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Camilla Sanger
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Class actions and major group litigation can be seismic events, not only for the parties involved, but also 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 fourth edition of The Class Actions Law Review.

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, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing 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 2020
Chapter 1

AUSTRALIA

Robert Johnston, Nicholas Briggs and Sara Gaertner

I  INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Australia has one of the better, more well balanced, functioning class action procedures in the world, facilitating appropriate access to justice without the excesses seen by defendants in some other jurisdictions. The balance is struck between, on the one hand, appropriate consumer protection legislation and working, class action rules and processes and, on the other hand, an adverse costs regime, no juries and no punitive or exemplary damages. Class actions in Australia are also known as group (or grouped) proceedings. There are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland. In 2019, the Parliament of Western Australia also sought to introduce a class action regime in Western Australia. While there are some minor differences, the state regimes generally mimic the regime of the Federal Court, which was the first class action regime introduced in Australia, in 1992.

In general, a class action can be commenced on behalf of all class members by a representative who becomes the named applicant. The threshold requirements are:

- at least seven people have claims against the same person;
- the claims arise out of the same, similar or related circumstances; and
- the claims give rise to substantial common issues of law or fact.

The applicant may bring proceedings against several respondents even if not all class members have a claim against all respondents. As long as seven or more persons have claims against the same respondent, an applicant can join other respondents against whom some class members have claims but some do not.

There is no ‘class certification’ process in Australia, which is a critical distinction. While there is not that ‘threshold’ and once commenced a class action or several similar or overlapping class actions can continue, there are a large number of early, interlocutory skirmishes or applications around not dissimilar threshold issues, including deciding which one of multiple class actions should proceed.

1 Robert Johnston is a partner and Nicholas Briggs and Sara Gaertner are senior associates at Johnson Winter & Slattery.
2 See discussion at Section III.
3 Civil Procedure (Representative Proceedings) Bill 2019 (WA).
4 Section 33C of the Federal Court of Australia Act 1976 (Cth) (the FCA Act), Section 33C of the Supreme Court Act 1986 (Vic) (the SC Vic Act), Section 157 of the Civil Procedure Act 2005 (NSW) (CPA NSW) and Section 103(B) of the Civil Proceedings Act 2011 (QLD) (CPA QLD).
The class action regimes in Australia operate on an opt-out basis. As Justice Jessup of the Federal Court explained, ‘an applicant will define on whose behalf the proceeding is brought and, unless they opt out, all persons who fit within the relevant definition will be part of the class, and bound by any result’. No consent is required from class members who come within the definition to be included in the group. This is a point of distinction between Australia and some other jurisdictions that oblige class members to opt in to a class action.

As the applicant is free to define the class, many class actions in Australia have been brought on a ‘closed-class’ basis. In these instances, the class definition usually comprises those persons who have entered into a funding agreement with a third-party litigation funder, effectively requiring potential class members to opt in by taking the positive step of executing a funding agreement. Although this appears to be inconsistent with the ‘open-class’ and opt-out model in the legislation, in 2007, the Full Federal Court held that a closed- or limited-group class action is permissible. It is generally accepted that this model has contributed to funders’ preparedness to fund class actions, and therefore to an overall increase in their number.

Class actions commenced since 1992 have covered a variety of areas, including mass torts such as defective pelvic mesh implants, damage from extreme weather events such as bushfires and floods, failing buildings, the Volkswagen diesel emissions scandal and responsible lending obligations, and human rights cases such as stolen wages from Aboriginal and Torres Strait Islanders. More recently we have seen a greater number of claims by investors in securities or shareholder class actions and consumer claims concerning financial products or services.

II THE YEAR IN REVIEW

i Developments on common fund orders

Prior to 2016, litigation funders were generally only able to recover their fees from those class members who had entered into funding agreements with the funder. This was one of the primary drivers for closed classes becoming the preferred model for funded class actions (although in open classes, the courts typically approved equalising adjustments to spread the cost of the funder’s commission between funded and unfunded class members). In October 2016, in Money Max, the Full Federal Court approved an application for a ‘common fund’ order.

In Money Max, the court accepted that all class members must contribute to the litigation funder a percentage of any monies they receive as a result of the proceeding, irrespective of whether they have entered into a funding agreement with the litigation funder. This decision probably encouraged litigation funders to fund more open class actions, as they could safely presume that they would be able to recover monies from all class members, including those who did not execute a funding agreement.

That decision was affirmed on appeal in 2019, at an unprecedented joint hearing of both the NSW state and the federal appeal courts sitting concurrently.

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6 Madgwick v. Kelly (2013) 212 FCR 1 at [151].
8 Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited [2016] FCAFC 148 (26 October 2016).
9 On this point see Section V, ‘Outlook and conclusions’.
However, in an appeal to the High Court of Australia, on 5 December 2019, in *Lenthall*, the High Court delivered a judgment finding that the courts were not empowered to make common fund orders in class actions at the outset or at interlocutory stages (under Section 33M of the Federal Court of Australia Act 1976 (Cth) (the FCA Act). There are likely to be many wide-ranging implications arising from this judgment, including removing the higher levels of certainty of returns that had been developing for funders in the Australian market, a return to book-building, higher numbers of closed class actions being commenced, fewer cases being filed (as smaller funders and some international funders may not have the infrastructure and relationships needed to book-build) and a reduced appetite for funding certain types of class actions, such as consumer-focused actions with high numbers of group members but low-value claims, because of potentially prohibitive book-building costs.

Since *Lenthall*, there have been a number of commentators and judges, including Justice Murphy (one of the judges in the Full Court in *Money Max*) suggesting that common fund orders may still be permitted at the settlement approval stage of a class action (under Section 33ZF of the FCA Act). However, with no case on this issue decided yet, there remains considerable risk for litigation funders when there is no guarantee of a settlement being reached.

In December 2019, the Federal Court updated its Class Actions Practice Note to include the following:

*Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, among all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable.*

This tends to suggest that the Federal Court at least considers that orders such as common fund orders can still be made by the courts but using other powers.

### ii Market-based causation

One unresolved issue in shareholder class actions in Australia had been whether shareholders were required to prove individual direct reliance on the company’s alleged misleading statements prior to purchasing shares on the market or rely upon the indirect market-based theory of causation (known as the ‘fraud-on-the-market’ theory in the United States). With so many cases settling and not proceeding to trial because of this uncertainty, there was no direct case law on this issue. Some guidance was provided by *HIH Insurance Limited (in liquidation) & Ors*, in which a single judge accepted the ‘indirect market-based theory of causation’, which enables class members to claim damages for the share price inflation attributable to material non-disclosure or misleading information without needing to prove direct reliance on that non-disclosure or misleading statement by a company when they purchased their shares on-market.

11 [2016] NSWSC 482.
In October 2019, a shareholder class action went all the way to trial and a landmark judgment was delivered. In Myer,\textsuperscript{12} the court accepted market-based causation as a basis for a damages claim and held that the respondent engaged in misleading and deceptive conduct. However, the court also found that the ‘hard-edged scepticism of market analysts and market makers at the time of the contraventions’ meant the market had already taken into account the lower guidance and no loss had been suffered.

The Myer decision, on the one hand, encourages plaintiffs with its acceptance of indirect market-based causation, but, on the other, encourages defendants as a more rigorous analysis of share price movements and causation complicates matters and increases risk for plaintiffs – as it did in Myer. The continuing uncertainty means most matters will continue to settle.

### iii Scrutiny of litigation funding and contingency fees

The Victorian and federal governments, in 2016 and 2017 respectively, launched inquiries into third-party funding of class actions.

The Australian Law Reform Commission’s Report on Class Action Proceedings and Third-Party Litigation Funders (the ALRC Report) was submitted to the Attorney-General on 21 December 2018 and published on 24 January 2019.\textsuperscript{13} The ALRC Report proposed 24 recommendations, including a requirement that all class actions be initiated on an open-class basis, providing the court with an express statutory power to make common fund orders and permitting class action solicitors to charge percentage-based or contingency fees to enable medium-sized class actions to proceed and provide a greater return to litigants (with a number of limitations, including that actions funded by percentage-based fees cannot also be directly funded on a contingent basis). At present in Australia, arrangements for payment of damages-based contingency fees are not permitted.

The Victorian Law Reform Commission’s Report on Access to Justice: Litigation Funding and Group Proceedings (the VLRC Report) was tabled in the Parliament of Victoria on 19 June 2018.\textsuperscript{14} The VLRC Report made a number of recommendations, including national regulation of litigation funders and allowing class action lawyers to charge contingency fees. On 27 November 2019, the Justice Legislation Miscellaneous Amendments Bill 2019 was tabled in the Victorian Parliament. If passed, this Bill will amend the Supreme Court Act 1986 (Vic) to allow lawyers to charge contingency fees in class actions.\textsuperscript{15} This would permit costs payable to law firms being calculated as a percentage of any settlement reached or amount recovered in the proceedings, subject to court approval. However, law practices would be liable for any adverse costs and would have to provide any security for costs ordered. The Bill was passed by the Legislative Assembly on 20 February 2020, and the second reading in the Legislative Council was moved on 20 February 2020. At the time of writing, in March 2020, the Bill was still before the Legislative Council.

If the Bill is assented to in Victoria, it is likely that other states and the Commonwealth will follow suit, as otherwise we are likely to see most class actions being commenced in Victoria, a situation the Supreme Courts in NSW and Queensland and the Federal Court

\textsuperscript{12} TPT Patrol Pty Ltd v. Myer Holdings Limited [2019] FCA 1747.
\textsuperscript{15} Justice Legislation Miscellaneous Amendments Bill 2019 (Vic).
will not want to arise. This will pose a challenge for litigation funders as they will now have law firms competing in their space. However, as we have seen in other jurisdictions, ‘funders’ will probably become ‘financiers’ of the law firms that charge contingency fees.

iv  Competing class actions

A dominant feature in the recent class action landscape in Australia has been the rapid rise of competing class actions. This occurs where, usually following well-publicised corporate wrongdoing or ‘stock drops’, numerous lawyers funded by different litigation funders separately commence their own class actions on behalf of a client against the same corporate defendant.

Australian courts do not have a North American-style process of certification of class actions at a pre-commencement hearing. Instead, it has been left to Australian judges to grapple with which action ought to proceed and which actions ought to be stayed, and which principles should be applied in coming to that decision – similar to the ‘carriage motions’ in Canada. Predicting the outcome of these carriage motions is fraught, makes for great uncertainty and is dissuading funders from investing significant sums in claims preparation when they may only have a one in four or five chance of ‘winning’.

The issue has spread to competing jurisdictions, with courts pitted against each other to have cases remain on their docket. To avoid this unseemly court turf war, protocols have been agreed between the Federal Court and the Supreme Courts of New South Wales and Victoria for dealing with similar situations in the future.

III  PROCEDURE

Australia’s federal class action regime commenced in March 1992 with the introduction of Part IVA of the FCA Act. Some, but not all, Australian states have since followed with regimes that mirror their federal counterpart.

i  Types of action available

The Australian class action regimes do not impose limits upon the causes of action that are permitted to found a class action. As long as the criteria for commencing a class action is met (discussed below), then a group of claims may form a class action. Accordingly, class actions encompass a wide variety of claims across a broad range of industries.

That said, and as noted above, shareholder actions have been a dominant feature of the recent Australian class action landscape. This might be explained by an increasing volatility in equity markets, together with the growth of litigation funders. Shareholder claims are attractive to litigation funders because of Australia’s strict continuous disclosure regime

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18 Protocol for Communication and Cooperation between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings (June 2019).
19 As noted above, there are there are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland.
and because group member losses are usually relatively easy to quantify. The popularity of shareholder class actions among litigation funders has resulted in the recurring spectacle of listed-company wrongdoing followed shortly by numerous 'lead applicants' backed by separate litigation funders competing to be the action chosen to represent shareholders' interests. The growth of shareholder class actions is unlikely to dissipate given the recent, and long-awaited, judicial acceptance of market-based causation in *Myer*.

Aside from shareholder actions, common types of class actions include claims relating to product liability, consumer protection claims and mass tort claims. The authors have also noted a recent rise in class action litigation arising from employment-related claims, in particular based upon allegations of systemic underpayment of wages, as well as actions arising from building defects or the supply of defective building materials.

### ii Commencing proceedings

Class actions (referred to as 'representative proceedings' in the Australian legislation) can be commenced where relatively straightforward criteria are met, as follows:

- **a** at least seven people must have claims against the same person;
- **b** the claims must arise out of the same, similar or related circumstances; and
- **c** the claims must give rise to substantial common issues of law or fact.\(^{20}\)

Assuming that these criteria are met, any person (a lead applicant) may commence a class action on his or her own behalf and on behalf of those whose claims arise out of the same, or similar or related circumstances and give rise to substantial common issues of law or fact.

The choice of lead applicant is an important feature of a class action, because the trial will generally be a trial of the lead applicant's case, along with issues of fact and law common to the group members. That said, there are no criteria or limits as to which member of a class may act as lead applicant, although once proceedings are under way the court may remove a lead applicant that it believes is not able to adequately represent the interests of group members.\(^{21}\) There may also be subgroups within a class action, representing particular groups with particular common characteristics within the larger group.

Notably, the Australian class action regimes have no requirement for US-style certification at the time of filing. This was a deliberate choice by legislators, who followed a view by the Australian Law Reform Commission at the time the first class action legislation was being contemplated by legislators that a certification procedure would impose an additional costly procedure 'with a strong risk of appeals involving further delay and expense'.\(^{22}\) Some commentators believe, however, that the absence of certification criteria has in reality led to high levels of protracted interlocutory disputes after proceedings have commenced.\(^{23}\)

In any event, the threat of unsuitable class actions is addressed under the Australian regimes, in part, by the power of the court on application, or of its own motion, to order that

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\(^{20}\) Section 33C of the FCA Act, Section 33C of the SC Vic Act, Section 157 of the CPA NSW and Section 103(B) of the CPA QLD.

\(^{21}\) See, for example, Section 33T of the FCA Act.


\(^{23}\) See D Grave et al., *Class Actions in Australia* (2nd Edition) at 131.
proceedings no longer continue if it is satisfied that it is in the interests of justice to do so.\textsuperscript{24} However, this system arguably shifts the burden from the plaintiff having to prove that a class action is suitable to the defendant having to prove that the class action it faces is unsuitable.

Persons upon whose behalf claims are commenced (termed ‘class members’ or ‘group members’) are not parties to the proceedings. They do not need to be named or specified at the time of filing.\textsuperscript{25} Nor is the plaintiff (or lead applicant) required to seek the consent of a person before making that person a group member.\textsuperscript{26} Frequently, a group member will have no retainer with solicitors acting for the plaintiff, nor any legal representation at all in respect of the matter. Indeed, a group member may be oblivious to the fact that he or she is a group member for a considerable period after proceedings have commenced (in cases where they are not contactable – they may never know).

\textbf{The opt-out nature of the Australian class action system}

As outlined above, the class action regimes in Australia operate on an opt-out basis – meaning that all persons who fall within a pleaded class definition are members of the class and bound by any result unless they opt out. This is a point of distinction between Australia and some other jurisdictions that oblige class members to take a positive step and opt in to a class action. Group members who opt out of a class action cease to be bound by the outcome of the action but also become ineligible to receive any proceeds from it.

The opportunity to opt out is generally facilitated by the distribution of an opt-out notice to all group members, at an appropriate time after the proceedings have commenced.\textsuperscript{27} These notices generally provide group members with an explanation of the nature of the claims and class action processes generally. The notices also explain the effect of opting out, and how to opt out (by filing a prescribed notice with the court). Notably, opt-out rates are generally quite low. In the experience of the authors, opt-out rates of approximately 10–20 per cent are common, although they can be much lower.

An ongoing concern is the ability of group members to read and properly understand opt-out notices, and other notices provided to them at the direction of the court in the course of a class action, given their lack of prior involvement in the proceedings and frequent lack of familiarity with litigation and legal language. It is plausible that a reasonable proportion of opt-outs arise from a lack of understanding of the effect of opting out or misplaced concerns as to the risk of becoming liable for legal costs.

\textbf{Limitation periods}

Upon the commencement of a class action, the running of any limitation period that applies to the claim of group members is suspended or ‘toggled’. The limitation period does not begin to run again unless either the group member opts out or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member’s claim.\textsuperscript{28}

\textsuperscript{24} Section 33N of the FCA Act, Section 166 of the CPA NSW, Section 33N of the SC Vic Act and Section 103K of the CPA QLD.
\textsuperscript{25} Section 33H of the FCA Act.
\textsuperscript{26} With limited exceptions: see Section 33E of the FCA Act.
\textsuperscript{27} Section 33X of the FCA Act.
\textsuperscript{28} Section 33ZE of the FCA Act.
iii Procedural rules

The courts have been granted extensive case management powers in relation to the conduct of class action proceedings and the courts almost have a supervisory or guardian role to play in ensuring group members’ interests are protected. For example, the Federal Court of Australia has:

- **a** broad powers to discontinue representative proceedings;
- **b** the power to substitute a lead applicant who is not adequately representing the interests of group members;
- **c** the power to order that notice of ‘any matter’ be given to group members;
- **d** the ability to decline or approve settlements; and
- **e** the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.²⁹

Not surprisingly, the key procedural differences between conventional litigation and class action litigation involve protecting the interests of group members, or facilitating their rights. Those differences (some of which are discussed further below) include:

- **a** an opt-out process to give notice to group members of their status as group members, and their right to opt out of the proceedings;
- **b** a registration process to identify group members who are contactable and willing to engage with the class action process and who wish to be eligible to receive part of any settlement; and
- **c** a settlement approval process, in which a judge reviews a prospective settlement to ensure it is fair and reasonable and in the interests of group members. As part of that process, group members are given notice of the settlement and the opportunity to object and appear before the judge at the settlement approval hearing, if they wish to do so.

The hearing of a class action generally involves the trial of common questions of fact and law as part of the trial of the lead applicant’s claim. Following the initial trial, a process or mechanism to resolve the individual claims of group members is developed. This might take the form of a series of mini trials, or a ‘claims resolution process’, whereby an independent adjudicator (who, depending on the nature of the dispute, might be a lawyer or barrister, or an accountant) is appointed to review and determine group member claims with the benefit of the findings from the initial trial and usually in the most cost-effective and efficient manner.

iv Damages and costs

The costs regime in Australia has a number of significant differences from those in other jurisdictions. First, Australia has a loser-pays or adverse costs system, meaning the unsuccessful litigant is generally ordered to pay the majority of the legal costs of the successful litigant. Group members, but not the lead applicant, are generally immune from adverse costs orders.³⁰ This difference operates as an obvious disincentive to be the lead applicant, given that it carries serious financial risk of adverse costs liability, which in large class actions is generally

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²⁹ See D Grave et al., *Class Actions in Australia* (2nd Edition) at 384.

³⁰ See, for example, Section 43(1)(a) of the FCA Act, Section 33ZD of the SC Vic Act and Section 181 of the CPA NSW.
in the millions of dollars. This disincentive, which has been somewhat ameliorated by the proliferation of litigation funding in Australia (discussed below), and difficulty in finding parties willing to act as lead applicants has not, as far as the authors are aware, substantially impeded the growth of class actions.

Plaintiffs must also usually contend with an application that they give security for the defendant’s costs. Frequently, the plaintiff in a large class action will be ordered to put up security worth millions of dollars over the course of the litigation, which the defendant may call upon in the event that the plaintiff is ordered to pay the defendant’s costs. Such security was traditionally given by way of money paid into court or a bank guarantee from an Australian trading bank. An alternative form of security has arisen whereby a large insurer provides an indemnity directly to the defendant for any adverse costs orders made against the plaintiff in favour of the defendant.31

The expense of litigation, the adverse costs risk and the burden of putting up security for the defendant’s costs have resulted in the widespread involvement of litigation funding in class actions in Australia. Litigation funders generally contract with the lead applicant to finance the proceedings and take responsibility for putting up security for costs and paying any adverse costs orders in return for a share of the proceeds of any settlement or judgment. The rise of litigation funding has been somewhat controversial in Australia and has resulted in the inquiries into litigation funding outlined above.

The growth in litigation funding has coincided with increased debate as to the traditional doctrines of maintenance and champerty. As noted above, the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), which provides for the Supreme Court of Victoria to order contingency fees in class action proceedings, has been introduced in response to the VLRC Report. The introduction of contingency fees is intended to increase access to justice by allowing plaintiff law firms to compete with third-party litigation funders, which typically fund class actions on the basis that they will receive a percentage of any amounts recovered in the proceeding.

v Settlement

The large majority of class actions settle before trial. The settlement of any class action must be approved by the court. The settlement process under the Australian class action regimes is relatively involved, because the settlement binds group members who may have had little or no involvement in the matter up to that point. The regime has therefore been designed to help ensure their interests are adequately protected. The settlement process usually involves:

- giving notice to group members of the settlement (this may give information such as the settlement amount or give an indication of the expected returns to group members);32
- giving group members the opportunity to make objection to the settlement if they consider it not in their interests; and
- having the court review the proposed settlement to ensure it is fair and reasonable and in the interests of group members.33 Senior counsel for the plaintiff will generally provide a confidential opinion to the court as to the reasonableness of the settlement given prospects of success, litigation and recovery risks, and the lead applicant’s solicitors

31 See, for example, DIF III Global Co-Investment Fund, LP & Anor v. BBLP LLC & Ors [2016] VSC 401.
32 See Section 33X of the FCA Act.
33 See Section 33V of the FCA Act.
will generally lead evidence as to how much of the settlement sum will go towards the payment of legal costs and litigation funder commissions (if involved), and how much will be paid to group members.

The court has the power to reject settlements outright, and has done so, although it is relatively rare. In the alternative, the court may adjust features of a settlement to make it fairer and more reasonable to group members. For example, in *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)*, the Federal Court approved a settlement between the plaintiffs and the defendants but substantially reduced the entitlement to costs of the lawyers for the plaintiffs and the commission of the litigation funders to be paid out of the settlement proceeds, so that a higher proportion was paid to group members. This approach reflects concerns as to the proportion of settlement sums generally being paid to lawyers and litigation funders, in comparison to the sums received by lead applicants and group members. In that respect, the new Federal Court of Australia Practice Note dated 20 December 2019 warns that:

> the parties, class members, litigation funders and lawyers may expect that . . . the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, among all persons who have benefited from the action.

**The registration process**

One difficulty with the opt-out system is that having an open-ended class of group members who fall within pleaded class criteria but may or may not be contactable or willing to engage with the class action process can make settlement difficult. The need to identify a finite group eligible to share in any settlement has given rise to what is referred to as a ‘registration process’.

Registration processes are not contemplated by the legislation but have arisen as a matter of practice. This process has also developed so that defendants have a better idea of the universe of persons who will be bound by any settlement, the value of their claims and those who will not be bound. They are generally (but not always) ordered in advance of a mediation and require group members who wish to be eligible to share in the proceeds of any settlement to take a positive step and register – usually by completing and submitting a paper or online form with registration details. Those who register are eligible to receive a share of any settlement reached at mediation or within a fixed period following mediation, often referred to as the ‘settlement period’. Those who do not register (and have not opted out) are not eligible to receive a share of any settlement reached at mediation. However, if the matter does not settle at mediation or during the settlement period, the registration process usually ceases to have effect, meaning those who did not register become once again eligible to receive a share in any settlement.

A registration process allows the parties at mediation to have some certainty as to whose behalf an outcome is being negotiated upon, and between how many group members

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34 See, for example, *ASIC v. Richards* [2013] FCAFC 89 (12 August 2013) and *Peterson v. Merck Sharp & Dohme (Aust) Pty Ltd (No. 6)*, [2013] FCA 447.

a settlement sum must be shared. This is important because the lawyers for the lead applicant must ensure that any settlement is sufficiently reasonable that the court will grant approval of it.

IV CROSS-BORDER ISSUES

As with conventional commercial litigation, class actions frequently involve cross-border issues. Defendants outside Australia may be, and have been, prosecuted, although court approval is necessary to effect service on overseas defendants. For example, in *Caason Investments Pty Limited v. Cao*, a shareholder class action, the court approved the service of court documents on three former company directors in the United States and one former director in Hong Kong under the Hague Service Convention. Group members may be overseas residents, although in Victoria the court can exclude class members who do not have a sufficient connection to Australia.

Australian courts have the power to decline to exercise jurisdiction when an alternative forum is ‘more convenient’ to hear the claim. However, that power is exercised with ‘extreme caution’ and only if it can be demonstrated that the local forum is ‘clearly inappropriate’ for the determination of the claim.

There are numerous instances where class actions in international jurisdictions have led to or influenced the commencement of class actions in Australia and vice versa. For example, the class actions in the United States against chemical manufacturers 3M, DowDuPont, Chemours and others in relation to allegedly toxic polyfluoroalkyl firefighting foam (or PFAS) has resulted in the institution of similar class action proceedings in Australia against the Australian Department of Defence in relation to its use of the same foam. In other examples, in 2015, class actions in Australia were launched against Volkswagen (and other defendants) following the exposure of the global diesel emissions issue and after a similar class action was launched against Volkswagen in the United States, and class action proceedings are currently under way against Johnson & Johnson in Australia in relation to deficient pelvic mesh products.

V OUTLOOK AND CONCLUSIONS

The pace of development within the class action space in Australia is showing no signs of slowing. There is increased uncertainty around litigation funding following the decision of the High Court in *Lenthall*, which did not permit common fund orders at early or interlocutory stages of cases, but clarity may be provided in the year ahead in light of the recommendations of the Australian Law Reform Commission and the Victorian Law Reform Commission, and judgments that are expected to clarify whether common fund orders may still be made at the time of settlement approval.

The prospect of Australian lawyers being able to charge contingency fees (a percentage of the damages or settlement) for the first time ever in this country will be a game changer. The Victorian Parliament was considering this legislation at the time of writing.

36 *Caason Investments Pty Limited v. Cao* [2012] FCA 1502.
37 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
Developments to watch in 2020 include:

a the fallout from the High Court’s Lenthall decision on funders’ commissions;

b whether the proposed legislation allowing contingency fees in Victoria will be assented to, and whether there will be a corresponding legislative response from the federal and other state governments;

c whether reviews of the law on continuous disclosure and misleading or deceptive conduct will be commenced, as recommended by the Australian Law Reform Commission, and which may put a brake on securities class actions;

d whether, in light of the Myer decision regarding the availability of market-based causation, on the one hand, more shareholder class actions are brought, but, on the other, they still settle because of the continuing uncertainties around calculating losses;

e how the Australian courts continue to grapple with and resolve competing class actions and whether Australia moves more towards a US certification-type model or a Canadian carriage motion-type model; and

f whether the question of Australian courts having the power to interfere with contracts and alter a funding agreement will be resolved, as this has been the subject of a number of differing decisions.39 An opportunity did arise for this issue to be resolved late in 2019; however, IMF Bentham Ltd instead gave an undertaking to the court that it would not raise an argument as to the court’s power to alter a funding agreement but would instead argue that the funding commission as agreed between itself and each of the group members was in the range of what was fair and reasonable in the circumstances of the case.40 This may be resolved if the recommendation of the ALRC Report that the Federal Court be given an express statutory power to vary funding agreements is acted upon.


40 The undertaking given by IMF Bentham Ltd is reflected in the orders made by Justice Murphy on 15 November 2019 in VID1010/2018.
I INTRODUCTION TO THE 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 chapter.

*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. An important exception to this principle was introduced in Title 2 of Book XVII of the Belgian Code of Economic Law by

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1 Hakim Boularbah is a partner and Maria-Clara Van den Bossche is an associate at Loyens & Loeff.
2 Articles 17 to 18, Belgian Judicial Code.
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, nine 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. 3

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, nine class actions have been instigated. Eight of the nine 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 SNCF/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 Luierbox. The seventh class action was brought against three Facebook entities within the context of the Cambridge Analytica data scandal. The eighth class action was undertaken at the initiative of the Belgian Ombudsman Service for Energy against six energy suppliers concerning fixed fees that energy suppliers continue to charge when energy contracts are terminated early. The most recent class action was filed against Ryanair in relation to flight delays and cancellations resulting from the strikes during the summer of 2018.

3 Article XVII.35, Belgian Code of Economic Law; Article 633 ter, Belgian Judicial Code.

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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. The elements that can be taken into consideration by the judge when examining this admissibility requirement are:

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

In a decision of 17 March 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. Whether this is so needs to be assessed by the judge on a case-by-case basis and according to 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. Even after the initiation of the proceedings, related cases that are pending before the same judge can be compiled, on request or ex officio.

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4 Article XVII.36(3), Code of Economic Law.
5 Case 41/2016.
6 Article 30, Belgian Judicial Code.
7 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. 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, 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 legislature’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 legislature struck the right balance between all interests at stake. These are, on one hand, the interests of the victims of collective damage, and on the other, those of the enterprises, and also 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. 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).

8 Articles XVII.36(1) and XVII.37, Code of Economic Law.
9 Articles 101 and 102, Treaty on the Functioning of the European Union.
10 Article 2262 bis.
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.\(^{11}\)

\( b \) 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.\(^{12}\)

\( c \) 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.\(^{13}\)

## 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.\(^{14}\)

However, the opt-in system is mandatory in two cases:\(^{15}\)

\( a \) 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 on the basis of the following elements:

\( a \) the facts and arguments submitted by the parties;

\( b \) the interest of both the consumers or SMEs and the market;

\(^{11}\) Article XVII.63, Section 1, Code of Economic Law.

\(^{12}\) Article XVII.63, Section 2, Code of Economic Law.

\(^{13}\) Article XVII.63, Section 3, Code of Economic Law.

\(^{14}\) Articles XVII.38, Section 1(1), and XVII.43, Section 2(3), Code of Economic Law.

\(^{15}\) Articles XVII.38, Sections 1(2) and 1/1(2), and XVII.43, Section 2(3), Code of Economic Law.
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) to ensure 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) to protect defendants by avoiding frivolous actions; and

c) if several candidates apply, to enable selection by the judge of the most suitable representative, and to exclude 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.16

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 third-party funding on an 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 Section III.v).

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.

16 Article XVII.40, Code of Economic Law.
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, eight out of the nine class actions undertaken 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. Both by launching actions for collective redress and through activities relating to collective purchase of products and services, 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 (within two months of 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 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 admissibility).

c Litigation phase, which 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.\textsuperscript{17} The purpose of the admissibility phase is threefold and aims at checking:

\begin{enumerate}
\item whether the alleged breach suffered by consumers or SMEs falls within the scope of the action for collective redress (see Section III.i);
\item the status and adequacy of the representative (see Section III.ii); and
\item the efficiency of the action for collective redress compared to individual actions (see Section III.i).
\end{enumerate}

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:

\begin{enumerate}
\item not disputed that all or some of the victims have been compensated; or
\item manifestly clear at first sight (and, therefore, it cannot be disputed) that full payment of the claim had been made.
\end{enumerate}

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

\textsuperscript{17} Articles XVII.42 to XVII.44, Code of Economic Law.
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 Section III.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 in 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 2020) at 1.75 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 Section III.iii). 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.

### 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 Recommendation 2013/396/EU on collective redress of 11 June 2013, many Member States adopted a collective redress mechanism, but as each Member State adopted a slightly different model, the desired goal of harmonisation was not achieved. On 11 April 2018, the European Commission published proposals on the ‘New Deal for Consumers’, which aims to strengthen EU consumer rights and their enforcement in a more harmonised way. As part of the New Deal for Consumers, the Commission submitted a proposal for a directive on

18 Articles XVII.45 to XVII.51, Code of Economic Law.
19 Article XVII.38, Sections 1(2) and 1/1(2), Code of Economic Law.
representative actions for the protection of the collective interests of consumers (the Collective Redress Directive), \(^{20}\) repealing the Injunctions Directive 2009/22/EC, which was considered not to sufficiently address the challenges of the enforcement of consumer law. Although the Injunctions Directive already allows a court or an administrative authority to stop a practice violating consumer rules, the injunctions provided do not give harmed consumers the option of obtaining redress or compensation at the same time. Although compensatory collective redress is already available in 19 Member States, in over half of these it is limited to specific sectors, mainly to consumer claims. Furthermore, 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. \(^{21}\)

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 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 26 March 2019 with a large majority. In November 2019, the Council adopted its general position on the new legislation. On 9 January 2020, the Committee on Legal Affairs confirmed the Parliament’s negotiation position on the new bill, which means that the Members of the European Parliament can now start negotiating with the Council on the final shape that the legislation will take. \(^{22}\)


INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Back in the 1970s, legal commentators in Brazil started supporting class actions as a form of dispute resolution because social conflicts could no longer be handled and settled through 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 action system differs greatly from that in place in the United States.

In 1985, Law 7,347 created a distinct 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 in a constitutional guarantee. Subsequently, the Brazilian Consumer Protection Code of 1990 brought important contributions to the class action 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 towards representing consumers collectively and expediting resolution for recurrent lawsuits involving the common interests of a class.

Although Law 7,347 of 1985 and the Consumer Protection Code are the most salient in the class action system in Brazil, other specific statutes also deal with class action-related issues, in parallel with relevant substantive law. Among these statutes are the Securities Market Investors Protection Act, the Persons with Disabilities Act, the Children and Juveniles Act, the Administrative Misconduct Act and the Elderly Act. In this context, legal scholars say that the Brazilian regulatory framework truly provides a class action system, underpinned primarily by the above-mentioned Law 7,347 of 1985 and the Consumer Protection Code.

Following 35 years of experience in the use of class actions in Brazil, the general belief is that class actions have in that time 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.
II THE YEAR IN REVIEW

In Brazil, 2019 was marked by discussions related to (1) the territorial applicability of class action awards; (2) the question as to who may start enforcement proceedings after a class action is ruled to have legally admissible grounds; (3) the statute of limitations for filing class actions; and (4) the rollout of incidental proceedings for the resolution of same-subject lawsuits under the aegis of the New Civil Procedure Code.4

With regard to the first point, the Superior Court of Justice had already decided in a vast number of cases that the extent of *res judicata* in class actions is determined by the matters for which relief is sought and also by the persons affected, and that the immutability of the effects that a collective judgment produces derives from its *res judicata* and not from the jurisdiction of the court that issued it. In other words, an award granted in a class action can be valid throughout Brazil, without the imposition of any mandatory limitation based on the jurisdiction of the body that granted the award.

However, the Brazilian Federal Supreme Court has decided to further review this point and there may be a change in case law in the near future. The Federal Supreme Court is to hear an extraordinary appeal and decide on the validity of a Superior Court of Justice decision rejecting the applicability of Article 16 of Law 7,347 of 1985, which states: ‘the court decision will have *res judicata* effects *erga omnes*, but only within the limits of the territorial authority of the court that granted the award’. This is a very important discussion that could overturn current Superior Court of Justice case law regarding the nationwide effects of a class action judgment.

With regard to the second point, it is worth noting a very interesting discussion as to who may start enforcement proceedings after a class action is deemed to have legally admissible grounds. In Special Appeal No. 1,758,708/MS, the Third Panel of the Superior Court of Justice will decide whether (1) the Public Prosecutor’s Office has standing to start enforcement proceedings related to awards dealing with homogeneous individual rights of consumers; and (2) such enforcement proceedings toll the statute of limitations for the enforcement of claims by individual consumers.

The Third Panel’s judgment was initiated with a vote from Justice Nancy Andrighi stating that the Public Prosecutor’s Office has no standing to pursue enforcement of an award dealing with homogeneous individual rights in that: (1) individual enforcement seeks to transform a ruling on overall damages into indemnities payable to the persons who suffered them; (2) the standing of victims and their successors pre-empts those set out in Article 82 of the Consumer Protection Code (e.g., prosecutors and associations); and (3) the Public Prosecutor’s Office has only vicarious (subsidiary) standing to pursue collective enforcement. Justice Andrighi also stated that an enforcement proceeding commenced by the Public Prosecutor’s Office would not toll the statute of limitations for individual consumers. The Panel’s judgment was interrupted following a request by Justice Luis Felipe Salomão and will probably resume in 2020.

Another interesting discussion with regard to this topic is whether a non-member can enforce an award granted in a class action filed by an association as a procedural substitute.

In 2019, the Superior Court of Justice held that previous judgments5 from the Federal Supreme Court were not necessarily applicable since they related to situations in which

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5 Extraordinary Appeals Nos. 573,232/SC and 612,043/PR.
associations brought class actions as representatives of their members and therefore only the members of those associations could benefit from the awards. It is a different scenario when associations file class actions as procedural substitutes for all consumers, and the Superior Court of Justice is to decide whether a non-member can enforce an award granted in a class action filed by an association as a procedural substitute. The Second Section of the Superior Court of Justice is currently addressing this matter in a leading case on the subject and will issue its judgment accordingly.  

On the third point, relating to the statute of limitations for filing class actions, case law from the Superior Court of Justice had previously established that a five-year term would apply pursuant to Article 21 of Law 4,717 of 1965. However, in May 2019, the Third Panel of the Superior Court of Justice held that it was necessary to review past decisions revolving around the limitation period. It was then decided that 'there is no procedural term for filing a consumer class action or for the use of a special proceeding since it is not possible to apply the term set out in Article 21 of Law 4,717 of 1965' and that 'the initial date of the statute of limitations for claims revolving around non-contractual illicit acts – such as that currently under scrutiny, consisting of abusive advertising and sale of a product without registration – starts only upon actual knowledge of all elements of injury, damage and extent, in keeping with the theory of actio nata, in its subjective aspect'.

On the fourth point, the incidental proceeding for resolution of same-subject matter lawsuits introduced by the New Civil Procedure Code 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 dispute (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 in the incidental proceeding for resolution of same-subject matter lawsuits.

To date, the Brazilian Justice Council has reported 393 incidental proceedings for resolution of same-subject lawsuits involving consumer law, tort, civil procedure and other subjects. This new proceeding has been praised as an effective addition to the Brazilian system of binding court precedents and it is intended to unclog the Brazilian courts.

Nevertheless, the Brazilian court precedent 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 action system and the Brazilian court precedent system are complementary. Class actions remain an important tool to address threats or injuries to rights and interests that would not qualify for protection via traditional individual actions.

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6 REsp 1,438,263/SP, REsp 1,362,022/SP and REsp 1,361,872/SP.
7 Law 13,105 of 2015.
8 https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shDRGraficos.
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’.

The sole paragraph of Article 81, III 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 or 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.

ii  Commencing proceedings

With regard to the standing to file class actions, unlike US law, Brazilian law opted to expressly indicate which parties have standing to file a class action. Under Article 5 of Law 7,347 of 1985 and Article 82 of the Consumer Protection Code, 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 Professor 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.
Furthermore, the legal standing is disjunctive, which is different from 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’. The standing is also exclusive in that the parties with legal standing are expressly identified in prevailing law.9

The Brazilian legislation has not established mandatory binding effects in a class action (the opt-out system). The rule is that a class action judged to be groundless does not prevent citizens from filing indemnification claims, but if a class action is judged to have admissible 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. Earlier rulings of the Superior Court of Justice had 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 courts10 sided with this opinion that an association could only bring a class action defending its members by way of representation in the proceedings11 under prior express authorisation (either through an individual act or through a resolution made at a meeting, which is a measure not satisfied via a mere generic statutory authorisation).

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’.12 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 a general statutory provision is not enough to legitimise the standing of associations in defence of the rights of their members, thus making it indispensable to obtain the prior express authorisation of the members.

The discussion is far from over, and the limits of the standing of an association to bring class actions are currently the subject of debate in actions still pending in the higher courts.

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10 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.
11 Article 5, XXI of the Federal Constitution.
12 Extraordinary Appeal 612043/PR, Reporting Justice Marco Aurélio, judgment of 10 May 2017, Federal Supreme Court.
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 legality 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 present 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 stay the applicability of the decision until it has been the subject of a future favourable judgment by the Court of Appeal.

Appeals, if any, are heard by a three-judge panel of the Court of Appeal. 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 stipulates 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.13

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

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. 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’. 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 to attorneys’ fees and court costs and expenses, except in cases of proven bad faith’.

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* (the amount 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 also file a class action suit for calculation and enforcement of an award. This option for enforcement by extraordinary legitimate entities was introduced to the Brazilian legal system to prevent the supplier or vendor from escaping the payment of damages arising from injury caused by it in the event that 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 Article 100 of 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’.

v Settlement

In Brazilian law, 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 of the legitimate parties that they execute terms of agreement by which they will abide by legal requirements or else face penalties, with the agreement being 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 doctrine 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’. Hence, according to the majority view emerging from legal doctrine 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 – although without ever entailing a disposal or waiver of substantive rights.

In Brazil, the terms of agreement and consumer collective agreements may be executed out of court, but recognition of these may also be sought from the courts – especially when a class action has already been brought. The judge’s role in recognising a settlement in a class action differs greatly from that 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 in the agreement. The judge only checks the formal aspects of a settlement, such as the parties’ standing, ascertaining that there has been 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, who may file individual lawsuits regardless of the agreement (unless they have expressly opted in). Also, most legal doctrine and court rulings hold that the execution of a settlement is not binding on other parties that have legitimate cause to file class actions to consider 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. However, in contrast to the law in other jurisdictions, Brazilian law does not offer particularly favourable options for foreign claimants and, although possible, cross-border class actions are extremely rare in practice. In fact, in some cases, foreign claimants are even required to post bond when bringing suit in Brazil.

Further, Brazilian courts have jurisdiction only 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 considering and adjudicating upon the same case (and connected cases).

Also in this context, to become enforceable in Brazil, a foreign judgment on a class action must be: (1) final and binding, with *res judicata* effects pursuant to Article 15 of Decree-Law 4,657 of 1942 and Article 5, III of Resolution 9 of 2009 of the Superior Court of Justice; and (2) recognised by the Superior Court of Justice pursuant to Article 961 of the Brazilian Civil Procedure Code. These rules apply in 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 (including Argentina, Venezuela, Uruguay and Paraguay), whereby 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 35 years’ experience in class actions and a well-defined system that serves as a veritable reference for civil law countries 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, in terms of effectiveness, class actions in Brazil are undergoing a crisis, which is mostly due to a misinterpretation of the class action proceeding that has its basis in the ordinary rules of Brazilian civil procedure (which is strongly marked by an individualistic culture).

In this context, the Brazilian higher courts are constantly debating case law, interpreting rules related to class actions and even reinterpreting rules on matters on which they were understood to have already reached a consensus.
Chapter 4

COLOMBIA

Javier Tamayo Jaramillo

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

The Political Constitution of Colombia of 1991, in Article 88, conceived actions aimed at protecting collective interests and rights, and remedying harm, common to a group of people. These actions were developed by Law 472 of 1998 (Law 472), 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, over 20 years have elapsed during which the issues arising from these actions have become evident. Thus, while the initial years were characterised by high expectations generated by the Law’s enactment and by a subsequent boom period, these were followed by abuses of these actions, particularly the highly publicised popular actions. In effect, too many people pursued the economic incentives incorporated by the Law in favour of those whose actions were successful. As a result of this experience, subsequent laws have led to a more settled case law, albeit one still in evolution.

In Law 472, through two mechanisms with apparently similar objectives but diametrically opposed in character, the Colombian legal system provides for the protection of collective rights and interests and the right to compensation for groups of people whose individual rights have been violated.

The first of these mechanisms is the popular action, whereby threats to collective interests are suppressed or prevented, or damage already caused is compensated; the second, the class action, seeks compensation for damage suffered by a number of people. Notably, in the context of individual damage or harm, reference is made to its effects on the patrimonial and extra-patrimonial assets of each individual concerned; inasmuch as class actions, inspired by the Anglo-Saxon model, pursue compensation of individual damage that affects ‘large’ groups of people, these effects will be brought to bear on the matter of the action.

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

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II THE YEAR IN REVIEW

As has already been noted, following the enactment of Law 472, this mechanism began to be used abusively and this situation led the legislature to suppress the economic incentives made available to successful claimants under the Law. The subsequent issuance of Law 1,425 of 2010 eliminated what represented for some a lucrative business in filing series of popular actions, thus leading to the achievement of more obviously laudable ends and controlling the exercise of the popular action mechanism.2

Even more important have been the legislative changes in matters of jurisdiction, particularly in the case of actions directed against a state entity, which are processed by the contentious-administrative courts. In consequence, when Law 472 came into effect, these actions were heard at first instance by the administrative courts of each judicial district and, at second instance, by the Council of State, the supreme court with jurisdiction over administrative issues. This ensured that, during the first years of the Law’s validity, jurisprudential lines were established around the interpretation, application and scope of collective rights, a subject that until then had little development in Colombia. However, in 2006,3 the administrative courts commenced operation, so at first instance claims lodged as popular actions – and, in some cases, also class actions – were filed with these courts, and second-instance knowledge was transferred to the administrative courts of each district, making jurisprudence more diffuse.

In light of these developments, Law 1,285 of 20094 established a mechanism for a review by the Council of State of judgments and some injunctions handed down by the courts in matters within the contentious-administrative jurisdiction, in both popular and class actions. The review seeks to unify jurisprudence in this area and ensure effective protection of fundamental rights, as well as reviewing the legality of judgments in the administrative jurisdiction. However, this mechanism is not always effective because many of these procedures take years to decide, given the caseload to be resolved by the Council of State. In addition, the review is optional, not automatic (much less mandatory), and only proceeds when the judgment is proven to be contrary to what is normally decided by the courts in similar cases or when it is contrary to the established jurisprudence of the Council of State. This has led to few judgments being subject to review.5

Moreover, not all rulings in popular and class actions are subject to review. Rulings that are appealable before the Council of State once the action has been dealt with by the administrative courts, or decisions handed down by administrative judges, are not subject to review. Similarly, the judges of the Council of State do not review matters that generate new debates based on evidence or legality.

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2 In this regard, the Superior Council of the Judiciary, the body in charge of, inter alia, compiling the statistics on popular actions, reported that following the elimination of the economic incentive, popular actions decreased by approximately 60 per cent. See Manjarrés Bravo, Patricia Victoria. ¿Se han transformado las acciones populares con ocasión de los cambios normativos y jurisprudenciales ocurridos en el periodo 2006–2012? Universidad del Rosario, Bogotá, 2013.
Furthermore, rulings in popular or class actions within the civil jurisdiction are also not subject to review and as a result jurisprudence in this area is not consistent.

Notably, although extraordinary appeals to the Supreme Court of Justice (the purpose of which is to unify jurisprudence in civil matters) are clearly applicable to class actions, according to the judgment of 20 September 2018 by the State Council, the applicability of such appeals in relation to popular actions is still subject to debate.

In this context, Article 338 of the General Procedural Code, apparently by mistake, established that the amount of compensation awarded following a conviction in a popular action should not be a consideration when the decision whether to allow the appeal is being made. Subsequently, Article 6 of Decree 1,736 of 2012 corrected the aforementioned Article, indicating that extraordinary appeal before the Supreme Court of Justice was ruled out for group actions exclusively, and did not in fact include popular actions. However, the ruling of 20 September 2018 issued by the State Council declared Article 6 of Decree 1,736 void, restoring Article 338 to its initial regulatory status. Thus, there is currently no certainty about whether extraordinary appeal is possible in relation to popular actions, but this question is likely to be decided by future decisions of the Supreme Court of Justice.

It is significant that, for more than 20 years, among the most relevant and frequently discussed issues in collective actions have been those related to the protection of the environment, including the ruling on the pollution of the Bogotá River in Judgment 01-479 of 25 August 2004; access and the services provided for the disabled in public places; access to and provision of domestic public services; and, finally, administrative principles and rules of conduct in state contracting.

III  PROCEDURE

Having already presented a general outline of the collective actions available in Colombia, this section deals with the corresponding procedures provided by law for these actions, and exposes some of the practical problems that have arisen during the years in which Law 472 has been applied.

i  Types of action available

The Colombian legal system provides two types of collective action, the choice of which depends on the object of protection pursued. Thus, if what is intended is the safeguarding and protection of collective interests and rights,6 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. It follows therefore that the determining factor will be the damage caused.

Damage that intangibly affects the quality of life of an entire community is collective damage, and 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, qualifies the creation of a group; or victims who suffer massive damage; and compensation in these cases can be claimed in the same judicial proceedings, 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 the class action as a theoretically more flexible procedural mechanism for the protection of the affected group’s interests. The word ‘theoretically’ is used because, in practice, claimants do not always obtain the benefit of the flexibility that class actions are meant to provide.

Although the object of protection of the actions in question is different, nothing prevents the same event leading to the initiation of both types of action; for example, when fishermen fall ill or are deprived of the means of their livelihood because of the contamination of a river. It has already been mentioned that a common theme in popular actions is environmental damage, and in a case such as this protection of the healthy environment would be requested through a popular action, while the individual damage caused to the health and patrimony of the fishermen would be the object of a class action.

Notwithstanding this, and as we have argued previously, although Article 46 of Law 472 establishes the award of damages as the exclusive purpose of a class action, it would
be absurd if, in the course of a class action for massive damage already caused, the judge were to find a latent threat of new individual damage or aggravation of the existing damage in the future and could not order the suppression of this threat on the grounds that the Law created the class action exclusively for indemnification purposes. A correct interpretation of this Article would understand class actions as being 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.  

In addition to the nature of the damage, certain procedural elements allow the differentiation of popular actions from class actions, such as the time frame for initiation of the action, the individuals with standing to bring the action, the passive subject of the action, the precautionary measures available, the options for settlement agreements between the parties and their execution, and the judgment and its execution.

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

As with popular actions, in class actions the defendant is required to be responsible. This implies the verification of civil liability, because without liability, compensation is not deemed appropriate. It follows from this that popular action proceedings will deal with either non-contractual civil liability or contractual civil liability, according to the elements of one or other liability regime.

**ii Limitation periods**

In terms of popular actions, the current procedural rule establishes that: ‘The Popular Action may be promoted during the time that the threat or danger to the collective right and interest persists.’ This implies that when the action involves a request that a latent or continuous threat of damage to collective or individual interests be eliminated, it is not extinguished by...
the passage of time. If repair or compensation of the damage already caused fails to prevent the production of new damage, the action will be subject to the terms prescribed for ordinary actions in the legal system.

In relation to class actions, Article 47 of Law 472 states that: ‘Without prejudice to the individual action corresponding to the compensation for damage, the class action must be promoted within two years of the date on which the damage was caused or the injurious action causing 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, each member of the group can still file an individual action, which will be valid in accordance with the terms of expiration and prescription applicable within the jurisdiction concerned.

In addition, in accordance with subparagraph (h) of Article 164(2) of Law 1,437 of 2011, there is an important exception to the previous expiration rule in administrative matters: ‘If the damage caused to the group comes from an administrative act and the action is intended to void the act, the request must be submitted within the term of four months, counted from the day following the communication, notification, execution or publication of the administrative act.’

### iii Commencing proceedings

With regard to legal standing in popular actions, Article 12 of Law 472 provides that every citizen and member of the community whose collective interests are harmed or threatened, whether a natural or a legal person, can file a popular action. Meanwhile, for class actions, Article 48 of Law 472 provides that every citizen whose particular interests have been violated can file a class action on behalf of a group of 20 or more victims harmed by the same act, for individual compensation of the damage caused.

It should also be noted that only one popular action at a time can be brought against a particular defendant in respect of a particular claim, under penalty of consequent litigation.

In relation to class actions, Article 48 of Law 472 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 delimitation of the affected class. This person must file the claims on behalf of the whole group, not just for those victims who have granted power of attorney.10

Once the action has been filed by at least one member of the group, the effects of the process extend to all members included in the class, with the sole exception of those affected who have decided to exclude themselves from the group expressly, and who retain the option to sue separately and individually.11 These conditions place the class action in Colombia in the category of an opt-out action.

### Defining the class

Limiting the class is where the greatest disadvantages of class actions in Colombia lie because, once the plaintiff has been identified and presented in the lawsuit, there is no specific law establishing procedural requirements for the definitive identification of the class. It is also

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10 Colombian Constitutional Court. Judgment C-116-08 of 13 February 2008, PJ. Dr Rodrigo Escobar Gil.
important to consider that, in practice, judges often ignore the criteria for identifying the class and end up ruling on the case without establishing a clear delimitation. In many cases, this situation leads to the emergence of doubts about the effects of the proceedings and the judgment in relation to 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 requisites contained in Article 53 of Law 472.

Delimitation of the class is important because failure to do so would make the distribution of compensation prior to the judgment unmanageable and would open up the question of compensation to discussion by people who had not become part of the process and whose membership in the class action could be debatable. The non-determination of the class in the case of an acquittal could also result in avoidance of the effects of *res judicata*. Finally, an inadequate delimitation of the class could impede the settlement process, as there would be no clarity about who should be called to the settlement and there would be insufficient guarantees to ensure closure of the event in a definitive manner for the defendant.

iv  Procedural rules

*Effects of class exclusion*

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

*Interrogation of the parties*

In 2006, in its capacity as the supreme court with jurisdiction over administrative issues, the Council of State issued a judgment stating that the interrogation of plaintiffs was incompatible with class actions. According to that court, the case at hand sought to clarify the common cause of the damages claimed by the group, which comprised both those alleged victims recognised as members of the class and alleged victims not yet recognised as members of the group.

This position was set aside for several years, during which interrogation of the parties was a common part of legal practice. However, in 2016, the Council of State issued a new decision disallowing interrogation of the plaintiffs of a class action, and definitively excluding interrogation of plaintiffs from administrative litigation.

In contrast, the Supreme Court of Civil Justice has established no jurisprudence regarding the interrogation of the parties. Therefore, interrogation of the members of the class remains a common practice in litigation within the civil jurisdiction.

Finally, it should also be noted that interrogation of the parties – as a means of proof – is not specifically excluded from class actions statutorily. In fact, since class actions seek to redress the individual harm suffered by the members of the class, interrogation is an adequate means to demonstrate whether the damage concerned has affected each member of the group individually.

*Effects of the judgment*

The final judgment in a class action has *res judicata* effects against all those involved, and it benefits all 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 are therefore not affected by the decision.
Similarly, an acquittal may jeopardise the rights of all the members of the class, except those who were expressly excluded in a timely manner. Additionally, a possible violation of the right of defence arises for those who did not expressly exclude themselves from the class but did not become part of the class action either, because membership of the class results in their being linked with an unfavourable ruling in a lawsuit in which they did not even participate.

**Presiding judge**

Both popular and class actions are subject to the jurisdiction rules to determine which judge is competent. The Colombian legal system contemplates a civil jurisdiction and a contentious-administrative jurisdiction. In simplified terms, it could be said that the jurisdiction will depend on whether the litigation concerns a public function or a state entity. Therefore, collective actions will be brought before civil judges or administrative judges, depending on which jurisdiction is called to review the matter in dispute and the parties involved.

**Applicable regulations**

The procedural rules governing collective actions are enshrined in Title III of Law 472. In the event of regulatory gap, Article 68 in Title III provides for referral to the Code of Civil Procedure – since replaced by the General Procedural Code – to govern conflicts in the sphere of private law.

For collective actions brought in the contentious-administrative jurisdiction, some jurisprudence and legal doctrine have held that popular and class actions must be subject to the residual rules of the Contentious-Administrative Code. The plurality of these laws can create confusion regarding the procedural rules applicable to a collective action; this may end up affecting the right of defence of the parties or may bring about legal uncertainty.

**v Damages and costs**

**Costs recovery**

For both popular and class actions, the legal system permits the parties to agree with their lawyers the fees that will be charged for the representation of their interests in the process. It must be specified that, in Colombia, contingency fee agreements are permitted, as are other remuneration mechanisms for services whose agreement and content are lawful. There is, therefore, no special regulation or prohibition regarding the remuneration of the trial lawyer.

Anyone can file a popular action without the need for the presence of a qualified lawyer, so interested parties can access the courts directly with the intention of protecting the interests of the community.

**Tort compensation**

As a rule, class actions in Colombia are predicated on the award of monetary compensation in favour of the plaintiff. In these actions, the damage that can be compensated corresponds to the damage that the plaintiff tries to prove in the process, in relation both to the damage of the group and to the individual damage of each member of the class that becomes part of the proceedings. Traditionally, the award of damages has been governed by the limits on

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12 Law 1,437 of 2011.
compensation for non-pecuniary damage recognised in case law and applicable to liability proceedings. As far as damage to property is concerned, compensation for the damage that can be proven within the proceedings will be recognised, if every element of tort law has been proven.

Compensation imposed in the class action judgment

The final judgment in the class action must stipulate 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 ensure suitable adequate management of the resources.

vi Settlement

Law 472 anticipates the parties in collective actions reaching an agreement to settle the matter before the collective action begins.

In the case of a popular action, Article 27 of Law 472 orders the holding of a compliance hearing, which is decreed ex officio by the judge, and which the parties are obliged to attend to sign 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. If agreement is reached, the agreement is then signed and the judge reviews it and approves it in a judgment. If the trial judge considers the signed agreement to be incompatible with protection of the collective right, or that it does not comply with current regulations, or that for any other reason it is not appropriate, the agreement can also be rejected in the judgment.

Finally, if the compliance agreement is approved, it becomes res judicata. In special cases, such as environmental damage owing to contamination, the agreement may be problematic because it can close the door to future actions against a defendant who continues polluting. However, the Constitutional Court has anticipated this risk by excluding res judicata effects in cases where the collective assets remain or will potentially be at risk again as a result of new conduct by the defendant.

With regard to class actions, according to the applicable regulations, early termination of the proceedings can be achieved through a settlement hearing or a transaction between the parties and, according to the regulations of the General Procedural Code, this also could be said to conclude the class action lawsuit. Regarding each of the mechanisms for early termination of the proceedings, the following are of note.

A 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 res judicata effects. Once the agreement is signed, the judge will order its publication in national journals, so that the members of the class who did not become part of the proceedings may present themselves to prove their eligibility and claim the corresponding weighted compensation.

Although Law 472 makes no provision regarding the admissibility of the option of transaction and withdrawal from the class action, there is nothing to prevent the early termination mechanisms of the proceedings from being applicable by reference to the General Procedural Code. In relation to the transaction, we believe that it would have to be governed by
the rules provided in law regarding settlements, except that there is no mandatory settlement hearing. There is also doubt as to whether, once the transaction contract is concluded, it must be approved by the presiding judge, because the law is silent on this.

Concerning withdrawal from the action, also applied by reference to the General Procedural Code, many doubts arise about prematurely ending a class action, especially in terms of its effects on those members of the class not present but who would be affected by what is decided in the proceedings. Finally, to expand on what was mentioned previously, inadequate identification of the class generates conflicts in practice, because the lack of clarity as to the potential claimants or members of the class makes settlement impossible.

IV CROSS-BORDER ISSUES

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

In cases in which issues of international law are discussed, Colombian law does not establish restrictions on who can bring class actions in other jurisdictions. Cases that are brought before the judges of foreign legal systems must be governed by the applicable law of the sovereign state in question.

Although in practice the application of foreign judgments in class actions is unlikely, for a foreign judgment in a class action to have effects in Colombia, Colombian law requires the application of the appropriate exequatur, together with 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 initiation of the proceedings 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 fall exclusively on a matter reserved to Colombian judges;
e. not concern an existing process or enforceable judgment by Colombian judges on the same matter; and
f. meet the exequatur requirements.

V OUTLOOK AND CONCLUSIONS

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

Furthermore, judgments are imprecise and insufficient if, after 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 effectiveness, since, as claims evolve, lawsuits are filed by small groups of injured parties, which leads to enormous uncertainty regarding the res judicata effects of the first lawsuit.

Finally, for as long as there continue to be no clear mechanisms to identify the class in space and time, class actions will not guarantee the victims damages of any significance.
INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

The class action scheme under Danish law entered into force on 1 January 2008. It was part of the largest reform of the Danish judicial system since 1919. The class actions regime has not been significantly amended since it was introduced.

The Danish class action regime is a 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 a class action with the ordinary courts through a request for approval of a class action and appointment of a class action representative as 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 their 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. In contrast to, for example, US law, Danish law does not provide 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, for those who have had the greatest losses, by initiating individual litigation.

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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 prevent others from initiating separate lawsuits.

II THE YEAR IN REVIEW

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

To our knowledge, no empirical study is available regarding the mechanisms that result in parties opting to initiate a class action instead of following other procedures (such as filing individual claims) or abstaining from making a claim. It is the general impression that an increase in investor-related cases has been seen over the past 10 years. This may be because a number of foreign companies and organisations have been increasingly active in 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 instructs the representing lawyer. In cases of this kind, however, the financing company is not formally a party to the proceeding. At the moment, the majority of these investor-related cases are not being heard as class actions, but it remains to be seen whether this trend will change.

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. The decisions generally set out clear distinctions between cases in which individual factual or legal assessments are required (and which are not eligible to be heard as class actions) and cases in which the facts and legal assessments are of an identical nature (and where class actions may be the best option depending on other available options and the number of claimants).

In 2019, the Eastern High Court rendered a decision in the class action concerning the implementation of the Danish digital land-registration platform. The Eastern High Court ruled in favour of the defendant, the Danish Court Administration, which is responsible for implementing the platform. The implementation of the digital system resulted in a significant slowdown in the processing of land registrations. The decision has been appealed to the Supreme Court.

III PROCEDURE

There is a substantial difference between litigating in Denmark and in common law countries such as England and the United States. 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:

- the claims are uniform (i.e., not necessarily identical, but arising from the same legal and factual basis);
- a class action is believed to be the best way to hear the claims;
- the class members can be identified and notified in an appropriate way; and
- 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.2

Regarding the requirement that a class action must be the best way to hear the claims, the court assesses the advantages and disadvantages of a class action compared to other legal procedures available.3 In the court's assessment, a number of considerations are taken into account, including the advantages of a 'package solution' and the 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 explained 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

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2 See pages 214–218 of the White Paper prepared by the Commission for the Administration of Justice in connection with the preparation of the bill on the introduction of group litigation into Danish law.
3 See Section I for other types of group litigation available under Danish law.
being responsible for conducting the action on the plaintiff’s side. The AJA provides which individuals can be appointed as class action representatives.\(^4\) The class action representative has the authority to instruct an attorney, decide what arguments are to be made, etc.

Importantly, the class action members are not, as such, competent to instruct the representative. However, in recent years, the prevailing method of selecting a class action representative has been to form an association established and funded by class members with the purpose of acting as the 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 that have opted in request the court to do so. 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 tried at 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 judgment was rendered at first instance by the Eastern High Court on 27 May 2019. The case is under appeal to the Supreme Court. The *Amagerbanken* class action was initiated in 2013 and was decided at first instance in 2018 and has not been appealed. 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 by the Supreme Court in 2002.

### 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. However, the rules do not apply in:

\(\text{\textit{a}}}\) marriage and parental rights cases;

\(\text{\textit{b}}}\) paternity cases;

\(\text{\textit{c}}}\) guardianship cases;

\(\text{\textit{d}}}\) review of administrative detention;

\(\text{\textit{e}}}\) review of decisions on adoption without consent;

\(\text{\textit{f}}}\) acquiring judgment for declaration of nullity and voidance of documents;

\(\text{\textit{g}}}\) acquiring judgment for confirmation of ownership; and

\(\text{\textit{h}}}\) private criminal cases.

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\(^4\) See Section 254c(1) of the AJA. Other requirements apply, such as the financial ability to represent the class action members. The Danish Consumer Ombudsman is currently the only public authority with statutory authorisation to be elected as the class action representative. As a consequence, only the Danish Consumer Ombudsman can be elected as the class representative in opt-out class actions as set out in Section 254e(8) of the AJA.
There are no particular limitation periods of a procedural or substantive nature applicable to class actions. In matters against public authorities for annulment of administrative decisions, particular limitation periods for filing court actions will apply depending on the statutory provisions of the relevant area of law.

**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 is eligible to be appointed as the 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 court actions.

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 comments on this point. Often several pleadings are exchanged and hearings can take place regarding whether to approve the class action, the appointment of the representative and the frame or scope of the action.

As an element in deciding whether to approve the class action, the court may limit the scope of the action (for the claims to be sufficiently identical), it 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 the court may also order individual class members to provide security for costs relating to the class members’ own claims. 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 period pertaining to the claims, specific criteria to be fulfilled by those who wish to participate in the class action, etc.). Court hearings on the question of approval of the class action are often required. A defendant will normally be allowed to comment on the approval of (1) the class action, (2) the suggested class representative, and (3) the framework for the action.

The parties may also ask for permission to have the case handled by either three judges in the district courts, by the high courts, or by the Danish Commercial and Maritime High Court. Permission will depend on a discretionary decision by the district court, which will only be granted if certain conditions are satisfied. If the case is referred, the receiving court will assess whether it agrees with the referral.

If the 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 (i.e., 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 United States, as a class in the United States 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 who do not want to participate in the class action from initiating separate legal actions.

In addition to the opt-in class action, the court may, upon request from the class action representative, decide that the group action shall cover all members who have not opted out (the opt-out model). The opt-out model is subject to two conditions. First, the action must relate to claims whose small size makes it evident that they would not normally be expected to be processed in individual proceedings. The preparatory remarks to the bill on the introduction of class actions state that 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 by law can be appointed as the class 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 the claims fulfil the criterion of being sufficiently uniform for the case to be tried as a class action. Although the decision on whether to approve the case as a class action depends on the specific circumstances of the case, the court is generally more likely to approve a case of this nature as a class action if:

- the claims may be said to have the same factual and legal basis; and
- 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 experience with investments, the plaintiff’s educational and professional background, and the size of the 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. See also the previous decisions in *BankTrelleborg* and *Roskilde Bank*. The *BankTrelleborg* cases are referred in more detail in Section III.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 alleged misrepresentation by an insurer in connection with an offer for certain members to change their pension plans. It was envisaged that the class would encompass both claimants still working and others about to retire, as well as already retired individuals. The Eastern High Court ruled that the claims were not sufficiently identical.

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5 See Section 254e(8) of the AJA.
6 See the decision in the weekly periodical *Ugeskrift for Retsvæsen* 2019, page 962.
7 See the unpublished Eastern High Court decisions of 21 June 2012 in cases 1198/11 and 1255/11 and the published *Roskilde Bank* case in the weekly periodical *Ugeskrift for Retsvæsen* 2016, page 1,014.
8 See the published Eastern High Court decision in *Ugeskrift for Retsvæsen* 2018, page 3,361.
The *AP Insurance* case decision is therefore consistent with the position that class actions will be dismissed if any of the criteria cannot be met. Alternatively, the court may scope the class action in such a way that the criteria are met; however, doing so may also exclude potential claimants.

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 recognize standardised mathematical methods of computing losses. In securities cases, an important element with regard to the computation of losses is whether a plaintiff kept or sold any of its securities following 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.

### iii Procedural rules

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

Court involvement in class action procedures can, however, be held to deviate from involvement in other ordinary civil litigation proceedings, since the mere approval of the action requires the court to rule that a 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 hearings of actions and refer actions to other courts where feasible. However, the courts have not shown increased activity in these areas.

The courts are also more involved with the substance in class actions than they are in other cases at a non-ruling level, as the courts have 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 requirement to encompass several claims, class actions can generally be expected to have a longer duration than other cases.

Issues regarding whether to bifurcate proceedings and, for example, split liability and quantum are likely to occur in class actions, but these will be of a specific nature, depending on each case. Such splitting of proceedings is 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 from those in ordinary civil cases. In the White Paper prepared in connection with the proposal of the bill on the introduction of class actions, the following was stated: "The Commission for the Administration of Justice 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."[^9]

[^9]: Our translation of page 24 of the White Paper prepared by the Commission for the Administration of Justice in connection with the preparation of the bill on the introduction of group litigation into Danish law.
Not many class action cases have resulted in an award of damages. In the only class action case decided by the Supreme Court to date, *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 with the status of a limited liability company, and for which a prospectus had been issued. Subsequently, the shares were all redeemed by the majority owner, Sydbank, as a measure to save BankTrelleborg, which would have gone bankrupt otherwise. The court cases involved four different lawsuits (one individual action and three class actions). *BankTrelleborg I* (one of the class actions) concerned alleged liability due to illegal compulsory redemption by 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 BankTrelleborg through a global offer. The other class action encompassed claimants with various backgrounds who had subscribed for shares over a certain period, and both private individuals and companies could join the action. The Eastern 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 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 shareholders’ damages.\(^{10}\) The approved damages consisted of the difference in 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 the processing of damages actions concerning violations of competition law applies in follow-on damages cartel cases and sets out special provisions of both a procedural and a substantive nature.\(^{11}\) According to the act, the Consumer Ombudsman is also authorised to act as the class representative.

Danish lawyer fees are governed by Section 126 of the AJA. While no-win-no-fee arrangements are allowed, genuine success fees such as a mere percentage of a claim are not allowed.

### Settlement

For filed and approved class actions, a settlement requires court approval.\(^{12}\) The court shall assess whether the settlement is fair. There are no public decisions on approved settlements.

With a reservation for the limited possibility of issuing a class action and subsequently having that action approved as an opt-out class action, a settlement will bind all class members that have joined the class action (i.e., that have opted in) unless they specifically decide to opt out of the settlement. Those class members who do not accept the settlement will, within certain time limits, be entitled to continue their claims as individual civil cases.\(^{13}\)

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\(^{10}\) See the published decision in *Ugeskrift for Retsvæsenet* 2013, page 1,107.

\(^{11}\) See Act of Parliament No. 1541 of 13 December 2016.

\(^{12}\) See Section 254h of the AJA.

\(^{13}\) See Section 254g of the AJA.
IV CROSS-BORDER ISSUES

The Danish class action rules may give rise to several cross-border issues. However, to date, no ruling involving such an issue 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(2) of the AJA. That provision states that the binding effect in an opt-out action only applies to parties that could have been sued individually in Denmark in relation to the substance of the matter at the time the class action was initiated.

The provisions allowing for orders regarding securities for costs (i.e., to counter the risk of circumventing costs awards) 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.¹⁴ In an exceptional Supreme Court decision from 2018, however, the Court ruled that even a Danish-domiciled claimant could be ordered to provide security for costs and, more particularly, where the claimant party had acquired the claim in question and had been specifically established as a 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 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

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

The decision in the class action filed against the Ministry of Justice and the state-owned broadcaster Danmarks Radio is the next expected substantive decision in a class action case. On 25 March 2019, the Eastern High Court decided to refer the case to the Court of Justice of the European Union for a preliminary ruling.

Funding of class actions

Mass litigation may be funded in a number of ways. Specifically, the predominant method seen for class actions in Denmark to date has been to set up a separate association to act as the class action 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 be a prerequisite for joining the class action. In the Trelleborg cases, the Eastern High Court briefly questioned whether such a criterion could be permissible but accepted it in those specific cases, making reference to the fact that the defendant had not objected.

¹⁴ See Section 321 of the AJA.
As another option for funding class actions, the emerging trend for litigation funding should be mentioned.

Class actions – primarily in consumer cases – may also benefit from free legal aid, with 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, Peter Wickham and James Lawrence

I  INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Group litigation has been available in the English 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. However, the past five years, in particular, have seen the group litigation sector undergo rapid development and expansion. One of the catalysts for this growth was the introduction of true opt-out class actions, as lawyers from the United States (US) would recognise them, in the context of certain competition law claims. Crucially though, developments have not been limited to the competition sphere; a combination of judicial enthusiasm, and growing interest from the claimant bar and litigation funders, has meant that class actions have now become an attractive and feasible means of redress across a variety of sectors. These developments, should they continue, may well make England one of the most attractive jurisdictions in which to commence group litigation in the near future.

II  OVERVIEW OF PROCEDURAL OPTIONS

The regimes available for English class or group actions broadly fall into two categories: (1) the opt-in regime, where the claim is brought on behalf of those (and only those) claimants who are identified in the proceedings and authorise the claim to be brought on their behalf; and (2) the opt-out regime, where the claim is brought on behalf of all those who fall within a defined class of claimants (unless they take positive steps to opt out), and there is no need for the individual class members to be identified or to authorise the claim to be brought on their behalf.

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1 Camilla Sanger is a partner and Peter Wickham and James Lawrence are associates at Slaughter and May. The authors would like to thank Charlotte McLean 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, although for the sake of convenience certain of those individuals 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.
i The opt-in regime – group litigation orders
A group litigation order (GLO) may be sought under Section III of Part 19 of the Civil Procedure Rules (CPRs). A GLO provides for the case management of claims that give rise to common or related issues of fact or law (referred to as the GLO issues). GLOs are opt-in actions, which means that individual claimants are not included in the action unless they take positive steps to join. Since the regime was introduced in May 2000, there have been over 100 GLOs made across a wide variety of cases, including environmental claims, product liability claims, tax disputes, claims relating to financial investments, claims relating to data breaches, and shareholder claims. Both the amounts in dispute and the number of claimants have varied. GLOs are fairly popular among claimants, compared to representative actions (considered further below) because of the simpler procedure and lower standard of commonality required between class members.

ii The opt-out regimes – representative actions and collective proceedings orders
There are two types of opt-out actions available in England: (1) representative actions; and (2) collective proceedings orders (CPOs).

Under CPR 19.6, a claim may be commenced or continued by or against one or more persons as representatives of any others who have the ‘same interest’ in the claim. The representative action proceeds on an opt-out basis as there is no need for the represented class to be joined as parties to the action or even to be identified on an individual basis. However, the court’s permission is needed to enforce a judgment or order against anyone who is not a party to the action. Although the representative action procedure can be used for any type of action (unlike the CPO procedure, discussed below), the regime has not been widely used, in large part because of the restrictive manner in which the same-interest requirement has been interpreted by the courts. Nonetheless, recently the Court of Appeal allowed a claim to proceed under CPR 19.6 in *Lloyd v. Google LLC* [2019] EWCA Civ 1599 (*Lloyd* – discussed further below), which may indicate a change in the courts’ attitude towards the representative action regime.

The other opt-out mechanism available to litigants in England is the collective proceedings regime. The collective proceedings regime is relatively new, having only been introduced by the Consumer Rights Act 2015 (CRA), by way of amendment to the Competition Act 1998 (CA). The CRA establishes a US-style class action regime in English law for the first time, although currently only for private competition litigation. Under a private competition action, a CPO is sought from the Competition Appeal Tribunal (CAT), which, if granted, then determines the scope of the class that will be bound by any subsequent judgment.

Prior to the CRA, there had been a specific opt-in procedure for private competition law claims, although this was deemed to have been too restrictive in scope. Given the nature of competition law claims, namely where the loss to the individual is small but the potential class is wide, this opt-out regime seeks to provide the collective redress that is considered imperative for effective remediation. Efforts have been made to introduce similar collective redress mechanisms in other sectors. In November 2008, the Civil Justice Council

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4 CPR 19.10. English civil procedure is governed by the CPR and supplementary practice directions (PDs). These can be found, with commentaries and interim updates, in *The White Book* published by Sweet & Maxwell.

recommended that the reforms that led to the collective action regime under the CRA should lead to a generic collective action available for all civil claims on an opt-in or opt-out basis. However, this suggestion was rejected by the government in favour of sector-by-sector reform where required. Only one attempt to extend the opt-out regime beyond the competition sphere in this way has since been suggested – 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. Nonetheless, 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 procedure remains of particular interest as it may possibly be a harbinger of future broader, or sector-specific, class actions in England. The Supreme Court’s decision in Walter Hugh Merricks CBE v. Mastercard Inc and others (Mastercard)\(^6\) (discussed below) is likely to be integral to the perceived success of the CRA regime, and consequently the likelihood of the regime being expanded beyond the competition sphere.

In addition to the three regimes described above, the courts are also able to consolidate proceedings and manage claims by multiple claimants together, if it is felt that it would be convenient to do so, by using ordinary case management powers.\(^7\) Although this inherent jurisdiction is nothing new, the courts have recently demonstrated an increasing willingness to use such powers to manage large and complex cases. As detailed further below, the courts are using case management powers to manage significant group action claims against Vedanta Resources plc\(^8\) and BHP Billiton Plc.\(^9\)

In all class or group actions, regardless of the procedural form they take, the courts must seek to ensure that each case is dealt with justly and at proportionate cost. This is known as the overriding objective.\(^10\)

III  THE YEAR IN REVIEW

The past 12 months have seen several significant developments in relation to each of the forms of class and group actions outlined above.

i  Opt-out class action proceedings

The English courts have continued to deal with issues arising from cases where the opt-out class action procedure for competition cases has been used.
England and Wales

Mastercard

Filed on 8 September 2016 with the 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)). The claim followed on from the finding of the European Commission 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. Upon Mr Merricks’ appeal, the Court of Appeal considered for the first time whether it had jurisdiction to hear an appeal against the CAT’s refusal to grant a CPO, finding that it did have such jurisdiction provided a point of law was raised.

In a judgment handed down on 16 April 2019, the Court of Appeal reversed the CAT’s decision. In the most important decision for the class action regime to date, the Court found that: (1) the proper standard for evidence for the proposed class representative (PCR) is no higher than a ‘real prospect of success’, so the methodology proposed by the PCR for establishing loss was sufficient for the CPO stage in the proceedings; (2) aggregate damages need not be proposed to be distributed on a compensatory basis (as had been envisaged by the CAT); and (3) loss does not need to be established through calculating individual loss. The Court of Appeal also held that refusal to grant the CPO would be likely to mean that no follow-on proceedings would succeed, given that the small sums involved for each individual would make individual litigation impractical, so there were strong policy reasons for granting the CPO. Mastercard has appealed to the Supreme Court and the appeal will be heard in May 2020.

The Supreme Court’s decision will be fundamental to the future of opt-out class actions in England (a number of which have been stayed pending the outcome of Mastercard) because it will provide authoritative guidance on the legal framework for certification that will apply to all future actions. The Supreme Court will need to consider the various legal questions that arise from the contradictory decisions of the CAT and the Court of Appeal in light of the policy considerations that underpinned the introduction of the collective proceedings regime. The opt-out regime was introduced to provide protection to, and enable more effective collective redress for, businesses and consumers in competition cases. However, at the same time, the legislature decided that strong safeguards were needed to ensure that proposed class actions would be subject to appropriately vigorous scrutiny to ensure that

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11 Dorothy Gibson v. Pride Mobility Products Limited (Case No. 1257/7/7/16). 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.
businesses are not exposed to costly and reputationally damaging claims that are frivolous and unmeritorious. Whether the Supreme Court agrees with the CAT or the Court of Appeal as regards the correct legal approach to certification will be vital to the other opt-out class action cases that are progressing through the CAT (discussed further below), as well as to the overall success of the CRA regime.

The discussion by the CAT in Mastercard regarding 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: (1) it could be terminated by the funder such that the applicant would not be able to pay the defendants’ costs, if ordered to do so; (2) its liability was limited to £10 million; and (3) its terms gave rise to a conflict of interest on the part of the applicant. The CAT rejected grounds (2) and (3) but accepted ground (1). 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 support of this kind), it also highlights the potential challenges such funding arrangements might face. However, the scope of ground (1) now seems likely to be of limited application in light of subsequent proceedings before the CAT (as discussed immediately below).

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

The Trucks Applications were the third and fourth follow-on claims to be brought pursuant to the new collective proceedings regime.

The Road Haulage Association Limited v. MAN SE and others (Road Haulage)\(^{12}\) CPO application has been brought under the opt-in collective proceedings regime, while the UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and others (UK Trucks)\(^{13}\) CPO application has been brought as opt-out collective proceedings at 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 engaged in collusive arrangements on pricing. 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. To date, over 10,000 members have signed up to the Road Haulage proceedings,\(^{14}\) although 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, and also suggested that there was nothing under the collective proceedings regime that prevented two opt-in proceedings being certified for the same infringement. This raises the possibility that both the UK Trucks and Road Haulage applications could be certified as opt-in proceedings, potentially allowing claimants to choose between the two proceedings (although this will depend on how the class is formulated). However, the applications have been stayed pending the outcome of the appeal in Mastercard.

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12 Road Haulage Association Limited v. Man SE and others (Case No. 1289/7/7/18).
13 UK Trucks Claim Limited v. Fiat Chrysler Automobiles N.V. and others (Case No. 1282/7/7/18).
14 http://bfff.co.uk/record-numbers-join-rha-truck-cartel-claim.
In the meantime, the CAT has dealt with preliminary issues, including in relation to the PCR’s third-party litigation funding arrangements. In a judgment published on 28 October 2019, the CAT held that the funding arrangements entered into by the applicants in both the applications do not provide grounds for refusing to authorise the PCR. The CAT crucially found that the funding arrangements, pursuant to which the funder is paid by reference to the amount of damages recovered, were not damages-based agreements and so not subject to the Damages-Based Agreements Regulations 2013, and therefore were not unlawful. The CAT also rejected the respondents’ concerns regarding the level of adverse costs cover, finding that it is adequate that the PCR has a level of adverse costs cover sufficient for at least a significant part of the proceedings.

The parties must now await the decision in Mastercard. In the interim, it is unclear how the courts will manage the different claims, as proceedings brought by individual claimants have now made significantly more progress than the CPO applications.

Justin Gutmann v. First MTR South Western Trains Limited and another, and Justin Gutmann v. London & South Eastern Railway Limited (together, the Trains Applications)

The first stand-alone claims have also now been brought under the opt-out collective proceedings regime were 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. As with the Trucks Applications, the CAT has decided to stay the CPO application pending the Mastercard decision. Unlike the other claims mentioned above, the Trains Applications will need not only to overcome the hurdles detailed above to obtain a CPO, but also to demonstrate a breach of the underlying competition law. The other CPO applications that have been brought to date are follow-on actions, meaning that a breach of competition law has already been established and the claims follow on from the infringement decision. 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.

Michael O’Higgins FX Class Representative Ltd v. Barclays Bank PLC & Others, and Phillip Evans v. Barclays Bank Plc & Ors (together, the FX Applications)

The FX Applications are opt-out follow-on damages claims arising out of the European Commission’s decisions adopted on 16 May 2019, which found that six banks had engaged in two cartels in the spot foreign exchange market for 11 currencies. The Michael O’Higgins FX Class Representative Ltd v. Barclays Bank PLC & Others (O’Higgins) and Phillip Evans v. Barclays Bank Plc & Ors (Evans) applications were filed on 29 July 2019 and 11 December 2019 respectively.

The unique point in the FX Applications is that this is the first time that competing opt-out collective proceedings have been filed in the UK. Consequently, the claims raise novel questions as to how competing applications should be managed efficiently and fairly, and the considerations that the CAT should take into account when deciding which claim

15 Respectively Justin Gutmann v. London & South Eastern Railway Limited (Case No. 1305/7/7/19) and Justin Gutmann v. First MTR South Western Trains Limited and Another (Case No. 1304/7/7/18).
16 Respectively Michael O’Higgins FX Class Representative Ltd v. Barclays Banks PLC & Others (Case No. 1329/7/7/19) and Phillip Evans v. Barclays Bank Plc & Ors (Case No. 1336/7/7/19).
is the most suitable. At a case management conference in the O'Higgins application on 6 November 2019, the CAT made some remarks that indicated how it would approach these issues, namely: (1) where there are two opt-out CPO applications that relate to the same subject matter, only one can prevail; and (2) in assessing which application should prevail, the CAT will engage in a comparative exercise.

The FX Applications have been stayed pending the appeal in Mastercard, but a joint case management conference was held on 13 February 2020 to consider case management issues pertaining to both applications and, in particular, whether the question of which class representative is the most suitable (termed a ‘carriage dispute’) should be dealt with as a preliminary issue. In a judgment handed down on 6 March 2020, the CAT concluded that the carriage dispute is not necessarily a discrete matter capable of being determined in advance of certification because the question of who may be appropriately authorised to bring a collective action cannot always be disassociated from the question of whether a claim should be certified. As a result, the CAT held that the issues of whether a CPO should be made at all and, if so, which application should succeed, should be heard together at a single hearing.

ii Significant environmental actions

Further significant developments are being seen in respect of large-scale environmental claims, which are raising interesting questions relating to the jurisdiction of the English courts.

In Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Vedanta), a group of Zambian villagers brought claims in respect of alleged pollution and environmental damage caused by toxic emissions from the Nchanga copper mine against (1) KCM, which is a Zambian company that owns and operates the mine, and (2) Vedanta Resources plc, which is KCM’s parent company. The claimants brought proceedings in the UK on the basis that Vedanta Resources was domiciled in England. In April 2019, the UK Supreme Court dismissed the defendants’ jurisdiction challenge. It held that the claimants had a good arguable case that Vedanta Resources owed them a duty of care. It further held it was not an abuse of law for the claimants to sue Vedanta Resources in England in order to bring in KCM as a co-defendant, even where almost all relevant facts pointed to Zambia as the appropriate jurisdiction. This decision is significant because it confirmed that a duty of care can exist between a parent company and those affected by the operations of its subsidiary, where the parent company ‘had sufficiently intervened in the management of the mine’.17

This case may be of concern for multinational companies as it demonstrates an expansion of the circumstances in which the English courts are prepared to find a good arguable case that a UK parent company may owe a duty of care for the activities of its overseas subsidiaries. It is likely that claimant law firms will seek to rely on this decision to bring similar claims against other UK-domiciled parent companies.

This trend towards parties bringing claims against UK-domiciled parent companies is also evident in the developing case against BHP Billiton Plc and BHP Limited, which currently face a significant claim in the English courts over the Samarco dam failure. There are parallel actions against other BHP group entities in a number of jurisdictions, including Brazil and Australia, and certain BHP group entities settled related proceedings in the US in August 2018.18 The English proceedings are for a claimed amount of approximately

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17 Vedanta Resources PLC and another (Appellants) v. Lungowe and others [2019] UKSC 20, paragraph 44.
£5 billion, brought on behalf of over 200,000 claimants, making it one of the largest claims in British legal history. 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 defendants have filed an application contesting the jurisdiction of the English court in August 2019, which is due to be heard in June 2020.

This year has also seen developments in the claim brought against Volkswagen (VW) in relation to the diesel engine emissions scandal. A GLO was granted in May 2018, opening the way for one of the largest consumer actions to come before the English courts. The period for marketing to potential claimants closed in October 2018, and the final claimant group consists of approximately 91,000 UK VW vehicle owners. Hearings took place in early December 2019 regarding the definition of a ‘defeat device’ and whether the EU auditor’s decision about such devices would be binding on an English court. The judgment had not been published at the time of writing. The trial is expected to take place in 2021.

In other proceedings filed in the English High Court in November 2019, a group of Brazilian orange farmers allege that they have suffered losses as a result of an alleged unlawful orange juice cartel in Brazil. Given that the claim is based on Brazilian law, the alleged wrongdoing took place in Brazil, the majority of defendants are not English-domiciled and the Brazilian competition authority has already issued a decision about potential wrongdoing following its investigation, questions regarding jurisdiction are once again likely to be in focus. While not strictly a claim in the environmental sphere, this case shows that these complex issues of jurisdiction are also being seen in other sectors.

iii Significant data breach actions

The past year has also seen an increase in activity in the data sector, regarding potential breaches of the Data Protection Act 2018 and the associated EU General Data Protection Regulation 2018 (GDPR).

In October 2019, a GLO was granted in respect of the group action against British Airways following the theft of customer data from British Airway’s customers. The stolen data included personal and financial details. This theft of personal information led to the Information Commissioner’s Office announcing a record fine of £183 million in July 2019. The court has granted a 15-month window for potential claimants to join the action and over 6,000 claimants have joined so far after the well-publicised breach of the company’s website and mobile app.

Furthermore, in Lloyd, one of the most significant cases to date for class actions in England, the Court of Appeal granted the claimant permission to serve Google out of jurisdiction in a claim that could involve over four million iPhone users. The claim relates to the ‘Safari workaround’, which allowed Google to determine the date visited and time spent by users on websites, as well as pages visited and advertisements viewed. Although there was no pecuniary loss or distress, the Court of Appeal found that damages could be awarded under Section 13 of the Data Protection Act 1998 for breach of Section 4(4) of the same Act. This is because the information collected by the workaround did hold economic value, and so loss of this data was a loss to the claimant group. Significantly, the Court of

19 In 2015, VW admitted that 11 million cars worldwide had ‘cheat devices’ installed. These devices changed the performance of the vehicle during emissions tests to improve results.

20 According to an article published by Leigh Day, one of the law firms co-leading the claim.
Appeal allowed the use of the representative action procedure under CPR 19.6(1) to pursue an opt-out-style claim. Although ‘unusual’, there was a commonality of interest, as required by CPR 19.6(1), since all claimants had browser-generated information taken without their consent over the same period and in the same circumstances. The Court also noted that it was appropriate to use its discretion under CPR 19.6(2) to allow the class representative to act given the alleged scale of the wrongdoing by Google, especially where there might otherwise be no other remedy. Google has already announced that it intends to appeal this decision.

In conclusion, the combination of increased protection of personal data rights as a result of the GDPR, the Cambridge Analytica scandal and the decision in *Lloyd* means that data breaches are likely to be a key growth area for class actions in future.

### iv Significant shareholder actions

A further growth area concerns shareholder group litigation. Aggrieved investors who feel that they have lost out because of a listed company falling short of its obligations to provide accurate and timely disclosure of matters relating to its disclosures may form a class that has the same claim against that company and, in some cases, its directors. So far, only one such claim has reached trial and that was unsuccessful. However, at least one other case settled before trial and others are progressing through the courts, as noted below.

It is perhaps surprising that there have not been more shareholder group actions, as Sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA) grant shareholders who have suffered loss because of untrue or misleading statements or omissions in a prospectus or other market announcements a right to be compensated if the company or others responsible were at least negligent in preparing the public document.

In the *RBS Rights Issue Litigation*, thousands of institutional and retail investors sued the Royal Bank of Scotland for losses they allegedly sustained following a £12 billion rights issue in 2008. Some claimants also sued the bank’s directors. The claim, made under Section 90 FSMA, alleged that the rights issue prospectus did not properly and fairly present the bank’s financial position and omitted relevant information. The claimants had organised themselves into several groups, each advised by different lawyers; their claims were the subject of a GLO. The claims were ultimately settled in 2017 before the matter could progress to trial.

In November 2019, the High Court dismissed a claim by 5,800 Lloyds shareholders against the bank and its former directors. They had argued that the bank’s directors were negligent in recommending support for the acquisition of HBOS at the height of the financial crisis and had failed to disclose relevant information. The claim was based on the common law, not FSMA, and was a challenging one to bring: the claimants needed to show that the directors owed them (as opposed to the company) specific duties; that the duties had been breached; that they had relied upon the misstatements that constituted the breaches of duty; and that the breaches caused the shareholders loss that it was appropriate for them to recover. In the event, the directors conceded that they owed at least some duties and the judge decided some of those had been breached. But he rejected the claimants’ case on reliance and causation and, although by that stage it was irrelevant, he said he would have found against them on loss too.

Nonetheless, the ongoing shareholder action against Tesco plc offers hope that this decision does not mean the end for shareholder class actions in England. This action,
brought under Section 90A FSMA, relates to allegedly false and misleading statements made by Tesco in 2014. In October 2019, the court dismissed a strike-out action, and the trial is listed for June 2020.

Moreover, there are a number of potential shareholder actions that are being investigated by the claimant bar. For instance, in November 2019, shareholders began legal action against one-time alternative business structure Quindell, alleging that Quindell made misleading statements to the market.

IV PROCEEDURE

i Types of action available

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

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.

If a court orders that a representative action may be continued, the court’s judgment will bind everyone the representative party purports to represent. 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 so long as the same-interest requirement is met.

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. 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 impossible to identify which members had the same interest. Furthermore, the overriding

24 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.
25 CPR 19.6(1).
26 The claimants were unsuccessful in obtaining a representative action as the class was so wide that 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,27 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'.28

This decision can be contrasted with the recent decision in Lloyd, described above, in which the Court of Appeal found that the roughly four million iPhone users did have the same interest as they were victims of the same alleged wrongdoing and had all sustained the same loss – loss of control of their browser-generated information. Sir Geoffrey Vos found that the applicable test is whether it is possible to identify whether a particular person qualifies for membership of the particular class. Crucially, the claimants were not relying on facts specific to individuals (such as breaches regarding special category data), making it possible to find a same interest across the whole class.

In light of the requirements for the courts to consider the overriding objective, particularly that the dispute is dealt with 'expeditiously and fairly',29 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.30 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 to save costs in their determination',31 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’.32 Nonetheless, the court has discretion in granting the order.33 There is no guidance as to how this discretion is to be exercised,34 though the overriding objective would still be applicable. Similarly, consideration must also be given to whether a representative action would be more appropriate,35 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.36 This is in part because the standard of commonality is lower.

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27 CPR 19.6.
28 John v. Rees and others [1970] Ch. 345 at 370, per Megarry J.
29 CPR 1.1(2)(d).
30 CPR 19.11, PD 19B, Paragraph 6.1A.
32 CPR 19.10.
33 CPR 19.11(1).
34 There is no guidance contained within CPR 19, nor the accompanying PDs.
35 PD 19B, Paragraph 2.3(2).
36 This can be seen particularly in the recent actions brought under Section 90, FSMA.
There are no special requirements for a GLO application, although the applicant should both consider the preliminary steps and ensure that his or her application contains the prescribed general information. 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. Nevertheless, the court may give directions 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. While there have been some notable GLOs granted recently, in particular in respect of the emissions litigation against VW and the shareholder claim against Lloyds Banking Group (see above), it is notable that, since the introduction of the GLO procedure in 2000, there have only been just over 100 GLOs ordered. Whether the increased availability of funding for these types of claims will lead to an increase remains to be seen.

### Joint case management

The courts are able to use ordinary case management powers under the CPRs to manage claims brought by multiple claimants. CPR 3.2(2)(g) and (h) allow courts to consolidate or jointly try claims. These powers afford judges significant control and flexibility over the management of the claim, and the decision to use this mechanism in Vedanta and the case against BHP indicates that this flexibility can also be attractive to claimants. The experience of the English courts in managing multiple claims is another attraction; the claimants in Vedanta pointed to the experience, resources and expertise of the English courts in managing large claims as one of the reasons for hearing the claims in England. The readiness of the courts to utilise these powers to manage such large cases is another indicator of growing judicial enthusiasm for facilitating class actions. Even if the Supreme Court decision in Mastercard is relatively restrictive, claimants will continue to have the option to pursue large claims through this procedural mechanism.

### 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 true 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, as detailed above, these were perceived as insufficient to address the harm caused to both direct and indirect purchasers.

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37 The normal application procedure under CPR 23 should be used according to PD 19B, Paragraph 3.1.
38 The preliminary steps are detailed at PD 19B, Paragraph 2.
39 This information is contained at PD 19B, Paragraph 3.2.
40 CPR 19.12(1)(a).
41 Pursuant to CPR 19.12(1)(b).
42 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 (the CAT Guide). 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 Office of Fair Trading or the European 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.

Similarly 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 proceedings. 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’ and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes. 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. The Supreme Court’s decision in Mastercard should provide authoritative guidance on some of these issues.

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 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 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,

43 Section 47B(6), CA.
the court may give directions stipulating the date by which further claims cannot be added to the group register without the court’s permission.\textsuperscript{46} However, failure to meet the deadline does not automatically mean that the claim cannot be added to the group.\textsuperscript{47}

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’.\textsuperscript{48} 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.\textsuperscript{49} 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.\textsuperscript{50} 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.\textsuperscript{51}

\textbf{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 and none have yet been certified.\textsuperscript{52} 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,\textsuperscript{53} they may not provide a good benchmark from which to assess the speed and potential efficiencies of such a group action mechanism.

\textbf{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

\textsuperscript{46} CPR 19.13(e) and PD 19B.13.
\textsuperscript{47} Taylor v. Nugent Care Society [2004] EWCA Civ 51.
\textsuperscript{48} Rule 79(2), CAT Rules. Rules 79(2)(a)–(g) give some guidance on the types of consideration that the CAT should have.
\textsuperscript{49} Rule 74(6), CAT Rules and Paragraph 6.37, CAT Guide.
\textsuperscript{50} Rules 80(1)(c) and 82, CAT Rules.
\textsuperscript{51} Rule 85(4), CAT Rules.
\textsuperscript{52} 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.
\textsuperscript{53} In \textit{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.
that are likely to support the case of the applicant, or adversely affect one of the other parties’ 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.54

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,55 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 decision (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.56 Although the case was not brought as a group claim or class action, it is notable as it demonstrates the willingness of the English courts to exercise their 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.57 There are also specific costs rules in the CPRs 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.58 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

55 Britned Development Ltd v. ABB AB [2018] EWHC 2616 (Ch).
56 BritNed was awarded only €11.7 million (plus interest) of the €180 million claimed.
58 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.
importance to, the litigation funding arrangements.\(^{59}\) Unlike proceedings governed by GLOs or representative actions, damages-based agreements are prohibited in respect of opt-out collective proceedings.\(^{60}\) Therefore, for opt-out collective proceedings to be successful, it is increasingly likely that they will be dependent upon third-party funding.

**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.\(^{61}\) However, there has been an incremental liberalisation such that it is established that damages can be claimed in a representative action.\(^{62}\) 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).\(^{63}\)

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.\(^{64}\) 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. The Court of Appeal’s decision in *Mastercard* suggests that aggregate damages need not necessarily be distributed on a compensatory basis, given that the CAT does not calculate loss for each individual. 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.\(^{65}\) If all the damages are not claimed within the CAT’s

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

60 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 (DBAs) 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).


63 With regard 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.

64 Section 47C(1), CA.

65 Rule 93(1)(a), CAT Rules 2015.
specified period, the CAT may order that undistributed damages are paid to the representative ‘in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings’.66 Any other remaining unpaid damages are to be paid to charity.67

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, defendants may 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 CPRs 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.68 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

66 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, 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.

67 Section 47C(5), CA.

68 Section 49A, CA.
by the CAT. The proposed settlement must be presented to the CAT by the representative and the defendant of the collective proceedings. The settlement need not apply to all of the defendants in the proceedings, merely those who 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’. 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. 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. 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. Nonetheless, certain other provisions may further promote settlement, for instance that any remaining unpaid damages are to be paid to charity. 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*, which effectively barred securities actions without a US nexus, has caused potential claimants, including institutional investors, to reappraise the situation. The advent of opt-out 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 regard to class actions: the Recast Brussels Regulation contains a framework for the allocation of intra-EU jurisdiction as well as the recognition of foreign judgments.

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69 Section 49A(5), CA.
70 However, the likelihood that this covers all potential claimants is still limited.
72 Section 49A(10)(b), CA.
73 Section 47C(5), CA.
75 ‘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.
provisions for the reciprocal enforcement of Member State court judgments; and a multitude of statutory claims, particularly in the area of securities law and financial regulation, are based on EU law. The European Union (Withdrawal) Act 2020 was given royal assent on 23 January 2020 and the UK left the European Union on 31 January 2020. The Act repeals the 1972 European Communities Act but provides that most provisions will remain in full force until the end of the transition period, 31 December 2020. The Act does not allow for an extension of the transition period. The UK therefore has 11 months to negotiate the legal footing for its new relationship with the European Union. 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 free-standing 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 or by reference to the formerly applicable, and substantively similar, UK rules. 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

The number of high-profile, high-value class and group actions brought in England has continued to increase in recent years. The introduction of opt-out proceedings, combined with cases such as Mastercard, Vedanta and Lloyd, demonstrate the determination of both the legislature and the courts to develop this area, in particular as a key means for consumers to seek redress across a variety of sectors. The year 2020 is likely to be a pivotal one in determining whether this upward trend continues, for a number of reasons.

First, the Supreme Court’s decision in Mastercard, which is expected to be delivered in the second half of 2020, will be crucial to the future development of the class action regime. A judgment that unduly restricts the ability of businesses and consumers to bring collective proceedings could discourage prospective claimants from pursuing opt-out collective proceedings in times to come, and it is difficult to see how the UK class action regime could develop in those circumstances. Conversely, a decision that provides claimants with the reassurance that it is possible to move past the certification stage with the right sort of claim may ignite the gathering momentum behind class actions in the competition sphere.

The Mastercard decision will be vital not only to the advancement of the opt-out regime, but also to class action expansion more broadly. At present, the opt-out regime only applies to competition actions. However, when the CRA was passed, it was envisaged by the legislature that it would eventually be extended to other legal areas. If the Supreme Court’s decision appropriately balances businesses’ and consumers’ need to have access to effective redress with ensuring that defendants’ rights are sufficiently protected, the opt-out regime is likely to be deemed a success, and the prospects of it being extended to other spheres may increase.

Second, how courts interpret and apply the decision in Vedanta is likely to have a significant impact on the accessibility of the UK class action regime to potential claimants.

76 For instance, Section 90A FSMA implemented EU Directive 2004/109/EC.
77 For instance, a domestication of the Rome II Regulation (Regulation (EC) No. 864/2007).
If courts embrace the decision, the widening of this jurisdictional principle to encompass parent company liability could provide fertile ground for class actions against multinational corporations, and is likely to be a major factor in the future growth of class actions in the UK.

Third, UK class actions are intrinsically linked to the UK litigation funder market and one of the primary reasons for the growth of class actions in the UK in recent years is the expansion of third-party litigation funding. A decade ago, the costs associated with pursuing class actions would have deterred action groups. Now, however, the litigation funding market is a developed market, both in terms of funder capacity and the number and size of funders.79 Funds are increasingly sophisticated, covering a broader range of actions than they did a few years previously. Furthermore, funders’ appetite for pursuing class actions has increased with the realisation that these claims have the potential to be extremely lucrative. However, in the past year, the funding market has faced challenging questions. In light of the collapse of Burford Capital, scrutiny has increased on internal governance of litigation funders. In addition, the funding market is presently going through a period of consolidation, highlighted by Fortress Investment Group’s takeover of Vannin Capital, and the merger between IMF Bentham and Omnia Bridgeway Holding. It remains to be seen whether the momentum that we have seen in the funding market will continue.

Ultimately, 2020 is shaping up to be an important year for the future of the class action market, with a number of key issues to be addressed.

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79 According to the Class Action Report 2020, the value of litigation funders’ balance sheets rose by 31 per cent to £1.3 billion in 2018/2019. This figure was £726 million in 2015/2016.
I  INTRODUCTION TO THE EUROPEAN UNION CLASS ACTIONS FRAMEWORK

Each Member State has the ability to create legislation on a national level for collective redress for damage resulting from consumer law infringements. There is also legislation in place to promote the effective protection of consumers against such infringements at European Union (EU) level.

Directive 2009/22/EC (the Injunctions Directive) is currently in force and gives qualified entities the option to bring an injunctive action on behalf of EU consumers. The EU has, in the past couple of years, started multiple initiatives concerning the development and expansion of protection of European consumers and the possibility of collective redress.

In 2013, the European Commission (the Commission) issued a recommendation on the common principles for injunctive and compensatory collective redress mechanisms in the Member States, proposing a horizontal framework for collective redress. On 23 May 2017, a regulatory fitness and performance fitness check of the EU’s consumer and marketing law was published. It covered an overview of the use of the Injunctions Directive and the Commission's recommendations for improvement. On 25 January 2018, a report was published concluding that there had been a rather limited follow-up to the 2013 recommendation.

As a result of the initiatives mentioned above, the EU is currently working on a new directive on representative actions for the protection of the collective interests of consumers. The new initiative seeks to create a mechanism for class action-style proceedings across Europe. The current Injunctions Directive and the envisaged changes to it are discussed in more detail below.

II  THE YEAR IN REVIEW

In the past decade, there have been multiple efforts at the EU level to facilitate a general collective action mechanism for the Member States. These efforts have been focused on the facilitation of collective actions for consumers only. The current result of these endeavours, the Injunctions Directive, has proven not to be effective: requests for injunctions based on the

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1 Anouk Rosielle is an associate partner at Dentons Europe LLP.
3 Articles 2 and 3 of the Injunctions Directive.
4 Commission Recommendation 2013/396/EU.
5 The Injunctions Directive and Commission Recommendation 2013/396/EU.
Injunctions Directive by collective groups of consumers in cases of a breach of EU consumer law are rare. The main reason for this is that the Injunctions Directive does not provide for collective redress. Another reason is that at the level of the individual Member States there are significant differences in the manner in which collective actions are initiated, leading to inequality in the manner in which consumer interests can be protected. The emergence of cross-border infringements of EU consumer law has led to the realisation that the level of protection for consumers against such infringements differs from one Member State to another. Illustrative in that sense is the ‘Dieselgate’ scandal, in which consumers in the EU were at a significant disadvantage in comparison to their counterparts in the United States, as a result of a lack of efficient pan-European legislation. As there is no legislative framework of this kind in place, cross-border collective redress actions in the EU have not taken off yet.

To address this issue, a proposed directive is being developed, which will repeal the Injunctions Directive and will have a broader scope to ensure actual redress, on both the national and cross-border level (the Proposed Directive). The Proposed Directive forms part of a combined proposal to amend four current EU directives that aim to protect the economic interests of consumers. These combined proposals are referred to as the ‘New Deal for Consumers’, which ‘aims at strengthening the enforcement of EU consumer law amid a growing risk of EU-wide infringements’.

On 11 April 2018, the Proposed Directive was published. On 26 March 2019, the European Parliament approved an amended version of the Proposed Directive. On 28 November 2019, the Competitiveness Council adopted a general approach. The general approach, inter alia, proposes to make a distinction between domestic and cross-border representative actions. While the criteria for cross-border actions would be common to the whole of the EU, those for domestic actions can be decided upon by the Member States individually. It also proposes additional criteria for the designation of qualified entities in cases of cross-border actions and makes requirements for Member States to assist qualified entities less stringent. In the general approach, it was also decided that the application of the directive would be delayed by a year and a half. The next stage in the procedure is the inter-institutional trilogue negotiations. Upon agreement between the Council and the European Parliament on the text of the Proposed Directive, it will become effective. Given the timing, it seems unlikely that this will take place in 2020.

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8 Explanatory memorandum par 1.1. (Brussels, 11.4.2018 COM (2018) 185 final 2018/0090(COD)).
III PROCEDURE

i Types of action available

The Injunctions Directive

The Injunctions Directive is the current European judicial mechanism that allows qualified entities to bring actions before courts or administrative authorities on behalf of consumers, to stop infringements of consumer legislation. Qualified entities, as defined in Article 3 of the Injunctions Directive, are organisations or independent public bodies that protect interests of consumers and meet national criteria. Article 4(3) requires the European Commission to publish a list of qualified entities designated by the Member States. This list includes the name of each entity, contact details and its purpose. Member States may have one qualified entity or several.

The Injunctions Directive provides *de minimis* requirements for each Member State to have a legislative framework in place that enables qualified entities to seek an injunction to cease or prohibit infringement of EU consumer laws. Some Member States have already provided for actions of this kind or even more elaborate actions. For those Member States, the Injunctions Directive contributed little of additional value. The pan-European element to the Injunctions Directive is that it provides for the possibility of a qualified representative of one Member State bringing an injunctive action in another Member State, thus adding a cross-border element. It is possible for a qualified representative to bring cross-border infringements before foreign courts, to bring cross-border infringements before domestic courts and to make use of domestic injunction proceedings.

The Proposed Directive

As no final version of the Proposed Directive is available yet, the amended version of 26 March 2019 will be referred to here, with elaborations based on the general approach of the Council when appropriate.

Under the Proposed Directive it will be possible to bring representative actions for collective redress (i.e., not only for injunctions to cease or prohibit infringement behaviour as is currently the case under the Injunctions Directive). The Proposed Directive proceeds from the notion that only qualified representative entities (QREs), which are public bodies that have been designated and placed on a publicly available list in advance, are eligible to represent collectives of consumers in these actions.

These collective actions can be directed at ‘traders’, meaning any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in the trader’s name or on the trader’s behalf, for purposes...
relating to the trader’s trade, business, craft or profession. To the extent that a trader is subject to EU consumer legislation (be it at the EU level or as implemented in national legislation) and has infringed this legislation, it can be a defendant against a collective action.

Under the current text of the Proposed Directive, QREs can bring actions for injunction orders and for collective redress. Article 5 lists the measures concerning injunctive relief, which are not dissimilar to the actions available under the current Injunctions Directive. Article 6 lists the redress measures and provides a QRE with the power to bring representative actions seeking a redress order, which obligates the trader to provide, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. The aim of the redress measures is to grant the consumers concerned full compensation for their actual loss. Punitive damages are explicitly prohibited.

The Proposed Directive provides specific rules to promote cross-border representative actions, and these rules are one of the elements of the proposal that could lead to an increase in use of collective redress actions on an EU-wide scale. A more detailed explanation of this feature will be discussed below.

The Proposed Directive is expected to be implemented in the second half of 2021, but extensive discussion will be required before a common approach is reached.

ii Commencing proceedings

The Injunctions Directive

Under the Injunctions Directive, proceedings can be commenced by defined qualified entities. A qualified entity must be an organisation that is properly constituted according to the law of a Member State and has a legitimate interest in ensuring that collective interests of consumers are protected and that the smooth functioning of the internal market is ensured.

The proceedings can only concern the obtaining of an injunction to cease or prohibit infringements of EU consumer legislation. Reference is made to Annex 1, containing a list of directives protecting the collective interests of consumers, such as consumer rights, consumer credit, package travel, unfair commercial practices and unfair terms in consumer contracts.

The Injunctions Directive merely prescribes that each Member State must ensure that a designated court or administrative body will rule on an injunction to cease or prohibit infringing behaviour, and with due expedition. How the Injunctions Directive is transposed into domestic law has been left to the individual Member States. As a result, the manner in which the proceedings are conducted differs in Member States.

18 Articles 5 and 6 of the Proposed Directive respectively.
19 Article 6(4a) of the Proposed Directive.
20 Article 6(4b) of the Proposed Directive.
21 Article 16 of the Proposed Directive.
23 Article 3 of the Injunctions Directive.
The Proposed Directive

The Proposed Directive enables QREs to bring representative actions aimed at the protection of the collective interests of consumers under consumer legislation. In comparison to the Injunctions Directive, a much more elaborate list of directives and regulations concerning consumer interests is added to Annex 1 of the Proposed Directive.

Member States or their courts have to designate at least one QRE. The prescribed criteria are that QREs must be properly constituted according to the law of a Member State and must demonstrate a legitimate interest in ensuring compliance with the EU legislation listed in Annex 1, which should be apparent from its statutes or another governance document. Furthermore, the QRE must be non-profit-making in character, in accordance with the specified criteria.

In the general approach, the suggestion is made that QREs that only operate in domestic representative actions are subject to national rules and should be able to receive ad hoc QRE status. For QREs in cross-border actions, however, the Council has proposed more stringent admissibility criteria than those listed in the Proposed Directive. Member States will also be allowed to apply more detailed criteria for national QREs, but only some of those criteria will also apply to cross-border QREs. Furthermore, the general approach introduces more room for national courts to review whether the QRE meets the admissibility criteria.

Transparency of QREs plays an important role in the Proposed Directive. QREs must disclose publicly, by appropriate means, such as on websites, in plain and intelligible language, how it is financed, its organisational and management structure, its objective and its working methods as well as its activities. Member States must ensure that a funding party does not have decision-making power within the QRE and does not fund redress proceedings directed at its competitor. In an early stage of a representative action, the QRE submits a complete financial overview, listing all sources of funds used for its activity in general and the funds that it uses to support the action, to demonstrate the absence of any conflict of interest. It also has to demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.

As the Proposed Directive will, like the Injunctions Directive, prescribe a set of de minimis rules, the implementation will differ in Member States, inevitably leading to different outcomes.

25 Article 4 of the Proposed Directive.
27 Article 4a(3)(ca), (cb) and (cc) of the general approach of the Council.
28 Article 4a(3) of the general approach of the Council.
29 Article 4 of the Proposed Directive.
30 Recital 11f of the general approach of the Council.
31 Third subparagraph of Article 4(1); 2018/0089(COD) Committee report tabled for plenary, 1st reading/ single reading (07/12/2018).
32 Article 7 of the Proposed Directive.
iii Procedural rules

The Injunctions Directive

The Injunctions Directive does not provide an elaborate set of procedural rules prescribing the manner in which a collective injunction action must be conducted. Rather, Member States must ensure that national legislation is in place that makes provision for an effective collective action on behalf of consumers to stop or prohibit an infringement of EU consumer law. Member States are allowed to implement legislation that makes provision for more than just collective injunction proceedings, but not for less. The procedural rules of an action under the Injunctions Directive are transposed into national legislation and as a result, differ from one Member State to another.

Given the partially voluntary nature of the Injunctions Directive, it is up to Member States whether to implement specific procedural rules provided for by the Injunctions Directive. Member States have been given the option (but not the obligation) to introduce legislation that only allows a collective redress action if the qualified representative has notified and sought from the defendant a voluntary cessation of the infringing behaviour within a period of two weeks. Not many Member States have implemented such a rule.33

The Proposed Directive

Under the Proposed Directive, the approach adopted under the Injunctions Directive has remained the same. Although the approach has been elaborated on, the Proposed Directive in essence prescribes that Member States are obliged to take necessary measures to ensure that representative redress actions are possible and that these are treated with due expediency.34 Member States have to implement penalties in cases of non-compliance with the final decision. These penalties may be in the form of fines.35 To what extent and in what manner these provisions are transposed into national legislation is up to each individual Member State.

Opt-in and opt-out systems

As a result of this variation, the Proposed Directive will not address the divergence in the manner of procedures in the different Member States. A striking example of this is that the Proposed Directive does not prescribe whether a representative redress action or settlement should be established on an opt-in or an opt-out basis. With an opt-in system, an affected consumer must actively make known that he or she wishes to be part of and bound by the collective action. Under an opt-out system, any consumer that falls within the definition of the class of consumers for which the collective action is initiated is bound by the outcome of the action by operation of the law. Following amendments to the Proposed Directive, it currently prescribes an opt-in mechanism, but only for those consumers who do not reside in a Member State.36 As the difference between the opt-in and opt-out systems can materially impact the position of an individual consumer, a common approach within the EU may be preferable.

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33 Sweden has, on the basis of Article 5 of the Injunctions Directive, introduced a mandatory consultation procedure between foreign qualified entities and the defendant.
34 Article 12 of the Proposed Directive.
35 Article 14 of the Proposed Directive.
36 Article 6 of the Proposed Directive.
Assumption of proof of infringement

With regard to the probative effect of infringement decisions in subsequent collective redress actions, the Proposed Directive does provide far-reaching legislation. If a national court or administrative body has rendered a final decision in public enforcement proceedings establishing an infringement of consumer law by a trader, the decision will be irrefutable evidence of that infringement in a collective redress action against that trader in the same Member State. Final decisions in public enforcement proceedings of courts or administrative bodies of other Member States establish a rebuttable presumption of an infringement in collective redress actions in other Member States. The Proposed Directive suggests not giving any probative effect to decisions in civil proceedings establishing liability of a trader against consumers, pointing to the fact that national rules on liability may vary between the Member States.

In the general approach, the aforementioned assumption of proof has been materially pared down, by proposing that final decisions of courts or administrative bodies establishing an infringement 'can be used as evidence' and making no distinction between national and foreign court decisions.

Cross-border collective redress

To make cross-border collective redress actions more effective, the Proposed Directive suggests a system of mutual recognition of QREs from other Member States. If a QRE has been recognised in one Member State, the courts and administrative authorities of another Member State will accept that status. In the event that an infringement affects consumers in multiple Member States, QREs of different Member States can bring a joint redress action at the competent court or administrative body of a single Member State for consumers of the different Member States. This combined collective redress action may provide an effective step towards a true pan-European class action.

In the general approach, the Council advises leaving more room for national courts and administrative bodies to assess whether the QRE meets certain criteria (such as those regarding third-party funding) and to set additional national criteria to review the status of the claimant.

Limitation periods

Under the Proposed Directive, the limitation period for a claim of an individual consumer for redress or injunction as a result of an infringement of consumer law is suspended pending a collective redress action. Although heavily redacted, the essence of this provision remains intact in the general approach (Article 11).

37 Article 10 of the Proposed Directive.
38 Article 16(1) of the Proposed Directive.
39 Article 4b of the general approach of the Council.
40 Article 11 of the Proposed Directive.
iv Damages and costs

The Injunctions Directive

The only recourse available under the Injunctions Directive is an injunction to stop or prevent infringements of consumer law, and as such the Directive does not provide rules for claiming redress for damage. The inability to claim damages has been one of the reasons for the relative unpopularity of the Injunctions Directive. This is further amplified by the fact that the Injunctions Directive does not provide regulations on the division of costs between parties to the proceedings. Most Member States adhere to some form of loser-pays principle, which may result in a high adverse-costs risk for qualified representatives seeking an injunction.41

The Proposed Directive

In contrast to the Injunctions Directive, the most important development in the Proposed Directive is that it allows for collective redress of damage.42 The Proposed Directive enables redress measures to fully compensate consumers for their loss.43 It does not, however, permit an award of punitive damages.44 The introduction of the possibility of seeking monetary relief may serve as a catalyst for proceedings under the eventual collective redress directive. Currently, however, there are already in place in several Member States class action mechanisms that provide redress measures. The collective redress directive will most probably not have a pronounced effect on the national practices of those Member States.

With regard to legal representation and fees, the Proposed Directive prohibits the use of contingency fees. The Proposed Directive proceeds from the loser-pays principle.45 As funding of QREs is specifically provided for, the adverse-costs risk associated with litigation may turn out to be a less prominent factor when deciding whether collective proceedings will be initiated.

v Settlement

The Injunctions Directive

The Injunctions Directive does not regulate collective settlements.

The Proposed Directive

The Proposed Directive refers to three types of settlement of disputes regarding collective redress:46

a First, a joint request for approval of a settlement involving redress between a QRE and a trader regarding a case in which consumers were affected by an allegedly illegal practice of that trader.

42 Article 6 of the Proposed Directive.
43 Article 6 of the Proposed Directive.
44 Article 6(4b) of the Proposed Directive.
45 Article 7a of the Proposed Directive.
46 Article 8 of the Proposed Directive.
Second, the court or administrative body may at any point while the representative action is pending invite parties to reach a settlement. This will have to be done within a reasonable time limit.

Third, the court or administrative body that issued the final decision may request the parties to the action to reach a settlement regarding redress based on the final decision.

Each of the types of settlement described above will, when reached, be subject to scrutiny by the court or administrative body. An approved settlement will be binding upon all parties, and therefore on all consumers who fall within the definition of the group that is being represented by the QRE. It will be a matter of the law of the Member State where the settlement is approved whether the consumers will need to opt in to be able to obtain the benefits of the settlement or, alternatively, to opt out not to be bound by it.

IV CROSS-BORDER ISSUES

The Injunctions Directive

The Injunctions Directive model enables a QRE of one Member State to bring an action against a violator of consumer laws in another Member State, if it can demonstrate that it is a recognised QRE in its own Member State. As such, the Injunctions Directive already contains one of the most relevant provisions to enable cross-border collective injunction proceedings. Apart from this provision, however, there is little in place in the way of a framework for true cross-border injunction proceedings.

The Proposed Directive

As one of the objectives of the Proposed Directive is to facilitate cross-border collective redress actions and make them more efficient, it naturally introduces several mechanisms to facilitate collective actions for consumers located in multiple Member States. The most relevant mechanisms are (1) the recognition of public infringement decisions of other Member States’ courts or administrative bodies, and (2) the option for cross-border collective redress (see Section III.iii).

Furthermore, the Proposed Directive encourages Member States to create a database that contains all final decisions on collective redress actions, which could give Member States the option to share best practice.

V OUTLOOK AND CONCLUSIONS

The Injunctions Directive is the current judicial mechanism for EU consumers to bring a collective injunctive action to protect consumer rights. It does not provide the possibility of seeking compensation. The effectiveness of the Injunctions Directive has been assessed on several occasions, with each leading to the conclusion that to be able to provide effective protection of consumers, structural amendments were required. The Proposed Directive aims to replace the Injunctions Directive and introduces the possibility of claiming for damages as a tool to provide consumers with such protection.

47 Article 2 of the Injunctions Directive.
It remains to be seen how effective the Proposed Directive will be at establishing a pan-European framework for collective redress actions in all Member States. For consumers in Member States that currently do not have any legislation that makes provision for collective redress, the Proposed Directive will provide a helpful *de minimis* level of protection and may encourage local QREs to seek redress. However, for those Member States that already have a legal system for collective redress in place, the Proposed Directive will most probably not bring about much change.

From a cross-border perspective, with the procedural rules being left to the Member States, the Proposed Directive will not prevent divergence in the manner in which collective redress actions are dealt with at a national level. As infringements of consumer law are increasingly of a cross-border nature, pan-EU harmonisation of rules on collective redress become more important. Under the current draft, the only true harmonisation being introduced by the Proposed Directive is that each Member State will have some form of collective redress at the disposal of its consumers. It is not unlikely that the differences between national legal systems will induce QREs (and their funders) to seek out the Member State jurisdiction with the most favourable collective redress system for their claims. Although forum shopping in this context is not surprising, traders should be prepared to find themselves in foreign courts for collective redress matters and, similarly, consumers may find their interests litigated in a collective redress action in a completely different Member State. It remains to be seen how the Proposed Directive will be put into practice once it comes into effect.
I INTRODUCTION TO THE 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.2

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:

1. joint actions brought by way of a single writ of summons by multiple claimants having a common interest against the same defendants;3
2. a third party’s voluntary interventions in existing proceedings;4
3. consolidations of different, coexisting proceedings;5
4. legal actions undertaken by associations in the name of their members (but solely in relation to the members’ collective, rather than individual, interests);6
5. specific proceedings brought by accredited consumer associations in the collective interests of consumers7 (such as, for example, proceedings relating to consumer contracts containing clauses that are deemed to constitute unfair terms);8
6. 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;9 or
7. specific proceedings brought by labour unions on behalf of employees who have been dismissed on economic grounds.10

1 Alexis Valençon and Nicolas Bouckaert are partners at Kennedys. The authors are grateful to Madeleine Motte for her 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.
The above-listed recourses, however, lacked efficiency, especially when dealing with mass disputes (among other things, because of the strict conditions limiting the ways in which associations can communicate publicly in relation to the proceedings they bring).¹¹

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).¹² Discussions were renewed, once again, in 2003 and the project had the support of the government in place at the time.¹³ 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 have been enacted at a steady pace since then. French law now also provides for group actions in relation to health issues,¹⁴ data protection, discrimination, environmental matters and administrative law.¹⁵

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

- brought by accredited legal entities acting in the name and interests of individual victims (rather than by the individuals themselves); and
- 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 law¹⁷ 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

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¹¹ Cour de cassation, Civ.1, 26 May 2011, No. 10-15676.
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.
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. This constitutional scrutiny was carried out and the envisaged fund was never created as the Constitutional Council held that it was unconstitutional 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 only 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 and May 2018 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.

To date, 19 group actions have been brought before civil jurisdictions (some are still ongoing, while others have settled or been rejected) regarding, among other matters, housing, financial services and mobile telecommunications.

II THE YEAR IN REVIEW

i Recent statutory developments

Decree No. 2019-1333 of 11 December 2019 (the 11 December 2019 Decree) reforming civil procedure was published on 12 December 2019, came into force on 1 January 2020 and will impact the French group action regime.

Indeed, the provisions of the Code of Civil Procedure apply to class actions as claims made under this regime are brought, administered and judged in accordance with the provisions of the Code, as would be the case with claims brought by individual claimants.

The most significant change introduced by the 11 December 2019 Decree, for the purposes of French collective redress claims, relates to changes to the prerogatives of the case administration judge (i.e., the judge who oversees the case-administration phase, during which parties exchange their submissions, before the dispute is finally heard by the judge (or judges) who decides the case on the merits).

Before the 11 December 2019 Decree, although the case-administration judge had jurisdiction to hear procedural incidents and objections that could lead to proceedings being dismissed, the judge who heard the case on the merits could also later rule on whether claims were inadmissible in certain instances (i.e., lack of standing or interest, time limitations, \textit{res judicata}).

Since the 11 December 2019 Decree came into force (and amended the relevant sections of the Civil Procedure Code), however, the above-described regime has been modified, and the case-administration judge now has sole jurisdiction to hear procedural objections and arguments intended to have the proceedings dismissed.

19 Court of Appeal of Paris, 9 November 2017, Appeal No. 16/05321.
20 Nanterre High Court, 14 May 2018, Case No. 14/11846.
These changes to case-administration judges’ jurisdiction constitute an important development in the French legal landscape, especially so in the context of group actions, which inherently give an important role to the case-administration judge.

ii Recent court decisions and current proceedings

In a decision handed down on 19 June 2019, the Court of Cassation ruled that residential leases, governed by the Act of 6 July 1989, could not fall within the scope of the group actions governed by Article L423-1 of the Consumer Code, as such leases do not constitute service contracts, contrary to the position held by the consumer association that had initiated the group action in question.

The scope and effects of this decision were, however, rather short-lived as Law No. 2018-1021 modifying Article L423-1 of the Consumer Code has since come into force and created a legal regime that is specifically intended to allow the sort of group claims that were considered and dismissed by the Court of Cassation in its above-discussed 19 June 2019 decision.

Moreover, in June 2019, the UFC-Que Choisir association initiated a group action before the Paris Tribunal de Grande Instance against Google Ireland and Google LLC to ‘put an end to the insidious exploitation of the personal data of its users, particularly those who have Android equipment with a Google account, and to compensate them, up to €1,000’.

According to the UFC-Que Choisir association, when it comes to geolocation and advertising targeting, Google must obtain the express consent of its users, leading them to take a clear action: check a box. By not asking for the user’s consent, Google would be acting in violation of the General Data Protection Regulation.

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 half of 2019.

Several recent developments that occurred before 2019 are also worth noting. On 27 June 2018, the French supreme court, the Court of Cassation, rendered its first decision regarding a group action. The decision was on a procedural point, but it 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 case-administration 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 list would render the writ null and void. The appellant therefore argued that, in the case at hand, the case-administration judge should have inspected the list, pursuant to 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 homogeneous set of claimants, having suffered identical or analogous prejudices on account of a common cause.

22 Cour de cassation, Civ. 1, 19 June 2019, No.18-10424.
23 Cour de cassation, Civ. 1, 27 June 2018, No. 17-10891.
In its decision, which should be followed in the future by French courts, the Court of Cassation ruled that the case-administration 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 case-administration judge did not have a legal obligation to review the list in detail to ascertain that it could indeed be deemed to be representative of individuals constituting a homogeneous class of claimants; this obligation, the Court of Cassation ruled, fell to the judge on the merits, and not the case-administration judge.

On 3 October 2018, the Paris High Court handed down a decision in a group action case regarding the claims brought by a consumer association against a mobile phone network provider.\(^2\) 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 14 group action proceedings currently pending, one against a mobile phone company, four against banks and insurance companies regarding financial services, one against an automotive company regarding defective products, two against pharmaceutical companies regarding drugs and contraceptive, one against a computer search engine regarding personal data, and five regarding discrimination, against:

- a company specialising in the design and manufacture of engines for the aeronautical industry;
- the French public railway company;
- a French town;
- the ministry in charge of higher education; and
- the Ministry of the Interior.

Finally, the Internet Society France, a non-governmental organisation, issued a formal notice before a group action to Facebook on 8 November 2018. In March 2019, the Internet Society France indicated that Facebook’s responses, specifically in relation to transparency and its protection of consumer personal data, were not satisfactory and that the Internet Society France therefore intended to initiate a group action against Facebook.

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

Possible legislative changes could lead the current French group action regime to evolve significantly in the near future. Indeed, on 17 October 2018, several Members of Parliament presented a bill intended to open group actions to groups of citizens. The proposal envisages that groups of consumers (of a minimum of 100) could initiate group actions themselves, without the need to be represented by one of the approved consumer associations. If this proposal were to be adopted, it could constitute a significant change to the current regime, by allowing consumers to have more direct access to group actions, which could, in turn, have a sizeable impact on the number of group actions brought before French courts.

This proposal was referred to the Committee on Economic Affairs and a fact-finding mission was launched on 10 July 2019.

Moreover, at the European level, on 11 April 2018, a proposal was filed for a European directive on representative actions relating to the protection of the collective interests of

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\(^2\) Paris High Court, 3 October 2018, Case No. 15/07353.
consumers. The envisaged regime would make it possible to introduce actions in a variety of areas, such as financial services, energy, telecommunications, health and the environment. These actions would make it possible not only to claim compensation, but also to file injunctions (preventive or final) compelling the defendant to cease and desist the conduct complained of. In addition, the directive would introduce an opt-out mechanism for ‘small claims cases’.

On 26 March 2019, the European Parliament voted on the first reading of the amended proposal for this directive. Before becoming final, the text will still have to be consulted upon by the European Parliament and the European Council, and then be published in the Official Journal of the European Union.

As it stands, the draft European directive shares significant similarities with the French group action regime. For example, it expressly provides that lawyers should not be considered a qualified representative entity, that punitive damages should be prohibited and that contingency fees should be avoided. Finally, the procedural scheme is, like the French group action, also made up of two phases: a first phase of declaration of liability, to which consumers are not parties, and a second phase of compensation.

Finally, an amendment also specifies that the directive is to be implemented at a level of minimum harmonisation, such that Member States will not be compelled to replace or modify existing collective redress mechanisms in their own jurisdictions. Member States will therefore be able to implement the rules provided by the proposed directive either by updating their existing procedures or, alternatively, by creating a separate procedure.

III PROCEDURE

As indicated above, group actions were introduced to the French legal system progressively, 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. 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.

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. In contrast, in healthcare group actions, claims can only be brought as a result of personal injuries. Other types of group actions, however, such as

25 Amendment 17, new recital 24 of the preamble.
27 Article L623-1, Consumer Code.
28 ibid.
29 Article L1143-2, Healthcare Code.
environmental group actions, can allow damages to be awarded for both physical injuries and financial losses.\textsuperscript{30} Finally, in group actions relating to discrimination and data protection, damages may be awarded for moral harm or financial losses.\textsuperscript{31}

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). A scenario of this kind, which has not occurred yet, would have clear disadvantages for both the claimants and the defendants because of the duplication involved. It could be avoided altogether if the scope of the various group actions were extended, but as far as we are aware no plan to do so is currently being considered by the legislature.

The limitation period that applies to group actions is the standard five-year period that applies in French civil law,\textsuperscript{32} 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.\textsuperscript{33} 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.\textsuperscript{34}

\section{Commencing proceedings}

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

\begin{itemize}
  \item[a] for consumer and competition law group actions: only consumer associations accredited at a national level can initiate proceedings,\textsuperscript{35} of which there are only 15 at the present time;
  \item[b] for healthcare group actions: only associations devoted to consumers of the healthcare system accredited at a regional or national level (and whose activities do not encompass commercialising health products) can initiate proceedings;\textsuperscript{36}
  \item[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);\textsuperscript{37}
\end{itemize}

\textsuperscript{30} Article L142-3-1, Code of the Environment.
\textsuperscript{32} Article 2224, Civil Code.
\textsuperscript{33} See, for instance, Article L623-27, Consumer Code; Article 77, Law No. 2016-1547 of 18 November 2016.
\textsuperscript{34} ibid.
\textsuperscript{35} Article L623-1, Consumer Code.
\textsuperscript{36} Article L1143-2, Healthcare Code.
\textsuperscript{37} Article 10, Law No. 2008-496 of 27 May 2008.
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;\(^{38}\)

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;\(^{39}\) 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.\(^{40}\)

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.\(^{41}\) 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.\(^{42}\)

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\(^{43}\) (there is, however, an exception to this rule is the derogatory regime of the simplified group actions relating to consumer law).\(^{44}\)

### iii Procedural rules

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

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

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

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

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39 Article L142-3-1, Code of the Environment.
40 Article 37, Law No. 78-17 of 6 January 1978.
41 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.
43 See Section III.iii.
44 Article L623-14, Consumer Code.
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). 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.

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 judgment on liability. 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. 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.

It should be noted, however, that the above two-tiered process does not apply to all 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, after having held the defendant liable, order compensation to be paid directly to the individual consumers according to the conditions set out in the judgment. In a case of this kind, the defendant must then contact the affected consumers so that they may accept the compensation they are owed.

Decisions handed down in group actions have res judicata authority, but only towards the parties that participated in the proceedings. The decisions do not, however, have res judicata effects in relation to claims that fall outside the scope of the court’s decision.

If the group action has been brought to obtain an injunction, so as to end a wrongful act by the defendant, 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 Public Treasury.

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45 Articles 66 and 67, Law No. 2016-1547 of 18 November 2016; Article L623-4-7, Consumer Code.
46 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.
47 Articles 69 and 70, Law No. 2016-1547 of 18 November 2016; Article L623-18, Consumer Code.
48 Article 73, Law No 2016-1547 of 18 November 2016.
49 Articles 71 and 73, Law No. 2016-1547 of 18 November 2016.
50 Article L623-14, Consumer Code.
54 Possible only in class actions on matters of discrimination, environmental law and personal data.
55 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 losses56 (where appropriate, the judge may order reparation in kind);57

b in healthcare group actions, damages can only be sought in relation to personal injuries;58

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;59

d in environment law group actions, damages can only be sought for personal injuries and financial losses; and60

e in personal data-related group actions, damages can only be sought in relation to financial losses and moral prejudice.61

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 three 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 settlement agreement.62

Courts can, at the claimant’s request, order the parties to participate in settlement talks after the initial judgment on liability has been handed down. This is only possible in group actions for environmental, data protection and discrimination matters (excluding

56 Article L623-2, Consumer Code.
57 Article L623-6, Consumer Code.
58 Article L1143-2, Healthcare Code.
60 Article L142-3-1, Code of the Environment.
61 Article 37, Law No. 78-17 of 6 January 1978.
discrimination at the workplace). In instances such as these, settlement negotiations have a narrow scope that is set by the court and relates only to the quantum of compensation to be paid out, and not to the principle of the defendant’s liability, which has been established.

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.

At the time of writing and to the best of our knowledge, there have only been three 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).

c. The third settlement was reached in connection with a group action initiated by a consumer association against a rental company, because of unfair clauses in the rental contract for mobile home parking plots, including an obsolescence clause preventing renewal and access to the land for vehicles over 15 years old. After several negotiations that took place between December 2017 and March 2018, the association announced on its website that an agreement had been reached with the company, with the result that the disputed clauses had been amended in exchange for the termination of the group action.

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, although in France it is nevertheless necessary to seek the enforcement of the decision. 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.68

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 regard to both substantive and procedural law); and (3) the parties must not have fraudulently sought a decision from the foreign court that would have been unattainable under French law.69

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).70 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 ‘Dieselgate’ scandal 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 United Kingdom 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 date, 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

69 Cornelissen v. Avianca, Cour de cassation, 1st civil division, 20 February 2007, appeal No. 05-14082.
70 M-L NIBOYET, Action de groupe et droit international privé, Revue Lamy Droit Civil, No. 32, 1 November 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.
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 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, capable of generating and accelerating further changes.
I INTRODUCTION TO THE 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 for the same relief and who need not be present or even named in the lawsuit is largely foreign to German civil law procedure. In principle, to obtain the relief sought, a litigant must appeal to the court as an individual and must show that he or she seeks a certain remedy on his or her own behalf.

This situation has recently been meaningfully changed with the introduction of the 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 specific elements of law and of fact for future proceedings between myriad claimants.

In addition to this, German law provides certain limited means of obtaining collective redress. All these measures partly resemble 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

The aim of the Model Case Proceedings is to allow for redress for only minor damage, for which a single party might not rationally bring action owing to the insufficient potential benefits. 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 (VW)). 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 a single, comparably short court proceeding, whereas German plaintiffs had to enforce their alleged claims individually in thousands of individual lawsuits, has been perceived as unjust by sections of the German public. In fact, as at the beginning of 2020, about 60,000 individual actions have been filed against VW with competent local
courts throughout Germany. Nearly five years into Dieselgate, with courts of appeal failing to adopt a uniform approach, the matter is still far from settled. What is more, none of these cases has been finally decided by the Federal Court of Justice yet.

Rather predictably, an action for Model Case Proceedings was brought against VW over diesel manipulation allegations immediately after the entry into force of the new law on 1 November 2018. In the time up until the first oral hearing, which took place on 30 September 2019, seemingly 463,000 consumers had registered their claims to the action. So far, the matter has revolved around procedural issues primarily, such as how to calculate the time periods for the various procedural steps and how to demonstrate that the case concerns the required number of consumers. Ultimately, the court has indicated that it leans towards considering the action against VW to be admissible, and that the motions fulfil the pertinent legal requirements, at least in part. At the same time, it urged the parties to find an amicable solution to the dispute. Contrary to prior statements by VW’s legal counsel, the parties to the dispute announced in January 2020 that they would work towards a settlement and the latest news (early March 2020) was that they had reached a settlement.

Other early actions based on the new Model Case Proceedings have been unsuccessful. One of these cases concerned the Mercedes-Benz Bank, which was alleged to have provided insufficient consumer credit information. In this matter, consumers apparently struggled with the formal requirements of the Model Case Proceedings. According to news reports, only 140 out of more than 600 consumers who registered their claims in this matter were acknowledged by the court, and the majority of registered claims did not relate to the matter in hand but instead concerned, for example, alleged diesel issues with Mercedes and even VW cars. The court eventually rejected the action as inadmissible (thus it did not rule on the merits) as it found that the organisation that launched the case was not eligible to initiate Model Case Proceedings. Concurrently, another court refused to accept registration of a similar action against VW Bank filed by the same consumer association. Critics have therefore raised concerns about the legal requirements for a consumer association to file a suit being too strict, thereby rendering Model Case Proceedings ineffective.

Since then and as at the time of writing, a total of seven actions have been accepted for registration under the new Model Case Proceedings, which is far fewer than the German government initially expected (about 450 actions per year). In addition to the aforementioned Mercedes-Benz Bank case, only one other case has led to a judgment to date. The matter concerned (allegedly) excessive rent increases in connection with a planned refurbishment of residential apartments. The Higher Regional Court of Munich ruled largely in favour of the consumers on 15 October 2019. The case has been appealed, but a decision by the Federal Court of Justice is not expected any time soon.

5 Gängel, NJW 2019, 378, 379.
6 Higher Regional Court of Stuttgart, judgment of 20 March 2019, reference No. 6 MK 1/18.
7 Higher Regional Court of Braunschweig, decision of 12 December 2019, reference No. 4 MK 2/18.
10 BT-Drucks. 19/2507, 18.
11 Higher Regional Court of Munich, judgment of 15 October 2019, reference No. MK 1/19.
Also in the realms of Dieselgate, two Model Case Proceedings trials under the Capital Markets Model Case Act have recently been commenced against VW and Porsche SE. More than 2,000 shareholders filed suits against VW for damages totalling approximately €9 billion.\textsuperscript{12} The Model Case Proceedings are pending before the Higher Regional Court of Braunschweig. These recommenced on 26 November 2018 after a delay to the oral hearings. 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 upheld the view that the proceedings before the Higher Regional Court of Braunschweig concerned the same subject matter and thus barred all other proceedings on this matter.\textsuperscript{13}

Despite the introduction of Model Case Proceedings, a US law firm-led initiative continues to bring mass actions seeking payment from automobile manufacturers, and these are sometimes named class actions in layman’s terms. Having made headlines by commencing a lawsuit before the Regional Court of Braunschweig on behalf of more than 15,000 car owners in November 2017, this law firm-led initiative is reported to have filed many other actions in the meantime.\textsuperscript{14} 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, or more precisely a fee, of 35 per cent of the realised amount. Technically, however, every single claim transferred to myRight must be ruled on by the court individually.

Until recently, courts and commentators were unsure whether the bundling of claims through fiduciary assignment for the purpose of mass action was legal in Germany and, hence, whether such claims could rightfully be brought to court. On 27 November 2019, the Federal Court of Justice allowed this operation in principle in a landmark case concerning a company seeking to enforce tenancy law.\textsuperscript{15} Despite this judgment, myRight subsequently suffered a setback with regard to the legality of its business model before the Regional Courts of Braunschweig and Munich. In an oral hearing on 6 February 2020, the Regional Court of Braunschweig stipulated that it did not consider the landmark ruling of the Federal Court of Justice to be applicable if the claims assigned to myRight originally belonged to Swiss consumers.\textsuperscript{16} The Regional Court of Munich ruled on 7 February 2020, that it was unlawful for myRight to bundle claims in a case about damage that related to purported infringements of EU competition law.\textsuperscript{17}

### III PROCEDURE

The goals of the following means of collective redress available under German law partly resemble the objectives of class actions.

Model Case Proceedings

Model Case Proceedings allow 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 that meet the requirement that the claimant made a valid registration for the Model Case Proceedings. Thus, the Model Case Proceedings do not themselves provide any relief for the injured class and there is no payment that follows directly from the proceedings. Rather, following the Model Case Proceedings, each individual party has to bring an individual claim before a court, which is then bound by the determinations of the proceedings. This is one of the reasons why the introduction of the Model Case Proceedings has not resulted in consumers no longer filing individual law suits in the Dieselgate matter, as they believe they are better off in a lawsuit directly aimed at obtaining compensation in the form of damages.

A payment only arises from the Model Case Proceedings themselves if the parties agree upon a class settlement. Commentators have therefore continued to call for further expansion of collective redress mechanisms.

The actions under the new law may be brought by ‘qualified entities’. These entities must (1) have a certain minimum number of members, (2) have been registered for at least four years, and (3) focus on helping consumers by way of advice and education. They must not (1) pursue claims in Model Case Proceedings for purposes of making profit, and (2) receive more than 5 per cent of their funding from private sector companies. As mentioned above, the specific make-up of consumer organisations eligible to initiate Model Case Proceedings has already become a decisive issue in early Model Case Proceedings cases.

Once Model Case Proceedings are pending, no further Model Case Proceedings are permissible in respect of the same motions and the same subject matter. There are no safeguards to ensure that the first proceedings to be initiated are in fact pursued by organisations that are actually well adapted to the task. Quite simply, it is a first come, first served approach.

Model Case Proceedings are permissible if (1) they have been initiated by a qualified entity, (2) it has been demonstrated that the motions for a declaratory judgment are relevant for the claims or legal relationships of at least 10 consumers, and (3) at least 50 consumers registered their claims or legal relationships within two months of the court publishing the matter in the registry of the Federal Office of Justice (the Registry).

In principle, Model Case Proceedings follow the general rules of civil procedure. The most notable exception is that the court of first instance is the higher regional court, which usually only acts as a court of appeal.

To participate in Model Case Proceedings, consumers must enter their claims or legal relationships in the Registry. This can be done only up until the date prior to the first hearing of the case, to prevent free-riding on proceedings the hearings for which hold promising prospects for claimants. The registration may be revoked up until the close of the day of the first oral hearing.

The registration of a claim or legal relationship triggers a number of legal consequences: (1) the lapse of the relevant limitation period is suspended; (2) registrants are no longer in a position to initiate an individual lawsuit for as long as the Model Case Proceedings are pending and individual actions pending at the time the claim is registered must be suspended; (3) only registered consumers will participate in the binding effect of the facts and legal views established by rulings in the Model Case Proceedings.
Model Case Proceedings end with either a judgment or a settlement. A judgment has the binding effect outlined above, irrespective of whether the ruling is in favour of the plaintiff or the respondent. It can only be challenged in the Federal Court of Justice, which, in principle, is bound by the factual findings of the court of first instance and will review the case only from a legal perspective.

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 adequate 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, in turn, is 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 because of several proceedings against Deutsche Telekom AG concerning stock market flotations of Telekom shares in 1999 and 2000 that resulted in plaintiffs filing lawsuits against Telekom alleging prospectus errors.

In contrast 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 arising from 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.

The first stage of the proceedings takes place before the trial court and starts with the request of one litigant to execute Model Case Proceedings 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 proceedings 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. 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 Case Proceedings, unless a plaintiff withdraws from the action within a month.

In the second stage, the higher regional court appoints a model case plaintiff. This is in contrast to Model Case Proceedings, which follow a first come, first served approach. 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. The remaining plaintiffs may take part in the proceedings as third parties with limited rights. As such, they are entitled to avail themselves of means of contestation or defence independently. There is no model case defendant. Instead all defendants of the initial proceedings are considered defendants in the Model Case Proceedings.

Subsequently, the case is published in the litigation register of the Federal Gazette once again. Third parties have the opportunity to register their claims within six months of
this publication. While the parties registering must be represented by a lawyer, they do not become involved in the Model Case Proceedings. Rather, the registration serves the purpose of suspending the limitation period of the claim.

The Model Case Proceedings are 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 to the Federal Court of Justice on points of law. 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 Case Proceedings. The judgment obtained in the continued proceeding can again be appealed for reasons that were not the focus of the Model Case Proceedings.

As for the aforementioned Telekom trials, two Model Case Proceedings were concluded by the Higher Regional Court of Frankfurt in 2012 and 2013. However, despite some back and forth between that Court and the Federal Court of Justice, the matter has not been comprehensively resolved by a final and binding judgment even to the present day. Under the KapMuG, therefore, no relief has been provided to the plaintiffs 18 years after the incurrence of the alleged damage and even this fact alone shows that the KapMuG has not lived up to the expectations many had for it. This is because, among other things, the relevant cases are conducted not by one or more plaintiffs on behalf of others in a single trial but essentially by way of two trials, the individual and the Model Case Proceedings – each with the possibility of appeal.

### 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. For purposes of procedural economy, the courts tend to interpret the requirements liberally insofar as the suitability of joint proceedings and decision-making are alone 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 that make it generally unattractive for larger groups of plaintiffs to bring a joint lawsuit. Most importantly, even though only one proceeding takes place, each litigant must obtain his or her own judgment and the court must rule on each case individually and determine the merits of each plaintiff’s claim separately. Therefore, the higher the number of plaintiffs, the greater the difficulties in handling the case. 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

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18 Higher Regional Court of Frankfurt, judgment of 16 May 2012, reference No. 23 Kap 1/06, ZIP 2012, 1236.
19 Higher Regional Court of Frankfurt, judgment of 3 July 2013, reference No. 23 Kap 2/06, ZIP 2013, 1521.
cases under substantive law. 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 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 be concentrated in one proceeding. The myRight action chose this approach to assist a large number of multiple claimants.

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 state their claims because the hassle associated with litigation and the risk of bearing the costs in the event of defeat are reduced to a minimum. This method does, however, differ from class actions in one important aspect. While the economic effects for 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 proceedings that one uniform judgment is appropriate for all class members. The 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. 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 professional liability insurance are required. It is for these reasons and for those discussed above that the pursuit of multiple claims by special purpose vehicles on behalf of consumers has been, and still is, highly controversial.

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.20

v Association or interest group complaints

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

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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. If, for example, a consumer feels entitled to compensation in the form 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 EU Member State can register with the European Commission, thus qualifying for standing in Germany.21

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 proceedings are a class action does not itself 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 option to opt out of the action.22 Enforcement of foreign judgments is also likely to violate public policy if a class action judgment awards punitive or treble damages.23

V OUTLOOK AND CONCLUSIONS

Despite recent developments, means of collective redress are still relatively 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 result of German lawmakers walking a thin red line. On the one hand, recent events have fuelled the discussion that German law should facilitate collective redress, particularly 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.24 The German government has, therefore, taken a rather cautious approach to the matter. It is an open question whether the new Model Case Proceedings significantly change the landscape of collective redress in Germany.

21 A list of these entities can be found in the Official Journal 2016/C 361/01.
22 Stein/Jonas/Roth, Commentary on the German Code of Civil Procedure, Section 328 Paragraph 113.
24 Tilp/Schiefer, NZV 2017, 14, 18.
No definite inferences can be drawn from the negligible practical application of Model Case Proceedings to date. Recent court rulings show that the requirements for a ‘qualified entity’ to file suit are not insignificant. It also remains to be seen whether the procedure of publishing Model Case Proceedings and the subsequent registration of claims and legal relationships in the Registry will stand a practicability test. Registering a claim with the action does not require the assistance of an attorney and thus can be achieved 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 formal requirements. Finally, 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.

The recent developments may only be the beginning for collective redress in Germany. In April 2018, the EU proposed the creation of a representative action for the protection of collective interests of consumers. Following the agreement by Member States on a number of amendments in a session of the Council of the European Union on 28 November 2019, a directive is expected to be enacted in the course of 2020. Under the current proposal and similarly to the German Model Case Proceedings, representative actions can only be filed by qualified entities, such as consumer organisations, designated by Member States for this purpose. Unlike the Model Case Proceedings, the EU proposal enables qualified entities to bring representative actions, not only for declaratory decisions, but also for different types of recourse, including injunctive and redress measures.

Because of these effects, the Model Case Proceedings could soon become superfluous. The same is true for attempts to circumvent the absence of class actions in Germany by resorting to a joinder of parties or a bundling of claims. These operations are likely to be uneconomical compared to representative actions under the EU proposal, because they do not disburden courts from assessing and deciding on every single claim separately.

25 Prütting, ZIP 2020, 197, 203.
I INTRODUCTION TO THE 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 2000.2

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.3

Order 15, Rule 12 of the RHC also provides that the court may appoint a defendant as the representative defendant.4 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.5 There is also a provision for appointing a representative plaintiff in the Small Claims Tribunal, which has jurisdiction for matters not exceeding HK$50,000.6

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 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, 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 as suitable for a class action suit, the members of the class would be automatically bound by the outcome, unless they indicated that they wish to be excluded from the action, 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.7

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 (the LegCo) 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 24 June 2019, the working group had held 25 meetings and its subcommittee had held 31 meetings but neither has yet given its 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 LegCo, 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.8

In April 2019, Ms Teresa Cheng, SC, the Secretary for Justice, in reply to the Honourable Mr Dennis Kwok, a member of the LegCo representing the legal functional constituency, stated that although there is not yet a specific timetable for consulting the public, the secretariat of the working group has started compiling a draft consultation document in parallel with and based on the research papers and deliberations of the working group, and the working group has started reviewing the draft. Ms Cheng further stated that the draft consultation document proposes to cover seven specific issues:

a a close scrutiny of the LRC’s proposed definitions of ‘consumer’ and ‘consumer cases’;

b how potential litigants may be included (or excluded) from an intended class action;

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7 Order 15, Rule 12(3), Rules of High Court (Cap. 4A).
the procedural features of a workable proposed class action regime that would also achieve the stated policy objectives of the regime;

d the interface of litigation by way of class action with other forms of dispute resolution;

e appropriate mechanisms for determining class action awards and distributing them fairly among the class members;

f cost implications; and
g the resulting draft bill.9

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, the Honourable Mr Dennis Kwok 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.10

In 2016, the gym chain California Fitness closed down all its outlets overnight and, as at the 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. Similarly to victims in consumer claims, victims of anticompetitive practices may present en masse, all claiming for relatively small amounts. Thus, the introduction of a class actions regime would most likely be seen as a positive development aimed at promoting a fairer economy.11 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 unable to operate in tandem to allow victims of anticompetitive practices collective redress through a class action procedure.

There were no significant developments in 2019 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

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proceedings involving: (1) the estate of a deceased person; (2) property subject to a trust; and (3) the construction of a written instrument including legislation; each of these 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 ‘threelfold 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.12

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.13 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.14 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 than likely be different for each plaintiff) was the only relief that could effectively be granted in representative proceedings.15

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’.16

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.17 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.18 The same-contract requirement is also no longer a prerequisite for commencing representative proceedings19 and it is accepted that members within the represented group may have different degrees of interest.20 The impediment of a defendant raising separate defences against different class members is also no longer a bar to bringing representative proceedings.21

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 having been the representative plaintiff at the date of the original writ.22

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14 ibid., at 1039–1040.
18 ibid., at 255.
19 Irish Shipping Ltd v. Commercial Union Assurance Co plc (The Irish Rowan) [1991] 2 QB 206 (CA).
20 Ng Hing Yau v. City Noble Developments Ltd [2017] HKEC 2470, at 12.
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.\(^{23}\)

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.\(^{24}\) The representative plaintiff’s writ must clearly and precisely define the class being represented.\(^{25}\) 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 to be dismissed if it is not.\(^{26}\)

A representative plaintiff action is suitable if there are a large number of plaintiffs with the same interest. If there are only a few members in the defined class, the court may, in the absence of any other acceptable justification, order that all members be added as plaintiffs to the action instead.\(^{27}\) There is no set number required, but a class that consists of five or fewer members is unlikely to suffice.\(^{28}\)

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.\(^{29}\)

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.\(^{30}\) The representative application would usually be heard before a master, as opposed to a judge.

As with 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.

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\(^{26}\) Hong Kong Kam Lan Koon Ltd v. Reality Investments Ltd (No. 2) [2005] 1 HKC 565.
\(^{28}\) Re Braybrook [1916] WN 74.
\(^{29}\) Re Pentecostal Mission, Hong Kong and Kowloon [1962] HKLR 171.
\(^{30}\) Order 6, Rule 3(b), Rules of the High Court (Cap. 4A).
The court retains the ultimate discretion in selecting the representative and will make a representation order for those it considers most proper, even if it is inconsistent with the choice made by the plaintiffs and defendants. 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.

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.

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. This also applies to judgments in default, and to 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.

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

33 Order 15, Rule 12(3), Rules of the High Court (Cap. 4A).
34 Order 15, Rule 12(4), Rules of the High Court (Cap. 4A).
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 Section III.ii, a class consisting of five or fewer members is likely to be too small. If the class is too small, or the definition is not clearly defined or the court otherwise concludes that the representative method is wholly inappropriate in the circumstances, 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 the principal aims of representative proceedings is to save time and resources by making the representative action binding on all represented members, such that, once that judgment is obtained, represented members are estopped from relitigating 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 if 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 (except 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 or putting him or her back in the same position he or she would have been in 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. Therefore, success fee arrangements for recovery of costs, such as conditional or contingency fees, are not permitted except under three limited exceptions: (1) a person may have a legitimate common interest in the outcome of the litigation to sufficiently justify

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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. 36 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.

Settlement
The representative plaintiff is the individual who has a real interest in the outcome of the case and, prior to the court rendering 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 having been 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 from 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, because of 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 under-utilised mechanism for plaintiffs pursuing class action-type claims. As the Chief Justice’s Working Party on Civil Justice Reform Interim Report and Consultative Paper notes, 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. 37

36 ibid. See also Re Cyberworks Audio Video Technology Limited [2010] 2 HKLRD 1137.
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 there still exist many hurdles to overcome in bringing 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 from 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 chart the waters of class action regimes 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.38 It is hoped that the working group and subcommittee will be able to finalise and publish the consultation document 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.

Chapter 11

INDIA

Sumeet Kachwaha and Ankit Khushu

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Class action provisions have existed in the Indian Code of Civil Procedure (CPC) since 1908. However, an elaborate framework relating to class actions came about through a 1976 amendment.² Broadly, the key provisions are:

a There must be numerous persons having the ‘same interest’; the ‘Explanation’ to the relevant section clarifies that it is not necessary that they have the same cause of action. A Supreme Court judgment elaborates: ‘either the interest must be common or they must have a common grievance which they seek to get redressed’.

b A declaration of a suit as a representative suit requires court permission and this permission can be sought either by the plaintiff or a person defending the suit.

c As well as the general provisions, special provisions exist in the CPC for collective actions in relation to public nuisance or other wrongful acts affecting or likely to affect the public, whether or not any special damage has been caused to the person bringing the action. In relation to suits in respect of charitable or religious trusts, however, ‘only a person who has an interest in the trust’ may bring a representative action. In either case, court permission is required.

The legislative intent in permitting class actions is to reduce multiplicity of legal proceedings (and the risk of diverse or conflicting findings on a common issue).

i Consumer Protection Act

Class action-enabling provisions are also available under the Consumer Protection Act 1986 (CPA). Once again, it requires that persons sought to be represented have the ‘same interest’. The complainant who first gets his or her complaint treated as a class action is entitled to lead the matter. Complaints filed previous to this action can continue or they may simply

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1 Sumeet Kachwaha and Ankit Khushu are partners at Kachwaha & Partners.
3 Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy, (1990) 1 SCC 608.
4 Section 91, CPC.
5 Section 92, CPC.
6 The Act is likely to be substituted by a new piece of legislation. However, no change is proposed in the class action provisions.
7 Section 2(1)(b), Consumer Protection Act, 1986.
join the lead complainant, withdrawing their individual complaints. Subsequently instituted complaints will not be entertained and they may instead, with permission from the consumer court, join the lead complainant.

ii Companies Act

There is a bit of a background to the introduction of class action provisions under the Companies Act in 2013. A few years prior to this, India witnessed a huge corporate scandal when the founder chairman of a leading information technology company, Satyam Computers, confessed that the company’s accounts were fabricated and about US$1 billion cash showing in the company books was in fact missing. A consumer protection organisation sought to bring a collective action before the consumer court. The complainants chose to approach the consumer court rather than the normal civil court, as a complex matter like this would have entailed inordinate delays given the backlog for civil suits in India. However, the consumer court rejected the complaint in limine as it follows a summary procedure and does not entertain matters that are likely to involve complex factual issues. An appeal by the complainant to the Supreme Court was also unsuccessful. The complainant then chose to abandon its claim. In essence, in the absence of a collective action mechanism under the Companies Act (and as the alternative avenues were found to be wanting and unsuitable), the Indian investors in the company were largely left remediless. In contrast, the American investors in the same company were able to recover damages in the US courts through a class action.

This vacuum was filled via a 2013 amendment to the Companies Act, which now empowers the National Company Law Tribunal (the Tribunal) to declare an action a class action. In class action litigation provisions under the Companies Act, there are certain departures from the CPC provisions, the most significant being a minimum number of members needed to join an action for it to be declared a class action. Further, the Companies Act avoids the expression ‘same interest’ and instead the Tribunal is required to consider (among several other factors) whether there are questions of law or fact common to the class and whether the claims or defences of the representing party are typical of the class it seeks to represent. Representative action provisions, however, do not apply to a banking company.

10 Re: Satyam Computer Services Ltd. Securities Litigation, U.S. District Court, Southern District of New York, No. 09-MD-2027 (BSJ).
11 Section 245(3), Companies Act, 2013 sets out the number of members or depositors required to file a class action suit:
   a Required number of members: for companies having share capital, no fewer than 100 members or a prescribed percentage of total members whichever is less, or a member or members holding a prescribed percentage of the shareholding in the company. For a company without share capital, not less than one fifth of the total number of its members.
   b Required number of depositors: minimum 100 depositors or a prescribed percentage of the total depositors, whichever is less, or a depositor or depositors to which the company owes the percentage of the total deposits as prescribed.
iii Competition Act

The class action came to be recognised under India’s new Competition Act in 2002. The basic structure is the same as under the CPC (i.e., that the loss or damage has been caused to numerous persons with the same interest and the Tribunal has granted permission to one or more of those persons to litigate on behalf of the class). The Competition Act provides that the class action CPC provisions apply. However, to date, the class action provisions under the Competition Act have not been tested.

iv Public interest litigation

There is an altogether different dimension of representative suits in India in the form of public interest litigation (PIL). This is a unique and expansive jurisdiction carved out by Indian courts in which any person (without the need to disclose any locus standi or special grievance) can espouse a public cause. These petitions lie before the high courts or the Supreme Court of India, in exercise of their writ jurisdiction. Indian courts have been extremely liberal in entertaining PIL suits (to the extent of being accused of crossing their legitimate constitutional bounds and transgressing into the realm of the legislative and the executive). PIL suits, however, are highly popular, resorted to regularly, and here to stay. They cover virtually every conceivable facet of public life, including the right to a clean environment, food, water, education and medical care.

The defining features of a PIL action are that the court disregards locus standi and procedural compliance. It is even willing to entertain a simple letter from a public-spirited person and suo moto convert it into a writ petition. However, the petitioner must be seen to be acting bona fide and not for personal gain or profit. A PIL judgment is binding on everyone, whether they have notice of the proceedings or not and whether they were afforded an opportunity of being heard or not. Indeed, the nature of the parties is amorphous and the petitioner is not dominus litus.12 PIL is viewed as non-adversarial, with the judge taking on a proactive role and not being confined to the pleadings or evidence produced by the petitioner. Public policy doctrines such as res judicata and estoppel are inapplicable.

Illustrative PIL cases

The body of case law concerning PIL is immense and diverse. A few illustrative cases are set out below to give a flavour of the scope and ambit of this jurisdiction.

M C Mehta v. Union of India13

Mr M C Mehta is an acknowledged environmentalist. In 1985, he filed a writ petition in the Supreme Court of India seeking court directions on environment-related matters, including relocation of polluting and hazardous industries outside Delhi. The Court has since kept the petition on record and, from time to time, entertained environmental issues brought before it. Various orders (on a diverse range of environmental issues) have been passed. These include orders concerning lead-free gasoline; cleaning up of major rivers; controlling crop burning

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12 Aman Hingorani on 'Public Interest Litigation'; Annual Survey of Indian Law 2017, Vol. LIII, Chapter 24, p. 634.
India

(which leads to smoke pollution across North India); restricting construction activities when pollution levels spike; disposal of waste and garbage; traffic congestion; and phasing out overaged vehicles from the city of Delhi.

**Vishaka v. State of Rajasthan**

In this case, the Supreme Court was approached by a group of social activists and non-governmental organisations seeking the Court’s intervention to prevent and address sexual harassment in the workplace. The Supreme Court held that there was a legal vacuum as neither the civil nor penal laws adequately address sexual harassment in the workplace and that enactment of legislation on this may take time. The Court virtually legislated by prescribing rules for both the private and the public sector to follow. Briefly, the Court imposed a duty on the employer to put in place systems to prevent and deter sexual harassment in the workplace and for resolution (or prosecution) of complaints relating to sexual harassment. Inter alia, the Court required an employer to set up complaint committees (to be headed by a woman). The complaint mechanism must ensure time-bound complaint redressal and maintain confidentiality. If the complained of conduct amounted to a criminal offence, the employer would be required to take action in accordance with the law by making a complaint to the appropriate authority. If it amounted to a civil wrong or misconduct, appropriate action was to be initiated in accordance with the applicable service rules.

**The Orissa Mining Corporation case**

In this case, two multinationals had sought the requisite permissions from the Ministry of Environment, Forest and Climate Change to undertake mining and industrial activities in a forest area. The Ministry granted the preliminary permissions but rejected the final permits. The rejection was pursuant to certain recommendations by a government committee appointed by the Ministry, which expressed concern regarding adverse effects on the region’s indigenous tribal people and their lifestyle. The Supreme Court concluded that the mining activities already undertaken were illegal as they exceeded the government permits. Further, it concluded that the mining activities threatened the stakeholders’ traditional lifestyle, which they were entitled to protect. Going forward, the Court required greater involvement of the village-level bodies in the decision-making processes concerning forest-related industrial or mining activities.

**Endosulfan (pesticide) case**

The Supreme Court in this case took cognisance of certain press reports that a pesticide, endosulfan, posed serious health risks. This pesticide was used widely on crops and fruit trees. Controversially (because the measures taken were merely on the basis of press reports), the Supreme Court put an immediate ban on the production, distribution, use and sale of endosulfan and directed the seizure of stocks. It then appointed a committee headed by the Director General of the Indian Council of Medical Research and the Agriculture

Commissioner to conduct a study on the adverse affects of endosulfan. Months later, the Court modified its interim order and permitted exports of endosulfan to countries that permitted its use and in relation to which Indian exporters had existing purchase orders.

II THE YEAR IN REVIEW

i Vivek Kumar Singh v. Sweta Estates Pvt Ltd
In this case, a group of purchasers of housing flats sought to move the consumer court by way of a class action. The respondent, however, resisted on the ground that the majority of the complaints would be time-barred as they were merely trying to piggyback to overcome the statute of limitations. The consumer court accepted this argument, holding that the complainants were not similarly placed (in as much as some actions were time-barred). Further, the grievances were not common and the ingredients of commonality and a common class were missing.

ii Surender Pal Singh v. DLF Homes Panchkula Pvt Ltd
In this case, certain allottees of apartments in the respondent’s housing development project approached the consumer court seeking classification of their complaint as a class action on behalf of allegedly ‘similarly placed consumers’ (including those not arrayed as parties in the complaint). The court declined to permit this as a class action, holding that the parties were seeking conflicting reliefs. One set of complainants sought possession of their flats with 8 per cent interest on the sums paid for the delay caused, whereas the other set wished to surrender their flats and have a refund of monies paid with 18 per cent interest. The court held that the reliefs claimed were not identical on behalf of the complainants, including those who had not been arrayed in the complaint.

iii Anjum Hussain & Ors v. Intellicity Business Park Pvt Ltd & Ors
In this case, the complainant, who had booked office space in a project consisting of residential and office units, sought to bring a class action on account of delays in completion. The consumer court declined to treat it as a class action, holding that although the grievance was common it was not shown who (from the class) would be covered as a ‘consumer’ under the definition provided under the Act. This decision was, however, reversed by the Supreme Court of India on appeal, with the Supreme Court stating that the ‘sameness of interest’ was not to be confused with the ‘same cause of action’: ‘It is true that each of the allottees is interested individually in fighting out the demand separately made or going to be made on him and thus separate causes of action arise in the case, but that does not make Order I, Rule 8 inapplicable.’ The Supreme Court also held that the class action provisions must receive a liberal interpretation, such as to subserve the object of the provisions’ enactment.

In this case, two factions of a church had been in dispute over several decades. The Supreme Court had intervened in 1958 and then again in 1995. In the latest round, the Supreme Court held that the principles of *res judicata* would apply and that the findings of its 1995 judgment would continue to be binding on the parish members (including those not born at the time of the most recent litigation).

### III PROCEDURE

#### i Commencing proceedings and procedural rules

The discussion below is relevant for class actions (other than PIL actions).

As seen, a class action in India necessarily requires court permission. Before granting the requisite permission, the court shall (at the plaintiff's expense) cause notice to be issued to all persons sought to be represented. Where personal service is not feasible (including for the reason that large numbers of persons are involved), service through public advertisements may be effected as the court may direct. A person who seeks to be represented or defended may apply to the court to be made a party to the suit. A decree passed in the suit is binding on all persons on whose behalf or for whose benefit the suit is instituted or defended.

#### ii Damages

Historically, Indian courts have been conservative in awarding damages. There are no jury trials. The basic principle for awards of damages is restitution and compensation. However, in environmental degradation cases, damages can be extensive and in some cases punitive as well.

In cases of public wrongs, courts tend not to calculate damages precisely or base them on any expert evidence; instead, the court takes a broad-brush approach and orders what it considers just and appropriate given the totality of the facts. In representative suits, damages will either be awarded to identified individuals (sometimes through court-appointed commissioners) or, in environmental cases, simply awarded in favour of the government exchequer towards restoration of the harm done.

#### iii Costs

One significant feature of Indian law is that actual or realistic costs are never awarded and an exercise of assessment of costs is not undertaken (as it is in American or English courts). Section 35 of the CPC deals with the subject of costs. It states that costs shall be at the discretion of the court but subject to limitations as may be prescribed in law. The general rule is that costs shall follow the event. However, where the merits are evenly balanced or there is a fair question of law involved, the parties are left to bear their own costs.

Various high courts have framed rules prescribing a schedule of costs awarded in suits and these are at a very modest scale (rarely exceeding a few hundred dollars). To illustrate this, Section 35A of the CPC (last amended in 1977) states that if a claim or defence is found to be false or vexatious to the knowledge of the concerned party, the court may award ‘exemplary costs’ against it, which, however, shall not exceed 3,000 rupees (about US$42).

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The courts have taken judicial notice that unscrupulous litigants may take advantage of the fact that costs are either not awarded or are awarded only nominally.\textsuperscript{21} At the same time, it is felt that heavy or actual costs may be an impediment in pursuance of a legal right or defence (and therefore, contrary to public policy). The Law Commission of India (an advisory body to the government and Parliament), in a report of May 2012,\textsuperscript{22} recommended that more reasonable costs should be awarded. Nonetheless, its recommendation for Section 35A of the CPC concerning false or vexatious costs claims is merely to increase the cap on costs from the existing 3,000 rupees to 100,000 rupees. This indicates that realistic costs amounts are still some distance away.

### iv Settlement

Once a court certifies an action as a class action, it can neither be withdrawn nor abandoned and no agreement, compromise or satisfaction can be entered into unless the court has given (at the applicant’s expense) notice in the prescribed manner to all interested persons.\textsuperscript{23} The legislation, however, is silent as to how the court is then to proceed. In particular, there is no provision for a ‘fairness hearing’ (as known in, for instance, the US courts). The absence of clarity in the legislative framework has led the Indian courts to proceed in an ad hoc manner and falter many times.

The following is illustrative of this situation.

The Supreme Court of India found itself in a peculiar situation over PIL in the \textit{Olga Tellis} case.\textsuperscript{24} The city of Mumbai (then known as Bombay) sees a continuous influx of migrants, who settle in shanties because of the unaffordability of regular housing. These dwellings sometimes spill over onto public pavements. In 1985, the city sought to evict the pavement dwellers, but it did not offer them any alternative shelter. There was public outrage as this was just prior to the outbreak of the monsoons. (Mumbai has heavy torrential rains during the monsoon months). Moved by the plight of the pavement dwellers, a citizens’ group approached the High Court of Bombay, through a leading senior advocate who ‘candidly conceded’ in court that his clients were not claiming any fundamental or legal right on the part of the pavement dwellers to stay on the pavement, rather they were only looking at a humanitarian approach to tide them over the monsoon period. On the strength of this, the eviction was halted. However, when the monsoons had passed, the pavement dwellers stayed put and some other organisation now petitioned the Supreme Court directly (under its writ jurisdiction) contending that the pavement dwellers had a fundamental right to stay on the pavement unless alternative accommodation was made available. The new set of petitioners representing the pavement dwellers claimed that they had nothing to do with the previous set (who had given the undertaking to the High Court). The problem was compounded because, in a PIL suit (where the CPC does not apply), no public notice was given and neither was the matter declared a representative action under the provisions of the CPC. Unfortunately the Supreme Court did not provide any guidance for future reference and simply dismissed the argument relating to \textit{res judicata}, stating that there can be no estoppel of fundamental rights.

\textsuperscript{22} ‘Costs in Civil Litigation’, Law Commission of India, Report No. 240.
\textsuperscript{23} Order I Rule 8(4), Code of Civil Procedure, 1908.
\textsuperscript{24} \textit{Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.}, (1985) 3 SCC 545.
and therefore any concession in the lower court (under a mistake of law) would not affect the fundamental rights of pavement dwellers to approach the Supreme Court and the Court ruled on the merits in favour of the pavement dwellers.

The issue was soon to be revisited. Lack of clarity on the procedure to be followed (and the absence of any court-led procedures) led to an alarming situation in the Bhopal Gas Leak case. By way of background, the Bhopal Gas Leak Disaster in December 1984 (in the city of Bhopal) was the worst industrial accident known to mankind. A major American multinational chemical company, Union Carbide Corporation, was involved. The government stated that over 3,000 people had died and another 30,000 suffered serious injuries. As Union Carbide was a US-based corporation, India immediately saw multitudes of ‘ambulance-chasing’ lawyers descend on the city and get people at large to sign over power of attorney to the lawyers, and in this way purporting to represent the victims. This led the government of India to step in and enact special legislation, the Bhopal Act,25 conferring exclusive powers on the central government, inter alia, to represent all victims and deal with the claims to the claimants’ best advantage. By virtue of the Bhopal Act, the central government ousted the claimants and took over the right to be represented in the matter (whether within or outside India) to the same extent as the original claimants. The Bhopal Act specifically allowed the government to enter into a compromise with Union Carbide but failed to provide any procedure or guidelines to be followed.

Armed with the Bhopal Act, the government filed a civil suit in the Bhopal civil court before a special court constituted for this purpose, and claimed a total of US$3 billion for the victims (making it the largest damages case in the world at the time).

The matter reached the Supreme Court of India on an interlocutory application by the government seeking interim compensation for the victims. The Supreme Court played a proactive role and nudged both parties to agree on an overall settlement of US$470 million. The settlement was worked out in an in-chamber hearing (and not in open court). No victims group was notified or heard. The Court later disclosed that it had arrived at this figure basically by bridging the gap between the US$500 million the central government sought from Union Carbide and the US$420 million that Union Carbide was willing to pay. While the Indian government found the court-suggested figure acceptable, it was apprehensive about public reaction, the political backlash and the possibility that the victims would feel let down. So the government essentially left it to the Supreme Court to mandate the settlement. The Supreme Court agreed to do so but it faltered at rendering a non-speaking ‘order’ requiring the government to settle the claim for this figure in full and final settlement. This led to a huge public outcry about not only the perceived inadequacy of the figure, but also the failure to hold a ‘fairness hearing’ and the lack of transparency as to how the figure was arrived at. The Supreme Court realised that it had overstepped itself and *suo moto* issued a supplementary order extensively setting out the reasoning behind the process it had adopted in arriving at the figure of US$470 million and why it considered this to be just and equitable given the facts of the case. The Court said that it was setting out its reasons in order to be of assistance in relation to the review proceedings, which had by then been initiated to challenge the settlement order.

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The Union Carbide settlement was questioned for decades afterwards and remains under a cloud to this day. The Supreme Court faced severe criticism, with the entire matter pointing back to the fundamental lack of clarity or guidance on the settlement of mass torts in India.

Soon thereafter, the Supreme Court was once again faced with a mass tort situation (the Oleum Gas Leak case). This concerned an ageing chemical factory located in north Delhi. In December 1985, a sulphur dioxide tank mounted on a steel structure collapsed under its weight, which led to a massive leakage of oleum gas, causing panic, harm and inconvenience to a large section of the people. Fortunately (given the nature of the gas) not many were seriously injured. There were a few reported cases of death, but causal effect was not established. The Supreme Court was already seised of the matter, as a writ petition seeking closure and relocation of the industry outside Delhi was pending consideration, and when the gas leak took place, the Court took up all issues including compensatory damages resulting from the leak. The Supreme Court entrusted the matter to the Delhi Legal Aid and Advice Board and under directions from the Court, claims were invited. Five thousand claims came to be filed in the civil courts of Delhi and pursued by the Delhi Legal Aid and Advice Board at no cost to the victims. At a certain point in time, the matter came up before the Supreme Court on an interlocutory issue and the Court felt that the matter was one that should be settled. Having recently suffered loss to its reputation (in the Union Carbide settlement), the Court chose to tread far more carefully this time. It did not monitor or drive the settlement process (much less suggest a settlement figure). The Supreme Court did, however, add that a plaintiff refusing to settle the matter in accordance with the advice of the legal aid committee would cease to enjoy the benefit of legal aid and would have to pursue the case independently. The legal aid committee invited the plaintiffs for settlement talks in small batches. The insurance company was also invited to be available. With a promise of ready cash, all 5,000 claims were settled within a month, without any outcry or expression of grievance on the part of any of the victims; in this case at least there was a happier ending.

The settlement of representative suits is very much work in progress. No lessons have been learnt from the past. Neither legislation nor court judgments have furnished the requisite guidance and, as can be seen above, when situations arise, the courts end up reinventing the wheel once more.

IV CROSS-BORDER ISSUES
i Overview
India’s judicial systems and traditions are moored to its English past. The commercial laws are all based on English common law and English case law is routinely referred to and relied upon.

Politically, India has a quasi-federal structure with each state headed by a high court, and the Supreme Court as the final court on all issues of law or fact. (The Supreme Court also enjoys original writ jurisdiction in relation to protection or enforcement of fundamental rights).

The Indian judiciary is known to be fair and independent. There is no xenophobia in relation to foreign litigants and the rule of law prevails. Indeed, there is not a single instance of a foreign arbitral award not being enforced by the Supreme Court of India. The main issue with the Indian judicial system concerns delays. A normal civil action can take well over a decade in the court of first instance itself. Writ petitions offer a quicker remedy but are available only against the state (for its acts or omissions) and are not appropriate for claiming
damages. Accordingly, India is not an attractive forum for bringing civil suits or actions in damages. Arbitration proceedings, however, do get seated in India and are dealt with under the efficient Arbitration and Conciliation Act (based on the UNCITRAL Model Law).26

ii Discovery
The general approach to discovery is conservative. The plaintiff is expected to have the evidence to establish its case, without the need for any elaborate discovery. A request for discovery must be shown to be relevant and proportionate. American-style discovery, or ‘roving’ or fishing expedition-style discovery, is not permitted.

iii Enforcement of foreign judgments
The CPC has two regimes for enforcement of foreign judgments:

a enforcement of a foreign judgment from a ‘reciprocating territory’; and

b enforcement of a foreign judgment from any other territory.

In both categories, enforcement can be resisted on six stated grounds, which generally boil down to denial of due process, or public policy. Where a reciprocating territory is involved, a foreign judgment is treated as a final decree of the court, which can be executed straight away, whereas a judgment from a non-reciprocating territory requires the initiation of a fresh suit based on the foreign judgment. The Indian courts will presume the foreign judgment to be conclusive on matters directly adjudicated between the parties.27

V OUTLOOK AND CONCLUSIONS
Two diverse paths are available in India in relation to class action litigation: the first is the regular mechanism available under the CPC, which in turn forms the template for allied statutes providing for class action (including the Companies Act 2013, the Competition Act 2002 and the Consumer Protection Act 1986). A good part of the action, however, lies through the robust mechanism available by recourse to the high courts (or directly to the Supreme Court) through the PIL instrument.


27 Section 13, CPC sets out the grounds exclusively upon which a foreign judgment can be challenged, which are the same as the grounds relating to foreign judgments of a reciprocating jurisdiction. (Section 44A, CPC). The six grounds on which a foreign judgment can be challenged may be summarised as follows:

a the foreign judgment has not been pronounced by a court of competent jurisdiction;

b it has not been given on the merits of the case;

c it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law in India (where applicable);

d the proceedings in which the foreign judgment was obtained are opposed to natural justice;

e it has been obtained by fraud; or

f it sustains a claim founded on a breach of any law in force in India.

Public policy grounds have been interpreted by the Indian Supreme Court as encompassing circumstances that are contrary to: fundamental policies of Indian law; the interests of India; and justice and morality.
Indian courts are liberal in matters of injunctive relief (including mandatory injunctions) and do not insist on security by way of costs as a condition for grant of any such injunction. Nonetheless, an action for damages is not attractive because of the inordinate judicial delays.

Indian courts need to focus on settlement mechanisms in representative actions and put in place a detailed mechanism to this effect. Equally, the PIL mechanism needs judicial attention, to provide for notice to the affected class and an appropriate methodology for gathering their views.
INTRODUCTION TO THE 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, 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, the Data Protection Act 2018, which implements Article 80(1) of the EU General Data Protection Regulation (GDPR) into Irish law, enables representative bodies to lodge a complaint or seek a judicial remedy (including compensation) on behalf of data subjects, subject to certain limitations.

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. Other examples of multiparty litigation in Ireland include claims relating to latent defects in buildings caused by the use of pyrite and claims relating to army deafness, contaminated blood products and tobacco-related illnesses.

As noted above, the GDPR introduced a representative or collective action mechanism whereby data subjects can mandate a representative body to lodge a complaint on their behalf, seek judicial remedy and seek compensation. The GDPR gave Member States the option under Article 80(2) to allow representative bodies to act without the specific mandate of data subjects, or on an opt-out basis. The Irish government decided not to permit

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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 Rachel Rock for her contribution to this chapter.
3 These limitations include a requirement that the representative body taking legal action must be ‘not-for-profit’ and must have ‘statutory objectives which are in the public interest’ and are ‘active in the field of the protection of data subjects’ rights and freedoms’.

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representative bodies in Ireland to act in this manner. Since the introduction of the GDPR in 2018, a number of actions arising out of breaches of the GDPR have been brought by representative bodies on behalf of data subjects under Article 80, and we anticipate that this trend will continue.

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, a procedural structure of this kind has not been implemented.

In November 2017, the Multi-Party Actions Bill 2017 was published as a private member's bill, 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. 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.

II THE YEAR IN REVIEW

Litigation funding is often considered in the context of multiparty litigation, and this issue has been litigated before the Irish courts in recent years. 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 United Kingdom 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

5 A private member's bill 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.
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.

Given the issues of public importance raised in the case, the Supreme Court agreed to hear the appeal from this decision, therefore bypassing, or ‘leapfrogging’, the Court of Appeal. The Supreme Court found that third-party litigation funding was unlawful, Denham CJ stating that ‘a person who assists another’s proceedings without a bona fide independent interest acts unlawfully’, and 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 2011 decision of Themia International Fund v. HSBC Institutional Trust Services (Ireland) Limited, 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.

The courts have clearly indicated that it is a matter for the legislature rather than the courts to develop the law in this area; and 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 – which further 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 United States), 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. Ultimately, the Supreme Court 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. 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.

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.’

### 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’. 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 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.

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:

- **tort claims**: six years from the date of accrual of the cause of action;
- **contract law**: six years from the date of breach;
- **claims for liquidated sums**: six years from the date the sum became due;
- **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;
- **land recovery**: 12 years from accrual of the right of action;
- **maritime and airline cases**: two years from the date of accrual of the cause of action;
- **defamation**: one year from the date of accrual of the cause of action; and
- **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).

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7. [Duke of Bedford v. Ellis.](#)
8. [Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.](#)
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.

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.\textsuperscript{9} 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.

\textbf{iii} \hspace{1cm} \textbf{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 is generally delivered quite promptly. There is currently a proposal to create a subdivision of the Commercial Court specifically for intellectual property and technology-related disputes. This reflects the rise in technology-related disputes before the Irish courts.

\textbf{iv} \hspace{1cm} \textbf{Damages and costs}

In most representative actions, the plaintiff is entitled only to declaratory and injunctive relief.\textsuperscript{10} 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:

\begin{itemize}
  \item \textit{general damages}: compensation for loss with no quantifiable value, such as pain and suffering;
  \item \textit{special damages}: compensation for precise financial loss, such as damage to property;
  \item \textit{punitive (exemplary) damages}: awarded to punish the behaviour of a defendant (rarely awarded); and
  \item \textit{nominal damages}: awarded where the claimant has been wronged but has not suffered financial loss.
\end{itemize}

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

\textsuperscript{9} Rules of the Superior Courts Order 4 \textit{r} 9.
\textsuperscript{10} Law Reform Commission Consultation Paper on Multi-Party Litigation (Class Actions) 2003.
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.

However, the procedural rules and reliefs available differ when redress is sought for a breach arising out of the Data Protection 2018 and the GDPR. For data protection actions, only the circuit court, concurrently with the High Court, has jurisdiction to hear and determine the case (the district court does not). The court hearing a data protection action has the power to grant to the data subject (on whose behalf the action is being brought) one or more of the following reliefs:

- relief by way of injunction or declaration;
- compensation for damage suffered by the plaintiff as a result of the infringement of the relevant enactment.

While there are no specific costs rules applicable to multiparty litigation, costs ‘follow the event’\(^{11}\) 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 FSPO, a quasi-judicial body tasked with resolving disputes outside litigation. While parties to complaints to the FSPO are permitted to be legally represented at each stage of the complaints process, 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

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\(^{11}\) Rules of the Superior Courts Order 99 Rule 1(4).
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.12

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.13

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.14 This Commission 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. At the time of writing, the Council and the Parliament have yet to reach an agreement and the directive has not yet been adopted; however, the Council adopted its general approach on the directive on 28 November 2019, and the Commission has stated that its focus is on ensuring the directive is passed in a timely manner so that consumers can enforce their rights in every Member State and obtain compensation when they fall victim to illegal practices.15

As drafted, the directive will allow a ‘qualified entity’ to take a representative action before a Member State court on 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. We can anticipate that the directive will raise some interesting questions in Ireland about how qualified entities designated to bring representative actions are constituted and funded.

In its original draft, the directive provided for a rebuttable presumption of liability in litigation before the courts of all Member States where liability has already been determined by a court in another Member State in respect of that matter. However, this has been replaced in the most recent draft with a provision that requires Member States to ensure that a final decision of a court or authority establishing an infringement harming collective interests of consumers can be used as evidence for the purposes of any other actions in another Member State.

The Council proposes an implementation period of 30 months from the entry into force of the directive to transpose it into national law, and an additional 12 months to commence application of its provisions, whereas the Commission is recommending that Member States implement the principles of the directive within two years of its publication.

In its current form, the directive provides that Member States shall, for the purpose of representative actions for redress, be free to choose between an opt-in and an opt-out system. The Law Reform Commission, in its 2005 report, indicated that Ireland will choose to adopt a mechanism that operates on the opt-in principle, subject to a power of the court to make an order for an action to be joined to an existing multiparty action. The opt-in principle reflects the traditional view of litigation, which requires a litigant to actively initiate proceedings before being considered a fully fledged member of a group. It remains to be seen whether this view has now changed, in light of the changes in the litigation landscape that have taken place in the 15 years since this report was issued. It is interesting to note that when implementing Article 80 of the GDPR, the Irish legislature elected not to implement Article 80(2), which would have allowed an opt-out regime for seeking redress on behalf of data subjects for infringements of the GDPR. The Minister for Justice and Equality at the time explained that to allow for an opt-out regime ‘without the permission or agreement of those individuals . . . would amount to an extraordinary change in our law’ that ‘is not part of our national law or legal system’.

V OUTLOOK AND CONCLUSIONS

Fifteen 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 it remains to be seen whether it will form part of the next government’s 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 lacked the support of the government of the day.

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 2017 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, it can be expected that change is on the horizon.

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 and a report published in 2020.
I INTRODUCTION TO THE 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 proceedings. 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.

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.

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. 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. 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 new shekels awarded to the public from class actions.

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 (The Fees Regulations), which introduced a fee related to the bringing and disposal of a certification motion for a class action. The Regulations now provide that 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 new shekels when filing a class action motion in the district court, 3,000 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 new shekels in the district court, 5,000 new shekels in the magistrates’ court or 1,800 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 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 action 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.

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5 ibid., p. 727 and ibid. These proportions have remained relatively stable over the past several years.

6 Based on statistics reported by Fink; see footnote 4.
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);\[ b \] and to cover a portion of the court expenses and judicial resources that are required by a class action because it is a complicated and long, legal proceeding.

Since the amendment to the Fees Regulations entered into force in May 2018, there has been a downward trend in the submission of certification motions, with a decrease of 72 per cent compared to 2017 (411 claims compared to 1,449). Most of the decline is attributed to there being fewer certification motions filed in consumer and banking claims, while research demonstrates an increase in the submission of certification motions related to: environmental damages claims; claims related to the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law 2000; and claims related to the Equal Rights for Persons with Disabilities Law 1998; all of which are exempt from fees according to the Fees Regulations.\[ b \]

With regard 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,\[ 9 \] 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.\[ 10 \]

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7 The currently proposed amounts are significantly lower than the Minister’s original proposal of 62,000 new shekels for the district courts and 50,000 new shekels for the magistrates’ courts; the new proposed fees fall reasonably within the range of current levels of public funding assistance.


10 Section 16 of the Class Actions Law; see footnote 2.
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.\textsuperscript{11}

The year 2019 was characterised by an increased number of certification motions submitted in the period before the application of the Fees Regulations came into force, while after the Fees Regulations came into force there was a significant decrease in the number of certification motions that opened. This trend strengthened after the \textit{Markit} ruling (however, it is difficult to isolate the effect of the \textit{Markit} ruling on the submission of certification motions since the ruling was rendered relatively close to the application of the Fees Regulations).

Moreover, although the amended Fees Regulations set higher fees in the district courts than in the magistrates’ courts, most certification motions are still submitted to the district courts.\textsuperscript{12}

A consequential decision was rendered in district court proceedings on 19 January 2020. Within the framework of a motion to certify a class action in connection with the ‘air cargo cartel’,\textsuperscript{13} the court certified the claim as a class action against four airlines. We believe the decision may have significance in relation to all follow-on damages class action proceedings in Israel.

The following is a summary of the main points of relevance in the decision:

\textbf{a} Limitation: the court rejected limitation claims, stating that the limitation period was tolled and did not commence until the US authorities’ publication revealed the existence of investigations regarding the air cargo cartel. According to the decision, prior to that date, the plaintiff did not have sufficient factual basis to file a claim regarding the alleged cartel.

\textbf{b} The factual basis required in the certification stage: the court held that the plaintiff’s burden of proof was to be interpreted in a lenient manner for several reasons, including (1) the inherent difficulty in establishing an evidentiary basis regarding cartels; (2) the court’s belief that the defendants had refrained from filing refutative evidence; and (3) the importance of the class action proceedings for the efficient enforcement of competition law.

\textbf{c} The applicability of the Israeli Competition Law: the court found that the Israeli Competition Law applied to the alleged cartel claims, as it found that Israel was likely to be part of the global cartel. First, because EL AL settled the case in the United States, inter alia, with respect to claims that may have affected Israel; and second, the court stated that it was unlikely that Israel would be excluded from a global cartel.

\textbf{d} The presumption of damage as a result of a cartel: the court held that, according to Israeli law, there is a legal presumption of the existence of damage in horizontal cartel cases.

\textbf{e} Indirect purchasers: the court held that the represented group of indirect purchasers was to be affirmed, as the Israeli courts have affirmed that indirect purchasers, who are two steps removed from the violators in a distribution chain, have the right to submit antitrust claims.

\textsuperscript{11} Based on statistics reported by Fink; see footnote 4.

\textsuperscript{12} See footnote 8.

\textsuperscript{13} C.A. 10538-02-13 \textit{Hzlaha the Consumer Movement to Promote a Fair Economic Society v. El-Al Airways to Israel Ltd} (published in Nevo, 3 February 2016).
The judge decided to postpone until the next stage most of the legal and evidentiary complexities and problems raised in the certification motion. Moreover, the judge based his decisions on general considerations of the importance of the class action mechanism and the enforcement of antitrust violations.\textsuperscript{14}

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:

\begin{itemize}
  \item[a] the claim presents questions of law or fact common to the class members;
  \item[b] there is a ‘reasonable chance’ that those questions will be decided in the group’s favour;
  \item[c] a class action would be the just and efficient method for resolving the dispute;
  \item[d] there are reasonable grounds to believe that the class members’ cause will be adequately represented and managed; and
  \item[e] there are reasonable grounds to believe that the class members’ cause will be represented and managed in good faith.
\end{itemize}

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.

\textsuperscript{14} It should be noted that one of the four defendants is represented by the authors’ firm, S Horowitz & Co, and there is an intention to submit a motion for leave to appeal to the Supreme Court.
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. At least one Supreme Court Justice has expressed the sentiment that standing in a class action should be granted liberally and with heightened flexibility, to better promote the public cause. 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 in 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. 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.

The default mechanism for a class action is the opt-out mechanism, 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 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 out 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.

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15 Vinshal-Margal and Kalament, footnote 4, p. 730.
16 Chayut, footnote 3, p. 945.
17 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 legal representation of cases of questionable value, since the allegation that counsel had ‘recruited’ plaintiffs in bad faith had not been proven 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).
18 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.
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.19

The fund’s nine-member management committee includes representatives from the Attorney General’s office and several government commissions concerned with matters 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 new shekels had been approved for 64 funding requests, for an average of approximately 24,300 new shekels per request.20

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.21 The representative plaintiff must provide a preliminary evidentiary basis that sufficiently demonstrates a reasonable chance of success on the merits.22 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 (The Phoenix),23 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

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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 Supreme 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 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 of success to allow the entire claim to proceed as a class action.24

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.25 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 at the approval stage may in fact include some preliminary review of the merits.26

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.27 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 to be required for the sake of fairness, efficiency or the defence of any of the class members’ interests, and the court

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25 According to figures provided by Vinshal-Margal and Kalament (p. 738) and Fink, footnote 4.
26 Vinshal-Margal and Kalament, footnote 4, p. 741.
27 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.
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 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 in the settlement, which may not be withdrawn 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. 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.

Motions for class actions are most commonly submitted to the district courts, since they generally involve aggregate claims in excess of 2.5 million new shekels. 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. 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.

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’. 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

29 See Chayut, footnote 3; see also the Israel Consumer Council website (in English) at www.consumers.org.il/category/en-consumers.
30 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.
31 Vinshal-Margal and Kalament, footnote 4, p. 756.
33 Section 1 of the Class Actions Law; see footnote 2.
‘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.\(^34\)

In the landmark *Tenuva (I)* case,\(^35\) 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.\(^36\)

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.\(^37\)

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 *Tenuva*, where the injured members were consumers of household items, who are not readily identifiable and who do not generally retain proof 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.

\(^{34}\) Chayut, footnote 3, p. 948.

\(^{35}\) Civ.App. 1338/97 *Tenuva Central Coop for the Mkrg of Agr Prod In Israel Ltd v. Rabi*, PD 57(4) 673, 2003 (*Tenuva (I)*).

\(^{36}\) ibid., at 688E.

\(^{37}\) 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 Mkrg 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).
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 aggregate interest of the class. 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. 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.

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. 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.

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, 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.

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39 The Supreme Court in *Tenuva (II)* (footnote 37) reduced the quantum from approximately US$16 million awarded in the district court judgment, ruling that non-monetary damages for a breach of autonomy should 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 17, 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 should 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).
40 *Tenuva (II)*, footnote 37, at [36] and [37].
42 Amendment 10, footnote 2; Sections 20(c) and 27A of the amended Law. The same applies, *mutatis mutandis*, to any similar condition in a court-approved settlement (Section 19(d2) of the amended Law).
43 See footnote 42.
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 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.44

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.45 The Attorney General has typically filed objections to around 15 per cent of proposed settlement and, among these cases, the court’s tendency to reject the settlement or approve the settlement with substantial changes is correspondingly greater.46 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

44 Amendment 10, footnote 2; 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 Hapvaklit 393, 441–451 (December 2014).
45 Vinshal-Margal and Kalament (pp. 754–755) and Fink, footnote 4.
46 Vinshal-Margal and Kalament, op. cit.
is a judge) under Regulation 500, 47 or by service to the defendant’s ‘authorised agent’ in Israel under Regulation 482. 48 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. 49 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, 50 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. 51 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. 52 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. 53 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

47 Permission to serve a statement of claims outside of the territory of Israel is governed by Regulations 500–503A of the Civil Law Procedure Regulations 1984, and is a matter of judicial discretion that is also 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.

48 Service to an authorised agent in Israel is governed by Regulation 482 of the Civil Law 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.


Contracts Law 1982 (the Standard Contracts Law). Furthermore, although *forum non conveniens* is a doctrine applied at 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 rights of Israeli residents, it will be challenging for a foreign defendant to persuade an Israeli court to relinquish jurisdiction.

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 *Optronic/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 new shekels in damages. The plaintiffs sought to introduce the ‘effects doctrine’ to Israel to justify extraterritorial application of Israel’s Restricted Trade Practices Law 1988. 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.

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57 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.

58 It should be noted that the district court’s decision is currently subject to leave for appeal proceedings pending before the Supreme Court.
However, a recent, significant amendment to the Civil Law Procedure Regulations has increased the risk to a foreign company of being sued for damages in an Israeli court. The new Section 500(7a) 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 damaged 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 fulfilled.

The first condition is that 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.

In the Booking case, in a district court ruling dated February 2019, a certifying motion was allowed in Israel against the foreign company Booking, claiming that Booking did not notify its app users, prior to placing an order, as to the final price that would be paid, and as it is required to do. The court ruled that, in being open to the public, publication on the internet constitutes an ‘act or omission that occurred within the territory of Israel’ as required by Regulation 500(7) of the Civil Law Procedure Regulations, and thus subject to international authority, with the act not reducible only to the place of the violator.

It should be noted that Section 500(7a) is a new regulation that came into force recently, and accordingly 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 condition is that the defendant or a related person 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. It must also be shown that the procedural rights of the class members were not compromised; specifically,

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59 Section 500(7a) of the Civil Law Procedure Regulations 1984.
61 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) (Paragraphe 1 to (3) of Section 500(7a)).
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. 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. 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.

In the Facebook ruling, the Supreme Court held in a class action that a clause in a contract determined to be a standard contract under the Standard Contracts Law and stipulating that any dispute arising between the parties should be heard in a jurisdiction outside Israel may deprive consumers of their right, pursuant to the Standard Contracts Law, to bring their dispute before an Israeli court, and is therefore null and avoid. Under the Standards 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. 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. 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 the 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 significant 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.

We can see from the preliminary data indications of a downward trend in claims that end in a withdrawal (from 72.7 per cent to 56.8 per cent) and in a reasoned verdict (from 3.8 per cent to 22.7 per cent). This follows the amendment of the Fees Regulations, aimed at reducing the claims in petitions filed with the courts, and supports our initial recognition of the first signs of this downward trend, observed previously in this Review.

In addition, there has been a significant downward trend in the number of motions to certify being filed following the amendment to the Fees Regulations, although the extent of the contributory effect of the Markit ruling in this downward trend is unknown. In the


64 Verifone, op. cit., at [27].

65 See Misc.Civ.Motion 4986/09 Merck Sharp & Dohme (Israel 1996) Ltd v. Naftali (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.


67 Section 3, Standard Contracts Law.

68 Section 4(9), Standard Contracts Law.
segmentation by records, no significant change was recorded after the Fees Regulations were applied, and claims continued to be submitted mostly to the district courts even after the changes to the law.69

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.

69 See footnote 8.
I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Class actions are currently regulated by the Italian Consumer Code, although this is due to change with the entry into force of a major law reform in October 2020 (see below).

In a nutshell, pursuant to Article 140 bis of the Consumer Code, a class action can be brought in favour of consumers only to seek legal relief in cases of breach of (1) contractual rights towards the same professional defendant; (2) rights arising from product liability even in the absence of a direct contractual relationship with the manufacturer; and (3) the right to compensation for damage suffered because of unfair commercial practices and anticompetitive behaviour. These rights are required to be ‘homogeneous’.

Consumers who have suffered damage are entitled to bring a class action lawsuit. Such a lawsuit may be brought individually by a consumer as a party of the relevant damaged class or through associations delegated by the consumers (although consumer associations are not entitled to bring class actions on their own).

Other consumers can join a class action that has already been initiated, but they may also decide not to opt in. In this case, the consumer will be entitled to file a separate individual action.

From a procedural point of view, first the court rules on the admissibility of the class action and, if the action is admitted, the court shall specify the requirements that every consumer should fulfil to join the class. During the subsequent phase, the court goes thorough and analyses the merits of the case. Thereafter, if the court finds the defendant to be liable, it shall rule on the amount of damages that each consumer is awarded or indicate general uniform criteria. The parties are granted 90 days to reach an agreement on the amount of damages; failing this the court shall quantify the amounts due. Furthermore, under the opt-in mechanism, consumers who did not join the class are not bound by any agreement.

Moreover, the Consumer Code sets out a collective action for injunctions. This action can be brought only by consumer associations registered in a special register managed by the Ministry of Economy and Finance. These associations may ask the court (1) to prohibit conduct that harms the interests of consumers in particular matters; (2) to take appropriate measures against the harmful effects of this conduct; and (3) to order the publication of the measure in several newspapers.

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2 Legislative Decree No. 206 of 6 September 2005.
3 Consumer Code Articles 139 and 140.
An important reform that should be highlighted is the Italian legislature’s approval of a comprehensive new set of rules on class actions, in Law No. 31 of 12 April 2019 (Law No. 31), which transfers governance in this area from the Consumer Code to the Italian Code of Civil Procedure (CCP); this Law is expected to enter into force in October 2020.

Finally, Legislative Decree No. 198 of 2009 prescribes a different type of class action, granting consumers the right to protect their interests in cases of misconduct by public bodies or private companies providing public services. This kind of class action is usually known as a ‘public class action’ (as opposed to the ‘private class action’ set out in the above-mentioned reform).

In this chapter, we will deal with private class actions and collective actions for injunctions only.

II THE YEAR IN REVIEW

The most significant development in the past year consisted of the approval of the new class action rules.

In this respect, pursuant to Article 7 Paragraph 1 of Law No. 31, the new provisions shall enter into force 18 months after publication in the Official Gazette. Therefore, the new rules will enter into force on 19 October 2020.

Given the above, the new provisions will apply to unlawful conduct occurring after the date of entry into force of the law reform, meaning that the old rules (i.e., Article 140 bis of the Consumer Code) will continue to apply with reference to unlawful conduct committed before the effective date of the law reform.

Considering that the law reform has not yet entered into force, there is no case law that can be mentioned in this section.

Several aspects differentiate the law reform from the previous regime. The following are the most significant of these changes: (1) a class action can be started by any individual or legal entity, as well as any non-profit organisation or association; (2) the new regime protects any homogeneous individual right, not only consumer rights; and (3) class action proceedings will be divided into three phases.

Basically, the class action law reform confirms the opt-in scheme, according to which a judgment produces effects only in respect of those who have joined the class action.

In addition, the law reform provides a collective action for injunctions aimed at issuing a prohibition order in respect of acts and conduct perpetrated against a number of individuals or bodies by private companies or by bodies providing public services or public utilities in the course of their business. The law reform modifies the former regime, granting anyone entitlement to bring such an action.

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4 CCP Article 840 bis–Article 840 sexiesdecies.
5 See Court of Cassation 30 September 2015 No. 19453, Giustizia Civile Massimario 2015, according to which the public class action is used to achieve a result that benefits, indiscriminately, all the co-owners of the widespread interest in restoring the correct performance of the administrative function or the correct provision of the service.
6 As further modified pursuant to Decree Law No. 162 of 30 December 2019, which was definitively converted into law in February 2020.
III PROCEDURE

i Types of action available

The new class action is aimed at protecting homogeneous individual rights, which have in common the fact that they have been damaged by (1) multi-offence conduct (i.e., a single instance of conduct that affects a number of interests); or (2) a number of similar repeated instances of single-offence conduct.

Pursuant to CCP Article 840 bis Paragraph 2, the claimant may apply to the competent court to ascertain the liability of whoever has violated the homogeneous right, and the compensation for damage.

The law reform does not provide a definition of homogeneous rights; in this respect, according to a recent statement of the Court of Cassation, it is reasonable to rule out any assessments related to specific personal situations or evaluations that focus on specific emotional effects experienced by particular individuals or on the dynamic relational experience of such individuals.7

In addition, it should be noted that the protection of homogeneous rights includes both the rights deriving from direct contractual relationships and those arising from non-contractual relationships.

The limitation period is the same as for ordinary civil actions (i.e., in principle, five years for torts and 10 years for contractual liability).

With reference to the collective action for injunctions, the purpose is to obtain a general termination and restraining order in favour of an a priori undefined number of individuals.

The adjective ‘collective’ is misleading because this action has a dual nature: on the one hand, it is individual and can be exercised by anyone who has an interest in obtaining such an order and, on the other hand, it is effectively collective, granting entitlement to organisations and non-profit associations.8

ii Class action

Commencing proceedings

Pursuant to CCP Article 840 bis Paragraph 2, any individual, as well as any non-profit organisation or association, provided it is registered on a public list established at the Ministry of Justice, is entitled to bring class action proceedings. The new regime aims to protect not only consumers, but also professionals, companies, investors, shareholders and, in general, all categories of natural or legal persons who previously did not have the right to bring a class action.9

The law reform’s introduction of the entitlement of organisations or associations is a particular novelty since, under the former rules, these associations did not have an independent right to bring class actions (although an individual consumer could be represented in court by such associations); now such associations may bring a class action autonomously without delegation.

As regards the potential defendants, pursuant to CCP Article 840 bis Paragraph 1, private companies or bodies providing public services or public utilities can be sued only with regard to conduct carried out in the course of their own activities.

8 SASSANI, Class action Commento sistematico alla legge 12 aprile 2019, No. 31, 2019, p. 231.
9 See SASSANI, reference quote p. 7.
As regards the collective action for injunctions, pursuant to CCP Article 840 sexiesdecies, the entitlement to bring proceedings is granted to anyone (individuals and associations and organisations registered at the Ministry of Justice) that has an interest in a ruling that inhibits conduct and acts committed in relation to a number of individuals or bodies.

These are two different initiatives: an individual brings proceedings by virtue of an alleged right or interest of his or her own that is independent of legal provisions, while associations or organisations bring proceedings by virtue of law.

As to the potential defendants, CCP Article 840 sexiesdecies Paragraph 2 refers to private companies or bodies providing public services or public utilities.

**Procedural rules**

Class action lawsuits fall under the jurisdiction of the court specialising in companies according to where the company is based. In court, the case is heard by a panel of three judges.

This proceeding is divided into the following three phases.

*First phase (eligibility of the application)*

After the petition has been filed and published on the website of the Ministry of Justice, the court issues a decision on the eligibility of the application. In particular, the application shall be declared inadmissible if (1) the application is clearly groundless; (2) there is no homogeneity of individual rights; (3) the claimant has a conflict of interest with the defendant; or (4) the claimant is considered inadequate to represent homogeneous individual rights.

Where an application is deemed inadmissible because of its clear groundlessness, the application may be relaunched if new circumstances or factual or legal reasons are alleged.

The court may suspend the first phase if there are ongoing proceedings pending before an independent authority or an administrative judge concerning the facts stated in the petition.

The decision on eligibility can be appealed within 30 days.

Further class actions based on the same facts as those alleged in a pending petition may be brought within 60 days of the pending petition's publication date. Any further class actions brought outside this 60-day period will not be allowed to proceed.

*Second phase (merits on causation)*

If the application is declared eligible, the court (1) sets a period of between 60 and 150 days for the holders of homogeneous individual rights to exercise the first right to join; and (2) sets out the necessary characteristics of the homogeneous individual rights for the joining party.

Anyone who wishes to join the proceedings must file an application to join; any such application must comply with all the form and content requirements of CCP Article 840 septies (i.e., it must set out the claim, the facts supporting the application, the relevant documentary notice and the written evidence). If the joining applicant fails to comply with the requirements, the application will be deemed inadmissible.

In addition, a number of preliminary activities can be carried out at this stage, including the rights (1) to arrange a technical assessment, with expenses being borne by the defendant as a general rule (unless there are specific reasons why the general rule should not apply);
(2) to use statistical data; and (3) to order the disclosure of documents and data, at the claimant’s request, subject to the same requirements regulating disclosure in compensatory proceedings for violations of competition law. 10

The second phase of the proceedings ends with a second decision, granting or rejecting the application on the merits. Any appeal against this decision must be lodged with the court of appeal within six months of the date of the ruling.

**Third phase (merits on quantum)**

In issuing the above-mentioned second decision granting the application, the court also (1) awards damages or the compensation sought by the claimant (where the claim was brought by a party other than an association or a committee); (2) determines that the defendant violated homogeneous individual rights; (3) sets a period of between 60 and 150 days for the holders of the homogeneous individual rights to exercise the second right to join; (4) sets out the necessary characteristics of the homogeneous individual rights; and (5) appoints the judge in charge and the joining parties’ common representative, who is a public official and who must satisfy the same requirements as for the appointment of a trustee in bankruptcy.

Given the above, within 120 days of the expiry of the period in which the second right to join can be exercised, the defendant may file a defensive brief addressing all the facts claimed by the joining parties. The reform introduced by Law No. 31 stipulates the application of the non-challenge principle, pursuant to which facts not specifically challenged by the defendant are considered proved.

During the following 90 days, the joining parties’ common representative drafts the joining parties’ homogeneous individual rights plan.

During the following 30 days, the joining parties and the defendant may file written observations and additional documents replying to the aforementioned plan.

During the following 60 days, the common representative can vary and modify the contents of the plan.

Once these deadlines have expired, the court rejects or grants the joinder application by means of a decree.

**Damages and costs**

If during the third phase of the class action proceedings the decree issued by the court grants the joinder application, the court also orders the defendant to pay (1) the amount or to deliver the goods as compensation for damage or reimbursement; (2) the expenses of the common representative in proportion to the amount paid in favour of the joining parties; (3) the litigation costs of each joining party’s legal representatives; and (4) an award in favour of the claimant’s legal representatives. 11

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10 See Article 3 Legislative Decree No. 3/2017.
11 In this respect, the suggestions provided by European Union Commission Recommendation 2013/396 EU seem to have been disregarded by the Italian legislature. The Recommendation, for the application of principles common to Member States, censures those legal systems that, through the choice of a certain method of calculation of lawyers’ fees, incentivise initiating unnecessary class actions.
It has been noted that pursuant to CCP Article 840 quinquies, the defendant is obliged to advance the costs and the down payment to the technical consultant who may be appointed.\(^\text{12}\) This provision has given rise to some criticism because the technical consultancy is carried out in the common interest of the parties and it is therefore fair to consider that the relevant costs be borne by all parties concerned.\(^\text{13}\)

The decree rejecting or granting the joinder application may be appealed within 30 days of its publication (although new proof or new documents are not allowed in the appeal proceedings) and the court may confirm, modify or revoke the challenged provision.

Pursuant to CCP Article 840 undecies, if the joinder application is revoked, a joining party can start individual proceedings before the decree issued by the court against him or her becomes final.

In the collective action for injunctions, pursuant to CCP Article 840 sexiesdecies, the court can, by means of a specific decree, order the defendant to (1) cease the harmful conduct; (2) pay a daily penalty payment, at the party’s request; (3) adequately disclose the ruling; and (4) take appropriate measures to eliminate or reduce the effects of the established violations.

The law reform does not provide for punitive damages. In this regard, although when ruling on the recognition of US judgments the Court of Cassation has stated that punitive damages are not incompatible with Italian law,\(^\text{14}\) the Italian legislature has currently excluded the possibility of imposing punitive damages by means of class actions.

In this respect, the choice of the Italian legislature to exclude compensation in the form of punitive damages was probably influenced by Recommendation No. 2013/396 of the European Union, which suggests prohibiting punitive damages, as they can result in overcompensation in favour of the claimant.

**Settlement**

Pursuant to CCP Article 840 bis, in the event that all the claimants waive their requests as a result of a settlement agreement between the parties, the court shall grant the joining parties a period of not less than 60 days and not more than 90 days for the prosecution of the lawsuit. Once this deadline has expired, the court shall dismiss the proceedings.

\(^\text{12}\) It has been noted that as an alternative to having the defendant party advance the costs of the technical consultancy, it could be possible to introduce a different way to provide the funding necessary to bear the costs of the lawsuit to the claimant and parties who have joined; for instance, by means of third-party funding.

At the end of the lawsuit, if the claim proposed by the party that received the financing is upheld, the funder that has borne the costs is entitled to obtain a part of the total amount paid according to the terms previously agreed in the ‘financial contract’; on the other hand, if the claim is rejected, the funder is not entitled to obtain anything and, on the contrary, depending on the financial contract, it may have to bear the expenses incurred by the other parties.

\(^\text{13}\) See Court of Cassation 13 May 2015 No. 9813.

\(^\text{14}\) See Court of Cassation 5 July 2017 No. 16601 Riv. Dir. Proc., 2018, 4-5, 1356. In particular, the Court of Cassation stated that punitive damages were compatible provided that the foreign judgment had been issued in the foreign legal system pursuant to laws that guaranteed that defendants were only punished according to the details of the case and the requirements of the law, and guaranteed the predictability of these conditions and their quantitative limits, as the Italian court would have regard during its deliberation only to the effects of the foreign judgment and their compatibility with the principles of Italian public order.
In addition, until the oral discussion phase of the case, the court shall make a settlement or conciliation proposal wherever possible and with regard both to the value of the dispute and to easy and prompt resolution of the matter in law.

Moreover, pursuant to CCP Article 840 quaterdecies Paragraph 2, it is possible to produce a draft agreement that (1) is arranged by the common representative of the joining party; (2) does not require the acceptance of the claimant; (3) may be proposed after the expiry of the deadline for joining, allowing the defendant to better assess its convenience; and (4) may affect all those who have not promptly challenged the draft agreement.

### iii Collective action

Applications for collective actions for injunctions are filed according to the chamber proceedings prescribed by CCP Article 737 et seq. (these are simplified proceedings) before the court specialising in companies where the defendant is based. The preliminary activities that can be carried out are the same as those that can be carried out in a class action.

An application for a collective action must be notified to the public prosecutor’s office.

CCP Article 840 sexiesdecies Paragraph 9 expresses clearly the intention of the Italian legislature to keep collective actions for injunctions separate from class actions. In fact, in the event that a collective action for an injunction and class action proceedings are brought jointly, the judge must formally declare their separation, so that each case proceeds autonomously.

In this context, the law reform has been criticised for not allowing a class action to be added to a collective action for an injunction, and particularly where the claimant is an individual. The non-overlap between the two proceedings made sense under the previous regime, with collective actions for injunctions being brought exclusively by organisations or associations representing a collective interest, while the purpose of the class action was to protect individual rights. But given that the law reform enables individuals to proceed with both injunctive and compensatory protection (the latter can be obtained with the class action), it may be useful to allow the combination of the two proceedings in the same trial, so that individuals can claim both for cessation of the harmful conduct and compensation for damage suffered.

### IV CROSS-BORDER ISSUES

The class action law reform does not expressly provide for the possibility of overseas claimants joining the class, or for class actions being brought against foreign companies, therefore ordinary provisions on jurisdiction and applicable law apply.

In this respect, it is relevant to mention the EU proposal for a directive on class actions,¹⁵ the scope of which would cover other horizontal and sector-specific EU instruments aimed at protecting the collective interests of consumers in different economic sectors, such as financial services, energy, telecommunications, health and the environment. The proposed amendment would make procedures more responsive to the broad spectrum of infringements in economic sectors, where illegal practices by traders may affect large numbers of consumers.

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In particular, subject to the necessary measures being taken by Member States, qualified entities on the list of one Member State may bring a representative action before a court or administrative body of another Member State.

If the infringement affects or is likely to affect consumers in different Member States, the representative action may be brought before the competent court or administrative body of a Member State by qualified entities from different Member States to protect the collective interest of these EU consumers.

The proposed directive will enable qualified entities to bring representative actions seeking different types of measures as appropriate, depending on the circumstances of the case. These include interim or definitive measures to stop and prohibit a trader’s practice if it is considered an infringement of the law, and measures eliminating the continuing effects of the infringement. The latter could include redress orders and declaratory decisions establishing the trader’s liability towards the consumers harmed by the infringements.

As a rule, qualified entities should be entitled to bring representative actions seeking a redress order that obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate.

The proposal takes into account the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in Member States concerning violations of rights granted under EU law. The Recommendation lays down a set of common principles for collective redress mechanisms, including representative actions for injunctive and compensatory relief that should apply to all breaches of EU law across all policy fields. The principles in the Recommendation are self-standing and the proposal does not reproduce all procedural elements addressed by the principles. The proposal only regulates certain key aspects necessary for the establishment of a framework, which must be complemented by specific procedural rules on the national level. Some procedural elements from the Recommendation are not mentioned in the proposal because of its more targeted scope, which is limited to infringements that may affect the collective interests of consumers, and the pre-existing features of the representative action model in the current EU Injunctions Directive.

V OUTLOOK AND CONCLUSIONS

There are some critical issues regarding class actions in the law reform that have already been pointed out by commentators. One key issue is the risk that defendants will be sued in multiple class actions without (or perhaps only with great difficulty) being able to estimate costs and the number of potential claimants.

16 To bring representative actions, qualified representative entities must be properly established, not for profit and have a legitimate interest in ensuring compliance with the relevant EU law.
17 See footnote 15.
The following, we would argue, are among the most significant problems of the law reform: (1) the possibility of rebringing class action proceedings, if these are granted simply on the basis of new circumstances or factual or legal reasons, or on a combination of these; (2) the possibility of multiple (and simultaneous) class actions when these are not based on the same factual circumstances; (3) the provision of a second joinder of parties, subsequent to the judgment accepting the application on the merits on causation, which clearly does not allow the defendant to know from the outset the number of counterparties and therefore to define the amount of risk to which it is exposed; (4) the provision that allows a party joining the class action also to propose an individual action, where the joining part has withdrawn its application to join the class action before the decree (theoretically) rejecting its joining application has become final, with the consequent serious risk that the class action will be used merely for opportunistic purposes; (5) the application of the non-challenge principle in proceedings involving potentially large numbers of parties; (6) the conflict of interest inherent in the fact that the compensation of the common representative of the members (who acts as a public official) is proportional to the compensation paid to the members of the class; and (7) the award in favour of the claimant’s lawyer paid by the defendant, even though the defendant clearly has no connection to, or lawyer–client relationship with, that lawyer.

We will just have to wait for the concrete application of the new legal regime, in the awareness that the new class action is unlikely to result in a fast and effective remedy, but instead could cause a lot of uncertainty and potentially become a way of exerting unfair pressure on companies.
INTRODUCTION TO THE 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, a few 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. In another judgment, from the Court of Appeal and dating back to 2007, it was held that unions are entitled to defend the interests of their members through court actions. 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 to act effectively on behalf of multiple victims is still very limited. 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.

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 Union Law. These past few years have seen a steady increase in efforts to lay the groundwork.

1 François Kremer is a partner and Ariel Devillers is a senior associate at Arendt & Medernach.
3 Court of Appeal, 20 June 2007, docket No. 30686, 30687 and 30688.
According to the 2018–2023 Coalition Agreement⁶ 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.⁷

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 to be one of the government’s current priorities. In a statement made in November 2019, Luxembourg’s Minister for Consumer Protection reiterated the will to move forward quickly with the preparation of a bill of law on collective recourse. In a recent meeting with the Luxembourg Consumers Union, the Minister explained that she wished to have such a bill of law before the summer holidays in 2020.

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 Article 1689 et seq. of the Luxembourg Civil Code. To be effective, it is necessary either to 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 to Article 1699 of the Civil Code, which provides that in the 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 interest as from 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

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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.

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 Procedure.

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, 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.8

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.

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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 the 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 universally applicable Rome I9 and II10 Regulations 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. Disparities such as this 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 rely on information on foreign law obtained in accordance with the European Convention on Information on Foreign Law of 7 June 1968.

Enforcement of foreign class action judgments

Whether or not caught by the Brussels Recast Regulation\textsuperscript{11} or other international agreements,\textsuperscript{12} 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 to 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.

V 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.


\textsuperscript{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).
Chapter 16

NORWAY

Andreas Nordby

I INTRODUCTION TO THE 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. The overall aim of the reform was to ensure 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 to promoting access to justice in cases involving small claims and to obtain more efficient and effective justice in such cases. The US 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. Such joinder of cases has a long tradition in Norway.

The enactment of the class action rules was preceded by considerable debate in Norway. Simply put, advocates for consumer interest saw the 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, opt-in class actions are deemed to be the general rule. Which of the two procedures 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 who meets 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 courts are composed of 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 in 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 compensation 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 actions 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 action 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).

Developments over the past few years, however, seem to suggest 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 institution and have emphasised that class actions should be reserved for typical class action situations 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 it was possible that there would 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 paid to employees should also be included when calculating the basis for employees' pension arrangements. The class action was challenged by the oil and offshore companies but was approved as an opt-out action and had approximately 7,000 members. The class, however, did not succeed in its action, which ultimately was heard before the Supreme Court.

In 2016, the Home Owners Association instigated a class action against the municipality of Oslo alleging that property tax, which was introduced following the municipal election in 2015, was invalid, and that illegally recovered property taxes should be repaid. Approximately 2,000 citizens in Oslo joined the class action, which was handled as an opt-in class action. The right to hear the action as a class action was not challenged by the municipality. The Supreme Court handed down its decision on the merits of the case in 25 June 2019. The Supreme Court concluded that the municipality had a legal basis for the property tax as such, but that the municipality had failed to comply with a specific deadline, which rendered this taxation null and void. Consequently, the group's action was successful and resulted in a partial refund. As a consequence of the ruling, the municipality decided also to make a refund to those citizens that were not part of the class action.

In 2016, the Norwegian Consumer Council instigated a class action against DNB, the largest Norwegian bank, alleging that some 180,000 customers had lost a total of approximately 700 million Norwegian kroner by paying excessive fees for management of their savings. 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. Furthermore, all three instances heard the case on the merits and it was concluded with the Supreme Court handing down its decision 27 February 2020. The group was successful and the Supreme Court ruled that the members of the group were entitled to a 'price reduction'.
The case is illustrative of the potential benefits of a class action. The average price reduction for each member was about 1,590 kroner, but the total amount refunded was in the region of 350 million kroner. In addition, the costs involved in the litigation, including those for experts, were rather significant.

In 2016, a class action was brought against a private school on the basis that its tuition fees were too high. In January 2017, the action was approved as a class action with close to 500 members (former students of the school); the action was not challenged as a class action. 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.

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 action:

a  opt-in class action: 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

a  opt-out class action: 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 also apply mutatis mutandis to class actions in which the class is the defendant, except that class membership without registration is excluded (i.e., in opt-out actions, for obvious reasons). Applying the class action rules in a case where the class is the defendant will give rise to 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’. So far, there have been no class actions where the class is the defendant.

In addition to class actions the Civil Procedure Act also allows 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 to 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 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 the organisation’s purpose and field of activity. As this alternative indicates, there is no requirement for the organisation itself to have a claim similar to that of potential class members in order to initiate a class action lawsuit. This alternative will, inter alia, allow the Consumer 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 the action being brought as a class action. 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 all be heard by the same court, in terms of its 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 (a) above). 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 an impact on 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, it must also be kept in mind that a feature of the class action institution is to ensure that the action is made public – so that potential group members are informed of the lawsuit. In some cases, there may be significant uncertainty as to how many group members exist. In such cases, it may be an argument in favour of a class action that such an 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). The case was, however, nevertheless heard as a class action.

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 (a) above). This is often a matter of debate in actions being pursued as class actions and it is quite common for the defendant to argue that the requirement has not been met. When assessing whether this requirement has been met, the court cannot apply only the claimants’ perspective but must also take into account possible objections from the defendant. The claimants may rightfully argue that the basis for their claims is very similar (e.g., they were all customers in the same bank, acquired shares in the same fund, got the same standard information, etc.). However, when looking at the defendant’s objections, it may be considered that the requirement has not been met after all; for example, it may be found that some customers have lost their rights owing to statutory limitations, or some customers were given specific information prior to entering into the agreement, or because of other particular 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 to 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., the ‘best’ way of dealing with the claims (see point (c) above)). This is a vague criterion and leaves room for discretion on the part of the court faced with a petition for a class action. Based on the preparatory works, the following elements should, however, be taken into account:

\[ a \] the number of parties involved or potentially involved;
\[ b \] whether the involvement of a number of parties will hamper coordination of the lawsuit;
\[ c \] the degree of individual factual or legal circumstances;
\[ d \] whether the (potential) members of the class action are easily identifiable; and
\[ e \] whether it is necessary to apply the mechanism for notifying the (potential) class members.

In reality, the criterion that a class action has to be the ‘best’ way of dealing with the claims, seems in practice not to have been important for the courts’ decision as to whether an action should be approved or not. It is perhaps illustrative that the Borgarting Court of Appeal, in a ruling of 12 April 2018,\(^4\) simply stated that although there were alternatives to a class action, there were at the same time no particular arguments against a class action. While this

\(^4\) LB-2018-28008.
is of course true in many cases, this approach, taken by the Borgarting Court of Appeal in its ruling in this case, is somewhat difficult to reconcile with the requirement that a class action should be the better choice for the case at issue than the available alternatives.

Finally, a class action may only be approved if it is ‘possible to nominate a class representative’, as in point (d) above; 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 action and thereby also the range of class membership. There is no limitation as to who may be a 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 of foreigners joining 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 in Germany will be able to instigate ordinary legal proceedings in Norway against the German trader.5 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

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5 Also, Norwegian law recognises that, to a certain extent, consumers may take legal action against a professional party before the courts of the place where the consumer is domiciled. See 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.
no longer included in the class action may, within one month of the ruling for reversal or amendment becoming final and enforceable, require the court to continue to hear their claims as individual actions.

Apart from being governed by 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 maintain 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 take place within six months of the date of submission of the writ of summons to the court, unless there are special circumstances. This also applies for class actions. However, in class action cases it is common for the defendant to contest whether the criteria for bringing the action as a class action have been met. This may lead to an exchange of pleadings and also, in some cases, a separate hearing with respect to the approval issue. If the class action is approved, the approval may also be appealed to the Court of Appeal. Thus, in many class actions it will not be possible to schedule the main hearing until later.6

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 general rule, in addition to the class representative, the class is required to be legally represented by counsel, who shall be an advocate.

iv Damages and costs

When the class action 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 incurred have been necessary and proportional to 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 decide that registration shall be subject to the class members accepting liability for a specified maximum amount of costs. This is typically done in cases where the class action is brought

6 The case against DNB is perhaps illustrative in that the writ of summons was submitted on 21 June 2016 and the procedural issue of whether the case should be heard as a class action was not resolved until 1 September 2017 (when the Supreme Court dismissed DNB’s appeal).
by a private individual or the class representative is a private individual. 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 in such arrangements in Norway.

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 such a low individual value that the group members cannot be expected to 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 safeguarding the members’ interests.

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). Second, 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 should exercise control of the settlement. With reference to interpretations of similar provisions 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 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 for the group representative to consult with the group members prior to any settlement.

In the case of a settlement, in both opt-in and opt-out actions, the settlement will be binding for all those who are class 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, however, there may be some limitations on foreign residents joining 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 Agreement on the European Economic Area (the EEA Agreement) provides for the inclusion of EU legislation covering the four freedoms, as well as non-discrimination
Norway

and rules of competition, into Norwegian law. Provisions equal to the EU antitrust rules,\(^7\) prohibiting cartels or abuse of a dominant position in the market, are also found in the Articles 53 and 54 of the EEA Agreement and are also implemented in secondary legislation. With respect to the area of competition law, where private enforcement and class actions have been the subject of great interest, the Directive on Antitrust Damages Actions\(^8\) has not yet been made part of the EEA Agreement. However, in December 2015, the Norwegian Ministry of Trade, Industry and Fisheries 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 European Free Trade Association 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.\(^9\) In general, it remains to be seen to what extent there will be an impact on Norwegian law from any EU initiative in this area (for example, the proposal for a directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC).

V OUTLOOK AND CONCLUSIONS

The Norwegian rules concerning class actions have ‘celebrated’ their 10-year anniversary and are now becoming teenagers. As noted previously, the application of the rules seems to have matured during these years. Class actions are now a natural part of the Norwegian legal landscape and are being brought in cases where there is real benefit in 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 of the business organisations seems to have carried into the court room in the sense that, as a first line of defence, private corporations facing class actions take the position that the requirements for a class action have not been fulfilled. In some cases, it is difficult to see why the class action is opposed. A class action may to a certain extent also be advantageous 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 cases being litigated as class actions.

The Norwegian Ministry of Justice has carried out a ‘re-examination’ of the Civil Procedure Act and launched a public consultation on proposed changes to the Act. However, to date the proposal has not included changes to the class action rules.

\(^7\) Articles 101 and 102 of the Treaty on the Functioning of the European Union.
\(^9\) This is also a background reason that Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (and which also contains some procedural rules) has not been made part of the EEA Agreement.
I INTRODUCTION TO THE 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). Law 83/95 establishes for all interested parties the right to opt out of a popular action. 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, the Consumer Protection Law, the Cultural Heritage Law, the Securities Code and the rules governing actions for damages for infringements of competition law.

Comparable to class actions are the collective actions heard together when multiple claimants join separate claims on a similar or related subject in one action (joiner 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 (joiner of actions).

The main difference between a joiner of parties or actions and popular actions is the opt-out rule. Also, whereas claimants generally only represent themselves and their interests (even when they join an action), popular actions’ claimants represent all parties with an
interest or a right in the proceedings. In contrast to a mere joinder of parties, claimants may not have a direct interest in the claim submitted in a popular action. Furthermore, it 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 (popular actions) are not very common in Portugal. According to statistical reports on the exercise of civil popular actions before first instance courts, only 209 cases were finalised from 2007 to 2018,7 and in 2018 alone, only nine civil popular actions were closed. The average number of cases heard before first instance courts in Portugal is 18 per year.

Nonetheless, the number of popular 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 popular 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 popular action before the administrative courts to annul the resolution measure taken against Banif.

In September 2016, more than a 1,000 investors filed a popular action before the Lisbon Administrative Court against the Bank of Portugal, its governor and the Portuguese state. They claimed compensation for damage 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, 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 representing the aggrieved investors of PT/Oi (Alope) intended to file a popular 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.

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7 This statistical analysis was carried out by the Portuguese Directorate-General for Justice Policy and is available at https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-cíveis-findos-nos-tribunais-judiciais-de-1-instancia.aspx.
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 charged unlawfully 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, and the energy corporations GALP and ENI.

In November 2018, DECO filed a popular 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.

In September 2019, the Portuguese Competition Authority fined 14 of the leading banks in Portugal a total of €225 million in connection with the concerted practice of exchanging sensitive commercial data on their credit products in retail banking, namely mortgages, and consumer and small and medium-sized enterprise credit products, for more than 10 years. Following this ruling and the defendants’ appeals, DECO announced the possibility of commencing a popular action against all 14 banks for damages arising from infringements of competition law.

Additionally, in November 2019, the Vila Franca de Xira Legionella Victim Support Association filed a popular action with the Administrative Court of Lisbon. This action to claim damages was filed against the Portuguese state on behalf of all 330 victims of legionnaires’ disease who were not identified as carrying the strain of the legionella bacteria that reportedly caused the epidemic in Vila Franca in March 2017. The victims have requested minimum compensation of €8,050 each.

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 choice of 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 Paragraph 4 of Article 22, Law 83/95 does not provide specific rules regarding limitation periods applicable to popular actions. In addition, the statute of limitations regime in the Portuguese Civil Code\(^8\) 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.

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, Portuguese law does not determine class by preliminary certification and there are no prerequisites to be fulfilled for the proceedings to qualify as a popular action.\(^9\)

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 parties injured by the competition law infringements in question, even if the corporate purpose of the association does not include the defence of competition.\(^10\)

As prescribed in Article 15 of Law 83/95, once a popular 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 the current stage and 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 and thereby not be bound by the decisions that follow.

The right to opt out of a popular 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 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, popular action claims may be brought by Portuguese citizens.

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\(^8\) Decree-law 47 344/66 of 25 November.

\(^9\) 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.’

or foreigners in, or residing in, Portugal. In accordance with 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 the popular 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 popular 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.11

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, such as in the United States. 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.

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As provided by Law 83/95, in popular 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 a decision of this kind, 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.

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 popular 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.12

There is no difference between the time taken for popular 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 popular 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 popular actions include compensation for damage, specific performance, penalties for non-performance and injunctions.13

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 rights holders, who may lawfully request it.

13 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).
The Securities Code provides that when compensation is not paid because of a statute of limitations 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 a fund does not exist, to the investors’ compensation system.\(^{14}\)

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 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 provides for the joint liability of claimants involved in the proceedings. As in most Member States of the European Union,\(^{15}\) the use of contingency fees (also known as pactum de quota litis) is prohibited in Portugal (by Article 106 of the Portuguese Bar Association Statute\(^{16}\) 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 to the lawyer a share of the damages awarded, 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 popular 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 popular action enter into a settlement agreement, the agreement must be submitted to the court for approval.

To approve the settlement of the popular action, the court must assess if the class of people covered by the claim was adequately and lawfully represented.\(^{17}\)

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 popular action will not be bound by the settlement.

### IV CROSS-BORDER ISSUES

In Portuguese law, there is no specific provision restricting forum shopping.

Additionally, in 2013, the European Commission issued a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in

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\(^{14}\) Article 31, Paragraph 3 of the Portuguese Securities Code.

\(^{15}\) The quota litis is permitted in Spain, for example.

\(^{16}\) Law 145/2015 of 9 September.

\(^{17}\) See, for example, Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela Dos Interesses Difusos*, cit., page 242.
the Member States, concerning violations of rights granted under EU law.\(^{18}\) Although non-binding, EU Member States were supposed to have implemented the principles set out in the Recommendation in their national collective redress systems by 26 July 2015, with the European Commission to assess the implementation by July 2017 at the latest. On 25 January 2018, a report was published concluding that there had been a rather limited follow-up to the 2013 recommendation.

In our view, there are numerous principles set out in the Recommendation that could lead to an amendment of the Portuguese legislation regarding popular actions.

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).\(^{19}\)

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.\(^{20}\)

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.\(^{21}\)

The Recommendation favoured an opt-in model, as opposed to the opt-out system applicable in Portuguese popular 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.\(^{22}\)

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.\(^{23}\)

Finally, Member States should establish a national registry of collective redress actions.\(^{24}\)

V \hspace{0.2cm} 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.\(^{25}\) Instead of popular action claims,
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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 their use has significantly increased in recent years. Today they are seen as an expedient and efficient option. In most cases, the court cannot immediately set the level of compensatory damages that it awards. This is because the court requires settlement procedures to be filed, which further delays the enforcement process. Although exempt from payment of preliminary costs, potential claimants can also be discouraged by the prohibition on the use of contingency fees.

One of the primary challenges of the popular action procedure is the backlog in court proceedings. Also, the commencement of proceedings always suffers delays because of uncertainty over the legal standing of the association or foundation filing 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 Observatory on Competition Law Enforcement against the television sports channel Sport TV, regarding damages for competition law infringements. Not only did it take about a year for the preliminary hearing to be scheduled, but concerns regarding the Portuguese Competition Observatory’s legal standing to bring proceedings also caused a one-year delay.

Nevertheless, it is already clear that we are witnessing a steady 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 resolutions passed, associations incorporated to defend and protect the individual or collective interests of investors who suffered injury or losses because of failure to repay their financial investments have strived to represent not only the interests of their members, but also those of any other interested parties. These cases are still pending and decisions have yet to be handed down.

Second, the Facebook popular 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. If DECO goes forward with a popular action against all 14 banks for damages for their concerted practice of exchanging sensitive commercial data connected to their credit products in retail banking, and given that it could cover a period of more than 10 years, the action could entail the payment of unparalleled compensation to numerous aggrieved clients.

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 widely publicised throughout Portugal and Europe. This is definitely a turning point that could define the future of the popular 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 those 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.
I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

While many Commonwealth jurisdictions provide a legal mechanism for the facilitation of group litigation, such a mechanism has remained notably absent in Scotland. The debate concerning whether a procedure of this kind 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. A report drawing similar conclusions was published in 1996 by the Scottish Law Commission (SLC). The SLC concluded that a single action could deal with a number of possible claimants or pursuers with a core of common issues, and that the advantages of a single instance of litigation outweigh the disadvantages.

Despite this continued discussion, and seeming approval for class actions in both academia and practice, it was not until 2018 that the Scottish Parliament tackled 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 uncertainty surrounding how the 2018 Act will operate in practice.

II THE YEAR IN REVIEW

i Existing procedures

Traditionally, the Scottish courts have utilised existing tools of procedure to grapple with multiple claims that, 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 without

1 Colin Hutton, Graeme MacLeod and Kenny Henderson are partners at CMS Cameron McKenna Nabarro Olswang LLP. The authors 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).

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evidence) or proof (a civil trial on the evidence in Scotland) as a ‘test case’. The remaining cases will then be continued, pending the final outcome of the test case. For example, there are over 500 cases presently before Scotland’s supreme civil court, 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 \textit{AH v. Greater Glasgow Health Board}, 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 explained that all but 18 of the 500 cases had been sisted (i.e., suspended), pending the outcome of these proceedings. At the request of the pursuers, Lord Boyd granted a proof before answer (a mixed trial of law and evidence) in all the cases, subject to time bar.

The primary deficiency of this approach is that, strictly speaking, these cases are still entirely distinct: there is no means by which a group of individual cases can be consolidated into a single court action in which a single, binding determination will be made for all the cases. While the court can issue directions to procedurally manage such groups of cases collectively, each case must be determined individually. 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 remain issues as to cost and duplication of papers; problems that underpin the rationale for class action procedure.

ii The 2018 Act

In light of these shortcomings, the 2018 Act came into force on 30 January 2019. The 2018 Act’s genesis dates back to 1 June 2017, when the then Cabinet Secretary for Justice, Michael Matheson MSP, introduced the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (the Bill) before the Scottish Parliament. The Bill was intended to deal with various matters of civil procedure in Scotland, including success fee arrangements, expenses (costs) in civil litigation, and the regulation of claims management companies. A further, and novel, concept for Scotland was the proposal to introduce multiparty procedure.

The Scottish Parliament’s Stage 1 Report to the Bill explored the possible forms that the new procedure, termed ‘group proceedings’, 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

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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.
7 id.
8 See, for example, Direction No. 2 of 2015: Personal Injury and Product Liability Actions relating to the use of Vaginal Tape & Mesh.

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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.

The 2018 Act provides that group proceedings can take the form of either an opt-in or opt-out procedure. The former is 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 automatically bound by any judgment or settlement unless they elect to opt out of the class. Only those who actively opted out of the proceedings would be entitled to raise their own separate claim.

The potential introduction of opt-out class actions is the most radical feature of the 2018 Act.

III PROCEDURE

i The 2018 Act

The 2018 Act sets out a framework for group proceedings in Scotland. Section 21 of the 2018 Act 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. 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 of 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. As the rules have not yet been promulgated, it is only possible to provide an outline of the procedure at this stage.

The 2018 Act provides that group proceedings will only be available in the Court of Session. The lower courts, such as local sheriff courts, will not be competent to hear group proceedings.

Group proceedings in Scotland will be initiated by a person known as a ‘representative party’, who will bring the proceedings on behalf of a wider class, described in the legislation as a ‘group’. There may only be one representative party to the proceedings. A group, for these purposes, comprises two or more ‘persons’ who each have a separate claim in the subject matter of the group proceedings. The framework created by the 2018 Act allows for both the representative and the represented persons to be either natural or legal persons (e.g., corporations). Significantly, this means that the framework is not restricted to consumer claims and so could also be used, for example, on behalf of small and medium-sized enterprises.

11 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. These Acts are accordingly ‘laid only’ and are not subject to the typical legislative process of the Scottish Parliament.

12 Section 20(1) 2018 Act.

13 Section 20(2) 2018 Act.

14 Section 20(4) 2018 Act.

15 Sections 20(3) and 21(2)(a) 2018 Act.

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There is no requirement for the representative to be a class member, but if the representative is not a class member, the claim may only advance with the Court's authorisation. The 2018 Act does not provide any guidance on how the Court should exercise its discretion on this point.

Permission must be granted by the Court before group proceedings can be progressed. Thus, the mechanism will have a ‘certification’ stage. The 2018 Act provides that permission is only to be granted if the Court considers that all the claims raise issues, whether of fact or law, that 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. 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.

The structure of the 2018 Act mechanism has some similarities with the Collective Proceedings Order (CPO) group proceedings regime introduced for competition claims by the Competition Act 1998 (CA), as amended by Schedule 8 to the Consumer Rights Act 2015. The CA regime applies three tests at the CPO (certification) hearing: (1) that the claims ‘raise the same, similar or related issues of fact or law’, which is the commonality test; (2) that the claims ‘are suitable to be brought in collective proceedings’, which is the suitability test; and (3) that the proposed representative will be authorised ‘only if . . . it is just and reasonable for that person to act as a representative in those proceedings’, which is the representative test. The tests set out in the CA are expanded upon by the Competition Appeal Tribunal Rules and the Competition Appeal Tribunal Guide to Proceedings.

The 2018 Act sets out a commonality test but does not have text equivalent to a suitability test nor a representative test. That said, the 2018 Act requirement for the representative to have made ‘all reasonable efforts’ to contact potential group members is not present in the CA regime. It is possible that the detailed rules to be promulgated by the Court of the Session will set out a suitability test or a representative test, or both of these.

To the extent that the detailed rules promulgate suitability or representative tests, there will be argument over whether judgments that interpret the CA CPO regime will be persuasive or binding when the Scottish courts interpret the 2018 Act. It is important to remember that the CA CPO regime is a UK-wide regime, and not solely an English device.

The 2018 Act leaves open to the Court of Session, and therefore to the SCJC, the question of whether an opt-in, opt-out or hybrid regime will be established. The CA CPO regime permits the CAT to grant a CPO application on either an opt-in or an opt-out basis, giving the CAT discretion. At present, the SCJC has given no indication which

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16 Section 20(3) 2018 Act.
17 Section 20(5) 2018 Act.
18 Section 20(6)(a) and (b) 2018 Act.
19 Section 20(6)(c) 2018 Act.
23 SI 2015/1648.
24 Such as the Court of Appeal ruling in Merricks v. MasterCard [2019] EWCA Civ 674, and the pending appeal to the Supreme Court.
25 Section 20(7) 2018 Act.
26 Rule 79(3), Competition Appeal Tribunal Rules.
route is likely to be taken. The 2018 Act limits the scope of the opt-out class to persons domiciled in Scotland, although persons domiciled outside Scotland may proactively opt in to proceedings. Similarly, the scope of the opt-out class under the CA CPO regime is restricted to persons domiciled in the United Kingdom, with those domiciled outside the United Kingdom able to opt in. A mechanism that automatically aggregates class members from outside the territorial scope of the relevant legislature would potentially offend against principles of comity.

ii Changes to fee arrangements

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 permissibility of contingent fee arrangements.

On 3 June 2014, Sheriff Principal Taylor published the Taylor Review of Expenses and Funding of Civil Litigation in Scotland (the Taylor Review). 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.

Historically, solicitors in Scotland were prohibited from entering 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, rather than by reference to time billed. 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.

Section 2 of the 2018 Act, which comes into force on 27 April 2020, will reverse this position by providing that a success fee arrangement is not unenforceable simply because it is an agreement for a share of the litigation. 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 (and other claims) in the Scottish courts. Claimants may be more

27 However, the statutory requirement that the proposed representative must make all reasonable efforts to identify and notify potential members of the group suggests that the rule-makers are envisaging that an opt-out option will be available under the 2018 Act. The obligation to notify all members of the group would be otiose under a regime that only permitted opt-in claims.

28 Section 20(8)(b) 2018 Act.


30 Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014).


33 Subject to the terms of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Arrangements) Regulations 2020, which come into force on 27 April 2020 and which regulate the terms of success fee arrangements.
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 the basis of a DBA for multiple clients in group proceedings.

Section 8 of the 2018 Act will introduce the new QOCS regime. At the time of writing, this Section is not yet in force, but it is expected to come into force in the course of 2020. Once in force, the QOCS regime may bring about an effect similar to that of DBAs, at least in the context of mass personal injury 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.34

Section 8 of the 2018 Act prohibits the Court of Session from making an award of expenses against an unsuccessful pursuer, essentially removing this hurdle. The new QOCS regime will be restricted to personal injury actions and contain its own procedural safeguards to ensure that vexatious litigants are not afforded protection of this kind. Section 8(1)(b) of the 2018 Act provides that QOCS will only apply 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.35 The 2018 Act will therefore impose 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 will require parties receiving financial assistance from a third party in respect of proceedings to notify that fact to the Court.36 The litigant will be required to 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 that the litigants succeed. Unlike 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 United States.37 By contrast, the Scottish market for

34 See, for example, Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014), page 161.
35 Section 8(4) 2018 Act.
36 Section 10(2) 2018 Act. At the time of writing, this Section is not yet in force, but it is expected to come into force in the course of 2020.
third-party funding has never quite found fertile ground.\(^\text{38}\) 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 United Kingdom where, aside from in competition matters, they are available to litigants. The financial rewards that might be available from 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 United Kingdom left the European Union on 31 January 2020. The agreed transition period will end on 31 December 2020, unless extended. During that period, the United Kingdom and the EU will seek to negotiate a replacement free trade agreement.

At the time of writing, holders of decrees (judgments) from Scottish court actions retain the almost automatic right to enforce these throughout the EU during the transition period. Thereafter, 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 the sending state would enforce a judgment of the destination state in similar circumstances). Post-transition period, the position on cross-border enforcement may be less straightforward than the current procedure under the Brussels I Recast Regulation 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 2020. The scope of the rules is only restricted by the substantive provisions of the 2018 Act outlined above, which override any of the existing Rules 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.\(^\text{39}\) 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

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38 Taylor Review of Expenses and Funding of Civil Litigation in Scotland (June 2014), page 244.
39 See the opening of Section 21(2) 2018 Act.
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.40

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 DPA provides the UK government with the power to make regulations enabling, effectively, opt-in class actions alone. That restriction41 is, however, only applicable to England and Wales. The position in Scotland will instead be governed by the 2018 Act and the Rules of the Court of Session.

The framework is in place, through the 2018 Act, for Scotland, in the next few years, to move closer to a 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.

Events that give rise to class actions, such as data breaches and product liability issues, often cross national and international boundaries. If a workable opt-out class action procedural device is implemented in Scotland, this may put pressure on the UK Parliament to introduce a similar mechanism. Consumer and lobbying organisations will point to the perceived unfairness of those who are Scots-domiciled being automatically included in a class, whereas recoveries south of the border will be less complete under opt-in procedural rules.

40 For the full list, see Section 21(2) 2018 Act.
41 Which is expressly subject to future review under Section 189 Data Protection Act 2018.
Chapter 19

SPAIN

Alejandro Ferreres Comella and Cristina Ayo Ferrándiz

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Spain has a judicial collective redress mechanism denominated ‘collective actions’. The Spanish collective actions framework was established in Spanish law as part of the Civil Procedure Law 1/2000 of 7 January (the Civil Procedure Law), which entered into force in January 2001. The framework was not included in the initial drafts of the Law prepared by the Ministry of Justice. However, it was subsequently incorporated in the draft bill at the last stage of drafting prior to the bill’s submission to Parliament. For that reason, the draft collective actions regulations received scant analysis and discussion during the parliamentary proceedings for the enactment of the Civil Procedure Law. The collective actions regulations are not drafted as a systematised, consolidated and structured body of regulations but rather are limited to a few rules spread throughout the Civil Procedure Law (essentially Articles 11, 15, 220, 221 and 519).

As we will further discuss below, the Spanish collective actions system is basically an opt-out system, but with important limitations. It is only applicable to consumer protection issues, in which procedural standing to initiate the action is not granted to a member of the class but to consumer associations and the Public Prosecutor’s Office.

II THE YEAR IN REVIEW

Collective actions in Spain have been used very infrequently to claim individual, normally monetary, homogeneous rights of a class (i.e., a group of consumers whose underlying individual cases have factual and legal issues in common). Furthermore, in those very limited cases in which collective actions regulations have been used to claim individual homogeneous rights, they nevertheless involved contractual issues. We are not currently aware of any collective actions brought in Spain claiming damages arising from non-contractual liability (i.e., based on tort).

Thus, the most significant collective actions in Spain are related to contractual damages in connection with the execution of financial or other types of mass-service contracts.

In particular, Spanish consumer associations have filed numerous claims in recent years on the basis of the EU Unfair Contract Terms Directive. They have sought a declaration of nullity for non-negotiated contract terms found to be unfair and, therefore, contrary to consumers’ rights. The relief sought in these claims is the removal of the unfair terms from the

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defendant’s model contract. While a declaration of the nullity of unfair terms is binding for the defendant company in relation to all its clients (i.e., it is understood to have res judicata effects erga omnes), most Spanish courts take the stance that each consumer must individually claim compensation for damages arising from the execution of the unfair contract terms by the defendant.

Nevertheless, some courts take the position that the reimbursement of consumers for the amounts the defendant has collected as payments under the unfair terms is not a compensation issue. Rather, it is a direct consequence of the declaration of nullity of the terms and, therefore, no further individual action is required, and reimbursement should form part of the relief granted in the collective action.

Nevertheless, we are not aware of any decision in Spain in which a court has ordered a defendant to reimburse consumers represented in a collective action brought by a consumer association.

However, in the past year, consumer and user associations in Spain announced the initiation of a collective action against several vehicle manufacturers to claim economic compensation for those affected by the emissions scandal. For the moment, no collective action has been filed, but some individual cases have already been lodged and these have been resolved differently and according to the specific circumstances of each case; these can serve as test cases for any collective action.

Most recently, the Court of Appeal of Madrid upheld an appeal filed by the manufacturer of the banned pregnancy drug thalidomide. The appeal was against a decision of a court of first instance in Madrid that had ordered the appellant to pay a significant amount in compensation to several people who were born with birth defects in the 1960s. In its decision, the Court of Appeal of Madrid accepted the statute of limitations defences presented by the manufacturer to refute its liability. This decision was recently confirmed by the Supreme Court.

III PROCEEDURE

i Types of action available

Traditionally, Spanish civil procedure legislation has granted consumer associations legal standing to file actions aimed at protecting consumers’ general rights or interests. These are rights or interests that cannot be apportioned to each consumer, such as the right to a clean environment. Protection is usually afforded by means of injunctive relief or, in contract law, by having a clause declared contrary to consumer rights and therefore void. However, before the enactment of the Civil Procedure Law, consumer associations could not file legal actions aimed at protecting individual homogeneous rights or interests of undetermined consumers.

The Civil Procedure Law instituted a system of collective actions whereby certain consumer associations can take legal action on behalf of either a determined or an undetermined number of consumers who have sustained injuries or suffered a loss as a consequence of consuming a product or using a service. Although the Spanish system is usually compared with the US Federal Rule of Civil Procedure 23 – Class Actions (FRCP 23), Spain has in fact established a representative system.
Commencing proceedings

In effect, the Spanish collective action system is a representative system. Nevertheless, not all consumer associations are entitled to file legal actions on behalf of an undetermined number of consumers, only those that (1) have a nationwide and long-standing record of activity in the defence of consumer rights; (2) have been certified as ‘representative’ associations by the government; and (3) have been appointed as members of the national Consumers and Users Council.

Having said that, the prerequisites for becoming a consumer association with standing to start collective actions are neither strict nor detailed. The standard of representation, therefore, is under-regulated in Spain.

According to the Civil Procedure Law, if the number, identity and specific circumstances of the aggrieved consumers are determined or are easily determinable at the declaratory stage of the proceedings, both the consumer associations and the groups of aggrieved consumers themselves (i.e., they do not need to be represented by a consumer association) have the capacity to sue on behalf of all the aggrieved consumers. In this regard, a group whose members comprise at least 50 per cent of all the aggrieved consumers is considered to be legally constituted as the representative plaintiff (i.e., as the plaintiff in the proceedings). For this reason, a group action is actually a sort of aggregation mechanism rather than a collective action.

Initially the Civil Procedure Law limited standing to initiate a collective action to consumer associations (and to groups of aggrieved consumers themselves where they are determined or easily determinable). However, in March 2014, Parliament passed Law 3/2014 of March 27, amending the 2007 Consumer Protection Law and adding new regulations on standing to initiate collective actions to the Civil Procedure Law. Pursuant to the new regulations, Spanish public prosecutors also have standing to initiate collective actions seeking compensation for consumers.

In contrast to class actions under other legal systems, Spanish class actions are not tightly regulated. In particular, there is no express regulation of compliance requirements for class actions, such as numerosity, commonality, typicality or the adequacy of representation. Nor is there a certification of class process prior to initiating the proceeding itself that confirms the fulfillment of these requisites. The Civil Procedure Law does not regulate the specific requirements that a collective claim must fulfill to be accepted, thus there is no specific reference to commonality as an essential prerequisite. Although it is understood that actions can only be considered class actions where the individual cases have underlying factual issues sufficiently in common, this lack of regulation is always problematic.

The Spanish collective actions system for homogeneous individual monetary rights is an opt-out system in the sense that the Civil Procedure Law provides that a decision issued in a collective action is binding on all members of the class, whether the court rules on the claim or dismisses it (i.e., the decision has res judicata effects ultra partes, and not only in utilibus).

The collective actions regime also allows any represented consumer to file allegations that are supplementary to the collective action. This is not an opt-in mechanism since the consumer will be bound by the decision (whether or not the consumer appears in the

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3 Consejo de Consumidores y Usuarios; http://www.consumo-ccu.es/.
proceedings in which the supplementary allegations are filed). Instead, it is a procedural mechanism, whereby represented consumers are entitled to contribute to the case by filing allegations supporting or supplementing those already made in the initial lawsuit.

In that regard, Spanish law establishes specific procedures for publicising a lawsuit to facilitate any class member’s joinder to the claim on a supplementary basis.

However, and although the system is considered an opt-out system, the Civil Procedure Law surprisingly does not establish any mechanism to allow represented consumers to opt out (to avoid being bound by the decision on the collective claim and, therefore, to preserve their individual action).

While this lack of regulation casts doubts on the constitutionality of the collective actions regime, we are not aware of any attempts by consumer organisations to challenge the constitutionality of the absence of any opt-out mechanism. In any case, the lack of an opt-out system should oblige judges and courts to be very strict in their assessment of the traditional prerequisites for a class action (particularly in connection with the assessment of commonality and adequacy of representation). Consequently, if those prerequisites are applied very strictly and as a result very few collective actions are ultimately admitted, in those limited cases in which commonality is beyond question (basically, mass accidents in which causation is simple and evident, and no reliance issues need be discussed, such as the failure of the dam and resulting damage and civilian casualties in the Presa de Tous case), then the lack of an opt-out mechanism for the represented consumers may be constitutionally acceptable.

In short, the lack of an opt-out system either renders the entire collective actions regime inconsistent with the constitutional rights of represented consumers or justified because of the extremely narrow circumstances in which collective actions would be admitted.

Because the configuration of the class is not specifically regulated, there is no minimum threshold or number of claims required. However, as noted above, the group is considered to be legally constituted as the representative plaintiff (i.e., in cases where the consumers claiming are determined or easily determinable) when its members comprise at least 50 per cent of all the aggrieved consumers.

Having said that, and as will be noted below, both European and Spanish legislators are in the course of enacting new legislation regarding collective redress and related mechanisms, and this may change the currently applicable system in the coming months.

### Procedural rules

First instance civil courts have jurisdiction to hear damages claims filed by either a single consumer or a consumer association. According to the Civil Procedure Law, when consumers act as the plaintiff, they will be entitled to choose between filing the lawsuit with the court of first instance in their own domicile, the court in the defendant’s domicile or the court linked to the underlying factual or legal relationship relevant to or affected by the litigation, provided the defendant has an establishment open to the public in that location or a representative who is authorised to act on its behalf. The various alternatives available to the consumer to file a lawsuit make it difficult to identify the most likely forum.

In addition, and following a very recent modification of Spanish procedural laws, the commercial courts hear collective claims based on general contractual conditions or consumer regulations, such as cessation actions. As their name implies, commercial courts are specialised courts with a high level of expertise. Commercial courts also have experience in dealing with individual consumers’ cases related to regulations on general terms and conditions, corporate matters, and unfair competition law and advertising, among other issues.
In these cases, the competent court will be that of the place where the defendant has an establishment or, failing that, has an address. If the defendant has no address in Spain, the court will be that of the place of the plaintiff’s address.

In principle, only cessation actions (or pure class actions) are considered collective actions. However, the courts may consider claims that are merely aggregated to have been wrongly filed as class actions, and these may be accepted as collective claims and be referred to be dealt with by the commercial courts.

In Spain, there are two basic types of declarative procedure for seeking compensation: verbal proceedings and ordinary proceedings. The type of procedure will depend on the amount claimed, as follows:

- for amounts of up to €6,000, claims are dealt with in verbal proceedings; and
- where the amount is more than €6,000, the claim is dealt with in ordinary proceedings.

Cessation actions filed by consumer associations are tried in accordance with the regulations on verbal proceedings, whereas collective actions filed by consumer associations in which homogeneous individual monetary rights are disputed are tried in accordance with the regulations governing ordinary proceedings or verbal proceedings, depending on the amount claimed.

In both cases, civil proceedings start with the filing of the claim. The claim must include all factual allegations on which it is based, in as much detail as possible, as well as the legal grounds on which it is based. However, under the principle of *jura novit curia*, (1) the plaintiff is not required to set out the legal grounds in thorough detail, and (2) the legal grounds claimed are not binding upon the judge, who may uphold the action on the basis of alternative legal grounds.

If verbal proceedings are initiated, once the claim has been filed and leave has been given to proceed, the defendant is notified so that a defence (or a counterclaim) can be presented within 10 working days (excluding Saturdays, Sundays, the month of August, national holidays, and non-working days in the autonomous region or the city where the proceedings take place). This period cannot be extended except when both parties agree to stay the proceedings.

Subsequently, the court will call the parties to a hearing in which they set out the evidence they are going to submit, produce that evidence and present their final conclusions, all at the same hearing.

If ordinary proceedings are initiated, once notified of the lawsuit, the defendant will have 20 working days to file a brief in response. This period cannot be extended except when both parties agree to stay the proceedings. Any allegation on which the defence is based, and any documentary evidence and expert reports on the facts or events on which the defence is based, must be attached to the allegations. It is unlikely that any other documents will be accepted subsequently (with very specific exceptions, such as expert reports).

The court will then call the parties to a preliminary hearing in which they set out the evidence they are going to submit and, ultimately, the court calls the parties to trial, at which the evidence and final conclusions are presented. Although the Civil Procedural Law requires the trial to be held within one month of the preliminary hearing, it is very common for the trial to be scheduled for between two and 12 months after the preliminary hearing, depending on the court’s agenda and workload. When there are a lot of witness and experts, the court may schedule more than one day for the trial.
Unfortunately, there is no procedure to determine at an early stage whether a claim is admissible and passes the applicable minimum criteria (and which would allow manifestly unmeritorious cases to be discontinued). In fact, the collective actions framework does not establish any preliminary proceedings similar to those under FRCP 23, which aim at clarifying whether or not the traditional prerequisites of a collective action are met (i.e., commonality, numerosity, typicality and adequacy of representation). This is clearly one of the major failings of the Spanish collective actions system.

In general (i.e., for both individual cases and collective actions), the admission of a lawsuit is a highly bureaucratic procedural step, managed by court officials and not the judge, and procedural defences challenging the suitability of collective actions must be filed simultaneously with the statement of defence of the case on the merits (i.e., procedural motions such as misjoinder of actions or lack of standing must be filed together with the defence).

Nevertheless, the Judiciary Law of 1985 allows courts to reject legal actions that are ‘clearly flawed’ or that have been filed with ‘procedural fraud’. In the limited day-to-day practice of collective claims, this provision has allowed defendants to file motions challenging the admissibility of claims on the basis that the lack of commonality in the represented consumers’ underlying cases impedes the plaintiff consumer association’s standing to file a collective action. Although the Civil Procedure Law does not expressly state that commonality is a prerequisite for collective actions, it nevertheless establishes that collective actions can be filed when a ‘damaging act’ affects several consumers. As noted above, the reference to a single, damaging act potentially suggests commonality is a fundamental prerequisite for collective actions.

However, since there are no specific regulations on the admissibility of collective actions, defendants do not have any guarantee that they will be entitled to challenge the admissibility of the legal action for lack of commonality (i.e., the consumer association’s lack of procedural standing to file the action).

Defendants may challenge commonality by (1) disputing the lawsuit’s admissibility (although it does not stay the proceedings); and (2) filing a procedural motion as part of their defence on the merits once the collective action has been admitted (i.e., following admission and simultaneously with the statement of the defence).

iv Damages and costs

Trials heard within the civil jurisdiction are held before a judge, therefore there is no jury.

The Spanish civil liability system is based on compensation. Consequently, indemnifiable damages should match the impairment or loss suffered by a person as a result of a given event or fact, whether the impairment or loss affects the person’s vital physical attributes or his or her property or assets.

Indemnifiable damages include strictly economic damages and ‘non-material damages’ (including, for instance, damages for suffering or pain).

The Spanish legal system does not provide punitive damages.

The ‘loser-pays’ rule applies in Spain, except when the losing party has been granted legal aid benefits. In that case, even if the judgment orders the loser to pay the legal fees incurred by the counterparty, the order cannot be enforced against the loser.

On 4 November 2008, the Spanish Supreme Court issued a decision declaring null Article 16 of the Code of Ethics of the National Bar Association, which had banned quota litis agreements (contingency fees). As a consequence, contingency fees are now completely valid in Spain.
v Settlement

Although there is no specific legislation relating to the settlement of collective actions cases, and no judicial experience on class settlement has been reported to date, it may be understood that court approval is required for collective actions to be settled. However, a court can only reject a settlement if it affects (1) the fundamental individual rights of any of the parties that cannot be waived, or (2) the interests of third parties.

IV CROSS-BORDER ISSUES

There is no specific legislation that considers cross-border issues under Spanish procedural law. We are not aware of any case in which Spanish courts have asserted jurisdiction over any ‘foreign’ or global claims. However, EU law allows any authority or entity of any other Member State with procedural standing for cessation actions to file such actions to protect general consumers’ rights in any Member State.

In accordance with the international rules of jurisdiction set out in the Brussels Regulation 4 and the Lugano Convention, if Spain were the jurisdiction competent to hear claims filed by consumers and users residing in Spain, this would also preclude excluding overseas claimants from opting into a Spanish class action.

V OUTLOOK AND CONCLUSIONS

On 13 September 2017, the European Commission announced the ‘New Deal for Consumers’, aimed at strengthening enforcement of European Union consumer law in the face of an increasing risk of EU-wide infringements.

Delivering on this commitment, on 11 April 2018, the Commission adopted the New Deal for Consumers package composed of a Communication on the New Deal for Consumers and two proposals for directives: one on representative actions for the protection of the collective interests of consumers (the Representative Actions Proposal); 5 and a second proposal on better enforcement and modernisation for the benefit of consumers. 6

At the time of writing, the Representative Actions Proposal was being discussed at trilogue level (i.e., by representatives of the European Commission, of the European Parliament and of the European Council), with approval and enactment of the final draft expected within the coming months. This approval may incorporate interesting changes to national regulations.

Although Spain’s collective actions framework is in line with the Representative Actions Proposal, its incompleteness and somewhat unsystematic nature generates a number of problems regarding its interpretation and enforcement, and this is evidenced by the

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5 A proposal on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC.

judicial experience to date. In fact, there are indications that Parliament is considering the implementation of amendments to improve and consolidate the collective actions regime in accord with what European legislators finally approve.

In our view, any amendment of the current Spanish collective actions regime should include at least (1) regulation of a pre-certification stage, similar to that provided by FRCP 23; (2) accurate regulation of commonality and the other prerequisites for certifying collective actions; and (3) the introduction and regulation of an opt-out mechanism that can be easily used by consumers represented in collective claims. Additionally, Parliament should seriously consider mass dispute resolution systems as an alternative to litigation. The European Ombudsman’s compensation mechanism provides a clear alternative to the current judicial collective redress system, which is ineffective and, in many cases, unfair.
I  INTRODUCTION TO THE 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 stipulate 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 protect 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 to the disputes being jointly adjudicated as regards 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 in relation to the subject of the 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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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 persuade the court that it is probable the disputed matter will have 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 decide ex officio whether consolidated proceedings should instead be pursued as a group action, although a change of this kind 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 statute of limitations was unfavourable to claimants prior to the new Competition Damages Act, which was enacted in 2016.

II THE YEAR IN REVIEW

As far as we are aware, there were no group action claims filed in 2019. However, in 2018, in light of the ‘Dieselgate’ scandal, the European Commission issued a proposal for a new directive,\(^2\) to improve consumers’ options for seeking collective redress and the Swedish government is generally in favour of the proposal.

III PROCEDURE

i Types of action available

Any civil claim that can be brought to the general courts may be the subject of a group action; for example, virtually all commercial disputes. No other type of claim may be brought as a group action unless there is statutory backing for such an action in relation to the particular circumstances. 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 groups and organisations may, in addition, bring claims concerning the prohibition of environmentally hazardous activities and claims to order defendants 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 limitations apply. The general limitation period is 10 years from the occurrence of a claim unless agreed otherwise 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. As regards interruptions caused by 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 be pursued equally well by the members of the group individually; (4) the group is appropriately defined as regards its size, demarcation and other circumstances; 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., as the actual claimant, the representative of a private group must have a claim that is a subject of the group action). However, a group member is treated as a party in several respects (e.g., in matters relating to conflicts 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 the group member becoming a 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 points (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 who 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 fee 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, with the result that contingency fees are 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 on 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 under general Swedish procedural law.

There are no general restrictions on 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 decide ex officio on various issues (including the general prerequisites for initiating court proceedings set out in the Code of Judicial Procedure)
when a group’s statement of claim is filed. A party is not required, but is 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 in respect of the issues outlined in Section III.ii. Generally, the court will only render a formal decision concerning these issues if either the claim is rejected by the court without prejudice or the court dismisses an objection raised by the defendant. Both possible outcomes may be subject to appeal. In addition, group actions brought by a private group or an organisation are required to 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 of 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 decide ex officio whether a claim of this kind 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 and two years in the district court if 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, however, group actions may 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 in 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 paying the immediately aggrieved party; third parties (i.e., anyone who incurs financial loss as a result of the aggrieved party’s loss) are generally not entitled to damages. In addition, the compensation paid 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 have been 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 the application processes for 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 he or she has gained through the proceedings.

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 possible, in theory, 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 determine *ex officio* 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 an opportunity to argue on the jurisdiction issue. Eventually, the court will rule on its jurisdiction based on applicable international legislation or treaties or, in the absence thereof, national sources of law.

As yet, to the authors’ knowledge, no particular issues of forum shopping in group actions have 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 because of the widespread application of the Brussels Regulation and the Lugano Convention of 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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 in 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, which was enacted in 2016. In addition, the Swedish government anticipates that the directive on actions to protect the collective interests of consumers proposed by the European Commission (see Section II) may lead to a slight increase in group actions in Sweden (if enacted).
Chapter 21

SWITZERLAND

Martin Burkhardt

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 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.

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 (ZPO) that also contains some steps towards collective redress. The proposals include (1) the extension of standing to claim monetary damages to representative associations on the basis of an opt-in; and (2) the introduction of a group settlement mechanism, with the resulting settlement to become binding on the entire class, subject, however, to individual opt-out.

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. The views expressed ranged from endorsement and suggestions for improvement to questioning the very necessity to introduce means of collective redress of this kind. Currently the opinions are being evaluated prior to the Swiss government, the Federal Council, submitting the bill to the Federal Assembly along with the Federal Council’s dispatch explaining the bill.

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1 Martin Burkhardt is a partner at Lenz & Staehelin.
3 ibid., p. 14.
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.
Under the current law, the most recent attempt at a class action-like suit was initiated by the Swiss consumer protection organisation Stiftung für Konsumentenschutz (SKS) before the Zurich Commercial Court against Volkswagen AG and Swiss car dealer AMAG on behalf of approximately 6,000 Volkswagen diesel car owners. 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 in relation to 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 the 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, 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.

Further, the Court added that, in light of the significant media attention, the car recall actions and the ban on registration of vehicles of this kind, the argument put forward by SKS of allegedly continued misrepresentation through misleading statements and advertising was not convincing.

On 8 February 2019, the Federal Tribunal upheld the decision of the Zurich Commercial Court not to consider the first suit. On 6 December 2019, the Commercial Court of Zurich decided not to consider the second suit on the grounds that the plaintiff had no standing to initiate proceedings, as the plaintiff as a legal entity could only initiate proceedings within the scope of its purpose. The Court stated that an interpretation of the plaintiff’s purpose, namely ‘safeguarding the interests of consumers’, would lead to the conclusion that the
plaintiff could carry out activities for the totality of consumers, but could not take legal action to protect the interests of certain individual consumers as it had attempted to do in this action.\textsuperscript{15} The challenge is currently pending before the Federal Tribunal.\textsuperscript{16}

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.\textsuperscript{17}

We continue to follow developments.

\textsuperscript{16} The challenge is pending with the Federal Tribunal under Case No. 4A_43/2020.
\textsuperscript{17} Report of the Swiss Federal Council ‘Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und Handlungsmöglichkeiten’, p. 52 et seq.
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 actions 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.² 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.³ 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).⁴

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.⁵ This chapter focuses solely on federal class actions, which are provided for by Rule 23 of the Federal Rules of Civil Procedure.

¹ Timothy G Cameron is a partner and Sofia A Gentel is an associate at Cravath, Swaine & Moore LLP in New York City.
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, 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 representatives 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 2019 concerning class actions included the following cases.

In *Lamps Plus, Inc v. Varela*, the Supreme Court held that where an arbitration agreement is ambiguous as to whether the parties to the agreement agreed to class-wide arbitration (as opposed to only individual arbitration), class-wide arbitration is not permitted under the agreement. The Court first emphasised that the Federal Arbitration Act (FAA) ‘requires courts to enforce arbitration agreements to their terms’, and that ‘arbitration is strictly a matter of consent’. The Court then pointed out that class arbitration lacks the key benefits traditionally associated with arbitration: lower costs, greater efficiency and speed, and informality. As a result, the Court concluded that ambiguity is not enough to conclude that parties consented to forgoing those main advantages of arbitration. Moreover, the Supreme Court found that a state law principle concerning contractual interpretation, *contra proferentem* (counselling that contracts should be construed against their drafter), was pre-empted in this context by the FAA ‘to the extent [the principle] stands as an obstacle to the accomplishment of the full purposes and objectives of the FAA’, and could therefore not be used against the drafter of the agreement to argue that class-wide arbitration should be permitted under the agreement in question.

In *Nutraceutical Corp v. Lambert*, the Supreme Court held that Rule 23(f), which requires that an appeal from an order granting or denying an order of class certification must be filed within 14 days of the order being entered, is not subject to equitable tolling. Equitable tolling...
tolling is a tool that allows a court to ‘soften’ certain deadlines in instances where one has missed a deadline but was nevertheless ‘diligent, reasonably mistaken, or otherwise deserving’ of tolling.\textsuperscript{14} However, the Court stated that whether a specific rule can be subject to equitable tolling depends on ‘whether the text of the rule leaves room for such flexibility’.\textsuperscript{15} The Court found that there was no such flexibility in this context. First, it found that Rule 23(f) showed a clear intent to preclude tolling because the Rule was a procedural claim-processing rule phrased in an unqualified manner.\textsuperscript{16} Second, the Court noted that while the Federal Rule of Appellate Procedure (FRAP) 2 permits the equitable suspension of ‘any provision of these rules in a particular case’, FRAP 26(b) carves out an exception to FRAP 2 by stating that a court of appeals ‘may not extend the time to file . . . a petition for permission to appeal’.\textsuperscript{17} Finally, the Court pointed to FRAP 5, which states that a petition for permission to appeal ‘must be filed within the time specified’.\textsuperscript{18} Therefore, the Court found that there was no flexibility with respect to the deadline set in Rule 23(f) so as to permit equitable tolling.\textsuperscript{19}

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.\textsuperscript{20} 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.\textsuperscript{21} Such motions are typically decided before the court certifies the class.\textsuperscript{22}

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

\textsuperscript{14} id. at 714.
\textsuperscript{15} id.
\textsuperscript{16} id. at 715.
\textsuperscript{17} id.
\textsuperscript{18} id.
\textsuperscript{19} id.
\textsuperscript{20} Fed. R. Civ. P. 3.
\textsuperscript{21} 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).
\textsuperscript{22} Managing Class Action Litigation, Federal Judicial Center, at 9 (2010).
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) 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. Then, no later than 90 days after that publication, the 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’.

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. 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’.

The court-appointed lead plaintiff is then empowered, ‘subject to the approval of the court’, to ‘retain counsel to represent the class’.

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, 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’. 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.

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Federal Rules of Civil Procedure, Rule 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’.30 Generally, there is no numerical threshold for determining whether a class is sufficiently numerous. Rather, courts must examine ‘the specific facts of each case’.31

Commonality requires a demonstration that ‘there are questions of law or fact common to the class’.32 This requirement was addressed in Wal-Mart Stores, Inc v. Dukes.33 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’.34 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’.35 Here, the primary inquiry for courts is to ‘uncover conflicts of interest between named parties and the class they seek to represent’.36 Courts also will assess the adequacy of proposed class counsel at this stage.37 In assessing the adequacy of class counsel, courts must conclude that the representative’s counsel is ‘qualified, experienced and capable of handling the litigation’38 and that class counsel will represent the interests of the class as a whole.39

36 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.
37 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).
38 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.
39 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).
Federal Rules of Civil Procedure, Rule 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). 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 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).

The purpose of the predominance inquiry is to test ‘whether proposed classes are sufficiently cohesive to warrant adjudication by representation’. 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.

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.

The class certification order

If the court finds certification is proper under the requirements of Rule 23, Paragraphs (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. 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.

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42 Amchem Prod., Inc., 521 U.S. at 623.
44 Fed. R. Civ. P. 23(b)(3); see also 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).’).
46 Fed. R. Civ. P. 23(c)(5).
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’).47 Those individuals who 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 against the defendant based on the same underlying claim at some later date (subject to any applicable statute of limitations).48

Affording absent class members the opportunity to exclude themselves from a class action comports with the due process requirements set out in the Fifth and Fourteenth Amendments to the US Constitution.49 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.50 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.51 Notice may be provided by regular mail, electronic means or any ‘other appropriate means’.52

Notice must be ‘clearly and concisely state[d] in plain, easily understood language’.53 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)’.54

Rule 23 does not set out 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.55 Where the class is sizeable, or actual notice is not practicable, those 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 the class. Other class members do not participate in most phases of litigation, even though those 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’.56

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*.57 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 would be likely to 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 702.58

v  Settlement

This section focuses on procedural aspects of a class action settlement, as set out 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.59 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’.60

57 136 S. Ct. 1036 (2016).
58 id. at 1046.
60 *In re Gen Motors Corp Pick-Up Truck Fuel Tank Prod. Liab Litig*, 55 F.3d 768, 786 (3d Cir. 1995).
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). The parties must provide the court with information sufficient to enable it to determine whether to give notice under that standard. The type of information that parties may provide at the preliminary approval stage includes details of the settlement, the nature 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.

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. Settlement notice provides absent 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.

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;
   (iii) 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.

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).

**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 out a formula or some other method of distributing settlement proceeds to members of the class.67 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 out 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.68

**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’.69 In addressing that issue, the Court applied the long-standing principle of US law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction

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67 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).
69 561 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).
of the United States’. 70 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’. 71 The Court further held that it was not sufficient that ‘some domestic activity is involved in the case’. 72 Rather, ‘it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which [Section] 10(b) applies’. 73 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’. 74

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

Several interesting decisions on class action law can be expected in 2020. As one example, the US Court of Appeals for the Sixth Circuit has granted review of In re National Prescription Opiate Litigation 75 to determine whether a district court order certifying a ‘negotiation class’ of over 30,000 cities and counties suing opioid companies is permissible under Rule 23. Unlike a traditional class, the negotiation class in this case was certified not for the purposes of pursuing litigation, but solely to enable the plaintiffs to negotiate a lump settlement. 76 The district court in In re National Prescription Opiate Litigation noted that, in contrast to settlement classes, negotiation classes are certified before settlement discussions, which allows plaintiffs to exert further pressure on defendants during negotiations, and also enables defendants to know the size of the class and magnitude of opt-outs ahead of settlement negotiations. 77 The Sixth Circuit will decide whether it agrees with the district court’s novel, and possibly ‘powerful, creative and helpful’ use of Rule 23. 78

70 Morrison, 561 U.S. at 255.
71 id. at 265.
72 id. at 266.
73 id. at 267.
74 id. at 273 (emphasis added).
75 332 F.R.D. 532 (N.D. Ohio 2019).
76 id. at 537.
77 id.
78 id.
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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 also considered a ‘superb’ team head by clients in The Legal 500 2017 guide.

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April advises clients on large-scale complex commercial disputes, including high-profile Commercial Court litigation and arbitration proceedings. She also advises insurance companies and corporate policyholders on policy wording interpretation and drafting, complex coverage disputes (particularly in relation to financial lines policies), D&O claims, professional indemnity claims (including any potential third-party liability), cyber and emerging risks, and subrogation claims.

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Aoife McCluskey is a senior associate in Matheson’s commercial litigation and dispute resolution department. She advises corporate clients across a range of industry sectors in complex, multi-jurisdictional litigation in the superior courts. Aoife has particular expertise in the defence of high-volume, multi-plaintiff class action-style litigation and advises on the legality of litigation funding in Ireland.

Aoife is a contributor to industry publications, such as the International Law Office newsletters on arbitration and ADR, banking, and insurance, and is a speaker at industry events. She lectures in the Law Society of Ireland’s diploma programme.

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Mr Marçal graduated from the Pontifical Catholic University of São Paulo (PUC) in 1985 and achieved credits towards his master’s degree, also from 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 Lawyers and Euromoney Legal Media Group’s Expert Guides directories of the world’s leading lawyers.

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Andreas Nordby is head of the dispute resolution and litigation group at the Oslo office of Arntzen de Besche. In 2019, he was admitted to the Supreme Court of Norway. Andreas has wide experience in the crossover between dispute resolution and counselling within industries such as technology, telecoms and IT; pharmaceuticals and biotechnology; food; media, entertainment and film production; and commodity trading. He has written several articles about procedural law and is also the co-author of a commentary to the Norwegian class action rules. He previously worked at the Norwegian law firm Thommessen and the legislation division of the Department of Justice, and with the Municipal Lawyer in Oslo.

Uriel Prinz is a commercial litigator with extensive experience in 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 telecommunications 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 all aspects of construction, project 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-dollar 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 (IEC) in a complex multimillion-dollar class action regarding IEC’s pricing calculations.
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Madalena Afra Rosa joined Uría Menéndez – Proença de Carvalho as a first-year junior associate in September 2016.

She graduated with a degree 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.

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Anouk Rosielle is an associate partner at Dentons Europe LLP, based in Amsterdam. She specialises in litigation and arbitration in international corporate and commercial disputes, including commercial contracts, shareholder disputes, and directors and officers liability.

Anouk regularly acts in energy, pharmaceuticals, manufacturing and distribution disputes. She has ample experience in both national and international arbitration.

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Camilla Sanger is a partner in Slaughter and May’s disputes and investigations group, and she advises on a wide range of complex and substantial disputes. Her practice spans commercial, competition and banking litigation, and contentious regulatory investigations.

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Mr Simão graduated from the Pontifical Catholic University of São Paulo (PUC) in 2007 and he has an LLM in contract law from Insper, São Paulo, and a master’s degree from PUC.

Mr Simão has represented major companies in the most significant product liability cases in Brazil, in industry sectors ranging from tobacco, drugs and medical devices to cars and electronics.

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Javier Tamayo Jaramillo graduated as a lawyer from the Pontifical Bolivarian University (UPB) in Colombia; he also holds a master's degree in economics and insurance law from the Université catholique de Louvain (UCL) in Belgium, a doctorate in law and political
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Alexis Valençon is a partner at Kennedys and co-founder of its 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, cyber-risk, fraud 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, and insurance litigation and arbitration at the Paris Insurance Institute (IAP) and at the law faculties of Le Mans University and the University of Montpellier. He is also regularly invited to speak at conferences and colloquia 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 International Insurance Law Association (AIDA), the Insurance and Reinsurance Legacy Association (IRLA), the Association for Enterprise Risk Management and Insurance (AMRAE), the International Bar Association (IBA), the French Arbitration Committee (CFA) and the Professional Association of Reinsurers operating in France (APREF).

He speaks French, English and Spanish.

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Maria-Clara Van den Bossche is an associate in 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 and 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 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 Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO).
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Kevin Warburton is a counsel in Slaughter and May Hong Kong’s disputes and investigations 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 is qualified in Hong Kong and England and Wales and 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.

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