors courts consider in granting preliminary approval of class action settlements are whether settlement negotiations occurred at arm's length between capable experienced counsel and whether there was sufficient meaningful discovery.<sup>58</sup>

### **Settlement notice**

Following entry of preliminary approval, adequate notice of the settlement must be provided to the class. Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to 'all class members who would be bound' by a proposed settlement, voluntary dismissal or compromise. Failure to give adequate notice of settlement is not only a violation of Rule 23, but also may violate due process protections.<sup>59</sup> Settlement notice provides absentee class members the ability to object to the propriety of the settlement, and, in the case of Rule 23(b)(3) class actions, 'the court may refuse to approve a settlement' unless it affords class members a 'new opportunity to request exclusion' (or opt out) from the class settlement.<sup>60</sup>

### **Fairness hearings**

Once notice of the settlement has been given, the court will hold a 'fairness hearing', to determine whether the proposed settlement is 'fair, reasonable, and adequate', as required by Rule 23(e)(2). In making that determination the court must consider whether:

- (A) *the class representatives and class counsel have adequately represented the class;*
- (B) *the proposal was negotiated at arm's length;*
- (C) *the relief provided for the class is adequate, taking into account:*
  - (i) *the costs, risks, and delay of trial and appeal;*
  - (ii) *the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;*
  - (ii) *the terms of any proposed award of attorney's fees, including timing of payment;*  
*and*
  - (iv) *any agreement required to be identified under Rule 23(e)(3); and*
- (D) *the proposal treats class members equitably relative to each other.*<sup>61</sup>

The objections of any class members to the settlement – which can be presented in writing or orally, at the discretion of the court – will also typically be considered by the court as part of the fairness hearing. Following a fairness hearing, the court may enter a final order and judgment approving the class action settlement, and granting the class plaintiffs' motion for an award of attorneys' fees and costs in favour of class counsel (discussed further below).

58 See, e.g., *Long v. HSBC USA Inc.*, 2015 WL 5444651, at \*3 (S.D.N.Y. Sept. 11, 2015); *Danieli v. Int'l Bus. Machines Corp.*, 2009 WL 6583144, at \*4-\*5 (S.D.N.Y. Nov. 16, 2009). See also Fed. R. Civ. P. 23(e)(1) advisory committee's note to 2018 amendment.

59 See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005).

60 Fed. R. Civ. P. 23(e)(4).

61 Fed. R. Civ. P. 23(e)(2).

### ***Settlement claims processing and allocation of settlement funds***

Following settlement of a class action, among other requirements, there must be a process for determining how, and to which class members, the settlement funds should be distributed. Most settlements establish a ‘plan of allocation’, setting forth a formula or some other method of distributing settlement proceeds to members of the class.<sup>62</sup> To determine whether an individual is properly part of the settlement class, absent class members generally must participate in a claims process, which involves executing and submitting documentation demonstrating their entitlement to a share of the settlement funds, and, typically, an individual release of claims against the defendant. The processing of these individual class member claims is often handled by private, for-profit companies retained by class counsel.

#### **vi Attorneys’ fees and costs**

Rule 23(h) specifically authorises courts to ‘award reasonable attorney’s fees and nontaxable costs’, upon motion under Rule 54 of the Federal Rules of Civil Procedure (which sets forth general procedures for claims for attorneys’ fees). Rule 23(h) also provides that class members, or the party from whom payment is sought, may object to this motion for attorneys’ fees. In both instances, the court must determine the award is reasonable.<sup>63</sup>

## **IV CROSS-BORDER ISSUES**

In recent years, an important cross-border issue concerning US class actions – particularly in the context of securities class actions – has involved the question of which claims may properly proceed as part of a class action in US courts. In *Morrison v. National Australia Bank Ltd*, the Supreme Court was asked to ‘decide whether [Section] 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges’.<sup>64</sup> In addressing that issue, the Court applied the long-standing 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’.<sup>65</sup> The Court observed that ‘there is no affirmative indication in the Exchange Act that [Section] 10(b) applies extraterritorially’, and ‘therefore conclude[d] that it does not’.<sup>66</sup> The Court further held that it was not sufficient that ‘some domestic activity is involved in the case’.<sup>67</sup> Rather, ‘it is . . . only transactions in securities listed on domestic

62 See, e.g., *City of Providence v. Aeropostale, Inc*, 2014 WL 1883494, at \*10 (S.D.N.Y. May 9, 2014) (approving a plan of allocation distributing the settlement fund to class members on a *pro rata* basis).

63 Fed. R. Civ. P. 23(h).

64 561 U.S. 247, 250-51 (2010). Rule 10b-5, which was promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful ‘(a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person, in connection with the purchase or sale of any security’. 17 C.F.R. Section 240.10b-5. In 2017, almost half of all federal securities class actions filed in the United States – 47 per cent – invoked Rule 10b-5. Cornerstone Research, *Securities Class Action Filings*, at 9 (2017).

65 *Morrison*, 561 U.S. at 255.

66 *id.* at 265.

67 *id.* at 266.

exchanges, and domestic transactions in other securities, to which [Section] 10(b) applies'.<sup>68</sup> As a result of *Morrison*, class plaintiffs seeking to bring a valid Section 10(b) claim must allege more than a domestic impact or effect; they must allege 'a manipulative or deceptive device or contrivance . . . in connection with the purchase or sale of a security listed on an American stock exchange' or 'the purchase or sale of any other security in the United States'.<sup>69</sup>

*Morrison* is generally credited with restoring the presumption against the extraterritorial application of US statutes, unless they explicitly so specify. That principle can impact the availability of the US class action mechanism, in US courts, to foreign litigants.

## V OUTLOOK AND CONCLUSIONS

The Supreme Court has several interesting cases concerning class actions on its docket for the upcoming year. In *Frank v. Gaos*, the Supreme Court will decide whether a class action settlement is 'fair, reasonable, and adequate' under Rule 23 when the settlement is not distributed to individual class members but is instead allocated under the *cy pres* doctrine to organisations that have pledged to use the funds to further the class members' interests.<sup>70</sup> In *Lamps Plus, Inc v. Varela*, the Court will decide the appropriate standard for determining whether parties have agreed to submit claims to class arbitration where the arbitration clause in the parties' agreement does not expressly allow for class-wide arbitration, but only provides for arbitration on an individual basis.

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68 id. at 267.

69 id. at 273 (emphasis added).

70 *Cy pres* is an equitable doctrine that, in the class action context, allows courts 'to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' beneficiaries for the indirect benefit of the class.' *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017), cert. granted sub nom. *Frank v. Gaos*, 138 S. Ct. 1697 (2018).

# ABOUT THE AUTHORS

## **MADALENA AFRA ROSA**

*Uría Menéndez – Proença de Carvalho*

Madalena Afra Rosa joined Uría Menéndez – Proença de Carvalho as a first-year junior associate in September 2016.

She graduated in law from the University of Lisbon and completed her master's degree course in civil and criminal forensic law at the Catholic University of Portugal.

## **CHRISTIAN ALSØE**

*Gorrissen Federspiel*

Christian Alsøe has been a partner at Gorrissen Federspiel since 2004 and focuses his practice on litigating complex cases as well as cases of a fundamental and significant nature. In recent years, Christian has predominantly litigated management liability cases, including one of the longest-ever civil court cases in Denmark concerning the financial sector. Christian obtained the right of audience before the Supreme Court of Denmark in 2003, and since then he has litigated a number of leading cases before the Danish High Courts, the Danish Supreme Court as well as the European Court of Justice. Christian is specially appointed to act in free legal aid cases before the Supreme Court. He also acts as a co-judge in the Danish Labour Court and sits on the board of the Danish Arbitration Institute.

## **HENNING BÄLZ**

*Hengeler Mueller*

Henning Bälz, born in 1968, studied law in Tübingen, Berlin and Bayreuth. After his studies, he worked as a law apprentice with the Higher Regional Court of Berlin and as a university assistant. He received his doctorate in law from the Freie Universität Berlin in 2001 with a thesis on information rights of shareholders in a stock corporation. Henning joined the Berlin office of Hengeler Mueller in 1999, and worked for one year as a foreign associate at Simpson Thacher & Bartlett in New York (2000 to 2001) and for almost one year in the Frankfurt office of Hengeler Mueller (2001 to 2002). He became a partner in 2004 and is a member of the dispute resolution group of Hengeler Mueller dealing with both litigation and arbitration cases for national and international clients. The focus of his work is on post-M&A matters and contract law in general, as well as matters regarding infrastructure projects.

## NICOLAS BOUCKAERT

*Kennedys*

Nicolas is a partner at Kennedys, whose Paris office he co-founded in October 2017. He is qualified as a French Avocat à la Cour and a solicitor in England and Wales, having studied in England (University of Oxford and University of York) and trained at a magic circle firm in the City.

Nicolas is regularly instructed in complex and international disputes, both before French courts and arbitration tribunals. He acts for leading insurers and reinsurers, brokers, major policyholders, manufacturers and service providers. His practice includes coverage disputes (insurance and reinsurance), defence work, subrogation claims and general commercial litigation. It spans several key industry sectors (aerospace, real estate, construction, finance and manufacturing), with a particular focus on product and professional liability. Nicolas also has significant experience of complex court-appointed technical investigations, specifically relating to industrial risks.

Nicolas is one of the co-authors of *The Insurance and Reinsurance Law Review* (7th ed.), the 2019 *Insurance Litigation* GTDT guidebook and the *FARAD Private Life Insurance Handbook* (2nd ed.). He is bilingual in English and French and also speaks Italian. He is a member of the Association Internationale du Droit des Assurances (AIDA), the Association du Management des Risques et Assurances de l'Entreprise (AMRAE) and the Franco-British Lawyers Society (FBLs).

## HAKIM BOULARBAH

*Loyens & Loeff*

Hakim Boularbah is partner in the dispute resolution department of the Brussels office of Loyens & Loeff.

He focuses on corporate litigation (class actions, shareholders' disputes, post-acquisition claims), international arbitration (including proceedings related to arbitration: enforcement, setting aside, interim measures) and asset recovery. Hakim is one of the most renowned specialists of collective redress. He is currently defending the first class actions and follow-on actions brought in Belgium. He also has an extensive practice in enforcement of foreign judgments or awards (especially against sovereigns) as well as in obtaining interim reliefs and protective measures or resisting to them. Hakim also frequently acts as counsel or arbitrator in international arbitration matters.

Hakim is professor at the University of Liège (ULg) where he teaches civil procedure law. He is the author of numerous books and publications on civil procedure, private international law and arbitration law.

He holds a law degree (1996) and a PhD (2007) from the University of Brussels (ULB).

Hakim is unanimously recommended as a leading lawyer in the fields of dispute resolution and arbitration: *Chambers and Partners* – Global Edition – Dispute Resolution – ranked Band 1 in 2018; *The Legal 500* – Dispute Resolution – ranked tier 1 in 2018.

## MARTIN BURKHARDT

*Lenz & Staehelin*

Dr Martin Burkhardt represents parties in commercial litigation and international arbitration. He also sits as arbitrator.

His main practice areas are litigation and international arbitration, and private clients, technology start-ups and charities.

He was educated at the University of St. Gallen (1988 lic. iur.), the University of California Berkeley Law School (1991 LL.M) and the University of St. Gallen (1996 Dr. iur.). In 1991 he was admitted to the New York Bar and in 1992 to the Zurich Bar. He joined Lenz & Staehelin in 1994 and has been a partner since 2000.

He is a member of the Swiss Bar Association (SAV), the Swiss Arbitration Association (ASA), the New York State Bar Association (NYS BA), and the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI).

## **TIMOTHY G CAMERON**

*Cravath, Swaine & Moore LLP*

Timothy G Cameron is a partner in Cravath's litigation department. His practice encompasses a broad range of litigation that in recent years has included: securities litigation and shareholder derivative cases; general commercial disputes; antitrust; product liability; False Claims Act and healthcare litigation; tax litigation; and alien tort claims and international torts.

Mr Cameron has particular expertise representing non-US clients in a wide variety of litigation (including class actions) in federal and state courts in the United States, as well as in arbitrations. He has extensive experience dealing with complicated cross-border issues that can arise in such matters, including jurisdictional issues, reconciling US law with the application of local laws, class certification issues involving foreign putative class members and the difficulties of obtaining testimony from witnesses located outside the United States.

Mr Cameron was born in Auckland, New Zealand. He received his LL.B (Hons)/B.Com degree in 1994 from the University of Auckland, New Zealand; an M.Com.Law degree with first-class honours in 1997 from the University of Auckland, New Zealand; and an LL.M degree in 1998 from the University of Chicago Law School.

From February 1994 to September 1997, Mr Cameron practised law at Russell McVeagh McKenzie Bartleet & Co, in Auckland, New Zealand. He joined Cravath in 1998 and became a partner in 2005.

## **JAN DE BIE LEUVELING TJEENK**

*De Brauw Blackstone Westbroek*

Jan de Bie Leuveling Tjeenk specialises in corporate litigation, financial services litigation and mass claims. Jan is admitted to the Supreme Court Bar. He regularly acts for corporates and financial institutions, particularly in mass litigation. Recent work includes: representing Shell in a dispute relating to oil spills in Nigeria; advising and representing NAM in mass claims surrounding earthquakes; and advising and representing financial institutions in mass claims relating to interest rate swaps sold to small and medium-sized enterprises.

Jan is a professor of corporate litigation at VU University Amsterdam.

## **ARIEL DEVILLERS**

*Arendt & Medernach*

Ariel Devillers is a senior associate in the dispute resolution practice of Arendt & Medernach where he specialises in civil and commercial law, advising domestic and international clients on corporate, commercial and financial disputes.



He has been a member of the Luxembourg Bar since 2012 and is part of a subcommittee on economic law focussing on class actions.

Ariel has been a member of the board of directors of the Nederlands Handelsforum Luxemburg (the equivalent of the Dutch Chamber of Commerce and Business Club in Luxembourg) since 2016, and currently serves as chairman.

Ariel Devillers holds a master's degree (LLM) in law and economics from University College London as well as a law master's degree (LLM) in European banking and financial law from the University of Luxembourg.

Languages: English, French, Dutch and Luxembourgish.

## **GIANFRANCO DI GARBO**

*Baker McKenzie*

Gianfranco Di Garbo is a partner of Baker McKenzie. His practice concentrates on the area of dispute resolution in commercial, construction, employment and industrial property matters. He also regularly assists domestic and foreign clients in various aspects of general corporate law. Gianfranco has also vast experience in product liability law, and throughout his career at Baker McKenzie has represented major multinational and Italian companies in major litigation and arbitration cases. He is the author of several publications in contractual matters.

## **HAGAI DORON**

*S Horowitz & Co*

Hagai, who chairs the firm's antitrust and competition law practice group, is widely acknowledged as being one of Israel's leading antitrust lawyers.

He is described by *Chambers Global* as 'an excellent litigator' who 'provides the quality of service that multinational clients expect'. His clients come from a wide range of industry sectors, including the pharmaceuticals, banking and financial services, technology, consumer healthcare, energy, retail, defence, telecommunications, insurance, aviation, media and automotive manufacturing industries.

Hagai's extensive experience in class actions includes advising Fuji Electric in a follow-on action based on the EU decision regarding a GIS switchgear cartel, representing Sharp Corporation in the defence of a follow-on action claiming that LCD panel manufacturers had conspired to fix prices, and representing British Airways in connection with a class action against British Airways and other airlines alleging price-fixing in cargo surcharges.

He advises on both non-contentious and contentious issues and has extensive experience resolving and litigating competition disputes before the Restrictive Trade Practices Tribunal and at all levels of Israel's civil courts. Hagai's clients are from a wide range of industry sectors, including the pharmaceuticals, banking and financial services, technology, consumer healthcare, energy, retail, defence, telecommunications, insurance, aviation, media and automotive manufacturing industries.

Hagai also has specific regulatory and industry expertise concerning the telecommunications and media industry. He acts for television and radio broadcasters, cable franchisees, internet content and service providers, production companies, internet service providers, newspapers and mobile phone manufacturers and network operators on all regulatory and legal aspects of operating their business in Israel. He has a wealth of experience representing clients on tenders issued by the Ministry of Communications for

the operation and broadcasting in Israel of television, radio and cable channels as well as for mobile telephone spectrum and internet services.

### **SOFIA A GENTEL**

*Cravath, Swaine & Moore LLP*

Sofia A Gentel is an associate in Cravath's litigation department.

Ms Gentel was born in Espoo, Finland. She received an LLB degree with first-class honours from the University of Edinburgh in 2014 and a JD with honours from Columbia Law School in 2018. Ms Gentel joined Cravath in 2018.

### **MORTEN MELCHIOR GUDMANDSEN**

*Gorrissen Federspiel*

Morten Melchior Gudmandsen joined Gorrissen Federspiel as a student assistant in 2015 and continued as an assistant attorney in 2017. During his time with Gorrissen Federspiel, Morten has provided advice on corporate law, financial markets law and dispute resolution to Danish as well as foreign corporate clients.

### **OLA HANSSON**

*Hamilton Advokatbyrå*

Ola Hansson is a partner in Hamilton's dispute resolution practice. He has extensive experience as litigator in general courts, administrative courts and Swedish and international arbitration proceedings. He is regularly engaged as an arbitrator. Ola is particularly experienced in disputes relating to M&A transactions, shareholder disputes, management of assets, financial instruments, supply agreements, IT contracts, audit and director liability, telecommunications and intellectual property. Ola is ranked as a leading lawyer within dispute resolution in Sweden by *Chambers and Partners* and is recommended by *The Legal 500*.

### **SØREN HENRIKSEN**

*Gorrissen Federspiel*

Søren Henriksen is an attorney-at-law and holds degrees from Aarhus University and King's College London. He has been with Gorrissen Federspiel since 2012. Søren focuses his practice on dispute resolution within all business matters and has particular experience with case management of large, complex cases. Søren is currently advising on two high-profile Danish civil court cases and has been deeply involved with the legal consequences of the financial crisis in relation to the Danish bank failures and has in-depth knowledge of the liability related to managing large financial institutions.

### **MARK HUGHES**

*Slaughter and May*

Mark Hughes is a partner in Slaughter and May Hong Kong's dispute resolution department. He joined Slaughter and May's dispute resolution department in London in 2003, moving to the Hong Kong office in 2010. He has a broad practice that includes civil and commercial litigation in the High Court, proceedings before specialist tribunals, management of overseas

litigation, arbitration under different international rules, advising on alternative dispute resolution mechanisms including mediation, and regulatory investigations and inquiries.

## **COLIN HUTTON**

*CMS Cameron McKenna Nabarro Olswang LLP*

Colin Hutton has over 20 years' experience in dispute avoidance and resolution. He has acted for a wide range of clients and has significant experience working with clients facing technology disputes. He also regularly advises clients on cyber and data breach claims. Colin specialises in the project management of the dispute resolution process and is a keen advocate of alternative dispute resolution, regularly using mediation to effectively resolve disputes.

## **GAETANO IORIO FIORELLI**

*Baker McKenzie*

Gaetano Iorio Fiorelli is an of counsel at Baker McKenzie. His practice concentrates on the area of dispute resolution in commercial, construction and banking and finance matters. Throughout his career Gaetano has represented major multinational and Italian companies in major litigation and arbitration cases.

From 2004, he has been an adjunct professor of international and European law at Luigi Bocconi University, Milan. He is the author of several publications in commercial and European law matters.

## **YURIKO KOTANI**

*Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (Squire Patton Boggs)*

Yuriko Kotani is a senior attorney in the Tokyo office of Squire Patton Boggs. She is a bengoshi and graduate of the University of Tsukuba. She also received an LLM from Harvard University. She is admitted to practise in Japan and the United States (California and Washington states). She is fluent in both Japanese and English. Her practice is primarily focused on issues involving both inbound and outbound international business transactions including mergers and acquisitions. She also advises non-Japan-based clients regarding Japan's business laws. Although corporate work is the main focus of Yuriko's practice, she has extensive experience assisting clients with US litigation including class actions, particularly in the areas of discovery and other pretrial procedures. She also advises clients regarding antitrust investigations in the United States and elsewhere. Yuriko is a member of the Daiichi Tokyo Bar Association.

## **FRANÇOIS KREMER**

*Arendt & Medernach*

François Kremer is a partner in the dispute resolution practice of Arendt & Medernach. He specialises in international litigation, in particular in the fields of asset tracing, white-collar crime and corporate disputes.

He has been a member of the Luxembourg Bar since 1988.

He has been admitted to the Mediation Centre of the Luxembourg Bar as a mediator.

François Kremer currently serves as chairman of the Luxembourg Bar Association until 2020. Prior to this office, he served as vice-chairman from 2016 to 2018, as member of

the Luxembourg Bar Council in 1999 and 2000 and on the Disciplinary Council of the Luxembourg Bar as a member from 2007 to 2015.

He also serves as Honorary Consul-General of Thailand in Luxembourg.

François Kremer holds a *Maîtrise en Droit des Affaires* from the Université Paris I Panthéon-Sorbonne (France) as well as a law master's degree (LLM) from the London School of Economics and Political Science (UK).

In the *Chambers Europe 2018* legal guide, interviewees hold François Kremer in high regard for his litigation skills, with one source saying that he is 'one of best litigators in Luxembourg', with a 'very strong track record and reputation'. He is considered as a 'superb' team head by clients in *The Legal 500 2017* guide.

Languages: English, French, German and Luxembourgish.

## **GRAEME MACLEOD**

*CMS Cameron McKenna Nabarro Olswang LLP*

Graeme MacLeod specialises in commercial litigation and professional negligence claims, and advises banks, corporates, public bodies and insurers about a variety of disputes across both fields. Graeme acts for clients in high-value commercial disputes in Scotland's Court of Session and sheriff courts, as well as in alternative dispute resolution processes such as mediation and arbitration. His wide-ranging practice also includes advising clients facing cyber and data breach claims.

## **APRIL MCCLEMENTS**

*Matheson*

April McClements is a partner in the insurance disputes team within the commercial litigation and dispute resolution department. April is a commercial litigator and specialises in insurance disputes. April is recommended by *The Legal 500* as a next generation lawyer in the insurance sector and is recognised by the *Intelligent Insurer* in its 'Influential Women In Re/Insurance' report.

April advises insurance companies on policy wording interpretation, complex coverage disputes (in particular relating to financial lines policies), D&O claims, cyber, professional indemnity claims, including any potential third-party liability, and subrogation claims. April has extensive experience of managing professional indemnity claims for professionals, including insurance brokers, architects and engineers, for a variety of insurers. She has also been involved in obtaining High Court approval for various insurance portfolio transfers and schemes of arrangement arising from reorganisations or mergers and acquisitions involving life, non-life and captive insurers. April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediations and arbitration.

## **AOIFE MCCLUSKEY**

*Matheson*

Aoife McCluskey is a senior associate in the insurance disputes team within the commercial litigation and dispute resolution department in Matheson. She advises a wide variety of

clients on contentious matters, with particular experience in acting for international clients and financial institutions.

Aoife has significant experience in managing the defence of high-volume multi-plaintiff litigation, which includes disputes surrounding the sale of insurance products. Aoife is also a strong advocate of ADR and adopts a pragmatic approach to disputes.

Aoife's extensive experience in the area of maintenance and champerty has resulted in her being considered the 'go to' person for advising on the legality of assignment of claims and funding arrangements under Irish law.

Aoife has a particular interest in consumer law and is subject matter expert on the proposed introduction by the European Commission of a collective redress model for consumers affected by EU law, which will lead to increased litigation across a variety of sectors.

Aoife is a contributor to industry publications, such as the International Law Office Arbitration and ADR, Banking and Insurance newsletters and is a speaker at industry events. She is a lecturer in the Law Society of Ireland's diploma on insurance law.

## **SÉRGIO PINHEIRO MARÇAL**

*Pinheiro Neto Advogados*

Mr Marçal graduated from São Paulo Catholic University (PUC) in 1985 and achieved credits towards a master's degree from São Paulo Catholic University (PUC). He is a former chairman of the São Paulo Lawyers Association (AASP). Mr Marçal is highly recommended as a product liability law practitioner by *Chambers and Partners* (Band 1), *Who's Who Legal*, *Best Lawyer* and *Euromoney World's Leading Lawyers*.

## **ANDREAS NORDBY**

*Arntzen de Besche*

Andreas Nordby is head of the dispute resolution and litigation group at the Oslo office. Nordby has wide experience in the crossing between dispute resolution and counselling within industries such as technology/telecoms/IT, pharmaceutical industry/biotechnology, food industry, media/entertaining/film production and commodity trade. He has written several articles about procedural law and is also the co-author of a commentary to the Norwegian class action rules. He has previously worked at the Norwegian law firm Thommessen and the division of legislation at the Department of Justice, as well as with the Municipal Lawyer in Oslo.

## **HAIG OGHIGIAN**

*Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (Squire Patton Boggs)*

Haig Oghigian is senior counsel at the Tokyo office of Squire Patton Boggs. He is a graduate of McGill University, attended graduate studies at Harvard University, has a diploma in Japanese language studies from the Foreign Service Institute and a diploma in international commercial arbitration from the Chartered Institute of Arbitrators, Keble College, Oxford. He is admitted to practise in Japan (*gaikokuho jimusho bengoshi*) and is a barrister and solicitor, British Columbia, Canada. Haig began his career in Japan as the legal economic officer at the Canadian Embassy in Tokyo. He returned to private practice in Japan in 2000. His practice is focused on international dispute resolution and advises on a wide range of issues

in the pharmaceutical and life sciences sectors, with an emphasis on government relations and regulatory matters. He has acted as counsel, arbitrator and mediator in more than 100 cases, including high-profile ICC, JCAA and SIAC cases in Asia, Europe and the US. He is consistently highly ranked by the leading rating institutions including *Chambers*, *GAR* and *Asia Law 500*. He is widely published in various journals and is the author and editor of *The Law of Commerce in Japan* (Prentice Hall).

## **URIEL PRINZ**

*S Horowitz & Co*

Uriel Prinz is a commercial litigator with extensive experience acting for clients on a broad range of complex corporate and commercial cases with a particular focus on class actions, construction, engineering and infrastructure-related disputes, energy sector disputes, technology and telecommunication sector-related disputes, tenders and administrative law.

Uriel regularly defends domestic, international, and government-owned companies against class actions in the energy, media, and entertainment sectors regarding claims of consumer protection, antitrust, and securities law violations.

He also handles the full range of aspects involved in construction, projects and tender-related disputes, including conflict resolution strategies such as negotiation, mediation, expert determination, arbitration and court proceedings. He has broad experience in successfully contesting and defending clients in cost overrun disputes, EPC contractual disputes, tender and government procurement disputes, and disputes concerning a wide variety of building and design defects. He has been involved in many of Israel's largest BOT, PFI and PPP tenders.

Uriel also handles the full range of aspects involved in construction, projects, and tender-related disputes, including conflict resolution strategies such as negotiation, mediation, expert determination, arbitration and court proceedings. He has broad experience in successfully contesting and defending clients in cost overrun disputes, EPC contractual disputes, tender and government procurement disputes, and disputes concerning a wide variety of building and design defects. He has been involved in many of Israel's largest BOT, PFI and PPP tenders.

In class actions, Uriel has handled, among other matters, the defence of British Airways in a certification motion of a multimillion class action in Israel connected to in class actions, Uriel has handled, among other matters, the defence of British Airways in a certification motion of a multimillion class action in Israel connected to multi-jurisdictional claims regarding allegations of an international cartel on cargo and freight rates, as well as the defence of the Israel Electric Company in a complex multimillion dollar class action regarding IEC's pricing calculations.

## **MAGNUS RYDBERG**

*Hamilton Advokatbyrå*

Magnus Rydberg is a partner in Hamilton's dispute resolution practice. He has extensive experience in assisting clients in domestic and international disputes in various legal areas, such as construction, product liability, audit liability, professional negligence and directors' and officers' liability. Magnus is also frequently engaged by Swedish and international

insurers in insurance cases and disputes. Magnus is ranked as a leading lawyer within dispute resolution by *Chambers and Partners* and is recommended by *The Legal 500*.

### **CAMILLA SANGER**

*Slaughter and May*

Camilla is a partner in Slaughter and May's dispute resolution and global investigations groups, and advises on a wide range of complex and substantial disputes. Her practice spans commercial, competition and banking litigation, and contentious regulatory investigations.

### **NUNO SALAZAR CASANOVA**

*Uría Menéndez – Proença de Carvalho*

Nuno Salazar Casanova has been a litigation lawyer at Uría Menéndez – Proença de Carvalho's Lisbon office since 2004. He was made partner of Uría Menéndez – Proença de Carvalho in January 2015.

Nuno has been actively involved in national and international arbitration and litigation related with derivatives and other financial products, and has advised leading banks and other financial institutions on some of the largest and most complex cases.

He often leads high-profile cross-border disputes, including regulatory investigations and enforcement, class actions and other major reputation-threatening litigation, especially where a global strategy is required to deal with litigation that is intertwined simultaneously with civil, criminal, regulatory and administrative issues.

He also represents clients in insolvency and restructuring proceedings, and has participated in numerous cases involving multiple jurisdictions.

He is a member of the supervisory board of Fórum Penal – Associação de Advogados Penalistas, a member and secretary of the Associação Portuguesa de Arbitragem, a member of Club Español del Arbitraje and a member enrolled in the list of arbitrators of Concórdia – Centro de Conciliação e Mediação de Conflitos. He is author of several publications on arbitration, financial litigation and insolvency.

### **LUCAS PINTO SIMÃO**

*Pinheiro Neto Advogados*

Mr Simão graduated from the São Paulo Catholic University (PUC) in 2007, has an LLM in contracts from Insper São Paulo and a master's degree from PUC.

Mr Simão has represented big companies in the most relevant product liability cases in Brazil, as such tobacco litigation, drugs and medical devices, cars and electronics issues.

### **JAVIER TAMAYO JARAMILLO**

*Tamayo Jaramillo & Asociados*

Javier Tamayo Jaramillo is a lawyer from Universidad Pontificia Bolivariana; holds a master's degree in economics and insurance law from University of Louvain in Belgium, a doctorate degree in law and political science from Universidad Pontificia Bolivariana and an honorary doctorate degree from University of San Pedro (Peru). He was a justice of the civil branch of the Supreme Court of Colombia (from 1994 to 1996), and nowadays runs the law firm.

## **AGNIESZKA TRZASKA**

*Kubas Kos Galkowski*

Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Galkowski. Agnieszka specialises in civil substantive and procedural law. She represents clients in court proceedings, including group proceedings, and provides consultancy services to commercial entities in the scope of the widely understood civil, commercial and companies law. She has extensive experience in complicated civil cases, in which problems in the scope of private international law and international commercial arbitration occur, as well as in business matters, including disputes between company shareholders. She is always concentrated on implementing an effective procedural strategy, tailor to a given dispute and client. In her practice she has conducted successful negotiations aimed at the amicable settlement of disputes. An effective consultant and negotiator. She has participated in dispute resolution for clients from the telecommunications, industrial and FMCG sector. She is also experienced in projects in the scope of bankruptcy proceedings as well as in the works of a team ensuring the comprehensive provision of legal services to one of the leading banks in Poland. She possesses vast knowledge in the scope of group proceedings, currently heading the team conducting group proceedings of flood victims from Sandomierz and Płock against the State Treasury and the remaining relevant entities. She also represents one of the largest banks in Poland in a group action of the group of Franc-debtors – persons that took out a mortgage loan denominated to the Swiss francs. Agnieszka is the main editor of the portal on class actions in Poland and worldwide: [www.classaction.pl](http://www.classaction.pl).

## **ALEXIS VALENÇON**

*Kennedys*

Alexis Valençon is a partner at Kennedys and co-founder of the Paris office. He is an insurance and reinsurance specialist with extensive expertise in complex litigation and arbitration. He advises leading French and foreign insurance and reinsurance companies, brokers, major policyholders, manufacturers and industrial companies on a broad range of issues, ranging from insurance and reinsurance disputes (litigation and arbitration) to product liability, financial lines, construction and professional liability. He also assists his clients in complex court-appointed investigations relating to industrial risks, drafting insurance contracts that comply with French law and setting up activities in France.

He teaches judicial procedure, insurance litigation at the Paris Insurance Institute of Dauphine University and at the Law Faculty of Le Mans. He is also regularly invited to speak at conferences and colloquiums on matters of (re)insurance law and litigation. He is one of the co-authors of the *Lamy Assurances* (France's leading textbook on (re)insurance law) and regularly contributes to various international reference books on (re)insurance law and product liability.

He is a member of the Association Internationale du Droit des Assurances (AIDA), Association du Management des Risques et Assurances de l'Entreprise (AMRAE), the International Bar Association (IBA), the Comité Français de l'Arbitrage (CFA) and the Association des Professionnels de la Réassurance en France (APREF).

He speaks French, English and Spanish.



## **MARIA-CLARA VAN DEN BOSSCHE**

*Loyens & Loeff*

Maria-Clara is an associate at the dispute resolution department of the Brussels office of Loyens & Loeff.

She specialises in the field of complex and international dispute resolution. She advises and represents clients in court litigation in various fields and in different types of procedures (including cease and desist proceedings, summary proceedings). Maria-Clara has broad experience in enforcement of foreign judgments and arbitral awards, including against sovereign entities. Through her involvement in most of the class actions initiated in Belgium so far and several publications on this topic, Maria-Clara has gained extensive expertise in this field. She is also the vice president of the Dutch-speaking Brussels bar association (VPG).

Maria-Clara holds a law degree (2015) from the University of Ghent.

Before she started working as a lawyer, Maria-Clara interned at the European Commission in the DG Humanitarian Aid and Civil Protection.

## **BART VAN HEESWIJK**

*De Brauw Blackstone Westbroek*

Bart van Heeswijk focuses on advising large multinationals on contract law, corporate law, mergers and acquisitions, and corporate governance. Bart also has experience in EU and Dutch competition law, particularly in multijurisdictional merger filings, advising multinational clients entering contractual relationships on competition law and defending clients in cartel claims.

## **KEVIN WARBURTON**

*Slaughter and May*

Kevin Warburton is a counsel in Slaughter and May Hong Kong's dispute resolution department. He joined Slaughter and May's London office in 2007 and, after spending time in the Hong Kong office in 2009 and 2014, relocated there permanently in 2016. He advises a broad range of clients both inside and outside Hong Kong on matters of litigation, international arbitration, regulatory investigations and inquiries, anti-bribery and corruption, data protection and data privacy and alternative dispute resolution mechanisms.

## **ALEX B WEISS**

*Cravath, Swaine & Moore LLP*

Alex B Weiss is an associate in Cravath's litigation department.

Mr Weiss was born in New York City, New York. He received a BA *magna cum laude* from Tufts University in 2012 and a JD with honours from Columbia Law School in 2017, where he was a senior editor of the *Columbia Law Review*. Mr Weiss joined Cravath in 2017.

## **PETER WICKHAM**

*Slaughter and May*

Peter is an associate in Slaughter and May's dispute resolution and global investigations group. He has a broad-ranging international arbitration and litigation practice with particular expertise in the oil and gas sector.

## Appendix 2

# CONTRIBUTORS' CONTACT DETAILS

### **ARENDT & MEDERNACH**

41A, Avenue J F Kennedy  
2082 Luxembourg  
Tel: +352 40 78 78 276  
Fax: +352 40 78 04 653  
francois.kremer@arendt.com  
ariel.devillers@arendt.com  
www.arendt.com

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Norway  
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Fax: +47 23 89 40 01  
ano@adeb.no  
www.adeb.no

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Fax: +39 02 76231 623  
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gaetano.iorio.fiorelli@bakermckenzie.com  
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EH1 2EN  
United Kingdom  
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graeme.macleod@cms-cmno.com  
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The Netherlands  
Tel: +31 20 577 1771  
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jan.tjeenk@debrauw.com  
bart.vanheeswijk@debrauw.com  
www.debrauw.com

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United States  
Tel: +1 212 474 1000  
Fax: +1 212 474 3700  
tcameron@cravath.com  
aweiss@cravath.com  
sgentel@cravath.com  
www.cravath.com

### **GORRISSEN FEDERSPIEL**

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Tel: +45 33 41 41 41  
ca@gorrissenfederspiel.com  
she@gorrissenfederspiel.com  
mcu@gorrissenfederspiel.com  
www.gorrissenfederspiel.com

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Hamngatan 27  
PO Box 715  
101 33 Stockholm  
Sweden  
Tel: +46 8 505 501 00  
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magnus.rydberg@hamilton.se  
ola.hansson@hamilton.se  
www.hamilton.se

### **HENGELER MUELLER**

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Germany  
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henning.baelz@hengeler.com  
www.hengeler.com

### **KENNEDYS**

31 Rue de Lisbonne  
Paris 75008  
France  
Tel: +33 1 84 79 37 80  
alexis.valencon@kennedyslaw.com  
nicolas.bouckaert@kennedyslaw.com  
www.kennedyslaw.com

### **KUBAS KOS GAŁKOWSKI**

Al. Armii Ludowej 26  
00-609 Warsaw  
Poland  
Tel: +48 22 206 83 00  
Fax: +48 22 206 83 02  
agnieszka.trzaska@kkg.pl  
www.kkg.pl

### **LENZ & STAEHELIN**

Brandschenkestrasse 24  
8027 Zürich  
Switzerland  
Tel: +41 58 450 80 00  
Fax: +41 58 450 80 01  
martin.burkhardt@lenzstaehelin.com  
www.lenzstaehelin.com

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Woluwe Atrium  
Neerveldstraat 101-103  
1200 Brussels  
Belgium  
Tel: +32 2 743 43 43  
Fax: +32 2 743 43 10  
hakim.boularbah@loyensloeff.com  
maria-clara.van.den.bossche@loyensloeff.com  
www.loyensloeff.com

**MATHESON**

70 Sir John Rogerson's Quay  
Dublin 2 D02 R296  
Ireland  
Tel: +353 1 232 2000  
Fax: +353 1 232 3333  
april.mcclements@matheson.com  
aoife.mccluskey@matheson.com  
www.matheson.com

47th Floor, Jardine House  
1 Connaught Place  
Central  
Hong Kong  
Tel: +852 2521 0551  
Fax: +852 2845 2125  
mark.hughes@slaughterandmay.com  
kevin.warburton@slaughterandmay.com  
  
www.slaughterandmay.com

**PINHEIRO NETO ADVOGADOS**

Rua Hungria 1100  
São Paulo 01455-906  
Brazil  
Tel: +55 11 3247 8400  
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Shibuya-ku, Tokyo 150-0012  
Japan  
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Fax: +81 3 5774 1818  
yuriko.kotani@squirepb.com  
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**TAMAYO JARAMILLO &  
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Carrera 43 No. 36-39 Office 406  
Medellin  
Colombia  
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**SLAUGHTER AND MAY**

One Bunhill Row  
London EC1Y 8YY  
United Kingdom  
Tel: +44 20 7600 1200  
camilla.sanger@slaughterandmay.com  
peter.wickham@slaughterandmay.com

Carrera 8 No. 69-80 Bogotá  
Colombia  
tamayoasociados@tamayoasociados.com  
www.tamayoasociados.com

**URÍA MENÉNDEZ -  
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Praça Marquês de Pombal, No. 12 1250-162

Lisbon

Portugal

Tel: +351 21 030 86 00

Fax: +351 21 030 86 01

nuno.casanova@uria.com

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